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New Thinking about National High Courts

Miguel Schor

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Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale U. Press 2009). Pp. 238. $49.50.

David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton U. Press 2010). Pp. 432. $80.00.

INTRODUCTION

There is a considerable and growing literature on the worldwide growth in judicial power written primarily from a political-science perspective.[1] The central issues have been, (1) why has judicial review spread around the globe, and (2) what are the consequences for democracy? Regarding the first issue, the prevailing view among political scientists is that the establishment of judicial review in new democracies facilitates the trust needed among elites for democracy to work.[2] The emphasis on the role of elites ignores, however, the role ordinary citizens play in the emergence of courts as powerful political actors.[3] Judicial review has become linked to the enforcement of individual rights,[4] which suggests that the demand for rights by citizens is an important factor in the emergence of constitutional courts as powerful political actors.[5] It is a mistake to ignore the role of societal actors as the emergence of new institutions is driven by both demand and supply-side factors.[6] With respect to the second issue, scholars are deeply divided over the implications that the growth in judicial power has for democratic governance.[7] Judicial optimists draw their lessons largely from new democracies to argue that a collective decision to constitutionalize rights symbolizes a sharp break from

* Professor of Law, Suffolk University Law School; Visiting Professor and Director of the Constitutional Law Center, Drake University School of Law, 2010-2011 academic year.

1. For a critical review of the literature, see Miguel Schor, *Mapping Comparative Judicial Review*, 7 Wash. U. Global Stud. L. Rev. 257 (2008). Social scientists were among the first scholars to write about the spread of judicial review. For a key early work, see *The Global Expansion of Judicial Power* (C. Neal Tate & Torbjörn Vallinder eds., N.Y.U. Press 1995).

2. The seminal work is Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge U. Press 2003).

3. Schor, *supra* n. 1, at 267-270.

4. Donald L. Horowitz, *Constitutional Courts: A Primer for Decision Makers*, 17 J. Democracy 125 (No. 3, 2006).

5. Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia*, 16 Ind. J. Global Leg. Stud. 173, 183-194 (2009). For a seminal work on the role that interest groups play in empowering courts, see Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (U. Chi. Press 1998).

6. Schor, *supra* n. 1, at 267-270.

7. *Id.* at 270-275.

the past and facilitates the emergence of the citizen mores needed for democracy to endure.[8] Judicial pessimists, on the other hand, tend to draw their lessons from older, well-established democracies to argue that the expansion of judicial power frustrates democratic outcomes and debilitates the mores needed for democracy to work.[9] The pessimists have obviously lost the empirical battle as the spread of judicial review continues unabated but they raise serious questions regarding the role of national high courts[10] in a democracy.

Two recent books - one by a law professor, the other by a political scientist - break new ground on the work of national high courts and do so by relying on an internalist rather than an externalist or social-science perspective. Víctor Ferreres Comella, a law professor at Pompeu Fabra University, argues in *Constitutional Courts and Democratic Values*[11] that specialized constitutional courts are better able to effectuate political morality than is the U.S. Supreme Court. David Robertson, a political scientist at Oxford University, argues in *The Judge as Political Theorist*[12] that national high courts play an important role in spreading the values of a constitution throughout society. This essay reviews these books and assesses their contribution to the burgeoning scholarship on comparative judicial review.

VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE

The normative puzzle Professor Víctor Ferreres explores begins with the emergence of judicial review and robust bills of rights in Europe after the Second World War. The post-war era witnessed the emergence of constitutional courts as powerful political actors.[13] The question is, why should Europe opt to entrust judicial review to specialized constitutional courts? The centralized model of judicial review, after all, departs radically from the American decentralized model of judicial review. The conventional explanation for this divergence is historical. One of the key principles of the French Revolution, which was subsequently embedded in civil codes that influenced legal thinking throughout continental Europe, is that courts were precluded from exercising judicial review by the principle of separation of powers.[14] Ferreres concludes

8. *See* Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (U. Chi. Press 2000); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev. 771 (1997); Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice,"* 35 Cath. U. L. Rev. 1 (1985).

9. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard U. Press 2004); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton U. Press 1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346 (2006).

10. This review essay uses the term "national high courts" to refer to all courts that have the power of constitutional judicial review. The term "constitutional court" will be used to refer to centralized systems of judicial review; the term "supreme court" will be used to refer to decentralized systems of judicial review. For a discussion of the different institutional mechanisms used to effectuate judicial review, see Miguel Schor, *Judicial Review and American Constitutional Exceptionalism*, 46 Osgoode Hall L.J. 535 (2008).

11. Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale U. Press 2009) [hereinafter Ferreres].

12. David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton U. Press 2010).

13. Ferreres, *supra* n. 11, at 30-31.

14. *Id.* at 10-19. The European understanding of separation of powers is, of course, very different from the

that historical and political explanations fail to adequately explain and justify the role of constitutional courts. Ferreres emphasizes the role courts play in modern European democracies construing bills of rights to argue that "constitutional courts are better equipped than ordinary courts to treat the constitution as a special kind of law, one that is deeply connected to abstract principles of political morality."[15]

The key move in Ferreres's argument is the distinction he draws between constitutional and ordinary courts. Constitutional courts are a better forum of principle than are ordinary courts for two reasons. First, constitutional courts typically have a diverse membership that facilitates a different discourse than does a court comprised solely of legal specialists.[16] Lawyers, professors, politicians, and high public officials are all frequently appointed to constitutional courts. Politicians play an important role because they can remind their fellow judges that the constitution must be "reinterpreted in light of new circumstances."[17] The diversity of membership means that constitutional courts are less likely to employ a "'legalistic'" discourse and more likely to grapple directly with the "abstract principles of political morality" embedded in bills of rights.[18] Constitutional courts, for example, readily concede that rights may be restricted by government and openly engage, therefore, in balancing.[19] Constitutional courts are also more likely to "resort to unwritten principles."[20] In short, constitutional courts "do not shy away from the more abstract principles of political morality that are included in the bill of rights."[21]

Second, the institutional separation that constitutional courts enjoy from ordinary courts plays a role in generating public deliberation over rights.[22] Constitutional courts have a monopoly on constitutional judicial review. Qualified political minorities may bring a claim directly before a constitutional court without there being a concrete case or controversy.[23] These two features "help enhance the public visibility of constitutional courts, as well as their impact on political debates."[24] Enabling the political community to initiate claims sends a signal to the public that important issues are at stake and reasonable disagreement exists over these issues. The possibility of bringing an immediate claim also facilitates the discussion of constitutional issues in parliament since the majority knows that the legislation will face a constitutional test.[25] Abstract review may also enable the constitutional court to better deal with the issues by

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American understanding, which arguably requires, rather than precludes, courts from exercising judicial review. *See* John Henry Merryman, *The French Deviation*, 44 Am. J. Comp. L. 109 (1996).

15. Ferreres, *supra* n. 11, at xv.

16. *Id.* at 39-48.

17. *Id.* at 42.

18. *Id.* at 46.

19. *Id.* at 46-47.

20. Ferreres, *supra* n. 11, at 48.

21. *Id.* at 46.

22. *Id.* at 55-66.

23. *Id.* at 5-9, 55-69. In addition to constitutional challenges, constitutional issues may be referred by an ordinary court to the constitutional court via a procedure known as a constitutional question. *Id.* at 5-9. Some European polities also allow an ordinary citizen to allege that her rights have been violated via a constitutional complaint. Ferreres, *supra* n. 11, at 5-9.

24. *Id.* at 55.

25. *Id.* at 62-63.

distancing them "from specific and fragmentary stories when they have to determine the constitutionality of legislation."[26]

Ferreres's defense of constitutional courts critiques two key assumptions of American constitutional thought. The first is that the Constitution is a species of law. The foundation for judicial review in the United States was first articulated in *Marbury v. Madison*[27] and rests on an analogy between the Constitution and statutes. Chief Justice John Marshall reasoned that it is the business of courts to interpret all laws, including the Constitution.[28] The Supreme Court "cannot easily abandon a legalistic approach to constitutional issues"[29] because the "legitimacy of judicial review appears to be linked to the assumption that the U.S. Constitution is part of the law that judges are experts at interpreting and enforcing in concrete disputes."[30] Consequently the charge that the Court is being "activist" or not acting as a court of law is one that carries political weight in the United States. Interpretive theories such as originalism, which have not proven attractive in Europe, are attractive to American judges since they appear to preserve the analogy between the Constitution and statutes. The U.S. Supreme Court, moreover, is likely to focus on technical legal arguments at the expense of the moral issues to preserve the appearance that it is acting as a court of law.

The second and related critique is the author's claim that constitutional courts should embrace activism.[31] Constitutional courts are specialized courts that were created to undo authoritarian legacies by effectuating constitutions that are a "symbolic expression of a deep collective commitment in favor of rights."[32] The objection that overly powerful courts undermine democracy is met by examining the linkages between political actors and courts. Legislatures can respond to constitutional decisions either by amending the constitution or by enacting statutes that conflict with judicial doctrine to generate a "second round of debate."[33] In addition, the ideological distance between the elected branches and constitutional courts is likely to be smaller than, for example, can occur in the United States because of different appointment mechanisms. Justices on constitutional courts are typically appointed for a fixed term by super-majority provisions.[34] Forcing competing factions to negotiate by means of a super-majority appointment provision and lowering the stakes of each appointment by limiting the term of office help ameliorate the political conflict that judicial review engenders.[35]

Ferreres's argument that judicial activism is not a normative problem for constitutional courts, however, is underdeveloped. One definition of judicial activism is that judges should not impose their value preferences on democracy. Given that

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26. *Id.* at 69.
27. *Marbury v. Madison*, 5 U.S. 137 (1803).
28. *Id.* at 177-178.
29. Ferreres, *supra* n. 11, at 52.
30. *Id.* at 53.
31. *Id.* at 71-85.
32. *Id.* at 78. There is empirical evidence that constitutional courts tend to be more "activist" than nonspecialized national high courts. *See* Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* 224-228 (Yale U. Press 1999).
33. Ferreres, *supra* n. 11, at 96.
34. *Id.* at 98-100.
35. *See* Schor, *supra* n. 10.

constitutional courts openly debate the moral issues raised in constitutional disputes, it would appear that activism might be an issue for constitutional courts as well. It would have been helpful for the author to have discussed some of the leading cases and the political conflicts they engendered to substantiate his point that activism is simply not an issue in European democracies. The failure to discuss constitutional cases is problematic given that the thesis of *Constitutional Courts and Democratic Values* is that constitutional courts forthrightly discuss issues of political morality.

DAVID ROBERTSON, THE JUDGE AS POLITICAL THEORIST: CONTEMPORARY CONSTITUTIONAL REVIEW

David Robertson's *The Judge as Political Theorist* examines in detail the case law produced by national high courts around the world and takes, therefore, a very different approach than does *Constitutional Courts and Democratic Values*. Robertson's theoretical concerns are driven by his empirical approach. *The Judge as Political Theorist* analyzes the output of national high courts to "understand the core nature of the business of doing judicial review" and "how such activity fits into modern liberal democracy."[36] The argument is that the job of national high courts is to spread the values of a constitution throughout society: "[C]onstitutional judges often come near to being applied political theorists, carrying out a quite new type of political function."[37] In fulfilling this mandate, judges create and rely on a body of judicial material, "part of what the French Conseil constitutionnel calls the *bloc de constitutionnalité*."[38] In short, the right way to understand what it is that national high courts do is to examine and take seriously the common law of the constitution.

The Judge as Political Theorist is built around five case studies: Germany, Eastern Europe, France, Canada, and South Africa. These cases were chosen because they represent examples of where judicial review was added to "societies that have undergone major change"[39] and consequently the "constitution emerges as a symbolic marker of a great transition in the political life of a nation."[40] Constitutional transitions are important because they invite courts to take on new tasks.[41] Robertson critiques the political-science paradigm that focuses on why courts emerge as political actors and largely ignores what they actually do.[42] The author utilizes an internalist perspective that takes judges and judicial arguments seriously. Ideology matters, but it is an ideology formed in the crucible of legal training.[43] Judges are tasked with the job of turning constitutions into action. Constitutions are not a cohesive political program but "bullet points" and

36. Robertson, *supra* n. 12, at x.

37. *Id.* at 1.

38. *Id.* at 5.

39. *Id.* at 6.

40. *Id.* at 7 (emphasis omitted) (quoting Ackerman, *supra* n. 8, at 778).

41. Robertson, *supra* n. 12, at 6-7. Scholars have largely ignored how courts are transformed when they begin to exercise judicial review. *But see* Schor, *supra* n. 5, at 192 ("When courts assume the job of judicial review in a new democracy, they may become institutions whose members believe they have an important role to play in keeping the democratic enterprise afloat.").

42. *Id.* at 13-19.

43. For a decisive and seminal monograph on this point, see E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Pantheon Bks. 1975).

"judges are required to weave the bullet points into a coherent and cohesive ideology for their contemporary world."[44]

The case studies offer a rich description of the job of national high courts and nicely illustrate the themes of the book. The first and most important case study is Germany. The German Basic Law declares the rupture with the totalitarian past in its first article that provides that human dignity shall remain inviolate.[45] The German Basic Law was a "deliberate moral act on the part of the German people."[46] The extent of this rupture with this past is illustrated by the Federal Constitutional Court's seminal decision in *Lüth*.[47] The issue was whether the Basic Law had horizontal effects. The Federal Constitutional Court reasoned that rights had two aspects, one subjective, the other objective. The subjective side was that rights existed to protect individuals. The objective side was that they represented values that the society was committed to effectuating.[48] The Federal Constitutional Court imposed on itself a "duty to ensure that the objective values of the constitution 'radiate' throughout . . . society"[49] and that rights, therefore, had "horizontal" effects that reached the actions of private individuals.

France is a critical case because the French Constitutional Council was designed to be an umpire in separation of power disputes between the president and Parliament.[50] The 1958 Constitution lacks a bill of rights, but its preamble states that the French people are committed to the "Rights of Man" declared in 1789 and the Preamble of the 1946 Constitution.[51] The French Constitutional Council, therefore, lacked the power to make major legal statements by construing a bill of rights. The seminal case that transformed the role of the Council is the 1971 *Associations Law* decision.[52] The French Constitutional Council relied on the *bloc de constitutionnalité*, the "bits and pieces of doctrine and sources that make up the Conseil's constitutional review armoury,"[53] to implicate rights that could be used to invalidate legislation. The case is often called France's *Marbury* as it transformed the French Constitutional Council from the watchdog of the boundary between Parliament and the president into a font of constitutional values.

Canada adopted a bill of rights known as the Charter of Rights and Freedoms in

44. Robertson, *supra* n. 12, at 32.

45. Grundgesetz für die Bundesrepublik Deutschland [GG] (Constitution) art. 1(1) (Ger.)

46. Robertson, *supra* n. 12, at 53.

47. 7 BVerfGE 198 (1958) (available at http://www.utexas.edu/law/academics/centers/transnational/-work_new/german/case.php?id=1369). *Lüth* is a seminal case in the development of global constitutionalism. *See* Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* 196-197 (Princeton U. Press 2007); Jacco Bomhoff, *Lüth's 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing*, 9 German L.J. 121 (2008).

48. 7 BVerfGE 198 (1958) (available at http://www.utexas.edu/law/academics/centers/transnational/-work_new/german/case.php?id=1369).

49. Robertson, *supra* n. 12, at 52. The U.S. Supreme Court has largely rejected the idea that the actions of private actors must comply with the Constitution under what is known as the state-action doctrine. *Civil Rights Cases*, 109 U.S. 3 (1883). For a comparative study of the state action doctrine, see Tushnet, *supra* n. 47, at 162-225.

50. John Bell, *French Constitutional Law* 14-54 (Oxford U. Press 1992).

51. La Constitution du 4 Octobre 1958 preamble (Fr.). *See also* Robertson, *supra* n. 12, at 146.

52. No. 71-41 DC, 16 July 1971.

53. Robertson, *supra* n. 12, at 149.

1982.[54] The Charter, like the German Basic Law, marks a sharp break from the past, albeit one adopted in less dramatic circumstances. Prior to the adoption of the Charter in 1982, the principle of judicial deference to Parliament was strongly entrenched. As a consequence, "[t]he Supreme Court was from the beginning intensely conscious of the need to carve out a new and much more active role, and correspondingly aware how vital its first few decisions would be."[55] One of the key early cases is *R. v Oakes*.[56] The Canadian Charter of Rights and Freedoms begins with a general limitations clause in section one that forthrightly states that rights are not absolute but "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[57] *Oakes* gave a definitive interpretation of section one. The case is highly influential because balancing tests lie at the heart of what modern national high courts do[58] and have generated, therefore, a large and important comparative constitutional law literature.[59]

In the last chapter, the author restates and defends his premise that "constitutional review is like writing political theory."[60] National high courts have become a fourth branch of government that articulates values: "Judges engaged in constitutional review act like political theorists, developing and explicating the value choices made, sometimes unconsciously, when the relevant constituent body set up the constitution."[61] Robertson observes that modern bills of rights differ from the U.S. Bill of Rights, which is the "grandfather constitution whose politics have so influenced all our thinking."[62] Modern constitutions empower judges to develop values for an evolving society as "most modern constitutions make no pretence that their bill of rights sections contain absolutes."[63] The notion that constitutions have a purpose and that the job of constitutional judges is to develop the values contained therein entails a rejection of originalism.[64]

CONCLUSIONS

The two books reviewed use different approaches to comparatively examine national high courts. *Constitutional Courts and Democratic Values* is a work in

54. Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (3d ed., U. Toronto Press 2004).

55. Robertson, *supra* n. 12, at 193.

56. *R. v Oakes*, [1986] 1 S.C.R. 103. *See also* Robertson, *supra* n. 12, at 200 (noting that *Oakes* is "probably the most important single case in the history of the Charter.").

57. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* (U.K.), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

58. Robertson, *supra* n. 12, at 281-346.

59. Two recent, important articles are Stephen Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 Mich. L. Rev. 391 (2008), and David S. Law, *Generic Constitutional Law*, 89 Minn. L. Rev. 652 (2005). An empirical analysis of why balancing tests emerged around the world in the twentieth century can be found in Schor, *supra* n. 5, at 189-191.

60. Robertson, *supra* n. 12, at 347.

61. *Id.* at 348.

62. *Id.* at 356.

63. *Id.* Comparatively speaking, the U.S. Supreme Court is unusual in its rejection of values and its concomitant emphasis on originalism. *See* Miguel Schor, *The Strange Cases of* Marbury *and* Lochner *in the Constitutional Imagination*, 87 Tex. L. Rev. 1463, 1486-1494 (2009).

64. *See generally* Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *The Migration of Constitutional Ideas* 84 (Sujit Choudhry ed., Cambridge U. Press 2006).

normative theory that posits that centralized systems of judicial review do a better job of effectuating constitutions than do decentralized systems. It is the most important piece of scholarship in English on constitutional courts. The author displays a fine knowledge of European constitutional courts as well as American constitutional theory. *The Judge as a Political Theorist*, on the other hand, is deeply empirical. It posits that, if we wish to understand what national high courts do, we need to examine the constitutional common law they create. *The Judge as Political Theorist* is a rare and important work because of its single-minded focus on the "common law" of the constitution.[65]

Both books should be of interest to political scientists, law professors, and comparative constitutionalists. The two studies forthrightly question the dominant political-science paradigm that assumes that the *raison d'être* for constitutional courts is to enforce separation of powers. They both look to bills of rights rather than separation of powers in seeking to understand the business of national high courts.[66] Legal scholars will find the rejection of originalism by courts abroad of interest. Quite simply, any argument that originalism flows solely from the nature of a written constitution is empirically infirm. Constitutions, after all, are as much political programs pointing to the future as they are limits to power. The wealth of detail found in both books will be of interest to comparative constitutionalists who will find the two studies fecund sources of new thinking about national high courts.

65. Comparative constitutional law casebooks for obvious reasons take seriously the output of national high courts. *See e.g.* Norman Dorsen, Michel Rosenfeld, András Sajó & Susanne Baer, *Comparative Constitutionalism: Cases and Materials* (Thomson-West 2003); Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* 1-140 (2d ed., Found. Press 2006). Comparative constitutional scholarship, on the other hand, has largely eschewed the hard work of analyzing the dizzying output of national high courts around the world to focus on big questions such as the spread of judicial review and its the implications for democracy as well as whether constitutional systems are diverging or converging. *See* Schor, *supra* n. 1.

66. Ferreres, *supra* n. 11, at 10-19; Robertson, *supra* n. 12, at 1.