

The Strange Cases of *Marbury* and *Lochner* in the Constitutional Imagination

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I. Introduction

This Article tells the story of the genesis and spread of judicial review. It is a story that reveals the role that *Marbury v. Madison*¹ and *Lochner v. New York*² played in shaping judicial review around the globe. It is a story that reveals that these are not just American cases, as there are many, many examples of *Marbury*³ and *Lochner*⁴ abroad. The jumble of ideas we call judicial review has been decisively shaped by how constitution makers, judges, scholars, and human rights activists have understood these two cases. This understanding, in turn, influenced the accommodations that polities around the globe made to the problem of judicial power. This Article argues that we must uncover how *Marbury* and *Lochner* became intertwined in the constitutional imagination if we are to understand what judicial review means as well as appreciate the design issues posed by the problem of judicial power.

Marbury is celebrated in the constitutional imagination as the fountainhead of judicial review.⁵ The Supreme Court routinely cites *Marbury* to clothe its decisions in constitutional legitimacy when challenged by political actors.⁶ Although canonical cases such as *Marbury* serve as a

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

2. 198 U.S. 45 (1905).

3. See *infra* Part II.

4. See *infra* Part III.

5. See, e.g., William E. Nelson, *Marbury v. Madison, Democracy, and the Rule of Law*, 71 TENN. L. REV. 217, 217 (2004) (identifying *Marbury* as the “progenitor of judicial review”).

6. When its authority to integrate public schools was challenged, the Court cited *Marbury* as authority in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). While *Cooper* was met with widespread approval, the Court first cited *Marbury* as authority to strike down a federal statute in more dubious circumstances when it invalidated the federal income tax. *Pollock v. Farmer’s Loan & Trust Co.*, 157 U.S. 429, 554 (1895). *Pollock* was subsequently overruled by the Sixteenth Amendment. See U.S. CONST. amend. XVI (granting Congress the power to collect taxes on incomes).

form of “social control for the relevant interpretive community,”⁷ a handful of intrepid scholars have sought to dethrone *Marbury* either by emphasizing the political environment in which the case was decided⁸ or by arguing that judicial review is a mistake.⁹ Nonetheless, *Marbury* is clearly a canonical case both in the United States and abroad.¹⁰ The hope that courts can withstand popular winds to effectuate constitutional guaranties is deeply entrenched.¹¹

Lochner, on the other hand, represents the fear that independent courts armed with the power of judicial review might run amok. Although a handful of scholars have engaged in *Lochner* revisionism by arguing that the case fit within the mainstream of legal thought when decided¹² or by arguing that it should provide the basis for the modern analysis of fundamental rights,¹³ *Lochner* is as clearly entrenched in the anticanon of constitutional law¹⁴ as *Marbury* is in the canon. The Supreme Court routinely argues that it is not repeating the errors of *Lochner* in politically charged decisions.¹⁵ *Lochner* plays an important role in constitutional discourse abroad as an example of

7. J.M. Balkin & Sanford Levinson, *Constitutional Canons and Constitutional Thought*, in LEGAL CANONS 400, 418 (J.M. Balkin & Sanford Levinson ed., 2000).

8. See, e.g., Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87, 113 (1996) (arguing that the outcome of *Marbury* can be better explained by the political environment in which the case was decided than by conventional legal analysis); Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553, 554–59 (2003) (arguing that *Marbury* is only significant in a historical context that most law students are entirely ignorant of).

9. See, e.g., MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154 (1999) (speculating on what would happen if the Court “end[ed] the experiment” of judicial review); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1406 (2006) (concluding that judicial review is the wrong way for a democratic society to decide rights disputes).

10. Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 252 (1998); see also RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 71 (1996) (arguing that judicial review is America's “most distinctive and valuable contribution to democratic theory”).

11. Anne-Marie Slaughter, *A Brave New Judicial World*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 227, 301 (Michael Ignatieff ed., 2005) (noting how countries around the world have looked to judicial review in the *Marbury* tradition “for inspiration in protecting the rights of their own minorities and women against majority interference”).

12. HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 46–48 (1993).

13. See David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 57 (2003) (observing that *Lochner* was correct “in establishing a strong judicial role in protecting unenumerated fundamental rights”).

14. Balkin & Levinson, *supra* note 7, at 417. Ronald Dworkin, for example, writes that *Lochner* has become the “whipping boy” of American law. DWORKIN, *supra* note 10, at 82.

15. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 861, 860–62 (1992) (distinguishing the Court's decision to affirm *Roe*'s central holding from its overruling of *Lochner* and *Adkins*, cases which “rested on fundamentally false factual assumptions” about society and the free market); *Griswold v. Connecticut*, 381 U.S. 479, 482, 481–82 (1965) (asserting that, since *West Coast Hotel*, the Court has consistently refused to look to *Lochner* as a “guide” when addressing the Due Process Clause of the Fourteenth Amendment).

the evils of judicial activism.¹⁶ Constitution makers, judges, scholars, and human rights activists around the globe believe that courts can implement rights and thereby effectuate the hope of *Marbury* while avoiding falling into the abyss of *Lochner*.

This Article challenges this dichotomy and argues that the two cases are not opposites but fraternal twins. In this story, however, *Marbury* becomes *Lochner*'s twin not by the use of drugs, which is how Robert Louis Stevenson imagined that Dr. Jekyll became transformed into Mr. Hyde,¹⁷ but by exposing the workings of the constitutional imagination. The historical and comparative record evinces deep, albeit hidden, linkages between the two cases. Both in the United States and abroad, judicial review has been shaped by *Lochner*.¹⁸ Contrary to the conventional wisdom that celebrates *Marbury*, *Lochner* is the more important of the two cases. The debates swirling around *Lochner*, not those extolling *Marbury*, lie at the root of judicial modernity, as these debates were the first time that the limits of judicial power received sustained, critical attention.¹⁹

This Article, in short, provides a historical and comparative, archaeological excavation of how *Marbury* and *Lochner* became intertwined in the constitutional imagination. Part II explores how *Marbury* fared in the nineteenth century as judicial review germinated in the constitutional imagination both in the United States and abroad. The nineteenth century ends with *Marbury* becoming linked to *Lochner* as the U.S. Supreme Court came under attack for the perceived excesses of the *Lochner* Era.²⁰ Part III examines how *Lochner* helped shape the political construction of judicial review around the globe in the twentieth century. When the hope of constitutionalized rights (*Marbury*) traveled abroad, it was joined with the fear of courts running amok (*Lochner*).²¹ As a consequence, politics abroad adopted different and stronger mechanisms of political accountability than the United States as the price of granting courts the power of constitutional judicial

16. See *infra* Part III.

17. ROBERT LOUIS STEVENSON, *THE STRANGE CASE OF DR. JEKYLL AND MR. HYDE* 126–27 (Pennyroyal Press 1990) (1886).

18. See *infra* Part II; see also Miguel Schor, *Judicial Review and American Constitutional Exceptionalism*, 46 *OSGOODE HALL L.J.* 535, 537 (2008) (“The fear of providing constitutional courts with too much power played an important role in shaping judicial review outside the United States.”).

19. See Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 *GEO. L.J.* 1385, 1388 (2006) (asserting that “[w]hile the authority of American courts to strike down laws contrary to the Constitution has existed at least since *Marbury*,” the concept of judicial review and any corresponding examination of the limits of judicial power “did not become a prominent or controversial feature of constitutional debate until the *Lochner* era”).

20. See *infra* Part II.

21. See *infra* Part III.

review.²² Judicial review transformed not only politics but also courts, which suddenly had to grapple with the problem of accommodating legislation to constitutional text.²³ Part IV argues that the judicial elaboration of *Marbury* has had a perverse impact, as courts in civil law jurisdictions have become more like common law courts, whereas the U.S. Supreme Court has become more like a civil law court. The United States is exceptional among the world's democracies, moreover, as it relies primarily on judicial virtues such as modesty²⁴ and intelligence,²⁵ rather than checks and balances, to solve the problem of judicial power.

II. The Genesis of *Marbury* and *Lochner* in the Constitutional Imagination

Constitutionally speaking, the nineteenth century begins with *Marbury* in 1803 and ends with *Lochner* in 1905. Legal scholars were quick to seize on an idea that married the possibility of aggrandizing their influence by enlarging the sphere of law with what they believed to be a normatively desirable outcome. Somewhat paradoxically, the idea of *Marbury* fared better abroad in the oligarchies and dictatorships of nineteenth-century Latin America than it did in polities with stronger democratic traditions.²⁶ Lacking an indigenous democratic tradition, the framers of Latin America's constitutional traditions were receptive to ideas flowing from the United States.²⁷ Polities with stronger democratic traditions, such as Canada and Australia, would prove more resistant to *Marbury*'s allure.²⁸

22. *See id.*

23. *See infra* Part IV.

24. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (“[The Judiciary] can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question.”).

25. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15–16 (1959) (“No legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation that I have suggested is intrinsic to judicial action—however much we may admire such a reasoned exposition when we find it in those other realms.”).

26. *See* Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257, 263 (2008) (“[T]he U.S. model of diffuse review, which does not rely on specialized courts to exercise judicial review, proved more successful in Latin America than elsewhere.”).

27. *See* Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 15 (2006) (noting that the framers of Latin America's constitutions and the drafters of its civil codes borrowed from both the United States and Europe).

28. *See, e.g.*, Jeffrey Goldsworthy, *Australia: Devotion to Legalism*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 106, 110 (Jeffrey Goldsworthy ed., 2006) (noting that Australians remain wary of constitutionally entrenched rights); Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 TEX. INT'L L.J. 537, 546 (2005) (pointing out that only since 1982 has Canada's Constitution “contained a supremacy clause that seems on its face to contemplate judicial enforcement of rights in the tradition of *Marbury v. Madison*”).

The debates over the meaning of these cases also began in the nineteenth century. How *Marbury* is understood today differs markedly from how it was understood in the nineteenth century. Rights were largely programmatic in the nineteenth century,²⁹ and the assertion that courts should displace legislatures in the enforcement of rights during the *Lochner* Era would prove controversial.³⁰ Prior to the Second World War, judicial review was linked to the protection of vertical and horizontal separation of powers rather than to a robust judicial role in the elaboration of rights.³¹ Judicial review, in short, was largely understood to mean that courts would limit power, not effectuate rights, in the nineteenth century. The hope of judicial review embodied in this more limited reading of *Marbury* enjoyed success abroad in the nineteenth century.³²

Marbury's limited reach helps explain why the case was not controversial when it was decided. Although it has become commonplace to assert that *Marbury* was a transformative case,³³ it is clear that judicial review was

29. In the early American republic, it was widely believed that popular majorities, not the courts, would shape the meaning of the Constitution. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 71–72 (2004) (“For most, including most politicians and public leaders, the focus remained on traditional popular means of enforcing the constitution.”). Although today we largely accept the idea that domestic courts may enforce rights, international human rights are largely programmatic. See PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 105–11 (2d ed. 2003) (noting the various governmental organizations and nongovernmental organizations that have pursued the worldwide expansion of human rights).

30. It is no surprise that sectors of the public first began to organize in a sustained, ideological fashion around the issue of judicial appointments during the *Lochner* Era. See Schor, *supra* note 18, at 545–51 (providing a historical, institutional account of how interest groups mobilized around the issue of appointments).

31. See Tom Ginsburg, *The Global Spread of Constitutional Review*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 81, 88–89 (Keith E. Whittington et al. eds., 2008) (pointing out that a theory of judicial review associated with a “rights ideology” only became prevalent in industrial economies after the Second World War); Schor, *supra* note 26, at 261–65 (noting that judicial review was linked to federalism in the nineteenth century).

32. Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 *TEXAS L. REV.* __, __ fig.1 (2009).

33. Constitutional scholars and judges around the globe, for example, liken cases that declare the power of judicial review to *Marbury*. Both of the leading comparative constitutional casebooks have sections dealing with this issue. NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 100–13, 157–60 (2003); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 451–63, 586–645 (2d ed. 2006). There is also a considerable comparative literature attesting to *Marbury*'s hold on the constitutional imagination. See, e.g., George A. Bermann, *Marbury v. Madison and European Union “Constitutional” Review*, 36 *GEO. WASH. INT’L L. REV.* 557, 557 (2004) (observing that *Marbury* “specifically raises the question of the legitimacy of a ‘horizontal’ species of judicial review, that is, review by courts of the exercise of powers by the coordinate branches of government,” which is the less problematic dimension of review in EU courts); James Crawford, *Marbury v. Madison at the International Level*, 36 *GEO. WASH. INT’L L. REV.* 505, 505 (2004) (noting that *Marbury v. Madison* “bears an interesting relationship to the history of constitutional review in other common law countries”); Daniel Halberstam, *Constitutionalism and Pluralism in Marbury and Van Gend*, in *THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH*

neither a political nor a legal innovation. *Marbury* was seen as an important, albeit noncontroversial, case, as “[s]ome newspapers even published the . . . opinion verbatim.”³⁴ The case was not politically controversial because the sharp distinction that Marshall drew between law and politics was widely shared by his contemporaries,³⁵ who largely believed that judges did not exercise policy discretion or make law in construing the Constitution.³⁶ The assertion of judicial review was not legally controversial, moreover, because it was one of the background assumptions against which the Constitution was framed.³⁷ It is no accident that Marshall used the term “repugnant” in *Marbury*³⁸ as the practice of judicial review arose from the common law rule that corporate bylaws could be invalidated if they were incompatible with the laws of the nation.³⁹ “During the colonial period, the

ANNIVERSARY OF THE ROME TREATY (Miguel P. Maduro & Loic Azoulai eds., forthcoming Oct. 2009, on file at <http://ssrn.com/abstract=1103253> (writing that the “highly relevant comparison between *Van Gend, Marbury*, and their respective progenies” relates to the separate American and EU systems of constitutional pluralism); Wolfgang Hoffmann-Riem, *Two Hundred Years of Marbury v. Madison, The Struggle for Judicial Review of Constitutional Questions in the United States and Europe*, 5 GERMAN L.J. 685, 687 (2004) (“*Marbury v. Madison* was a velvet revolution, which did not claim its first victim for several decades.”); M.C. Mirow, *Marbury in Mexico: Judicial Review’s Precocious Southern Migration*, 35 HASTINGS CONST. L.Q. 41, 43–44 (2007) (“*Marbury* now embodies a particular approach to constitutional law and decision making; it is emblematic of the doctrine of judicial review [and was] instrumental in the development of Mexican constitutional law.”); Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1241 (2006) (“Sub-Saharan Africa is one region of the world where *Marbury*’s legacy is enjoying a quiet resurgence.”); Yoram Rabin & Arnon Gutfeld, *Marbury v. Madison and Its Impact on Israeli Constitutional Law*, 15 U. MIAMI INT’L & COMP. L. REV. 303, 320 (2007) (observing that “[t]he power of judicial review declared by the Court in *Bank Hamizrahi* was not restricted to cases in which the ostensibly unconstitutional law conflicts with the specific provisions of the two new basic laws and the individual rights enumerated in them,” and was revolutionary in Israel in the same manner in which *Marbury* was in America); Luc B. Tremblay, *Marbury v. Madison and Canadian Constitutionalism: Rhetoric and Practice*, 36 GEO. WASH. INT’L L. REV. 515, 522 (2004) (reporting that even prior to 1982, “the Judicial Committee of the Privy Council and the Canadian courts recognized the supremacy of the British North America Act and the legitimacy of judicial review on the basis of arguments quite similar to those of Chief Justice Marshall”); Mark Tushnet, *Marbury v. Madison Around the World*, 71 TENN. L. REV. 251, 258–59 (2004) (observing the effects of *Marbury* on the German judicial system); Eric Engle, *Constitutive Cases: Marbury v. Madison Meets Van Gend & Loos* 15 (Jan. 23, 2009) (unpublished manuscript, on file at <http://ssrn.com/abstract=1331505>) (observing that *Marbury* and *Van Gend* both “took risky positions to imply rights where no express right in the constitutive document existed”).

34. WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 72 (2000).

35. *Id.* at 59.

36. In advocating the adoption of the Constitution, Hamilton assured those who feared the power of the Supreme Court that it exercised neither force nor will in invalidating legislation. THE FEDERALIST NO. 78, at 464–72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

37. See Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 503, 535 (2006) (asserting that between 1776 and 1787, the framers of the U.S. Constitution, Federalists and Anti-Federalists, federal judges, and Supreme Court Justices widely assumed that legislation could not be repugnant to the newly written Constitution).

38. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 177, 180 (1803).

39. Bilder, *supra* note 37, at 513–14.

limit on corporate bylaws became a limit on colonial legislatures enforced by colonial courts and the Privy Council.”⁴⁰ When Marshall wrote that long-established principles answered the question of “whether an act, repugnant to the constitution, can become the law of the land,”⁴¹ he was relying on ideas that permeated legal thought in the colonies. Judicial review was simply the “unavoidable consequence of limited legislative power.”⁴²

The transatlantic understandings that shaped judicial review in the United States⁴³ unsurprisingly also played an important role in Canadian constitutional developments. The British North America Act of 1867 (BNA) provided Canada with a federal government.⁴⁴ The fathers of the Canadian Confederation rejected American-style federalism as they thought it “dangerously decentralizing” and granted the residuum power, therefore, to the central government.⁴⁵ The BNA was largely silent on rights and said nothing about judicial review.⁴⁶ Canadian courts and the Privy Council,⁴⁷ nonetheless, used judicial review to effectuate federalism.⁴⁸ Although there is some disagreement over the propriety of judicial review in Canada prior to the adoption of the Charter of Rights and Freedoms in 1982,⁴⁹ its scholarly

40. *Id.* at 535.

41. *Marbury*, 5 U.S. (1 Cranch) at 176.

42. Bilder, *supra* note 37, at 554.

43. See MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 10–11 (2004) (attributing the principles of repugnancy and divergence, which shaped early conceptions of judicial review, to the transatlantic legal culture of the seventeenth century).

44. PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE?* 12, 18–26 (3d ed. 2004); JOHN T. SAYWELL, *THE LAWMAKERS: JUDICIAL POWER AND THE SHAPING OF CANADIAN FEDERALISM* 3–8 (2002).

45. RUSSELL, *supra* note 44, at 23.

46. See Robert A. Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191, 1193 (1984) (“In Canadian legal theory, then, individual rights were not entrenched. The [BNA] provided the courts with no legal basis to override otherwise valid governmental actions which interfered with individual rights.”).

47. The judicial committee of the Privy Council was one of the highest courts in the United Kingdom and served as the highest court of appeal for a number of commonwealth nations. Loren P. Beth, *The Judicial Committee as Constitutional Court for the British Empire 1833–1971*, 7 GA. J. INT’L & COMP. L. 47, 47 (1977). With the decline of the British Empire, the Privy Council no longer plays the role it once did in hearing appeals from abroad. *Id.* Its domestic importance will be greatly reduced by the creation of the Supreme Court of the United Kingdom pursuant to the Constitutional Reform Act of 2005. See, e.g., Kate Maleson, *Judicial Reform: The Emergence of the Third Branch of Government*, in *REINVENTING BRITAIN: CONSTITUTIONAL CHANGE UNDER NEW LABOUR* 133, 145 (Andrew McDonald ed., 2007) (stating that the Supreme Court will take on the devolution powers of the Privy Council). The new Supreme Court will begin its work in October 2009. United Kingdom Supreme Court, Ministry of Justice, <http://www.justice.gov.uk/about/uksc.htm>.

48. RUSSELL, *supra* note 44, at 42–43.

49. The debate is over whether judicial review is compatible with parliamentary supremacy. Jennifer Smith, *The Origins of Judicial Review in Canada*, 16 CAN. J. POL. SCI. 115, 118 (1983).

defenders believe it was a “product of the British colonial system.”⁵⁰ Since colonial “legislatures were bodies of limited power, the colonial charters establishing them typically included clauses prohibiting them from passing laws repugnant to Imperial statutes.”⁵¹

Marbury's British roots were forgotten, however, and judicial review emerged as an American innovation during the nineteenth century. The importance of British constitutional ideas quickly receded in the wake of the American Revolution and Constitution.⁵² The idea that a constitution was not simply the result of historical accident but could be framed by conscious choice⁵³ seized the nineteenth-century constitutional imagination.⁵⁴ American ideas—spread by sources such as the Constitution, the Declaration of Independence, the *Federalist Papers*, and the work of de Tocqueville⁵⁵—found fertile soil amongst revolutionaries throughout the Atlantic world. American ideas played an important role, for example, in the independence movements of Latin America⁵⁶ and in republican struggles on the continent of Europe.⁵⁷

This debate surfaced anew with the adoption of the Charter of Rights and Freedoms in 1982. While Section 52 of the Charter provides for constitutional supremacy and affords judicial review in Canada with a textual footing for the first time, the Charter also arguably preserves parliamentary supremacy by allowing for a temporary legislative override of judicial declarations of legislative invalidity. *Id.* at 133–34.

50. *Id.* at 116.

51. *Id.* Not surprisingly, Australia also shared in the understanding that courts could invalidate “colonial legislation inconsistent with local constitutions and other Imperial legislation.” Goldsworthy, *supra* note 28, at 110.

52. See, e.g., Larry Kramer, *Fidelity to History—and Through It*, 65 *FORDHAM L. REV.* 1627, 1633–34 (1997) (“[T]he American Revolutionaries developed and defended a conception of the constitution that differed sharply from the one subscribed by their English and Loyalist counterparts, [but i]t would be a mistake . . . to assume that this new conception simply replaced the older one, rather than supplementing and transforming it.”).

53. This idea was discussed during the Founding Era debates:

It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.

THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 36, at 33.

54. CARL J. FRIEDRICH, *THE IMPACT OF AMERICAN CONSTITUTIONALISM ABROAD* 6 (1966) (noting the broad “enthusiasm” for the American Constitution in the nineteenth century).

55. *Id.* at 4.

56. See JOHN LYNCH, *THE SPANISH AMERICAN REVOLUTIONS, 1808–1826*, at 29 (1973) (“In the years before and after 1810 the very existence of the United States excited the imagination of Spanish Americans The works of Tom Paine, the speeches of John Quincy Adams, Jefferson and Washington all circulated in Spanish America.”).

57. See Helmut Steinberger, *Historic Influences of American Constitutionalism upon German Constitutional Development: Federalism and Judicial Review*, 36 *COLUM. J. TRANSNAT'L L.* 189, 190 (1997) (noting that while there was considerable fear of the French Revolution in Germany, educated Germans were “fascinated by the events in North America”). The framers of Norway's 1814 Constitution had a “good knowledge of the Constitution of the United States of 1787 as well

The *Federalist Papers* and de Tocqueville's *Democracy in America*, for example, were both translated into German by the 1830s, and a systematic treatise on the U.S. Constitution was published by a leading German constitutional lawyer in 1824.⁵⁸ These ideas bore fruit when a National Assembly met in Frankfurt in 1848 to draft a constitution.⁵⁹ Although the democratic seed planted by the Frankfurt Assembly failed to take root, the proposed constitution "became the most influential document for the future of German democratic constitutional development."⁶⁰ The representatives to the Assembly made numerous references to the American Constitution.⁶¹ One of the delegates argued that the U.S. Supreme Court was the key to the success of the American Constitution and that if the "American example" were followed, the proposed constitution would "harvest the most splendid fruits."⁶² The "decision at St. Paul's Church for the 1849 Constitution to assign the settlement of constitutional disputes to an Imperial Supreme Court was heavily influenced by the American example of the Supreme Court and its power of judicial review."⁶³

The hope represented by *Marbury* also played an important role in the constitutional imagination of Latin American judges and constitutional scholars. A decision of the Colombian Supreme Court in 1887 was tagged by scholars as the nation's "*Marbury*."⁶⁴ Judicial review in Mexico bears *Marbury*'s imprint.⁶⁵ In a case decided in 1881,⁶⁶ a claim was brought that a

as the various state constitutions." Eirik Holmoyvik, *Why Did the Norwegian Constitution of 1814 Become a Part of Positive Law in the Nineteenth Century?*, <http://blogit.helsinki.fi/reuna/holmoyvik-paper-Tartu.doc>. American ideas played an important role in shaping the view that the Norwegian Constitution was not simply programmatic but part of Norway's positive law, which, in turn, facilitated the exercise of judicial review by the Norwegian Supreme Court in the mid-nineteenth century. *Id.* at 1–2; see also Rune Slagstad, *The Breakthrough of Judicial Review in the Norwegian System*, in CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 81, 102 (Eivind Smith ed., 1995) (recognizing that early literature regarding judicial review in the Nordic realms repeatedly references the American system).

58. Steinberger, *supra* note 57, at 193.

59. *Id.* at 194.

60. *Id.*

61. *Id.*

62. *Id.* at 200 (quoting *Stenographische berichte über die verhandlungen der deutschen Constituierenden* [*Stenographic Report on the Negotiations of the German Constitution*], in IV NATIONALVERSAMMLUNG ZU FRANKFURT AM MAIN [NATIONAL ASSEMBLY AT FRANKFURT] 2726, 2928, 3614 (Franz Jacob Wiegand ed., 1848/49)).

63. *Id.*

64. MANUEL JOSÉ CEPEDA ESPINOSA, *POLÉMICAS CONSTITUCIONALES* 94 (2007).

65. See Mirow, *supra* note 33, at 44 ("The [*Marbury*] decision was also instrumental in the development of Mexican constitutional law, leaving a legacy of constitutional jurisprudence and a broadly construed supreme court power in Mexico. The Mexican Supreme Court would not be the same institution today were it not for *Marbury*.")

66. JUSTO PRIETO, Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], *Seminario Judicial de la Federación, Segunda Epoca, tomo III, Septiembre de 1881, Página 339* (Mex.).

state law ran afoul of the Mexican Constitution of 1857.⁶⁷ Ignacio Vallarta, the President of the Mexican Supreme Court, was familiar with American legal sources.⁶⁸ His decision acknowledged that there was “scant” support for judicial review in the existing Mexican sources.⁶⁹ Nonetheless, Vallarta authored an opinion declaring the power of judicial review and cited as authority American sources including Kent’s *Commentaries*, the *Federalist No. 78*, and *Marbury*.⁷⁰

Argentina provides a remarkable example of *Marbury*’s transnational influence. After a prolonged period of civil war, Argentina fashioned a stable political regime and a new constitution in the mid-nineteenth century.⁷¹ The Argentine Constitution of 1853 was “inspired by the model of the United States.”⁷² In one of the more improbable accidents of constitutional history, the Argentine Supreme Court faced a situation analogous to that of *Marbury* in a case entitled *Sojo*.⁷³ The issue in *Sojo* was whether the Argentine Congress could augment the original jurisdiction of the Supreme Court beyond the parameters established by the Argentine Constitution.⁷⁴ While Justice Marshall faced intense political pressure not to issue an order requiring President Jefferson to provide William Marbury with his commission,⁷⁵ the Argentine Supreme Court faced no political pressure to duck the issue by finding that a statutory grant of original jurisdiction was unconstitutional.⁷⁶ The Court, moreover, had previously exercised original jurisdiction in similar circumstances. The Argentine Supreme Court, nonetheless, followed

67. See Mirow, *supra* note 33, at 41–42 (describing Justo Prieto, a judicial officer of a state court, who, in 1881, decided that a state statute could not be enforced because it violated the Mexican Constitution).

68. *Id.*

69. *Id.* at 52.

70. Mirow, *supra* note 33, at 42. While the case provides legal grounds for judicial review in the nineteenth century, the Mexican Supreme Court was, at best, a minor player in Mexican politics until the country democratized at the end of the twentieth century. Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Colombia and Mexico*, 16 *IND. J. GLOBAL LEGAL STUD.* 173, 178–79 (2009).

71. Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith*, 46 *AM. U. L. REV.* 1483, 1486 (1997).

72. See *id.* at 1501 (pointing out that the 1853 Constitution emerged from the intellectual vision of a small number of Argentine thinkers who drew inspiration from the U.S. model).

73. Corte Suprema de Justicia [CSJN], 22/9/1887, “Sojo Eduardo / recurso de habeus corpus,” Fallos (1887-32-120) (Arg.) [hereinafter *Sojo*], available at <http://www.biblioteca.jus.gov.ar/Fallo-SOJO.html>.

74. *Id.*

75. See NELSON, *supra* note 34, at 58 (noting that *Marbury v. Madison* created the possibility of a direct confrontation between the Federalist Judiciary left over from the Adams Administration and the new Jeffersonian Congress).

76. *Sojo*, *supra* note 73.

Marbury and held the statutory grant of original jurisdiction unconstitutional.⁷⁷

Marbury began to take its modern trappings in the late-nineteenth-century United States when the Supreme Court came under attack during the *Lochner* Era. The *Lochner* Era marks a decisive turning point in our understanding of judicial review for the following three empirical reasons. First, it is during this period that the Supreme Court began its practice of citing *Marbury* as standing for the proposition that it is the Judiciary's job to safeguard the Constitution against legislative inroads. Prior to the late nineteenth century, both the Court and treatise writers viewed *Marbury* as precedent for mandamus or for the extent of the Court's original jurisdiction rather than as the fountainhead of the judicial protection of rights.⁷⁸ When the Court came under political attack for, among other things, having "engaged in an extraordinarily controversial exercise of judicial review in 1895, declaring the newly enacted federal income tax unconstitutional,"⁷⁹ the Court's supporters used the centennial of Justice Marshall's appointment in 1901 to mount a vigorous defense designed to enhance the prestige of the Supreme Court. *Marbury* became a "great" case as a consequence of this political campaign.

Second, the Court's agenda shifted dramatically during the *Lochner* Era in response to a stream of litigation brought by business interests.⁸⁰ The growth of American capitalism provided business with a professional managerial class that had both the incentive and the capacity to mount a strategic litigation campaign designed to use the Constitution as a sword to cut down socially progressive legislation.⁸¹ As a consequence of this campaign, liberty of contract became the Court's first sustained foray into effectuating rights.

Third, the Court's new agenda led to a political backlash. The Democratic platform of 1896, for example, called for curbing the power of judicial review.⁸² It is during the *Lochner* Era, moreover, that popular mobilization around the issue of Supreme Court appointments first began.⁸³ This mobilization, in turn, would lay the groundwork for the current politicized appointment process, which prominently features the role of interest

77. *Id.*

78. Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a "Great Case,"* 38 WAKE FOREST L. REV. 375, 377 (2003).

79. *Id.*

80. CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 45–47 (1998).

81. *Id.* at 45. Groups such as the ACLU and the NAACP would subsequently use the template established by business interests in what has become known as the rights revolution. *Id.*

82. Douglas, *supra* note 78, at 397.

83. Schor, *supra* note 18, at 545–51.

groups.⁸⁴ *Lochner*, in short, decisively shaped the path that *Marbury* would henceforth take since it was the first time that the Supreme Court,⁸⁵ scholars,⁸⁶ and political actors⁸⁷ grappled in a *sustained* fashion over how courts should effectuate rights.

The American debate regarding the proper scope of judicial review played a role in preventing a robust version of judicial review from being adopted in Australia. The discussions surrounding the framing of the Commonwealth of Australia Constitution Act 1900 show a considerable knowledge of the U.S. Constitution.⁸⁸ The principal issue was whether Australia should adopt Canadian- or American-style federalism.⁸⁹ Australia opted for the American model because it was feared that Canadian federalism provided the central government too much power.⁹⁰ Australia's framers also debated whether a provision analogous to the Fourteenth Amendment should be adopted.⁹¹ The proposal was defeated as there was considerable resistance

84. *Id.*

85. The police-powers analysis employed by the majority in *Lochner* has been much maligned, but it, along with Justice Holmes's famous dissent, helped shape the modern debate over how courts should construe rights. See Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84, 106 (Sujit Choudhry ed., 2006) (noting a "striking similarity" between the majority's analysis in *Lochner* and the modern-day Court's approach to "integrat[ing] traditional police power analysis into the complicated structure of constitutional law, including common law liberties").

86. Thayer's seminal article arguing in favor of judicial moderation helped launch this debate. See Thayer, *supra* note 24, at 152, 146–55 (arguing that judges "must not step into the shoes of the law-maker"); see also Scott D. Gerber, *The Court, the Constitution, and the History of Ideas*, 61 *VAND. L. REV.* 1067, 1071 (2008) ("Scholars have been opining about the Supreme Court's role in the American constitutional order since at least 1893, when James Bradley Thayer published *The Origin and Scope of the American Doctrine of Constitutional Law*."). In response to the "spectre of illegitimate judicial activism in the mode of *Lochner*," scholars devised a variety of "proposed safeguards that circumscribed judicial review." Weinrib, *supra* note 85, at 106.

87. See GILLMAN, *supra* note 12, at 147–50 (describing the Progressive and Conservative positions during the *Lochner* Era on how courts should effectuate rights).

88. See OWEN DIXON, *Two Constitutions Compared*, in *JESTING PILATE AND OTHER PAPERS AND ADDRESSES* 100, 101 (1965) ("The [Australian framers] had the American document before them; they studied it with care; they even read the standard books of the day which undertook to expound it."); J.A. LA NAUZE, *THE MAKING OF THE AUSTRALIAN CONSTITUTION* 24–28 (1972) (summarizing the Australian framers' discussions of the U.S. Constitution). For a more nuanced view of the knowledge that the Australian framers had of the American Constitution, see John Williams, *The Emergence of the Commonwealth Constitution*, in *AUSTRALIAN CONSTITUTIONAL LANDMARKS* 1 (H.P. Lee & George Winterton eds., 2003).

89. See LA NAUZE, *supra* note 88, at 27–28 (chronicling the debate over which system, American or Canadian, was more appropriate for distributing power between the Australian central government and the colonies).

90. *Id.* at 27–28; Goldsworthy, *supra* note 28, at 108; see also DIXON, *supra* note 88, at 103 (describing the Australian system as a combination of principles characteristically British with principles of American federalism).

91. Williams, *supra* note 88, at 25–27; see also Goldsworthy, *supra* note 28, at 109–10 (explaining that the Australian framers ultimately rejected explicit protections for abstract rights—on the issue of race specifically, the Australian framers did not want to be prevented from discriminatory practices designed to protect the racial and cultural homogeneity of their communities).

to empowering the judiciary. “Many of the Australian framers were aware of [and disapproved of] the . . . considerable judicial creativity [exercised by the U.S. Supreme Court] in constitutional interpretation.”⁹² The framers of Australia’s Constitution hewed to the British model where Parliament was responsible for effectuating rights.⁹³ Consequently, the Australian Constitution lacks a bill of rights, and the ability to exercise judicial review to effectuate rights in Australia remains questionable.⁹⁴

If, by the end of the nineteenth century, *Marbury* would come to stand for the proposition that courts armed with the power of judicial review are essential to safeguarding rights, *Lochner*, in the twentieth century, would come to stand for the proposition that an overly independent court might derail democracy.⁹⁵ Curiously, Canada provides a better example than the United States of the perils of an overly independent court. The British North America Act of 1867 lacked a bill of rights but created a federal structure for Canada.⁹⁶ The fathers of the Canadian Confederation had witnessed the disintegration of the United States and believed that the culprit was the Tenth Amendment, as it gave the states too much power.⁹⁷ They sought to correct the perceived mistake of the American Constitution by providing the residuum power to the central government rather than to the provinces.⁹⁸ The problem was that Canada’s highest court until 1949 was the Privy Council that sat in London, knew little about Canada, and was obviously not amenable to any political pressure emanating from Canada.⁹⁹ The Privy Council

92. Goldsworthy, *supra* note 28, at 115.

93. *See id.* at 109 (deducing that, with respect to rights, the Australian framers were influenced more by the British than by the American tradition).

94. The Australian High Court implicated free speech rights to exercise judicial review in *Australian Capital Television v. Commonwealth* (1992) 177 C.L.R. 106. The case has proven controversial. *See* JASON L. PIERCE, *INSIDE THE MASON COURT REVOLUTION: THE HIGH COURT OF AUSTRALIA TRANSFORMED* 157, 157–70 (2006) (highlighting the line of “implied rights cases” decided by the Australian High Court in the 1990s and acknowledging the criticism engendered by their approach); Goldsworthy, *supra* note 28, at 146, 144–46 (noting that this case, as well as others based on a theory of implied rights in the Australian Constitution, has “provoked a vigorous theoretical and critical commentary”).

95. This Article advances a *political* definition of judicial activism. For a review of the various normative definitions of judicial activism proposed by legal scholars, see Robert Justin Lipkin, *We Are All Judicial Activists Now*, 77 U. CIN. L. REV. 181, 183 n.8 (2008).

96. Peter W. Hogg, *Constitutional Reform in Canada: A Comment on the Canadian Constitutional Crisis*, 6 YALE STUD. WORLD PUB. ORD. 285, 286 n.5, 287 (1980).

97. *See* RUSSELL, *supra* note 44, at 23 (noting that the British North Americans, seeing the Americans “in the throes of civil war,” made the “decision to give the residual power to the central rather than the local legislatures” in order to “revers[e] what many regarded as the most dangerously decentralizing feature of the American Constitution”).

98. *Id.*

99. *See id.* at 41 (commenting that until 1949, the Privy Council decided “a steady stream of constitutional cases” that reversed the Canadian Supreme Court’s constitutional approach); Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, in *INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY*, *supra* note 28, at 55, 75 (noting that the Lordships of the Privy Council

read federal powers in a narrow, legalistic fashion and, in so doing, dashed the hopes of the fathers of the Confederation by eviscerating the power of the federal government.¹⁰⁰ The *Lochnerian* peril of independent courts armed with judicial review is also illustrated by the role that the Privy Council played in derailing Canada's version of the New Deal.¹⁰¹ The Privy Council repeatedly held that the measures adopted by the Canadian government were an "unconstitutional invasion of provincial jurisdiction over property and civil rights" and "refused to hold that the Depression was an emergency that would authorize exceptional federal powers."¹⁰²

It would be the American experience of judicial review, however, that would provide the germ for the idea of *Lochner* in the constitutional imagination. As American scholars grappled to explain what the Court was doing in invalidating social legislation, they began to use terms such as "judicial review" and the "countermajoritarian difficulty."¹⁰³ Reformers in the United States argued that courts should not be armed with broad powers of judicial review under the Fourteenth Amendment lest they derail needed social legislation.¹⁰⁴ The United States opted, however, not to strengthen the external, political mechanisms by which courts may be held accountable and relied instead on doctrinal solutions to the problem of judicial power. When it came to interpreting the Constitution, the guardians would guard the guardians in the United States. When polities abroad adopted constitution-alized rights and judicial review almost en masse after the Second World War, on the other hand, it was understood that the power of judicial review had to be tempered with stronger mechanisms of political accountability.¹⁰⁵

"were quite ignorant of the history, geography and society of Canada, as numerous faux pas in their opinions demonstrate").

100. See Hogg, *supra* note 99, at 63 (writing that the Privy Council showed a "relentless refusal to give significant content to the federal peace, order, and good government power whenever it came into potential conflict with the provincial power over property and civil rights").

101. See KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* 42, 44 (2001) (arguing that the Privy Council's use of a constitutional mandate for a division of powers between the federal government and the provinces to strike down federal-marketing, unemployment-insurance, minimum-wage, and maximum-hours legislation allowed the Privy Council to effectively practice judicial review over economic regulatory legislation to the detriment of Canadian citizens).

102. *Id.* at 42; see also SAYWELL, *supra* note 44, at 226–29 (relating that the constrictive delimitation of federal powers undertaken by the Privy Council in the 1930s spurred a backlash in favor of rewriting the Constitution and abolishing appeals to the Privy Council altogether).

103. Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 821 (2005).

104. See GILLMAN, *supra* note 12, at 145 ("For these critics, the problem was not that judges didn't read their social science carefully enough; rather, it was that in attempting to maintain the distinction between general welfare and class legislation the judiciary was preventing legislatures from responding to the unprecedented challenges associated with managing an advanced, industrial capitalist society.").

105. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 34–38 (3d ed. 2007) (pointing out that the constitutionalization of judicial review after the Second World War

Part III of this Article will recount how *Marbury* and *Lochner* became intertwined abroad as polities around the globe fashioned mechanisms of political accountability for their national high courts.

III. The Political Construction of Judicial Review

Constitutionally speaking, the hope of *Marbury* became tempered by the fear of *Lochner* in the twentieth century. There were two *Lochnerian* moments in the twentieth century. The first occurred before the Second World War as a number of polities rejected aggrandizing judicial power, fearing it would upend social legislation as had occurred in the United States.¹⁰⁶ The second occurred after the Second World War.¹⁰⁷ Human rights reformers embedded rights into international legal discourse with the Universal Declaration of Human Rights.¹⁰⁸ Polities around the globe inscribed both rights and judicial review into national legal discourse as well.¹⁰⁹ Judicial review, which had been exceptional and linked to federalism,¹¹⁰ became the rule rather than the exception *and* became linked to constitutionalized rights.¹¹¹ The spread of judicially enforced rights around the globe was not, however, an unalloyed victory for *Marbury*. The American model of judicial review with its weak rules of political accountability for the Supreme Court was rejected and stronger mechanisms of accountability adopted.¹¹²

Lochner played an important role in limiting the spread of judicial review before the Second World War. France rejected judicial review in the early part of the twentieth century because scholars warned that courts armed with such power would derail social legislation as had occurred in the United States.¹¹³ Mexico adopted a new constitution in 1917 that sought to address the root causes of the Mexican Revolution of 1910.¹¹⁴ Mexican constitutional scholars knew that the U.S. Supreme Court had played a conservative role in preventing social reforms during the *Lochner* Era and

in civil law countries took a very different course owing to, *inter alia*, traditional civil law limitations on the role of judges and separation-of-powers concerns).

106. See *infra* notes 140–45 and accompanying text.

107. See *infra* subpart III(B).

108. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001); see also PAUL GORDON LAUREN, *THE EVOLUTION OF HUMAN RIGHTS: VISIONS SEEN* 200–27 (2d ed. 2003) (describing the efforts of several activists to use the UN Charter to advance international human rights).

109. Ginsburg, *supra* note 31, at 88–89.

110. *Id.* at 83–84.

111. *Id.* at 81–82; Schor, *supra* note 26, at 259.

112. Schor, *supra* note 18, at 555–57.

113. See *infra* notes 140–45 and accompanying text.

114. The 1917 Mexican Constitution incorporated social rights that were “designed to subordinate individual rights to collective needs.” Jonathan Hartlyn & Arturo Valenzuela, *Democracy in Latin America Since 1930*, in *LATIN AMERICAN POLITICS AND SOCIETY SINCE 1930*, at 3, 15 (Leslie Bethell ed., 1998).

believed, therefore, that the political branches, rather than the judiciary, should play the key role in effectuating the guaranties of the Mexican Constitution of 1917.¹¹⁵ British courts relied on common law, rather than constitutional principles, to derail attempts at social and labor reforms early in the twentieth century.¹¹⁶ As a consequence, “Labour Party leaders found the contemporaneous experience in the United States, where courts were invoking constitutional principles to obstruct the adoption of redistributive legislation to confirm their suspicion that courts—staffed by upper-class professionals—would systematically disfavor Labour Party interests.”¹¹⁷ The United Kingdom did not entrench rights until 1998 when Labour finally changed its long-standing opposition to judicial empowerment.¹¹⁸ Mexico did not fully empower its courts to construe constitutional guaranties until 1995.¹¹⁹ France did not move into the mainstream of constitutional rights adjudication until 2008 when an amendment strengthened France’s Constitutional Council to provide it the power of a posteriori review.¹²⁰

Lochner’s influence in shaping judicial review abroad becomes clear when one contrasts the American model of judicial review with the principal competing models of judicial review adopted after the Second World War. When the U.S. Constitution was drafted, the framers obviously did not envision the power that the Supreme Court would one day wield. The framers mistrusted power but did not fear the Judiciary, since they assumed that courts would not make law but simply interpret it¹²¹ and that constitutional change would be cabined within the four walls of Article V.¹²² There are two principal mechanisms¹²³ used by the framers of the U.S. Constitution to hold

115. Charles A. Hale, *The Civil Law Tradition and Constitutionalism in Twentieth-Century Mexico: The Legacy of Emilio Rabasa*, 18 LAW & HIST. REV. 257, 278 (2000) (discussing Mexican scholar Emilio Rabasa’s rejection of the “legislation by judges” implemented by the conservative U.S. interventionist courts of the early twentieth century).

116. MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 28 (2008).

117. *Id.*

118. See *infra* notes 189–91 and accompanying text.

119. Schor, *supra* note 70, at 180–81.

120. Federico Fabbrini, *Kelsen in Paris: France’s Constitutional Reform and the Introduction of a Posteriori Constitutional Review of Legislation*, 9 GERMAN L.J. 1297 (2008); Alec Stone Sweet, *Le Conseil constitutionnel et la transformation de la République [The Constitutional Council and the Transformation of the Republic]*, 25 CAHIERS DU CONSEIL CONSTITUTIONNEL [PAPERS CONST. COUNS.] 65, 65 (2008) (Fr.), translated at http://works.bepress.com/alec_stone_sweet/23.

121. See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 36, at 465 (“The judiciary . . . has no influence over either the sword or the purse . . . and can take no active resolution whatsoever. It may truly be said to have neither force nor will but merely judgment . . .”).

122. Citizens, not courts, were responsible for shaping the meaning of the Constitution. KRAMER, *supra* note 29, at 53.

123. The other mechanisms such as impeachment and jurisdiction stripping have fallen into desuetude because it is believed that such measures undermine judicial independence. CHARLES G. GEYH, *WHEN COURTS AND CONGRESS COLLIDE* 161–64 (2006).

the Supreme Court accountable. The Appointments Clause¹²⁴ provides an example of *ex ante* judicial accountability. By requiring that the President nominate and the Senate confirm Supreme Court appointments by a simple majority,¹²⁵ an indirect linkage is created between the Court and the electorate. The nomination process has become increasingly polarized, however, as factions seek to mold the meaning of the Constitution by having their partisans placed on the bench.¹²⁶ Republican presidents, in particular, used nominations as a payoff to the most conservative elements of their coalition.¹²⁷ Article V of the Constitution provides an example of *ex post* accountability.¹²⁸ The high bar to amendment¹²⁹ means, however, that few Supreme Court decisions are overridden.¹³⁰ This has led law professors to argue that the Supreme Court is a countermajoritarian institution as it almost invariably has the last word, formally speaking, on the meaning of the Constitution.¹³¹ Popular forces have chosen to fight over nominations in the hope of changing the meaning of the Constitution, since it is practically impossible to amend the Constitution.¹³² In short, the American model of judicial review does a poor job of resolving the inevitable tensions that occur

124. U.S. CONST. art. II, § 2, cl. 2.

125. *Id.*

126. Schor, *supra* note 18, at 545–51.

127. The political ascendancy by Republicans in recent years has decisively shaped the ideology of the Court. A study ranking the Justices from 1937 to 2006 by ideology concludes that five of the ten most conservative justices are currently sitting on the Court (Justices Thomas, Scalia, Roberts, Alito, and Kennedy). William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* 46 tbl.3 (Univ. of Chi. John M. Olin Law & Econ., Working Paper No. 404, 2008), available at <http://ssrn.com/abstract=1126403>.

128. U.S. CONST. art. V.

129. The United States has one of the most difficult constitutions in the world to amend. DONALD S. LUTZ, *PRINCIPLES OF CONSTITUTIONAL DESIGN* 171 (2006) (“Comparative cross-national data show that the U.S. Constitution has the second most difficult amendment process.”). A supermajority approval is needed both in Congress and among the states. *Id.* at 169 (stating that a two-thirds vote by Congress and approval by three-fourths of the states is required to amend the U.S. Constitution, while the alternate method of initiating the process with a national convention by vote of state legislatures has never been successful).

130. The Supreme Court has been overruled by amendment four times. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 334, 597 n.26 (2005).

131. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (2d ed. 1986) (characterizing judicial review as countermajoritarian). Political scientists, on the other hand, argue that the Supreme Court is an anomalous majoritarian institution whose discretion is ultimately checked by appointments. See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court As National Policy-Maker*, 6 J. PUB. L. 279, 284–85 (1957) (arguing that the Supreme Court’s policy views will eventually reflect those of the dominant political players because the President will appoint, on average, two Supreme Court Justices during a single term).

132. See MICHAEL COMISKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* 30–31 (2004) (asserting that an ideological review of candidates as they are appointed to the Court is more successful than attempts to overturn Supreme Court rulings by constitutional amendment).

between democracy and constitutionalism, as it invites partisan battles over the makeup of the Court.

Polities abroad generally adopted judicial review after the Second World War¹³³ and had the opportunity, therefore, to learn from our experience with *Lochner*. The calculus of modern constitution makers and the stock of ideas they have to draw from are quite different from those that animated the framers of the American Constitution. There are two principal competitors to the American model of judicial review. The political-court model of judicial review, which relies on a specialized constitutional court, was first adopted in Europe¹³⁴ and then spread to East Asia¹³⁵ and Latin America.¹³⁶ The politicized-rights model, which provides legislatures with significant constitutional interpretive authority, was first adopted in Canada and then spread to New Zealand and the United Kingdom.¹³⁷ Both the political-court and the politicized-rights models of judicial review reject the American assumption that a constitution is a species of law and consequently adopt stronger mechanisms of political accountability for courts.¹³⁸ The political-court model relies chiefly on *ex ante* mechanisms of accountability such as appointment mechanisms; the politicized-rights model relies primarily on *ex post* mechanisms as parliament retains the power to trump courts in construing rights. Both the political-court¹³⁹ and the politicized-rights

133. Schor, *supra* note 26, at 261–70.

134. See Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice,"* 35 CATH. U. L. REV. 1, 5–6, 6 n.5 (1985) (stating that several European countries adopted constitutional judicial review through independent constitutional courts, such as Austria in 1945, Italy in 1948, and Germany in 1949).

135. See *id.* (noting that Japan adopted constitutional judicial review through independent judicial courts in 1947); see also TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 107, 168, 207 (2006) (chronicling that Taiwan's Council of Grand Justices was established in 1947, Mongolia's Tsets was established in 1992, and Korea's Constitutional Court was established in 1988).

136. Patricio Navia & Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMP. POL. STUD. 189, 191–92 (2005).

137. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 719 (2001); Rosalind Dixon, *Designing Constitutional Dialogue: Bills of Rights and the New Commonwealth Constitutionalism* (2008) (unpublished S.J.D. dissertation, Harvard University) (on file with author and Harvard University); David Oliver Erdos, *Mace, Sword, and Scales: The Bill of Rights Debate in Westminster Democracies 97–102* (2007) (unpublished dissertation, Princeton University) (on file with author).

138. See Schor, *supra* note 18, at 555 (observing that when countries in the second half of the twentieth century sought to implement judicial review, they embraced the idea that constitutions are a type of political law and thereby rejected the American notion that constitutions should be analogized to ordinary law).

139. Scholars typically refer to the political-court model as the European model of judicial review, but this is a problematic term, as it has been adopted in a number of polities outside Europe. *Id.* at 539 n.17. The term used in this Article—the political-court model—is preferable as it captures the essential element of the model which is that qualified political minorities may bring claims directly before a national high court. *Id.* The other term used in this Article—the politicized-rights model—is preferable as it captures the key element of the model which is that rights are weakly entrenched. *Id.* at 557–58.

models do a better job than the American model of resolving the tensions that arise between democracy and constitutionalism.

A. *The Political-Court Model of Judicial Review*

Lochner helped shape the debate over whether to adopt judicial review in continental Europe before the Second World War. This debate, which began in France, laid the intellectual groundwork for the political-court model of judicial review adopted after the War.¹⁴⁰ Public-law scholars in France sought to undo the deeply rooted constitutional principle of separation of powers that prohibited judicial review.¹⁴¹ These scholars championed the American model of diffuse review over the political-court model with its single, specialized constitutional court fearing that such a court “would be continuously embroiled in political and partisan controversy.”¹⁴² A counter-movement arose that was based on a study of the *Lochner* Era in the United States by an important public-law scholar, Edouard Lambert.¹⁴³ He argued that if France were to adopt judicial review, it would give “effective governing power to courts” and “laissez-faire capitalism . . . would be frozen judicially” to the detriment of France’s well-being.¹⁴⁴ Lambert’s work undermined the doctrinal consensus in favor of judicial review and its

140. Although judicial review did not take off in Europe until after the war, *Marbury* germinated in the period between the two world wars. See generally PEDRO CRUZ VILLALÓN, *LA FORMACION DEL SISTEMA EUROPEO DE CONTROL DE CONSTITUCIONALIDAD (1918–1939)* (1987) (describing the experimentation and formation of constitutional review in the period after the First World War). The Austrian Constitution of 1920, unlike the U.S. Constitution, has provisions on judicial review. *Id.*; see also Stanley L. Paulson, *Constitutional Review in the United States and Austria: Notes on the Beginnings*, 16 *RATIO JURIS* 223, 233 (2003) (describing the importance of the provisions on judicial constitutional review in the Constitution of 1920). The constituent assembly that drafted Germany’s Weimar Constitution in 1919, on the other hand, could not reach an agreement on judicial review, and consequently the Constitution was silent on the topic. See CRUZ VILLALÓN, *supra*, at 80–85 (describing the assembly’s differing opinions and final silence on the subject of judicial review). The German national high court, or Reichsgericht, decided a case in 1925 that was immediately recognized as a “*Marbury*” decision. See *id.* at 86 (noting that this decision was widely recognized as signaling assumption of the right of judicial review). While judicial review was of little practical importance in Weimar, that did not prevent scholars from sharply disputing its propriety. See *id.* at 92–94 (noting and summarizing the arguments advanced in favor of and against judicial review); see also JEFFREY SEITZER, *COMPARATIVE HISTORY AND LEGAL THEORY: CARL SCHMITT IN THE FIRST GERMAN DEMOCRACY* 73–97 (2001).

141. ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* 37 (1992).

142. *Id.*

143. EDUOARD LAMBERT, *LE GOUVERNEMENT DES JUGES* (1921); see STONE, *supra* note 141, at 39 (describing Lambert’s study of American judicial politics, which radically departed from traditional French public-law scholarship); Michael H. Davis, *A Government of Judges: An Historical Re-View*, 35 *AM. J. COMP. L.* 559, 559 (1987) (describing how Edouard Lambert single-handedly coined the phrase “government of judges”).

144. STONE, *supra* note 141, at 39.

political support amongst the members of a political class loath to cede power to judges.¹⁴⁵

The key intellectual figure in the pre-war European debate over judicial review is Hans Kelsen.¹⁴⁶ He wrote a seminal article published in 1928 explicating his views.¹⁴⁷ He rejected the assumption that underpins the American model of judicial review, which is that law and politics are distinct categories.¹⁴⁸ Kelsen argued that judicial review is the exercise of lawmaking power, albeit a purely negative one.¹⁴⁹ He feared that judicial review coupled with constitutions that contained open-ended provisions, however, would give judges too much power.¹⁵⁰ He argued, therefore, that such open-ended constitutional provisions should be “radically excluded” from judicial review, as they would “play an extremely dangerous role.”¹⁵¹ Such principles should be construed as programmatic and directed towards legislators so that laws would conform to underlying constitutional principles.¹⁵² Courts should not be able to enforce open-ended constitutional provisions because a “[c]onstitution in employing a term such as justice did not intend that the fate of a law would depend on the pleasure of a collegial body selected in a more or less arbitrary fashion.”¹⁵³ He also favored appointments to national high courts by means of legislative elections.¹⁵⁴ In short, Kelsen concluded that judicial review was critical in effectuating separation of powers but doubted whether it made sense to constitutionalize rights.¹⁵⁵

Although Kelsen’s ideas did not prevent European constitution makers from employing broad, open-ended provisions or from constitutionalizing rights,¹⁵⁶ his ideas played an important role in shaping the mechanisms of

145. *Id.* at 40.

146. Kelsen played an important role in drafting the Austrian Constitution of 1920, particularly its provisions on judicial review. Paulson, *supra* note 140, at 232–35 (noting that for Kelsen, the provisions on constitutional review meant the most to him in his work on the Constitution of 1920 and describing his defense of centralized review).

147. Hans Kelsen, *La garantie juridictionnelle de la Constitution*, 45 REVUE DU DROIT PUBLIC 197 (1928).

148. *Id.* at 198–200.

149. *Id.* at 222–23.

150. *Id.*; Theo Öhlinger, *The Genesis of the Austrian Model of Constitutional Review of Legislation*, 16 *RATIO JURIS* 206, 217 (2003).

151. Kelsen, *supra* note 147, at 239, 241.

152. *Id.* at 241–42.

153. *Id.* at 241.

154. *Id.* at 224–25. Kelsen was a realist on appointments; since “it is impossible to avoid political influence on the tribunal, it is preferable to accept . . . the participation of political parties in the formation of the tribunal such as by according a certain number of seats to parliamentary election.” *Id.* at 225.

155. *Id.* at 222–25, 234–37.

156. The desire to deal with the horrors of the Second World War led Germany to draft a Constitution with a number of open-ended provisions that are judicially enforceable. Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 *EMORY L.J.* 837, 852 (1991). The German Constitution, or Basic Law, begins by declaring that the dignity of man shall remain

judicial review.¹⁵⁷ In the political-court model, judicial review is concentrated in a constitutional court rather than spread diffusely throughout the judicial system; statutes can be reviewed abstractly before they are promulgated; and appointments require a legislative supermajority.¹⁵⁸ The political-court model is designed to deal with a pathology of parliamentary government, which is that there are few roadblocks to legislative majorities because executive and legislative powers are fused.¹⁵⁹ The solution is to provide a forum where losers in the legislative arena can find redress.¹⁶⁰ The politics of Europe, unlike the United States, moreover, could not invest ordinary courts with this power. Civil law courts were poorly suited for the job because they were staffed by bureaucrats who breathed an ideology of judicial subservience to legislative will.¹⁶¹ A specialized organ or a constitutional court was therefore needed that had the stature to stand up to parliament.

There is also an important affinity between the political-court model and appointment by legislative supermajorities.¹⁶² Institutional success or failure is often dependent on the linkages or affinities between different institutions.¹⁶³ The operative idea animating the creation of the political-court

inviolable. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution] art. 1 (F.R.G.). Many of the constitutions adopted after the Second World War belong to this family of “dignity based rights instruments.” GLENDON, *supra* note 108, at 175.

157. See Paulson, *supra* note 140, at 225 (describing Kelsen’s role in the development of constitutional review in Austria as “monumental”); Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 992 n.5 (2006) (“Kelsen designed the Austrian constitutional court, the major institutional alternative to the U.S. model for a court exercising the power of judicial review, as he did, precisely because he understood constitutional law to be a special kind of law, in which the political played a large role.”).

158. Schor, *supra* note 18, at 555–56.

159. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 641 (2000); Cindy Skach, *The “Newest” Separation of Powers: Semipresidentialism*, 5 INT’L J. CONST. L. 93, 96 (2007).

160. CRUZ VILLALÓN, *supra* note 140, at 80–85. The desire to provide a neutral arbiter between political parties led Mexico, for example, to adopt provisions moving it towards the political-court model in 1995. Schor, *supra* note 70, at 180–82. Tom Ginsburg argues persuasively that the political-court model provides competing political factions with “insurance” against losing elected office as courts limit the power of politicians. GINSBURG, *supra* note 135, at 25.

161. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 105, at 34–38 (picturing the judicial process in civil law countries as routine activity and describing the function of civil law judges as analogous to an expert clerk).

162. Appointments in European courts are typically via legislative supermajorities. See ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 46 (2000) (noting that Germany, Italy, and Spain appoint judges via legislative supermajorities, while France does not). The idea of legislative election was attractive given that parliaments traditionally had the final word on constitutional meaning. See FRIEDRICH, *supra* note 54, at 86 (“As far as selection of the judges is concerned, the traditional European inclination to leave constitutional interpretation to the legislative bodies . . . ha[s] led to giving the legislative authorities a major, if not the decisive voice in this selection.”).

163. CINDY SKACH, *BORROWING CONSTITUTIONAL DESIGNS: CONSTITUTIONAL LAW IN WEIMAR GERMANY AND THE FRENCH FIFTH REPUBLIC* 128 (2005) (“In stressing the contingent

model is to engender trust between competing democratic factions, and a supermajority provision forces factions to reach a rough consensus on appointments.¹⁶⁴ While the political-court model of judicial review does not prevent courts from running amok, it does make it unlikely that popular forces will mobilize to contest appointments.¹⁶⁵ Supermajority appointment provisions obviously make it difficult for factions to seek to amend the Constitution by having their partisans placed on a national high court as occurs in the United States.

B. *The Politicized-Rights Model of Judicial Review*

Europe, and particularly Germany, constitutionalized rights to deal with the legacies of the Second World War.¹⁶⁶ The principal members of the politicized-rights model (Canada, New Zealand, and the United Kingdom), on the other hand, had obviously not suffered a democratic breakdown and constitutionalized rights to deal with certain democratic pathologies. These polities decided to entrench rights because it was feared that parliamentary democracy failed to adequately protect rights.¹⁶⁷ They sought to marry constitutional and legislative supremacy by adopting a weak form of judicial review that preserved an important role for legislatures.¹⁶⁸ The defining characteristic of the politicized-rights model is that courts have the first but not the final word in construing rights.¹⁶⁹

Canada provides the key to understanding this model. It was the first nation to adopt the politicized-rights model with its Charter of Rights and Freedoms in 1982, and the Charter has proven highly influential.¹⁷⁰ The decision to entrench rights was made to provide linguistic and cultural

nature of constitutional law, my argument . . . represents part of a growing effort to understand why certain clusters of institutions appear together throughout history—and why the relative success of one institution may be intimately tied to the presence and success of another, partner institution.”)

164. See Lisa Hilbink, *Beyond Manicheism: Assessing the New Constitutionalism*, 65 MD. L. REV. 15, 23–24 (2006) (describing the constitutional court appointment process as allowing “explicitly for negotiation” and, in many cases, requiring a supermajority vote).

165. See *id.* at 23 (“While never perfect, the appointment process has worked to provide rough proportionality in partisan, religious, and geographic representation on the court.”).

166. See Schor, *supra* note 18, at 555 (stating that Germany and much of Western Europe adopted a political-court model after the Second World War).

167. See generally Erdos, *supra* note 137, at i (analyzing “the socio-political origins of national Bill of Rights institutionalization in advanced, industrialized democracies through a focus on divergent developments in four ‘Westminster’ democracies—the United Kingdom, Canada, Australia and New Zealand”).

168. See TUSHNET, *supra* note 9, at 24 (discussing the “use of weak-form review in New Zealand, the United Kingdom, and Canada”).

169. See Gardbaum, *supra* note 137, at 709 (noting that the model of countries like Canada, New Zealand, and the United Kingdom “decouple[s] judicial review from judicial supremacy by empowering legislatures to have the final word”).

170. Adam M. Dodek, *Canada as Constitutional Exporter: The Rise of the “Canadian Model” of Constitutionalism*, 36 SUP. CT. L. REV. 309, 317–18 (2007).

minorities in Quebec protection against legislative majorities.¹⁷¹ Constitutional developments in Canada occurred, moreover, against the background of a deep knowledge of analogous developments in the United States.¹⁷² The framers of Canada's Constitution, the British North America Act of 1867, for example, rejected both popular sovereignty and the American model of federalism, believing that these principles played an important role in facilitating the American Civil War.¹⁷³ Canadian courts have cited American cases and "discussed the similarities and differences between the two constitutional systems" since the "early days of the confederation."¹⁷⁴

Lochner played an important role in shaping the Charter, as "[t]he *Lochner* Era and its multilayered legacy loom large in the Canadian constitutional imagination."¹⁷⁵ The framers of the Charter "were well aware of the benefits and the dangers of judicial activism."¹⁷⁶ There was considerable disagreement over whether Canada needed strong judicial review similar to the American model, and so a compromise was reached.¹⁷⁷ The Canadian solution to the fear that courts might become too powerful can be found primarily in Sections 1 and 33 of the Charter.¹⁷⁸ The former is a general limitations clause that provides that rights may be limited by legislation.¹⁷⁹ Section 1 instructs courts that rights are subject to legislative limits and so invites judicial balancing.¹⁸⁰ It played a key role in the debates surrounding

171. EDWARD MCWHINNEY, *CANADA AND THE CONSTITUTION 1979–1982: PATRIATION AND THE CHARTER OF RIGHTS* 33 (1982).

172. See Hogg, *supra* note 99, at 81 (stating that the Canadian judges "drew on rich American case-law and commentary").

173. See RUSSELL, *supra* note 44, at 23 (noting that British North Americans departed from the American federal system because they viewed it as the "dangerously decentralizing feature of the American Constitution").

174. Hogg, *supra* note 99, at 80–81.

175. Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1, 15 (2004).

176. ROACH, *supra* note 101, at 53.

177. See *id.* at 53–54 (chronicling how the two sides—political groups favoring judicial supremacy and those preferring legislative supremacy—"devised a creative compromise that combined the virtues of both judicial and legislative activism").

178. Part I of the Constitution Act §§ 1, 33, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

179. Canada was the first polity to adopt a general limitations clause, as the pattern in Europe had been to use "multiple explicit internal limitations clauses." Dodek, *supra* note 170, at 314–15; see also Part I of the Constitution Act, § 1 ("The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."). The Universal Declaration of Human Rights also contains a general limitations clause. Universal Declaration of Human Rights, G.A. Res. 217A, at 99, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

180. *Id.*

the adoption of the Charter.¹⁸¹ Section 33 allows for a temporary legislative override of a judicial decision holding a statute unconstitutional.¹⁸² Although Section 33 has proven controversial, its defenders argue that a legislative override is necessary since “potentially dangerous . . . responses to judicial review” are shunted to legislatures rather than falling on courts.¹⁸³ A legislative override, moreover, provides a mechanism by which judicial mistakes can be corrected.¹⁸⁴

Both New Zealand and the United Kingdom subsequently learned from the Canadian experience when they entrenched rights.¹⁸⁵ New Zealand and the United Kingdom adopted stronger forms of the politicized-rights model of judicial review than Canada by strengthening the legislature’s hand in construing rights.¹⁸⁶ The New Zealand Bill of Rights Act of 1990 (NZBORA) is a statutory bill of rights that “bears a striking resemblance to Canada’s Charter.”¹⁸⁷ Sections 4 and 6 preclude courts from striking down legislation while empowering courts to construe statutes as conforming to NZBORA insofar as possible.¹⁸⁸ The United Kingdom Human Rights Act 1998 (UKHRA) also empowers courts to construe statutes so that they are in conformity with the rights protected therein insofar as possible.¹⁸⁹ Unlike NZBORA, however, Section 4 of the UKHRA also authorizes courts to declare that statutes are incompatible with UKHRA’s provisions.¹⁹⁰ Once such a declaration is made, it is incumbent on Parliament to “respond by amending the statute to eliminate the incompatibility.”¹⁹¹

IV. The Judicial Elaboration of Judicial Review

The spread of *Marbury* around the globe elicited both political and judicial accommodations. The political response in the United States has

181. Janet Hiebert, *The Evolution of the Limitation Clause*, 28 OSGOODE HALL L.J. 103, 104 (1990).

182. Part I of the Constitution Act § 33.

183. Choudhry, *supra* note 175, at 48.

184. Peter H. Russell, *Standing Up for Notwithstanding*, 29 ALTA L. REV. 293, 297 (1992).

185. The “participants in the debates” over entrenching rights in New Zealand and the United Kingdom “were extremely well aware of . . . events in Canada, which as a fellow Commonwealth country with a similar legal culture and tradition of parliamentary sovereignty was viewed as a far more relevant example than either the United States or western Europe.” Gardbaum, *supra* note 137, at 727.

186. *See id.* at 742–43 (comparing Canadian courts, which may decline to apply a statute that conflicts with fundamental rights, with courts in New Zealand and Britain, which may not decline to apply legislation when it violates fundamental rights but are encouraged to find interpretations that avoid violation).

187. Dodek, *supra* note 170, at 327.

188. New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109, §§ 4, 6.

189. Human Rights Act, 1998, c. 42, § 3(1) (Eng.).

190. *Id.* § 4(2).

191. TUSHNET, *supra* note 116, at 28.

been the advent of social movements that contest judicial appointments;¹⁹² in politics abroad, on the other hand, the political responses included the development of the political-court and the politicized-rights models of judicial review.¹⁹³ Courts both in the United States and around the globe were also transformed by the growth in judicial power.¹⁹⁴ While the exercise of judicial review has recently led the U.S. Supreme Court to move towards formalism,¹⁹⁵ the Court's initial response to the backlash engendered by *Lochner* was to adopt a pragmatic and flexible approach.¹⁹⁶ Reformist legal thinkers successfully "yoked" formalism to *Lochner* to create an "impressive and threatening bogeyman."¹⁹⁷ The pragmatist turn involved, therefore, a rejection of formalism and the development of balancing tests which the Supreme Court began to use in the 1930s and 1940s.¹⁹⁸ Justices such as Holmes, Brandeis, and Stone, for example, championed this new approach as it "facilitated doctrinal change in time of social flux."¹⁹⁹

A similar pragmatist turn away from formalism occurred in civil law countries around the globe.²⁰⁰ The civil law was built on an intellectual edifice created in the wake of the French Revolution that sought to sharply curtail the power of judges.²⁰¹ The legal "innovation" wrought by the French Revolution was an "effort to make the law judge-proof."²⁰² The civil code sought to eliminate judicial discretion by providing a legislative answer to all legal problems.²⁰³ Civil law judges, unlike common law judges, are minor players in the legal process; they are bureaucrats steeped in an ideology of subservience to legislative will.²⁰⁴ The attempt to insulate the law from judicial discretion failed, however, as it proved impossible to separate policy making from the judicial process.²⁰⁵

192. Schor, *supra* note 26, at 545–51.

193. *See supra* Part III.

194. Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 474–76 (2003).

195. Chief Justice John Roberts, for example, noted this change when he stated that the Court has adopted "'a more legal perspective and less of a policy perspective.'" Adam Liptak, *Roberts Sets Off Debate on Judicial Experience*, N.Y. TIMES, Feb. 17, 2009, at A14.

196. Grey, *supra* note 194, at 476–77.

197. *Id.* at 476.

198. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 948 (1987).

199. *Id.* at 960, 954–60.

200. Grey, *supra* note 194, at 474.

201. John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109, 109 (1996).

202. *Id.*

203. *Id.* at 111–12.

204. *Id.*

205. *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 29–30 (1981) (discussing "the brute fact of judicial discretion" and observing that the study of the "political psychology of judging . . . has fairly convincingly demonstrated that many judges are not

The erosion of the civil law ideology has been accelerated by the introduction of judicial review. Proportionality analysis, which is the European analogue to balancing, involves determining whether legislation is rationally related to a legitimate government end or purpose and then determining whether the means chosen appropriately effectuates that end.²⁰⁶ The German Constitutional Court is a highly influential proponent of proportionality analysis.²⁰⁷ Courts around the globe have turned away from formalism and towards proportionality analysis or balancing tests “as they began to actively effectuate rights.”²⁰⁸ The most striking example of the spread of proportionality analysis can be found in Latin America, where courts relied on formalism after it went out of fashion elsewhere in the civil law world.²⁰⁹ Latin America is an outlier in the civil law world, as courts throughout the region relied on formalism to avoid conflict with dictators, oligarchs, and presidents.²¹⁰ Courts that actively construe and effectuate rights in the region, such as the Colombian Constitutional Court, have embraced proportionality analysis²¹¹ to effectuate rights, which is a striking transformation in a region where politicized constitutions have long facilitated a dangerous centralization of power.²¹²

Although courts throughout the legal world now employ proportionality or balancing tests when exercising judicial review, scholars vigorously dispute whether the U.S. Supreme Court behaves similarly to other national

entirely ‘neutral’ thirds but instead bring . . . distinct public policy preferences, which they seek to implement through their decisions”); *id.* at 115–16 (“[E]fforts to make the law judge-proof . . . dwindled under the pressure of necessity and the natural tendency of lawyers and judges to do what seems reasonable, fair and effective in their work.”).

206. See David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 688 n.133, 689–91 nn.135–38 (2005) (discussing proportionality review and its application by British, German, French, and EU courts, and by the European Court of Human Rights).

207. See Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 73, 113 (2008) (“In post-1989 Central and Eastern Europe . . . virtually every constitutional court had adopted [proportionality analysis] on the German model; most did so all but immediately, citing the case law of the [German Federal Constitutional Court] . . . as authority.”).

208. Schor, *supra* note 70, at 189, 189–91.

209. DIEGO EDUARDO LÓPEZ MEDINA, *TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURIDICA LATINOAMERICANA* 118–20 (2004) (describing classical formalism in Latin America and noting that it continued in full force even when European formalism was in crisis).

210. See LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* 54–55 (2007) (asserting that judges deferred “almost completely to the authority of the conservative legislators”).

211. See CEPEDA ESPINOSA, *supra* note 64, at 159–66 (describing the Colombian Supreme Court’s use of proportionality analysis to prevent the legislature or executive from disproportionately harming fundamental individual rights varying from freedom of the press to habeas corpus).

212. See Schor, *supra* note 27, at 18–19 (“[T]he framers of [Latin America’s] constitutions . . . were clearly worried about the possibility of civil unrest” and thus “designed constitutions that placed too much power in one central figure, namely the president.”).

high courts. Stephen Gardbaum, for example, rejects the idea that the U.S. Supreme Court is exceptional and argues that it “shares the deep common structure of modern constitutional rights analysis” with other courts around the world.²¹³ American courts may use the term balancing whereas courts abroad speak of proportionality, but the difference is semantic. Lorraine Weinrib, on the other hand, argues that the U.S. Supreme Court does not fit within the postwar paradigm of rights protection.²¹⁴ The constitutional systems that developed abroad after the Second World War differ from the United States because they “share a sophisticated legal paradigm”²¹⁵ that invites comparative analysis and rests on “notions of dignity and equality.”²¹⁶ The United States, on the other hand, belongs to a “historical, indigenous school” that believes that comparative engagement invites *Lochnerian* subjectivity.²¹⁷ The cure for *Lochner*, therefore, is an approach that emphasizes originalism and rejects comparative engagement.

This Article argues that the Supreme Court is exceptional because the United States relies primarily on internal constraints such as judicial modesty or virtue rather than external constraints such as political accountability to cabin judicial discretion. Politics abroad, on the other hand, crafted stronger mechanisms of political accountability for national high courts in response to the perils of *Lochner*.²¹⁸ The exercise of judicial review transformed national high courts in civil law jurisdictions since it led them to eschew formalism and adopt a more pragmatic style of legal reasoning. The widespread use of proportionality analysis means, moreover, that these courts do not hide that they engage in policy making. Nonetheless, these courts do not face the political backlash²¹⁹ that the U.S. Supreme Court faces because citizen anger at court decisions is mediated by sharper tools of political accountability for national high courts.

213. Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 430 (2008).

214. Weinrib, *supra* note 85, at 84.

215. *Id.*

216. *Id.* at 87.

217. *Id.* at 98.

218. *See supra* Part III.

219. *See* Alec Stone Sweet, *Why Europe Rejected American Judicial Review and Why It May Not Matter*, 101 MICH. L. REV. 2744, 2780, 2779–80 (2003) (noting that while in the “past three decades, the French, German, and Italian courts have . . . invalidated more national laws than has the U.S. Supreme Court—in its entire history,” European theorists do not question the legitimacy of the exercise of judicial power); *see also* Justice Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 668–69 (2004) (noting that the framers of Colombia’s 1991 Constitution feared the activism of the U.S. Supreme Court and fashioned, therefore, stronger mechanisms of political accountability for the Colombian Constitutional Court).

The United States, which has largely been unable to reform the Constitution to deal with its defects,²²⁰ turned to internal constraints or judicial responses to the democratic backlash engendered by *Lochner*. Although democratic discontent with the Court has been a feature of American politics since the early days of the Republic,²²¹ the first sustained wave of citizen anger and social mobilization occurred in reaction to *Lochner* during the Progressive Era.²²² The Court, faced with the threat of court packing by President Roosevelt, developed balancing tests and a more pragmatic approach to judicial review.²²³ The latest sustained wave of citizen anger has been by social and political conservatives who turned to judicial appointments as a means of transforming the meaning of the Constitution.²²⁴ The Court, in response to this political pressure, has turned to originalism to escape the claim that it engages in subjectivity.²²⁵ Originalism, much like the ideology of the civil law, is a response to the problem of judicial power that seeks to sweep judicial creativity under the rug of legal formalism.²²⁶ Paradoxically, as civil law courts have become more pragmatic and more like common law courts, the U.S. Supreme Court has become more “civilian,” as it seeks to rely on a single, correct interpretive approach to blunt claims that it engages in policy making.²²⁷

220. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 21 (2006).

221. DWIGHT WILEY JESSUP, *REACTION AND ACCOMMODATION: THE UNITED STATES SUPREME COURT AND POLITICAL CONFLICT, 1809–1835*, at 128, 172–73 (1987); WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937*, at 6–7 (1994); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 381–87 (2007).

222. Schor, *supra* note 18, at 545–51.

223. Aleinikoff, *supra* note 198, at 948–49, 952–54.

224. Schor, *supra* note 18, at 547–51.

225. Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 610 (2008); *see also* Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL’Y 599, 599–601 (2004) (discussing the initial development of originalism as a reaction to the Warren Court, noting the widespread conservative support for originalism, Justice Rehnquist’s defense of it, and the Rehnquist Court’s continued adherence to judicial restraint).

226. *See* JOHNATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* 1–2, 7–9 (2005) (describing the formalistic approach of originalism and its emergence as a response to theories advocating an evolutionary approach to constitutional meaning).

227. The U.S. Supreme Court is exceptional in its reliance on originalism. Jamal Greene, *On the Origins of Originalism*, 88 TEXAS L. REV. (forthcoming 2009–2010) (manuscript at 2, on file with Texas Law Review); *see also* O’NEILL, *supra* note 226, at 137–41 (discussing how early originalists relied on the term “originalism” to argue that they, unlike their detractors, relied on a close reading of the Constitution that left no room for policy making); Mary Ann Glendon, *Comment in* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 101 (Amy Gutman ed., 1997) (noting a rise in U.S. regulation and contrasting this tendency with a decrease in the significance of codes in civil law systems).

The chief proponent of the turn to the civil law is Justice Scalia. In a remarkable essay entitled *Common Law Courts in a Civil Law System*,²²⁸ he argues that the common law approach to interpretation is inappropriate in a constitutional democracy as it invites judicial subjectivity.²²⁹ The common law method is an “art or a game, rather than a science” because of the discretion it affords judges.²³⁰ This method is inappropriate for interpreting either statutes or the Constitution, as it emphasizes precedent and judicial creativity rather than the text.²³¹ Justice Scalia writes the following about constitutional cases:

[Y]ou will rarely find the discussion addressed to the text of the constitutional provision that is at issue The starting point of the analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding.²³²

Justice Scalia, like the French revolutionaries who crafted the ideology of the civil law, believes that judicial power must be circumscribed by formalism, as textual analysis allows courts to go about their business without engaging in policy making.²³³ Federal courts, like civil law courts, should disdain precedent and hew to the text, which, after all, is democratically enacted.²³⁴

Justice Scalia’s musings on the civil law bore fruit in his majority opinion in *District of Columbia v. Heller*.²³⁵ *Heller* may well be the first and is certainly the greatest civil law decision²³⁶ of the U.S. Supreme Court, as evidenced by the majority’s emphasis on the power of language to cabin

228. SCALIA, *supra* note 227, at 3.

229. *See id.* at 13, 38–41 (questioning whether the “attitude” of the common law is appropriate).

230. *Id.* at 8.

231. *Id.* at 12–14, 38–41.

232. *Id.* at 39.

233. *See id.* at 44–46 (cautioning that judicial evolutionism is not a practicable constitutional philosophy).

234. *See id.* at 13–15, 23–25 (contending that every issue of law resolved by a federal judge involves the interpretation of text and articulating a “science of statutory interpretation” designed to adhere to its fair and reasonable meaning).

235. 128 S. Ct. 2783 (2008).

236. Interestingly, Justice Breyer used the term “proportionality” rather than balancing in his dissent, which may herald an attempt on his part to shepherd the U.S. Supreme Court into the fold of European constitutionalism. *See* Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. (forthcoming 2009) (manuscript at 2–5, on file at <http://ssrn.com/abstract=1317833>) (arguing that Breyer’s focus on “proportionality” marks an important step in bringing American constitutional law closer to the mainstream of global constitutionalism).

judicial discretion,²³⁷ their odd belief that originalism is hardwired in the Constitution,²³⁸ and their disdain for precedent.²³⁹

A. *The Heller Majority's Emphasis on the Power of Language to Cabin Judicial Discretion*

Scalia's opinion begins with the text of the Constitution and emphasizes the power of that text to curtail judicial discretion.²⁴⁰ Similarly, the civil law turned to a framework statute, the civil code, as a means of eliminating judicial subjectivity, and civil law opinions celebrate the importance of the text.²⁴¹ An originalist decision, when stripped to its essentials, would look much like decisions by French courts that laconically state that in light of articles *x*, *y*, and *z* of the Civil Code, we reach the following decision.²⁴²

B. *The Heller Majority's Odd Belief That Originalism Is Hardwired in the Constitution*

Originalism, moreover, with its emphasis on a single, correct interpretive method somehow embedded in a Constitution²⁴³ that is silent on the issue, is in deep tension with the common law and global

237. See *Heller*, 128 S. Ct. at 2788 (“In interpreting [the Second Amendment], we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

238. See, e.g., *id.* at 2791–92 (searching for the original meaning of the word “arms” to elucidate the meaning of the Second Amendment); *id.* at 2797–99 (looking at the historical background of the Second Amendment to confirm the Court’s interpretation and noting that historical background is particularly important in interpreting the Second Amendment, since the Amendment codified a preexisting right at the time of its adoption).

239. See *id.* at 2816 (concluding that “nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment”); *id.* at 2845 n.38 (Stevens, J., dissenting) (“The majority appears to suggest that even if the meaning of the Second Amendment has been considered settled by courts and legislatures for over two centuries, that settled meaning is overcome by the ‘reliance of millions of Americans’ ‘upon the true meaning of the right to keep and bear arms.’”).

240. See *id.* at 2822 (stating that the “enshrinement of constitutional rights necessarily takes certain policy choices off the table”).

241. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 105, at 39 (asserting that in a pure civil law system “authoritative interpretation by the lawmaker [is] the only permissible kind of interpretation” and describing the duty of civil law judges to refer problems of statutory interpretation to the legislature so that these problems can be resolved through code revision rather than judicial subjectivity).

242. Mitchell Lasser, *Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de Cassation, and the United States Supreme Court* 8 (The Jean Monnet Program, Working Paper 1/03, 2003), available at <http://www.jeanmonnetprogram.org/papers/03/030101.html>; see also Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 544 n.138 (“[A]ll French courts have traditionally taken a very limited view of their ability to strike down legislative or executive action or to create new legal principles.”).

243. See Michael Stokes Paulson, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 104 NW. U. L. REV. (forthcoming 2009) (manuscript at 24, on file at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1301706) (arguing that the Constitution provides a general interpretive instruction to abide by its objective, original public meaning).

constitutionalism. The common law eschews an overreliance on logic and is famously eclectic in its approach to solving legal problems.²⁴⁴ While constitutional courts around the globe also rely on originalism as an interpretive method, they do not pretend that it is the single correct approach to constitutional analysis.²⁴⁵ Proportionality analysis, after all, emphasizes the role of courts as problem solvers, which means that courts look forward rather than to the past in solving interpretive problems.²⁴⁶ The *Heller* majority opinion, on the other hand, is indifferent to whether the upshot of the decision is that more murders might result.²⁴⁷ The civil code also seeks to prevent judges from taking the policy implications of their decisions into account.²⁴⁸

C. *The Heller Majority's Disdain for Precedent*

There is an obvious tension between the language of an authoritative text—such as a constitution or a civil code—and precedent. The issue is whether judges should look primarily to the language of the authoritative text or to precedent. The civil law has a well-developed hierarchy of legal sources in which code is the law but precedent is not.²⁴⁹ As a consequence, judges are free to ignore precedent, even when it emanates from a higher court, since the code, not judicial precedent, is the law. Proponents of originalism also argue that the original meaning of the Constitution should trump precedent.²⁵⁰ The *Heller* majority opinion is very civilian in its disdain for

244. See SCALIA, *supra* note 227, at 9, 4–9, 13–14 (criticizing the common law practice of pulling together policy considerations, precedent, and statutes to varying degrees to “discern the best rule of law for the case at hand” and arguing that in the modern statutory environment the common law method should give way to the strictures of statutory interpretation).

245. See, e.g., Cohen-Eliya & Porat, *supra* note 236 (manuscript at 2–3, 27) (noting the German Constitutional Court’s use of proportionality, which since the 1970s has become a defining feature of global constitutional law).

246. See *id.* (manuscript at 13) (describing the stages of proportionality analysis, the last being a determination of whether the benefits to be achieved from the government objective will be proportionate to the contemplated right’s violation).

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

248. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 105, at 39 (describing a judge’s role in a pure civil law system, which, if followed, would prevent the judge from making law).

249. JULIO CUETO RUA, FUENTES DEL DERECHO 161–62 (1982) (contrasting the civil law with the common law and noting that common law systems generally yield fewer contradictory verdicts in similar cases because of their use of precedent); see also *id.* at 169–70 (asserting that in countries of the Roman civil law tradition, the law is found only in the statute itself and precedents are merely instructive in that they provide examples of the application of the statute to concrete cases).

250. See, e.g., Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 259 (2005) (“If precedent trumps original meaning, then the Constitution would truly be what the Supreme Court says it is, rather than the Supreme Court itself being bound to adhere to the Constitution.”); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 17, 19–21 (2007) (opining that the Supreme Court should rarely defer to its own precedent because virtually all existing precedent was not reached through an originalist inquiry).

precedent. It turned to precedent as an afterthought and only after a careful exegesis of the language and its public meaning throughout the course of American history.²⁵¹

V. Conclusions

Although there is a considerable and growing literature on the growth of judicial power around the globe,²⁵² little has been written on the transnational debate that shaped its growth. Scholars have ignored the struggle over ideas that shaped the institutional landscape we currently inhabit. The failure to do so negatively impacts our understanding of judicial review. We need to contextualize the debate over judicial review across space and time. This Article tells that story by uncovering the role that *Marbury* and *Lochner* played in the constitutional imagination.

The meaning of judicial review shifted as it spread around the globe. Although *Marbury* now stands for the proposition that courts have an important role to play in effectuating rights, that was not how the case was understood when it was decided nor how it was understood throughout most of the nineteenth century. *Marbury* once stood for the proposition that courts have a role to play in effectuating the limits on power etched in the Constitution. *Lochner* now stands for the proposition that courts armed with the power of judicial review may abuse that power and is considered, therefore, to be the opposite of *Marbury*. Yet *Lochner* once stood for the proposition that courts play a key role in protecting economic rights against governmental inroads. The point is that while we now invariably associate judicial review with rights, that was not how the idea was understood for much of the nineteenth century. The arrogation by courts of this power, moreover, has not been the unqualified success that human rights advocates pretend,²⁵³ as *Marbury* and *Lochner* are inextricably linked. Courts may get it wrong and political actors will, from time to time, contest the exercise of judicial power.

This Article makes three principal claims. The first is methodological. Constitutional arrangements are the result of historical struggles²⁵⁴ and cannot be properly appreciated by simply figuring out who the winners and

251. The majority did not seek to plumb the meaning of the Second Amendment by using precedent but rather asked “whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment.” *Heller*, 128 S. Ct. at 2812.

252. For a critical review of the literature, see generally Schor, *supra* note 26.

253. See, e.g., LAUREN, *supra* note 29, at 297 (concluding that the progress of international human rights has been punctuated with numerous failures and false starts).

254. See generally Kim Lane Scheppele, *The Agendas of Comparative Constitutionalism*, 13 LAW & CTS. 5, 5 (2003) (recounting the broad historical context in which modern constitutionalism developed).

losers are.²⁵⁵ Historical institutionalism, not rational choice, has the most promise for constitutional theory and constitutional design.²⁵⁶ Constitution makers, after all, do not write on an empty slate but must mold the tools at hand to deal with the political, social, and economic problems of the day.²⁵⁷ Judicial review, viewed in the sweep of time and space, is not simply a bright tale involving the inevitable triumph of human rights around the globe²⁵⁸ or a darker story where self-interested politicians afford judges power in an effort to curtail democracy;²⁵⁹ it is also the result of a long struggle to both empower courts *and* to cabin judicial discretion.²⁶⁰

The second claim is that ideas matter. *Marbury* and *Lochner* played a critical role in shaping the constitutional imagination. Scholars celebrate the aggrandizement of judicial power by insisting that judicial review is the story of *Marbury* writ large around the globe.²⁶¹ In so doing, they perpetuate a myth that judicial modernity, with its emphasis on the role courts play in protecting rights, is built on the idea of *Marbury*. The construction of this myth was facilitated by the ease with which judicial review spread in the nineteenth century²⁶² when courts exercised little power compared to their twentieth-century brethren.²⁶³ In constitutional design, however, debates over the fear of power are considerably more illuminating than those surrounding the hope of its exercise. *Lochner*, not *Marbury*, lies at the root of judicial modernity.

Lochner's importance has been submerged by a global constitutional canon that assumes that courts can effectuate rights without impermissibly

255. See RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 12 (2004) (arguing that constitutional arrangements, including "timing, extent, and nature of constitutional reforms," result from the self-interests of political, economic, and judicial elites); see also MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, & JUDICIALIZATION 61–64 (2002) (articulating dyadic and triadic theories as to how parties with divergent interests engage in the rule-making process).

256. See, e.g., Rogers M. Smith, *Historical Institutionalism and the Study of Law*, in THE OXFORD HANDBOOK OF LAW AND POLITICS, *supra* note 31, at 46, 57 (discussing the growth of historical institutionalist scholarship in public law).

257. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1286 (1999) (comparing constitution making to bricolage).

258. See, e.g., GINSBURG, *supra* note 135, at 261–63 (concluding that although the formal power of judicial review is now nearly universal in new democracies, courts have had varying levels of success in actually applying it, so that protection of substantive human rights has expanded only incrementally over time).

259. See HIRSCHL, *supra* note 255, at 12, 213–17 (describing the use of judicial review by "hegemonic sociopolitical forces" who perceive that their interests will be "less effectively contested" in courts than in "majoritarian decision-making arenas").

260. See *supra* Part III.

261. See *supra* note 33.

262. See *supra* Part II.

263. See KRAMER, *supra* note 29, at 232 (noting the change in public sentiment during the latter part of the twentieth century toward supporting judicial supremacy over popular constitutionalism).

interfering with the political branches.²⁶⁴ The historical record, however, belies the notion that *Lochner* and *Marbury* are opposites. *Marbury* did not stand for the jumble of ideas we now call judicial review until the U.S. Supreme Court came under attack during the *Lochner* Era.²⁶⁵ It is during the *Lochner* Era, after all, that the first sustained debate over the role that courts should play in effectuating rights began.²⁶⁶ It is in response to the perceived excesses of the *Lochner* Era that the twin, modern responses to this issue—political accountability²⁶⁷ and balancing tests²⁶⁸—emerged. Scholars have been lulled by the global expansion of judicial power into believing that the commonalities of judicial review matter more than the differences. They have ignored, therefore, how *Lochner* helped shape the differing accommodations that each polity made to the expansion of judicial power.

The third claim is that timing matters in explaining institutional variation. When the framers designed the U.S. Supreme Court, they obviously had no idea how powerful it would become. They believed naively, moreover, that courts did not engage in policy making.²⁶⁹ They feared power but did not fear the Supreme Court. As a consequence, citizens angered by the Court's decisions have weak tools at their disposal to keep it in check. The United States did not seek to reform the mechanisms of political accountability for the Supreme Court in the wake of *Lochner*. More importantly, the assumption that underpinned the Court's role in American democracy, which is that law and politics are discrete categories, was put to rest for only half a century in the wake of the Constitutional Revolution of 1937. This assumption has come back to life under the guise of originalism. By eschewing precedent and emphasizing constitutional text, the Court has freed itself from the common law shackles that once constrained its discretion. Among the world's democracies, the United States is exceptional in having a national high court that proclaims that whether its decisions facilitate murder is inconsequential.²⁷⁰ Originalism is a considerably more flawed solution to the problem of judicial power than is the ideology of the civil law, since civil law judges, unlike constitutional judges, may be overruled by ordinary statute. Textualism can no more cure the problem of judicial power than *Marbury* could exist without *Lochner*. Judicial self-

264. See *supra* Part III.

265. See *supra* Part II.

266. *Id.*

267. See *supra* Part III.

268. See *supra* Part IV.

269. See KRAMER, *supra* note 29, at 7 (explaining that the Court was not intended to be responsible for ensuring proper constitutional interpretation and implementation—the people were entrusted with this task: “[t]he idea of turning this responsibility over to judges was simply unthinkable”).

270. See *supra* subpart IV(B).

regulation founders on the connections these two cases exhibit across space and time. Power needs to be checked by external, not internal, constraints.

Democracies around the globe constitutionalized rights after the Second World War and drew very different lessons from *Lochner*. The fear of judicial power led polities abroad to craft stronger institutional restraints than the United States for national high courts. The political-court model relies primarily on *ex ante* mechanisms of control. Supermajoritarian appointment provisions are important in facilitating trust between political parties. It would be impossible to successfully appoint justices as partisan as those currently sitting on the U.S. Supreme Court in polities that have supermajoritarian appointment provisions. The politicized-rights model relies primarily on *ex post* mechanisms of control. Courts have the first but not the final word on the meaning of the Constitution. As a consequence, dialogue between different branches over the meaning of the Constitution is possible²⁷¹ as legislators retain the power to construe its dictates.

271. See Peter W. Hogg et al., *Charter Dialogue Revisited—Or “Much Ado About Metaphors,”* 45 OSGOODE HALL L.J. 1, 7–13 (2007) (outlining legal issues for which the Supreme Court of Canada recognizes the importance of dialogue between it and the legislature).