



THE STRAUS INSTITUTE
for the ADVANCED STUDY
OF LAW & JUSTICE

The NYU Institutes on the Park

THE JOSEPH AND GWENDOLYN STRAUS INSTITUTE FOR THE ADVANCED STUDY OF LAW & JUSTICE

*Professor J.H.H. Weiler
Director of The Straus Institute*

Straus Working Paper 05/13

Stephen Gardbaum

Separation of Powers and the Growth of Judicial Review (Or Why has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)

NYU School of Law • New York, NY 10011
The Straus Institute Working Paper Series can be found at
<http://nyustraus.org/index.html>

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

ISSN 2160-827X (online)
Copy Editor: Danielle Leeds Kim
© Stephen Gardbaum 2013
New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, STRAUS INSTITUTE WORKING PAPER NO./YEAR [URL]

**SEPARATION OF POWERS AND THE GROWTH OF JUDICIAL REVIEW
(OR WHY HAS THE MODEL OF LEGISLATIVE SUPREMACY
MOSTLY BEEN WITHDRAWN FROM SALE?)**

By Stephen Gardbaum*

Abstract

Most of the literature explaining the tremendous growth of judicial review in recent decades has focused on the transition from authoritarian rule or post-conflict states and employed a broadly public choice methodology to account for the change. To the limited extent explanations have been presented for the significant number of established parliamentary democracies that have also created or expanded judicial review during the same period, these have also mainly relied on a similar public choice framework. This paper presents an alternative – or at least supplementary – account of the abandonment of traditional legislative supremacy in this latter group that is institutional in nature and puts the parliamentary nature of these democracies in the center of the picture. It identifies a series of developments and changed institutional practices that have undermined faith in political accountability as an effective and sufficient check on the undue concentration of governmental authority. In this way, it argues that separation of powers concerns have been an important but mostly overlooked reason for the growth of judicial review in these countries.

* MacArthur Foundation Professor of International Justice and Human Rights, UCLA School of Law. This working paper was written during my tenure as a joint Straus and Senior Emile Noël Fellow at NYU School of Law during 2012-13. Many thanks to faculty conveners Sam Issacharoff, Rick Pildes and Joseph Weiler along with fellow Fellows for extremely helpful comments at the Straus Institute fall workshop at which an outline of this project was presented.

I. Introduction

It is commonplace that one of the most striking features of contemporary constitutionalism is the growth of judicial review. The “global expansion of judicial power”¹ that has taken place since 1945, and with even greater vigor since 1989, means that judicial review of legislation is now the norm among drafters of constitutions, with virtually every “third” and now “fourth wave” democracy having established a constitutional court with this power.² Prior to 1945, and even 1989, this was certainly not the case.³

Within the comparative politics and comparative constitutional law literatures, four main general explanations have been provided for this exponential contemporary growth of judicial review and its accompanying transfer of power to courts. The first is the “catastrophe” or “never again” thesis associated with the horrors of the Second World War and the “rights revolution” that emerged from it, which had particular resonance in and for the former Axis powers that adopted constitutional review at the first opportunity: Germany, 1949; Italy, 1948; Japan, 1947.⁴ Similar transition from fascist/military dictatorships and a “new beginning” scenario also played an important role in the adoption of judicial review in Spain (1978), Portugal (1982), and its reawakening in Latin America (1990s).⁵ Second, and more recently, the somewhat related “insurance,”⁶ “hedging,”⁷ and “commitment”⁸ theses have focused on new democracies in Asia and Eastern Europe making the transition from authoritarian rule. Constitutional courts facilitate democracy by providing a form of political insurance to existing power holders facing uncertain electoral

¹ THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995).

² According to Tom Ginsburg and Mila Versteeg, 38% of countries had judicial review in 1951, whereas 86% did in 2011. Tom Ginsburg and Mila Versteeg, *Why Do Countries Adopt Judicial Review?* J LAW ECON ORGN first published online July 23, 2013 doi: 10.1093/jleo/ewt008.

³ For a summary of pre-1945 judicial review, see STEPHEN GARDBAUM THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE 2-8 (2013).

⁴ See, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VIRGINIA L. REV. 771 (1997).

⁵ *Id.*

⁶ TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES, chapter 1 (2003).

⁷ Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEORGETOWN L.J. 961 (2011).

⁸ Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 175-240 (Jon Elster & Rune Slagstad eds., 1988); JON ELSTER, ULYSSES UNBOUND (2000).

futures; by helping to resist or hedge against the risk of one-party consolidation of power that threatens to make the first election the last; and/or by credibly signaling the commitments of the drafters to their promises. The third explanation is federalism. For some time, it had been understood that federalism has a historical and practical connection to judicial review in that where it exists there is often the need for an umpire or “neutral” third party to resolve disputes between the two levels of government, federal and state, just as there may also be in presidential systems with separated power between the two independently elected branches of government, executive and legislature.⁹ The more recent literature has focused on the question of “why” (rather than “if”) federalism, and found that it has been employed in different ways as a potential conflict-solving device in the new constitutions of several polities radically divided along ethnic or religious lines, such as Iraq, Bosnia and Herzegovina and Northern Ireland.¹⁰ Finally, there is the “hegemonic preservation thesis” associated with Ran Hirschl, which holds that the political origins of constitutionalization and judicial review are to be found in the self-interest of certain political, economic and judicial elites to preserve their hegemony once they are no longer able to dominate democratic politics.¹¹

Their undoubted general or overall merits notwithstanding, these explanations are directed mostly (Hirschl’s apart) towards transitions from different types of authoritarian rule or post-conflict situations and so seem less relevant to another group of countries in which there has also been a relatively recent transfer of power to courts through the creation or expansion of judicial review of legislation. This group consists of established parliamentary democracies without similarly catastrophic histories. It includes Belgium (1980, 2003), Canada (1982), New Zealand (1990), Israel (1992), Luxembourg (1997), the United Kingdom (1998), and Finland (2000). France (1958, 1971, 2008), a traditional opponent of judicial power, is another (if more complicated) example, having made a three-step switch: first from parliamentarism to semi-

⁹ MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971).

¹⁰ AREND LJPHART, *PATTERNS OF DEMOCRACY* (1999); Sujit Choudhry, *After the Rights Revolution: Bills of Rights in the Post-Conflict State*, 6 ANN. REV. OF LAW AND SOCIAL SCIENCE 301-22 (2010).

¹¹ RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004).

presidentialism, then from exclusively separation of powers to rights-based constitutional review by the quasi-judicial *Conseil constitutionnel*, and finally from abstract only to concrete review in 2008. The result of these developments has been that with only a handful of remaining exceptions, the venerable and once-dominant model of legislative supremacy has, in Mark Tushnet's memorable phrase, "been withdrawn from sale."¹² The interesting and, I believe, not fully-answered question is why. What explains this important structural constitutional change from one institutional form of liberal democracy to another?

There have been a few more targeted explanations for the establishment of judicial review in these established parliamentary democracies, although they tend to focus on one or other of two sub-groups: (1) the four member-states of the European Union (EU) and the European Convention on Human Rights (ECHR) and (2) the common law or common law-influenced jurisdictions (Canada, the UK, New Zealand, and Israel). Starting with the first, the evolution of these two transnational legal orders, which includes robust judicial oversight of national conduct, has implanted in these countries a form of constitutional pluralism that has undermined traditional notions of the sovereignty of the national legal system. In this context, domestic judicial review -- albeit limited to conflicts with transnational law -- becomes both a structural requirement of membership (EU) and a strategic method of reducing the incidence of international oversight (ECHR).¹³

With respect to the common law jurisdictions, three partially overlapping theses have been developed by political scientists. In chronological order, F.L. Morton and Rainer Knopf presented the "Knowledge Class Thesis," which applies primarily to Canada and posits a minority liberal cultural elite with disproportionate legal resources and access to the political elite who find it

¹² Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- And Democracy-Based Worries*, 38 WAKE FOR. L. REV. 813, 814 (2003) ("For all practical purposes, the Westminster model [of parliamentary sovereignty] has been withdrawn from sale.").

¹³ See Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53-90 (2012); Alec Stone Sweet, *Trustee Courts and the Judicialization of International Regimes*, J OF LAW AND COURTS 61-88 (Spring 2013). This explanation will be discussed in greater detail in *infra* Part III.

possible and in their interests to transfer power to the courts and away from majoritarian politics.¹⁴ More generally, Ran Hirschl has illustrated his “hegemonic preservation thesis” for the trend towards “juristocracy” with the examples of Israel, Canada, and New Zealand (as well as South Africa). Most recently, David Erdos has advanced the “post-materialist trigger thesis” to explain the introduction of bills of rights and judicial review, which identifies as causal factors both a general background post-materialist culture in wealthy advanced industrial societies that is conducive to a human rights, equality and self-expression agenda, and a specific political trigger for the change. This trigger is either an “aversive” reaction to prior negative political experience while in opposition (Canadian Bill of Rights 1960, New Zealand Bill of Rights Act 1990, UK Human Rights Act 1998) or a threat to the political stability of the country arising from regional or ethnic conflict (Canadian Charter 1982).¹⁵

As helpful and persuasive as these distinct theories are, I believe they miss an important dimension of the full explanation -- a dimension that promises the possibility of a more unified understanding of the common change. The transnational thesis does not consider internal practices and developments, at least as an independent variable. The three common law theses do not explain why the traditional, systemic and hard-wired resistance to judicial review in these countries crumbled so easily. It is this particular internal dimension of the explanation that I plan to explore and provide in the article. So while I think Hirschl and Erdos are correct to focus on the specific timing and triggering issues that led to judicial review in 1982, 1990 or 1998 rather than, say, ten years earlier or later, it is also important to identify with similar specificity the background factors that prepared the way, “softened up” the systems, for the moves when they came. Erdos only gestures towards some of this in positing the development of a general “post-materialist” rights culture, as his account is rather vague and generic. I believe there are more particular reasons for this change that have not been systematically identified. Moreover, unlike the public choice framework of

¹⁴ FREDERICK MORTON AND RAINER KNOPF, *THE CHARTER REVOLUTION AND THE COURT PARTY* (2000).

¹⁵ DAVID ERDOS, *DELEGATING RIGHTS PROTECTION: THE RISE OF BILLS OF RIGHTS IN THE WESTMINSTER WORLD* (2010).

the political scientists that has so far dominated the general discussion, focusing on the motives and self-interest of elites, my suggested explanation is broadly institutional in nature. It puts the *parliamentary* nature of these democracies in the center of the picture. This feature also distinguishes it from the transnational account which, important part of the story as it undoubtedly is, applies regardless of domestic form of government. Stated simply, my explanation identifies separation of powers as an important but mostly overlooked reason for the growth of judicial review in these countries.

As a core part of their adherence to the principle of legislative supremacy, prior to the creation or expansion of judicial review these established parliamentary democracies relied for the most part exclusively on political modes of accountability, especially for legislative acts, rather than on legal and judicially enforceable ones. Executives were politically accountable and responsible to legislatures, and legislatures directly to the electorate, rather than both being generally legally accountable for their actions to the judiciary. In the terms that have come to identify this difference in the UK, they subscribed to political rather than legal constitutionalism. Within these countries, the traditional conception of separation of powers reflected this principle of legislative supremacy: making or unmaking the law, including laws creating rights, was the function of the legislature and that of the courts to faithfully interpret and apply it. My essential claim is that faith in political accountability as an effective and sufficient check on government action has been seriously undermined by a series of institutional developments and changing political practices in the modern era, with the result that for many no viable alternative to the legal/judicial ones long rejected seem any longer feasible. Separation of powers has been reconceptualized to further one of its basic purposes of countering the undue concentration of political power – mostly in the executive – in a new context. This is one important reason, alongside rising demands on government and efficiency/expertise, that power

has been transferred or dispersed to a host of more independent actors and institutions, including courts.¹⁶

Accordingly, my aim in this article is to supplement existing accounts by supplying the missing but important (internal) institutional part of the explanation for the recent empowerment of the judiciary in several parliamentary democracies in order to help create a fuller, more comprehensive understanding of the general phenomenon. In so doing, I also hope to show the usefulness in this context of a third type of explanation, an institutional one, in addition to both the public choice methodology and the general rights culture approach employed in the existing non-transnational explanations.¹⁷

In the next two sections of the article, I fill in some details about the growth of judicial review in the established parliamentary democracies that I am considering as a category, and also the existing explanations for this development. In Part IV, I briefly elaborate on the constitutional theories of separation of powers and political constitutionalism that underpin the traditional adherence to legislative supremacy within these countries. Part V is the heart of the article and sets out the series of general developments that have radically undermined faith in the older constitutional theories. While not entirely distinctive to these countries, these developments did have a distinctive practical effect in lowering the historical resistance to judicial power and so constitute an important part of the explanation for its growth.

II. The recent growth of judicial review in established parliamentary democracies

Between 1980 and 2000, most of the remaining outliers among stable, mature democracies from the postwar paradigm of judicial review made the constitutional switch from legislative supremacy as traditionally conceived to

¹⁶ Non-judicial examples of this type of transfer include the creation of (1) independent "Officers of Parliament" in Canada, such as the Auditor-General and Chief Electoral Officer, see Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 AM. J. COMP. L. 531, 539-40 (2009), (2) quangos (quasi-autonomous non-governmental organizations) in the UK and Ireland, and (3) the widespread appointment of ombudsmen.

¹⁷ It is perhaps worth pointing out here that my institutional explanation aims to identify the specific changes in political practices that combined to create an overall political context in which faith in legislative supremacy eroded, and not the motives of those bringing about the changes or the justifications they employed.

empowering one or more of their courts to review the constitutionality of legislation for the first time. To be sure, they did so in interestingly different and divergent ways, but the common theme and direction of the move is evident.

Constitutional review in Belgium evolved at the unnatural speed of movement we see today in older silent films. Before 1980, Belgium was one of the group of Western European countries that eschewed judicial review of legislation, then also including fellow Benelux members the Netherlands and Luxembourg, as well as Finland, Switzerland and the United Kingdom. First created in that year when Belgium entered its initial phase as a federal state, the Court of Arbitration was initially limited to the classic function of adjudicating the line between national and state authority. In 1988, however, a constitutional amendment granted it jurisdiction to review legislation for violation of the constitution's equality, nondiscrimination and educational rights provisions (Articles 10, 11 and 24),¹⁸ with a further extension in 2003 to review the entire bill of rights contained in Section II,¹⁹ rendering it effectively a full-fledged constitutional court in the European tradition. Another amendment in 2007 belatedly granted the court that formal title.

By comparison, Canada took one hundred and fifteen years to make the same journey from judicial review on federalism grounds only under the British North America Act 1867 to full multi-purpose judicial review under the 1982 Constitution. Twenty-two years before the latter, Canada had experimented with a statutory bill of rights applying to the federal government only, which required judges to “construe and apply” laws of Canada as not to “abrogate, abridge or infringe” any of the protected rights unless expressly declared by an Act of Parliament that it “shall operate notwithstanding the Canadian bill of rights.”²⁰ This statutory bill did not specify whether courts were to apply or disapply laws of Canada that, in the absence of such a declaration, could not be so construed. Although ten years after enactment a bare majority of the Supreme Court of Canada held that inconsistent laws were to be disapplied, the case in which they

¹⁸ Article 142, under the constitutional amendment of 15 July 1988.

¹⁹ By the Special Act of 9 March 2003.

²⁰ Section 2, Canadian Bill of Rights 1960.

did so was the only time the Court exercised the power before 1982.²¹ In this year, the Constitution Act, containing the Charter of Rights and Freedoms as Part I, was enacted as an essential part of the “repatriation” of the Canadian constitution from the United Kingdom. The Charter is a fully constitutionalized bill of rights granting the power of judicial review of legislation to the courts.²² The one major structural novelty is the “notwithstanding mechanism” adapted from the 1960 Bill of Rights, which empowers provincial legislatures and the federal parliament to expressly declare that part or all of a statute “shall operate notwithstanding a provision in section 2 or sections 7 to 15 of the Charter.”²³ Demanded by provincial premiers (outside Quebec) as the price of accepting a national bill of rights, this “override” mechanism may be used either preemptively or in response to a judicial decision, and lasts for five years although it may be renewed indefinitely.²⁴ Since 1982, the Supreme Court of Canada has established itself as one of the best known, most cited, and more influential courts in the world, applying a broad, “generous” interpretation of rights and employing its invalidation power on approximately sixty occasions.²⁵

In New Zealand, a 1985 white paper issued by the Labour Government of Geoffrey Palmer proposing a constitutional bill of rights along the lines of the Canadian Charter was met with widespread opposition, whereupon the government settled for a statutory bill of rights along the lines of the 1960

²¹ R v. Drybones [1970] S.C.R. 282. The four dissenting judges argued that they were required to apply the statute notwithstanding the conflict on the basis that had parliament intended to grant them this novel power, it would have done so expressly.

²² Constitution Act, 1982, sections 24(1) and 52(1).

²³ Constitution Act, 1982 Part I, Canadian Charter of Rights and Freedoms, section 33 (1).

²⁴ *Id.*, sections 33 (3) and (4). As is well-known, the notwithstanding mechanism has been relatively rarely used by provincial legislatures -- 17 times since 1982, the last occasion in 2000 -- and never by the federal parliament. See Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 43 CANADIAN ADMINISTRATION 255 (2001).

²⁵ This approximation is based on Rosalind Dixon’s calculation of 54 invalidating decisions between 1982 and the end of 2004. Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235, 282 (2009). Dixon reports that her number is based on Manfredi and Kelly’s study of cases between 1982 and 1995, a further study by Kelly between 1995 and 1997, and independent examination of cases decided between 1998 and 2004. Peter Hogg and co-authors state that there were 66 invalidations by the SCC and certain lower courts between 1982 and 1997, and a further 23 invalidations by the SCC alone between 1997 and 2006. Peter Hogg, Allison Bushell and Wade Wright, *Charter Dialogue Revisited – or ‘Much Ado About Metaphors,’* 45 OSGOODE HALL L.J. 1, 51 (2007).

Canadian Bill of Rights model, with one important exception. Section 4 of the resulting New Zealand Bill of Rights Act 1990 deliberately precludes the conclusion reached by the Supreme Court of Canada in 1970 that it is empowered to disapply a statute which cannot be interpreted consistently with the bill of rights; it expressly instructs the judiciary that an inconsistent statute is to be fully applied.²⁶ The courts' powers of constitutional review with regard to legislation consist of giving statutes rights-consistent interpretations where "possible" under section 6 and, where not, at least impliedly indicating the statute's incompatibility with the bill of rights – even though they must still apply it under section 4.²⁷ By contrast, incompatible executive acts are unlawful under the Bill of Rights Act.²⁸ Accordingly, even though they exercise a different version of "weak-form" judicial review than the Canadian one,²⁹ the position and power of New Zealand courts with respect to rights issues has been substantially augmented. They engage in full-scale rights review of executive acts, award damages for rights violations, employ a generous, "constitutional" mode of rights interpretation, give rights-friendly interpretations of statutes in place of more limited, traditional modes, and review statutes for compatibility with protected rights – even if they are required to apply incompatible ones.

Israel came by judicial review in a still different way. In 1949, the elected constituent assembly failed to agree on a constitution for the new state and transformed itself into the First Knesset, which then decided on piecemeal enactment of separate Basic Laws until the constitution was eventually completed. Between 1958 and 1988, the Knesset enacted nine Basic Laws, all dealing with institutions, through the ordinary legislative process and none were deemed to have higher law status. In 1992 the Knesset enacted the first two Basic Laws dealing with rights, the more general Basic Law: Human Dignity and Liberty, and the more specific Basic Law: Freedom of Occupation. Both Basic

²⁶ New Zealand Bill of Rights Act 1990, section 4.

²⁷ Paul Rishworth, *The Inevitability of Judicial Review under "Interpretive" Bills of Rights: Canada's Legacy to New Zealand and Commonwealth Constitutionalism?* 23 SUPREME COURT LAW REVIEW (second series) 233 (2004).

²⁸ *Id.*, section 3(a).

²⁹ On weak-form judicial review, see STEPHEN GARDBAUM, *supra* note 3, chapter 2; Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003).

Laws contained the same limitations clause stating that: “There shall be no violation of rights under this Basic Law except by a law befitting the State of Israel, enacted for a proper purpose, and to an extent no greater than required.”³⁰ In 1994, both clauses were amended to add the words “or by regulation enacted by virtue of express authorization in such law.” In addition, Basic Law: Freedom of Occupation contained a section, with the heading “entrenchment,” stating that “[t]his Basic Law shall not be varied except by a basic law passed by a majority of the members of the Knesset.”³¹ This provision matched one in the earlier Basic Law: The Knesset, but failed to be included in Basic Law: Human Dignity and Liberty by a single vote. Notwithstanding the heading, this is barely a form of entrenchment at all, requiring a simple majority of all members of the Knesset rather than of votes cast (i.e., 61 of the 120 members). Also in 1994, Basic Law: Freedom of Occupation was amended to add a Canadian notwithstanding mechanism-style provision permitting express override of the right by a majority of members of the Knesset for a maximum period of four years.³² In the landmark 1995 case of *Mizrahi Bank*,³³ the “Israeli *Marbury v. Madison*,” the Supreme Court declared that all of the Basic Laws had higher legal status than ordinary legislation and that the courts were empowered to enforce this superior status through the power of judicial review. As compared with the U.S. *Marbury*, however, the impact of these pronouncements is reduced by the fact that, as we have just seen, none of the Basic Laws is really entrenched but can be amended by ordinary majority vote (either of all Knesset members or of votes cast, depending on the Basic Law in question),³⁴ including presumably in response to a Supreme Court decision invalidating conflicting legislation.

Luxembourg amended Article 95 of its 1868 constitution in 1996 to establish judicial review of legislation and a constitutional court for the first time.

³⁰ Basic Law: Dignity and Liberty, section 8; Basic Law: Freedom of Occupation, section 4.

³¹ *Id.*, section 5.

³² Basic Law: Freedom of Occupation, section 8.

³³ *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, CA 6821/93, LCA 1908/94, CA 3363/94.

³⁴ See Tsvi Kahana, *Majestic Constitutionalism? The Notwithstanding Mechanism in Israel*, in *ISRAELI CONSTITUTIONAL LAW IN THE MAKING* (Gidon Sapir, Daphne Barak-Erez & Aharon Barak, eds., 2013).

Previously the highest court, the *Cour de cassation*, had adhered to its own rule laid down in 1874 that courts lacked this power. Although there had been prior debate and discussion about instigating judicial review, the change when it came was largely a by-product of a European Court of Human Rights decision of the previous year dealing with the separate issue of administrative courts. This decision had questioned the structural impartiality of the judicial role of the *Conseil d'État*,³⁵ to which the constitutional amendment setting up an independent set of administrative courts was the response. It was deemed efficient to deal with both matters at the same time.

In 1998, the United Kingdom enacted the Human Rights Act, a statutory bill of rights along the structural lines of the New Zealand and Canadian Bill of Rights 1960 which, substantively, incorporated most of the European Convention on Human Rights into domestic law. Like both of the other bills, it mandates rights-consistent interpretation of statutes where possible. Like the NZBORA, it precludes judges from disapplying statutes held to be incompatible with the bill of rights; but unlike it, it empowers judges to make a formal declaration of such incompatibility.³⁶ Although this has no immediate legal effect, in most cases it places political pressure on the government and parliament to amend or repeal the statute. It has been argued that, both separately and in combination, the two judicial powers of constitutional review amount effectively to an invalidation power.³⁷ Whether or not this is so, indeed whether or not the HRA is consistent with parliamentary sovereignty or leaves it an empty shell, there is no doubt that there has been a transfer of powers over legislation to the judiciary.

Finally, Finland enacted a new constitution in 2000. Although largely aimed at consolidating in one text numerous supplementary constitutional laws and amendments since its prior constitution of 1919, among its more important substantive reforms were enhancing the powers of parliament at the expense of the president and permitting judicial review of legislation for the first time. Rather than establishing a specialized constitutional court along the lines of the

³⁵ *Procola v. Luxembourg*, ECHR case 27/1994/474/555.

³⁶ Human Rights Act 1998, section 4.

³⁷ See AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 418 (2009).

standard European model, the constitution grants the power of judicial review to the existing courts.³⁸ Prior to this, there was only *ex ante legislative* review performed by the Constitutional Law Committee of Parliament, consisting of MPs aided by the opinions of constitutional law experts. Although under Section 106, the new constitution incorporates a form of “Thayerian” deference by empowering the courts to apply its provisions over an Act of Parliament only where there is an “evident” conflict between the two, this was unmistakably a new power.

III. Existing explanations

As previewed above, existing explanations for these developments within the comparative politics and comparative constitutionalism literatures have tended to focus on one or other of two sub-groups of countries: (1) member-states of the EU and ECHR (Belgium, Finland, Luxembourg, the UK), and (2) those within, or heavily influenced by, the common law tradition (i.e., Canada, New Zealand, the UK, Israel). Apart from not offering a unified account of the common change, neither set of explanations, which I will now canvass in a little more detail than in the introduction, significantly turns on the parliamentary form of government that all these countries share.

The first general explanation focuses specifically on the European countries among the group and the role of both the EU and the ECHR in the domestic growth of judicial review.³⁹ Starting with the EU, membership in this evolving supranational quasi-federal entity created significant *structural* pressures that undermined pre-existing conceptions of national legal sovereignty and particularly legislative supremacy that had grounded the opposition to judicial review. The European Court of Justice's transformative doctrines of the supremacy and direct effect of EU law within national legal systems culminated (for current purposes) in the decision that, regardless of domestic constitutional principles and institutional arrangements, all member-state courts must refuse to

³⁸ Constitution of Finland (2000), Sections 98 and 106.

³⁹ See Stone Sweet, *supra* note 13.

apply national law, including legislation, that conflicts with EU law.⁴⁰ This standard implication of federalism, first spelled out in the Supremacy Clause of the U.S. Constitution,⁴¹ was ultimately accepted and applied by all member-state highest courts including the UK's House of Lords, thereby creating an important exception to the traditional rejection of judicial review.⁴² By contrast, the ECHR created *strategic* pressures for member-states to adopt judicial review internally. Although the ECHR itself does not require that member-states afford those within their jurisdictions domestic judicial remedies for claimed violations of protected rights, the practical alternative of having more of these claims litigated and aired before the international judges of the European Court of Human Rights in Strasbourg provides strong political and public relations incentives for countries to domesticate these claims, at least in the first instance. Undoubtedly, as leading examples of this attempt at damage control, enactment of both the UK's Human Rights Act 1998 and the French constitutional amendments in 2008 -- to create concrete judicial review for the first time -- were intimately connected to, and partially explained by, the countries' obligations and travails under the ECHR.

Despite their differences in content and orientation, the three existing explanations that focus specifically on the recent growth of judicial review among established democracies within the common law world (as is also mostly true of those focusing on transitions from authoritarian regimes) are all the work of political scientists and, perhaps, unsurprisingly therefore, are to greater or lesser degree, power-based or realist explanations. Writing from a right-of-center perspective, F.L. Morton and Rainer Knopff developed an account of the political origins of the Canadian Charter that gives a central role to a "knowledge" or "new class" of left-leaning civil libertarians, egalitarians and social engineers with disproportionate access to the liberal political elite and extensive legal resources

⁴⁰ See *van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] ECR 1 (direct effect), *Costa v. ENEL*, Case 6/64, [1964] ECR 585 (supremacy), *Simmenthal II*, Case 106/77, [1978] ECR 629 (judicial review).

⁴¹ U.S. CONST., Art VI (2): "This Constitution, and the Laws of the United States....shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

⁴² *Regina v. Secretary of State for Transport ex parte Factortame Ltd.* [1991] 1 All ER 70.

of lawyers and sympathetic judges which is able to successfully push their agenda despite political minority status and its disdain for majoritarian decision-making procedures.⁴³

Taking a broadly opposite ideological position within the overall framework of the “electoral threat” paradigm for understanding judicial review, Ran Hirschl’s “hegemonic preservation thesis” locates the political origins of bills of rights and judicial review in a coalition of political, economic and judicial elites seeking to preserve a hegemony that is no longer assured within the system of democratic politics by insulating it through the defensive strategy of entrenchment and judicialization. Hirschl argues that the clearest illustration of his thesis is the 1992 constitutional revolution in Israel, which was instigated by the secular European Ashkenazi political, economic and judicial elite as a direct response to the loss of its previous monopoly on power held by their political wing, the Labor Party. In the face of this loss of electoral power and increasing challenges to their hegemony by religious, Sephardic and immigrant sections of the population, the bourgeois elite decided that constitutionalization of their interests in basic laws and transferring power to the judiciary was now the best strategy for promoting them.⁴⁴

Likewise, in Canada, Hirschl argues that the threat to the existing hegemony of the English-speaking political and economic elite came from the separatist movement in Quebec that reached its peak in the late 1970s. The Charter was a strategic response to promote national unity by attempting to shift political debate away from regional concerns towards a universal set of rights and to subordinate provincial legislation, such as Quebec’s, to a federal standard interpreted and applied by a national court.⁴⁵ Similarly, the political origins of the NZBORA lay in the strategy of constitutionalizing the neo-liberal, market-based reforms of the 1980s against increasing political opposition.⁴⁶ Hirschl also applies the thesis to explain the struggle of South Africa’s white ruling elite to ensure the inclusion of a bill of rights and judicial review in the post-apartheid

⁴³ See *supra* note 14.

⁴⁴ Hirschl, *supra* note 11, chapter 3.

⁴⁵ Hirschl, *supra* note 11, at 75.

⁴⁶ *Id.*, at 82-89.

constitution.⁴⁷ In line with their origins in the strategic interests of the existing elite, he additionally argues that the political and economic *consequences* of the growth of judicial power have been to retard progressive notions of distributive justice.⁴⁸

David Erdos presents his “postmaterialist trigger” thesis as a new general explanation for the adoption of bills of rights and judicial review in stable, advanced democracies, and applies it to the cases of the Canadian Bill of Rights 1960, the Charter, the New Zealand Bill of Rights Act, the UK Human Rights Act and (more briefly) to Israel’s constitutional revolution.⁴⁹ He also argues that it explains the *absence* of a national bill of rights in Australia. As briefly noted above, the thesis consists of two components: (1) the background incremental development in wealthy advanced economies of a general postmaterialist culture that is conducive to the values of human rights, civil liberties and social equality; and (2) a concrete trigger providing a clear and specific political rationale and impetus for a bill of rights at a particular time. Erdos in turn identifies two such triggers: (1) the championing of a bill of rights by a newly ascendant political grouping as part of an “aversive” reaction to prior negative political experiences during opposition; and (2) a “threat to political stability” posed by centrifugal regional or ethnic political forces. The first trigger explains the CBOR, NZBORA, and HRA, as aversive political reactions to Louis St. Laurent’s Liberal Government of the 1950s, Robert Muldoon’s National Party Government of 1975-84, and Margaret Thatcher’s Conservative Government of 1979-90 respectively. The second trigger explains the Charter, in the face of threats to political stability and national unity posed by the Quebec separatist movement. By contrast, Erdos explains the continuing absence of a national bill of rights in Australia by the absence of such a necessary political trigger.

In addition, outside these general explanatory theses, there are well-known individual factors that undoubtedly contributed to the acceptance of judicial review in certain of these countries, suggesting that any mono-causal

⁴⁷ *Id.*, at 90-94.

⁴⁸ *Id.*, chapter 5.

⁴⁹ Erdos, *supra* note 15.

account is bound to oversimplify what are inevitably multi-causal developments. So, for example, the establishment of federalism in Belgium was clearly a critical factor in the creation of the constitutional court along the lines of the classic theory, although its jurisdiction was expanded in 2003 to cover rights issues and its name changed in 2007.⁵⁰ Similarly, in France, the original function of the *Conseil constitutionnel* was a twist on the traditional separation of powers rationale of having a third-party umpire resolve disputes between the legislative and executive branches.⁵¹

This article is not the place for a fine-tuned critical assessment of these various theses or a full evaluation of their distinctness or relative contribution. It suffices for my purposes to describe their general nature and methodology, to acknowledge and praise their undoubted overall contribution, and to identify the dog that doesn't bark in them. By employing public choice-style interest analysis and general cultural explanations only, the common law theses lack an institutional dimension -- especially one focused on the parliamentary natures of the systems under analysis -- that I believe is an important component of the developments to be explained. And, of course, by not including the continental European countries in the analysis, it is uncertain whether and to what extent the explanation applies, or is intended to apply, to them. Although, by contrast, the transnational law thesis does take an institutional approach, looking at the impact of external legal developments on domestic arrangements, it is a more global or general one that does not seem to turn on the parliamentary nature of the systems involved. It also, of course, does not focus on the importance of internal developments in these countries and cannot explain the growth of judicial review in Canada and New Zealand, which are not part of any similarly powerful transnational legal system. Is there a more unified account that helps to explain the growth of judicial review in all of these established parliamentary democracies?

⁵⁰ To the Constitutional Court from the Court of Arbitration.

⁵¹ The twist was the task of ensuring that the legislature did not impinge on the residual lawmaking powers of the executive under Article 34. Normally, judicial review seeks to maintain the (residual) lawmaking prerogatives of the legislature against executive encroachment.

IV. Preexisting constitutional theory: political constitutionalism and separation of powers

Prior to the recent establishment of one or other form of judicial review, all of the countries discussed in this paper adhered to the overarching principle of legislative supremacy. Even in Canada, with a Supreme Court to police the limitations on federal power under the British North America Act 1867, the issue was always which legislature, national or provincial, was supreme on the relevant subject-matter. Indeed, legislative supremacy was the dominant conception – or institutional variant -- of constitutionalism among democracies until 1945, both because few parliamentary systems had judicial review and few democracies had presidential forms of government,⁵² and remained a well-represented alternative until these more recent developments.

Legislative supremacy expressed the historical and political cultural notion of the legislature as the specific and distinctive institutional locus of popular sovereignty,⁵³ reflecting a fairly standard pattern that played out mostly in evolutionary (but occasionally in revolutionary) mode in which the representatives of the people in parliament successfully challenged the absolutist claims and pretensions of the monarchy. During the course of these struggles, popular sovereignty was institutionalized in the legislature and monarchical power in the executive and the judiciary. Accordingly, legislative supremacy did not only manifest the abstract idea of democracy as against an “unelected” judiciary but also the more concrete and historical triumph of the people against the rival claims to supremacy of the crown and a narrow political elite, creating a deep connection between legislatures and the citizenry. For those parliamentary systems that made the switch to judicial review fairly soon after 1945, elite and international distrust of “the people” as a whole, who had supported inter-war authoritarian and fascist regimes, at least as much as legislatures per se, was an important driving force behind the postwar rights revolution.

⁵² See, e.g., José Anton Cheibub, Zachary Elkins & Tom Ginsburg, *Latin American Presidentialism in Comparative and Historical Perspective*, 89 TEX. L. REV. 1707, 1719 & n.71 (2011).

⁵³ This idea, stemming from Rousseau, has had particular significance in France and Switzerland, and though them also in Belgium and Luxembourg.

Within the three Commonwealth jurisdictions considered here, this adherence to the general principle of legislative supremacy was more particularly conceptualized through the twin theoretical underpinnings of separation of powers and “political constitutionalism.” With the recent shift away from legislative supremacy, both have been significantly revised.

In British public law, the dominant and distinctive conception of separation of powers since at least the seventeenth century has been the division between King and Parliament.⁵⁴ Even today, every institution of government traces its legal source to one or the other.⁵⁵ Evolving over time amid competing claims and contested battles, the central role of Parliament became that of checking, overseeing and counterbalancing royal power. As exercise of the king’s personal powers as executive magistrate was gradually transferred to his governmental representatives, so too the primary task of parliament became that of holding the now-parliamentary executive to account. The tools for performing this task were several and continuous, but the most important one after the advent of parliamentary government by the mid-nineteenth century was the executive’s political responsibility to it, meaning that gaining and retaining majority support in parliament was essential for the government’s accession to and continuance in office.

A slightly different conception of British separation of powers, albeit a more abstract one mostly popular during the seventeenth and eighteenth centuries *before* the rise of parliamentarism and employed by both Locke and Montesquieu, was that of the “mixed system” of government. Harking back to Aristotle’s view that the best form of government is a mixed one combining the one, few and the many, it was claimed that the British system exemplified this balanced model in the institutions of Kings, Lords and Commons, and in particular that the consent of all three of these social estates of the realm was required for any piece of legislation. As the actual veto power of first the king, then the House of Lords, disappeared by the early twentieth century,⁵⁶ the

⁵⁴ See ADAM TOMKINS, PUBLIC LAW (2003).

⁵⁵ *Id.*

⁵⁶ See *infra* TAN 71.

balance was re-constituted within the House of Commons itself, between that part of it who are also members of the government and the remaining part to whom they are politically responsible.

By the middle of the twentieth century, the dominant theory of the British constitution as a whole – as of the Canadian and New Zealand – including its commitment to legislative supremacy was “political constitutionalism.” First put forward as a descriptive theory and more recently, in response to its partial demise, as a normative one, the concept of a political constitution – and of political constitutionalism -- contrasts with a legal and judicially enforceable one.⁵⁷ As a form of constitutionalism within a parliamentary system, political constitutionalism does not deny the importance and centrality of constraints on governmental power, but looks primarily to political limits rather than legal ones – in its normative mode as both more democratically legitimate and effective. In particular, the twin mechanisms of political constraint are (1) the power and duty of parliament to hold the government to account on a continuous basis, employing in particular the doctrines of collective and individual ministerial responsibility to it; and (2) the electoral accountability of the government to the people. Apart from Israel, the concept of political constitutionalism is less common in, and less applicable to, the other parliamentary democracies making the switch because Belgium, Luxembourg and Finland have long had codified, entrenched constitutions and bills of rights, the absence of which is generally taken to be a distinctive feature of a political constitution.⁵⁸ Nonetheless, the absence of *the* most central characteristic, judicial accountability for the substance of legislation, was of course common to all.

⁵⁷ On the descriptive side, see the seminal article by John Griffith, *The Political Constitution*, 42 MOD. L. REV. 1 (1979). On the normative, see ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* (2005); RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM* (2007).

⁵⁸ Generally but not always because (1) some legal constitutionalists have claimed that a written constitution is not necessary as the common law constitutionalism of the judges provides the legal and judicially enforced constraints on governmental power, see T.R.S. ALLEN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (2001), and (2) some political constitutionalists have argued that a bill of rights is compatible with political constitutionalism, as long as the final word rests with parliament. See Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 INT. J. CONST. L. 86 (2011).

V. Institutional developments explaining the growth of judicial review

So what is the series of developments that have undermined the old faith in political constitutionalism, in the political rather than the legal accountability of government? Why has the traditional resistance to judicial review crumbled to greater or lesser degree?

First and foremost, the rise and dominance of the modern political party system has overwhelmed the ability of legislatures to perform their major task within a parliamentary system of holding the government politically accountable for its actions. Within a presidential system, the independently elected, fixed-term executive is not accountable to or removable by the legislature but by the voters directly, if and when eligible for re-election. Given their allocation and separation, the powers of the legislature may act as a check on those of the executive, and vice-versa, but a check or veto is not a power of removal. By contrast, within parliamentary systems maintaining the executive in office -- or not -- is and has always been the first and most important task of the legislature. Because only members of the legislature are directly elected, the executive's democratic legitimacy and mandate turns on the continued support of the peoples' representatives, who are in turn ultimately accountable for it to those they represent.

Although the birth of the parliamentary system in the first half of the nineteenth century drove a massive hole through eighteenth century separation of powers theory by putting executive power, previously held by the quintessentially politically independent monarch, into the hands of a committee of the legislature (the cabinet), a new balance between executive and legislative powers soon emerged. During the era of genuinely "parliamentary government" that lasted in Britain from very roughly 1832 until 1945 and in France from 1870 until 1958, albeit on a declining trajectory, the prime minister and cabinet governed at the will of a majority of relatively independently-minded members of the legislature.

In Britain, these years are roughly bookended by (1) Sir Robert Peel's 1846 resignation following defeat in the House of Commons over the Irish Coercion Bill (on the very same day as passage of repeal of the Corn Laws) by a

combination of left-of-center Whigs and Radicals and right-of-center Tory protectionists, and (2) Neville Chamberlain's resignation on May 10, 1940 following the "Norway Debate" in which many MPs in the majority Conservative Party voted with the opposition Labour Party and against the government. As another illustration of the relative independence of members of the legislature, consider Winston Churchill. He started his political career as a Conservative Member of Parliament, crossed the floor to join the Liberal Party – then the second party in the two-party system -- in 1904 for which he subsequently served in several cabinet positions, including Home Secretary, was re-elected as an independent in 1924, finally switching back ("re-ratting" as he described it) to the Conservatives the following year – serving as Chancellor of the Exchequer -- and becoming its leader in November 1940 only after Chamberlain's death and seven months into his prime ministership.

This era ended with the rise to dominance of the modern political party to organize mass democracy outside parliament, resulting in the ever-greater disciplining of members inside through the whip system. This new all-defining party political identity and accompanying sink or swim together mentality rendered the fortunes of government and parliament so interdependent and intertwined that partisanship smoothed over and replaced the functional distinctness of government and parliament. The major task of (the majority in) parliament became to support the government, increasingly at all costs, rather than to hold it to account. In other words, the interdependence of government and parliament resulting from the modern party system has really become the *dependence* of the latter on the former. This loss of parliamentary independence has immeasurably strengthened the executive as it generally has little to fear from a formal power of accountability that is in practice virtually impossible to exercise. Between 1832 and 1945, there were seventeen successful votes of no confidence in the British Parliament, resulting in the resignation of the prime minister; since 1945, there has only been one.⁵⁹ Indeed, not since 1895 has a majority party government been voted out of office by parliament. In New

⁵⁹ James Callaghan, in 1979.

Zealand and Israel, the number of successful votes of no confidence is one each, in 1912 and 1990 respectively.⁶⁰ As a result, in normal times this effectively amounts to the end of ongoing or continuing political accountability, leaving only the roughly quinquennial mechanism of parliamentary elections. Rousseau's quip that the English are free only once every five years seemed harder to refute.⁶¹

A similar displacement of party for Madisonian-style institutional competition has occurred in some presidential systems, at least during periods of "unified government" in which the same party controls both the executive and legislative branches.⁶² Nonetheless, the differences between the two are still significant. First, within presidential systems, this necessary political alignment tends to be an episodic and temporary feature, especially where legislative and executive elections are staggered rather than concurrent.⁶³ By contrast, it is a more-or-less permanent feature of modern parliamentary systems, especially those with stable two party or two bloc systems. Second, even during periods of unified government, presidential-style separation of powers still does some real work so that there is less "unity" than in parliamentary systems. The fortunes of executive and legislature are rarely so interdependent and intertwined as government and parliament, given their still greater functional distinctness. This is magnified in large and/or federal presidential systems so that more local interests compete with the national constituency of the presidency. The result is that, even when their elections are simultaneous, voters do not tend to equate voting for members of the legislature as a referendum on the president, at least to the same extent as they do on the government in parliamentary systems. Third, and most importantly, the strength of the party system tends to be structurally or

⁶⁰ The number is higher in Canada, where six prime ministers, all heads of minority governments, have been defeated in no-confidence votes resulting in dissolutions of parliament and immediate general elections.

⁶¹ J. J. ROUSSEAU, *THE SOCIAL CONTRACT*, Book III, chapter 15.

⁶² See Daryl Levinson and Richard Pildes, *Separation of Parties, not Powers*, 119 HARV. L. REV. 2312 (2006).

⁶³ There has been a reduction in the frequency of "cohabitation" in France since presidential and parliamentary elections were made largely simultaneous. In the United States, there is a marked difference in the likelihood of "unified" or "divided government" between mid-term and presidential year congressional elections.

inherently greater in parliamentary systems than presidential ones precisely because only in the former is the executive politically accountable to the legislature. Unified or divided government in a presidential system may determine whether legislation is enacted, or its content, but not the executive's continuance in office. Where that is at stake, and legislators' own political fortunes-- both in terms of reelection and promotion -- are significantly tied to that of the executive through party identity and affiliation, individual interests merge into the collective in a sink-or-swim together mentality; mavericks and individual consciences are luxury items.

The second, if related, development is that within the executive itself there has been significant centralization of power in the office of prime minister and away from the cabinet as a whole. The traditional notion that vis-a vis cabinet colleagues, the prime minister is merely "primus inter pares" may never have accurately reflected the reality, but during the era of genuinely parliamentary government it was also true that the structure of the executive was the relatively collective one captured in the term "cabinet government."⁶⁴ The extent to which this latter has in turn given way to "prime ministerial government" is a matter of much dispute, as well as one of semantics, and it undoubtedly varies among parliamentary democracies with a rough spectrum running from Germany and Canada (greatest centralization) to Italy (least). But it is not contested that power has generally become more centralized in prime ministers than previously. The result of these first two developments in combination is that there has been a concentration of power both *in and within* the contemporary parliamentary executive. This new double concentration of power – in the government as a whole versus parliament and in the prime minister versus the cabinet -- is a major institutional reason that certain parliamentary systems have deemed it necessary to re-conceptualize separation of powers in a way that views a greater judicial role as now a means of dispersing, rather than (as previously) usurping, political power.

⁶⁴ This is the term used by Walter Bagehot's in his classic book *The English Constitution* (1867) to describe its key feature.

The impact of these two developments has been greatest in stable two party or two bloc parliamentary systems, as distinct from genuinely multiparty ones.⁶⁵ In two-party systems, the respective powers of government and parliament are mostly zero-sum so that the increased strength of government resulting from the modern party system has meant a weaker, more dependent, parliament. The party replaces parliament as the central non-executive political institution and locus of power, so that a prime minister is more likely to lose office by being replaced as leader of the party than by being defeated in parliament on a vote of confidence.⁶⁶ Accordingly, the modern party and whip system has made members of parliament far more accountable to the government than vice-versa.

Nonetheless, the impact of the party system is still substantial in multiparty systems, which are usually the direct consequence of adopting one or other version of proportional representation. Where no single party can realistically hope to command a majority in parliament on its own, the resulting (minority or coalition) government is relatively weaker, but this does not necessarily translate into a stronger parliament. In other words, here at least the respective powers of government and parliament are not zero-sum. This is because the dependence that causes the relative weakness of government is not so much on parliament as on the other political parties whose support is needed. These other parties are of course less reliable and controllable than one's own. Given the strength and discipline of the modern party system, in multiparty no less than two party systems, it is still the parties that play the major role in forming, sustaining and changing governments rather than parliament as an institution.⁶⁷ So although there may be somewhat greater power dispersal and

⁶⁵ Several multiparty systems – including those in France, Germany and Italy -- effectively function for electoral purposes like two party systems, with two party blocs, typically a left-of-center and right-of-center one. See, for example, Bernard Grofman, *Extending Duverger's Law When Parties Become Blocs: Evidence from Italy Under Three Different Electoral Systems, 1945-2010*, paper presented at The Colloquium on Law, Economics and Politics at NYU School of Law, on October 2, 2012.

⁶⁶ As evidenced by recent replacements as party leader and prime minister of Margaret Thatcher, Tony Blair, Kevin Rudd, and Julia Gillard.

⁶⁷ As illustrated by the recent toppling as party leader and prime minister of Enrico Letta in Italy. See, for example, the description of the strength of parties and the weakness of the Knesset in Israel's multiparty system in Martin Edelman, *Israel*, in Tate and Vallinder, *supra* note 1, at 405.

political checks in multiparty systems than in two-party ones, these are primarily among the political parties and their leaders, and do not increase accountability to parliament. For similar reasons, coalition governments resulting from multiparty systems also tend to be a little more collective and counter the centralization of power in the office of prime minister, as the other party leaders in the government have significant leverage due to their ability to withdraw support. In sum, governments and parties remain the central loci of power in multiparty systems; the relative independence of individual members of parliament necessary for the classical theory of parliamentary accountability and counterbalancing is no more in evidence here than in two-party systems. And sometimes less, where the numbers dictate that minority or coalition governments have no safety margin and cannot afford the luxury of a few stray votes.

Moreover, the overall stability of governments in our four multiparty systems is not significantly different than in the three two-party systems. Between 1945 and 1998, the average duration of governments was approximately 1200 days in Luxembourg, 950 in the UK, 900 in Canada, 600 in both Finland and New Zealand, and 520 in Belgium.⁶⁸ Israel has had thirty-two governments in its sixty-five year history, and so an average duration of a fraction over two years or 730 days.⁶⁹ Accordingly, the concentration of power in the executive/party leader(s) and the inadequacy of parliamentary accountability arising from these first two developments were perhaps only slightly less central in Belgium, Finland, Israel, and Luxembourg than in Canada, New Zealand,⁷⁰ and the United Kingdom.

The third factor is that, had it existed, an independent and powerful second legislative chamber might have replaced the lost independence of the first

⁶⁸ John Huber & Cecilia Martinez-Gallardo, *Cabinet Instability and the Accumulation of Experience: The French Fourth and Fifth Republics in Comparative Perspective*, 34 BRIT. J. POLI. SCI. 27-48, 38 (2004).

⁶⁹ Israel, Ministry of Foreign Affairs website.

⁷⁰ Following enactment of the NZBORA 1990, New Zealand switched in 1994 from its traditional first past the post system to mixed-member proportional representation (MMP) in a bid to end the duopoly of the National and Labour Parties. As a result of MMP, no party has since won a majority in parliament, leading to minority and coalition governments, albeit fairly stable ones. This switch in electoral systems is evidence of concern at the concentration of power, of which the NZBORA itself was another consequence.

to provide an alternative means of holding the executive politically accountable. In other words, alternative forums for legislative or political review might have forestalled, or prevented, the turn to judicial review. However, with the exception of Canada, in each of these countries there is either no second chamber at all (New Zealand, Finland, Israel, Luxembourg) or the powers of the second chamber are relatively weak and do not include a veto power over legislation – legislation that is primarily “government legislation.” Here, the loss of faith in political accountability alone is partly due to the fact that certain of these second chambers previously had co-equal powers with the first, but now exercise more or less vestigial ones. In other words, the legislative structure is no longer fully bicameral. Thus, before 1911 the British House of Lords held a veto power over legislation, a power that was reduced to a delaying power of two years at that time and further reduced to one year in 1949.⁷¹ Prior to 1993, the Belgian Senate held co-equal power with the Chamber of Deputies, but since the constitutional amendments of that year most legislation can be enacted without Senate approval.⁷² Although the Canadian Senate formally still has co-equal legislative power, in practice it rarely opposes bills passed by the House of Commons because of lack of democratic legitimacy as an appointed body.⁷³ In short, although where they exist in these countries, second chambers may review government bills and other actions, they do so more or less in an advisory capacity which, however useful substantively, is insufficient as a method of political accountability to check the concentration of power.

Interestingly, one of the few countries to resist constitutionalization and judicial review of rights is Australia, whose Senate has both co-equal legislative powers with the House of Representatives *and* an elected membership. Modeled more on the U.S. Senate than the UK House of Lords (unlike other Westminster systems), with equal representation for the states and elected six year terms, the

⁷¹ Parliament Acts 1911 and 1949.

⁷² The French second chamber also held equal powers with the National Assembly under the Third Republic (1870-1940), but its powers have been circumscribed under the Fourth and Fifth Republics so that it has lost its veto. The National Assembly has the power of decision in cases of disagreement.

⁷³ The recent scandal over false expense claims by appointed members of the Senate has further weakened its political position.

Australian Senate exercises real legislative power and actively scrutinizes government legislation. Although members are subject to only slightly less strict party discipline than in the lower house and rarely “cross the floor,” this relative ability to hold governments to account has arisen because the use of proportional representation for Senate elections – in contrast to the “instant-runoff” or alternative vote in single-member seats for the House of Representatives -- has frequently denied the government a majority in the Senate.⁷⁴ Compare this with the Italian Senate, also elected and with co-equal legislative powers, but elected using almost the same proportional list system (and at the same time) as the Chamber of Deputies. The result is thus usually guaranteed to be very similar in both chambers, with the implications this has for political accountability.⁷⁵ Accordingly, this institutional difference may also help to explain the absence of a bill of rights and judicial rights review in Australia.⁷⁶

The fourth factor that has undermined faith in political mechanisms of accountability over legal/judicial ones is the rise of the administrative state. Under traditional constitutional theory in Westminster systems, the substance of administrative acts and decisions are subject to political accountability (alone) through the specific doctrine of ministerial responsibility, under which ministers supervise the actions of their departmental administrators and are accountable for them to parliament. The role of courts is limited to ensuring that parliament’s delegation of authority has not been exceeded through ultra vires review. Any substantive judicial review would be to impinge on the policy-making functions of the elected branches and thereby violate separation of powers.

⁷⁴ See Clive Bean and Martin Wattenberg, *Attitudes Towards Divided Government and Ticket-Splitting in Australia and the United States*, 33 AUSTRALIAN J. OF POLI. SCI. 25 (1998); John Uhr, *Generating Divided Government: the Australian Senate* in SENATES: BICAMERALISM IN THE CONTEMPORARY WORLD (S.C. Patterson and A. Mugan, eds., 1999).

⁷⁵ Since 2005, the one major difference in the electoral systems is that in the Chamber of Deputies, the coalition with a plurality of the national vote is given bonus seats to guarantee a majority, whereas in the Senate the bonus seats are based on the regional vote meaning that a majority is not always guaranteed. This possibility occurred in the most recent Italian elections, in February 2013, where the center-left alliance Italy Common Good led by the Democratic Party obtained a majority in the Chamber of Deputies with the help of the bonus, but no group won a majority in the Senate.

⁷⁶ As mentioned above, *supra* TAN 15, Erdos explains Australian exceptionalism by the absence of a necessary political trigger.

With the enormous growth in the scale and scope of the administrative state since 1945, especially outside the confines of traditional government departments and into quasi-autonomous agencies, as well as its specialized content and partial privatization, both parts of the chain of political accountability have become highly ineffective, if not fictional.⁷⁷ Ministers simply cannot supervise all acts and decisions of the administrators for whom they are notionally responsible and, even if they could, government dominance means that as an institution parliament is normally too weak to hold the executive to account. This practical inability to perform its theoretical and historical function of controlling the executive in the context of the modern administrative state is a particularly important consequence and illustration of the power of the party system previously discussed. As one commentator puts it: [i]t is a characteristic of the British political system that when the future of a minister is in question, it will be regarded as first and foremost an aspect of the continuing party conflict rather than as an occasion for the House [of Commons] to act collectively to discipline the executive.”⁷⁸ As a result of this growing political unaccountability, judicial review of administrative acts gradually extended to their substance, in order to fill the gap. Starting with the landmark *Wednesbury* reasonableness test of 1949,⁷⁹ in which the courts wrapped this indubitably substantive test in the language of implied parliamentary intent and ultra vires, to the abandonment of this fig leaf in the *GCHQ* case of 1985,⁸⁰ to the additional independent requirement of procedural fairness, and finally full judicial rights review of administrative action under the Human Rights Act 1998, “the want of Parliamentary control over the executive [has been] to an important degree, mitigated by the rigours of judicial review.”⁸¹

⁷⁷ EOIN CAROLAN, *THE NEW SEPARATION OF POWERS* 60 (2010).

⁷⁸ Mike Radford, *Mitigating the Democratic Deficit? Judicial Review and Ministerial Accountability*,” in, *ADMINISTRATIVE LAW FACING THE FUTURE: OLD CONSTRAINTS AND NEW HORIZONS* 40 (P. Leyland and T. Woods, eds., 1997).

⁷⁹ *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223.

⁸⁰ *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

⁸¹ Lord Irvine, *Judges and Decision-Makers: The Theory and Practice of Wednesbury Review* [1996] PL 59 59, cited in Radford, *supra* note 78, at 37, and quoted in Carolan, *supra* note 77, at 66.

Moreover, this increased role for judicial review of administrative action turned out to be a Trojan horse wheeled into the citadel of parliamentary sovereignty, for in the UK and the other Westminster systems, it ultimately presaged and lowered resistance to judicial review of *legislative* acts. If it is democratically unproblematic to seek judicial review of the action of an unelected official, then an elected one – even the head of the government – why not also a legislative act? Indeed, even in civil law countries, at least with a larger sweep of history, it could be argued that the establishment of specialized administrative law courts in the nineteenth century eased the path to a specialized constitutional court in the twentieth.⁸² And more concretely, as we have seen, the connection between the two played a major role in the recent acceptance of judicial review in Luxembourg.

VI. Conclusion

As evidenced by the strong principle of legislative supremacy developed in French and British parliamentary democracies, many of those political systems that most defied the traditional idea of separation of powers between legislative and executive functions most adhered to it as between legislative and judicial ones. By contrast, many political systems with more separate and independent executives and legislatures defied traditional notions by permitting judges to review rather than merely apply the law made by the legislature. Accordingly, the adoption of judicial review by parliamentary democracies might be viewed as the complete abandonment of separation of powers. From another perspective, however, the one presented in this article, this adoption represents the reconceptualization of the latter to achieve one of its main underlying purposes -- countering the concentration of political power -- in a changed political context.

⁸² The ultimate influence of continental administrative law on its constitutional law is also suggested by the origin of the principle of proportionality in the former and its subsequent rise as the dominant approach to the latter in recent times. See Moshe Cohen-Eliya and Iddo Porat, *American Balancing and German Proportionality: The Historical Origins* (origins), 8 INT'L. J. CONST. L. 263 (2010); Alec Stone Sweet and Jud Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 COLUMB. J. TRANS. L. 68 (2008) (dominance).

Constitutional evolution towards judicial review in established parliamentary democracies has been, in significant part, the result of changing institutional practices that have combined to undermine faith in traditional political modes of review and accountability, and render judicial ones the only seemingly practical alternative. In combination, these developments have created a situation in which judicial review appears to offer the individual citizen the respite from the sense of powerlessness in the face of authority that democratic theory and political accountability seem to promise but too rarely provide. Seeking redress of grievances by the more heralded route of petitioning the government rather than the courts now seems almost quaint.