

Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2004). Pp. 286.

“First they ignore you, then they laugh at you,
then they fight you, then you win.”

Mahatma Gandhi

So it was in the fight for Indian independence. But for scholars who argue against prevailing orthodoxies, the process tends to be somewhat more succinct. Mainstream academics tend to be too polite to laugh at those who challenge their most precious habits of thought, but they also often find themselves unable to deal with such challenges. For radical scholars, then, the process can often be summarized as follows: “First they ignore you, period.”

Such may be the fate of Ran Hirschl’s exceptional book, *Towards Juristocracy*, which examines the recent constitutional revolutions in Canada, Israel, New Zealand, and South Africa. As late as 1942, the judiciary could declare a national law void for unconstitutionality in only two countries—the United States and Norway.¹ In a third—Mexico—it could declare an unconstitutional law inapplicable to a specific individual.² Since the mid-twentieth century, as Hirschl notes, power has been transferred from representative institutions to judiciaries in more than eighty countries (1), and the pace has accelerated with the spread of the new constitutionalism. Hirschl tests mainstream explanations for this transfer of power against empirical data and finds them lacking. Standard evolutionist and functionalist approaches, for example, respectively assume that constitutionalization is inevitable in democratic societies and is intended to overcome institutional inefficiencies. But these approaches inadequately explain the significant differences in the timing, scope, and nature of this transfer of power between states (31-38). In place of such accounts, Hirschl develops his “hegemonic preservation thesis,” according to which this transfer of power results from an interplay between the strategic interests of three key groups: political elites, economic elites, and judicial elites.

Hirschl assumes that these elites are strategic decision makers who attempt to maintain or enhance their dominant positions (43). Power will most likely be transferred to the judiciary, therefore, when these groups believe that such a transfer will enhance or prevent the erosion of their power. For judicial elites, particularly the high court, the benefits are obvious—increased prestige and decision-making power (47-48). The benefits for economic elites are also easy to discern: the constitutional

¹ Leslie Friedman Goldstein, “From Democracy to Juristocracy”, Book Review of *The Power of Judges: A Comparative Study of Courts and Democracy* by Carlo Guarneri & Patrizia Pederzoli; *Governing with Judges: Constitutional Politics in Europe* by Alec Stone Sweet; and *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* by Ran Hirschl (2004) 38 *Law & Soc’y Rev.* 611 at 612-13. (Oxford: Oxford University Press, 2002) at 135.

² This type of constitutional review was, and is, known as the *juicio de amparo*, or “protection trial”. For the leading analysis on this subject, see Ignacio Burgoa O., *El juicio de amparo*, 40th ed. (Mexico City: Porrúa, 2004).

protection of private property safeguards them against what Alexander Hamilton once referred to as “the democratical jealousy of the people.”³ Even when the constitution does not explicitly protect private property, the prevalent emphasis on individual rights and negative liberties tends to favour economic elites (46-47). As for political elites, it seems counterintuitive for them to delegate their power voluntarily. And so it is, except when their traditional control over electoral politics is threatened by the rising influence of peripheral groups. At such times, political elites may conclude that they can protect their policy preferences more effectively by transferring control to the judiciary, particularly when they control the judicial appointment process and are relatively certain that judicial decisions will serve their interests (43-44).

To test his thesis, Hirschl examines the origins, actual impact, and political consequences of the recent constitutional revolutions in Canada, Israel, New Zealand, and South Africa, and he focuses on these countries for several reasons. All four countries are characterized by deep political, economic, ethnic, and cultural-linguistic divisions. Israel, New Zealand, and Canada were informed by a strong British common law tradition, particularly with regards to the Westminster model of parliamentary sovereignty. Also, the constitutional transformations in those three countries were not preceded or accompanied by major changes in their respective political regimes, which makes it easier to investigate the actual impact of the constitutional changes. South Africa, whose political elites also traditionally favoured parliamentary supremacy, is studied precisely because it is a problem case: it represents the strongest *prima facie* case for the progressive potential of an entrenched bill of rights. And finally, all four countries have adopted different mechanisms to address the obvious counter-majoritarian implications of judicial review, from New Zealand’s preferential model, which does not formally allow the courts to nullify unconstitutional legislation, to sections 1 and 33 of the *Canadian Charter of Rights and Freedoms*⁴ (8-10).

As Hirschl demonstrates, political elites in all four countries were traditionally opposed to entrenched bills of rights but changed their minds once they risked losing control over the parliamentary process or, in the case of Canada, the territorial integrity of the country. The Israeli Knesset, for example, was traditionally dominated by the Ashkenazi secular bourgeoisie, which saw no need to delegate its power to the judiciary (50-53). But by the mid-eighties, this group’s power was being eroded by peripheral groups, primarily religious Mizrahi Jews (55-60). At the same time, Israel was undergoing a fundamental political and economic transition towards global neoliberal integration (60). As a result, a cross-party coalition representing primarily secular and neoliberal interests, with the support of judicial and economic elites,

³ Alexander Hamilton, *Conjectures about the New Constitution*, in Bureau of Rolls and Library of the United States Department of State, *Documentary History of the Constitution of the United States of America, 1786-1870*, vol. 4 (New York: Johnson Reprint, 1965) at 289 (reprint).

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

pushed for constitutional reforms that culminated in the 1992 adoption of *Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation*, as well as the amendment of *Basic Law: The Government* (54-55).

Beginning in the seventies, New Zealand experienced profound economic changes as its traditional economic ties with Britain began to erode. As a result, between 1984 and 1994, New Zealand's economic and political elites reconsidered that country's political economic policy and transformed the country from a welfare state to one of the most neoliberal economies in the world (83-84). At the same time, the parliamentary representation of peripheral groups, primarily the Maori, also increased, as did Maori political consciousness (85-86). The adoption of the 1990 New Zealand *Bill of Rights Act*⁵ was spearheaded by a coalition of economic elites, who wanted to facilitate the economic restructuring process, and political elites, who wanted to protect their policy preferences from majoritarian politics (83).

South Africa also experienced a deep economic shift in the eighties and nineties. Considered a pariah state by the West, it was largely cut off from international capital flows at a time when its gold wealth was in decline. The white economic elite realized that it could not expect to receive access to foreign capital, or find investment opportunities abroad, without first dismantling the apartheid system. But afraid that democratic rule would make whites vulnerable to wealth redistribution, the National Party began advocating an entrenched bill of rights, and the process culminated with the *Constitution of the Republic of South Africa, 1996*,⁶ which includes a protection for property rights (92-94).⁷

Canada was one of the first countries to embrace the new constitutionalism, primarily as an attempt to combat Quebec nationalism (75-76). To a greater extent than in other countries, the adoption of the *Charter* can be traced to the influence of one individual, Pierre Trudeau. Trudeau's political career was defined by his attempts to create a stronger federal government and counter Quebec independence, and he considered the adoption of official bilingualism, for example, to be insurance against separatist sentiment. But far more important was the 1982 *Charter*, particularly section 23(1)(b), or the "Canada clause," which was intended to override the mandatory French language education policies of Quebec's *Bill 101*⁸ (79-80). Interestingly, though this fact is undisputed in Canadian historiography, not one *Charter* apologist has acknowledged Trudeau's primary interests in pursuing patriation. Economic elites also supported the *Charter* and its proposed property

⁵ (N.Z.), 1990/109.

⁶ No. 108 of 1996.

⁷ For an analysis of the political economic transformations that underlay the constitutional transitions in South Africa and Israel, see Jonathan Nitzan & Shimshon Bichler, "Going Global: Differential Accumulation and the Great U-turn in South Africa and Israel" (2001) 33 *Rev. Radical Pol. Econ.* 21; Jonathan Nitzan & Shimshon Bichler, *The Global Political Economy of Israel* (London: Pluto, 2001).

⁸ *Charter of the French Language*, R.S.Q. c. C-11.

protection. Public resistance prevented that protection from being included in the final draft, but, as Hirschl points out, it became practically assured in 1994 through the *North American Free Trade Agreement*⁹ (77).

Proponents commonly attribute significant progressive effects to judicial review, most typically regarding the empowerment of marginalized groups. Hirschl systematically analyzes the constitutional jurisprudence of the four countries' high courts and concludes that while judicial review has had a significant impact on procedural justice and negative liberties issues such as criminal due process rights, and freedom of expression (117-19), it has had almost no impact on issues of distributive justice (148, 156-62). Negative rights litigation has made up between 80 and 90 per cent of all high court bill of rights litigation in the four countries and has been far more successful than positive or collective rights litigation (105-08). In Canada and Israel, the bills of rights have been used by litigants to erode many protections formerly enjoyed by unions (139-46). Inequality has increased in New Zealand, Israel, and Canada since these countries adopted bills of rights, while in South Africa it has remained relatively unchanged since the apartheid era (156-62).

In his recent defence of the *Charter*, Kent Roach outlines the principal leftist and conservative fears regarding the *Charter*—that it will lead to the constitutional protection of the rich and of those minorities favoured by the intellectual elite, respectively. Roach pretends to dismiss these criticisms by claiming that the two sets of fears contradict each other.¹⁰ But, as Hirschl demonstrates, there is no contradiction at all. Both are consistent with the primarily negative conception of liberty adopted by the judiciary: the less the state interferes in the private sphere, personal or economic, the better (13-14). Of course, the obvious problem is that socio-economic disparity can only be remedied through collective action. Hirschl provides empirical evidence for the familiar argument that liberal freedoms are largely meaningless for those who lack the ability to exercise them.

Finally, Hirschl examines the political consequences and implications of the new constitutionalism. The legalization of politics has gone far beyond bill of rights litigation and now reaches the most fundamental political and moral questions faced by all four countries. In Israel, the issues of who is a Jew and what it means for Israel

⁹ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*]. The property protection was perhaps unnecessary in any event, since property enjoys potential constitutional protection through the common law and the *Canadian Bill of Rights* (S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III). The *Bill of Rights* was not eliminated by the *Charter*, and though it has fallen into disuse, its property protection remains in effect. Also, the Supreme Court of Canada declared in *New Brunswick Broadcasting Co. v. Nova Scotia*, [1993] 1 S.C.R. 319, that the constitution includes unwritten doctrines. Therefore, if a future government attempts to expropriate property for social democratic purposes, it is possible that the courts will rely on these sources to declare the expropriation unconstitutional.

¹⁰ Kent Roach, *The Supreme Court on Trial* (Toronto: Irwin Law, 2001) at 211.

to be a Jewish and democratic state; in South Africa, New Zealand, and Canada, fundamental restorative justice dilemmas; and in Canada, the very future of the federation are all routinely dealt with through the courts rather than the political process. In South Africa, as in Canada in the late nineteenth century, the judiciary has shaped the federation's division of powers, and in 1996 the South African Constitutional Court even refused to certify a draft constitution approved by the country's National Assembly (172-99).

Hirschl's book may be met with silence because mainstream scholars will tend to lack the skills and knowledge necessary to challenge its breadth of scope and wealth of empirical data. It is a genuinely comparative analysis that gives equal attention to all four countries and links their constitutional transformations to a broader global phenomenon—the transfer of policy-making authority from representative institutions to semi-autonomous professional bodies such as central banks, the International Court of Justice, the World Trade Organization, and the NAFTA Secretariat (215-16). Thus, at a time when individuals in many countries are increasingly protected from state intrusion into the “private sphere”, they are also increasingly losing the ability to influence social policy through democratic channels. Apologists can put a positive spin on the outcomes in specific bill of rights cases, but in a democratic society it is much harder to justify the delegation of fundamental political and moral issues to undemocratic professional bodies.

It seems odd that apologists for judicial review, who have little faith in politicians, have great faith in the constitutions they produce. In contrast to such views, Hirschl's hegemonic preservation thesis is consistent with what is sometimes called radical institutionalism. Most famously associated with Thorstein Veblen and C. Wright Mills, radical institutionalism starts from the premise that elites derive much of their power from their ability to control and restructure social institutions for their own ends.¹¹ Hirschl's principal argument is similar to the one made by Charles Beard in 1912 and 1913 in reference to the American constitution.¹² Beard demonstrated that the drafters of that document were more preoccupied with their ability to maintain control over the American political economy than with the high-sounding ideals contained in its preamble. Thus, for example, securities speculators made some \$40 million in profit from the constitution's contracts clause, a figure that represented approximately 10 per cent of the taxable value of all the lands in the thirteen States

¹¹ See e.g. Thorstein Veblen, *The Theory of Business Enterprise* (New York: Charles Scribner's Sons, 1919); Thorstein Veblen, *Absentee Ownership and Business Enterprise in Recent Times: The Case of America* (Boston: Beacon Press, 1967); C. Wright Mills, *The Power Elite* (Oxford: Oxford University Press, 1956).

¹² Charles Beard, *The Supreme Court and the Constitution* (Englewood Cliffs, New Jersey: Prentice-Hall, 1962); Charles Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1960). Some of Beard's specific arguments have been challenged, perhaps most successfully by Forrest McDonald, *We the People: The Economic Origins of the Constitution* (Chicago: University of Chicago Press, 1958). Nonetheless, Beard's general argument is still sound.

and a charge of \$10 for every inhabitant of the United States. And yet, several decades after Beard's works were written, the two most important American advocates of judicial review were still able to conclude that the constitution was drafted "in the bright morning of liberal thought,"¹³ "when there really [did] exist a calm consensus" about the rights to be included.¹⁴ Confronted with uncomfortable facts, Dworkin and Ely simply ignored them. Hirschl's book poses equally uncomfortable facts for the apologists of the new constitutionalism. We have yet to see if it, too, will be ignored.

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¹³ Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (Cambridge: Harvard University Press, 1996) at 38.

¹⁴ John Hart Ely, *On Constitutional Ground* (Princeton: Princeton University Press, 1996) at 15. Both Dworkin (*ibid.*) and Ely refer to a constitution in the abstract, but their accounts are clearly based upon the American experience.