

A Tale of Two Maps: The Limits of Universalism in Comparative Judicial Review[†]

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For most of the twentieth century, the dominant paradigm in comparative public law was particularism. This was accompanied by a strong skepticism towards universalist features and possibilities in public law and, especially, constitutional law. With the rise of judicial review after World War II—and especially in Eastern Europe after the collapse of the Soviet Union—comparative judicial review has begun to flourish. However, comparative scholarship on judicial review overemphasizes the centrality of “the question of legitimacy” of judicial review in a democratic polity. This has been a result of the mistaken extrapolation of the American debate over judicial review to other countries. Examples from Canada, South Africa, and Israel reveal that the question of legitimacy is, in each of these countries, less important and decisively different in character than in the United States. It is therefore time to recall and embrace some of the particularist skepticism when comparing judicial review across different legal systems.

Pendant la majorité du XX^e siècle, le particularisme représente le paradigme dominant en matière de droit public comparatif. Ceci s'accompagne d'un fort scepticisme envers les propriétés et possibilités universalistes en droit public, particulièrement dans le droit constitutionnel. Avec la montée de la révision judiciaire après la Seconde guerre mondiale, surtout en Europe de l'Est après l'effondrement de l'Union soviétique, la révision judiciaire comparative a commencé à s'épanouir. Toutefois, l'ensemble des recherches comparatives sur la révision judiciaire se concentre excessivement sur la centralité de « la question de la légitimité » de la révision judiciaire dans un régime démocratique. Cela découle de l'extrapolation erronée à d'autres

† This article is an outgrowth of a comment on Miguel Schor, “Mapping Comparative Judicial Review” (Paper presented to the 2nd Osgoode Constitutional Law Roundtable: Comparative Constitutional Law and Globalization – Towards Common Rights and Procedures, Toronto, 24 February 2007). For the version of Professor Schor’s paper that was later published as an article, see *infra* note 9. Thank you to Professor Peer Zumbansen for inviting me to participate in the Roundtable and to the participants for their insightful comments throughout the day. Thank you also to Professors Jamie Cameron and Richard Goldstone for providing comments on an earlier draft of this article.

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pays du débat américain concernant la revue judiciaire. L'exemple du Canada, de l'Afrique du Sud et d'Israël révèlent que, dans chacun de ces pays, la question de la légitimité est moins importante qu'aux États-Unis et présente un caractère vraiment différent de ce pays. Il est temps par conséquent de reprendre et d'adopter une petite mesure de scepticisme particulariste lorsque l'on compare la revue judiciaire de différents systèmes juridiques.

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UNTIL RELATIVELY RECENTLY, comparative law tended to be rather dubious about the universalist possibilities of constitutional law. The dominant paradigm in comparative public law until the late twentieth century was particularism. It found expression in Montesquieu's skepticism: because of the belief that laws must be appropriate to the people for whom they are made,¹ he questioned whether the laws of one nation could be suitable for another. Modern scholars posited that the transfer of political institutions from one country to another was simply not possible.² On the basis that nations differ so much in their political structures, social organizations, and legal cultures, it was contended by constitutional particularists that the intimate connection between a nation and its constitution meant that meaningful comparisons of constitutional law were impossible.³ In a word, the historical nexus between public law and national

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1. Charles de Secondat, baron de Montesquieu, *The Spirit of the Laws*, trans. by Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone (Cambridge: Cambridge University Press, 1989) at 8-9.
 2. See Carl J. Friedrich, *The Impact of American Constitutionalism Abroad* (Boston: Boston University Press, 1967) at 10-11 (noting and critiquing this argument).
 3. See Donald P. Kommers, "The Value of Comparative Constitutional Law" (1976) 9 J. Marshall J. Prac. & Proc. 685 at 688 ("It is possible to suggest that nations do differ to such an extent in the details of their political structure, legal culture, or the wording of their constitutions that no meaningful comparison of constitutional law across national boundaries is possible"); Christopher Osakwe, "Introduction: The Problems of the

identity may not readily transfer to other countries.⁴ As a practical matter, the leading comparativists in the twentieth century were private law scholars, and, as a result, the field of comparative law was largely focused on this area. This dominant particularist paradigm prevailed until the fall of the Soviet Union and the subsequent explosion of scholarship in comparative constitutional law.

The reinvigoration of comparative law in the early 1990s brought with it not only an exponential growth in comparative constitutional law scholarship, but also the ascendancy of universalism over particularism within the field. The words of one leading scholar best capture this school of thought: “the basic principles of constitutional law are essentially the same around the world.”⁵ There are strong links between this universalist constitutionalism and international human rights law.⁶

In addition, it is possible to identify both a “thick” and a “thin” version of this universalism. Thick universalism contains both normative and process claims. It posits the strong universal application of specific norms and values, as well as a global network that facilitates the communication and reinforcement of these values.⁷ In contrast, thin universalism presents a more modest argument about universal values. Although it recognizes the existence of a global network of

Comparability of Notions in Constitutional Law” (1985) 59 Tul. L. Rev. 875 at 876 (stating that “[p]ublic law reflects an inner relationship—a sort of spiritual and psychical relationship—with the people over whom it operates”).

4. See Osakwe, *ibid.* at 876.
5. David M. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 10. See also at 15-17, 105, 142 (identifying these basic principles as “proportionality” and “rationality”).
6. See Mark Tushnet, “Some Reflections on Method in Comparative Constitutional Law” in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 67 at 69.
7. For leading examples of thick universalism, see Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005) (*i.e.*, “purposive interpretation”); David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) (*i.e.*, “ultimate rule of law”); Lorraine E. Weinrib, “The Postwar Paradigm and American Exceptionalism” in Choudhry, *ibid.*, 84 (*i.e.*, “postwar paradigm”); and Lorraine E. Weinrib, “Constitutional Conceptions and Constitutional Comparativism” in Vicki C. Jackson & Mark Tushnet, eds., *Defining the Field of Comparative Constitutional Law* (Westport: Praeger, 2002) 3. Other forms of universalism are referred to variously throughout the literature as “the Convergence Model,” “normative universalism,” and the like. See Vicki C. Jackson, “Constitutional Comparisons: Convergence, Resistance, Engagement” (2005) 119 Harv. L. Rev. 109 at 112; Tushnet, *ibid.* at 68.

courts as an interchange for ideas, its focus is more on the universal nature of problems that courts face, rather than on the norms that should be applied. As such, it is problem-based rather than norm-centred.⁸

In this article, I contend that it is time to recall and embrace some of the particularist skepticism in comparing judicial review across legal systems. Miguel Schor uses mapping as a metaphor for the process of organizing various approaches to the comparative analysis of judicial review around the world.⁹ Because comparativists have attempted to map the world's legal systems into various legal families or traditions¹⁰—in much the same way that cartographers once charted the continents and the oceans¹¹—this mapping metaphor has been, at different times, frequently invoked in comparative law. It has also been invoked literally, with one leading comparativist noting in 1998 that: “The le-

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8. Anne-Marie Slaughter is the leading proponent of a thin universalism. See *e.g.* Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) at 1-15, 65-103.
 9. Miguel Schor, “Mapping Comparative Judicial Review” (2008) 7 Wash. U. Global Stud. L. Rev. 257.
 10. See *e.g.* René David & John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 2d ed. (New York: Free Press of Glencoe, 1978) (describing the idea of legal families and identifying the legal families in the world); Konrad Zweigert & Heins Kötz, *Introduction to Comparative Law*, 2d ed., trans. by Tony Weir (Oxford: Clarendon Press, 1987) at 63 ff. (also describing the concept of, and identifying, legal families); Mary Ann Glendon, Michael W. Gordon & Christopher Osakwe, *Comparative Legal Traditions in a Nutshell* (St. Paul: West Publishing, 1982) at 4-5 (explaining that “[c]omparativists believe that the grouping of legal systems into legal traditions or families is possible because within every national legal system there are certain constants as well as certain variables” at 4, and identifying the “three major legal traditions in the modern Western world” as “the Anglo-American common law tradition, the Romano-Germanic civil law tradition and the socialist law tradition” at 5); and John Henry Merryman & David S. Clark, *Comparative Law, Western European and Latin American Legal Systems: Cases and Materials* (Indianapolis: Bobbs-Merrill, 1978) at 2 (identifying the three principal legal traditions in the world as civil law, common law, and socialist law).
 11. See *e.g.* Chester G. Hearn, *Tracks in the Sea: Matthew Fontaine Maury and the Mapping of the Oceans* (Camden: International Marine, 2002); Robert Kunzig, *Mapping the Deep: The Extraordinary Story of Ocean Science* (New York: W.W. Norton, 2000); Thomas Suárez, *Early Mapping of the Pacific: The Epic Story of Seafarers, Adventurers and Cartographers Who Mapped the Earth's Greatest Ocean* (North Clarendon: Periplus, 2004); and Nicholas Crane, *Mercator: The Man Who Mapped the Planet*, 1st Amer. ed. (New York: Henry Holt, 2003). See generally Nicholas Crane, *The Map Book* (Toronto: McArthur and Company, 2005). See also Arthur Jay Klinghoffer, *The Power of Projections: How Maps Reflect Global Politics and History* (Westport: Praeger, 2006).

gal map of the world today is not what it was in 1798, or in 1898, or even in 1989, and it no doubt will continue to change in the future.”¹²

Schor, however, departs from prior usage and proposes a different type of conceptual map. Focusing on questions rather than phenomena, he maps out the inquiries that have been made by scholars of comparative judicial review and then assesses their answers. As a general matter, he finds their explanations wanting; they are often too polar or too reliant on single-variable explanations. In short, Schor’s map demonstrates that the answers provided by the conventional accounts of judicial review are overstated. This is the theme that I will take up here. I will focus, however, on the questions being asked rather than on their answers.

While Schor rightly takes existing scholarship to task for painting judicial review with too broad a brush, I suggest that conventional accounts give judicial review too much prominence. At times, the indomitable quest for a solution to the conceptual “problem” of judicial review across different legal systems may seek to resolve a non-existent problem. This emphasis on comparative judicial review reveals the dominant theme in comparative law, especially in comparative constitutional law: the tension between universalism and particularism. Schor’s article demonstrates how stressing judicial review overemphasizes its importance as a universal phenomenon in a manner somewhat similar to how our standard Mercator projection map centralizes and over-represents Europe and North America at the expense of other continents.¹³ I endeavour to demonstrate this argument by reflecting on a tale of two maps of my own.

I. A TALE OF TWO MAPS

A. THE FIRST MAP: THE MAPPARIUM

In Boston’s Back Bay neighbourhood, there is an incredible map room like no other. The “Mapparium” is located there, in the Mary Baker Eddy Library at the headquarters of the Christian Science Center Publishing Society.¹⁴ The

12. Rudolf B. Schlesinger *et al.*, *Comparative Law: Cases, Text, Materials*, 6th ed. (New York: Foundation Press, 1998) at 283.

13. See Mark S. Monmonier, *Rhumb Lines and Map Wars: A Social History of the Mercator Projection* (Chicago: University of Chicago Press, 2004).

14. Mary Baker Eddy was the founder of Christian Science as well as *The Christian Science Monitor* in 1908. See generally Willa Cather, *The Life of Mary Baker G. Eddy and the History of Christian Science* (Lincoln: University of Nebraska Press, 1993).

Mapparium is by no means a conventional map room (in the sense of a room that contains maps where one can go and spread them out on a table for examination). Rather, the Mapparium *is* a map; it is a room that consists of a single map—or, rather, a globe. This three-story room was built between 1934 and 1935, a time when the United States was in the midst of the turmoil of the Great Depression and Hitler was on the rise in Europe. Designed by Boston architect Chester Lindsay Churchill, the Mapparium was based on Rand McNally's 1934 map of the world. To the visitor, it appears that the globe has been turned inside out, with the map on the inside of the sphere. The visitor stands inside the globe—three stories of it—and is able to peer at locations in every direction. It is a full three hundred and sixty degree cartographical visual experience. While some thought was apparently given to updating the map from time to time,¹⁵ the futility and the expense of attempting to keep this particular map of the world current meant that the Mapparium became frozen in time.¹⁶

The visitor standing on the glass bridge of the observation deck, which traverses the room from one end to the other, is propelled back in time to 1934.¹⁷ Great Britain, her colonies, and her mandates are in imperial pink, and other “mother” countries also share a common colour with their colonies. The Mapparium alters one's perspective, viewing the world in three-dimensional terms from, as it were, the inside out. The oceans have different shades of blue to denote depth—a frequent map feature that was critical for sailors, not to mention divers. The Mapparium is a remarkable work of art, stimulating thought about history, geography, politics, and, perhaps, about comparative law as well.

15. By the time the Mapparium was nearing completion in 1935, the world had changed from that represented in Rand McNally's world map of 1934.

16. All references in this paragraph are based on a visit by the author to the Mapparium on 18 February 2007 and on the history of the Mapparium contained in its webpage. See The Mary Baker Eddy Library for the Betterment of Humanity, “History of the Mapparium” (2009), online: <<http://www.marybakereddylibrary.org/exhibits/mappariumhistory.jhtml>>. According to the website: “In 1939, 1958, and again in 1966, different committees discussed updating the map. In 1966, the estimated cost was \$175,000 to create and install new glass panels. It was decided that the Mapparium held much more value as an art object, and the idea of updating was finally dropped.”

17. The Mapparium is a three-dimensional encounter of experiencing maps as “a ‘window’ into times now passed.” Lez Smart, *Maps That Made History: The Influential, the Eccentric and the Sublime* (Toronto: Dundurn Press, 2004) at 14.

B. THE SECOND MAP: MR. FOSTER'S COLD WAR MAP

The second map fast-forwards five decades to the mid-1980s and my high school social studies class in Vancouver (*i.e.*, during the end of the Cold War). Our class was taught by a relatively young and hippyish Mr. Dave Foster, who was one of those rare teachers able to capture the attention of otherwise hormonally distracted fourteen-year-olds and succeed in inspiring a few of them.

Mr. Foster showed us a map of how Americans perceived the world at that time; it was a conceptual map more akin to the type we might use in comparative law. Not surprisingly, the size and centrality of the United States was hugely distorted. Eastern Europe and the Soviet Union were similarly inflated and described with the simple moniker “Commieland.” The Middle East was enlarged and labeled with the sole descriptor: “oil.” Africa and South America were shrunken, as was Canada, which was identified with the simple denotation of “cold.” Offering much of the same perspective, a similar map, entitled “The World According to Ronald Reagan,”¹⁸ is available on the internet. It divides the world into the “West (Us)” and the “East (Them).” Further, the United States is divided into four regions: a hugely disproportionate California, a tiny Northwest swath called “Ecotopia,” an oversized Northeast pocket called “Democrats and other welfare bums,” and a rump lying east of the Mississippi that is coloured in red and white stripes and labeled “Republicans and other Real Americans.” Great Britain (“Thatcherland”) is expanded beyond its normal size, and Europe (“socialists and pacifists”) lies in the red shadow of the Union of Soviet Socialist Republics (USSR), which is referred to as “Godless Communists, Liars and Spies.”¹⁹

Mr. Foster’s Cold War Map was a useful tool of engagement for the purpose of articulating who the Americans saw in the world and how the Americans per-

18. “The World According to Ronald Reagan,” online: <<http://strangemaps.wordpress.com/2006/11/23/38-the-world-according-to-ronald-reagan/>>; humor.beecy.net <<http://humor.beecy.net/misc/world/>>.

19. For example, in this map, Canada is grey and labelled “Acidrainia,” Mexico is simply “Mariachi Land,” and a tiny South America—or “Bananaland”—is about the same size as the Falkland Islands. The Middle East is divided into Israel and “Our Oil,” and Beirut is the only city in the region that is noted. Africa is shrunken. Asia is simply “Their China,” and appears to be roughly the same size as “Our China.” See *ibid.*

ceived these others.²⁰ It was a simplistic depiction of what international relations theorists would describe in more conceptual terms as a bi-polar international system, almost to a *reductio ad absurdum*. But in presenting the Cold War Map's view of a bi-polar world through the eyes of one superpower (we might imagine a similar exercise from the Soviet perspective), the map is also notable for what it omitted. The Cold War Map sees the United States at the centre of a world struggle, and, in dividing the world into "us" and "them," the perspectives of the "others" are literally diminished or excluded from the map altogether.

What is the connection between my two maps and Professor Schor's mapping of comparative judicial review? It is this: in our own conceptual mapping of judicial review, we tend to exaggerate the importance of the problem of the legitimacy of judicial review in constitutionalism. Like Mr. Foster's Cold War Map or "The World According to Ronald Reagan," we, as comparative constitutional scholars, tend to view the centrality of judicial review through the prism of the American experience. By universalizing "the problem" of judicial review from the American experience, we may be creating a false positive in some constitutional systems, while creating a false negative in others, and also missing other important features and elements in constitutional systems because of our collective fixation on judicial review.

II. FROM THE PARTICULAR TO THE UNIVERSAL OR AMERICAN EXCEPTIONALISM?

Comparative judicial review extrapolates the well-developed theoretical issues from the American context and applies them universally. A number of factors should cause us to question the extent to which the concerns raised in the American context have broader universal application. As a starting point, the burgeoning literature on American exceptionalism gives us reason to treat extrapolations from the American experience in judicial review with some degree of skepticism.²¹ In particular, we should begin by acknowledging the origins of

20. For a modern version of "The World According to Ronald Reagan," see the depiction of "The World According to Dubya," online: <<http://www.dailykos.com/story/2006/11/16/8490/2873>>.

21. On American exceptionalism, see *e.g.* Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005); Seymour Martin Lipset, *American Exceptionalism: A Double-edged Sword* (New York: W.W. Norton, 1997); Siobhan

judicial review in the United States, the centrality and persistence of the debate over its legitimacy, and the politicized nature of that debate.

Judicial review was born in the United States. The United States contributed a distinct conception of constitutionalism to the international community, consisting of judicially enforceable rights grounded in the power of judicial review.²² The text of the American Constitution, however, is silent on the issue, and it was not until 1803, in *Marbury v. Madison*,²³ that Chief Justice Marshall declared the existence of the power of judicial review. This power was not exercised for half a century, until the infamous *Dred Scott* decision.²⁴ As a result, it has been said that judicial review

McEvoy-Levy, *American Exceptionalism and US Foreign Policy: Public Diplomacy at the End of the Cold War* (New York: Palgrave, 2001); Deborah Madsen, *American Exceptionalism* (Jackson: University Press of Mississippi, 1998); Jack P. Greene, *The Intellectual Construction of America: Exceptionalism and Identity from 1492 to 1800* (Chapel Hill: University of North Carolina Press, 1993); and Harold Hongju Koh, "Foreword: On American Exceptionalism" (2003) 55 *Stan. L. Rev.* 1479.

22. See Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990) at x-xi, 65 ("The United States is commonly acknowledged to be a principal ancestor of the contemporary idea of rights" at 65). See also Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, MA: Belknap Press of Harvard University Press, 2005). On the American contribution of the Declaration of Independence to the global community, see David Armitage, *The Declaration of Independence: A Global History* (Cambridge, MA: Harvard University Press, 2007). On the American conception of rights, see Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Hunt, 2007) at 113-26, 214.
23. 5 U.S. (1 Cranch) 137 (1803).
24. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) [*Dred Scott*]. Many scholars characterize *Dred Scott* as "infamous" or "notorious." See e.g. Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999) at 8 [Tushnet, *Taking*] (calling *Dred Scott* "notorious"); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990) at 28 [Bork, *Tempting*] (calling *Dred Scott* "the worst constitutional decision of the nineteenth century" under the heading "Chief Justice Taney and *Dred Scott*: The Court Invites a Civil War"); Bruce Ackerman, *We the People*, vol. 1 (Cambridge, MA: Belknap Press of Harvard University Press, 1991) at 63, 64 (characterizing *Dred Scott* as "the single darkest stain upon the Court's checkered history" at 63, and calling *Dred Scott* "moral evil" at 64); Lawrence M. Friedman, *American Law* (New York: W.W. Norton, 1984) at 185 (calling *Dred Scott* "infamous" and stating that "[n]o decision in the Court's long history has been so thoroughly reviled, then and now"); Charles Fried, *Saying What the Law Is: The Constitution in the Supreme Court* (Cambridge, MA: Harvard University Press, 2004) at 172 (terming *Dred Scott* "notorious"); and John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980) at 16 (characterizing *Dred Scott* as "probably more notorious" than the decision of *Wynehamer v. The People of New York*, 13 N.Y. 378 (1856)).

in the United States was “born in sin.”²⁵ What is critical for comparative purposes is that judicial review originated with the Supreme Court, not with democratically elected representatives, and not within the text of the Constitution itself.

In the United States, the persistence of the debate over the legitimacy of judicial review is notable, as is the centrality of that debate. Former Stanford Dean of Law, Paul Brest, has rightly called “the controversy over the legitimacy of judicial review in a democratic polity ... the historic obsession of normative constitutional law scholarship” in the United States.²⁶ Since before and after Herbert Wechsler’s endeavour at articulating neutral principles,²⁷ American constitutional law scholars have embarked on a collective quest for a theory of interpretation to justify judicial review. They include formalists,²⁸ neo-formalists,²⁹ originalists,³⁰ textualists,³¹ process-theorists,³² moral theorists,³³

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25. Lino A. Graglia, “Constitutional Law Without the Constitution: The Supreme Court’s Remaking of America” in Robert H. Bork, ed., *A Country I Do Not Recognize: The Legal Assault on American Values* (Stanford: Hoover Institution Press, 2005) 1 at 8.
 26. Paul Brest, “The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship” (1981) 90 Yale L.J. 1063 at 1063. See also Roger P. Alford, “In Search of a Theory for Constitutional Comparativism” (2005) 52 UCLA L. Rev. 639 (claiming that “constitutional law scholars [are] obsessed with the latest nuance of a grand constitutional theory” at 644).
 27. Herbert Wechsler, “Toward Neutral Principles of Constitutional Law” (1959) 73 Harv. L. Rev. 1.
 28. See e.g. James B. Thayer, “The Origin and Scope of the American Doctrine of Constitutional Law” (1893) 7 Harv. L. Rev. 129.
 29. See e.g. Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge, MA: Harvard University Press, 2006).
 30. See e.g. Bork, *Tempting*, *supra* note 24; Antonin Scalia, “Originalism: The Lesser Evil” (1989) 57 U. Cinn. L. Rev. 849.
 31. See e.g. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law: An Essay* (Princeton: Princeton University Press, 1997).
 32. See e.g. Ely, *supra* note 24; Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (New York: Oxford University Press, 2001); and Frank Michelman, “Law’s Republic” (1988) 97 Yale L.J. 1493.
 33. See e.g. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977); Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985); Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Belknap Press of Harvard University Press, 1986); David A.J. Richards, *Toleration and the Constitution* (New York:

populists,³⁴ pragmatists,³⁵ judicial minimalists,³⁶ and many others.³⁷ There are also those who address the legitimacy of judicial review by calling for its abolition or its severe curtailment.³⁸

The American debate over the legitimacy of judicial review must be considered in its larger political context. American constitutionalism is deeply entrenched in American political culture as acceptance of the *idea* of the Constitution as a limit on the power of the state. In fact, constitutionalism in the United States is considered by some to be a form of secular religion.³⁹ The *exercise* of judicial review, however, as a component of constitutionalism—that is, the power of the judiciary to strike down legislation as inconsistent with the Constitution—is not similarly entrenched. To put the matter in starker terms, the constitutional debate over the ratification of the Constitution that led Publius to pen *The Federalist Papers* is now a matter of

Oxford University Press, 1986); and Michael J. Perry, *The Constitution in the Courts: Law or Politics?* (New York: Oxford University Press, 1994).

34. See e.g. Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Ackerman, *supra* note 24, vols. 1, 2; and Tushnet, *Taking*, *supra* note 24. See also Richard D. Parker, “Here, the People Rule”: *A Constitutional Populist Manifesto* (Cambridge, MA: Harvard University Press, 1994).
35. See e.g. Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge, MA: Harvard University Press, 2003); Richard A. Posner, “Pragmatic Adjudication” in Morris Dickstein, ed., *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* (Durham: Duke University Press, 1998) 235; and Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution* (New York: Alfred A. Knopf, 2005).
36. See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999).
37. Critical legal scholars have sought to undermine efforts to develop such a theory and some have argued for the abolition of judicial review. See e.g. Gerald E. Frug, “A Critical Theory of Law” (1989) 1 *Legal Educ. Rev.* 43; Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1986); Mark Tushnet, “Critical Legal Studies and Constitutional Law: An Essay in Deconstruction” (1984) 36 *Stan. L. Rev.* 623; and Tushnet, *Taking*, *supra* note 24.
38. See Tushnet, *Taking*, *ibid.* (calling for the abolition of judicial review); Graglia, *supra* note 25 at 52-53 (also calling for the abolition of judicial review); and Robert H. Bork, *Slouching Toward Gomorrah: Modern Liberalism and American Decline* (New York: Regan Books, 1996) at 117 [Bork, *Slouching*] (proposing a constitutional amendment that would make any federal or state court decision subject to being overruled by a majority vote in each House of Congress).
39. See e.g. Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988).

history. There are vibrant debates on the meaning and interpretation of the US Constitution, but not about the validity of the document itself. This is not the case with judicial review; its legitimacy continues to be questioned and debated.

The legitimacy of the judicial role was an issue that first confronted the framers of the US Constitution, and it continues to define American constitutionalism today. The problem of legitimacy arises because of the apparent conflict between the concept of judicial review and the principle of democratic accountability. In simple terms, the principle of democratic accountability holds that decisions relating to government policymaking, which inevitably require choosing between competing values, be made by persons who are accountable to the electorate.⁴⁰ A person may be either *directly* or *indirectly* accountable to the electorate. As explained by Michael Perry:

[A] person is accountable to the electorate *directly* if he holds elective office for a designated, temporary period and can remain in office beyond that period only by winning reelection; accountability is *indirect* if he holds appointive office and can remain in office only at the discretion of his appointer (who in turn is electorally accountable) or, if his office is for a designated, temporary period, by securing reappointment after that period has expired.⁴¹

Elected representatives, therefore, are directly accountable, and many of their officials are indirectly accountable. A life-tenured judiciary, however, is neither. Given the principle of democratic accountability, the question must therefore arise about the legitimacy of judicial review.⁴² That quest for justification, which has been the defining feature of American constitutional thought in the twentieth century, was set off by Alexander Bickel's characterization of judi-

40. Michael J. Perry, *The Constitution, the Courts and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (New Haven: Yale University Press, 1982) at 9.

We in the United States are philosophically committed to the political principle that government policymaking—by which I mean simply decisions as to which values among competing values shall prevail, and as to how those values shall be implemented—ought to be subject to control by persons accountable to the electorate. [footnotes omitted]

41. *Ibid.* [emphasis in original; footnotes omitted].

42. See *ibid.* For a leading article of this genre, see Eugene V. Rostow, "The Democratic Character of Judicial Review" (1952) 66 Harv. L. Rev. 193.

cial review as a “deviant institution”⁴³ in American democracy and his definition of the problem in terms of the “counter-majoritarian difficulty.”⁴⁴ To this effect, Cappelletti referred to the “Mighty Problem” of judicial review.⁴⁵ I refer to this debate around judicial review’s legitimacy simply as “the Question of Legitimacy” in comparative constitutionalism.

The Question of Legitimacy in the United States is notable for its centrality, its intensity, and its endurance. It is a dominating issue jurisprudentially, academically, and politically. In this sense, the Question of Legitimacy continues to be more of a concern in the United States than in many other countries that have explicitly adopted what might be termed “American-style judicial review.” It has been sustained and, perhaps, elevated by the politicized nature of the appointment process of US Supreme Court justices. Although there is a political element to the judicial appointment process in all countries,⁴⁶ what distinguishes the American judicial appointment process is the extent to which it is caught up in partisan politics. American judicial nominees are part of American political theatre and are used as pawns in political inter-party and sometimes intra-party political warfare. The effect has been to sustain and nurture the debate over the Question of Legitimacy in the political sphere, and this ensures a continuing market for academic writings on the issue.

The Question of Legitimacy should properly be considered an aspect of American exceptionalism, as part of the growing discourse on the uniqueness of the United States in international relations, human rights, and political theory.⁴⁷ While discussing his decision to exclude the United States from a book entitled *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Philip Alston explained that:

43. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962) at 16.

44. *Ibid.* at 18.

45. See Mauro Cappelletti, “The ‘Mighty Problem’ of Judicial Review and the Contribution of Comparative Analysis” (1980) 53 S. Cal. L. Rev. 409.

46. See e.g. Kate Malleson & Peter H. Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006).

47. See sources cited, *supra* note 21.

The American Bill of Rights is, in many ways, *sui generis*. Because it is in a class of its own, experience under it offers fewer insights and less guidance than is usually assumed to those who are curious about the viability or optimal shape of bills of rights elsewhere in the world.⁴⁸

As I argue below, the Question of Legitimacy in the United States is also *sui generis*. It has taken on a very different tenor in other legal systems.

III. THREE ALTERNATE ACCOUNTS OF JUDICIAL REVIEW AND THE QUESTION OF LEGITIMACY

In this section, I describe judicial review in Canada, Israel, and South Africa. In each case, judicial review operates within the rubric of a common law system that is very much cognizant of the American model of judicial review. I argue, however, that the nature of judicial review in these three countries differs significantly from that in the United States, and that the Question of Legitimacy has taken on a very different character in each of them.

With these countries, I examine judicial review on three continents (while a representative from Europe is noticeably absent⁴⁹). This review is by no means intended to be exhaustive, but rather informative of the nature of the debate on judicial review outside the United States. Thus, the experiences of these three countries, taken together, provide a cautionary tale about universalizing judicial review from the American experience. In each example, we can identify differences of history and context, constitutional structure, and legal culture that reduce the centrality of the Question of Legitimacy in comparison to the United States.

A. CANADA NOTWITHSTANDING

We might expect the characteristics of judicial review in Canada to most resemble the United States because of the geographic proximity of the countries, shared cultural and language bonds, and strong commonalities between the legal systems. Further, many Canadian lawyers, judges, public servants, and public policy makers

48. Philip Alston, "A Framework for the Comparative Analysis of Bills of Rights" in Philip Alston, ed., *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1999) 1 at 6.

49. On judicial review in Europe, see *e.g.* Cappelletti, *supra* note 45; Alec Stone Sweet, "Why Europe Rejected American Judicial Review – And Why It May Not Matter" (2003) 101 *Mich. L. Rev.* 2744.

have done graduate work in the United States. However, the Canadian narrative and debate over the Question of Legitimacy differ significantly from the US experience.

To begin, historical differences between Canada and the United States are critical. Canadians never declared their independence from Great Britain, but rather came together to form a union under the continued aegis of the mother country, expressly seeking a constitution “similar in principle” to it.⁵⁰ Canada’s original Constitution—the *British North America Act, 1867*⁵¹—largely set out the federal structure of the new dominion and contained few express rights. While it is arguable that the federal government, and not the courts, was envisioned as the arbiter of the boundaries of federal-provincial powers, the courts soon took on this role.⁵² In Canada’s first century, therefore, judicial review was about federalism.⁵³ Until the enactment of a constitutionally entrenched bill of rights in 1982, the dominant theme in constitutional debates over judicial review focused on the proper scope of power to be given to the federal and provincial governments.⁵⁴

In 1960, Canada adopted a statutory bill of rights.⁵⁵ Its impact, however, was limited: it applied only to the federal government and not to the provinces,

50. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, Preamble, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*].

51. This was re-enacted and renamed the *Constitution Act, 1867*, *ibid.*

52. In the years following Confederation, the provincial courts and the Privy Council assumed the power to review the validity of legislation that had been enacted by the provincial legislatures and the federal Parliament. This was done in order to ensure compliance of the legislation with the *B.N.A. Act*. See Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough: Thomson Carswell, 2007), s. 5.5(a) at 5-24.

53. Schor acknowledges that judicial review first developed in federal systems—*i.e.*, the United States—because of the need to arbitrate between federal and state (or provincial) powers. See Schor, *supra* note 9 at 262:

Judicial review was designed to knit the nation together by counterbalancing the pressures exerted by federalism. The framers understood that the national government needed a mechanism that would bind the states to the Constitution. The Supreme Court and the Supremacy Clause were intended to prevent centrifugal forces from tearing the new nation apart... The American experience suggests an affinity between judicial review and federalism.

54. See *e.g.* Frank R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977); Robert MacGregor Dawson, ed., *Constitutional Issues in Canada, 1900-1931* (London: Oxford University Press, 1933).

55. *Canadian Bill of Rights*, S.C. 1960, c. 44.

and it was given a very narrow interpretation by the courts.⁵⁶ Only once in two-and-a-half decades did the Supreme Court of Canada exercise the power of judicial review to strike down legislation that it found to be inconsistent with the Canadian Bill of Rights.⁵⁷ The failure of the Supreme Court of Canada to exercise judicial review under the Bill of Rights, as well as the lack of hesitation of the Warren Court to do so south of the border, provided an important backdrop for Canada's enactment of a constitutional bill of rights—the *Canadian Charter of Rights and Freedoms*⁵⁸—in 1982. To this effect, “Canada’s adoption of the *Charter* ... was a conscious decision to increase the scope of judicial review.”⁵⁹

Key structural characteristics differentiate the Canadian Constitution from its American counterpart on the Question of Legitimacy. In a critical distinction from the American Constitution, which is silent on the question, Canada’s *Constitution Act, 1982*⁶⁰ expressly bestowed upon the courts the power of judicial review. Section 52(1) of that act provides that: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”⁶¹ Further, section 24(1) of the *Charter* provides that “[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”⁶² This express textual authorization for judicial review in the Canadian Constitution significantly distinguishes it from American constitutionalism, and, on its own, it could also be seen to largely resolve the question of the legitimacy of judicial review under

56. See generally Walter Surma Tarnopolsky, *The Canadian Bill of Rights*, 2d ed. (Toronto: McClelland & Stewart, 1975); Hogg, *supra* note 52, s. 35.5 at 35-10, 35-12.

57. See *R. v. Drybones*, [1970] S.C.R. 282.

58. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].

59. Hogg, *supra* note 52, s. 5.5(b) at 5-30.

60. *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*].

61. *Ibid.*, s. 52(1). See Hogg, *supra* note 52, s. 5.5(a) at 5-25 (“Section 52(1) is the current basis of judicial review in Canada”), s. 40.1(b) at 40-2 (“s. 52(1) provides an explicit basis for judicial review of legislation in Canada”).

62. *Charter*, *supra* note 58, s. 24(1).

Canada's Constitution. In the words of Canada's leading constitutional law scholar: "much of the American debate over the legitimacy of judicial review is rendered irrelevant."⁶³ However, Canadian attempts to address this issue do not end here.

When a judicially-enforced bill of rights was being debated in Canada between 1979 and 1981, the American experience with judicial review and the counter-majoritarian dilemma were very much front and centre in the discussion. Opponents of what might be termed "American-style judicial review" feared giving courts, through the process of constitutional interpretation, the final say—always—in the determination of important public policy issues. Their opposition to a constitutional bill of rights was tempered by the federal government's agreement to insert into the *Charter* a "notwithstanding clause" that would allow provincial legislatures (as well as the federal Parliament) to "override" certain provisions of the *Charter* (and thereby immunize legislation from judicial review) for a limited period of time.⁶⁴ The attraction found adherents among provincial premiers—at opposite ends of the political spectrum—who generally opposed constitutional entrenchment of a bill of rights.⁶⁵

Because the notwithstanding clause gives the popular representatives of the people the final say in constitutional matters, its existence is seen by many to conclusively resolve any apparent counter-majoritarian difficulty in the Canadian context.⁶⁶ It means that courts do not have a conclusive veto over legislatures. As Peter Hogg explains, if an equivalent to Canada's notwithstanding clause existed under the US Constitution, Roosevelt would likely have used it during the New Deal in response to the *Lochner*-era decisions, thus averting his court-packing plan.⁶⁷ The conceptual success of Canada's notwithstanding

63. Hogg, *supra* note 52, s. 39.8 at 39-12. See also Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Don Mills: Oxford University Press, 2001) at 11-12 ("[T]he basic legitimacy of judicial review has been less controversial in Canada for both historical and structural reasons").

64. See *Charter*, *supra* note 58, s. 33.

65. See generally Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 56-59.

66. See *e.g.* Manfredi, *supra* note 63 at 188-95 (arguing that the notwithstanding mechanism promotes democratic legitimacy); Janet Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002).

67. Hogg, *supra* note 52, s. 36.4(d), n. 44 at 36-12 (also noting that some decisions of the Warren Court would have likely been overridden by the government of the day).

mechanism as a response to the Question of Legitimacy, by providing a possible “third way” between parliamentary supremacy and judicial supremacy, is perhaps demonstrated by the support that it has found among some of the strongest critics of judicial review in the United States.⁶⁸

While the notwithstanding clause may address the Question of Legitimacy in theory, it has, however, become politically illegitimate in practice,⁶⁹ and has not been used since the late 1980s.⁷⁰ That is to say, most of the experience under the *Charter* has been without the operation of the notwithstanding clause. As a consequence, the debate around judicial review has moved to one about judicial activism and the proper relationship between the courts and the legislature. This

68. See Bork, *Slouching*, *supra* note 38 at 117 (proposing a constitutional amendment that would make any federal or state court decision subject to overrule by a majority vote in each House of Congress). On Bork’s wavering about the idea of a legislative override, see Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Toronto: Vintage Canada, 2002) at 76-78. See also Mark R. Levin, *Men in Black: How the Supreme Court is Destroying America* (Washington: Regnery, 2005) at 202 (proposing a legislative veto over court decisions through a two-thirds vote of both Houses of Congress).

69. The notwithstanding clause soon became caught up in the longest-standing Canadian political dispute—between English and French Canada—when it was invoked by the government of Quebec in response to a Supreme Court decision that held as unconstitutional certain prohibitions on the use of languages other than French. See *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712. For a time, the Quebec legislature included the notwithstanding clause in every piece of legislation that it passed as a sign of protest against the exclusion of Quebec from the 1982 constitutional deal. As a result, the notwithstanding clause, which could have given a very different character to judicial review in Canada, quickly became the *bête noire* of Canadian constitutional politics. The literature on the notwithstanding clause is vast. See Hogg, *supra* note 52, s. 39.1, n.1 at 39-1 (providing a list of articles on this topic). On the rise and decline of the notwithstanding clause, see Manfredi, *supra* note 63 at 181-88.

70. It is arguable that a constitutional convention has developed or is developing against the use of the notwithstanding clause. In the 2006 federal election, Prime Minister Paul Martin promised that if his government were to be re-elected, it would introduce legislation that would prohibit the federal government from using the notwithstanding clause. See “Martin Wraps Campaign in Constitutional Pledge,” *CBC News* (10 January 2006), online: <<http://www.cbc.ca/story/canadavotes2006/national/2006/01/09/elxn-debates-look.html>>. See also Paul Wells, *Right Side Up: The Fall of Paul Martin and the Rise of Stephen Harper’s New Conservatism* (Toronto: Douglas Gibson, 2006) at 220-22. Professor Allan Hutchinson suggested to me that the lapse of time in the use of the notwithstanding clause may suffice to qualify it for desuetude along the lines of the long-lapsed constitutional powers of disallowance and reservation. For a comparable analysis on the constitutional power of disallowance, which has not been invoked since 1943, see Hogg, *ibid.*, s. 5.3(e) at 5-19.

shift has spawned a vast literature on the subject, focusing most prominently since the late 1990s on the concept of “dialogue” between the courts and the legislatures.⁷¹

Canadian constitutional scholarship since 1982 reflects a sustained critique of the effect of the *Charter*. The critics come from both the left⁷² and the right⁷³ sides of the political spectrum, and their criticisms focus, either explicitly or implicitly, on the constitutionalization of rights. Scholars and “commentators often exaggerate the political impact of judicial review”⁷⁴ in this process. The Canadian debate is not about the legitimacy of judicial review *per se*, but about its proper scope and the role of the courts. In contrast to American constitutional scholarship, Canadian attempts at grand theoretical justification for

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71. See Peter W. Hogg & Allison A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall L.J. 75. Hogg & Bushell’s dialogue theory spurred a cottage industry of commentary. See F.L. Morton, “Dialogue or Monologue?” (April 1999) *Policy Options* 23; Janet L. Hiebert, “Why Must a Bill of Rights be a Contest of Political and Judicial Wills?” (1999) 10 Public L. Rev. 22; Christopher P. Manfredi & James B. Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell” (1999) 37 Osgoode Hall L.J. 513; Peter W. Hogg & Allison A. Thornton-Bushell, “Reply to ‘Six Degrees of Dialogue’” (1999) 37 Osgoode Hall L.J. 529. To commemorate the 10th anniversary of the Hogg & Bushell article, the Osgoode Hall Law Journal published a special issue on “*Charter* Dialogue: Ten Years Later.” For the opening article, see Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, “*Charter* Dialogue Revisited—Or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall L.J. 1. This issue also includes commentaries by Richard Haigh & Michael Sobkin, Grant Huscroft, Christopher Manfredi, Carissima Mathen, Andrew Petter, and Kent Roach, and a reply from Hogg, Bushell & Wright. The Supreme Court of Canada has embraced the concept of dialogue. See *e.g.* *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 137-39, 178; *M. v. H.*, [1999] 2 S.C.R. 3 at para. 328; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 116; *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 20, 57, 125; *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at para. 268; *Bell ExpressVu v. Rex*, [2002] 2 S.C.R. 559 at paras. 65-66; and *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 at para. 37.
72. See *e.g.* Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thomson Educational, 1994); Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); and Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).
73. See *e.g.* F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).
74. Hogg, *supra* note 52, s. 36.4(b) at 36-9. See also Peter W. Hogg, “The *Charter* Revolution: Is it Undemocratic?” (2001) 12 Const. F. 1; Robin Elliot, “The *Charter* Revolution and the Court Party’: Sound Critical Analysis or Blinkered Political Polemic?” (2002) 35 U.B.C. L. Rev. 271.

judicial review are exceedingly rare.⁷⁵ For the *Charter's* first fifteen years, the debate was largely between a small cadre of scholars on the left—who viewed the courts as, essentially, conservative power structures that are unlikely to foster progressive social change—and a similarly small group of critics on the right, who continued to fight for deference to the parliamentary supremacy that had been abandoned as a conscious policy choice with the adoption of the *Charter*. The large majority of constitutional scholars supported the *Charter* project. Since the late 1990s, the debate has changed somewhat, focusing on “judicial activism” (and what that means) and whether or not Canadian courts are activist.⁷⁶ The original *Charter* critics have remained, adapting their stances somewhat. A growing number of *Charter* supporters, however, have lamented the courts’ failure to exercise judicial review more aggressively and more frequently.

In sum, the debate in Canada has not been over the threshold question of the democratic legitimacy of judicial review, but rather over its appropriate scope and boundaries. Moreover, this debate has largely been confined to legal and academic circles, and it only infrequently enters the public forum in the manner that it does in the United States. Professor Hogg has explained that:

The controversy about the political role of the [Supreme Court of Canada] has mainly taken place in academic journals, books and conferences. The *public* controversy about the role of the highest court that has become the standard fare of politics in the United States is muted and sporadic in Canada. It is not clear whether this is because Canadians are more respectful of their Court, or because they are less disturbed by the anti-majoritarian outcomes. It may be a bit of both.⁷⁷

75. For one such early account, see Patrick Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada* (Agincourt: Carswell, 1987). See also David M. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995); David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

76. For a symposium on this matter, see *Policy Options* (April 1999) at 3-4, 8-37 (the issue is entitled “Are Judges Too Powerful?”). See *e.g.* William Watson, “From the Editor’s Desktop: Who’s Got the Power?” (April 1999) *Policy Options* 3; Bertha Wilson, “We Didn’t Volunteer” (April 1999) *Policy Options* 8; Peter H. Russell, “Reform’s judicial agenda” (April 1999) *Policy Options* 12; Peter W. Hogg & Allison A. Thornton, “The Charter Dialogue Between Courts and Legislatures” (April 1999) *Policy Options* 19; Morton, *supra* note 71; Lorraine Eisenstat Weinrib, “The Activist Constitution” (April 1999) *Policy Options* 27; Rainer Knopff, “Courts Don’t Make Good Compromises” (April 1999) *Policy Options* 31; and Sébastien Lebel-Grenier, “La charte et la légitimation de l’activisme judiciaire” (April 1999) *Policy Options* 35.

77. Hogg, *supra* note 52, s. 36.4(b) at 36-9 [emphasis in original].

The legitimacy of judicial review under the *Charter* is generally accepted in Canada and Canadians are not particularly interested in debating the subject, one way or the other.⁷⁸

B. SOUTH AFRICA'S CONSCIOUS EMBRACE OF RIGHTS

In South Africa, the Question of Legitimacy is even more muted than in Canada. Under apartheid, judicial review was almost non-existent.⁷⁹ Anti-apartheid activists and legal scholars generally expressed frustration or indictment with the general failure of the judiciary to protect the rights and freedoms of apartheid's victims.⁸⁰ The South African debate over the legitimacy of judicial review is largely a historical one. Attempts by the white liberal opposition during the apartheid years to enact a bill of rights with judicial review failed. The apartheid government used the bogeyman of *Lochner* as part of its justification for opposing judicial review. Initially, the African National Congress (ANC) opposed judicial review, preferring instead to rely on the principle of unfettered majoritarianism. However, as the anti-apartheid struggle increasingly became embedded in the international human rights movement, the ANC embraced the enactment of a constitutional bill of rights enforced through the exercise of judicial review. By the time of the constitutional negotiations of the early 1990s, as Schor recognizes, both black and white South Africans supported the establishment of judicial review and the constitutionalization of rights—although for different reasons. For Black South Africans—represented to the

78. The attempt by Prime Minister Martin to inject a debate over the use of the notwithstanding clause into the 2006 Canadian election was largely considered an act of political desperation and not a subject in which the public was particularly interested. See Wells, *supra* note 70 at 221-22 (stating that Prime Minister Martin “had reached out to an incredibly narrow target demographic,” and the proposal “excited almost no Canadian”).

79. The only exercise of judicial review occurred in the 1950s in a constitutional crisis over entrenched provisions of the *South Africa Act, 1909*, which functioned as South Africa's Constitution between 1910 and 1960. On these events, see generally John Dugard, “Toward Racial Justice in South Africa” in Louis Henkin & Albert J. Rosenthal, eds., *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1990) 349 at 357-62; Henry John May, *The South African Constitution*, 3d ed. (Westport: Greenwood Press, 1955) at 50-56; and T.R.H. Davenport, *South Africa: A Modern History*, 4th ed. (Toronto: University of Toronto Press, 1991) at 329-43.

80. See *e.g.* John Dugard, *Human Rights and the South African Legal Order* (Princeton: Princeton University Press, 1978); David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998).

largest degree by the ANC—a constitutional bill of rights anchored in the power of judicial review became almost an article of faith. White South Africans became quick converts to a constitutional bill of rights backed by judicial review as a means to protect their minority rights and *de facto* privileges.⁸¹

The structure of the South African Constitution also severely diminishes the Question of Legitimacy. The interim Constitution that governed the transition from apartheid to democracy explicitly provided, in the clearest of language, for the establishment of a Constitutional Court that would have the power to declare legislation invalid to the extent of its inconsistency with the Constitution;⁸² further, it made any such declaration binding on all executive, legislative, and judicial organs of the state.⁸³ This interim Constitution also contained a supremacy clause that declared the Constitution to be “the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.”⁸⁴ Similar provisions were carried over into the final Constitution that now operates in South Africa.⁸⁵

While the Canadian *Charter* exerted significant influence on the drafting of the South African Bill of Rights,⁸⁶ the framers of South Africa’s Constitution chose not to adopt a notwithstanding clause. Given the rarity of such provisions in constitutions around the world, as well as the apartheid-era concern (of the

81. See African National Congress, *Constitutional Guidelines for a Democratic South Africa* (1988), reprinted as Appendix B in Albie Sachs, “Towards a Bill of Rights for a Democratic South Africa” (1989) 12 *Hastings Int’l & Comp. L. Rev.* 289 at 322-24; Albie Sachs, *Protecting Human Rights in a New South Africa* (Cape Town: Oxford University Press, 1990).

82. See *Constitution of the Republic of South Africa*, No. 200 of 1993, s. 98(5), (3) [interim *Constitution*].

83. *Ibid.*, s. 98(4).

84. *Ibid.*, s. 4.

85. See *Constitution of the Republic of South Africa*, No. 108 of 1996, ss. 1 (the founding values), 2 (the supremacy of the Constitution), 167 (the jurisdiction and powers of the Constitutional Court) [*Constitution*].

86. See D.M. Davis, “Constitutional Borrowing: The Influence of Legal Culture and Local History on the Reconstitution of Comparative Influence: The South African Experience” (2003) 1 *Int’l J. Const. L.* 181 at 186-87, 191; Jeremy Sarkin, “The Effect of Constitutional Borrowings on the Drafting of South Africa’s Bill of Rights and Interpretation of Human Rights Provisions” (1998) 1 *U. Pa. J. Const. L.* 176 at 181, 196, n. 154. See generally Adam M. Dodek, “The Protea and the Maple Leaf: The Impact of the *Charter* on South African Constitutionalism” (2004) 17 *N.J.C.L.* 353.

white elite) that unbridled parliamentary supremacy would fail to protect the rights and freedoms of unpopular groups, this omission is unsurprising. However, considering the ability of the South African Parliament to amend most of the Constitution with a two-thirds vote⁸⁷—a figure that the ANC has either obtained or very nearly obtained in the four elections since 1994⁸⁸—no notwithstanding mechanism has been required to keep the legislature in the constitutional conversation; the ANC government has often been in a position to obtain the requisite voting weight to amend the Constitution.⁸⁹ Moreover, because of this relative ease with which the South African Parliament may

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87. See *Constitution*, *supra* note 85, s. 74(2), (3) (providing that most provisions of the *Constitution* can be amended by a two-thirds vote of the National Assembly and the support of at least six (of nine) provinces). Furthermore, s. 74(1) requires that provisions to amend the founding provisions of the Constitution (c. 1) and the amendment provision itself, require a support level of at least 75 per cent.
88. In the 1994 election, the ANC alone received 252 of 400 seats (63 per cent). An additional 16 votes were required to reach the threshold of two-thirds that was necessary for amendment of the Constitution (*i.e.*, 268 of 400 seats). This could have been achieved with the addition of either partner in the Government of National Unity: the National Party (82 seats) or the Inkatha Freedom Party (43 seats). See Independent Electoral Commission of South Africa, “Results of Past Elections: Elections ‘94,” online: <<http://www.elections.org.za/Elections94.asp>>. In 1999, the ANC received 66.35 per cent of the national vote, just short of the two-thirds required to amend the Constitution on its own. See Independent Electoral Commission of South Africa, “National Elections ‘99: National Results,” online: <<http://www.elections.org.za/results/natperparty.asp>>. In 2004, however, the ANC did obtain the two-thirds necessary to amend the Constitution without the support of any other parties when it received 69.69 per cent of the vote. See Independent Electoral Commission of South Africa, “National & Provincial Elections 2004: Election Results,” online: <http://www.elections.org.za/Elections2004_Static.asp?radResult=45>. In the April 2009 elections, the ANC received 65.9 per cent of the national vote, which, although down from 2004 and 1999, remained up from the first elections in 1994. This translated into 264 of 400 seats in the National Assembly. See Independent Electoral Commission of South Africa, “Seat Reports: Seat Calculation Report,” online: <<http://www.elections.org.za/NPEPStaticReports/reports/ReportParameters.aspx?catid=9>>.
89. The leading text on South African constitutional law states: “despite its considerable majorities in the national legislature, the ANC has not, as yet, used its legislative power to enact major changes to the negotiated peace settlement reflected in our Interim Constitution and our Final Constitution.” Stu Woolman & Jonathan Swanepoel, “Constitutional History” in Stuart Woolman, Theunis Roux & Michael Bishop, eds., *Constitutional Law of South Africa*, 2d ed. (Cape Town: Juta, 2008) 2.1 at 2.46-2.47.

currently amend the Constitution,⁹⁰ the problem of the legitimacy of judicial review is far less acute in South Africa than in the United States.

President Mandela put to rest any lingering doubts about the legitimacy of judicial review when the Constitutional Court, in one of its first judgments, held that the death penalty was unconstitutional under South Africa's new Constitution.⁹¹ The decision was divisive, and Deputy President F.W. de Klerk, expressing the wide support for the death penalty among the country's white population, denounced the Constitutional Court's decision and called for a national referendum on the subject. President Mandela responded in a characteristically shrewd yet sage fashion. Speaking directly to de Klerk and the country's population in a televised address, Mandela stated that he had no problem with a referendum on the death penalty so long as another question was added to the ballot: whether the white population should return all the land that had been taken from indigenous Africans. This response effectively quelled any talk of referenda to overturn unpopular court decisions. Mandela's message was clear: we live in a constitutional democracy now, where the Constitutional Court exercises the power of judicial review—and we accept the legitimacy and the validity of the court's decisions.⁹²

In its judgments, the Constitutional Court of South Africa has exercised the power of judicial review cautiously, with a distinct appreciation of the enormity of the challenges that are faced by the executive and the legislature in South Africa. A case in point is the *TAC* case,⁹³ where the Constitutional Court ordered the

90. As of July 2009, the South African Constitution has been amended on sixteen occasions. See Republic of South Africa, Government Communication and Information System (Department), "Amendments to the Constitution," online: <<http://www.info.gov.za/view/DynamicAction?pageid=612>>. Three of the amendments were enacted in 2009. For a review and analysis of the prior thirteen amendments, see *ibid.* at 2.46-2.47.

91. See *State v. Makwanyane and Mchunu*, [1995] 6 B. Const. L.R. 665 (S. Afr. Const. Ct.).

92. This episode is related by Ronald Dworkin in Robert Badinter & Stephen Breyer, eds., *Judges in Contemporary Democracy: An International Conversation* (New York: New York University Press, 2004) at 34-35. See also Jonny Steinberg, "Judges Shrug in Bemusement" in *Notes from a Fractured Country* (Johannesburg & Cape Town: Jonathan Ball, 2007) 247 at 247 (noting that the Constitutional Court struck down legislation in 2003 that disenfranchised prisoners; Steinberg also relates that "President Thabo Mbeki said he did not think it right that all prisoners vote, but that the court's decision must be respected").

93. *Minister of Health and others v. Treatment Action Campaign and others*, [2002] 10 B. Const. L.R. 1033 (S. Afr. Const. Ct.).

government to provide anti-HIV drugs to pregnant women, but refused the request to grant a structural order that would have maintained court supervision over the development and implementation of government health policy in this area. To some, the Court's deference to the ANC government has rendered its performance a source of disappointment.⁹⁴ To others, this simply reflects the recognition that the courts have a limited ability to effect significant social change. Still others see the Court as out of touch with the country's high crime rate.

In sum, South Africa consciously adopted judicial review under its Constitution and created a new Constitutional Court entirely dedicated to this responsibility. Judicial review operates in a completely different context in South Africa than in the United States.

C. ISRAEL: JUDICIAL REVIEW WITHOUT A CONSTITUTION

Israel's constitutional status has long been anomalous, and it is deserving of its own colour on any constitutional map. Israel's constitutional history has been marked by continued debate over whether to adopt a formal written constitution. A constitution is a means both of expressing universalist and particularist values, while accommodating tensions between them. Israel, however, has never been able to reach the necessary level of consensus on how to accommodate these

94. There has been significant criticism of the Constitutional Court's social and economic rights jurisprudence. See *e.g.* Marius Pieterse, "Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services" (2006) 22 S.A.J.H.R. 473; David Bilchitz, "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence" (2003) 19 S.A.J.H.R.1 at 8-10; D. Brand, "The Proceduralisation of South African Socio-economic Rights Jurisprudence, or 'What are Socio-economic Rights For?'" in Henk Botha *et al.*, eds., *Rights and Democracy in a Transformative Constitution* (Stellenbosch: Sun Press, 2003) 33; F. Coomans, "Reviewing Implementation of Social and Economic Rights: An Assessment of the Reasonableness Test as Developed by the South African Constitutional Court" (2005) 65 Heidelberg J. Int'l L. 167; Sandra Liebenberg, "South Africa's Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?" (2002) 6 L. Dem. & Dev. J. 159; and Marius Pieterse, "Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience" (2004) 26 Hum. Rts. Q. 882. For other, more general criticisms about the deference of the Constitutional Court to the executive, see David Dyzenhaus, "The Past and Future of the Rule of Law in South Africa" (2007) 124 S.A.L.J. 734; Dennis Davis & Michelle le Roux, *Precedent and Possibility: The (Ab)use of Law in South Africa* (Cape Town: Double Storey Books, 2009) 117.

competing values.⁹⁵ Israel's constitutional history, its political and legal culture, and its constitutional structure have created an environment in which the Question of Legitimacy operates quite differently than it does in the United States.

Israel is atypical in that judicial review preceded the recognition of a constitution. Consequently, the dominant issue in Israel has been the constitutional one, and judicial review has been a second-order issue. Since the early to mid 1990s, the defining issue in Israeli constitutional politics has been—and continues to be—judicial activism, with judicial review being but one of several issues that fall under this rubric.

After achieving independence in 1948, Israel deferred the adoption of a formal constitution, electing to build its constitution chapter by chapter through a series of "Basic Laws." For the next five decades, scholars focused on questions such as "what was the status of the Basic Laws?" "What was the authority of Israel's Parliament to enact constitutional legislation?" "Did the Supreme Court have the power of judicial review?"⁹⁶ During this time, in the absence of a formal bill of rights and judicial review over legislation, Israel's Su-

95. But see Michael Mandel, "Democracy and the New Constitutionalism in Israel" (1999) 33 *Isr. L.R.* 259 at 274 [Mandel, "Democracy"] (arguing that the failure to adopt a constitution in Israel was attributable to "the hegemony of labour at the helm of a strong state and the relative weakness of capital").

96. See George M. Gross, "The Constitutional Question in Israel" in Daniel J. Elazar, ed., *Constitutionalism: The Israeli and American Experiences* (Lanham: University Press of America, 1990) 51 at 70. On these questions, see Amnon Rubinstein, "Israel's Piecemeal Constitution" (1966) 16 *Scripta Hierosolymintana* 201; Claude Klein, "A New Era in Israel's Constitutional Law" (1971) 6 *Isr. L. Rev.* 376. On the issue of judicial review, see Melville B. Nimmer, "The Uses of Judicial Review in Israel's Quest for a Constitution" (1970) 70 *Colum. L. Rev.* 1217; Eliahu Likhovski, "The Courts and the Legislative Supremacy of the Knesset" (1968) 3 *Isr. L. Rev.* 345; and Aharon A. Bergman, "The Supremacy of the Knesset: Further Comment on the Election Finance Law Case" (1971) 6 *Isr. L.R.* 117. See also Eliahu S. Likhovski, *Israel's Parliament: The Law of the Knesset* (Oxford: Clarendon Press, 1971) at 73-103. In this work, Likhovski also addresses the Knesset's authority to enact constitutional legislation (at 216-23). On this matter, see also Ruth Gavison, "The Controversy Over Israel's Bill of Rights" (1985) 15 *Isr. Y.B. H.R.* 113. These issues were considered by the Supreme Court in the *Gal Law* decision, *infra* note 98. Whether they were resolved, however, is another matter. Because a determination of these issues was not necessary to the resolution of the case, the Court's 519-page examination may be the longest example of *obiter dicta* in history.

preme Court developed a “judicial bill of rights.”⁹⁷ The Supreme Court thus exercised judicial review without a constitution, under certain “entrenched” provisions of several Basic Laws. The recognition of judicial review under a constitutional document, however, did not take root until 1995.

In a 1995 decision,⁹⁸ the Supreme Court declared that Israel had a constitution, that this constitution was largely contained in Israel’s Basic Laws, and that the Supreme Court had the power of judicial review over legislation—and could therefore strike down laws that were inconsistent with a Basic Law.⁹⁹ Having thus assumed the power of judicial review, the Supreme Court of Israel, as of October 2007, has only exercised it to strike down legislation on six occasions since 1995. This response is not for want of opportunity, however, as the Supreme Court of Israel hears thousands of cases each year.¹⁰⁰ Judicial review in Israel is always controversial, but that is more a consequence of its rarity than of its frequency.

97. Gary L. Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton: Princeton University Press, 1993) at 11-12.

98. See *United Mizrahi Bank plc v. Migdal Cooperative Village* (1995) 49 (iv) P.D. 221 [*Gal Law* case] in Omi, ed., “Cases: Leading Decisions of the Supreme Court of Israel and Extracts of the Judgment” (1997) 31 Isr. L.R. 754 at 764-802 (includes a partial English translation and an editorial commentary). For a complete English translation of the case, see *United Mizrahi Bank Ltd., et al. v. Migdal Cooperative Village*, CA 6821/93, [1995] Isr. L.R., online: Judgments of the Israel Supreme Court <http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf>.

99. *Ibid.*

100. In 2005, over 12,000 petitions were filed with the Supreme Court. See Judicial Authority, *Annual Report 2005* (Jerusalem: 2006) at 11 (in Hebrew), online: <<http://elyon1.court.gov.il/heb/info/DochRashut2005.pdf>>. The numbers of cases heard by the high courts of the other countries that are discussed in this article are typically in the double digits, although they might at times break a hundred. On Canada, see Supreme Court of Canada, *Bulletin of Proceedings: Special Edition – Statistics 1998 to 2008* (Ottawa: Supreme Court of Canada, 2009), online: <<http://www.scc-csc.gc.ca/stat/pdf/doc-eng.pdf>>. On the Constitutional Court of South Africa, see Michael Bishop, “Constitutional Court Statistics for the 2005 Term” (2006) 22 S.A.J.H.R. 518 at 518-19 (noting that the Court delivered 24 judgments in 2005, 22 judgments in 2004, 25 in 2003, 34 in 2002, 25 in 2001, 28 in 2000, 19 in 1999, 21 in 1998, 20 in 1997, 27 in 1996, and 14 in 1995). On the United States Supreme Court, see Supreme Court of the United States Blog (SCOTUSblog), “SCOTUSblog End-of-Term ‘Super StatPack’ – OT06,” online: <<http://www.scotusblog.com/movabletype/archives/SuperStatPack.pdf>> (the U.S. Supreme Court decided 68 cases for the October Term (OT) 2006, 71 cases for OT 2005, 76 for OT 2004, 74 for OT 2003, and 73 for OT 2002).

Simply put, judicial review is not *the* question of legitimacy in Israel that it is in the United States. In Israel, the question is concerned with the Supreme Court's activism; judicial review is only one element in this larger issue. The heated debate on judicial activism and the legitimacy of the Supreme Court of Israel preceded Israel's 1995 constitutional "moment" and has continued thereafter. Far more important and controversial has been the Supreme Court of Israel's exercise of judicial review over administrative action and political decisions, as well as the expansion of the Court's jurisdiction and the doctrine of standing.¹⁰¹ The debate—and the questioning—of the Court's legitimacy is very much about what Michael Mandel and others would term "the legalization of politics."¹⁰²

In 2007, Israel's reform-minded Justice Minister, former law professor Daniel Friedmann, embarked on a campaign to limit the power of the Supreme Court. In a wide-ranging interview in August 2007,¹⁰³ Friedmann listed his targets as: (1) curbing excessive prosecutorial zeal against politicians, (2) lack of oversight in certain prosecutorial decisions of the Attorney General, (3) intervention by the High Court in political appointments, (4) questions of justiciability, (5) the process for selecting justices and the composition of the Judicial Election Committee, (6) the need for a legislative override of court decisions, (7) the jurisdiction of the Supreme Court, (8) limiting the scope of the judicial doctrine of "reasonableness," and (9) the role of the Chief Justice.¹⁰⁴ From this varied and extensive list, it is possible to get a sense of the range of the debate over judicial activism in Israel, and how the exercise of judicial review—and the reactions thereto (such as mooting the introduction of a legislative override)—are simply one element in a much larger debate.

101. See *e.g.* Shimon Shetreet, "Standing and Justiciability" in Itzhak Zamir & Allen Zysblat, eds., *Public Law in Israel* (Oxford: Clarendon Press, 1996) 265; David Kretzmer, "The Supreme Court and Parliamentary Supremacy" in Itzhak Zamir & Allen Zysblat, eds., *Public Law in Israel* (Oxford: Clarendon Press, 1996) 303; and Ruth Gavison, Mordechai Kremnitzer & Yoav Dotan, *Judicial Activism: For and Against – The Role of the High Court of Justice in Israeli Society* (Jerusalem: Magnus Press, 2000) (in Hebrew).

102. See Mandel, "Democracy," *supra* note 95.

103. Orit Schohat & Ze'ev Segal, "Saving the High Court from Itself" *Ha'arets* (18 August 2007).

104. *Ibid.*

IV. CONCLUSION: THE LIMITS OF UNIVERSALIZING JUDICIAL REVIEW

In mapping comparative judicial review, we need to recognize the limits of universalizing the Question of Legitimacy from the particular American experience. If we do not, we risk replicating some of the perceptual biases that were captured in my teacher's Cold War Map. As North American comparative constitutional law scholars, we are prone to exaggerate the significance of judicial review because of the strong influence of American doctrine on the subject. We need to understand the constitutional system "from the inside"¹⁰⁵ in order to accurately map out judicial review comparatively. We need, in other words, to be able to accurately depict the phenomenon of judicial review in each system before mapping the larger phenomena comparatively. Schor is quite careful in recommending a contextual approach; he is consistently critical of polar theories—that is, single-explanation theories for the rise of judicial review and other related phenomena. He rightly states that comparative constitutional law is an enterprise in which scholars seek to lay bare the foundations of constitutionalism.

In mapping judicial review, we need to distinguish between judicial review and the larger phenomena of the global expansion of judicial power. The global expansion of judicial power refers to "the infusion of judicial decision-making and of court-like procedures into political arenas where they did not previously reside. To put it briefly, we refer to the 'judicialization' of politics."¹⁰⁶ Judicial review is one element: judicialization from without. There are also other forms of judicialization from within.¹⁰⁷ As noted in the Israeli case,¹⁰⁸ we need to distinguish between constitutional judicial review and administrative judicial review. One possible remedy can be found in my first map, the one that I saw in the Mapparium in Boston. In that map, ocean depths were noted by darker and lighter shades of blue. We need to use a similar system of *conceptual* shading in looking comparatively at judicial review in countries around the world.

105. See Günter Frankenberg, "Critical Comparisons: Re-thinking Comparative Law" (1985) 26 Harv. Int'l L.J. 411.

106. Torbjörn Vallinder, "When the Courts Go Marching In" in C. Neal Tate & Torbjörn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995) 13 at 13.

107. See *ibid.* at 16.

108. *Gal Law* case, *supra* note 98.

Carl Friedrich wrote that “[c]omparative constitutionalism seeks to determine the theoretical presuppositions and institutional manifestations of constitutional systems.”¹⁰⁹ American politics is “notably Constitution centred,”¹¹⁰ and fixated on the Question of Legitimacy. While the United States provided the prototype for judicial review that many other countries have consciously adopted, it is a mistake to assume that the debate surrounding its legitimacy has necessarily migrated with it. Each system that has adopted judicial review has done so in its own manner. The American debate over the Question of Legitimacy is a useful framework for probing the particular narrative of judicial review in a given jurisdiction, but it should not subvert that analysis. Cappelletti mused that the solution to the mighty problem is to be found in “a given society’s history and traditions, the particular demands and aspirations of that society, its political structures and processes, and the kind of judges it has produced.”¹¹¹ In the case of comparative judicial review, there is a limit to where an American map can lead us.

109. Carl J. Friedrich, *Limited Government: A Comparison* (Englewood Cliffs: Prentice-Hall, 1974) at 11.

110. See Martin Shapiro, “The United States” in Tate & Vallinder, *supra* note 106, 43 at 43.

111. Cappelletti, *supra* note 45 at 411-12.