THE JUDGE AS POLITICAL THEORIST

CONTEMPORARY CONSTITUTIONAL REVIEW

DAVID ROBERTSON

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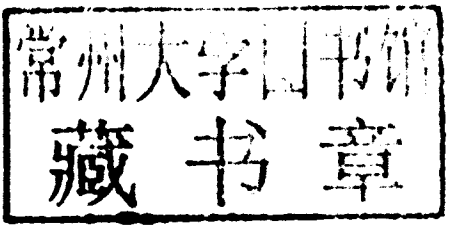

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For Clare

PREFACE

Those who write long books cannot quite forget Pascal's apology to his friend for writing a long letter, on the grounds that he did not have time to write a short one. Unfortunately, I have had quite long enough for that excuse not to work. Had I had longer, the book would have grown beyond any publisher's interest. Perhaps the material is just too complex for a shorter work, because I am far more conscious of what I have had to leave out. The book really ought to have had chapters on Australia, India, and Israel at the very least. Or perhaps I am just verbose?

I am a rarity nowadays, not because I am a political scientist writing about courts—there are now quite a lot of us—but because my approach is much nearer than most to the old style of political scientists, often dismissed scornfully by my more hard-edged colleagues as "doctrine scholars." Comparative work on judicial review is extraordinarily difficult unless one does adopt the methods of modern political science, measuring and seeking quantitative generalizations about external patterns of judicial behaviour. I do not do that here. Nor do I adhere to the currently dominant "rational choice" perspective in analysis. Neither of these methodological failings stems from incompetence. I was, still am, a political sociologist, and most of my work has been quantitative, including the first piece I ever wrote on courts. As for rational choice, I was a fully paid-up member of the gang from my doctoral days. I do not disrespect either quantitative methodology or rational choice theory; they just do not offer answers to the questions that interest me about constitutional review.

No political scientist writing about seven or eight jurisdictions, as I do here, can possibly know as much law as a real lawyer will know about any one of them. Or at least he will not "know the law" as a lawyer knows it. So this book is not one

a lawyer is likely to write, nor is it that of a political scientist—it is not political science, and it is not truly a doctrine study. It is an attempt to understand the core nature of the business of doing judicial review by reading a lot of judicial opinion writing. And it is a speculation about how such activity fits into modern liberal democracy. I believe in judicial review. I have often noticed at conferences that the lawyers trust parliaments, and the political scientists trust the courts. I hope my ultimate trust in constitutional courts is not simply a case of preferring the evil one is familiar with. In the end the book is as it is because I am truly fascinated by constitutional argumentation. I hope some readers may become equally entranced.

A note on errors. There are errors in the book, quite inevitably given its range and my limitations. Sometimes, though, apparent errors are choices of emphasis, and apparent lacunae—a missing caution or shading of argument—are filled in elsewhere in the book. In a study of this size some things need saying more than once, and I may not always have spotted these desirable repetitions. Other apparent errors will turn out to be matters of interpretation. There are, after all, very few actual facts in legal doctrine. Though I have not consciously striven for originality in doctrinal exposition, I must at times have given sincere interpretations that others disagree with. These occasions are not necessarily errors or mistakes.

In writing this big book with a wide scope I have, as all authors admit, benefited from far more people than I can name or properly identify, even to myself. I owe a real debt to the lawyers in my own college—Andrew Burrows, Josh Getzler, Mike McNair, and Derek Wood—who have treated me more courteously than I deserve, talked to me at great length, treated me like an honorary lawyer. Apart from them, I owe many thanks to a perhaps unlikely helper, Peter McDonald, Fellow and Tutor in English, who over many lunches has shared his knowledge of South Africa. I would like to thank the two readers to whom Princeton University Press gave the manuscript for review. I have never really credited authors' expressions of gratitude for such reports, but these two reviewers' supportive but highly acute criticism has been both vital and a real pleasure to receive.

The Oxford scholar who has most influenced my thinking is the late Geoffrey Marshal. I have not achieved his wonderful down-to-earthness, nor managed to retain my Yorkshire accent as well as he did. The biggest of all my debts is owed to my wife Liz, not just for wifely support, but because as a practising corporate lawyer qualified in both the United Kingdom and United States she has been a constant intellectual influence. Finally, an apology to my daughter to whom this book is dedicated. I'm sorry you had to wait longer than your sister to get your book, but it is longer than the one Ellen got.

David Robertson
Oxford
May 2009

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CHAPTER ONE

The Nature and Function of Judicial Review

Le Conseil constitutionnel est une jurisdiction, mais il ne sait pas; mon rôle est de lui faire prendre conscience de sa nature.

—Robert Badinter, president of the Conseil constitutionnel, 1986–95[1]

The theme of this book is that modern constitutional review cannot always be adequately understood if seen through the traditional categories of the separation of powers. Constitutional courts do more than can be fitted into the domain allowed to courts exercising the judicial function. Much of what they do in what I call "transforming societies" involves spreading the values set out in the constitution throughout their state and society. Indeed, their idea of what a constitution is does not always fit well with the orthodox idea of a liberal constitution. I try to show that constitutional judges often come near to being applied political theorists, carrying out a quite new type of political function. This first chapter develops some of these concepts and sets out the plan of the book, offering technical information and definitions to be filled out in the substantive chapters.

A few examples always help in setting out a general approach. Though this book is primarily about "new" constitutional review in countries undergoing some form of transformation, I begin with a different sort of example. It is chosen not from a new constitutional court, or one involved in transformative jurisprudence, but from the oldest court doing constitutional review, what is beyond doubt the model court, the US Supreme Court. There are two reasons for this. First, the Supreme Court is familiar—if the reader knows anything about constitutional review, it is likely to be about America's experience. Second, I hope to show that the patterns and ideas that are relevant in newer jurisdictions have their counterparts even in this oldest and most familiar territory.

[1] D Rousseau, *Sur le Conseil constitutionnel: La doctrine Badinter et la démocratie* (Paris: Descartes & Cie, 1997), 19.

In 2003 the Supreme Court overturned one of its own precedents, a precedent that had only stood for seventeen years. The case was *Lawrence v Texas*, which challenged a state law criminalizing some homosexual practices.[2] The ruling precedent, *Bowers v Hardwick* from 1986, ought to have made the case unnecessary.[3] In *Bowers* a Georgia state law that made sodomy punishable by up to twenty years' imprisonment was challenged. Hardwick had been arrested for committing sodomy when a police officer had entered his house and found him with another man. In the end he was not prosecuted, but undertook a civil suit against the state claiming the law was unconstitutional. Though the federal appeals court agreed with Hardwick, the Supreme Court ruled that Georgia was entitled to use the criminal law to impose the majority's moral code.[4]

The Supreme Court is not totally forbidden to overturn its own previous decisions, but puts a very strong value on *stare decisis*, the rule of precedent. Certainly it is rare for the court to change its mind so soon after a major ruling, even one as controversial as that in *Bowers v Hardwick*. That case had raised a huge protest because it clashed with liberalising trends in American society during the 1970s and 1980s. When *Lawrence v Texas* overruled *Bowers*, there was an equivalent uproar from political and judicial conservatives.[5] When major courts do overturn their own precedents, they usually do so because they think an earlier decision has become inappropriate for a later society. Or they at least shade their disagreement with the past decision. The US Supreme Court of 2003 was much blunter. The majority opinion says outright, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent."[6] This really was a choice by the Supreme Court—it could have held for Lawrence without overruling *Bowers*. The majority opinion explicitly says that the justices rejected an alternative approach that would have disallowed the Texas statute on narrower grounds. In fact Justice O'Connor, who voted along with the majority to overturn the Texas law, had been part of the majority in *Bowers* and still thought it correct. To find the law under which Lawrence was prosecuted unconstitutional, she used an ap-

[2] *Lawrence v Texas*, 539 US 558 (2003) (US Supreme Court).

[3] *Bowers v Hardwick*, 478 US 186 (1986) (US Supreme Court).

[4] The court's own summary of this point is this: "Sodomy laws may not be invalidated under the due process clause of the Fourteenth Amendment on the theory that there must be a rational basis for the law and that majority sentiments about the morality of homosexual sodomy are not an adequate basis." *Bowers v Hardwick*, 3.

[5] There is an extensive journal literature on both cases. As a selection, EM Maltz, "The Court, the Academy, and the Constitution: A Comment on *Bowers v. Hardwick* and Its Critics," 1989 *Brigham Young University Law Review* 59–95, gives a good account of both the first case and its reception, while J Weinstein and T DeMarco, "Challenging Dissent: The Ontology and Logic of *Lawrence v. Texas*," 2003 10 *Cardozo Women's Law Journal* 423–67, is a useful analysis of the judicial logic in the second case. The two cases and intervening decisions are treated together in R Turner, "Traditionalism, Majoritarian Morality, and the Homosexual Sodomy Issue: The Journey from *Bowers* to *Lawrence*," 2004 53 *University of Kansas Law Review* 1–81.

[6] *Lawrence v Texas*, 12. The nine justices on the court were split. Five signed the majority opinion, with a sixth judge concurring in the result but using a quite different approach. The main dissent, joined by two other justices, was by Justice Scalia. Even by the standards of the Supreme Court, it is bitter and confrontational towards the majority.

proach quite different from that offered in the majority opinion. But if the court in 2003 did not have to overrule *Bowers*, the court in 1986 did not have to rule on the constitutionality of the Georgia statute at all—it would have been perfectly possible to overturn the court of appeals by simply ruling, as the Supreme Court was invited to, that the case was moot. Right at the beginning, the first Georgia court to hear the case had ruled that Bowers had no cause of action because he had not actually been prosecuted.

The first point to make is that courts sometimes really do set out deliberately to make major legal statements. No one can avoid the fact that two US Supreme Courts, only seventeen years apart, felt so strongly about the issue of criminalizing homosexual behaviour that they took up challenges that could have been avoided. Both courts, though radically opposed to each other, felt it their duty to make law in this way. The second point to make at this stage is how much personnel changes matter. Since the 1930s the US Supreme Court has always had nine justices; though this number is not prescribed in the constitution and has not always been mandated by law, it may have hardened into a "constitutional convention." Of the nine men and women who heard *Lawrence*, only three survived from the *Bowers* court, and one of them, O'Connor, effectively changed tack. The six new appointments split four to two against the ruling in *Bowers*. On such minor things as judicial death and retirement can depend something as fundamental as a shift in a nation's public morality. (The route by which people become judges is commented on later, especially, as an example, in chapter 4 on France.)

In other ways this relatively ordinary piece of constitutional adjudication shares many of the features to be discussed at length in this book. The ruling in *Lawrence* is a self-conscious "modernization" of values, and an imposition of them. Much of the disagreement about the case revolves round the question of whether or not public disapproval of private behaviour can justify legal restrictions, but discussion is always admixed with matters of what I have called elsewhere "judicial methodology"—the rules to be applied in deciding such cases.[7] So those who wanted to overturn the Texas law claimed that there was no important and legitimate government aim served by it. Their opponents said that the law needed no such aim, because that test applies only to rights that are "deeply rooted in this Nation's history and tradition." Much of what will follow in this book is about what tests are applicable in what circumstances.

Part of the disagreement over *Lawrence* is factual—the two sides differ on the history of legal constraints on homosexuality—and we will see frequent use and misuse of claims to empirical knowledge in other jurisdictions. Much of the disagreement over *Bowers* and *Lawrence* is disagreement over what the cases are actually about. For both sides the issues have little to do with homosexuality in itself. For the majority in *Lawrence* the issue is the right of the citizen to be left alone in private. For the other side, the cases are about the right of the state governments to reflect majority feeling within their territories with no federal intervention. Sociol-

[7] D Robertson, *Judicial Discretion in the House of Lords* (Oxford: Clarendon Press, 1998), especially chapters 3 and 4.

ogists might call this the "framing" of the issues. A matter of framing or perception is the "What is this all about?" question, asked at a lower level. What is it about for the actual people caught up in the legislation? To the majority in *Bowers*, it is only a matter of their sexual activities. To the majority in *Lawrence*, it is a deep matter of human dignity, and the consequences for those liable to be prosecuted are far more onerous than the actual sentences. Indeed, where the protection of dignity is concerned, it does not matter that such laws as the Georgia and Texas statutes are hardly ever invoked. Not only will such framing issues occur in several contexts later in the book, but the concept of dignity will prove to be the most important single value in modern judicial review.

Lawrence, if not *Bowers*, raises the question of whether legal and constitutional thinking outside the United States counts in US courts. The majority in *Lawrence* attach great importance to, inter alia, decisions of the European Court of Human Rights, because they regard moral opinion across developed democracies as an important measure. To the minority, such matters are utterly irrelevant, because only aspects of American moral history are relevant or can legitimately be cited. (The extensive use of foreign judgements, so that a sort of international constitutional law is rapidly developing, will be discussed several times in this book.) These cases are about, and are examples of, what has come to be called "legal culture." They have to do with the way different generations and groups of judges are socialised or have their "professional formation." Justice Scalia makes this abundantly clear in one of his harshest condemnations of the *Lawrence* majority. I quote him at length to make this point (lengthy quotations from the judges are a major part of my technique throughout the book):

> Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. . . . One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." . . . It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination"

> which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream."[8]

Scalia may well be unfair, but the fact remains that matters like a profession's own rules crucially shape the way constitutional law develops. I shall often refer to this idea of a legal, or politico-legal, culture.[9]

Finally, there is one thing that neither *Bowers* nor *Lawrence* is really about. Neither case depends on interpretation of the US Bill of Rights, or any other part of the constitution—or not in any sense of textual interpretation that one would find outside law, and especially constitutional law. Nowhere in the constitution is homosexuality or sodomy mentioned. Indeed, nowhere in that document is any matter of sexual rights or behaviour mentioned. The whole of the more apparently "legal" parts of the opinions in *Bowers* and *Lawrence* are about previous judicial glosses on the constitution. This practice, as the book will show, is true to a large extent everywhere in adjudication. As soon as constitutional issues arise and are given judicial consideration, a rich body of interlinked judicial thought develops. This body of judicial material, part of what the French Conseil constitutionnel calls the *bloc de constitutionnalité*, is both the result of, and a constraint on, judicial review. Judges often decide on constitutionality by relying on what other judges have said more than on the document that is supposed to be controlling.

Introductory Definitions and the Plan of the Book

What is constitutional review? At one level this question is a technical matter of constitutional law. Constitutional review is a process by which one institution, commonly called a constitutional court, has the constitutional authority to decide whether statutes or other decrees created by the rule-making institutions identified by the constitution are valid given the terms of the constitution. It is a highly reflexive process. Such a definition tells us nothing about the purpose of constitutional review in the political system; it tells us nothing about the impact of constitutional review on the governance of the society; it does not describe constitutional review as a functional element in the political complex we usually call a state. Some liberal democracies, probably most by now, have some form of constitutional review, but not all, so it is not just a definitional element of democracy.[10] As long as impeccably democratic nations-states like the Netherlands do without judicial review, its presence and functioning in other countries must invite seri-

[8] *Lawrence v Texas*, 578.

[9] Certainly the *Lawrence* decision has provoked some anxiety about judicial bias: TA Sparling, "Judicial Bias Claims of Homosexual Persons in the Wake of *Lawrence v. Texas*," 2004 *Southern Texas Law Review* 255–309.

[10] One count gives 128 countries with judicial review: FR Romeu, "The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions," 2006 2 *Review of Law and Economics* 1, 104–35. A detailed analysis of such courts can be found at http://www.concourts.net/comparison.php.

ous inquiry. Only a very subtle argument would suggest that Norway, which has judicial review, is more democratic than the rest of Scandinavia, which does not. This whole book is really dedicated to answering one question—what does constitutional review *do* for the countries that have it? Ostensive definition can get us started. Constitutional review answers questions like these:

- Can a state pass legislation prohibiting floor-crossing by those elected to its legislature?[11]
- Can a state forbid a wide range of state officials to join political parties?[12]
- Can the new democratic parliament of a former Communist state pass a law characterising the previous regime as a state of "lawlessness"?[13]
- Can a state decriminalize the actions of doctors and patients involved in terminating a pregnancy?[14]
- Can an education authority ban teaching material that treats homosexual partnerships as equivalent to heterosexual families?[15]
- Can a state nationalise its banking sector?[16]

Yet these are only questions where something exists to make them questions—obviously states can, and do, do all of these things. They become real questions only where two conditions apply: there must be a constitution purporting to restrict what a state can do, and there must be a body independent of the legislature and executive empowered to test state action against that constitution. Where a parliament is entitled itself to decide whether or not its laws satisfy constitutional limitation, the constitution, in this respect at least, cannot be more than advisory or aspirational. There is a rich and complex literature in political theory considering whether a system of independent oversight on parliamentary legislation is fully compatible with democracy.[17] This book will not do more than touch tangentially on some aspects of that debate. It is not, however, irrelevant to the debate, because my concern here is to give a much fuller characterization of what exactly happens in judicial review than the theoretical literature normally concerns itself with. However, my concerns are also much narrower than those of the theoretical debate. I have chosen to concentrate almost entirely on constitutional review mechanisms in societies that have undergone major change, where constitutional review of legislation has been added to an ongo-

[11] *United Democratic Movement v The President of the Republic of South Africa* CCT 23/02 (South African Constitutional Court).

[12] *Statutory Prohibitions of Political Party Membership*, K26/00 (2000) (Polish Constitutional Tribunal).

[13] *Lawlessness*, Pl. US 19/93 (Czech Republic Constitutional Court). All citations are from the website of the court, which is http://angl.concourt.cz/angl_verze/cases.php.

[14] *Abortion Case No 1*, 39 BVerfGE 1 (1975) (German Federal Constitutional Court).

[15] *Chamberlain v Surrey School District No. 36*, 4 SCR 710 (2002) (Canadian Supreme Court).

[16] *Nationalizations*, 81-132 DC (1982) (Conseil constitutionnel).

[17] As examples, only, of the debate, consider the issues and citations in FI Michelman "The Constitution, Social Rights, and Liberal Political Justification," 2003 1 *International Journal of Constitutional Law* 1, 13–34. Perhaps the main writer associated with an anticonstitutional review position is Jeremy Waldron. See his classic essay "A Rights Based Critique of Constitutional Rights," 1993 13 *Oxford Journal of Legal Studies* 18–51.

ing society, either in a new constitution or as something grafted on to a continuing constitutional tradition. In essence I am looking to see what constitutional review tries to do, and how it does it, in societies undergoing a form of political transformation. This focus is not new. For example, Bruce Ackerman's seminal study of the international development of constitutional review is based on two general scenarios. One is federalism; the other is what he calls "new beginnings." The latter

> operates with a different logic, dealing in expressive symbols, not functional imperatives. Under this scenario a constitution emerges *as a symbolic marker of a great transition in the political life of a nation.*[18]

Most of the jurisdictions I talk about hereafter are also covered by Ackerman.

This choice is made for two reasons. First, it is intrinsically important to see how constitutional review functions in such societies, as compared with states, like the United States, where review was built in at the beginning of the constitutional epoch. Second, such transforming constitutional arrangements help me focus on what I take the main function of constitutional review to be. My claim is that constitutional review is a mechanism for permeating all regulated aspects of society with a set of values inherent in the constitutional agreement the society has accepted. This position is developed seriatim throughout the rest of this book. The idea embraces various subthemes. One crucial idea is that modern societies lack other all-embracing moral or ideological commitments as a result of religious secularization, on the one hand, and the victory of a middle-of-the-road political consensus around a form of liberalism, on the other. Consequently, constitutionalism reigns supreme. If a politician wants to attack another politician's policies in a way that seems nonpartisan, the claim that the policy is unconstitutional is the best bet. If constitutionalism is the main overarching value, it is also true that one specific constitutional value often seems to dominate constitutional discourse—the value of nondiscrimination. This is the legal equivalent to saying that equality is the one prime value: in a liberal secular society no value code exists to justify inequality. Equality of opportunity is a requirement for the legitimating of a secular, individualistic, liberal society. Thus constitutional interpretation takes centre stage whoever does it, and where it is done by special courts or tribunals, constitutional review becomes a process of throwing a net of logically derived values over legislation, creating a mesh policies must pass through.

These and related ideas are developed in the following chapters. The plan of the book is simple. There are five case studies of constitutional jurisdictions, chosen to represent different examples of transformative constitutions. There follows a long comparative theme chapter on particular problems in constitutional adjudication. The aim of this chapter is to demonstrate the variance, but also the limitations to variance, in the ways jurisdictions deal with issues none can avoid. The jurisdiction chapters are essentially descriptive. Very little has been published that seeks to describe several jurisdictions side by side, so there ought to be no sense that description is somehow a less valuable academic pursuit. These

[18] B Ackerman, "The Rise of World Constitutionalism," 1997 83 *Virginia Law Review* 4, 771–97, at 784.

accounts are sketches of the state of constitutional review in each jurisdiction, not up-to-date accounts of the exact body of law currently valid within them. As sketches, they highlight what seems to me most importantly characteristic of each jurisdiction's approach to constitutional review. This is the more so because of the methodology I embrace. To call it a methodology is overgrand, but the point is that my descriptions are concerned almost entirely with the actual cases decided, and above all with the judicial argument in them. Far too little attention is paid to what judges actually say in judging, as opposed simply to the decisions they reach. Because I see these courts as involved in the explication of constitutional values, in the making of low-level political theory, I attach huge importance to the arguments crafted by judges. An alternative title for this book would indeed have been "Constitutional Judging as Political Theorising: A Comparative Analysis." The nature of modern democracy is such that governments engage in justification, and judicial opinions constitute an important aspect of what is sometimes called "deliberative democracy."[19]

The same sorts of issues substantive and procedural occur in all these societies with judicial review, though with emphases that differ according to national politico-legal culture and the pathways that have brought the courts to importance. Finding out what variety of answers seem possible, and why some are chosen over others, should tell us a great deal about the nature of this obscure activity of judicial review. The first jurisdiction chosen is Germany because of its enormous importance as the first postwar constitutional court with real power, which has given it great influence over later courts. I follow that discussion with a composite chapter that describes judicial review in three of the new Eastern European democracies, Poland, the Czech Republic, and Hungary, which face similar problems in (re)establishing democracy and the rule of law. The differences in their approaches are as revealing as the similarities, and the apparently anodyne concept of the "rule of law" turns out to be richly complicated and various. These chapters are followed by one other European example, the French experience in the Fifth Republic. The most important aspect of the French story is that constitutional review came for the first time in the Fifth Republic, against a background of long-term historical antipathy to the courts in politics. What my sketch highlights here is summed up in the quotation heading the chapter: France really does have a body of complex and thought-out constitutional law, and the Conseil constitutionnel has not merely responded to issues in an ad hoc, partisan way.

Canada follows, vital as an example of a country where a decision was made to import constitutional review into a common-law-based political system with parliamentary supremacy. Canada had previously had constitutional review, but of a limited kind. How its judges coped with the new Charter of Rights and Freedoms,

[19] The idea of deliberative democracy has been used and developed by a host of major political theorists, including Elster, Habermas, and Rawls. It probably originated in an article by Joseph M. Bessete, who worked it out most fully in *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago: University of Chicago Press, 1994).

which expanded constitutional review, is an important topic in its own right, but is also worth examination because the problems they faced tell us a good deal about the special nature of the activity and the political role of constitutional review. The final jurisdiction treated is South Africa, the country that has most openly embraced the idea of "transformative jurisprudence," yet where constitutional review was grafted onto a long history of judicial passivity and a common-law background. Throughout these sketches several concepts occur and reoccur. The best example is the role of "dignity" as a touchstone for constitutionality, which can be found in very nearly every jurisdiction.

After the case studies there are two chapters, one rather long, taking themes in a directly comparative perspective. (I make a good deal of effort to draw useful comparisons within the jurisdiction chapters as well, to illuminate approaches to similar problems.) The longest chapter in the book, and probably the most demanding, is chapter 7. It is long because it offers a comparative study of how the most common and unavoidable issue in the whole of rights enforcement has been handled in different jurisdictions. The problem is simple to state. Whatever a constitution says about rights, it is virtually impossible to guarantee that any right will be absolute; there must always be some circumstances when a right will have to give in to the needs of the state. But how is this restriction of rights to be handled? Above all, what sort of analysis must a constitutional court go through to decide when a right can be trumped by social need? This chapter is unlike the others in that a good part of it considers the constitutional jurisprudence of the United States. The US Supreme Court has the longest experience in the world of dealing with just this question, made all the more difficult because the US Bill of Rights, unlike other statements of rights, does not on the face of it accept that the rights it guarantees cannot be absolute. Chapter 7 is thus, more than other chapters, about the sorts of arguments that can carry respect inside a deliberative democracy. It is also where I give my most sustained discussion of problems rising from antidiscrimination rights, the core value in modern constitutional thinking. The arguments for limiting rights are of the same logical form as those for allowing forms of discrimination between citizens where this allowance is necessary for policy. These themes and considerations are brought together in the concluding chapter, where I sketch a justification for judicial review of constitutionality in light of the fears some express about its lack of democratic legitimacy. In so doing I offer a characterisation of the constitutional judge as a professional political theorist.

The Forms of Judicial Review

There are two basic types of constitutional review. The first type involves questions about how authority to act is distributed by the constitution to various parts of the state, and with federal constitutions, how it is distributed between the national and component unit levels. The case that tradition claims began American judicial review, *Marbury v Madison*, was about such an issue, as were nearly all the major