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THE JUDICIARY AND INSTITUTIONS OF JUDICIAL REVIEW

Mark Tushnet*

When speaking of the transition from apartheid to democracy, one can too easily become a cheerleader for an independent judiciary. When contrasting an independent judiciary with what was known as “telephone justice” in the former Soviet Union—where judges would call up the local Communist Party chief to find out what they should do in particular cases—the argument for independence is obviously strong. Further, the United States experience with an independent judiciary over the past half-century is good enough to quell doubts that might have arisen in earlier generations when an independent judiciary acted as a political force independent of, and at odds with, majorities controlling other political institutions.¹ The exact boundaries of what constitutes an independent judiciary, and what it should do, remain ill-defined. Under these circumstances, it is important to introduce some skeptical notes into the chorus of enthusiasm about judicial review.

This comment is divided into three parts. First, I examine some reasons to think that there is little to be gained by talking about institutional details, largely because we know almost nothing about the long-term significance of such details. Second, the argument is made that styles of judicial decision-making may be more important in the early years of a constitutional democracy than institutional details. Finally, the proposition that the early experience with judicial review in the United States may have little bearing on questions of judicial review following the transition to democracy in contemporary societies is examined.

I. Skepticism About Institutional Details

Constitutional lawyers in the United States, having discovered that

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1. Of course, there are problems in the contemporary United States constitutional order, such as its apparent inability to deal with the federal budget. In an extended sense, perhaps, these concerns may be laid at the door of the judiciary, which, it might be argued, generated or lent support to a culture of rights that has made it more difficult to resolve political controversies in the political arena.

constitutionalists elsewhere think it important to compare their institutions to ours, have begun to write about comparative constitutional law. Their articles tend to have two parts. The first and larger part enumerates different ways of organizing systems of judicial review. There is general agreement that judges who exercise the power of judicial review ought to serve relatively long terms. The question then becomes whether the terms should endure indefinitely as in the United States, or whether judges should serve a single defined term of perhaps fifteen-years or perhaps a renewable eight-year term. A second concern arises because these judges will exercise a power that combines both law and politics. Therefore, should they be selected through a process heavily dominated by politics, as in the United States? Alternatively, should they be chosen through a process that highlights their technical legal abilities, perhaps by limiting the pool of potential candidates to those who have avoided substantial political involvements? Related to this last question is whether constitutional review should be centralized in a specialized constitutional court, on the theory that only specialized judges will be sensitive to the political dimensions of constitutional law, or whether such review should be distributed among the ordinary courts, with final review in a generalized court in the American style, on the theory that specialized judges will undervalue the legal dimensions of constitutional law.

The second and shorter part of comparative constitutional law articles tend to assert that theory and experience demonstrate the value of organizing systems of judicial review similar to that of the United States. I believe that rather little is gained in spending time considering these institutional details. First, the transition from a non-democratic to a democratic constitutional regime is likely to take a long time. What seems significant at an early point may fade from the scene, and early "successes" may look different as time passes. Second, although it is relatively easy to show that an independent judiciary is likely to serve constitutional democracy, details for such a system remain confused and complicated. Only some institutional arrangements made at the outset will have long-term effects, and we have almost no theoretical or empirical basis for choosing one over another institutional arrangement.

A. EARLY DEVELOPMENTS ARE AMBIGUOUS

Recent comments by Eric Stein and Herman Schwartz suggest why skepticism about early developments might be justified. Stein says in the course of discussing constitutional federalism in Czechoslovakia, "[h]appily, the Constitutional Court . . . has been in place since 1991, and its first case dealing with a jurisdictional conflict is a harbinger of

things to come."² Whether the Constitutional Court solved its problem "happily", it seems quite premature to pronounce on the Court's success especially in light of the dissolution of the Federal Republic.

Schwartz discusses a more interesting, and more ambiguous, development in Russia.³ Shortly after the coup attempt in August 1991, Russian President Boris Yeltsin began to dismantle the KGB, the state security agency. The authority left to the KGB differed little from that of the general police force, controlled by the Interior Ministry (MVD). Yeltsin, therefore, directed that the KGB be merged with the MVD, purporting to exercise his general executive authority. He then appointed Victor Barranikov, a close political ally, to head the merged agency. Fearing that KGB agents would actually control the new force, and thereby threaten individual rights and Russia's new democracy, fifty-one deputies challenged the merger in the Constitutional Court, arguing that the merger was beyond Yeltsin's power. The Constitutional Court agreed, and ordered the merger dissolved. According to Schwartz, Yeltsin had to be persuaded to comply, but eventually he did.⁴ In the end, however, he kept Barranikov as head of the old KGB and named Barranikov's deputy to head the MVD.

As Schwartz points out, the significance of the Constitutional Court's decision remains undetermined.⁵ Consider the analogy to *Marbury v. Madison*.⁶ United States constitutionalists marvel at John Marshall's cleverness, in establishing the power of judicial review and chastising President Thomas Jefferson, while leaving Jefferson's immediate political power unimpaired. The KGB-MVD merger may turn out to be Russia's

2. See Eric Stein, *Devolution or Deconstruction Czecho-Slovak Style*, 13 MICH. J. INT'L L. 786, 801 (1992) (discussing the Constitutional Court's review, upon the request of the Federal Ministry of Communications, of the interpretation of 1990 Czech and Slovak new allocation of powers law with reference to jurisdiction over the communications network).

3. See Herman Schwartz, *The New East European Constitutional Courts*, 13 MICH. J. INT'L L. 741 (1992) [hereinafter Schwartz] (cross-comparing characteristics of different courts in Russia, Hungary, Poland, Czechoslovakia, Bulgaria and Romania and noting comparisons with the United States).

4. See *id.* at 767 (discussing the Constitutional Court's finding that the KGB and MVD merger, as authorized by Russian President Boris Yeltsin, was unconstitutional).

5. See *id.* at 767-68 (stating that the Constitutional Court's utilization of judicial review to rebuke President Yeltsin's decree demonstrates the Court's dedication to the rule of law).

6. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (proposing the federal judicial power to review the acts of Congress and state governments).

Marbury. The Court exercised the power of judicial review, challenged President Yeltsin more directly than Marshall challenged Jefferson, and triumphed. Although Yeltsin apparently needed persuading, in the end he realized he could promote his immediate political goals without confronting the Constitutional Court, by putting two allies in charge of the de-merged agencies. The experience may turn out to validate judicial review if, some time in the future, courts tell the Russian president or legislature that they simply cannot do what they want to do.

However, the story may turn out differently. Perhaps the lesson will be, not that judicial review is valuable, but that it is pointless. After all, Russians a decade from now might conclude that Yeltsin ended up getting essentially what he wanted. Judicial review, they may think, put a facade of legality and constitutionalism on a purely political practice that continued unaffected by the Constitutional Court's decision. We simply do not know now which interpretation will turn out to be correct.

It seems worthwhile to propose an even broader skepticism, although I do not share it. Perhaps, even an independent judiciary may not be an important component of constitutional democracy. In the United States, the independent judiciary has been part of our constitutional democracy from the beginning. However, as Donald Horowitz has suggested, international experience shows that, at least in "severely divided societies," judicial review does not ensure constitutionalism.⁷ Horowitz noted that larger societal discord may affect judicial decisions, undermining the integrity of the judiciary.⁸ Likewise, self-interested politicians may achieve similar results by disobeying judicial decrees or limiting the courts jurisdictional authority.⁹ As the KGB-MVD example shows, similar results can be achieved by working around the constitutional strictures. Judicial review seems compatible both with constitutional democracy as well as non-democratic regimes, as long as such review is not a mere sham. When judicial review coexists with constitutional democracy, the reason may lie in the society's deeper commitment to a democratic culture rather than in the society's institutional arrangements.

As Horowitz suggests in his general thesis, however, choices made

7. See DONALD L. HOROWITZ, A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY 159 (1991) [hereinafter Horowitz] (citing the presence of external, extra-judicial pressures placed upon some divided nations' judiciaries and the influence these pressures may have on their decisions).

8. *Id.* at 159.

9. *Id.*

about judicial review early in the life of a constitutional democracy may set the society on particular paths.¹⁰ Small changes early on may have large effects later. Horowitz argues persuasively that choosing the correct electoral system at the outset substantially affects whether the constitutional regime will be able to stabilize itself for the long haul.¹¹ I am unable to come up with reasons to believe that the design details of judicial review will have such effects: whether judges serve for life terms or for fifteen years; or whether the constitutional court is specialized or generalist, do not appear to have predictable long-term consequences.

B. THE ARGUABLE IRRELEVANCE OF DESIGN DETAILS

We might choose among institutional designs on either the basis of a theory of judicial behavior, or on the basis of judicial experience. Unfortunately, I know of no decent theory of judicial behavior that sheds light on the design questions, and experience is so scant that it likewise provides no ground for choice.

Like all questions of institutional design, the ones in this area require answers that simultaneously provide actors—in this case the judges exercising the power of judicial review—with appropriate incentives, and embed appropriate expertise in the relevant institutions. Two premises underlie suggested answers to the basic design questions. First, some insulation from political influence is essential if constitutional review is to succeed. The insulation must be sufficient to immunize judges from political demands, from having incentives to cater to the desires of a powerful group (whether it be politicians holding power in other institutions, or other interest or ethnic groups who the judges might take as their constituencies). Second, constitutional review blends political and legal considerations. Interestingly, these two premises point in different directions. The requirement of insulation, or independence, could be satisfied if judges regarded themselves as purely legal specialists. While taking advantage of one expertise, in law, complete insulation from politics would deny the judges another expertise, in politics. That, in turn, would reduce the effectiveness of the blend of law and politics that is constitutional review.

As a result, theory says little about institutional design. Theoretical

10. *Id.* at 163.

11. *See id.* at 163 (suggesting that the electoral system is the most powerful tool in ethnically and racially divided countries to influence constitutional development).

frameworks rather strongly suggest that long terms should be preferred to short ones, because judges with short terms will have too many incentives to cater to prevailing political or interest group demands, so as to create opportunities for post-judging careers. However, no guide as to the length of these terms has been suggested.

The next consideration is the choice between a specialized and centralized constitutional court or a court where constitutional review is only part of the business. That choice cannot be divorced from the choice among selection methods, which depends on essentially empirical evaluations. Opinions will differ, and theory provides no guidance, about the right balance between law and politics in constitutional review. Those who prefer the balance to favor the political aspect, rather than the legal side, may prefer a centralized and specialized court. Those who prefer the balance to weigh more heavily on the legal side might accept such a court, but only if the selection methods would systematically favor legal technicians over politically-astute judges. In any event, much will turn on the traditions and training of the judges themselves. The United States system of constitutional review may have succeeded not because of any particular institutional design, but because lawyers and judges in the United States have always been sensitive to the political dimensions of legal decisions.

Theoretical considerations thus can be brought forward to support essentially any of the prominent models of institutional design. The choice cannot be substantially affected by examining what forms of constitutional review have worked, as the record is quite thin. Successes are few, and the courts that have succeeded appear to share no characteristics sufficient to suggest that institutional design matters. Failures, too, are few, largely because constitutional review is not a widely accepted practice. As is evident in the successful courts, the failures seem to come in all institutional varieties.

The example set by the United States is itself more ambiguous than has often been supposed. The successes of judicial review are concentrated in the recent past, from roughly 1940 to the present. Prior to this time, contemporaneous judgment argued that the case for judicial review was quite uncertain. Of course, no institutional arrangements have changed between the period of failure and that of success.

In the generation before the Civil War, the United States lurched from crisis to crisis. The judiciary, as independent then as it is now, never helped resolve these crises. Moreover, with its decision in *Dred Scott v.*

Sanford,¹² the judiciary actually exacerbated the climactic crisis. Even today, the independent judiciary may have contributed to the near paralysis of United States political institutions by magnifying the sense of alienation experienced by people who feel they lack control over their political order. By exercising the power of judicial review, the independent judiciary removes issues from the people's hands, and they come to think that political participation is not worth their time because important decisions will be resolved by judges and in a manner which they cannot control.

Lacking either theoretical or evidentiary grounds for insisting on a particular institutional arrangement, political decision-makers, constructing new constitutions for transition into constitutional democracies, will almost certainly respond to the politics of the moment in giving judicial review its particular form. Whatever form it eventually takes, no one is likely to know for a long time whether such a framework will succeed or fail.

This would be a matter of concern if the politically driven choice had definable long-term effects. That certainly seems true of other early design choices. Horowitz argues, for example, that South Africa would be ill-served by an early decision to adopt the Anglo-American "first-past-the-post" system for deciding who wins elections, and that some forms of proportional representation are more likely than others to promote long-term stability.¹³ He also notes, and is troubled by the fact that immediate political concerns, in the foreseeable South African context, point toward adopting a system that is less likely to promote stability. However, as I have indicated, the situation is different with respect to the institutions of constitutional review.

II. Methods of Reasoning and Judicial Review After the Transition

One might contrast an independent judiciary, not with telephone justice, but with a judiciary in a well-established, well-functioning democratic system. There, the case for a judiciary that is both independent, in a formal sense, and dependent, in the sense that judges do not have

12. See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (holding that descendants of the African race are not considered citizens within the meaning of the Constitution).

13. See HOROWITZ, *supra* note 8, at 163-67 (discussing the tendency of plurality electoral systems to underrepresent minorities and obtain legislative control by united pluralities).

values too substantially at variance from those prevalent in the representative branches, is rather strong. As a further practical matter, in such a system the democratic majority is unlikely to tolerate long any institution that remains substantially out of line with majority desires, meaning that the judiciary remains independent in the only way that matters.

In the situation we are addressing, whether and how to establish the institutions of an independent judiciary in the years immediately following the creation of a democratic system, the argument about judicial independence is more complicated. We should begin by sketching the point of having first a constitution and then establishing judicial review. Constitutions are often best understood as pre-commitments by people to refrain from self-interested actions. In effect, the constitution's framers are stating things they believe they and their successors might want to do, which would be detrimental if done. Therefore, they promise not to do them, and direct their successors not to do them either. Constitutions are designed, in this view, to promote overall social welfare by barring people from taking actions that, in the immediate circumstances, seem beneficial, but which, in the long run, actually will undermine social welfare. The constitution is, roughly speaking, a contract whose terms seem acceptable at the time. As time goes on, however, political circumstances may change; the deal struck earlier might seem less acceptable to politicians, who will adopt laws reflecting their immediate circumstances.

In the short run, those who make such commitments can be expected to honor most of them, because (in the short run) their immediate political concerns are unlikely to be inconsistent with the commitments they are willing to make at the time. Roughly speaking, one side is saying to the other not to fear actions taken by the party in power because the reasons for putting the new government in place take precedence over minor political conflict. As a sign of good faith, the party in power will support a constitutional provision barring them from taking the feared actions.

For the first few years after the constitution is adopted, political circumstances are likely to be reasonably stable; what made sense when the constitution was adopted is likely to continue to make sense. Ordinarily, even politicians act in good faith, and those who signed the initial deal will find persuasive the argument that they agreed to certain limitations. Even when the reason for inserting a constitutional limitation was that the interest in putting a new government in place overrode any desire to harm the political losers, a desire to ensure some degree of short-run stability may continue to constrain the new government.

In the long run, though, pre-commitments and political interests can be expected to diverge. Politicians will respond, credibly, that they never agreed to limit themselves in *this* particular way on *this* particular issue. Conversely, they may say that they no longer believe that acting in violation of the limitation would be as bad as their predecessors believed. Even farther down the line, they may assert that any deals struck by a prior generation of politicians have no binding force on a new generation.

There is a second difficulty: sometimes, drafters of a constitution consciously defer, or blur over, controversial decisions on which they cannot come to a solution acceptable to all parties.¹⁴ Ordinarily, the very politicians who found it important to defer controversy at the constitution-writing stage will find it equally important to continue to defer controversy at later stages. However, sometimes political factors will lead politicians to inject one of these controversial, deferred issues into ordinary politics immediately after the constitution is adopted. Again, the experience in the Czech and Slovak Federated Republic is instructive. The immediate post-transition constitution deferred resolution of fundamental questions of federalism, and politicians in Slovakia never suspended their efforts to re-structure the new regime's federal system, to the point where the federation dissolved.¹⁵

When controversial, deferred issues are again injected into ordinary politics, or when political interests and acknowledged pre-commitments diverge substantially, some mechanism to enforce the pre-commitments embodied in the constitution is necessary. Structural arrangements like federalism and separation of powers can sometimes be enough to ensure that pre-commitments will be honored, particularly where those pre-commitments ought to lead the government to refrain from acting.¹⁶

14. For example, the framers of the United States Constitution did not definitively resolve how governmental power would in the long run be allocated between the states and the nation. Nearly all of the framers would likely have thought it improper for the national government to exercise power in the field of education. Yet, they gave the national government power to act in the national defense, and by the 1950s the link between education and national defense became almost indisputable. Because the Constitution's allocation of power does not preclude the exercise of power over education in the name of national defense, politicians were able to say, credibly, that Congress ought to exercise such power.

15. Stein, *supra* note 3 and accompanying text.

16. Further, because these structures operate most effectively to keep the government from acting, they leave the array of non-public power in place. Domestic corporations, multinational corporations, and international institutions like the International Monetary Fund therefore have greater effective power in the society than they would

The enforcement mechanism is political bargaining. Interestingly, constitutional experience in the United States and elsewhere strongly suggests that structural arrangements must be supplemented by some other enforcement method.

For United States constitutionalists, enforcement by means of an independent judiciary exercising the power of judicial review is the primary additional method of enforcement.¹⁷ This means, though, that judges are in a position to obstruct what political majorities want. When the institutions of democracy have only recently been established, demonstrating to the citizenry that their participation in politics makes a difference seems particularly important. Judicial review ought therefore to be quite unusual, and the pre-commitments the courts enforce ought to be quite important.

The details of judicial organization, while interesting and significant on the margins, are less important than more fundamental issues going to the "legal-constitutional culture." The reason for this secondary importance arises from the task given to judges. Judges are to enforce the pre-commitments contained in the constitution. But, discerning exactly what those commitments are, by interpreting the constitution, is not a simple technical exercise. Constitutional interpretation will be affected by the judges' legal-constitutional culture. If the judges enforcing the constitution have an appropriate set of cultural values, any organization of judicial review will work well enough, and if the judges lack those values, no organization will work.

Cultural values can be divided into two groups: those of the legal culture itself, that is, how judges and lawyers approach questions of constitutional law, and those of the general public. With respect to the lawyers' culture, there are again two approaches which affect how the judges go about identifying the constitutional pre-commitments they are to enforce. The first approach, termed the formalist approach for purposes of this article, argues that judges can and should treat the constitution as ordinary, although supreme, law. In dealing with constitutional issues, formalists will confine their attention to aspects of the law such as the language they are asked to interpret and its legal background—how similar words have been interpreted in other contexts. They give relatively little weight to the purposes that the constitutional provision at issue was designed to serve. Formalists see the constitution as a techni-

if the government were completely unconstrained by pre-commitments.

17. See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing the tenure of judges based upon good behavior to safeguard independence).

cal legal document and they will bring a technician's cast of mind to its interpretation.

The justification for formalism is that judges who pay attention to purposes may be overly influenced by the same immediate short-term pressures that gave rise to the constitutional dispute, and thereby may fail to enforce the pre-commitments within the constitution. This is particularly true if the composition of the judiciary mirrors (in political terms) the composition of the political branches. Then, judges who examine constitutional purposes will too often conclude that their counterparts in politics were merely trying to pursue the constitution's purposes, and that the constitutional pre-commitments were therefore not breached.

The second approach is instrumentalist. In this approach, purposes play a large role, although not the only one. Finding the traditional sources of legal interpretation inadequate, either with respect to the law as a whole, or with respect to the constitution understood as a special kind of law, instrumentalists ask how particular controversies could be resolved so as to promote the purposes for which the constitution was adopted. This examination of purposes includes whether the enforcement of pre-commitments under the circumstances following the adoption of the constitution would entail immediate losses in social welfare.

Consider, for example, the question of whether the United States government can aid selected aspects of elementary and secondary education. Congress may attempt to direct local education investment into science and technical education because it believes that doing so will promote the nation's defense. If that effort is challenged as exceeding Congress's authority, an instrumentalist judge will ask whether this program actually assists in promoting national defense. The answer to that question will take almost exactly the same form as the debates in Congress. The formalist judge, on the other hand, will ask whether the proposed program truly falls within the constitutional provisions giving Congress power to promote the national defense. The answer will take the form of recognizing Congress' good faith, or treating the invocation of the national defense power as a pretext for claiming power that Congress does not have.¹⁸

18. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by United States v. Darby*, 312 U.S. 100 (1941) (limiting congressional authority to regulate interstate commerce produced by child laborers); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (invalidating Congress' Child Labor Tax Law which required employers to pay taxes for child laborers).

The other aspect of the legal-constitutional culture is the culture of legalism in the general public. In this aspect, the question is whether the public will see judicial interpretations of the constitution as entitled to respect because the judges are specialists in interpreting the law (and because the constitution is law), or whether the people will regard judicial review as simply another stage in on-going political controversies.

With these distinctions in hand, I suggest that creating a constitutional culture in the modern world may be quite difficult, although not impossible. On the one hand, it seems essential that in the early years of a constitutional regime, judges should be formalists. If controversial deferred issues are placed on the political agenda soon after the constitution's adoption, judges will be asked to resolve important constitutional controversies, and the contending parties will each argue that the constitution's purposes will best be served by following their particular path. If the judges pay too much attention to purposes, the public is likely to see them as taking partisan sides, and the constitution's effectiveness as a pre-commitment will be reduced. Ethan Klingsberg, discussing Hungary, suggests that legal realism will quickly appear because the political branches are more likely to engage in criticism of the constitutional court's work. Such critiques will surely lead to legal realist allegations that ulterior motives influence decisions.¹⁹

The United States experience is suggestive. John Marshall's Supreme Court first exercised the power of judicial review in a case that combined a fundamental issue of constitutional power—the extent to which the first substantial shift in political power would be honored—with an extremely technical issue regarding judicial organization.²⁰ In *Marbury v. Madison*, Marshall used a highly formalist approach to the second issue, thereby establishing the Court's power of judicial review.²¹ Marshall and his colleagues actually took a formalist approach to the first issue as well. The answers Marshall gave, in dictum, enraged his political opponents. Had he asked the instrumentalist question of why the Constitution gives Congress the power to create lower federal courts, the partisan nature of his answer would have been even more apparent.

Yet, in the modern world, and in circumstances of high political

19. Ethan Klingsberg, *Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights*, 1992 B.Y.U. L. REV. 41, 125 (discussing Hungary's transition from a "command-obedience" judicial system to one of consent).

20. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

21. *Id.*

concern, it may be difficult for judges to adhere to the formalist approach. Sophisticated judges will know that formalism is not highly regarded among elite legal thinkers, and to the extent that they take such thinkers as one of their audiences they may be disinclined to adopt formalist approaches.²²

Although one might take this as an argument for selecting relatively unsophisticated constitutional judges, another concern intervenes. If constitutional controversies arise that go to the foundations of the constitutional order, judges—especially relatively unsophisticated judges—are likely to have strong views about how those controversies should be resolved, that are independent of their detached reflection on the formal meaning of the constitution's provisions. After all, they inevitably have backgrounds that influence their thinking about the world as a whole, as well as the meaning of their constitution. The more unsophisticated judges are, the less likely they are to control their political inclinations. The most formalist unsophisticated judge is likely to believe that the only sensible reading of the plain language of the constitution supports his or her own political inclinations. Moreover, no matter how formalist a judge is, his or her actions are likely to be received by the public (in the early years of a constitutional regime) as reflections of the judge's substantive views.

This latter problem is likely to be exacerbated by the fact that the country is in a transition from one regime to another. If the judges are people clearly linked to the predecessor regime, which the new constitution repudiates, it seems likely that it will be quite difficult to establish distance in the public culture of legality between their substantive views, which are connected in the eye of the public to their positions in the predecessor regime, and the constitution itself as properly understood.

Taking the preceding points under consideration, the most optimistic scenario for the successful establishment of an independent judiciary as a means of enforcing constitutional commitments would have the following elements: (1) All, or a substantial number of the judges, should *not* have held legal or political positions in the repudiated predecessor regime. If, however, supporters of the predecessor regime still have significant political power, some or a substantial number of the judges *must* have held such positions in that regime; (2) For a period of time (requiring a decade or more if based on reflection on the United States

22. For example, the foreign judges who are most admired in the United States by legal academics are instrumentalists, not formalists.

experience), the judges interpreting the constitution must adhere to a relatively formalist approach to interpretation, thereby entrenching the view that the constitution is law and not politics; (3) For an additional decade or so, fundamental issues going to the core of the constitutional order must not come before the courts. Otherwise, the sense that the constitution is law rather than politics is unlikely to become entrenched no matter how formalist the judges are.

Satisfying the first two conditions is likely to be extremely difficult. Both "new" judges and supporters of the predecessor regime will be suspicious of the courts, as will many "old" judges and supporters of the successor regime. Furthermore, satisfying the third condition depends on the accidents determining which constitutional issues come to the courts early: are they primarily technical, or are they fundamental? Yet, to call these "accidents" may be too generous. The issues that come to the courts do so because politicians have adopted laws that raise constitutional issues. Satisfying the third condition, then, actually depends on the constitutional astuteness of politicians: can they understand the importance of continuing to defer controversial issues until the constitutional order is fully entrenched?

III. Special Dimensions of the United States Experience

United States constitutionalists, relying primarily on the experience of recent decades, typically overlook the ways in which the transition to judicial review in the United States was different from contemporary problems. To begin, judicial review was not fully established when the new government came into being. First, the new government created in 1789 rested on two decades of experience. From the mid-1760s through the war for independence, the revolutionaries had established governments parallel to the official government. The Committees of Correspondence, state governments, and coordinated military actions during the war for independence, were all transitional governments. The revolutionaries, in short, had been governing for a long time before the Constitution was adopted. Although they certainly expected the courts to enforce the 1789 Constitution's limits, they basically added judicial review on to a system of a reasonably well-functioning government.

Second, the transition occurred over an extremely extended period. The "starting point" for the transition can reasonably be set at sometime in the 1760s, after the shock of the French and Indian Wars. Even if the starting point is determined to be later—in 1776, with the Declaration of Independence, or 1783, with the creation of the Confederation, or even 1789, with the adoption of the Constitution—the transition's

“ending point” should be set in 1800, when the first regime-shift occurred. Only in 1800 were those who took power immediately after the Revolution displaced by another group of revolutionaries whom they deeply believed to be fundamentally misguided. When the Federalists relinquished power peacefully, this transfer of power signified that the new government was stabilized. Further, not until 1803 did the Supreme Court exercise the power of judicial review.²³ During this extended transition period, constitutional issues going to fundamental matters did not come before the Supreme Court.

A third consideration is that the transition from the pre- to the post-revolutionary regime was, with respect to the relevant issues here, quite sharp. Relatively few supporters of the predecessor regime remained in the country, and essentially all the judges who took over had been central actors in the revolutionary transformation. The new government had relatively little need to accommodate the interests of supporters of its predecessor, except in the sense that the repudiation of state debts owed to Loyalists constituted a continuing irritant in relations with Great Britain. Another favorable factor was that John Marshall and his colleagues succeeded in transplanting the formalist legal culture pervasive in non-constitutional law to the constitutional domain.²⁴

Finally, relying too heavily on the United States experience risks raising the difficulty that confronts all comparative exercises. People in different systems use the same word to refer to institutions that fit into their systems in quite different ways. For example, the word “federalism” means one thing in United States constitutional discussions and quite another in South African ones. In the present context, it may be misleading to refer to “judges” and “courts” in the United States and South Africa as if they were the same institutions. Without careful attention to such matters as how judges are trained and chosen for the bench, or what are the legal culture’s values, United States constitutionalists, understandably fond of their own system, may issue misleading prescriptions for South Africa.

I am not confident that any of the world’s current and impending successor regimes will be so fortunate in having as favorable a conflu-

23. See *Marbury v. Madison*, 5 U.S. (1 Cranch) at 137 (declaring the power of the Supreme Court to determine the constitutionality of acts of Congress).

24. See GEORGE L. HASKINS & HERBERT A. JOHNSON, 2 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES—FOUNDATIONS OF POWER*, JOHN MARSHALL 1801-15 (1981) (describing how Marshall and his colleagues established the authority of the Supreme Court despite earlier obscurity and the possibility of dissolution).

ence of factors as the United States enjoyed. In particular, the possibility of creating or sustaining a formalist approach to issues of high political moment seems quite small. Perhaps, however, the conditions for the successful establishment of a constitutional regime are not as stringent as suggested.

IV. Conclusion

Most discussions of judicial review in new constitutional regimes assume that judicial review must be in place from the outset. An alternative model, however, is suggested by the Canadian framework. After experience with a constitution specifying fundamental rights but lacking judicial review, Canada adopted a Charter with judicially enforceable rights. Perhaps it is best to begin with a constitution that is understood to be hortatory. The constitutional exhortations themselves may restrain politicians from blatantly violating their terms, without barring majorities from adopting policies that can reasonably be defended as consistent with the constitution. Then, as experience accumulates, the exhortations can be transformed into enforceable rights. The vision would be of a constitution that becomes entrenched, rather than of one that is entrenched from the start. After all, constitutional entrenchment is, as the foregoing discussion of the legal and constitutional culture suggests, always a process, and it may be best to acknowledge that from the outset.