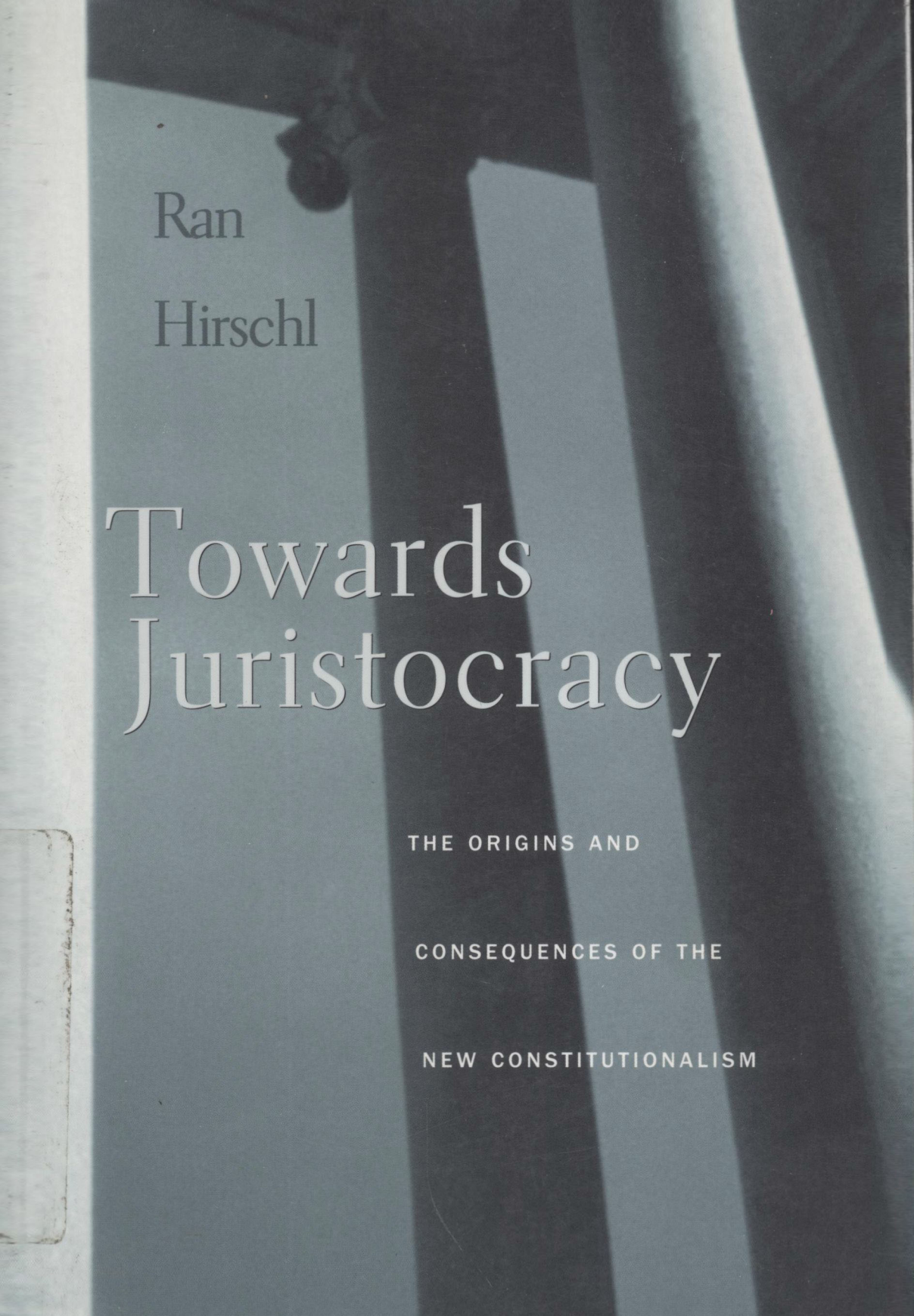
Ran
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Juristocracy
THE ORIGINS AND
CONSEQUENCES OF THE
NEW CONSTITUTIONALISM

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The Origins and Consequences of the New Constitutionalism

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TOWARDS JURISTOCRACY

As Wine and oyl are Imported to us from abroad; so must ripe Understanding, and many civil Virtues, be imported into our minds from Foreign Writings, and examples of best Ages, we shall else miscarry still, and come short in the attempts of any great Enterprise.

John Milton, *The Character of the Long Parliament*

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Introduction

Over the past few years the world has witnessed an astonishingly rapid transition to what may be called *juristocracy.* Around the globe, in more than eighty countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries. The countries that have hosted this expansion of judicial power stretch from the Eastern Bloc to Canada, from Latin America to South Africa, and from Britain to Israel. Most of these countries have a recently adopted constitution or constitutional revision that contains a bill of rights and establishes some form of active judicial review. An adversarial American-style rights discourse has become a dominant form of political discourse in these countries. The belief that judicially affirmed rights are a force of social change removed from the constraints of political power has attained near-sacred status in public discussion. National high courts and supranational tribunals have become increasingly important, even crucial, political decision-making bodies. To paraphrase Alexis de Tocqueville's observation regarding the United States, there is now hardly any moral or political controversy in the world of new constitutionalism that does not sooner or later become a judicial one.[1] This global trend toward juristocracy is arguably one of the most significant developments in late-twentieth- and early-twenty-first-century government.[2]

The emergence of this new method of pursuing political goals and managing public affairs has been accompanied and reinforced by an almost unequivocal endorsement of the notion of constitutionalism and judicial review by scholars, jurists, and activists alike. According to the generic version of this canonical view, the crowning proof of democracy in our times is the growing acceptance and enforcement of the idea that democracy is not the same thing as majority rule; that in a real democracy (namely a constitu-

tional democracy rather than a democracy governed predominantly by the principle of parliamentary sovereignty), minorities possess legal protections in the form of a written constitution, which even a democratically elected assembly cannot change. Under this vision of democracy, a bill of rights is part of fundamental law, and judges who are removed from the pressures of partisan politics are responsible for enforcing those rights. In fact, American constitutional scholars often argue that the foundation of the United States was based on precisely this understanding of constitutional democracy. As Ronald Dworkin, perhaps the most prominent proponent of this view, observes, every member of the European Union as well as other "mature democracies" (in Dworkin's words) subscribe to the view that democracy must protect itself against the tyranny of majority rule through constitutionalization and judicial review.[3] Even countries such as Britain, New Zealand, and Israel—described fairly recently as the last bastions of Westminster-style parliamentary sovereignty—have recently embarked on a comprehensive constitutional overhaul aimed at introducing principles of constitutional supremacy into their respective political systems.

This sweeping worldwide convergence to constitutionalism, many theorists contend, stems from modern democracies' post–World War II commitment to the notion that democracy entails far more than a mere adherence to the principle of majority rule. Not least, we are often reminded, it reflects these polities' genuine commitment to entrenched, self-binding protection of basic rights and civil liberties in an attempt to safeguard vulnerable groups and individuals from the potential tyranny of political majorities. Accordingly, the seemingly undemocratic characteristics of constitutions and judicial review are often portrayed as reconcilable with majority rule or simply as necessary limits on democracy. In short, judicial empowerment through the constitutionalization of rights and the establishment of judicial review now appear to be the widely accepted conventional wisdom of contemporary constitutional thought.

The constitutionalization of rights and the corresponding establishment of judicial review are widely perceived as power-diffusing measures often associated with liberal and/or egalitarian values. As a result, studies of their political origins tend to portray their adoption as a reflection of progressive social or political change, or simply as the result of societies' or politicians' devotion to a "thick" notion of democracy and their uncritical celebration of human rights. Yet most of the assumptions regarding the power-diffusing, redistributive effects of constitutionalization, as well as the assumptions re-

garding its predominantly benevolent and progressive origins, remain for the most part untested and abstract.

Even critics of the view that constitutionalism is an all-out "good thing" have not paid much attention to the actual political origins or consequences of judicial empowerment through constitutionalization. Instead, these critics have been almost exclusively preoccupied with the well-rehearsed normative debate over the "countermajoritarian" nature of judicial review and the "democratic deficit" inherent in transferring important policy-making prerogatives from elected and accountable politicians, parliaments, and other majoritarian decision-making bodies to the judiciary.[4] Indeed, one can count on the fingers of one hand the works that use concrete empirical and inductive inquiry to question the democratic credentials of constitutionalism and judicial review.

Surprisingly, Ronald Dworkin, perhaps the champion proponent of constitutionalization and judicial review on normative grounds, agrees that ultimately "the proof of the pudding is in the eating." Democracy, he argues, is fundamentally concerned with treating people as equals. If courts can do this as effectively as representative institutions elected by universal suffrage, it is irrelevant whether in doing so they overrule majority will. None of Dworkin's six books on constitutionalism cite any empirical work on the origins and consequences of constitutionalization and judicial review.[5] Nonetheless, Dworkin admits that there is "no alternative but to use a result-driven rather than a procedural-driven standard for deciding [the judicial review question]. The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions."[6]

I could not agree more. Once we have settled on a given normative meaning of the term "social justice" (be it a collectivist-egalitarian, individualist-libertarian, or any other understanding of the term), the question of democracy versus constitutionalism in pursuit of social justice becomes an empirical question: What type of fundamental governing principle—parliamentary sovereignty, constitutional supremacy, welfare state, neoliberal macroeconomics, or any other overarching principle—has produced or is likely to produce practical outcomes closest to that meaning of social justice? In other words, the index of democracy vis-à-vis constitutionalism and/or judicial activism is not the character of constitutionalism or judicial review per se, but rather the nature of its substantive outcome. Likewise, an inquiry into

the concrete sociopolitical vectors behind specific incidents of constitutionalization would not only explore a rarely traveled scholarly terrain; it would also yield illuminating insights concerning the questionable democratic credentials of constitutionalism and judicial review.

The preoccupation of prominent scholars who shape the contours of contemporary debate is not the only reason for the dearth of research concerning the origins and consequences of constitutionalization. Scholars of constitutional law and politics also tend toward parochialism regarding the constitutional arrangements and practices of other countries. Most existing studies on the political origins and consequences of judicial power are based on the United States' exceptional, if not downright idiosyncratic, constitutional legacy. Several important critical assessments of the 1982 constitutionalization of rights in Canada have appeared over the past decade.[7] A few other single-country studies have examined the significant political role of national high courts in advanced democracies that have adopted a variety of administrative and judicial review procedures during the postwar decade.[8] In addition, several very fine studies have assessed the utility of constitutional engineering in the former Eastern Bloc countries,[9] and a spate of scholarship concerns judicial politics in Western Europe and the EU.[10] However, with a few notable exceptions,[11] genuinely comparative studies of the origins and consequences of constitutional transformation and judicial empowerment are rare, and those that do exist often lack coherent methodology. In short, despite the fact that courts now play a key role in dealing with the most contentious social and political issues, the field of comparative judicial studies in general, and the study of the political origins and consequences of judicial empowerment in particular, remain relatively underresearched and undertheorized.

In an attempt to move beyond the abstract rhetoric and parochialism that have all too often dogged the academic debate over constitutionalism, in this book I examine the political origins and consequences of constitutional revolutions in four countries: Canada (which adopted the Canadian Charter of Rights and Freedoms in 1982); New Zealand (which enacted the New Zealand Bill of Rights Act in 1990); Israel (which adopted two new Basic Laws protecting a number of core civil liberties in 1992); and South Africa (which adopted an interim Bill of Rights in 1993, a final Bill of Rights in 1996, and a new Constitutional Court in 1995). Drawing on a systematic analysis of these four recent constitutional revolutions, I address three major questions:

1. What are the political origins of the recent constitutionalization trend? That is, to what extent is the expansion of judicial power through the constitutionalization of rights and the establishment of judicial review a reflection of a genuinely progressive revolution in a given polity? Or, conversely, is it a means by which preexisting sociopolitical struggles in that polity are carried out?

2. What is the real impact of the constitutionalization of rights and the fortification of judicial review on national high courts' interpretive attitudes toward progressive notions of distributive justice, and what are the extrajudicial effects of constitutionalization on the actual advancement of such notions?

3. What are the political consequences of judicial empowerment through constitutionalization, and what are the implications for twenty-first-century democratic government of the unprecedented judicialization of politics that proceed through the constitutionalization of rights and the establishment of judicial review?

In short, this study aims to put the political origins and consequences of constitutionalization to the test.

Beyond the American Experience

"For the past two centuries," writes critic Daniel Lazare, "the Constitution has been as central to American political culture as the New Testament was to medieval Europe. Just as Milton believed that 'all wisdom is enfolded' within the pages of the Bible, all good Americans, from the National Rifle Association to the ACLU, have believed no less of this singular document."[12] Indeed, remarkably profound symbolic and practical effects are attributed to the American Bill of Rights and judicial review by scholars, legal practitioners, and political activists. Over the past two decades, however, a number of closely reasoned and well-researched critical studies have sought to revisit the optimistic, albeit untested and abstract, court-centric consensus of the post-*Brown* generation in American constitutional law scholarship. While these studies successfully undermine the complacent view that constitutional catalogues of rights and judicial review are unequivocally positive, they draw almost exclusively on the experience of the American "rights rev-

olution" and that country's history of judicial review. It is remarkable how rarely books and articles on American constitutional law and politics, for example, refer to constitutions and bills of rights in other countries. As George Fletcher notes, a striking feature of the American jurisprudential debate is its provinciality. The arguments are put forward as though the American legal system were the only legal system in the world.[13] Indeed, many American scholars of constitutional law and politics treat the term "constitution" as though it were a proper name rather than a concept whose nature, origins, and consequences could best be understood by examining and comparing a variety of instances of constitutionalism. American parochialism with regard to other countries' constitutional arrangements and practices is especially remarkable given the scope of the trend toward the adoption of constitutional catalogues of rights, the fortification of judicial review, and the consequent judicialization of politics that has recently swept the world. Despite an increasing number of notable exceptions, American scholarship on constitutional law and politics still tends to ignore comparable developments in other countries.

The dearth of comparative research into the origins and consequences of constitutionalization is not merely a problem in terms of aesthetics or intellectual taste; it has important methodological implications. Relatively few American constitutionalists have examined how this process has unfolded outside the United States. This means that American critics of judicial review have systematically failed to address a common observation made by proponents of judicial review, namely that there is no experimental control for the U.S. case. We know what the U.S. Supreme Court has done in the name of judicial review, but we do not know what the relevant legislatures would have done if the Supreme Court had eschewed or been deprived of this power.

The American experience of active judicial review is nearing its bicentennial. This long history makes a diachronic, quasi-experimental, prelegislation-postlegislation empirical investigation into the impact of the constitutionalization of rights and the establishment of judicial review in the United States difficult, perhaps impossible, to conduct. This is not so of countries with a relatively short experience of judicial review, where it is possible to hold other variables to manageable levels. While the extremely rich and diverse constitutional jurisprudence of the U.S. Supreme Court over the past two centuries provides us with an abundance of data pertaining to judicial interpretation and behavior, the American constitutional leg-

acy is perhaps the least appropriate example to use in assessing the function of judicial review in the pursuit of social justice: there is no alternative domestic model against which to measure the achievements of the U.S. Constitution. Moreover, a study that concentrates solely on the singular American constitutional legacy is necessarily going to produce idiosyncratic conclusions not readily transferable to other political and legal contexts. In contrast, the fact that many countries have moved toward the constitutionalization of rights and the establishment of judicial review over the past few decades provides fertile terrain for investigating the political origins and consequences of these changes.

Six broad scenarios of constitutionalization and the establishment of judicial review at the national level have been commonly seen in the post–World War II era:[14]

1. *The "reconstruction" wave,* in which judicial empowerment was a by-product of political reconstruction in the wake of World War II. Examples include the 1946 introduction of a revised constitution in Japan; the introduction of a new constitution in Italy in 1948 and the consequent implementation of the Italian Constitutional Court in 1956; the adoption of the Basic Law in 1949 and the establishment of the Federal Constitutional Court in Germany; and the 1958 adoption of the French Constitution and the consequent establishment of the Constitutional Council *(Conseil Constitutionnel).*

2. *The "independence" scenario,* in which the constitutionalization of rights and the establishment of judicial review were part of decolonization processes, primarily in former British colonies. A classic example of this pattern was the 1950 proclamation of the new Indian constitution and the establishment of the Supreme Court of India, the foundations of which had been laid out by the Indian Independence Act of 1947. In addition, while for many years Britain was unwilling to incorporate the provisions of the European Convention on Human Rights (ECHR) into its own legal system (let alone enact a constitutional bill of rights of its own), it enthusiastically promoted the entrenchment of rights protected by the ECHR in the "independence constitutions" of newly self-governing African states, as devices for protecting established interests from the whims of independent majoritarian politics. The constitutionalization of rights in the Gold Coast (Ghana) in 1957, Nigeria in 1959, and Kenya in 1960 (to mention just three examples) followed this pattern.

3. *The "single transition" scenario,* in which the constitutionalization of rights and the establishment of judicial review are the by-products of a tran-

sition from a quasi-democratic or authoritarian regime to democracy. South Africa adopted an interim Bill of Rights in 1993 and a final Bill of Rights in 1996, along with a Constitutional Court in 1995, as part of its transition to full democracy in the mid-1990s. Almost all the newer democracies in Southern Europe (Greece in 1975, Portugal in 1976, Spain in 1978) and Latin America (Nicaragua in 1987, Brazil in 1988, Colombia in 1991, Peru in 1993, Bolivia in 1994) adopted bills of basic rights as part of their new constitutions, as well as establishing some form of active judicial review.

4. *The "dual transition" scenario,* in which constitutionalization is part of a transition to both a Western model of democracy and a market economy. Obvious examples of this scenario include the numerous constitutional revolutions of the postcommunist and post-Soviet countries. The most significant of these were the pioneering establishment of the Polish Constitutional Tribunal in 1986; the establishment of the Hungarian Constitutional Court in 1989–90 and the Russian Constitutional Court in 1991; and the inauguration of judicial review in the Czech Republic and Slovakia in 1993.

5. *The "incorporation" scenario,* in which constitutionalization is associated with the incorporation of international and trans- or supranational legal standards into domestic law. Important examples include the incorporation of the European Convention on Human Rights into Denmark's domestic law in 1993 and Sweden's in 1995 (Sweden had already adopted judicial review in 1979); and the recent passing in Britain of the Human Rights Act (1998), which effectively incorporated the provisions of the ECHR into British constitutional law—the first rights legislation in the United Kingdom for three hundred years.

6. *The "no apparent transition" scenario,* in which constitutional reforms have been neither accompanied by nor the result of any apparent fundamental changes in political or economic regimes. Some examples would be the consititutional revolution and the corresponding establishment of active judicial review in Sweden (1979) and Mexico (1994); the enactment of the New Zealand Bill of Rights Act in 1990; the adoption of two new Basic Laws in Israel protecting a number of core rights and liberties; and the adoption of the Canadian Charter of Rights and Freedoms in 1982.

Each of these types of constitutional reform poses its own puzzles for scholars of public law and judicial politics. It is the "no apparent transition" scenario of constitutional revolution, however, that I find the most intriguing from a methodological standpoint. The recent constitutional revolutions in Canada, New Zealand, and Israel, for example, provide nearly

ideal testing ground for identifying the political origins and consequences of the constitutionalization of rights and the fortification of judicial review, for several reasons. First, all three countries have undergone a major constitutional reform over the past two decades that introduced such changes; yet, unlike many former Eastern Bloc countries, for example, the dramatic constitutional changes in all three countries were not accompanied by, nor did they result from, major changes in political regime. In these countries, therefore, it is possible to disentangle the political origins of constitutionalization from other possible explanations and to distinguish the impact of judicial empowerment by looking at changes in judicial interpretation and the judicialization of politics. Second, the constitutional revolutions in Canada, New Zealand, and Israel took place in societies deeply divided along political, economic, and ethnic lines. A study of these three countries therefore allows us to assess the significance of preexisting sociopolitical struggles in the move toward judicial empowerment through constitutionalization in each polity. Third, the recent constitutional overhaul in Canada, New Zealand, and Israel marked a departure from the Westminster model of parliamentary supremacy and the established British legal tradition of judicial restraint in these countries. This has provided the Canadian Supreme Court, the New Zealand Court of Appeal, and the Israeli Supreme Court with the necessary institutional framework to become more vigilant in protecting basic rights and liberties. Indeed, these three national courts have reacted with great enthusiasm to the constitutionalization of rights and the fortification of judicial review in their respective domains by adjudicating many landmark constitutional rights cases over the past decade. Fourth, all three polities possess a strong British common law legal tradition. This common inheritance eliminates variations in legal tradition as possible explanations for differences in legal activity and judicial interpretation among the three countries. Fifth, these countries represent different models of judicial review and distinct variances in constitutional rights status while remaining within the context of an established democratic tradition. Precisely because the recent constitutional revolutions in Canada, New Zealand, and Israel have taken place in established democracies, framers of the new constitutional arrangements could not ignore the countermajoritarian tendency embedded in constitutionalism and judicial review. Persisting political traditions of parliamentary sovereignty and democratic representation had to be taken into account by those who initiated the constitutional overhaul in these countries. The result has been the development of a variety of innovative institu-

tional mechanisms aimed at compensating for the countermajoritarian difficulty embedded in judicial review. The significance of formal institutional factors can thus be assessed while accounting for variations in legal and political outcomes of constitutionalization as experienced by all three polities.

The widely celebrated South African constitutional revolution meanwhile represents a most difficult case to scholars skeptical of the conventional views concerning the progressive driving forces behind bills of rights and the overwhelmingly positive effects of such bills. Prior to the enactment of the 1993 interim Bill of Rights (replaced by the final Bill of Rights in 1996), there was perhaps no other developed country in the postwar world in which the gap between popular will and constitutional arrangement was so wide. In addition to issues of material inequality, the notorious apartheid regime excluded over 80 percent of South Africa's population from any meaningful participation in the democratic political arena. The abolition of apartheid in early 1991, the constitutionalization of rights in 1993, the first inclusive national election in 1994, and the establishment of the Constitutional Court in 1995 together mark a dramatic shift in the formal status of the vast majority of nonwhite South Africans. Few would doubt the crucial symbolic importance of these measures to the historically disenfranchised groups in South Africa. The practical effects of South Africa's constitutional rights revolution, however, appear to be much more nuanced and ought to be examined carefully. Moreover, from a methodological standpoint, "most difficult cases" have an important merit: our confidence in a given set of hypotheses is enhanced once it has proven to hold true even in the most challenging cases. It is precisely for this reason that I have chosen to refer to the South African constitutional revolution throughout the present study and to examine some of its political origins and salient de facto consequences, along with those of Canada, New Zealand, and Israel.

Outline of the Book

My discussion proceeds in three major steps. I begin in Chapter 1 by presenting an outline of the new constitutional framework in Canada, New Zealand, Israel, and South Africa, and by charting the effect of the recent constitutionalization of rights on the size and scope of judicial review in the four countries. This brief survey delimits the book's parameters and provides a context for the discussion to follow. The second part of the book (Chapters 2 and 3) is devoted to a comparative study of the political origins of constitutionalization. In Chapter 2 I examine existing theories of constitu-

tional transformation that purport to explain the causal mechanisms behind the constitutional entrenchment of rights and the establishment of judicial review. These include evolutionist and functionalist approaches to constitutional transformation; institutional economics theses, which see the development of constitutions and judicial review as mechanisms to mitigate systemic collective-action problems, such as commitment, information, and enforcement problems; and, finally, micro-level, "thin" strategic behavior models, which tend to employ party-based, "electoral market" logic to explain judicial empowerment.

I argue that none of these existing theories is based on a genuinely comparative systematic and detailed analysis of the political vectors behind any of the actual constitutional revolutions of the past few decades. Moreover, none accounts for the precise timing, scope, and nature of constitutional reform.

To address this puzzle, I develop a new explanation of judicial empowerment through constitutionalization as a form of self-interested *hegemonic preservation.* My underlying assumptions in developing this explanation for constitutionalization and judicial empowerment are: (1) the expansion of judicial power is an integral part and an important manifestation of the concrete social, political, and economic struggles that shape a given political system and cannot be understood in isolation from them; (2) the political origins of constitutional reform cannot be studied in isolation from the political origins of constitutional stalemate and stagnation; (3) other variables being equal, prominent political, economic, and judicial actors are likely to favor the establishment of institutional structures that will benefit them the most; and (4) constitutions and judicial review hold no purse strings and have no independent enforcement power, but nonetheless limit the institutional flexibility of political decision-makers. Thus, voluntary self-limitation through the transfer of policy-making authority from majoritarian decision-making arenas to courts seems, prima facie, to run counter to the interests of power-holders in legislatures and executives. The most plausible explanation for voluntary, self-imposed judicial empowerment is therefore that political, economic, and legal power-holders who either initiate or refrain from blocking such reforms estimate that it serves their interests to abide by the limits imposed by increased judicial intervention in the political sphere. In other words, those who are eager to pay the price of judicial empowerment must assume that their position (absolute or relative) would be improved under a juristocracy.

Specifically, I suggest that judicial empowerment through constitu-