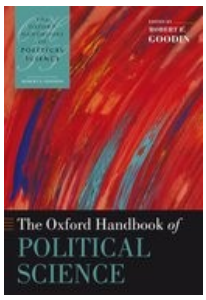

The Oxford Handbook of Political Science

Robert Goodin (ed.)

https://doi.org/10.1093/oxfordhb/9780199604456.001.0001

Published online: 05 September 2013 **Published in print:** 07 July 2011 **Online ISBN:** 9780191766879 **Print ISBN:** 9780199604456

CHAPTER

13 The Judicialization of Politics

Ran Hirschl

https://doi.org/10.1093/oxfordhb/9780199604456.013.0013 Pages 253–274

Published: 05 September 2013

Abstract

The judicialization of politics—the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies—is arguably one of the most significant phenomena of late twentieth- and early twenty-first-century government. Armed with newly acquired judicial review procedures, national high courts worldwide have been frequently asked to resolve a range of issues from the scope of expression and religious liberties and privacy to property, trade and commerce, education, immigration, labor, and environmental protection. This article analyzes the scope, nature, and causes of the judicialization of politics, as well as judicial behavior, recent jurisprudence of courts and tribunals worldwide, and the judicialization of "mega-politics" or "pure" politics—the transfer to courts of contentious issues of an outright political nature and significance. Questions of pure politics include electoral processes and outcomes, restorative justice, regime legitimacy, executive prerogatives, collective identity, and nation building. These developments reflect the demise of the "political question" doctrine, and mark a transition to what is termed "juristocracy."

Keywords: courts, judicialization of politics, judicial review, judicial behavior, jurisprudence, mega-politics, restorative justice, juristocracy, political question doctrine, legitimacy

Subject: Politics and Law, Comparative Politics, Politics

Series: Oxford Handbooks

Collection: Oxford Handbooks Online

THE judicialization of politics—the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies—is arguably one of the most significant phenomena of late twentieth and early twentyfirst century government. Armed with newly acquired judicial review procedures, national high courts worldwide have been frequently asked to resolve a range of issues, varying from the scope of expression and religious liberties, equality rights, privacy, and reproductive

freedoms, to public policies pertaining to criminal justice, property, trade and commerce, education, immigration, labor, and environmental protection. Bold newspaper headlines reporting on landmark court rulings concerning hotly contested issues—same sex marriage, limits on campaign financing, and affirmative action, to give a few examples—have become a common phenomenon. This is evident in the United States, where the legacy of active judicial review recently marked its bicentennial anniversary; here, courts have long played a significant role in policymaking. And it is just as evident in younger constitutional democracies that have established active judicial review mechanisms only in the last few decades. Meanwhile, transnational tribunals have become the main loci for coordinating policies at the global or regional level, from trade and monetary issues to labor standards and environmental regulations.

However, the growing political significance of courts has not only become more globally widespread than ever before. It has also expanded its scope to become a manifold, multifaceted phenomenon that extends
p. 254 well beyond the now "standard" ↳ concept of judge-made policy-making, through ordinary rights jurisprudence and judicial redrawing of legislative boundaries between state organs. The judicialization of politics now includes the wholesale transfer to the courts of some of the most pertinent and polemical political controversies a democratic polity can contemplate. Recall such matters as the outcome of the American presidential election of 2000 or the Mexican presidential election in 2006, the war in Chechnya, the Pervez Musharraf-led military *coup d'état* in Pakistan, Germany's place in the EU, restorative justice dilemmas in post-authoritarian Latin America, post-Communist Europe, or post-apartheid South Africa, the secular nature of Turkey's political system, Israel's fundamental definition as a "Jewish and Democratic State," or the political future of Quebec and the Canadian federation: all of these and many other "existential" political controversies worldwide have been framed as constitutional issues. And this has been accompanied by the concomitant assumption that courts—not politicians or the demos itself—are the appropriate fora for making these key decisions.

Despite the increasing prevalence of this trend, academic discourse addressing the judicialization of politics worldwide remains surprisingly sketchy. With a few notable exceptions (e.g. Tate and Vallinder 1995; Goldstein et al. 2001; Hirschl 2002; 2004*a*; 2006; Ferejohn 2002; Shapiro and Stone Sweet 2002; Pildes 2004; Sieder et al. 2005), the judicialization of politics is often treated as an obvious byproduct of the global convergence toward constitutional supremacy and the prevalence of rights discourse. What is more, the judicialization of politics is often used indiscriminately to refer to what in fact are several distinct phenomena: these range from judicial activism and rights jurisprudence to debates over judicial appointments and the politicization of the judiciary—the inevitable flip side of judicialization.

This chapter presents a lucid vocabulary and a coherent framework for analyzing the scope, nature, and causes of the judicialization of politics as we now know it. I begin with a classification of the various categories and instances of the trend that is broadly referred to as the judicialization of politics. I illustrate the distinct characteristics of each of these groupings of judicialization through recent jurisprudence of courts and tribunals worldwide. Special attention is given to the judicialization of "mega" or "pure" politics —by this I mean the transfer to courts of contentious issues of an outright political nature and significance. In the chapter's second part, I explore the main theories that purport to identify the central institutional, societal, and political conditions that are conducive to the judicialization of politics.

1 What is the Judicialization of Politics?

The "judicialization of politics" is an often umbrella-like term referring to what are really three interrelated processes. At the most abstract level, the term refers to the spread of legal discourse, jargon, rules, and
p. 255 procedures into the political sphere ↳ and policy-making fora and processes. The ascendancy of legal discourse and the popularization of legal jargon is evident in virtually every aspect of modern life. It is perhaps best illustrated by the subordination of almost every decision-making forum in modern rule-of-law polities to quasi-judicial norms and procedures. Matters that had previously been negotiated in an informal or nonjudicial fashion have now come to be dominated by legal rules and procedures (Sieder et al. 2005, 5). The proliferation of legalistic discourse and procedures seems to reflect the common translation of fundamental justice into what is predominantly procedural fairness. Judicialization of this type is inextricable from law's capture of social relationships and popular culture and its expropriation of social conflicts (Teubner 1987; Habermas 1988). Related aspects of this type of "juridification" of modern life have also been identified by early legal sociologists—for example, Henry Maine and Emile Durkheim's "from status to contract" thesis (Maine 2000 [1861]; Durkheim 1964 [1893]); or Max Weber's emphasis on the rise of a formal, unambiguous, and rational legal system in Western societies (Weber 1978 [1914]).

A second, more concrete aspect of the judicialization of politics is the expansion of the province of courts and judges in determining public policy outcomes, mainly through administrative review, judicial redrawing of bureaucratic boundaries between state organs, and "ordinary" rights jurisprudence. Not a single week passes by without a national high court somewhere in the world releasing a major judgment pertaining to the scope of constitutional rights protections or the limits on legislative or executive powers. Of these, the most common are cases dealing criminal due process rights and other aspects of procedural justice. Also common are rulings involving classic civil liberties, various aspects of the rights to privacy, and formal equality—all of which expand and fortify the boundaries of the constitutionally protected private sphere, often perceived as threatened by the long arm of the encroaching state and its regulatory laws (Hirschl 2004*a*, 103–18). This ever-expanding body of civil liberties jurisprudence has essentially redefined the boundaries of the private sphere in constitutional democracies, and has transformed numerous policy areas involving individual freedoms.

The proliferation of administrative agencies in the modern welfare state has expanded the scope of administrative review by courts. More often than not, such judicial involvement in public policy-making is confined to procedural aspects, focusing on process rather than substance. Drawing upon basic norms from contract law, constitutional law, and mainly administrative law, courts oversee and enforce the application of due process, equal opportunity, transparency, accountability, and reasonableness in public policy-making. It is therefore not surprising that judicialization of this type dominates the justice system itself, from civil procedure to criminal due process; it is particularly noticeable in other process-heavy policy areas such as immigration, taxation, or public tenders. But it is also clearly evident in countless other areas, from urban planning and public health to industrial relations and consumer protection. In short, whereas the first type of judicialization may be described as "juridification of social relations," judicialization of this second type manifests itself mainly in the domain of procedural justice and formal fairness in public policymaking processes.

p. 256 Over the last two decades, the judicialization of public policy-making has also proliferated at the international level (Romano 1999; Slaughter 2000; Goldstein et al. 2001), with the establishment of numerous transnational courts and quasijudicial tribunals, panels, and commissions dealing with human rights, transnational governance, trade, and monetary affairs. Perhaps nowhere is this process more evident than in Europe (e.g. Weiler 1999; Stone Sweet 2000). The European Court of Justice (ECJ) interprets the treaties upon which the European Union is founded and the enormous body of EU secondary legislation, and has been awarded an increasingly important status by legislators, executives, and judiciaries in the now

eastward-expanded EU, particularly with respect to interstate legal and economic disputes. The European Court of Human Rights in Strasbourg, the judicial arm of the Council of Europe, has in effect become the final court of appeal on human-rights issues for most of Europe. The judgments of these courts (as well as of other supranational tribunals such as the Inter-American Court of Human Rights) carry great symbolic weight and have forced many countries to incorporate transnational legal standards into their domestic legal system.

A similar process has taken place with respect to international trade disputes. Decisions by the World Trade Organization's (WTO) dispute settlement mechanism have had far-reaching implications for trade and commerce policies at the national level. This is also the case even in the United States, where compliance with unfavorable rulings by foreign tribunals has always been a tough sell. The 1994 North America Free Trade Agreement (NAFTA) also establishes quasi-judicial dispute resolution processes regarding foreign investment, financial services, and antidumping and countervailing instances. Similar arrangements were established by the MERCOSUR agreement in South America and ASEAN in the Asia-Pacific region. In short, a large-scale transfer of crucial policy-making prerogatives—from policy-making bodies and majoritarian decision-making arenas at the national level to relatively insulated transnational entities and tribunals—has been rapidly established over the last few decades. This trend has been described as nothing short of a new world order (Slaughter 2004).

A third emerging class of the judicialization of politics is the reliance on courts and judges for dealing with what we might call "mega-politics:" core political controversies that define (and often divide) whole polities. The judicialization of megapolitics includes a few subcategories: judicialization of electoral processes; judicial scrutiny of executive branch prerogatives in the realms of macroeconomic planning or national security matters (i.e. the demise of what is known in constitutional theory as the "political question" doctrine); fundamental restorative justice dilemmas; judicial corroboration of regime transformation; and above all, the judicialization of formative collective identity, nation-building processes and struggles over the very definition—or *raison d'etre*—of the polity as such—arguably the most problematic type of judicialization from a constitutional theory standpoint. These emerging areas of judicialized politics expand the boundaries of national high-court involvement in the political sphere beyond the ambit of constitutional rights or federalism jurisprudence, and take the judicialization of politics
p. 257 to a point that far exceeds any previous ↳ limit. More often than not, this trend is supported, either tacitly or explicitly, by powerful political stakeholders. The result has been the transformation of supreme courts worldwide into a crucial part of their respective countries' national policymaking apparatus. Elsewhere I have described this process as a transition to juristocracy (Hirschl 2004*a*).

It is difficult to overstate the profoundness of this transition. Whereas oversight of the procedural aspects of the democratic process—judicial monitoring of electoral procedures and regulations, for example—falls within the mandate of most constitutional courts, questions such as a regime's legitimacy, a nation's collective identity, or a polity's coming to terms with its often less than admirable past, reflect primarily deep moral and political dilemmas, not judicial ones. As such, they ought—at least as a matter of principle—to be contemplated and decided by the populace itself, through its elected and accountable representatives. Adjudicating such matters is an inherently and substantively political exercise that extends beyond the application of rights provisions or basic procedural justice norms to various public policy realms. Judicialization of this type involves instances where courts decide on watershed political questions that face the nation, despite the fact that the constitution of that nation does not speak to the contested issues directly, and despite the obvious recognition of the very high political stakes for the nation. It is precisely these instances of judicialization of watershed national questions involving the intersection of very high political stakes with little or no pertinent constitutional guidelines that make the democratic credentials of judicial review most questionable. For it is ultimately unclear what makes courts the most appropriate forum for deciding such purely political quandaries.

The difference between the second and third face of judicialization is subtle, but it is important. It lies in part in the qualitative distinction between mainly procedural justice issues on the one hand, and substantive moral dilemmas or watershed political quandaries that the entire nation faces on the other. In other words, there seems to be a difference between the political salience of judicialization of public policymaking and the judicialization of mega-politics. Ensuring procedural fairness in public tenders is an important element of corruption-free public administration. But its political salience is not nearly as significant as that of purely political issues such as the place of Germany in the European Union, the future of Quebec and the Canadian federation, the constitutionality of the post-apartheid political pact in South Africa, or that of the boundaries of the Jewish collective in Israel.

But the difference between the second and third level of judicialized politics goes beyond the question of political salience. It depends on our conceptualization of the "political." What counts as a "political" decision is not an easy question to answer. A political decision must affect the lives of many people. However, many cases that are not purely political (e.g. large class-action lawsuits) also affect the lives of many people. More importantly, since there is no plain and simple answer to the question "what is political?"—for many social theorists, the answer to that question would be "everything is political"—there cannot be a plain and simple definition of the judicialization of politics either. Likewise, what may be
p. 258 considered a controversial ↳ political issue in one polity (say, the right to have an abortion in the United States) may be framed as a clash between domestic law and supranational law in another country (e.g. Ireland), or may be a nonissue in yet another polity. That said, there seems to be a qualitative difference between the political salience of (for example) a court ruling refining the boundaries of the right to fair hearing or reviewing the validity of federal quotas on agricultural export, and a landmark judgment determining the legitimacy of a polity's regime or a nation's collective identity and membership boundaries. Indeed, few decisions may be considered more "political" than authoritatively defining a polity's very *raison d'être*. That elusive yet intuitive distinction is what differentiates the judicialization of mega-politics form the first two levels of judicialization. Consider the following examples—all are seldom addressed by American constitutional theory, often preoccupied with rights jurisprudence and with matters American.

2 A New Frontier: The Judicialization of "Mega-Politics"

The judicialization of mega-politics includes several different types of controversies, not all of which are equally problematic from the standpoint of canonical constitutional theory. One emerging subcategory of judicialized mega-politics is the increased judicial scrutiny of core prerogatives of legislatures and executives in foreign affairs, fiscal policy, and national security. The Supreme Court of Canada was quick to reject the "political question" doctrine (nonjusticiability of explicitly political questions) following the adoption of the Canadian Charter of Rights and Freedoms in 1982. In its landmark ruling in *Operation Dismantle* (1985)—a challenge to the constitutionality of U.S. missile testing on Canadian soil—the Supreme Court of Canada held unanimously that "[i]f a case raises the question of whether executive or legislative action violated the Constitution, then the question has to be answered by the Court, regardless of the political character of the controversy … [d]isputes of a political or foreign policy nature may be properly cognizable by the courts."

In the *Chechnya Case* (1995), the Russian Constitutional Court agreed to hear petitions by a number of opposition members of the Duma, who challenged the constitutionality of three presidential decrees ordering the Russian military invasion of Chechnya. Rejecting Chechnya's claim to independence and upholding the constitutionality of President Yeltsin's decrees as *intra vires*, the majority of the judges of this court stated that maintaining the territorial integrity and unity of Russia was "[a]n unshakable rule that
p. 259 excludes the possibility of an armed secession in any federative ↳ state." In a similar fashion, the Israeli

Supreme Court ruled in 2004 on the constitutionality and compatibility with international law of the West Bank barrier—a controversial network of fences and walls separating Israel from Palestinian territory. It also heard arguments concerning the constitutionality of matters such as the Oslo Peace Accords or Israel's unilateral pullback from the Gaza Strip. In recent years, constitutional courts in many countries have also begun the scrutiny of "processlight" measures adopted by governments to combat terrorism in the so-called "war on terror" era. In 1999, the Israeli Supreme Court banned the use of torture in interrogations by Israel's General Security Services. In late 2006 it ordered the weighing of security considerations against potential harm to civilians in determining the legality of "targeted killings" (the controversial practice of assassinating suspected Palestinian terrorists by Israel's security forces).

A slightly different, yet equally telling manifestation of judicial scrutiny of core executive prerogatives—this time in the context of national fiscal and welfare policy—can be found in the 1995 *Austerity Package Decisions* (the so-called "Bokros cases") by the Hungarian Constitutional Court. Here, the Court drew upon the concepts of reliance interest and legal certainty to strike down twenty-six provisions of a comprehensive economic emergency plan introduced by the government, the major thrust of which was a substantial cut in the government's expenditures on welfare benefits, pension allowances, education, and health care in order to reduce Hungary's enormous budget deficit and foreign debt. An equally significant manifestation of the judicialization of contentious macroeconomic matters is the Supreme Court of Argentina's October 2004 ruling (the so-called *Corralito Case*) on the constitutionality of the government's "pesification" plan (total convergence of the Argentine economy into pesos) and the corresponding freezing of savings deposits nominated in U.S. dollars—a fall-out of Argentina's major economic crisis of 2001.

A second area of increased judicial involvement in mega-politics is the corroboration of regime change. The most obvious example here is the "constitutional certification" saga in South Africa: This was the first time a constitutional court refused to accept a national constitutional text drafted by a representative constitutionmaking body. Other recent manifestations of this type of judicialization of megapolitics include the 2004 dismissal by the Constitutional Court of South Korea of the impeachment of President Roh Moo-hyun by South Korea's National Assembly (the first time in the history of modern constitutionalism that a president impeached by a legislative body has been reinstated by a judicial body); the rarely acknowledged yet astonishing restoration of the 1997 Fijian constitution by the Fijian Court of Appeals in *Fiji v. Prasad* 2001 (the first time in the history of modern constitutionalism that a polity's high court restored a constitution and the democratic system of government created by it); and the crucial yet seldom recognized involvement of the Pakistan Supreme Court in political transformation in that country (since 1990 Pakistan has known five regime changes and the Pakistan Supreme Court has played a key role in each of these radical transitions).

p. 260 The judicialization of mega-politics is also increasingly evident in a third area: judicial oversight of electoral processes, or what may be referred to as "the law of democracy" (Miller 2004). The most prevalent subcategory here is the judicial scrutiny of the pre-electoral process in virtually all countries where elections, referenda, or plebiscites take place. In some instances this is done via scrutiny, at times compulsory, of candidates and voter registry by electoral commissions that often comprise judges. In terms of jurisprudence, courts are frequently called upon to decide on matters such as party funding, campaign financing, and broadcast advertising during election campaigns; the redrawing of electoral districts; and the approval or disqualification of political parties and candidates. Over the last decade, courts in a number of countries, notably Bangladesh, Belgium, India, Israel, Spain, Thailand, and Turkey, have banned (or come close to banning) popular political parties from participating in national elections. During the last decade alone, constitutional courts in over twenty-five countries have been called upon to determine the political future of prominent leaders through impeachment or disqualification trials. Courts approved (or disapproved) the extension of Colombia's President Alvaro Uribe, Uganda's President Yoweri Museveni, and

Russia's President Boris Yeltsin's terms in office. Pakistan's former prime ministers Benazir Bhutto and Nawaz Sharif, and the Philippines' President Joseph Estrada—to give a few examples—have all had their political fate determined by courts. To that list one could add corruption indictments against heads of state (e.g. Italy's Silvio Berlusconi, Peru's Alberto Fujimori, or Thailand's Thaksin Shinawatra), and "political trials," in which prominent opposition candidates and leaders have been disqualified or otherwise removed from the race by a politicized judiciary.

Courts have also become ultimate decision-makers in disputes over national election outcomes, for example in Taiwan (2004), Georgia (2004), Puerto Rico (2004), Ukraine (2005), Congo (2006), Italy (2006), where the Constitutional Court approved a win of fewer than 25,000 votes by center-left leader Romano Prodi in one of Italy's closest elections. Likewise, a series of election appeals and counter-appeals culminated in Mexico's Federal Electoral Court's dismissal of leftist runner-up Andres Manuel Lopez Obrador's claim for a massive fraud by right-wing candidate and election winner Felipe Calderon in the July 2006 presidential election in that country. Calderon won the election by a less than 0.6 percent margin. Constitutional courts have also played key roles in deciding election outcomes in states and provinces. Even the fate of elections in the exotic island nations of Madagascar and Trinidad and Tobago has been determined by judicial tribunals. Clearly, the *Bush v. Gore* courtroom struggle over the fate of the American presidency was anything but an idiosyncratic moment in the recent history of comparative constitutional politics.

A fourth emerging area of mega-politics that has been rapidly judicialized over the past few decades is that of transitional or restorative justice. Quasi-judicial "truth commissions" or special tribunals dealing with core issues of transitional justice have been established in dozens of countries from El Salvador to Ghana.
p. 261 Recall, for example, the judicialization of restorative justice in the early years of the ↳ post-apartheid era in South Africa: Here, the "amnesty-for-confession" formula had been given a green light by the South African Constitutional Court in *AZAPO* (1996) allowing establishment of the quasi-judicial Truth and Reconciliation Commission. Similarly, the Pinochet affair can be thought of as an example of the judicialization of restorative justice dilemmas in post-authoritarian Latin America. Another example would be the major role played by the newly established constitutional courts in post-Communist Europe: these courts have played a central role in confronting their respective countries' pasts through the trials of former officeholders who committed what are now considered to be human rights violations during the Communist era. A paradigmatic case here is the 1993 decision of the constitutional court of the Czech Republic to uphold a law that declared the entire Communist era in the former Czechoslovakia illegal. These courts also made landmark rulings pertaining to Holocaust-related reparative justice and restitution policies. Yet another example would be the wholesale judicialization of the battle over the status of indigenous peoples in so-called "settler societies," particularly Australia, Canada, and New Zealand.

The judicialization of restorative justice is also evident at the transnational level. Here too there are many examples. The International Criminal Court (ICC) (ratified by ninety countries as of 2006) was established in 1998 as a permanent international judicial body with potentially universal jurisdiction pertaining to genocide, crimes against humanity, war crimes, and so on. The International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague was established in 1993. Another example here is the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, established in 1995. Also included in this category are the "hybrid courts" in Cambodia, East Timor, Kosovo, and Sierra Leone, which are all tribunals working within the rules and regulations of the domestic legal system, and applying a compound of international and national, substantial and procedural, law. Notorious leaders such as Slobodan Milosevic, Charles G. Taylor, and Saddam Hussein, were all put to trial before this new nexus of war crime tribunals.

But the clearest manifestation of the wholesale judicialization of core political controversies—arguably, the type of judicialization of politics that is the hardest to reconcile with canonical constitutional theory concerning the role of courts in a democracy—is the growing reliance on courts for contemplating the very

definition, or *raison d'être*, of the polity as such. This type of judicialized "mega-politics" is common in fragmented polities facing deep ethnic, linguistic, or religious cleavages. A few examples of this phenomenon include: the central role the Turkish Constitutional Court has played in preserving the strictly secular nature of Turkey's political system, by continually outlawing antisecularist political forces and parties; the landmark jurisprudence of the Supreme Court of India pertaining to the status of Muslim and Hindu religious personal laws; the crucial role of courts in Egypt, Pakistan, Malaysia, or Nigeria in determining the applicability of Islamic *Shari'a* law in public life; the wholesale transfer of the deep secular/religious cleavage in Israeli society to the Israeli judiciary through the judicialization of the question
p. 262 ↳ of "who is a Jew?" and the corresponding entanglement of the Israeli Supreme Court in interpreting Israel's fundamental definition as a "Jewish and Democratic State." An example here is the German Federal Constitutional Court's key role in the creation of the unified Germany, illustrated for example in the *Maastricht Case* (1993): here, the Court drew upon Basic Law provisions to determine the status of post-unification Germany vis-à-vis the emerging European supranational polity. Another "textbook" illustration is the unprecedented involvement of the Canadian judiciary in dealing with the status of bilingualism and the political future of Quebec and the Canadian federation, including the Supreme Court of Canada's landmark ruling in the *Quebec Secession Reference* (1998)—the first time a democratic country had ever tested in advance the legal terms of its own dissolution. Following a slim loss by the Quebecois secessionist movement in the 1995 referendum, the federal government was quick to draw upon the reference procedure to ask the Supreme Court to determine whether a hypothetical unilateral secession declaration by the Quebec government would be constitutional. The court accepted the challenge with open arms and took the liberty to articulate with authority the fundamental pillars of the Canadian polity in a way no other state organ has ever done before.

In short, "nothing falls beyond the purview of judicial review; the world is filled with law; anything and everything is justiciable," as Aharon Barak, the former Chief Justice of the Supreme Court of Israel, once said; and this appears to have become a widely accepted motto by courts worldwide. While many public policy matters still remain beyond the ambit of the courts (Graber 2004; Schauer 2006), in numerous countries throughout the world, there has been a growing legislative deference to the judiciary, an increasing (and often welcomed) intrusion of the judiciary into the prerogatives of legislatures and executives, and a corresponding acceleration of the process whereby political agendas have been judicialized. Together, these developments have helped to bring about a growing reliance on adjudicative means for clarifying and settling fundamental moral controversies and highly contentious political questions, and have transformed national high courts into major political decisionmaking bodies.

The wave of judicial activism that has swept the globe in the last few decades has not bypassed the most fundamental issues a democratic polity ought to address—whether it is the corroboration of new political regimes, coming to terms with its own (often not so admirable) past, or grappling with its embedded collective identity quandaries. Although foundational political questions of this nature may have certain important constitutional aspects, they are neither purely, or even primarily, legal dilemmas. As such, one would think, they ought to be resolved, at least on the level of principle, through public deliberation in the political sphere. Nonetheless, constitutional courts throughout the world have gradually become major decisionmaking bodies for dealing with precisely such dilemmas. Fundamental restorative justice, regime legitimacy, and collective identity questions have been framed in terms of constitutional claims (often for rights and entitlements), and as such have rapidly found their way to the courts.

p. 263

3 Why the Judicialization of Politics?

Scholars have identified a number of possible reasons and explanations for the judicialization of politics. Akin to any other major sociolegal phenomenon, no simple or single explanation can account for its wide range of manifestations. Given that a confluence of elements must exist, it is most productive to consider the factors that are, *ceteris paribus*, conducive to the judicialization of politics. These may be grouped into three main categories: institutional features, judicial behavior, and political determinants.

3.1 Institutional Features

As a bare minimum, the judicialization of politics requires the existence of a reasonably independent judiciary, with a well-respected and fairly active apex court. It is also generally agreed that there is a close affinity between the existence of a constitutional catalogue of rights and viable judicial review mechanisms in a polity, and judicial activism on the part of that polity's judiciary. If the constitution does not list tangible and defensible rights that individuals hold against the state, then judicial review is based on limited *ultra vires* principles, and is generally confined to procedural matters. In these circumstances, intervention by the judiciary in fundamental moral controversies or in highly political or politicized issues is generally unlikely. On the other hand, the existence of a constitutional catalogue of rights and judicial review mechanisms not only provides the necessary institutional framework for courts to become more vigilant in their efforts to protect the fundamental rights and liberties of a given polity's residents; it also enables them to expand their jurisdiction to address vital moral dilemmas and political controversies of crucial significance to that polity.

What is more, the existence of a constitutional framework that facilitates judicial activism may provide political actors who are unable or unwilling to advance their policy preferences through majoritarian decision-making arenas with an alternative institutional channel (the courts) for accomplishing their policy goals. Likewise, the existence or adoption of a constitutional catalogue of rights is likely to increase the public's "rights awareness." It also allows for what may be referred to as "judicialization from below"—legal mobilization by groups and movements that aim to advance social change through constitutional rights litigation. Therefore, in countries where bills of rights and active judicial review procedures have been adopted, one can expect a significant growth in the frequency and scope of the exercise of judicial review, and a corresponding intrusion by the judiciary into the prerogatives of both legislatures and executives. Likewise, the adoption of multilateral treaties and international agreements that contain justiciable provisions, and the accompanying establishment of adjudication or arbitration tribunals at the supranational level, are preconditions for the judicialization of international trade disputes.

p. 264

Models of judicial review employed by constitutional democracies vary significantly in their procedural characteristics—a fact that has important implications for the scope and nature of judicial review in these countries. A pertinent distinction here is between a priori or *abstract* review and a posteriori or *concrete* review—whether the constitutionality of a law or administrative action is determined before or after it takes effect, or whether a declaration of unconstitutionality can be made in the absence of an actual case or controversy; in other words, the distinction is between hypothetical "what if" scenarios ("abstract" review) and judicial review that may take place only in the context of a specific legal dispute ("concrete" review). In the United States, only a posteriori and *concrete* judicial review is allowed. Judicial review of legislation, whether exercised by lower courts or by the Supreme Court, is a power that can only be exercised by the courts within the context of concrete adversary litigation; i.e. when the constitutional issue becomes relevant and requires resolution in the decision of the case. In France, by contrast, judicial review is limited to an a priori and *abstract* judicial review. The *Conseil Constitutionnel* has pre-enactment constitutional review powers, but no power to nullify a law after it has been enacted by the legislature.

A number of leading democracies feature combined a priori/a posteriori, abstract *and* concrete review systems. In the latter capacity, national high courts in such countries could outlaw a statute before it was formally enacted on the basis of hypothetical constitutional arguments about its potential effect. Judicial review in Canada, for example, is not limited to review within the context of concrete adversary litigation. The reference procedure allows both the federal and provincial governments in Canada to refer proposed statutes or even questions concerning hypothetical legal situations to the Supreme Court or the provincial courts of appeal for an advisory (abstract) opinion on their constitutionality. It is hardly surprising therefore that some of the most contentious issues in Canadian politics of the last few decades have reached the Supreme Court through the reference procedure.

Moreover, unlike in the United States, most countries that employ an a priori and abstract review model allow public officials, legislators, cabinet members, and heads of state to initiate judicial scrutiny of proposed laws and hypothetical constitutional scenarios, thereby providing a constitutional framework hospitable to the judicialization of politics and the accompanying politicization of the judiciary. In France and Italy, for example, the initiation of constitutional litigation in constitutional courts is limited to elected politicians. In other countries (Germany and Spain, for example) elected officials may challenge proposed legislation through the abstract a priori review. In short, a system that permits a priori and abstract review initiated by politicians would appear to have a greater potential for generating high levels of judicialized policy-making using the process of constitutional review (Stone 1992). That said, scholars have correctly pointed out that "the apparently more restrictive combination of *a posteriori* and concrete review has hardly relegated the U.S. Supreme Court to a minor policy role" (Tate 1992, 6).

Another pertinent distinction is that which exists between *decentralized* (all courts) and *centralized* (constitutional court) review. In a decentralized system (for example, in the U.S.), judicial review is an
p. 265 inherent competence of almost all courts in ↳ nearly any type of case and controversy. The centralized judicial review system (often referred to as "constitutional review") is characterized by having only a single state organ (a separate judicial body in the court system or an extrajudicial body) acting as a constitutional tribunal. This model of judicial review has been adopted by many European countries that follow various branches of the civil law tradition (such as Germany, Austria, Italy, and Spain), as well as by almost all new democracies in post-Communist Europe. Some new constitutionalist countries (such as Portugal) employ a combined decentralized/centralized model of judicial/constitutional review.

Other variables being equal, the impact of the judiciary on public policy outcomes is likely to be more significant under a decentralized, all-court review system. As Tate points out, "restricting the power to declare legislation and regulations unconstitutional to a constitutional court ... sharply reduces the number of occasions and range of policy issues on which courts can be invited (or can invite themselves) to exercise judicial review" (1992, 7). That said, administrative review—however limited—is always available to the courts in most centralized review countries. Moreover, the symbolic importance of landmark high-court decisions in such countries is at least as significant as that of national high-court rulings in countries employing a decentralized review system. Germany's Federal Constitutional Court and the youthful Hungarian Constitutional Court are perhaps the most frequently mentioned examples of centralized judicial bodies that not only fulfill the sole function of judicial review in their respective countries, but have also become crucial policy-making bodies at the national level (Kommers 1997; Sólyom and Brunner 2000).

Another important aspect of judicial review that has implications for the judicialization of politics is the question of standing (*locus standi*) and access rights: Who may initiate a legal challenge to the constitutionality of legislation or official action; and at what stage of the process may a given polity's supreme court become involved. In the United States, standing rights have been traditionally limited to individuals who claim to have been affected by an allegedly unconstitutional legislation or official action. The U.S. Supreme Court will not hear a challenge to the constitutionality of legislation unless all other possible legal paths and remedies have been exhausted. Moreover, the Court has full discretion over which

cases it will hear—its docket therefore consists of "discretionary leave" cases, rather than appeals by right. However, constitutional democracies that employ a priori and abstract judicial review (such as France) allow for, and even encourage, public officials and political actors to challenge the constitutionality of proposed legislation. Several polities authorize their constitutional court judges, in an *ex-officio* capacity, to initiate proceedings against an apparently unconstitutional law. Other countries (South Africa, for example) impose mandatory referrals of constitutional questions by lower courts to a constitutional tribunal. And yet other countries, most notably Israel and India, allow private-person constitutional grievances to be submitted directly to their respective high courts. In addition to legislative frameworks, constitutional courts in most liberal democracies have continuously liberalized the rules of standing and expanded intervener (e.g. *amicus curiae*) status. Other variables being equal, liberal standing and accessibility rights
p. 266 along with lowered barriers of nonjusticiability provides an important ↳ institutional channel through which ordinary citizens can challenge what they regard as infringements upon their constitutionally protected rights before a country's judicial system, thereby increasing the likelihood of judicial involvement in public policymaking.

3.2 Judicial Behavior

The rise of "philosopher king courts" cannot be attributed solely or even primarily to the existence of a constitutional framework conducive to the judicialization of politics. It depends to a large extent upon judicial willingness to engage in public policy-making. In that respect, an increasing number of scholars suggest that judges do not behave or reach decisions in a way that is fundamentally different from other branches of government. Courts are political institutions not merely because they are politically constructed, but also because the determinants of judicial behavior are not distinctly different from the determinants of decision-making by other public officials. Judicial behavior, especially by constitutional courts in cases involving politically charged issues, may be driven by adherence to national meta-narratives, responsiveness to public opinion, personal ideological preferences, collegial considerations, prevalent attitudes within the legal profession, or strategic considerations vis-à-vis other national decision-making bodies.

Of particular relevance to the judicialization of politics are some insights drawn from the strategic approach to the study of judicial behavior. Like most other institutions, courts and judges are strategic actors to the extent that they seek to maintain or enhance their institutional position vis-à-vis other major national decision-making bodies or simply expand the ambit of their political influence and international profile. Accordingly, constitutional court rulings may not only be analyzed as mere acts of professional, apolitical jurisprudence (as doctrinal legalistic explanations of court rulings often suggest), or reflections of judicial ideology (as "attitudinal" models of judicial behavior might suggest), but also a reflection of judges' own strategic choices (Epstein and Knight 1998; 2000).

Courts may realize that there are circumstances—such as the changing fates or preferences of other influential political actors, or gaps in the institutional context within which they operate—in which they may be able to strengthen their own position by extending the scope of their jurisprudence and fortifying their status as crucial national policy-making bodies. The establishment of a supranational rule of law in Europe, for example, was driven in no small part by national judges' attempts to enhance their independence, influence, and authority vis-à-vis other courts and political actors (Alter 2001), as well as by a corresponding and continuous judicial activism by the ECJ (Mattli and Slaughter 1998; Weiler 1999). Conversely, credible threats on the court's autonomy and harsh political responses to unwelcome activism or interventions on the part of the courts have chilling effects on judicial decisionmaking patterns (Epstein et al. 2001; Helmke 2005; Vanberg 2005). Courts must be responsive to the political environment in which
p. 267 they operate in other respects ↳ as well. Because justices do not have the institutional capacities to enforce their rulings, they must take into account the extent to which popular decision-makers will support their

policy initiatives (McGuire and Stimson 2004). Judges seem to care about their reputation within their close social milieu, court colleagues, and the legal profession more generally (Baum 2006). And with the increasing internationalization of constitutional discourse, the judicialization of politics (primarily through constitutional rights litigation) may also support the interests of a supreme court seeking to increase its symbolic power and international prestige by fostering its alignment with a growing community of liberal democratic nations engaged in judicial review and rights-based discourses.

The centrality of judicial will in explaining the judicialization of politics is often emphasized by constitutional theorists critical of judicial activism. With a few exceptions, these critics often blame "power hungry" courts and judges for being too assertive and excessively entangled with moral and political decision-making, subsequently disregarding fundamental separation of powers and democratic governance principles. Even the more politically astute critics of the US Constitution's expropriation by the United States Supreme Court are more concerned with the Supreme Court's "imperialist" impulse than with the political conditions that promote the transition to juristocracy (e.g. Tushnet 1999; Bork 2001; Kramer 2004).

In my opinion, portraying courts and judges as the main source of judicialization is misguided. Courts are first and foremost political institutions. Like any other political institutions, they do not operate in an institutional or ideological vacuum. Their establishment does not develop and cannot be understood separately from the concrete social, political, and economic struggles that shape a given political system. Indeed, constitutionalization, political deference to the judiciary, and the expansion of judicial power more generally, are an integral part and an important manifestation of those struggles, and cannot be understood in isolation from them. And this brings us to the final category, political determinants of judicialization.

3.3 Political Determinants

A favorable constitutional framework and an active judiciary are important contributors to the judicialization of politics. However, this unprecedented level of political jurisprudence cannot develop, let alone be sustained, without the receptiveness and support, tacit or explicit, of the political sphere itself. Recent studies of comparative judicial politics propose a number of explanations for the expansion of judicial power and the corresponding judicialization of politics. These may be grouped into three subcategories: macro sociopolitical trends, the prevalence of rights discourse and litigation, and finally strategic maneuvering by powerful political stakeholders.

The proliferation of democracy worldwide is a main cause of judicialization and the expansion of judicial power more generally. By its very nature, the establishment of a democratic regime entails the establishment of some form of separation of powers among the major branches of government, as well as
p. 268 between the central ↳ and provincial/regional legislatures. It also entails the presence of a set of procedural governing rules and decision-making processes to which all political actors are required to adhere. The persistence and stability of such a system, in turn, requires at least a semi-autonomous, supposedly apolitical judiciary to serve as an impartial umpire in disputes concerning the scope and nature of the fundamental rules of the political game. Active judicial review is both a prerequisite and a byproduct of viable democratic governance in multilayered federalist countries (Shapiro 1999). In other words, more democracy equals more courts. However, the "proliferation of democracy" thesis cannot provide a full explanation for the significant variations in levels of judicialization among new democracies. And it does not provide an adequate explanation for increased levels of judicialization in polities that have not undergone any apparent changes in their political regime.

From a functionalist standpoint, judicialization may emanate from the proliferation in levels of government and the corresponding emergence of a wide variety of semi-autonomous administrative and regulatory state agencies as the main driving forces behind the expansion of judicial power over the past few decades

(Shapiro and Stone Sweet 2002). According to this thesis, independent and active judiciaries armed with judicial review practices are necessary for efficient monitoring of the everexpanding administrative state. Moreover, the modern administrative state embodies notions of government as an active policy-maker, rather than a passive adjudicator of conflicts. It therefore requires an active, policy-making judiciary (Feely and Rubin 1998). Along the same lines, the judicialization of politics may emanate from a general waning of confidence in technocratic government and planning, and a consequent desire to restrict the discretionary powers of the state, resulting in a diffusion of judicial power (Shapiro 1999). It may also stem from the increasing complexity and contingency of modern societies (Luhmann 1985), and/or from the creation and expansion of the modern welfare state with its numerous regulatory agencies (Teubner 1987; Habermas 1988). Some accounts of the rapid growth of judicialization at the supranational judicial level portray it as an inevitable institutional response to complex coordination problems deriving from the systemic need to adopt standardized legal norms and administrative regulations across member states in an era of converging economic markets (Stone Sweet 2000). In some instances, economic liberalization may be an important pro-judicialization factor. In the regulatory arena, the combination of privatization and liberalization may encourage "juridical regulation" (Vogel 1998; Kelemen and Sibbitt 2004).

A second approach emphasizes the prevalence of rights discourse or greater awareness to rights issues, which is likely to yield what may be termed "judicialization from below." Charles Epp (1998) suggests that the impact of constitutional catalogues of rights may be limited by individuals' inability to invoke them through strategic litigation. Hence bills of rights matter to the extent that a support structure for legal mobilization—a nexus of rights-advocacy organizations, rights-supportive lawyers and law schools, governmental rights-enforcement agencies, and legal-aid schemes—is well developed. In other words, while the existence of written constitutional provisions is a necessary condition for the effective protection
p. 269 of rights and liberties, it ↳ is certainly not a sufficient one. The effectiveness of rights provisions in planting the seeds of social change in a given polity is largely contingent upon the existence of a support structure for legal mobilization, and more generally, sociocultural conditions that are hospitable for "judicialization from below."

Legal mobilization from below is aided by the commonly held belief that judicially affirmed rights are self-implementing forces of social change removed from the constraints of political power. This belief has gained a near-sacred status in public discussion. The "myth of rights" as Stuart Scheingold (1974) termed it, contrasts the openness of judicial proceedings to the secret bargaining of interest group pluralism so as to underscore the integrity and incorruptibility of the judicial process. "The aim, of course, is to enhance the attractiveness of legal and constitutional solutions to political problems" (1974, 34). This is turn may lead a spread of populist "rights talk" and the corresponding impoverishment of political discourse (Glendon 1991).

Similarly, an authentic, "bottom up" judicialization is more likely to occur when judicial institutions are perceived by social movements, interest groups, and political activists as more reputable, impartial, and effective decision-making bodies than other bureaucracy-heavy government institutions or biased majoritarian decisionmaking arenas (Tate and Valinder 1995). An all-encompassing judicialization of politics is, *ceteris paribus*, less likely to occur in a polity featuring a unified, assertive political system that is capable of restraining the judiciary. In such polities, the political sphere may signal credible threats to an overactive judiciary that exert a chilling effect on courts. Conversely, the more dysfunctional or deadlocked the political system and its decision-making institutions are in a given rule-of-law polity, the greater the likelihood of expansive judicial power in that polity (Guarnieri et al. 2002, 160–81). Greater fragmentation of power among political branches reduces their ability to rein in courts, and correspondingly increases the likelihood of courts asserting themselves (Ferejohn 2002).

A more "realist" approach suggests that the judicialization of politics is largely a function of concrete choices, interests, or strategic considerations by self-interested political stakeholders. From the politicians'

point of view, delegating policy-making authority to the courts may be an effective means of shifting responsibility, and thereby reducing the risks to themselves and to the institutional apparatus within which they operate. The calculus of the "blame deflection" strategy is quite intuitive. If the delegation of powers can increase credit or legitimacy, and/or reduce the blame placed on the politician as a result of the delegated body's policy decision, then such delegation can benefit the politician (Voigt and Salzberger 2002). At the very least, the transfer to the courts of contested political "hot potatoes" offers a convenient retreat for politicians who have been unwilling or unable to settle contentious public disputes in the political sphere. It may also offer refuge for politicians seeking to avoid difficult or "no win" decisions and/or avoid the collapse of deadlocked or fragile governing coalitions (Graber 1993). Conversely, political oppositions may seek to judicialize politics (for example, through petitions and injunctions against government policies) in order to harass and obstruct governments (Tate and Vallinder 1995). At times, opposition
p. 270 politicians may resort to litigation in an attempt to enhance their media ↳ exposure, regardless of the actual outcome of litigation (Dotan and Hofnung 2005). A political quest for legitimacy often stands behind the transfer of certain regimechange questions to courts. (Consider the aforementioned Pakistani Supreme Court legitimization of the 1999 military *coup d'état* in that country). Empirical studies confirm that national high courts in most constitutional democracies enjoy greater public legitimacy and support than virtually all other political institutions. This holds true even when courts engage in explicit manifestations of political jurisprudence (Gibson et al. 2003).

Judicial empowerment may also reflect the competitiveness of a polity's electoral market or governing politicians' time horizons. According to the "party alternation" thesis, for example, when a ruling party expects to win elections repeatedly, the likelihood of an independent and powerful judiciary is low. However, when a ruling party has a low expectation of remaining in power, it is more likely to support a powerful judiciary to ensure that the next ruling party cannot use the judiciary to achieve its policy goals (Ramseyer 1994; Ginsburg 2003). Likewise, judicial empowerment may be driven by "hegemonic preservation" attempts taken by influential sociopolitical groups fearful of losing their grip on political power (Hirschl 2004*a*). Such groups and their political representatives—who possess disproportionate access to, and influence over, the legal arena—are more likely to delegate power to the judiciary when they find strategic drawbacks in adhering to majoritartian decision-making processes or when their world-views and policy preferences are increasingly challenged in such arenas. For example, constitutional courts have become key guardians of secular or moderate interests against the increasing popularity of principles of theocratic governance (Hirschl 2008). Likewise, when elected politicians are obstructed from fully implementing their own policy agenda, they may favor the active exercise of constitutional review by a sympathetic judiciary to overcome those obstructions (Hirschl 2004*b*; Whittington 2005). Powerful national high courts may allow governments to impose a centralizing "one rule fits all" regime upon enormous and diverse polities (Morton 1995; Goldstein 2001). (Think of the standardizing effect of apex court jurisprudence in vast and exceptionally diverse polities such as the United States or the European Union).

Perhaps the clearest illustration of the necessity of political support for the judicialization of mega-politics is the political sphere's decisive reaction to instances of unwelcome judicial activism. Occasionally, courts may respond to counterestablishment challenges by releasing rulings that threaten to alter the political power relations in which the courts are embedded. However, as the recent history of comparative constitutional politics tells us, recurrent manifestations of unsolicited judicial intervention in the political sphere in general—and unwelcome judgments concerning contentious political issues in particular—have brought about significant political backlashes, targeted at clipping the wings of over-active courts. These include legislative overrides of controversial rulings, political tinkering with judicial appointment and tenure procedures to ensure the appointment of "compliant" judges and/or to block the appointment of "undesirable" judges, "court-packing" attempts by political power holders, disciplinary sanctions,
p. 271 impeachment or removal of "objectionable" ↳ or "over-active" judges, the introduction of jurisdictional constraints, or clipping jurisdictional boundaries and judicial review powers. In some instances (e.g. Russia

in 1993, or Ecuador in 2004, or Pakistan in 2007) they have resulted in constitutional crises leading to the reconstruction or dissolution of high courts. To this we may add another political response to unwelcome rulings: more subtle, and possibly more lethal, sheer bureaucratic disregard for, or protracted or reluctant implementation of, unwanted rulings (Rosenberg 1991; 1992; Garrett et al. 1998; Conant 2002). In short, the judicialization of politics is derivative first and foremost of political, not judicial, factors.

In sum, over the last few decades the world has witnessed a profound transfer of power from representative institutions to judiciaries, whether domestic or supranational. One of the main outcomes of this trend has been the transformation of courts and tribunals worldwide into major political decision-making loci. Over the last two decades, the judicialization of politics has extended well beyond the now "standard" judicialization of policy-making, to encompass questions of pure politics—electoral processes and outcomes, restorative justice, regime legitimacy, executive prerogatives, collective identity, and nation-building. These developments reflect the demise of the "political question" doctrine, and mark a transition to what I have termed "juristocracy." Akin to any other transformation of that scope and magnitude, the judicialization of politics is not derivative of a single cause. Instead, a confluence of institutional, societal, and political factors hospitable to the judicialization of politics is necessary to create and sustain it. Of these factors, three stand out as being crucial: the existence of a constitutional framework that promotes the judicialization of politics; a relatively autonomous judiciary that is easily enticed to dive into deep political waters; and above all, a political environment that is conducive to the judicialization of politics.

References

Alter, K. 2001. *Establishing the Supremacy of European Law*. Oxford: Oxford University Press.

Baum, L. 2006. *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton, NJ: Princeton University Press.

Bork, R. H. 2002. *Coercing Virtue: The Worldwide Rule of Judges*. Toronto: Vintage Canada.

Conant, L. 2002. *Justice Contained: Law and Politics in the European Union*. Ithaca, NY: Cornell University Press.
Google Scholar Google Preview WorldCat COPAC

Dotan, Y. and Hofnung, M. 2005. Legal defeats—political wins: why do elected representatives go to court?. *Comparative Political Studies*, 38: 75–103.
Google Scholar WorldCat

Durkheim, E. 1964[1893]. *The Division of Labor in Society*. New York: Free Press.
Google Scholar Google Preview WorldCat COPAC

Epp, C. 1998. *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.

Epstein, L. and Knight, J. 1998. *The Choices Justices Make*. Washington, DC: CQ Press.

——2000. Towards a strategic revolution in judicial politics: a look back, a look ahead. *Political Research Quarterly*, 53: 625–61.

p. 272 Epstein, L., Knight, J. and Shvetsova, O. 2001. The role of constitutional courts in the establishment and maintenance of democratic systems of government. *Law and Society Review*, 35: 117–63.

Feeley, M. and Rubin, E. 1998. *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*. Cambridge: Cambridge University Press.

Ferejohn, J. 2002. Judicializing politics, politicizing Law. *Law and Contemporary Problems*, 61: 41–68.
WorldCat

Garrett, G. et al. 1998. The politics of judicial integration in the European Union. *International Organization*, 49: 171–81.
Google Scholar WorldCat

Gibson, J. L., Caldeira, G., and Spence, L. K. 2003. The Supreme Court and the U. S. presidential election of 2000: wounds, self-inflicted or otherwise? *British Journal of Political Science*, 33: 535–56.

Ginsburg, T. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge: Cambridge University Press.
Google Scholar Google Preview WorldCat COPAC

Glendon, M. A. 1991. *Rights Talk: The Impoverishment of Political Discourse*. New York: Free Press.

Goldstein, J. et al. (eds.). 2001. *Legalization and World Politics*. Cambridge, Mass.: MIT Press.
Google Scholar Google Preview WorldCat COPAC

Goldstein, L. 2001. *Constituting Federal Sovereignty: The European Union in Comparative Context*. Baltimore: Johns Hopkins University Press.

Graber, M. 1993. The nonmajoritarian difficulty: legislative deference to the judiciary. *Studies in American Political Development*, 7: 35–73.

—2004. Resolving political questions into judicial questions: Tocqueville's thesis revisited. *Constitutional Commentary*, 21: 485–545.

Guarnieri, C. and Pederzoli, P. 2002. *The Power of Judges: A Comparative Study of Courts and Democracy*. New York: Oxford University Press.

Habermas, J. 1988. Law as medium and law as institution. In *Dilemmas of Law in the Welfare State*, ed. G. Teubner. Berlin: Walter De Gruyter.
Google Scholar Google Preview WorldCat COPAC

Helmke, G. 2005. *Courts under Constraints: Judges, Generals, and Presidents in Argentina*. New York: Cambridge University Press.
Google Scholar Google Preview WorldCat COPAC

Hirschl, R. 2002. Repositioning the judicialization of politics: *Bush v. Gore* as a global trend. *Canadian Journal of Law and Jurisprudence*, 15: 191–218.

—2004*a*. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, Mass.: Harvard University Press.

—2004*b*. Constitutional courts vs. religious fundamentalism: three Middle Eastern tales. *Texas Law Review*, 82: 1819–60.
WorldCat

—2006. The new constitutionalism and the judicialization of pure politics worldwide. *Fordham Law Review*, 75: 721–53.

—2008. Juristocracy vs. theocracy: constitutional courts and the containment of religious fundamentalism, *Middle East Law and Governance*.

Kelemen, D. and Sibbitt, E. 2004. The globalization of American law. *International Organization*, 58: 103–36.

Kommers, D. 1997. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham, NC: Duke University Press.
Google Scholar Google Preview WorldCat COPAC

Kramer, L. 2004. *The People Themselves: Popular Constitutionalism and Judicial Review*. New York: Oxford University Press.

Luhmann, N. 1985. *A Sociological Theory of Law*. London: Routledge.
Google Scholar Google Preview WorldCat COPAC

Maine, H. 2000. [1861] *Ancient Law*. Washington, DC: Beard Books.
Google Scholar Google Preview WorldCat COPAC

Mattli, W. and Slaughter., A.-M. 1998. Law and politics in the European Union: a reply to Garrett. *International Organization*, 49: 182–90.

McGuire, K., and Stimson. J. 2004. The least dangerous branch revisited: new evidence on Supreme Court responsiveness to public preferences. *Journal of Politics*, 66: 1018–35.

Miller, R. A. 2004. Lords of democracy: the judicialization of "pure politics" in the United States and Germany. *Washington and Lee Law Review*., 61: 587–662.

Morton, F. L. 1995. The effect of the Charter of Rights on Canadian federalism. *Publius*., 25: 173–88.

Pildes, R. 2004. The Supreme Court., 2003 term—foreword: the constitutionalization of democratic politics. *Harvard Law Review*, 118: 29–160.

Ramseyer, J. M. 1994. The puzzling (in)dependence of courts: a comparative approach. *Journal of Legal Studies*., 23: 721–48.
WorldCat

Romano, C. 1999. The proliferation of international judicial bodies: the pieces of the puzzle. *New York University Journal of International Law and Politics*, 31: 709–51.

Rosenberg, G. 1991. *The Hollow Hope: Can Courts Bring About Social Change?*. Chicago: University of Chicago Press.

—1992. Judicial independence and the reality of political power. *Review of Politics*, 54: 369–98.

Schauer, F. 2006. The Supreme Court., 2005 Term-foreword: the Court's agenda—and the nation's. *Harvard Law Review*, 120: 4–64.

Scheingold, S. 1974. *The Politics of Rights: Lawyers, Public Policy, and Political Change*. New Haven, Conn.: Yale University Press.
Google Scholar Google Preview WorldCat COPAC

Shapiro, M. 1999. The success of judicial review. In *Constitutional Dialogues in Comparative Perspective*, ed. S. Kenney. New York: Palgrave Macmillan.

—and Stone Sweet, A. 2002. *On Law, Politics, and Judicialization*. New York: Oxford University Press.
Google Scholar Google Preview WorldCat COPAC

Sieder, R., Schjolden, L., and Angell, A. (eds.) 2005. *The Judicialization of Politics in Latin America*. New York: Palgrave Macmillan.

Slaughter, A.-M. 2000. Judicial globalization. *Virginia Journal of International Law*, 40: 1103–24.
WorldCat

—2004. *The New World Order*. Princeton, NJ: Princeton University Press.

Sólyom, L. and Brunner, G. 2000. *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*. Ann Arbor: University of Michigan Press.

Stone, A. 1992. *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*. New York: Oxford University Press.

Stone Sweet, A. 2000. *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press.
Google Scholar Google Preview WorldCat COPAC

Tate, C. N. 1992. Comparative judicial review and public policy: concepts and overview. In *Comparative Judicial Review and Public Policy*, ed. D. Jackson and C. N. Tate. Westport, Conn.: Greenwood Press.

—and Vallinder, T. (eds.) 1995. *The Global Expansion of Judicial Power*. New York: New York University Press.

Google Scholar Google Preview WorldCat COPAC

Teubner, G. 1987. *Juridification of the Social Spheres*. Berlin: Walter de Gruyter.

Tushnet, M. 1999. *Taking the Constitution Away from the Courts*. Princeton, NJ: Princeton University Press.

Vanberg, G. 2005. *The Politics of Constitutional Review in Germany*. Cambridge: Cambridge University Press.

Vogel, S. 1998. *Freer Markets, More Rules*. Ithaca, NY: Cornell University Press.

Voigt, S. and Salzberger., E. 2002. Choosing not to choose: when politicians choose to delegate powers. *Kyklos*, 55: 289–310.

Weber, M. 1978. [1914] *Economy and Society: An Outline of Interpretive Sociology*. Berkeley: University of California Press.

Weiler, J. H. H. 1999. *The Constitution of Europe: Do the New Clothes Have an Emperor?* Cambridge: Cambridge University Press.
Google Scholar Google Preview WorldCat COPAC

Whittington, K. E. 2005. “Interpose your friendly hand:” political supports for the exercise of judicial review by the United States Supreme Court. *American Political Science Review*., 99: 583–96.