Judicial Review in New Democracies

Constitutional Courts in Asian Cases

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Introduction

The Decline and Fall of Parliamentary Sovereignty

THE DECLINE OF PARLIAMENTARY SOVEREIGNTY

The idea of the sovereignty of Parliament was long seen as the core of democratic practice. The superior position of the popularly elected legislature and its corollary of majority rule have been central principles for democratic revolutionaries since the notion was appended to the unwritten English constitution.[1] At that time, the threat to liberty was monarchical power, and the subjugation of monarchical power to popular control was the primary goal. The resulting doctrine was that Parliament had "the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."[2]

In the continental tradition, the intellectual underpinning of parliamentary sovereignty was provided by the Rousseauian concept of the general will. The people were supreme, and their general will as expressed through their republican representatives could not be challenged. This theory, combined with the regressive position of the judicial *parlements* in the French Revolution, led to a long tradition of distrust of judges in

[1] The original focus in England during the Glorious Revolution was on control of the crown rather than the rule of the people per se, because the democratic franchise was quite restricted. Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999). Rakove distinguishes the supremacy of Parliament from the idea that representative bodies were primarily designed to be law-making bodies. Jack Rakove, "The Origins of Judicial Review: A Plea for New Contexts, 49 *Stan. L. Rev.* 1031, 1052 (1997).

[2] Albert V. Dicey, *The Law of the Constitution* 3–4 (8th ed., 1915).

France.[3] The *government du juges* replaced the crown as the primary threat to popular will in French political thought.[4]

It was natural that the early proponents of democracy supported parliamentary sovereignty. They saw threats to liberty from the traditional sources: the *ancien régime*, the monarchy, and the church. Once these formidable obstacles to popular power had been overcome, theorists could hardly justify limitations on the people's will, the sole legitimate source of power. As democratic practice spread, however, new threats emerged. In particular, Europe's experience under democratically elected fascist regimes in World War II led many new democracies to recognize a new, internal threat to the *demos*. No political institution, even a democratically legitimate one, ought to be able to suppress basic liberties. Postwar constitutional drafting efforts focused on two concerns: first, the enunciation of basic rights to delimit a zone of autonomy for individuals, which the state should not be allowed to abridge; and second, the establishment of special constitutional courts to safeguard and protect these rights. These courts were seen as protecting democracy from its own excesses and were adopted precisely because they could be countermajoritarian, able to protect the *substantive* values of democracy from procedurally legitimate elected bodies.

The ideal of limited government, or constitutionalism, is in conflict with the idea of parliamentary sovereignty.[5] This tension is particularly apparent where constitutionalism is safeguarded through judicial review. One governmental body, unelected by the people, tells an elected body that its will is incompatible with fundamental aspirations of the people. This is at the root of the "countermajoritarian difficulty," which has been

[3] Jeremy Jennings, "From 'Imperial State to l'Etat de Droit': Benjamin Constant, Blandine Kriegel and the Reform of the French Constitution," in *Constitutionalism in Transformation: European and Theoretical Perspectives* 76, 78 (Richard Bellamy and Dario Castiglione, eds., 1996). The *parlements* had engaged in a kind of judicial review themselves. Mauro Cappelletti, *Judicial Review in the Contemporary World* 33–34 (1971). The activation of the *Conseil Constitutionnel* in the Fifth Republic, especially because it unilaterally read the preamble of the constitution as being legally binding in 1971, has radically changed French practice in this regard. See Alec Stone, *The Birth of Judicial Politics in France* (1992).

[4] This distrust of a judicial role in governance, beyond applying legislation, led the French to create a special system of administrative courts in 1872. This system of special courts applying a separate law for the government led Dicey to argue that the French *droit administratif* was less protective of individual liberties than the English institutional manifestation of the rule of law. Dicey, *supra* note 2, 220–21, 266.

[5] Paul W. Kahn, *The Reign of Law:* Marbury v. Madison *and the Construction of America* 215 (1997).

the central concern of normative scholarship on judicial review for the past three decades.[6]

Although the postwar constitutional drafting choices in Europe dealt parliamentary sovereignty a blow, the idea retained force in terms of political practice. More often than not, the idea was used by undemocratic regimes. Marxist theory was naturally compatible with parliamentary sovereignty and incompatible with notions of constitutional, limited government. Similarly, new nations in Africa and Asia reacting to colonialism often dressed their regimes in the clothes of popular sovereignty, though oligarchy or autocracy were more often the result.

Today, in the wake of a global "wave" of democratization, parliamentary sovereignty is a waning idea, battered by the legacy of its affiliation with illiberalism. Judicial review has expanded beyond its homeland in the United States and has made strong inroads in those systems where it was previously alleged to be anathema. From France to South Africa to Israel, parliamentary sovereignty has faded away. We are in the midst of a "global expansion of judicial power," and the most visible and important power of judges is that of judicial review.[7]

Even in Britain, the homeland of parliamentary sovereignty and the birthplace of constitutional government, there have been significant incursions into parliamentary rule. There have been two chief mechanisms, one international and the other domestic. The first mechanism is the integration of Britain into the Council of Europe and the European Union (EU), which has meant that supranational law courts are now regularly reviewing British legislation for compatibility with international obligations. The domestic subordination of legislation of the British Parliament to European law was established when the House of Lords disapplied a parliamentary statute in response to the European Court of Justice's (ECJ) *Factortame* decision of 1991.[8] More recently, the incorporation of

[6] The term, and the terrain of the debate, were laid out by Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of American Politics* (2d ed., 1986).

[7] Neal Tate and Thorsten Vallinder, eds., *The Global Expansion of Judicial Power* (1995).

[8] *R. v. Secretary of State for Transport, ex parte Factortame Ltd (No. 2)* [1991] 1 A.C. 603. The case concerned parliamentary legislation aimed at preventing primarily Spanish-owned but British-registered ships from operating in particular quota areas. This violated various EU law principles of nondiscrimination. The House of Lords asked the ECJ whether it could issue a preliminary injunction against an act of Parliament and was told that it had an obligation to do so where legislation violated EU treaty rights. For a detailed discussion of the case, see Josef Drexl, "Was Sir Francis Drake a Dutchman? – British Supremacy of Parliament after Factortame," 41 *Am. J. Comp. L.* 551 (1993).

the European Convention of Human Rights into United Kingdom domestic law by the Human Rights Act 1998 has led to greater involvement of courts in considering the "constitutionality" of parliamentary statutes (and administrative actions) under the guise of examining compatibility with Convention requirements.[9] Although as a matter of domestic law the Human Rights Act attempts to preserve parliamentary sovereignty in that it allows an explicit parliamentary derogation from the convention, it has not been wholly successful. The Parliament now tends to scrutinize legislation for conformity with the convention, and this is a source of constraint; furthermore, even explicit parliamentary derogations may still lead to a finding by the European Court of Human Rights that Britain has violated its obligations. Thus, it cannot really be said that the Parliament is truly sovereign in Dicey's sense of being unchecked by other bodies.

The second mechanism is the growth of domestic judicial review as shown by an expanding body of administrative law. According to many observers, United Kingdom (UK) courts are exhibiting growing activism in checking the government, especially since the 1980s.[10] This administrative law jurisprudence has grown in recent years. The practice of international courts reviewing British legislation no doubt played a role in undermining the primary objection to domestic judicial review. The British objection to domestic courts exercising judicial review was *not* that judges were incapable of it or that the rule of law was a secondary goal. Indeed, it was the assertion that government was subject to ordinary law applied by ordinary judges that was at the heart of Dicey's celebration of the English constitution. Rather, the traditional objection to judicial review was that the people acting through Parliament possess complete sovereignty. This argument has now lost force. If the will of the Queen in Parliament is already being constrained by a group of European law professors sitting in Strasbourg, then the objection to constraint by British judges is much less potent.

[9] See, for example, Ian Leigh, "Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg," *Public Law* 265–87 (2002), and David Feldman, "Parliamentary Scrutiny of Legislation and Human Rights," *Public Law* 323–48 (2002).

[10] See, for example, Jerold L. Waltman, "Judicial Activism in England," in *Judicial Activism in Comparative Perspective* 33–52 (Kenneth Holland, ed., 1991); Susan Sterett, *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (1997). For an older doctrinal exegesis of judicial review in UK courts, see C.T. Emery and B. Smythe, *Judicial Review* (1986).

Even if one believes that Parliament is still sovereign in the United Kingdom, the adaptability of the always-anomalous British unwritten constitution as a model is clearly declining. In Britain itself, academics widely agree that there is a crisis of constitutional legitimacy.[11] Furthermore, several countries that were historically recipients of the British model have recently departed from it. In the Caribbean, several former British colonies have joined together to establish a new supranational court of final appeal, the Caribbean Court of Justice, discontinuing the practice of appeal to the Privy Council in London. Other former colonies have adopted constitutional acts or amendments entrenching new rights in the constitution.[12] In some countries, such as New Zealand and Israel, these acts are amendable by ordinary majorities and not entrenched as in other polities. Nevertheless, they maintain great normative power as constitutional legislation and politically speaking are more difficult to amend than legislation concerning routine matters of governance, even if not institutionally protected. There has even been a step in this direction in Saudi Arabia, although the Saudi government continues to take the formal position that it has neither a constitution nor legislation other than the law of Islam.[13]

The major bastions resistant to judicial involvement in constitutional adjudication have lowered their resistance in recent years. The concept of expanded judicial power has even crept surreptitiously into the international system, where there has been recent consideration as to whether there is a sort of inherent power of judicial review in international law.[14] The issue under consideration concerns whether the United Nations Security Council's findings that it is acting to defend peace and security under Chapter VII of the United Nations Charter (UN Charter) are reviewable by the International Court of Justice. There is no explicit

[11] For cites, see Tony Prosser, "Understanding the British Constitution," in *Constitutionalism in Transformation: European and Theoretical Perspective* 61, 68 n.33 (Richard Bellamy and Dario Castiglione, eds., 1996).

[12] For example, the Israeli Basic Laws of 1992, the Canadian Bill of Rights Act (1960), the Canadian Charter of Rights and Freedoms (1982), and the New Zealand Bill of Rights Act (1992).

[13] In 1992, the government adopted a Basic System of Rules that defines the structure of government and establishes a new mechanism for succession. See Rashed Aba-Namay, "The Recent Constitutional Reforms in Saudi Arabia," 42 *Int'l & Comp. L.Q.* 295 (1993).

[14] Dapo Akande, "The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?," 46 *Int'l & Comp. L.Q.* 309 (1997); see also Jose Alvarez, "Judging the Security Council," 90 *Am. J. Int'l L.* 1 (1996).

provision for judicial review in the UN Charter, and a Belgian proposal to establish it during the drafting of the UN Charter was rejected. The International Court of Justice has, however, considered the issue in *dicta*. The court has thus far carefully avoided making an express finding that the security council has acted outside of the scope of its powers, but it refused to explicitly deny that the court has the power to review the security council's actions.[15]

The United Nations, of course, is not a democratic system, nor one wherein majority rule has ever been unconstrained, by virtue of the institutional entrenchment of particular founding nations through the veto power on the Security Council. It is nevertheless interesting that some of the same questions that confront new democracies are being asked at the international level as well. Is there any action by supreme organs in a legal system that are *ultra vires*? If so, who has the power to decide whether an action crosses the line? And if the answer is a judicial body, who guards the guardians of legality?

As the "third wave" of democracy has proceeded around the globe, it has been accompanied by a general expansion in the power of judges in both established and new democracies. Virtually every post-Soviet constitution has at least a paper provision for a constitutional court with the power of judicial review.[16] New constitutional courts have been established in many new democracies. The following table (Table 1.1) demonstrates the spread in new democracies of constitutional courts, that is, bodies with the explicit power to overrule legislative acts as being in violation of the constitution. Countries listed in the table are those characterized by the Freedom House survey as democracies in 2000 that had not been so as of 1986, plus other well-known "third wave" democracies.

Table 1.1 shows that although there are institutional variations, providing for a system of constitutional review is now a norm among democratic constitution drafters. Indeed, that such a norm exists is also evidenced by the fact that new constitutions in countries that still fall fairly short

[15] See "Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. US; Libya v. UK)," 3, 114 *I.C.J.* (1992) (Provisional Measures). The issue was also raised in "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia/Herzegovina v. Yugoslavia (Serbia and Montenegro))," 3 *I.C.J.* (1996) (Request for Provisional Measures).

[16] See, for example, Rett R. Ludwikowski, "Constitution Making in the Countries of Former Soviet Dominance: Current Developments," 23 *Ga. J. Int'l & Comp. L.* 155 (1993), and Rett R. Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance* (1996).

TABLE 1.1 *Constitutional Review in Third Wave Democracies*

Country	Year of Constitution/ Last Major Amendment (*= amendment only)	Freedom House Rating 2000–01 (average)	Form of Constitutional Review (Key: CR = review by special body; JR = review by courts; L = scope of review or access limited)
Albania	1991*	4.5	CR
Argentina	1853	1.5	JR
Armenia	1995	4	CR
Bangladesh	1972/1991	3.5	JR
Benin	1991	2	LCR
Bolivia	1994	2	JR
Bosnia-Herzegovina	1995	4.5	CR
Brazil	1988	2	JR/CR
Bulgaria	1991	2.5	JR/CR
Burkina-Faso	1991	4.5	LCR
Cape Verde	1992	1.5	JR
Central African Republic	1994	3.5	CR
Chile	1981	2.5	LCR/LJR
Colombia	1991	3.5	CR
Croatia	1990	2.5	CR
Czech Republic	1993	1.5	CR
Dominican Republic	1996	2	JR
Ecuador	1979	2.5	JR/CR
El Salvador	1983	2.5	JR
Estonia	1992	1.5	JR
Ethiopia	1995	4	LCR
Fiji	1990/1997	3.5	JR
Gabon	1991	4.5	LCR
Georgia	1995	3.5	CR
Ghana	1993	3	JR
Greece	1975	2	CR
Guatemala	1985	3.5	JR/CR
Guinea-Bissau	1984/1990	4.5	JR
Guyana	1992	2	JR
Honduras	1982	2.5	LJR
Hungary	1949/1990	1.5	CR
Indonesia	1949	3.5	CR†
Jordan	1952	4	LJR
Korea	1988	2	CR
Kyrgyz Republic	1993	5	CR
Latvia	1922/1991	1.5	LCR
Lesotho	1993	4	JR

(*continued*)

TABLE 1.1 (*continued*)

Country	Year of Constitution/ Last Major Amendment (*= amendment only)	Freedom House Rating 2000–01 (average)	Form of Constitutional Review (Key: CR = review by special body; JR = review by courts; L = scope of review or access limited)
Lithuania	1992	1.5	CR
Macedonia	1991	3	CR
Madagascar	1992	3	CR
Malawi	1994	2.5	JR
Mali	1992	2.5	CR
Moldova	1994	3	CR
Mongolia	1992	2.5	CR
Morocco	1972/1996	4.5	LCR
Mozambique	1990	3.5	JR/CR
Namibia	1990	2.5	JR
Nepal	1990	3.5	JR
Nicaragua	2000*	3	LJR
Panama	1972/1994	1.5	JR
Paraguay	1992	3.5	LJR
Peru	1993	3	JR/CR
Philippines	1987	2.5	JR
Poland	1997	1.5	CR
Portugal	1976	1	JR/CR
Rumania	1991	2	LCR
Russia	1993	4	LCR
Sao Tome & Principe	1990	1.5	JR
Senegal	1991*	3.5	LCR
Seychelles	1993	3	JR
Sierra Leone	1991	4.5	JR
Slovakia	1993	2	LCR
Slovenia	1991	1.5	CR
South Africa	1994	1.5	JR/CR
Spain	1978	1.5	LCR
Suriname	1987	1.5	JR
Taiwan	1947/1997	2	CR
Tanzania	1992*	4	JR
Thailand	1997	2.5	CR
Ukraine	1996	4	CR
Uruguay	1997	1	JR
Zambia	1991	4.5	LJR/LCR

† A Constitutional Court was proposed for Indonesia in 2001.

Source: Robert Maddex, *Constitutions of the World* (1995); United States Department of State, *Human Rights Reports* (1997); Freedom House, *Freedom in the World*. Dates of Constitutions were supplemented through the CIA Factbook at *http://www.theodora.com/wfb/*. Note that a lower Freedom House rating indicates a higher level of democracy.

of the conventional definition of democracy (such as Cambodia (1993), Mozambique (1990), Ethiopia (1995), and Eritrea (1996)) contain provisions for constitutional review that remained unimplemented for several years after their passage. Like democracy itself, constitutionalism commands such normative power as an aspiration that it is invoked by regimes that make no pretense of submitting to constitutional control.

The table shows that the centralized system of constitutional review, designed by Hans Kelsen for Austria and subsequently adopted in Italy and Germany, has been predominant in the recent wave of democratization.[17] In contrast, a 1978 study of constitutions found that only 26% of constitutions included provision for a designated constitutional court with the power of judicial review.[18] The centralized system reflected Kelsen's positivist jurisprudence, which incorporated a strict hierarchy of laws. Because constitutional rules are provided only to parliament and ordinary judges are subordinate to the parliament whose statutes they apply, only an extrajudicial organ could restrain the legislature.[19] This extra-judicial organ was solely responsible for constitutional review.

In new democracies, there may be particularly strong reasons to distrust a decentralized system.[20] After all, the judiciary was typically trained, selected, and promoted under the previous regime. While some judges may have been closet liberals, there is little ability to ensure that these judges will wield power in a decentralized system. Furthermore, there may be significant popular distrust of the judiciary. Giving the ordinary judiciary the power of constitutional review risks dragging the prestige of the

[17] Because designated constitutional courts in this tradition use adjudicative methods, we consider the term *judicial review* to apply to them as well as to systems of decentralized constitutional control. For a discussion of whether systems of abstract review are better characterized as engaging in a legislative or judicial process, see Stone, *supra* note 3, at 209–21.

[18] Henc van Maarseveen and Ger van der Tang, *Written Constitutions* (1978).

[19] Kelsen made his argument in Hans Kelsen, "La garantie jurisdictionnel de la constitution," 44 *Revue de Droit Public* 197 (1928). There, Kelsen characterized the Constitutional Court as a kind of negative legislature. For a discussion, see Elena Marino-Blanco, *The Spanish Legal System* 96–97 (1996) and Stone, *supra* note 3, at 228–30.

[20] One hybrid variation is to adopt a single hierarchy of courts, with a supreme court that is exclusively charged with constitutional control. See, for example, Constitution of Yemen (1991), Article 124; Constitution of Estonia (1992), Article 152 (ordinary courts can refuse to apply an unconstitutional act, but only the National Court can declare it null and void); Constitution of Eritrea (1997), Article 49(2)(a).

constitution down to the level of the adjudicators in the public eye. Setting up a specialized body, by contrast, designates constitutional adjudication as a distinct, important function. So one explanation for the shift toward centralized review may be that widespread democratization has occurred and that decentralized review is particularly unattractive in new democracies.

Accompanying the institutional spread of judicial review has been a normative turn in its favor in western scholarship on democratization. Conventional analysts of democracy are increasingly frustrated with the illiberal tendencies of democratically elected regimes and suggest that elections are not enough. Zakaria notes that "[t]he trouble with . . . winner-take-all systems is that, in most democratizing countries, the winner really does take all."[21] Huntington notes that thirty-nine "electoral democracies" are deficient in protecting civil and political liberties.[22] There is increasing concern for the constitutional elements of democracy, leading some analysts to distinguish between electoral democracy and liberal democracy, with the latter guaranteeing civil rights to a greater degree.[23]

Despite this fundamental shift in democratic practice and scholarship, there has been little inquiry into questions about the expansion of judicial review. We know very little about the conditions leading to the establishment of judicial review and about the successful exercise of judicial power. This is particularly acute with regard to non-European contexts, outside the core.[24] With development banks, scholars, and politicians insisting on the importance of the rule of law as a universal component of "good governance,"[25] the issue of judicial power merits more attention. We ought to know where judicial power comes from, how it develops in the crucial early stages of liberalization, and what political conditions support the expansion and development of judicial power. This study is an effort to examine these questions by focusing on the most visible and important

[21] Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Aff.* 22, 42 (November/December 1997).

[22] Samuel Huntington, "After Twenty Years: The Future of the Third Wave," 8 *J. Democracy* 3, 10 (1997).

[23] See Larry Diamond, "Is the Third Wave Over?" 7 *J. Democracy* 20 (1996); Huntington, *supra* note 22, at 3–12 (1997); Guillermo O'Donnell, *Horizontal Accountability in New Democracies,* 9 *J. Democracy* 112, 117 (1998); Andreas Schedler, Larry Diamond, and Marc F. Plattner, eds., *The Self-Restraining State* (1999).

[24] C. Neal Tate, "Book Review of Paula Newberg's Judging the State: Courts and Constitutional Politics in Pakistan," 6 *L. & Pol. Book Rev.* 109–12 (1996).

[25] Thomas Carothers, "The Rule of Law Revival," 35 *Foreign Aff.* 23 (1997).

institutional manifestation of judicial power, constitutional constraint by courts.

One theory argues that the spread of judicial power is a reflection of a broader extension of rights consciousness around the globe.[26] This theory focuses on the *demand* for judicial protection of fundamental rights. The achievements of the human rights movement, the shift toward markets that rely on notions of private property, and the spread of democracy all reflect the importance of ideas of fundamental rights. As rights consciousness has spread, the argument goes, so, too, does the importance of courts as the primary political actors with the mission to protect rights.

I do not wish to contest the basic contours of this story. It would be difficult to deny that globalization and democratization have been accompanied by a dramatic spread in awareness of the importance of fundamental rights. What I wish to do is to supplement this story by examining specific contexts of judicial review, rather than simply accepting that a single uniform process is affecting the entire globe. In doing so, I will introduce considerations of power into the analysis, showing how politics shapes and is shaped by judicial review. If we were to accept the conventional argument that a shift in consciousness is the key factor behind the spread of judicial review, it would follow that differences in the way judicial review is structured and operates could be explained by variations in consciousness. My analysis shows that interests, as mobilized through institutions and politics, are at least as important in dictating outcomes in new democracies as rights ideology. In doing so, I shift attention from the demand for institutions of judicial review to the supply side, asking why it is that politicians would be interested in providing it.

CONSTITUTIONALISM IN EAST ASIA

I approach the problem of courts in new democracies by focusing on understudied constitutional contexts, particularly in East Asia. Asia has been called the home of illiberal democracy and represents perhaps the most difficult regional context for establishing the rule of law.[27] Although Asia has deeply rooted indigenous legal and political traditions, the assumptions and orientation of these traditions are often contrasted with

[26] See, for example, Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000); Charles Epp, *The Rights Revolution* (1998).

[27] Daniel Bell, David Brown, Kanishika Jayasuriya, and David Martin Jones, *Towards Illiberal Democracy in Pacific Asia* (1995); Huntington, *supra* note 22, at 10.

the western ideals associated with constitutionalism. Confucianism, in particular, would seem to present a difficult cultural environment for the development of judicial review. In contrast with western legal traditions organized around the notion of the autonomous rights-bearing individual, the Imperial Chinese legal tradition is usually depicted as emphasizing social order over individual autonomy and responsibilities over rights.[28] Law exists not to empower and protect individuals from the state, but as an instrument of governmental control. Any rights that do exist are granted by the state and may be retracted.

Furthermore, power is conceived as indivisible in the Confucian worldview, flowing solely from the emperor, who is the center of the cosmological and political order. No human force can check the emperor's power if he enjoys the mandate of heaven.[29] The notion of an intergovernmental check on the highest power is foreign to traditional Confucian thought. The emperor has "all-encompassing jurisdictional claims over the social-political life of the people."[30] The only human constraint on the emperor's power is the duty of scholar-officials to remonstrate the leader where he errs (a practice that varied in its practical impact in different periods of Chinese history).[31] This unified conception of power is a very different one from that of modern constitutionalism with its distrust of concentrated authority.[32]

[28] See the classic presentation of this position in Derk Bodde and Clarence Morris, *Law in Imperial China* (1967).

[29] See, generally, Tu Wei-ming, ed., *Confucian Traditions in East Asian Modernity: Moral Education and Economic Culture in Japan and the Four Mini-Dragons* (1996).

[30] Benjamin Schwartz, "The Primacy of Political Order in East Asian Societies: Some Preliminary Generalizations," in *Foundations and Limits of State Power in China* 1 (Stuart Schram ed., 1987), quoted in A. King, "State Confucianism and Its Transformation in Taiwan," in *Confucian Traditions in East Asian Modernity: Moral Education and Economic Culture in Japan and the Four Mini-Dragons* 228, 230 (Tu Wei-ming, ed.,1996).

[31] See Thomas Gold, "Factors in Taiwan's Democratic Transition," paper presented at Consolidating the Third Wave Democracies: Trends and Challenges, Institute for National Policy Research 12 (Taipei, Taiwan, August 27–30, 1995); Andrew Nathan, "China's Constitutionalist Option," 7 *J. Democracy* 43 (1996).

[32] See, for example, R. Fox, "Confucian and Communitarian Responses to Liberal Democracy," 59 *J. Pol.* 561, 572 (1997); Daniel Bell, *East Meets West: Human Rights and Democracy in East Asia* (2000). Of course, Confucianism offers a more general critique of law as a means of social ordering. For example, the Analects express disdain toward "guiding the people by edicts and keeping them in line with punishments." The classical opposition between *Fa* and *Li* is discussed in virtually every account of Chinese law. See, for example, Bodde and Morris, *supra* note 28; Janet E. Ainsworth, "Categories and Culture: On the 'Rectification of Names' in

To the extent that these traditional ideas about law and power continue to operate in East Asia (a highly contested question), they would seem to pose a challenge to the establishment of judicial power. Some authors have pointed to modern law as a reflection of a particularly western configuration of values and ideals.[33] A set of strong, secular, autonomous legal institutions capable of checking legislative and executive authority took centuries to develop in Western Europe.[34] With much less experience with the legal machinery of the modern nation state and with a legacy of strong and concentrated political authority, similar institutional development would seem to be a difficult proposition in Asia. Despite increasing public scrutiny and pressure from foreign donors and international financial organizations, reciprocity and personalism remain central to many descriptions of East and Southeast Asian politics and economies.[35] Many scholars and professionals remain skeptical about the possibility of the rule of law taking root, even after the economic crisis of 1997–98 led to political reforms in some countries in the region.[36]

This discussion echoes the now decade-old debates over the question of whether Asian values are incompatible with western notions of human rights and democracy.[37] Several leaders in the region have argued

Comparative Law," 82 *Cornell L. Rev.* 19 (1996); S. Lubman ed., *China's Legal Reforms* (1996); Ralph Folsom, John Minan, and Lee Ann Otto, *Law and Politics in the People's Republic of China* 13–18 (1992). *Li* refers to morality, custom, and propriety, while *Fa* is usually translated as criminal law, but refers more broadly to formal rules backed by sanctions.

[33] Roberto Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (1976); see also Samuel Huntington, "After Twenty Years: The Future of the Third Wave," 8 *J. Democracy* 3 (1997).

[34] Harold Berman, *Law and Revolution* (1985).

[35] On donor efforts, see the *Bulletin on Law and Policy Reform* maintained by the Asian Development Bank at *http://www.adb.org/documents/periodicals/law_bulletin/*. On personalism, see, for example, David I. Steinberg, "The Republic of Korea: Pluralizing Politics," in *Politics in Developing Countries: Comparing Experiences with Democracy* 396 (Larry Diamond et al., eds., 1995).

[36] See Lester Thurow, "Asia: The Collapse and the Cure," *N.Y. Review of Books*, February 5, 1998, at 22. See also Enrique Carrasco, "Rhetoric, Race and the Asian Financial Crisis," *L.A. Times*, January 1, 1998; Enrique Carrasco, Tough Sanctions: The Asian Crisis and New Colonialism," *Chi. Trib.*, January 3, 1998; H. Patrick Glenn, *Legal Traditions of the World* 297 (2000).

[37] For contributions to the debate on "Asian Values," see William Theodore de Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective* (2000); Kishore Mahbubani, *Can Asians Think* (1998); Joanne R. Bauer and Daniel Bell, eds., *The East Asian Challenge for Human Rights* (1999); and Michael C. Davis, "Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values," 11 *Harv. Hum. Rts. L. J.* 109 (1998).

that Asian political traditions, especially the Confucian legacy, are fundamentally incompatible with, and offer an alternative to, western-style liberal democracy. The western emphasis on civil and political rights, it is asserted, does not take into account an alleged Asian preference for economic well-being and communal goods. Asians prefer order over freedom, hierarchy over equality, and harmony over conflict. Hence, authoritarian governments in Asia actually reflect different cultural values that constrain democratic and constitutional development in the Chinese and more broadly Asian tradition.[38]

Others have challenged these views as simplistic and have called into question the cultural determinism that underlies the Asian values position.[39] The notion that Asian values are distinct presupposes an orientalist dualism between a monolithic Asian tradition of hierarchy and a western tradition of individualism. This dualism does justice to neither tradition, ignoring individualistic and liberal elements in the Confucian tradition as well as collective, hierarchical, and conflict-avoiding elements in the western tradition.[40]

In terms of thinking about the development of particular institutions, one problem with using culture as an explanatory category is that a tradition such as Confucianism is so broad it contains elements that might either support or hinder any institution under consideration. For example, Confucianism, once thought to be a hindrance to modernization, has in recent years been used to *explain* economic success in Asia.[41] Similarly, one might argue that certain aspects of the Imperial Chinese tradition, such as government by elite generalists, are compatible with judicial review.[42]

[38] Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996). Lee Teng-hui's reflection on the contribution of Chinese culture to Taiwan's democratization is found in Lee Teng-hui, "Chinese Culture and Political Renewal," 6 *J. Democ.* 3 (1995).

[39] See Davis, *supra* note 37, and Randall Peerenboom, "Answering the Bell: Round Two of the Asian Values Debate," 42 *Korea Journal* 194 (2002).

[40] William Theodore de Bary, *The Liberal Tradition in China* (1983); Tatsuo Inoue, "Critical Perspectives on the 'Asian Values' Debate," in *The East Asian Challenge for Human Rights* 27, 37–45 (Joanne Bauer and Daniel Bell eds., 1999).

[41] See, for example, Gary Hamilton and Kao Cheng-shu, "Max Weber and the Analysis of the Asian Industrialization," Working Paper No. 2, University of California, Davis Research Program in East Asian Culture and Development (1986); Benjamin A. Elman, "Confucianism and Modernization: A Reevaluation," in *Confucianism and Modernization: A Symposium* 1 (Joseph P. L. Jiang, ed., 1987); Cal Clark and K. C. Roy, *Comparing Development Patterns in Asia* 61–93 (1997).

[42] See Tom Ginsburg, "Confucian Constitutionalism? The Emergence of Judicial Review in Korea and Taiwan," 27 *Law and Social Inquiry* 763 (2002).

The point is that, because of their very breadth, cultural and legal traditions do not dictate outcomes in predictable ways. The Confucian legacy as conventionally interpreted poses barriers to the emergence of constitutionalism and judicial review of legislation in Chinese society. But cultural and legal traditions are flexible and dynamic and can provide rationales for a wide range of political institutions.[43] This suggests the difficulty of building a workable theory of the adoption and function of judicial review on cultural factors.

This study will explain the emergence of judicial review as a result of institutions and politics, rather than culture. By focusing on the spread and transfer of a central practice of constitutional democracy, judicial review, outside of its core areas in the United States and later Western Europe, this study is an effort to broaden the empirical and theoretical base of comparative constitutional law. The core areas have been at the center of comparative projects documenting the vast expansion of judicial review in recent decades.[44] Studies of nonwestern countries have been far less frequent. By demonstrating that judicial review can function outside the core, this study will challenge culturally deterministic accounts of the rule of law and judicial power.

AMERICAN EXCEPTIONALISM?

How ought one approach the study of judicial review in countries beyond the core? There may be several dangers in treating the American experience as the benchmark against which other countries' practices are measured. One way that American constitutionalism is distinctive is the fact that there is no explicit constitutional provision for judicial review in the American constitution. This has consequences that may not apply to other systems, including the embedding of the constitution into ordinary law.[45] (Technically, there is a distinction between judicial review, in which ordinary judges play the role of constitutional check, and constitutional review, in which the function is given to specialized judges or political actors. This study uses the terms interchangeably.) The primary role of the

[43] *Cf.* Huntington, *supra* note 38. See de Bary, *supra* note 40; William Theodore de Bary, "The 'Constitutional Tradition' in China," 9 *J. Asian L.* (1995); Davis, *supra* note 37; Michael C. Davis, "The Price of Rights: Constitutionalism and East Asian Economic Development," 20 *Hum. Rts. Q.* 303–37 (1998). See also Michael C. Davis, ed., *Human Rights and Chinese Values: Legal, Philosophical and Political Perspectives* (1995).

[44] *The Global Expansion of Judicial Power*, *supra* note 7.

[45] Stephen Griffin, *American Constitutionalism: From Theory to Politics* (1996).

United States federal judiciary is resolving disputes among private parties, and it need not exercise judicial review to do so. Because judicial review is incidental to the basic functions of the courts, the legitimacy of judicial review is always in doubt. Scholars of American constitutionalism have responded by focusing almost exclusively on normative issues of judicial legitimacy rather than positive issues of judicial power. But these issues may be less important in contexts where there is a clear constitutional moment and a designated court whose only role is to safeguard the constitution.

Another risk of focusing exclusively on the American origins of judicial review is that one might overcharacterize the insular, purely national character of the practice. American courts are notoriously reluctant to acknowledge the normative or legal importance of other countries' case-law or international instruments.[46] Yet, in the international context, domestic practices of judicial review draw extensively on international treaties, other countries' case-law, and normative rhetoric from other national experiences. The danger of beginning with the American experience is missing the significant international dimension of contemporary judicial review. The rule of law ideal has strongly universalist overtones, and courts may invoke their fraternal duty to defend it in specific cases. This often involves an examination of how other judiciaries have dealt with a particular problem. This practice of borrowing has long been a feature of the common law tradition, but also occurs in civil law jurisdictions.[47] Citing cases from other contexts is a strategy of legitimation for courts.[48]

[46] See, for example, *Sei Fujii v. California*, 38 Cal. 2d 718, 242 P. 2d 617 (1952). But see *United States v. Then*, 56 F. 3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring).

[47] See, for example, T. Koopmans, "Comparative Law and the Courts," 45 *Am. J. Comp. L.* 545, 550–55 (1996); Anne-Marie Slaughter, "The Real New World Order," 76 *Foreign Aff.* 183 (1997) (arguing that such "transgovernmentalism" by both judges and bureaucrats is the primary response to globalization, and represents the future of governance in an era when the traditional territorial state seems less able to cope with growing regulatory demands). Another form of judicial use of comparative law involves looking to practices consistent with notions of a "free and democratic society," an approach reflected in Israeli Supreme Court practice as well as in the case-law of the European Court of Human Rights. The European Court of Justice itself engages in comparative law exercises under Article 287 (formerly Article 215) related to noncontractual liability of the community, where it must compensate based on principles common to the laws of the member states. See T. Koopmans, *supra*.

[48] See, for example, Herman Schwartz, "The New Courts: An Overview," 2 *E. Eur. Const. Rev.* 28 (1993).

Finally, the origin of the practice in the United States may lead us to look for *Marbury*-type "grand cases" wherein the court asserts its power to overrule political authorities.[49] The danger is that a grand case is not the only way judicial review can be established. Beginning with an American orientation may lead us in the wrong direction by focusing our attention on the search for nonexistent "grand cases" in new democracies. This approach may misread *Marbury*, which after all did not include any command to a political branch.[50] More accurately, observers looking for "grand cases" that establish institutions of judicial review have in mind *Brown v. Board of Education*, where the Supreme Court overturned the American caste system with a single blow.[51] But *Brown* is another highly atypical case. First, it explicitly overrules a precedent in contrast with the usual characterization of common law courts. Second, *Brown's* rhetoric is primarily moral rather than legal.

Only in the sense that the Warren Court was highly conscious of the political ramifications of its decision was *Brown* a "normal" constitutional case. And it is precisely here that the U.S. experience *is* helpful. For studies of courts in new democracies will have to consider the delicate political contexts in which they operate. Just as the American courts are concerned about securing compliance with their decisions, so courts in new democracies face the same fundamental political problem: how to convince the losing party to abide with their decisions.[52]

APPROACH AND PLAN OF THE BOOK

This book addresses three questions concerning judicial review. First, why is it that countries adopt judicial review during periods of democratization and constitutional design? After all, if judicial review is undemocratic as scores of scholars have argued, it should be unattractive to newly empowered democrats. Second, what explains variation in the design and powers of new constitutional courts? One might think that there would be little variation in the design of new courts across different countries, but in fact there is variation, as Table 1.1

[49] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[50] See Michael J. Klarman, "How Great Were the 'Great' Marshall Court Decisions?" 87 *Va. L. Rev.* 1111 (2001).

[51] *Brown v. Board of Education*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

[52] Martin Shapiro makes a similar argument for courts in all times and places. See Martin Shapiro, *Courts: A Comparative and Political Analysis* (1981).