

Introduction: Towering Judges – A Conceptual and Comparative Analysis

Rehan Abeyratne and Iddo Porat

This volume is a collection of essays on a new topic in comparative constitutional law: towering judges. The volume discusses nineteen judges of apex and constitutional courts from fourteen jurisdictions. Within their particular political, historical, and institutional settings, each of these judges made a significant impact on the trajectory and development of constitutional law. These judges towered over their peers to distinguish themselves in the local context and, in some cases, globally. Some of these judges became well-known public figures, cultural icons, or political leaders. Some acted in crucial moments in their country's constitutional history or led their court in a new direction. Others acted in less fraught times and were known primarily within the legal profession. Some were uncontroversially respected and valued, while others were complex figures that were subject to debate and criticism. All of them, however, were able to shine individually to an uncommon degree in a profession where individualism is not always looked on favorably.

That there are such judges, we think, is indisputable. Everyone can intuit the “towering” judges in their own jurisdiction. But this is the first in-depth study of this phenomenon within the field of comparative constitutional law. The term “towering judge” and the questions we pose about these judges are novel. What makes for a towering judge and what are the possible parameters for assessing their “toweringness”? What are the background conditions that foster or deter the rise of towering judges? Are towering judges, on balance, positive or detrimental for a constitutional system? How do towering judges differ from one country to another and what are the comparative and global effects on towering judges? How do historical and social development relate to this phenomenon, and is it part of “global constitutionalism”? These questions will be at the center of this volume, and are answered by the rich, varied chapters that comprise it.

In this introduction, we outline in Section I the contours of the phenomenon that we aim to investigate; its naming; and its definition. We then preview all the chapters (Section II). Section III provides an overview of the existing literature and explains how this volume contributes to it. Sections IV and V discuss different dimensions of

toweringness (political, institutional, and doctrinal) and the various contexts that promote or deter towering judges (institutional, political, and historical). Sections VI, VII, and VIII discuss additional aspects of toweringness (personal traits, relations with other judges, and transnational/global relations among judges). We conclude (Section IX) with a discussion of some of the challenges faced in this project.

I CHOICE OF TERM, DEFINITION, AND SELECTION PRINCIPLE

The first two questions for this project were naming and defining the phenomenon. Our hypothesis was that there is a distinct phenomenon in which certain judges, especially in apex and constitutional courts, distinguish themselves from their peers. We had some prototypes in mind, such as President Aharon Barak of Israel and Chief Justice Bhagwati of India, who were singular figures in expanding the authority of their respective courts and developing fundamental rights jurisprudence. We also hypothesized that this phenomenon is interesting and robust enough to warrant a broad comparative study. But, how would we name it and what would be the criteria for including judges within this category?

We considered several names. First, “Herculean judges,” following Ronald Dworkin’s hypothetical judge, Hercules, who is all knowing and all capable.¹ This term captured the amazing capabilities of these judges and their larger-than-life status in the public eye. However, it was too demanding and connoted an infallibility that was too far removed from complex (and flawed) individuals discussed in this volume. We also considered “hero judges.” This term captured the struggles that many of these judges faced vis-à-vis powerful political forces, requiring courage and resilience, especially in times of revolution or constitutional upheaval. However, not all judges that distinguished themselves operated under such conditions. In addition, this concept carried with it a positive normative connotation – heroes are always good – while we aimed at a neutral concept that does not necessarily connote a positive assessment of the judge and their legacy.

We finally opted for towering judges, which we believe captures the essential characteristics of the phenomenon while allowing enough variance not to exclude too many important examples. At a minimum, a “towering judge” is in some respects “taller” than other judges and is therefore *individually* distinguishable from them. Thus, there is something individualistic about a towering judge that we think is essential to the phenomenon. This means that the judiciary in which such a judge operates is no longer impersonal and uniform. Rather, there is one (at times more than one) judge that draws disproportionate attention and has some disproportionate influence. Towering also connotes not just a little bit taller but taller in some important or substantial way. But this still leaves, intentionally, a lot open: it does not say or

¹ Ronald Dworkin, *Law’s Empire* (Belknap, 1986).

determine in what way the judge is taller than other judges. It also does not say whether taller is necessarily better – is he or she taller in a good or in a problematic way? Our conception also allows different degrees of toweringness. Towering judges could be those that completely reshape the judicial, legal, and even societal landscape, but their impact need not be so far-reaching as to be viewed as such.

While we decline to provide a single definition of towering judges – a precise definition would probably do more harm than good for a project such as ours – there are two key aspects to the phenomenon that we hold constant in our selection: individualism and influence. That is, the judges in this volume have to be individually distinguished from their colleagues and they should have a substantial influence on their constitutional systems. As we will discuss, a towering judge’s influence can be met with backlash that can undo some of their achievements, and a judge’s worldview can become outdated or obsolete over time. However, we also include such judges under the assumption that a substantial stamp on the history of ideas always leaves a trace, even by way of antithesis, making it influential even if undone over time. The same criterion would also usually rule out judges that “tower” on irrelevant or immoral grounds: judges that “tower,” for example, in corruptness or ineptitude. Such judges generally do not leave a significant trace on the history of ideas of their society.

We added one more important qualification – we included only judges that towered mostly, or substantially, in the field of constitutional law. There are two reasons for this. One is practical, as we wish to make a contribution in the field of comparative constitutional law. The other is more substantive. Constitutional law is inherently more political than other areas of law and its stakes for the broader society are usually higher. Judges, particularly those who aim to influence the course of their societies, often do so through constitutional law. Thus, we might expect the phenomenon of towering judges to be particularly well represented in this area. As a result of this choice, most of the judges in the volume operated in the past half-century. The global rise in the power and influence of constitutional courts is a relatively recent phenomenon in most parts of the world, beginning in earnest only after World War II. Finally, we also aimed to include judges from a variety of legal systems and geographical areas, as well as from both the global North and the global South so as to provide a wide case selection for comparative analysis and to make the volume as inclusive as possible.

Following these guidelines, we explore in this volume the legacy of the following judges (ordered here alphabetically by jurisdiction and including tenures on their respective apex or constitutional courts): Australia (Chief Justice Sir Anthony Mason, 1972–95²); Chile (Judge Eugenio Valenzuela, 1981–9/1997–2006); Columbia (Justice Manuel Cepeda, 2001–9³); Hong Kong (Chief Justice Andrew Li, 1997–2010; and Justice Kemal Bokhary, 1997–2012); Hungary (President László

² 1987–95 as chief justice.

³ 2005–6 as president.

Sólyom, 1990–8); India (Chief Justice PN Bhagwati, 1973–86⁴); Ireland (Chief Justice Hugh Kennedy, 1924–36); Israel (President Aharon Barak, 1978–2006⁵); Nepal (Chief Justice Kalyan Shrestha, 2005–16⁶); Singapore (Chief Justice Chan Sek Keong, 2006–12⁷); South Africa (Chief Justice Arthur Chaskalson, 1994–2005⁸); United Kingdom (Lady Hale, President of the Supreme Court, 2009–20⁹); United States (Chief Justice Earl Warren, 1953–69; Chief Justice Charles Evans Hughes, 1930–41¹⁰; Justice William Brennan, 1956–90; Justice Hugo Black, 1937–71; and Justice Owen Roberts, 1930–45); and Vietnam (Chief Justice Truong Hoa Binh, 2007–16).

II PREVIEW OF CHAPTERS

In Chapter 1, Iddo Porat discusses towering judges in the context of global constitutionalism. This chapter explains how a strong cosmopolitan and liberal turn in global politics in the 1990s, and the creation of a global community of judges, may have incentivized the emergence of towering judges and affected the liberal content of their judicial legacies. It uses this hypothesis to highlight some of the normative concerns stemming out of toweringness and its possible relationship to the current conservative backlash in many jurisdictions. In Chapter 2, Mark Tushnet examines the concept of toweringness in relative terms and across different eras in the US Supreme Court. He focuses, in particular, on Chief Justices Charles Evans Hughes and Earl Warren and their relationships to other towering and less-than-towering justices. Gabrielle Appleby and Andrew Lynch discuss the legacy of Sir Anthony Mason in Chapter 3. Mason, who served on the High Court of Australia for twenty-three years (eight years as chief justice), forged a new jurisprudential path for the Court. He exercised “jurisprudential leadership” to move the Court away from the legalism of Sir Owen Dixon (another towering judge candidate) toward “constitutional guardianship” in which he defended the Court’s rights-protective case law in the media and against public criticism.¹¹ In Chapter 4, Rosemary Hunter and Erika Rackley discuss the most recently active judge in the volume: Lady Hale, President of the UK Supreme Court until 2020. They examine Hale’s jurisprudential, administrative, and wider community leadership as a justice and as president of the Supreme Court, drawing on a large data set of cases, extrajudicial speeches,

⁴ 1985–6 as chief justice.

⁵ 1995–2006 as president.

⁶ 2015–16 as chief justice.

⁷ Chan also served as a judicial commissioner (1986–8) and as a puisne judge of the Supreme Court (1988–92).

⁸ President of the Constitutional Court (1994–2001); chief justice of South Africa (2001–5). This is the same position, but the title changed in 2001.

⁹ 2017–20 as president.

¹⁰ Hughes also served as an associate justice of the US Supreme Court (1910–16).

¹¹ Appleby and Lynch, Chapter 3.

publications, and annual reports since the Supreme Court's inception in 2009. In addition to this statistical analysis, Hunter and Rackley explore a further distinctive aspect of Hale's judicial approach – her feminism – including her substantive contributions to the jurisprudence of equality, human rights, diversity, and social justice.

Moving beyond these “usual suspects,”¹² Tom Daly brings to light the intellectual brilliance and statesmanship of Ireland's Chief Justice Hugh Kennedy in Chapter 5. Kennedy was a central architect behind the 1922 Constitution of the Irish Free State, which ensured maximal autonomy for Ireland from the British Empire. Later, as Ireland's first chief justice, Kennedy bolstered the reputation and independence of the Court, including an assertion (in dissent) that repressive constitutional amendments could be held unconstitutional, four decades before the Indian Supreme Court first announced the basic structure doctrine. In Chapter 6, Chin Leng Lim discusses the legacies of two founding justices of the Hong Kong Court of Final Appeal: Chief Justice Andrew Li and Justice Kemal Bokhary. Lim argues that these two justices explained better than their colleagues the meaning of the unique “one country, two systems” model under which Hong Kong is governed. While Li's judgments reflect a perfectionist theory of the “civic virtues” underlying Hong Kong's Basic Law, Bokhary's jurisprudence reflects a stance of “rights perfectionism” that seeks to advance particular political outcomes.¹³

Chapter 7 explores the towering judge phenomenon in a country with some authoritarian elements in its regime. Jaelyn Neo and Kevin Tan explain the importance of Chief Justice Chan Sek Keong (2006–12), whose keen intellect, administrative efficiency, and prodigious output allowed him to be a towering figure in a constrained political context. In Chapter 8, Mara Malagodi discusses another Asian judge who towered despite difficult circumstances. Chief Justice Kalyan Shrestha of Nepal served on the Supreme Court from the end of that country's civil war and through its tumultuous transition to constitutional democracy. Despite bouts of emergency and autocratic rule, the dissolution of a constituent assembly, and violence surrounding the constitution-making process, Shrestha remained a steadfast champion of fundamental rights and judicial independence.

The next four chapters focus on judges who initiated or presided over constitutional revolutions in their countries. In Chapter 9, Alon Harel discusses President Aharon Barak of Israel, the quintessential towering judge, who is renowned globally for his jurisprudence and scholarship. Harel argues that Israel under Barak's tenure as president of the Supreme Court (1995–2006) underwent two revolutions: the judiciary-empowerment revolution and the liberal rights revolution. He notes that while much of the criticism directed against Barak's legacy is directed against the former (judiciary-empowerment) revolution, conservative forces in Israel have no

¹² Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Cambridge University Press, 2014) 192.

¹³ Lim, Chapter 6.

urgent interest in overturning that revolution. Rather, this judiciary-empowerment revolution is currently being used by conservative groups in Israel to undo the liberal revolution. Along similar lines, Rehan Abeyratne argues in Chapter 10 that Chief Justice PN Bhagwati's legacy in India has been undermined since his retirement. While Bhagwati was the driving force behind public interest litigation (PIL) in the 1980s, his aversion to formalism and regular procedural and evidentiary rules imbued the Supreme Court and High Courts of India with tremendous flexibility and independent authority to dictate the terms of public policy – powers they have not always wielded with care. In addition, many of his landmark judgments lack firm doctrinal foundations, and entrenched a style of *ipse dixit* decision-making in the Indian higher judiciary. In Chapter 11, David Landau assesses the legacy of Justice Manuel Cepeda of Colombia, whose main contribution was an institutional one. Though he served on the Constitutional Court for only eight years, Cepeda skillfully navigated the fraught political environment in Colombia to develop the *tutela* mechanism and permit the Court to engage in “mega-interventions” on issues of internally displaced persons and health without significant political backlash.¹⁴ Another institution-builder, albeit in a different sense, was post-apartheid South Africa's first president of the Constitutional Court: Arthur Chaskalson. Dennis Davis, who currently sits as a judge on the High Court of South Africa, recounts Chaskalson's many accomplishments in Chapter 12. Among other things, Chaskalson was a prominent public interest lawyer who challenged the validity of pernicious apartheid-era laws. He played a key role in drafting South Africa's 1996 Constitution, and carefully guided the Constitutional Court in its early years to develop a reputation for legal rigor and excellence – a model for the rest of the world.

The final three country-specific chapters deal with towering judges in transitional or authoritarian states. In Chapter 13, Gábor Attila Tóth discusses the legacy of László Sólyom, president of the Hungarian Constitutional Court between 1990 and 1998. Tóth notes that while there is widespread agreement that Sólyom is the most influential Hungarian jurist of the post-Soviet era, there is no consensus on the nature or effectiveness of his legacy. Tóth's chapter does not offer “simple or easy answers”;¹⁵ instead, it analyzes Sólyom's complex legacy with respect to his role in Hungary's democratic transition, his main judgments on the Court, and his change of stance on key constitutional issues when serving as the head of state from 2005 to 2010. In Chapter 14, Bui Ngoc Son presents a case study of a towering judge in a socialist state: Vietnam. Truong Hoa Binh was appointed as chief justice of the Supreme People's Court despite having no legal training or prior experience as a judge. In fact, he served in the police force before his elevation to the Court. But, as Bui notes, this lack of training can be explained contextually, as the Supreme People's Court in Vietnam serves an instrumental function to propagate support

¹⁴ Landau, Chapter 11.

¹⁵ Tóth, Chapter 13.

for the Communist Party. Truong, as a loyal member of the Party, was able to fulfill this function, while also using his role as chief justice to bring about significant institutional reforms to the Vietnamese judiciary. Chapter 15, too, focuses on a judge in an authoritarian regime but one who chose a different *modus operandi vis-à-vis* the ruling regime. Judge Eugenio Valenzuela of the Chilean Constitutional Court opted to stand up to General Pinochet's dictatorship in the 1980s. As Sergio Verdugo explains, Valenzuela was able to turn "the Pinochet Constitution against the interests of Pinochet," including by enforcing the rules of a 1988 plebiscite that led to the downfall of the Pinochet regime.¹⁶

Finally, in Chapter 16, Rosalind Dixon draws insights from the previous chapters to bring greater clarity to the concept of towering judges. Among other things, she discusses (a) the relevant notions of judicial influence involved; (b) its temporal aspects; and (c) the relative versus absolute nature of the concept.

III REVIEW OF EXISTING LITERATURE

There are two main bodies of literature that our study engages with and contributes to: (1) comparative constitutional law and (2) judicial leadership and behavior. The comparative constitutional law literature is seldom concerned with the role of individual judges and judicial leadership. It is largely concerned with the institutional role and adjudicative functions of judges and courts. Our volume, therefore, fills a void in the comparative constitutional literature by adding the personal judicial angle and placing it within the larger and impersonal phenomena analyzed by the field. Meanwhile, the judicial leadership and behavior literature lacks the global and comparative perspectives that our volume seeks to provide. In what follows, we survey the existing literature in these two bodies of research to show how our study fits within it.

The existing literature on judges and judiciaries in comparative constitutional law focuses mostly on institutional aspects of the role and function of judges. There is, firstly, a large body of literature on judicial review. This literature includes a normative debate on the desirability and legitimacy of judicial review both at a theoretical level and in specific contexts. Famous in this context is the debate, which is partly comparative, between Jeremy Waldron¹⁷ and Richard Fallon.¹⁸ There is also descriptive and explanatory comparative research on judicial review. Tom Ginsburg, for example, links the rise of constitutional judicial review with the spread of democracy. He argues that parties who fear election losses may opt for

¹⁶ Verdugo, Chapter 15.

¹⁷ Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 *Yale Law Journal* 1346 (arguing that judicial review, under specific conditions, is not necessary as legislatures can protect rights equally, if not more, effectively).

¹⁸ Richard H Fallon, "The Core of an Uneasy Case for Judicial Review" (2008) 121 *Harvard Law Review* 1693, 1699 (responding to Waldron with a limited defense of judicial review in which he contends that some rights might be worthy of "overprotection" from multiple institutions and that judicial review could promote "morally better outcomes").

judicial review as “a form of political insurance that mitigates the risk of electoral loss.”¹⁹ In a recent large-N study, using a data set of constitutional review for 204 countries from 1781 to 2011, Ginsburg and Versteeg find that such strategic, domestic political considerations drive the adoption of constitutional review, much more so than “ideational factors” or the diffusion of norms.²⁰ In authoritarian or illiberal states, too, judicial review has expanded significantly in recent decades as a means, inter alia, to legitimate ruling regimes, to delegate controversial policy questions, and to provide legal certainty on economic matters to encourage foreign investment.²¹ There is also a well-developed comparative literature on different forms of judicial review, such as strong and weak-form judicial review,²² and on constitutional dialogue between the judiciary and political branches.²³

Secondly, there is a large comparative literature on the globalization of constitutional adjudication, the interactions and sharing of ideas among constitutional courts, and the global rise of judicial power. Global constitutionalism has seen extensive research in recent times,²⁴ as has the documentation of trends in constitutional design²⁵ and of the migration of constitutional rights and norms across jurisdictions.²⁶ Ran Hirschl has shown how the global trend toward “juristocracy” has been aided by political elites who use judicial review for “hegemonic preservation.”²⁷

While both these types of comparative constitutional study – relating to judicial review and to globalization – greatly illuminate and set the background for the workings of the judges in our volume, none directly addresses the role of individual judges in driving constitutional change, which is the particular contribution of this volume.

¹⁹ Tom Ginsburg, “The Global Spread of Constitutional Review” in Keith E Whittington, R Daniel Keleman, and Gregory A Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008).

²⁰ Tom Ginsburg and Mila Versteeg, “Why Do Countries Adopt Constitutional Review?” (2013) 30 *Journal of Law, Economics, and Organization* 587, 589.

²¹ Tom Ginsburg and Tamir Moustafa, “Introduction: The Functions of Courts in Authoritarian Politics” in Tom Ginsburg and Tamir Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008).

²² See, e.g., Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press, 2008) ch 2.

²³ Peter W Hogg and Allison A Bushell, “The Charter Dialogue Between Courts and Legislatures” (1997) 35 *Osgoode Hall Law Journal* 75; Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press, 2015); Rosalind Dixon, “The Supreme Court of Canada, Charter Dialogue and Deference” (2009) 47 *Osgoode Hall Law Journal* 235.

²⁴ See, e.g., Michel Rosenfeld, “Is Global Constitutionalism Meaningful or Desirable?” (2014) 25 *European Journal of International Law* 177; David S Law and Mila Versteeg, “The Evolution and Ideology of Global Constitutionalism” (2011) 99 *California Law Review* 1163.

²⁵ David S Law and Mila Versteeg, “The Declining Influence of the United States Constitution” (2012) 87 *New York University Law Review* 762; Kim Lane Scheppele, “Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models” (2003) 1 *International Journal of Constitutional Law* 296.

²⁶ See, e.g., Alec Stone Sweet, “Constitutional Courts” in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012); Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press, 2009).

²⁷ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).

Our study also draws on, and contributes to, a second set of studies: those that focus on individual judges but usually do not emphasize the comparative angle. These are several academic genres relating to judicial personality and leadership.²⁸ First, there is a long-standing tradition of biographies of great judges and groups of judges in important historical moments.²⁹ There have also been studies on the role and importance of chief justices and constitutional court presidents. The chief justice of the United States has been the subject of several studies that have examined the effects of their institutional position and the concomitant strategic opportunities on judicial behavior.³⁰ Specifically, scholars have highlighted the chief justice's ability to set the agenda for deliberations, preside over the justices' internal conference, and assign opinions to individual justices as mechanisms for judicial leadership.³¹ Kim Scheppele, in a study of President Laszlo Sólyom of the Hungarian Constitutional Court and Valerii Zorkin of the Russian Constitutional Court, noted that these men became leading public figures in the post-socialist era of their respective countries, and often took political leaders to task for failing to uphold constitutional principles.³²

There are also studies about judicial leadership generally. In their study of judicial leadership in the United Kingdom – which has been adapted into Chapter 4 for this volume – Hunter and Rackley conducted a quantitative study of judicial leadership along three dimensions: administrative, jurisprudential, and community leadership.³³ Meanwhile, Arguelhes and Ribeiro argue that Brazilian Supreme Court justices may influence legal developments and the behavior of external actors in three ways: “(i) *agenda setting* (deciding what the court will decide); (ii) *position taking* (speaking on behalf of the court, thus signalling a potential judicial decision in specific directions); and (iii) *decision making* (resolving cases, controversies, and matters of dispute brought to the court).”³⁴

²⁸ See, e.g., Richard A Posner, “The Learned Hand Biography and the Question of Judicial Greatness” (1994) 104 *Yale Law Journal* 511; Allan C Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (Cambridge University Press, 2012); Omri Ben-Zvi, “Judicial Greatness and the Duties of a Judge” (2016) 35 *Law and Philosophy* 615.

²⁹ See, e.g., Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (Twelve Books, 2010).

³⁰ See, e.g., Drew Noble Lanier, “Acclimation Effects and the Chief Justice: The Influence of Tenure and the Role on the Decisional Behavior of the Court's Leader, 1888–2007” (2011) 39 *American Politics Research* 682.

³¹ G Edward White, “The Internal Powers of the Chief Justice: The Nineteenth Century Legacy” (2006) 154 *University of Pennsylvania Law Review* 1464.

³² Kim Lane Scheppele, “Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe” (2006) 154 *University of Pennsylvania Law Review* 1757, 1758.

³³ Rosemary Hunter and Erika Rackley, “Judicial Leadership on the UK Supreme Court” (2018) 38 *Legal Studies* 191, 192.

³⁴ Diego Werneck Arguelhes and Leandro Molhano Ribeiro, “The Court, It Is I? Individual Judicial Powers in the Brazilian Supreme Court and Their Implications for Constitutional Theory” (2018) 7 *Global Constitutionalism* 236, 240.

Finally, there is a vast political science literature, largely emanating from the United States, on how judges decide cases. This literature largely rejects the traditional, “legal” model of adjudication in which judges decide cases on the basis of the facts and the relevant legal materials before them.³⁵ Instead, the American literature favors the “attitudinal model,” which posits that judges’ personal attitudes, backgrounds, and political views shape their judgments.³⁶ While this approach has great appeal in the United States, particularly with respect to the deeply divided Supreme Court, it is inapposite in a comparative context, as institutional and cultural factors also appear to affect judicial decision-making. Benjamin Alarie and Andrew J Green recently published a detailed cross-country examination of the apex courts in the United States, the United Kingdom, Canada, India, and Australia. They show that judges exhibit varying degrees of commitment to their own ideals and cooperation with their colleagues based on institutional design. As such, they describe four types of courts: (1) an “attitudinal court” (US Supreme Court) in which judges are “both politicized and independent”; (2) a “positivist court” in which judges are “independent and ground their decisions in legal considerations” (Australian High Court); (3) a “strategic court” that comprises judges that are both politicized and collegial (Canadian Supreme Court); and (4) a “deliberative court” in which judges look for the best answer and enlist their colleagues in that search (UK Supreme Court).³⁷

The chapters in this volume draw on these bodies of literature. They also seek to contribute to these bodies from a new perspective. By shifting the focus away from institutional questions about the role and legitimacy of courts, and from judicial decision-making at the domestic level or among a few jurisdictions, this volume aims to make an original contribution to the comparative constitutional literature.

IV DIMENSIONS OF TOWERINGNESS

As the following chapters will demonstrate, there are several ways in which judges leave towering legacies. We distinguish among three dimensions along which a judge may be towering – the political, the institutional, and the jurisprudential. We should note that this is not meant to be an exhaustive set of criteria and there is some overlap among these dimensions. Of course, judges could tower in more than one of these categories and most of the judges included in this volume do precisely that.

Political towering judges are those that promote a particular ideological, moral, and/or political agenda of change. Examples include President Barak and Chief Justices

³⁵ Benjamin Alarie and Andrew J Green, *Commitment and Cooperation on High Courts: A Cross-Country Examination of Institutional Constraints on Judges* (Oxford University Press, 2017) 3.

³⁶ *Ibid.*; Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press, 2002).

³⁷ Alarie and Green (*supra* n 35) 6–8. The Indian and Israeli Supreme Courts are a mix of the strategic and deliberative models.