Technocracy and Distrust: Revisiting the Rationale for Constitutional Review

"Democracy is a device to ensure that we are governed no better than we deserve."

George Bernard Shaw

Abstract

Two hundred years after *Marbury v. Madison*, constitutional review has spread to all parts of the world. Yet it remains an eminently contentious practice, which has spawned a vast scholarly literature. Surprisingly, though, little has been done to make the normative debate conversant with comparative and empirical research on judicial behaviour and institutions. The present paper seeks to evaluate two distinct approaches to the justification of constitutional review which it takes to be implicit in the normative scholarship: (1) The Principal-Agent Model, which essentially views constitutional review as a means to enforce the choices of the constitutional framers over recalcitrant legislative majorities. And (2) the Trustee Model, which casts constitutional judges as trustees of the political system: their task is to ensure that the legislative process produces the "best" policy outcomes. In light of the courts' organizational setting, incentive structure and actual impact on policy outcomes, the Trustee Model is found to provide both a more accurate picture of how judicial review of legislation works in reality and a more solid—albeit by no means problem-free—rationale for the institution. The Trustee Model shifts the focus from constitutional interpretation to the courts' real impact on policy outcomes, such as *de facto* human rights protection. But while there is some empirical evidence that constitutional review may improve some policy outcomes some of the time, the analysis also makes plain that the best available justification for the practice rests on contentious normative assumptions.

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I. INTRODUCTION

Having spread from America to Europe and from Europe to the rest of the world, constitutional review—the practice of allowing judges to reverse the choices of democratically elected officials—has become a defining feature of global constitutionalism.[1] In places as diverse as India, Israel, Canada, the United States, South Africa, France, Germany or Hungary, constitutional judges have become major political actors, with constitutional review affecting virtually every facet of public and private life.[2]

Even so, more than two hundred years after *Marbury v. Madison* constitutional review remains an eminently contentious practice. Lawyers, constitutional theorists and political philosophers continue to disagree over its merits and legitimacy and the proper place of judges in democratic regimes. The debate has spawned a vast literature, with countless essays written in defence of the practice[3] and new normative theories of constitutional review steadily adding to the existing stock.[4] Meanwhile, long on the defensive, the detractors of

[1] Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, J. L. ECON. & ORGAN. (2013) (using quantitative data from the ComparativeConstitution Project to document and explain the global spread of constitutional review).

[2] GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY (2005); MARY L. VOLCANSEK, CONSTITUTIONAL POLITICS IN ITALY: THE CONSTITUTIONAL COURT (2000); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000); WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2005); NEAL TATE & TORBJORN VALLINDER, THE GLOBAL EXPANSION OF JUDICIAL POWER (1995); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

[3] RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN (1990); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1999); Hans Kelsen, *La Garantie Juridictionnelle de La Constitution*, REVUE DU DROIT PUBLIC 197 (1928); HANS KELSEN, WER SOLL DER HÜTER DER VERFASSUNG SEIN? (2008).

[4] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); CHRISTOPHER L EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001); Matthias Kumm, *Alexy's Theory of Constitutional Rights and the Problem of Judicial Review*, INSTITUTIONAL REASON: THE JURISPRUDENCE OF ROBERT ALEXY 201 (Matthias Klatt, 2012); WILL WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE (2007); ALON HAREL, WHY LAW MATTERS (2014).

"legal constitutionalism" are striking back, reinvigorated by the work of scholars such as Jeremy Waldron and Richard Bellamy.[5]

Rich and philosophically sophisticated though it is, this literature has nonetheless failed to appreciate the empirical dimension of the issue. What is claimed in support or in opposition to judicial review of legislation rests on assumptions about the nature of judicial decision-making and the inner workings of judicial institutions that appear largely unwarranted. To be fair, there is increasing recognition that an argument whether *pro* or *contra* constitutional review needs to be grounded in an account of how real-world judges decide cases and interact with their political environment.[6] Still, these efforts have fallen short of bridging the gap between the normative literature and empirical research on judicial behaviour. This is all the more regrettable as the failure to take the empirical dimension seriously makes the normative discussion both less meaningful for the public at large and less relevant for policy-makers. As John Ferejohn points out:

> [I]t seems impossible to engage in meaningful normative discourse – to criticize a practice or give advice – without some conception of how political institutions either do

[5] JEREMY WALDRON, LAW AND DISAGREEMENT (1999); RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM (2007); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000); LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2005); Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346 (2005).

[6] See e.g. Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Rewiew*, 2 JOURNAL OF LEGAL ANALYSIS 227, 229 (2010) (noting that instrumentalist justifications for constitutional review "require establishing complex empirical assertions such as the claim that courts render better decisions or the claim that courts' decisions are more protective of democracy, rights, or stability and coherence"); BELLAMY, *supra* note 5 (drawing on social scientist research, notably the work of Alec Stone Sweet, to substantiate his critique of constitutional review); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005); Waldron, *The Core of the Case against Judicial Review*, *supra* note 5 (expliciting the factual assumptions underpinning his argument contra judicial review); Ran Hirschl, *From Comparative Constitutional Law to Comparative Constitutional Studies*, 11 INT. J. CON. L. 1 (2013) (making the case for a strong injection of interdisciplinarity in comparative constitutional studies).

> or could be made to work. Without some conception of the politically possible, normative advice is inherently vulnerable to utopian impulses.[7]

This does not mean that all normative questions are reducible to empirical ones. It makes little sense to evaluate an institution without prior knowledge of how it operates in practice or how it could be reformed so that it functions as the proffered normative ideal prescribes. In that sense, *ought* presupposes *can*. Yet any evaluation or policy advice necessarily relies on normative assumptions, which, as such, cannot be derived from empirical statements. So the point of the present paper is not to dismiss the normative debate as irrelevant. Rather, its point is that the normative approach should be conversant with positive theories of judicial decision making and empirical studies on law and courts. As Barry Friedman points out, the problem is precisely that, in academic discourse, the normative and the positive approaches have "travelled on largely separate tracks".[8] Not only have constitutional scholars and legal philosophers typically favoured the former over the latter. But they also seem to treat the two approaches as belonging to distinct, incommensurable genres. Yet we contend that such a view is wrong. Whether or not we are justified in granting judges the power to review legislative acts is a question that cannot be answered without making empirical, as well as normative, assumptions.

Without pretending to offer apodictic conclusions on the merits of constitutional review, the main intended contribution of the present paper is to clarify the empirical assumptions implicitly made in the normative debate and to assess whether these assumptions are plausible in light of our empirical knowledge about constitutional adjudication. The paper seeks to accomplish this in two steps. First, it draws on delegation theory to capture and to

[7] John Ferejohn, *Law, Legislation and Positive Political Theory*, MODERN POLITICAL ECONOMY 191, 192 (Eric Hanushek & James Banks, 1995).

[8] Friedman, *supra* note 6, at 258.

contrast two distinct approaches to the justification of judicial review that are taken to be implicit in the normative debate. In brief:

1) Following the Agent Model, judges are given the authority to review and to invalidate legislation to enforce the choices of the constitutional framers over recalcitrant legislative majorities.

2) Under the Trustee Model, judges are given the power of judicial review to act as trustees of the political system: their task is to ensure that the legislative process produces the "best" outcome or, at least, Pareto-optimal policy.

As we shall see, the two models capture two distinct conceptions of the role of judges, which differ profoundly in how they relate to notions such as constitutionalism, democracy and the rule of law. But, while delegation theory does help clarify the normative foundations underpinning these two approaches to the justification of constitutional review, it is in identifying and assessing their implicit empirical assumptions that it proves most useful. So, in a second step, the analysis turns to political economy and empirical research on judicial behaviour to determine whether the courts' organizational setting and the judges' incentive structure actually ensure that constitutional review works as the accepted model prescribes. The goal here is not to offer a general survey of the empirical literature. Instead, we use the empirical literature and data to discuss only these empirical aspects that are immediately relevant for the assessment of the two models.[9] In doing so, we do not try to hide the

[9] Because the two models rest on empirical assumptions of various sorts, we draw from multiple strands of empirical research. Yet we do not intend to offer a comprehensive overview of these research fields. It is only to the extent that we deem it necessary to answer the empirical questions raised by the two models that we analyse existing datasets and consider or refine the findings of the empirical literature. Data was crunched using the statistical software package STATA, which we also used to generate Figure 1, 2, 4, 6.1 and 6.2. Replication data are available with the author upon request.

limitations and deficiencies of the positive literature.[10] Nevertheless, we contend that our analysis warrants the conclusion that, as it exists in today's democracies, constitutional review is both descriptively closer to and normatively easier to justify under the Trustee Model. The institutional design of courts exercising constitutional review does more to ensure independence and output legitimacy than to guarantee that constitutional judges act as indefectible agents of the constitutional framers. Yet this technocratic justification comes with problems of its own, both at the normative and at the empirical level.

The analysis proceeds as follows. Section II sets out the Agent/Trustee distinction applied in the remainder of the paper. Section III assesses the distance that separates the Agent Model from the reality of actual judicial practice. Three factors, it is argued, explain why courts exercising constitutional review do not—and, in most circumstances, cannot—operate in a manner consistent with the Agent Model: the indeterminacy of constitutional language, the policy-seeking motivations of judges and the absence of appropriate mechanisms to harness judicial behaviour to the preferences of constitution-makers. Section IV then turns to the Trustee Model. As it turns out, much of the empirical support for the Trustee Model stems from the factors that do most to undercut the Agent Model. But, in many respects, the argument *pro* constitutional review based on the Trustee framework parallels the one economists make for independent central banks. Basically, the argument states that, because constitutional judges are largely insulated from the electoral cycle, they are able to take a more long-term approach to policy-making. Unlike elected politicians they do not face incentives to adopt popular policies they believe to be unwise. Nevertheless, the technocratic case for constitutional review—similar to the technocratic argument for

[10] For all their shortcomings, we nonetheless believe that these data and studies are better than the educated guesses about the operations and policy impact of constitutional review on which participants in the normative debate tend to rely. To the extent that these shortcomings are real, it should spur us to try and improve our empirical research and indicators rather than to dismiss the empirical approach altogether.

independent central banks—is potentially vulnerable to a number of objections. One relates to the very possibility of policy optimization. The other is that, even in areas where there appears to be some consensus as to what constitutes an optimal policy outcome, constitutional review might simply fail to deliver on its promises—although there is some evidence that constitutional review has a positive impact on *de facto* human rights protection, at least for certain categories of rights. Section V concludes by returning, again, to the normative debate. While more attractive on a normative plane, the Agent Model cannot serve to justify the institution as it exists today. Yet, more empirically plausible though it undeniably is, the technocratic rationale is predicated on a sceptical view of democracy. As such it makes the counter-majoritarian difficulty more, not less, stringent.

II. AGENTS AND TRUSTEES: JUDICIAL REVIEW THROUGH THE LENS OF DELEGATION THEORY

First developed in organizational and transaction costs economics from common law concepts of agency,[11] delegation theory is not really a theory as it does not spell out tight propositions or predictions about when, why and how delegation will take place. Rather it serves primarily as a heuristic device to problematize the phenomenon of delegation, the transfer of authority by one party to another.[12] Only when combined with additional assumptions to formulate concrete hypotheses about the behaviour of the parties to a specific

[11] Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, 25 WEST EUR. POL. 1, 3 (2002); Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, AM. POL. SCI. REV. 1094 (1985).

[12] In some contexts, though, delegation theory and the principal-agent framework take the character of ontological assumptions. A principal-agent relationship is first posited and the task of the empirical scholar is then conceived as that of unraveling the hidden mechanisms by which the principal achieve or fail to control the agent, see e.g. Geoffrey Garrett & Barry Weingast, *Ideas, Interests and Institutions: Constructing the EC's Internal Market* (1993). For a discussion of the problems raised by such use of delegation theory see Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT'L REL. 33 (2008).

delegation scheme, as in the present paper, does it become a theory truly amenable to falsification, in the scientific sense of the term.

A. The Principal-Agent Framework

The Principal-Agent (P-A) framework constitutes undoubtedly delegation theory's most prominent offshoot. It addresses the difficulties that may arise when a party, the principal, hires another, the agent, to act on her behalf. As with employer/employee relations, the agent's preferences and interests may differ from those of the principal. Hence the famous principal-agent problem: what mechanisms can the principal use or devise to ensure that the agent act in accordance with the terms of the delegation? The analysis of particular delegation schemes thus becomes a study of the various incentives and control mechanisms—the combination of carrot and stick—that principals have at their disposal to control the behaviour of their agents: commissions, profit sharing, re-contracting, threat of dismissal, etc.

B. The Trustee Framework

Less familiar, the Trustee framework presents itself as an alternative to the P-A Model. In common law, a trust is a contract by which a party, the settlor, grants some property or good to be administered by a second party, the trustee, on behalf of a third, the beneficiary. A typical example is a will trust, whereby a testator designates a trustee for the execution of his will. Other illustrations are pension and charitable trusts. The trustee is not meant to take her cue from the settlor but to act in the beneficiary's "best interest", which does not necessarily coincide with what the beneficiary sees as her short-term best interest. It is why the crucial issue in setting up a trust are not the available prods that would ensure that the trustee's behaviour is aligned with the settlor's preferences or the beneficiary's. Instead, the crucial issue is the personality of the trustee herself. Trustees are supposed to be wise and prudent—"trustable"—persons. Fees and other sweeteners may constitute an additional motivation to

act in the beneficiary's best interest. But the rationale for entrusting the administration of a property to a trustee rather than to its beneficiary results primarily from a consideration of the trustee's personal reputation. Setting up a trustee makes sense only insofar as the person or institution acting as trustee is held to have a sense of prudence or an ability to exert her expertise superior to the beneficiary and the settlor. For the purpose of the present paper, it is also worth noting that in a Trustee scheme the settlor and the beneficiary can be one and the same person.

In economics, it has been argued that independent central banks fit a Trustee rather than a P-A model. Independent central banks are entrusted with the power to set interest rates and issue bank regulations for the citizens' best interest. Independence is meant to insulate central bankers not only from the pressure of the settlor, the elected government who set up the bank, but also from the citizenry, as both may be tempted to sacrifice long term interests for short term benefits.[13] Similarly, in political science, Giandomenico Majone has argued that the European Commission, the European Central Bank and the European Court of Justice are best thought of as trustees rather than as agents of the Member States and their citizens. Far from reflecting any failure of the control mechanisms established by the Member States, the remarkable degree of independence enjoyed by EU institutions results from the very act of delegation, the Treaty provisions that created them. By enshrining the institutions' authority in European Treaties and by making Treaty amendments difficult to pass, Member

[13] Eric Bennett Rasmusen, *A Theory of Trustees, and Other Thoughts* in PUBLIC DEBT AND ITS FINANCE IN A MODEL OF A MACROECONOMIC POLICY GAME: PAPERS PRESENTED AT A WORKSHOP HELD IN ANTALYA, TURKEY ON OCTOBER 10- 11, 1997 (1997), *available at* http://works.bepress.com/rasmusen/59.

State governments have deliberately relinquished the powers to control their course of action.[14]

C. Delegation, Legitimacy and Courts

As with central banks and regulatory agencies, delegation theory can be applied to courts and judges to problematize the decision of constitution-makers to entrust judges with the power of invalidating the laws enacted by elected officials. The P-A and Trustee framework help contrast two distinct logics of delegation to judicial institutions, which in turn identify two ways of justifying constitutional review.

Under the P-A approach, constitutional framers, acting as principals, delegate to judges, who thus become their agents, the power to invalidate legislative acts to prevent violations of the constitution. The logic of delegation here is essentially one of precommitment. It rests on three assumptions. First, the constitution-makers want the legislature to comply with the constitutional norms they have enacted. Second, it is believed that legislators may at times be tempted to disregard their constitutional obligations. Third, it is believed (a) that judges are more likely than legislators to have preferences congruent with those of the framers, and/or (b) that the judges' expertise and incentive structure as well as the courts' institutional design make judges more likely to behave in accordance with the choices made by the constitution-makers. Within the P-A framework, the case for judicial review will turn on the validity of these assumptions. In short, if judicial review is legitimate it is not because it produces good or optimal policies, but because it ensures that laws are made in accordance with the rules and principles spelled out in the constitution. What counts

[14] GIANDOMENICO MAJONE, DILEMMAS OF EUROPEAN INTEGRATION: THE AMBIGUITIES AND PITFALLS OF INTEGRATION BY STEALTH 64–82 (2005); Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POL. 103 (2001).

as legitimate judicial behaviour is fully defined *ex ante* by the rules that judicial agents are in charge of enforcing.

The Trustee Model, by contrast, casts the case for judicial review in terms that are unambiguously consequentialist. The function of a constitutional court is not to enforce the preferences of the members of the constitutional convention who set it up. Nor is it to cater to the will and desires of the beneficiaries of the constitutional contract, the people. Instead, the function of such a trustee court is to improve the quality of legislation, to enhance the efficiency of public policies and, if possible, to facilitate the smooth functioning of the political system.

We believe that these two models capture the two manners in which constitutional review is commonly defended, either by emphasising the judges' role as "guardian of the constitution"[15] or, in more recent legal scholarship, by emphasising its desirable effect on the political process or certain policy outcomes[16]. But we now want to confront these models with the available empirical evidence. This is, at least, the task we set ourselves in the next two sections.

III. CHALLENGES TO THE AGENT MODEL: INCOMPLETE CONTRACTS, MULTIPLE PRINCIPALS AND JUDICIAL DRIFT

Of the Agent Model, it can be said that it captures traditional understandings of the role of courts in a constitutional democracy committed to the rule of law and the separation of

[15] See Kelsen, *La Garantie Juridictionnelle de La Constitution*, *supra* note 3; KELSEN, WER SOLL DER HÜTER DER VERFASSUNG SEIN?, *supra* note 3; Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW AND PHILOSOPHY 327 (1990).

[16] See e.g. Kumm, *supra* note 4; Richard H. Jr Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2007); Alon Harel, *Rights-Based Judicial Review: A Democratic Justification*, 22 LAW AND PHILOSOPHY 247 (2003).

powers. Constitutionalism recommends that the rules constituting the polity and establishing its citizens' basic rights be entrenched so as to secure the stability of the political system as well as its commitment to individual freedom. To the extent that constitutional review has a place in traditional constitutionalist thinking, it is as a means to achieve these ends. Another key tenet of political liberalism is the rule of law. It stresses the ideal of "government by law" and sees courts as crucial in protecting citizens against arbitrary governmental decisions. From this perspective, granting judges the power to review legislative acts is naturally viewed as a means to consolidate the rule of law by subordinating the entire state apparatus to government by law. Seen through the prism of the Agent Model, constitutional review sits equally well with conventional interpretations of the doctrine of the separation of powers. The doctrine of the separation of powers is widely believed to entail the commandment that the function fulfilled by the judiciary be distinct from the other two branches. Judges should neither "make" nor "execute" the law but merely apply it. A further attractive feature of the Agent Model is that it seems to avoid the so-called "counter-majoritarian" difficulty,[17] thus presenting constitutional review as fully compatible with democracy. After all, if the job of a court exercising constitutional review is only to enforce the rules enacted by the constitution-makers and if the rules in question were themselves adopted through a democratic procedure, there should be little to object to about judges occasionally disallowing the policies of popularly elected legislators. As a staunch advocate of constitutional review puts it:

> By granting to a non-legislative body that is not electorally accountable the power to review democratically enacted legislation, citizens provide themselves with a means for protecting their sovereignty and independence from the unreasonable exercise of their political rights in legislative processes… By agreeing to judicial review they in effect tie

[17] BICKEL, *supra* note 4, at 16.

> themselves into their unanimous agreement on the equal basic rights that specify their sovereignty. Judicial review is then one way to protect their status as equal citizens.[18]

An appealing analogy, drawn by Jon Elster, is with Homer's *Odyssey* when Odysseus' ship skirts the land of the Sirens. Having decided he should be tied to his mast in order to resist the sirens' enchanting song, Odysseus instructs his crew "if I beg you to release me, you must tighten and add to my bonds".[19]

Finally, the Agent Model fits the rhetoric constitutional judges typically appeal to to justify their rulings. When coming under attack from other political actors, constitutional judges almost invariably retort that "they're only applying the law". In the United States, where the confirmation hearings for Supreme Court nominees are a highly politicised affair, John Roberts, later confirmed as Chief Justice, famously compared the role of a judge to that of an umpire in a ball game in his opening statement before the Senate Judiciary Committee:

> Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.[20]

In a similar vein, on its official homepage the German Federal Constitutional Court insists that, whatever the consequences of its decisions, its function is not "political" but purely "legal":

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[18] Freeman, *supra* note 15, at 36.

[19] JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 36 (1984).

[20] Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States, 12 September 2005, http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/55-56.pdf (accessed 27 January 2012). For similar statements by Spanish and Portuguese constitutional judges see Pedro C. Magalhães, *The Limits to Judicialization: Legislative Politics and Constitutional Review in the Iberian Democracies* (2003).

> The decisions of the Court do have political consequences. This is most evidently the case when the Court declares a statute unconstitutional. However, the Court is not a political body. Its sole standard of review is the Basic Law. Considerations of political expediency do not play any role for the Court.[21]

The political and judicial rhetoric notwithstanding, there are at least three reasons why we must conclude that the Agent Model fails as a descriptive account and, by the same token, as a normative justification for what constitutional judges actually do. These three reasons are: i) the incomplete character of constitutional agreements, ii) the influence of the judges' changing ideology on constitutional adjudication, iii) and divisions among the judges' multiple principals. We examine these three considerations in turn.

A. Constitutions as Incomplete Contracts: Law's Indeterminacy and the Overrepresentation of Indeterminate Cases in Constitutional Adjudication

The Agent Model presupposes that the principal communicates her preferences to her agent with a certain degree of precision, especially when it is anticipated that the agent may have divergent interests. Precision, however, is not the most striking quality of constitutional documents. Certainly, not all constitutional norms are indeterminate. The requirement in the US Constitution that the person occupying the office of president be at least 35 years of age is quite straightforward; as is the formula by which the German Basic Law sets the number of votes for large and small *Länder* in the *Bundesrat*[22]. Nor does the clause fixing the number of rounds in the presidential election in the French Constitution, to give another example, leave

[21] See http://www.bundesverfassungsgericht.de/organisation/aufgaben.html (accessed 1 February 2011).

[22] Article 52, German Basic Law :

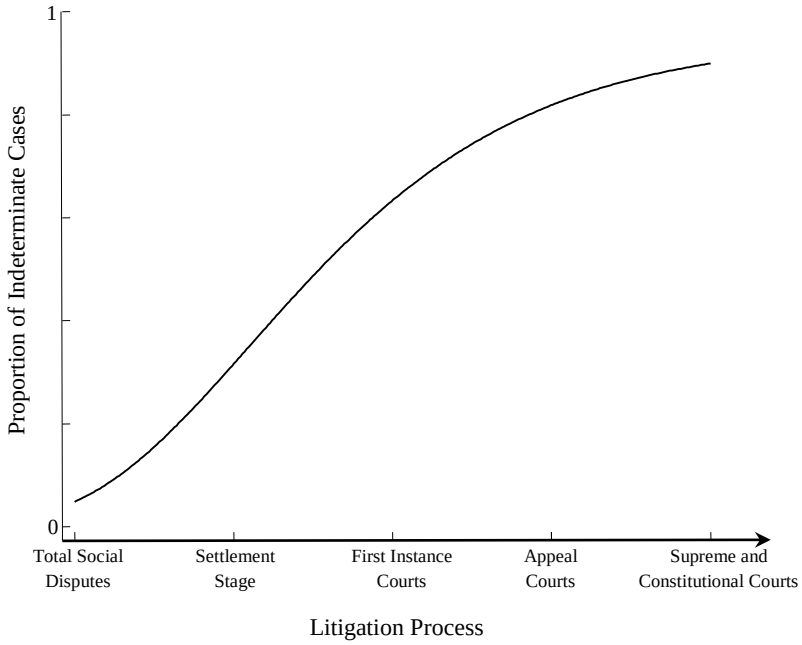
> Each Land shall have at least three votes; Länder with more than two million inhabitants shall have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes.

much wiggle room for "creative" interpretation. Generally speaking, when constitutional rules have a constitutive character, as opposed to a regulatory one, they tend to be relatively clear and straightforward. The rules that create the office of president, establish courts, confer upon the actions of a group of individuals the meaning of a legislative act, etc., do not—and for that matter cannot—leave much to ambiguity. So there are indubitably some constitutional questions for which there is a single right answer.

Nevertheless, the fact is that these questions are seldom raised in constitutional litigation. The rules making up a legal system address all sorts of real or merely potential social conflicts. But not all these social conflicts are brought before a judge and those that are appear to be precisely those vis-à-vis which the law is the most indeterminate. Other things being equal, as long as courts are expected to uphold the law in cases where it is clear and unequivocal, litigants who expect to lose will have an incentive to renounce filing a suit.[23]

[23] There is a substantial law and economics literature relying on game-theoretic models to study the behaviour of litigants at the several stages of the litigation process, for a review see Daniel P. Kessler & Daniel L. Rubinfeld, *Empirical Study of the Civil Justice System*, Volume 1 HANDBOOK OF LAW AND ECONOMICS 343 (Polinsky Mitchell A. & Shavell Steven, 2007). These models typically treat judicial decision-making as an exogenous parameter to the plaintiff-defendant game and few explicitly address legal indeterminacy and the role courts might play in either reducing or augmenting it. Most of them, though, emphasise the importance of uncertainty in explaining litigation behaviour, see e.g. Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267 (2005)..

Figure 1. Litigation and the Indeterminacy of Legal Rules.



As suggested by Figure 1, considering all possible social disputes and not just the cases brought before a tribunal, it seems reasonable that there is, overall, more clear cases—i.e. social disputes vis-à-vis which the law is determinate—than indeterminate ones. Yet we should expect the share of indeterminate cases to be much bigger when we consider only the cases that are actually brought before the courts, and the more so as we go up the court hierarchy all the way to the constitutional judges.[24]

The available evidence corroborates the hypothesised effect of indeterminacy on constitutional litigation. Figures reveal that over the 1973-1995 period the French Constitutional Council, for one, invoked the "principle of equality" as a basis for its decision in 39 per cent of its rulings.[25] Equality, the "fundamental principles recognized by the laws of

[24] This argument was made early on by American legal realists who argued that adjudication made legal rules appear more indeterminate than they really are because clear cases are settled outside the court system, see Karl N. Llewellyn, *Some Realism About Realism--Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1239 (1931); Max Radin, *In Defense of an Unsystematic Science of Law*, 51 YALE L. J. 1269, 1271 (1942).

[25] FERDINAND MELIN-SOUCRAMANIEN, LE PRINCIPE D'EGALITE DANS LA JURISPRUDENCE DU CONSEIL CONSTITUTIONNEL 17 (Presses Universitaires de France ed. 1997).

the Republic" and other similarly indeterminate constitutional provisions are the most frequent legal grounds in Council decisions pronouncing the unconstitutionality of a statute.[26] The equality clause also tops the list of most popular constitutional provisions in litigation before the Constitutional Court of Austria.[27] In Germany, meanwhile, the most frequently recurring constitutional clause in the jurisprudence of the Federal Constitutional Court turns out to be Article 2 (1) of the Basic Law, which provides for the open-ended right to "the free development of one's personality".[28] Based on information from the Supreme Court Database,[29] Figure 2 lists the constitutional clauses most frequently considered in US Supreme Court decisions. Like constitutional provisions regularly litigated in other jurisdictions, these provisions are phrased in vague or evaluative ("due", "unreasonable", "equal", "cruel") language. Put together, the twin Due Process Clauses of the Fifth and Fourteenth Amendment account for well over 15 per cent of the constitutional provisions dealt with in Supreme Court litigation over the last 60 years.

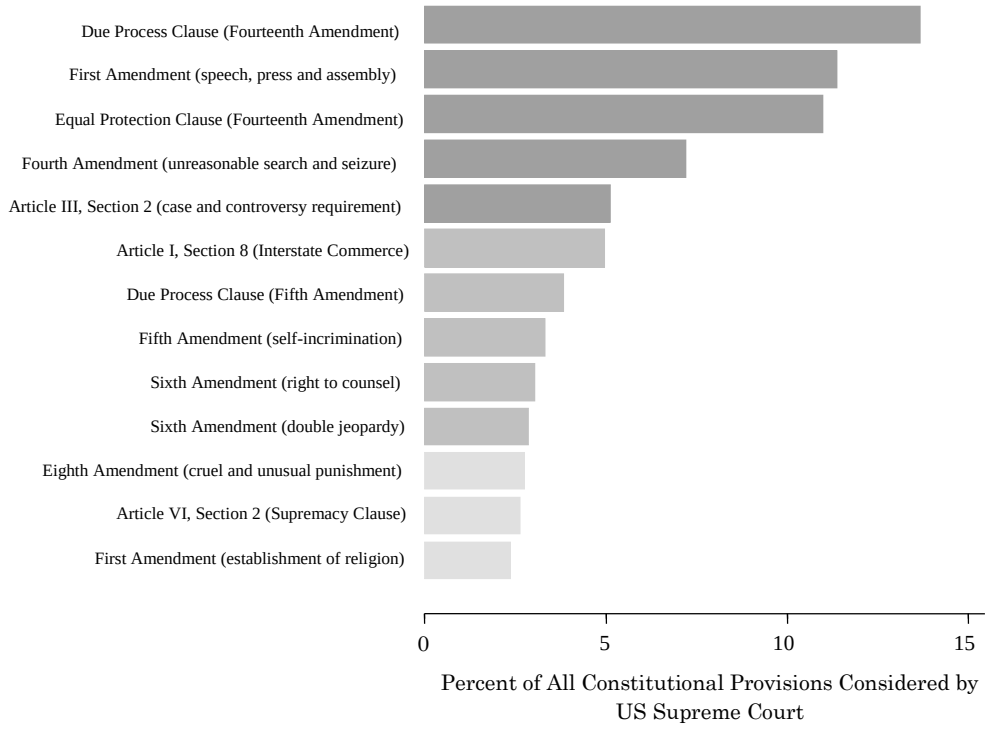
[26] RECUEIL DE JURISPRUDENCE CONSTITUTIONNELLE: 1959-1993 4 (Louis Favoreu, 1994).

[27] Theo Öhlinger, *The Genesis of the Austrian Model of Constitutional Review of Legislation*, 16 RATIO JURIS 206, 220 (2003) (counting 127 statutes annuled for violation of the Federal Constitution's equality clause, compared to 19 for other fundamental rights provisions).

[28] Arthur Dyevre, *L'activisme Juridictionnel En Droit Constitutionnel Comparé: France, États-Unis, Allemagne* (2008).

[29] http://scdb.wustl.edu/index.php (accessed 26 January 2012).

Figure 2. Constitutional Provisions Most Frequently Considered in US Supreme Court Decisions, 1946-2011



Notes: Calculations based on the Supreme Court Database. The unit of observation is the constitutional provision considered by the Court (N = 4234), so that more than one provision may be considered in the same decision. Where the Court considers a provision of the Bill of Rights that has been made binding on the states through the incorporation doctrine, identification is to the specific guarantee rather than to the Due Process Clause of the Fourteenth Amendment.

Every time a court strikes down a law, the alleged justification is virtually always that the legislature has violated the constitution. Yet these figures suggest that most of the time what the court is really doing is substituting one linguistically possible reading of the constitution, its own, for another linguistically possible reading of the constitution, that of the legislature.

B. Constitutional Judges Are Policy-Seekers

The Agent Model further assumes that judging is essentially about legal expertise and that ideology and attitudes have little influence over judicial behaviour. However, there is

compelling evidence that this is wrong and that judicial outcomes vary significantly depending on who is sitting on the bench.

The effect of ideology on judicial outcomes is well established by research on the US Supreme Court. Using newspaper editorials to rank judges on a liberal-conservative scale, Spaeth and Segal find a strong correlation between the attitudes and the votes on the merits of Supreme Court Justices. On this measure, ideology alone explains 57 per cent of the variance in the votes cast.[30] Recent studies have shown that the preferences of individual judges constitute a good predictor of judicial outcomes on courts outside the United States, too. Some of these studies rely on the political orientation of the appointing authority as proxy for the judges' attitudes, while others use latent trait models to infer ideological ideal-points from observed voting behaviour. Whether for the two Iberian constitutional courts,[31] the French Constitutional Council,[32] the German Federal Constitutional Court,[33] or the European Court of Human Rights,[34] these studies all point to a clear link between ideology and judicial decision-making. Christoph Hönnige, for one, demonstrates that the probability of the Constitutional Council annulling a law goes down when the number of judges appointed by the legislative majority goes up. For instance, when five judges (out of nine) have been appointed by the opposition and the odds that the Council annuls a law are one to one (i.e. a

[30] JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

[31] Chris Hanretty, *Dissent in Iberia: The Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals*, 51 EUR. J. POL. RES. 671 (2012); Magalhães, *supra* note 20.

[32] Christoph Hönnige, *The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts*, 32 W. EUR. POLITICS 963 (2009); Sylvain Brouard, *The Politics of Constitutional Veto in France: Constitutional Council, Legislative Majority and Electoral Competition*, 32 W. EUR. POLITICS 384 (2009); Raphaël Franck, *Judicial Independence Under a Divided Polity: A Study of the Rulings of the French Constitutional Court, 1959–2006*, 25 J. L. ECON. & ORGAN. 262 (2009).

[33] Hönnige, *supra* note 32.

[34] Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008).

probability of 50%) the legislative majority may lower the odds to one to two (33% probability) by appointing one more judge to secure a 5:4 majority.[35]

By showing that the judges' policy preferences play a significant role in constitutional adjudication and that these preferences are likely to vary not only from judge to judge but also over time, this body of research implies that the judges' own agenda may well not coincide with the framers' agenda.

C. Divisions among Multiple Principals: Constitutional Rigidity and Judicial Activism

That, as the judicial politics literature suggests, a change in judicial personnel may often produce a change in judicial outcomes goes to the core of the principal-agent problem. Hence the next question: is there any mechanism to prevent what we might call "judicial drift"?[36] *Ex ante* procedures like having judicial appointees take an oath of allegiance to the constitution do not look very effective. In fact, to suggest, as part of a defence of judicial review, that a mere oath to observe the constitution will suffice to dissuade judges from deviating from the framers' position seems self-defeating. Were an oath of office enough to ensure that officials behave in accordance with constitutional norms, judicial review would seem to be an expensive superfluity. After all, why do we need judicial review if compliance with the constitution can be achieved with the same effectiveness and at a lesser cost by requiring legislators and cabinet members—as is the case in some countries[37]—to take an oath of allegiance to the constitutional compact?

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[35] Hönnige, *supra* note 32.

[36] I use the expression "judicial drift" to draw an analogy with the term "bureaucratic drift" as employed in political science analyses of legislative control over administrative agencies, see Murray J. Horn & Kenneth A. Shepsle, *Commentary on Administrative Arrangements and the Political Control of Agencies: Administrative Process and Organizational Form As Legislative Responses to Agency Costs*, 75 VA. L. REV. 499 (1989).

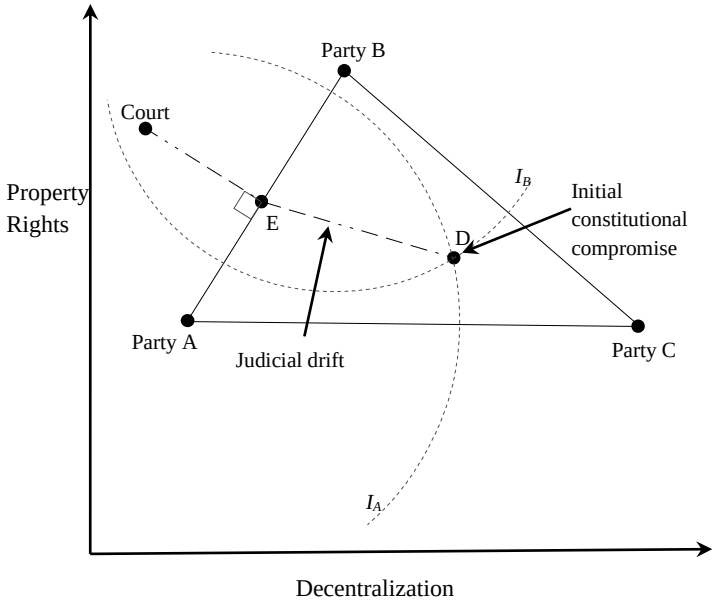
[37] E.g. US Constitution, Article VI clause 3:

On the face of things, *ex post* procedures offer a more effective means to rein in the judges. The *ex post* control mechanisms constitution-makers have at their disposal resemble those available to legislators overseeing regulatory agencies. Sitting as constitution-amending power, they can, in principle, respond to any ruling they dislike by passing an amendment overriding the decision, rolling back the court's jurisdiction or lowering the judges' salary. Moreover, we should expect the mere threat to change the constitution to feed back on judicial decision making, deterring the judges from straying in the first place.

The effectiveness of the mechanism, though, presupposes that the threat is a credible one and may really be put to execution. Yet constitutions are often difficult to revise. When modifications to the constitutional charter are subject to prior approval by a supermajority in both the lower and the upper chamber of the legislature and ratification by popular referendum, amendments are unlikely to be successfully enacted unless there is a broad consensus on the necessity of constitutional change. Generally speaking, the more rigid the constitution, the more actors will be in position to block an attempt to override the courts. This clearly favours judges. A more rigid constitution means they will have less reason to worry about override amendments and will have more room to pursue their own policy agenda. Figure 3 helps grasp the logic of the argument.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution;

Figure 3. Constitution-Making and Judicial Drift.



Notes: The Court chooses the outcome closest to its ideal point in the set defined by the *ABC* triangle so that any alternative outcome, including a return to the initial compromise, will make at least one party less well off.

It depicts a policy space in which the actors have preferences along two dimensions—here decentralisation and property rights, two issues commonly debated in constitutional conventions. Each actor is presumed to prefer an outcome closer to her ideal-point to an outcome further from her ideal-point. Here three political parties—*A, B* and *C*—agree on constitutional compromise *D* which the Court must then apply to concrete cases. In case the Court moves away from *D*, the three parties may pass a constitutional amendment by unanimous approval. Yet we can see that all outcomes within the *ABC* triangle—the "unanimity core" in game-theoretic jargon—are Pareto-optimal. This means that any change to an outcome within the triangle will necessarily make one of the parties less well off. So if the Court moves the outcome to *E*, the outcome closest to its ideal-point in the Pareto set, party *C* will want to push for an override amendment, since *E* is farther from its ideal-point

than *D* (from *C*'s perspective: *E* < *D*). *A* and *B*, though, will have an incentive to oppose an override amendment because *E* is closer to their preferred position than *D* (*E* > *D*). Note that the Court does not even need two parties on its side. The support of only one party will be enough, as long as the party in question is better off with the judicially enacted outcome.

More constitutional rigidity means more actors involved in the constitution-amending process, which in turn means a higher probability that an actor will prefer the judicial outcome to any override amendment proposed. Put in the language of delegation theory, a more rigid constitution means that multiple principals will be involved in monitoring the activity of the judicial agents. So whenever re-contracting is contemplated in response to an instance of judicial drift, disagreement is more likely with the effect that the agents are effectively protected from punishment.

There is some anecdotal evidence that judicial drift does occur in countries with rigid constitutions. Even in cases where the constitutional text makes the framers' intent plain, the courts have chosen to depart from this intent. The Due Process Clauses of the Fifth and Fourteenth Amendments, for instance, were meant to apply exclusively to matters of procedure.[38] Yet countless are the decisions where the Supreme Court applies them to matters of substance. In fact, the oxymoron "substantive due process" has become one of the Court's most salient doctrines.[39] Likewise, the reference to the Declaration of the Rights of Man and to the Preamble of the 1946 Constitution in the Preamble of the Constitution of the Fifth Republic was thought of as a reverential homage carrying no legal weight. But the Constitutional Council turned it into hard law, with the 1946 Preamble and the Declaration

[38] ELY, *supra* note 4; John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997).

[39] Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501 (1998); ELY, *supra* note 4.

serving as justification for the Council's activist jurisprudence.[40] Generally speaking, courts have favoured loose constructions and flexible standards over rigid doctrines and strict interpretive regimes. The dominant interpretative paradigm of global constitutionalism is the "living constitution" rather than the originalist approach defended by Justice Antonin Scalia in the United States.[41] The opinion of the Canadian Supreme Court on same-sex marriage appears to encapsulate the dominant judicial philosophy:

> The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.[42]

But the judicial-drift hypothesis argument is further corroborated by empirical evidence showing a clear correlation between constitutional rigidity and judicial activism. "Judicial activism" is, of course, a contested concept, which seemingly eludes precise definition. Various attempts have been made, though, to develop empirical measures of judicial activism. Some are based on their author's own appraisal of which courts are more activist and which ones less so.[43] Others rely on the opinions of comparative law scholars asked to

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[40] See ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE (1992).

[41] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: FEDERAL COURTS AND THE LAW (1998).

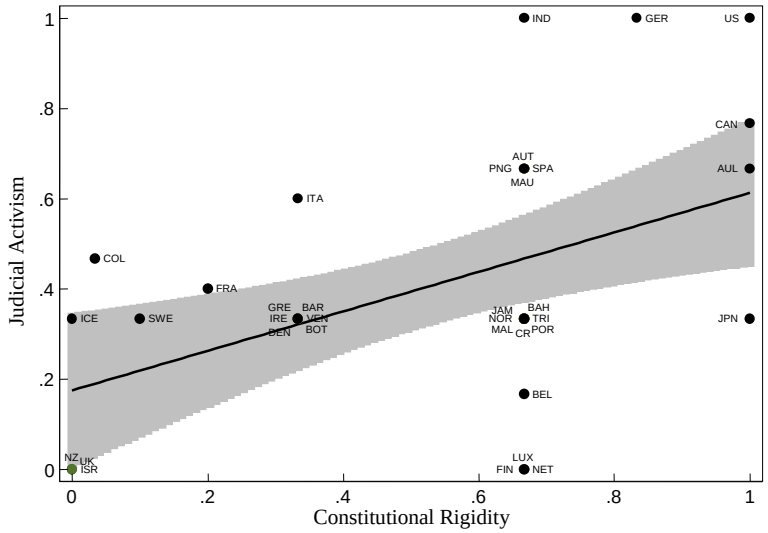
[42] *Re Same-Sex Marriage*, [2004] 3 S.C.R 698. Writing for the Court in the case *Re B.C. Motor Vehicle Act*, Justice Antonio Lamer made no bones that this approach to adjudication entailed a complete disregard for the intent of the framers of the Canadian bill of rights, the Canadian Charter of Rights and Freedom:

> If the newly planted "living tree" which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth.

[43] See Nicos Alivizatos, *Judges as Veto Players*, 566 PARLIAMENTS AND MAJORITY RULE IN WESTERN EUROPE (1995); AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES (1999).

rank the courts' adventurousness on a five point scale.[44] Easier though it may seem at first blush, constructing a metric for constitutional rigidity is not a problem-free endeavour either.[45] Still, imperfect data remain better than groundless speculation. Relying on measures developed by Arend Lijphart[46] Figure 4 shows the relationship between constitutional rigidity and judicial activism in 35 countries.

Figure 4. Constitutional Rigidity and Judicial Activism in 35 Democracies.



Notes: Data are from Arend Lijphart, Patterns of Democracy (1999).[47] The regression line represents the equation: Judicial Activism = 0.174 + 0.438(Constitutional Rigidity) + e. OLS method is used. 95% confidence interval line is shown in grey.

[44] Robert Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT'L REV. L. & ECON. 296 (1996).

[45] See Donald Lutz, *Towards a Theory of Constitutional Amendment*, AM. POL. SCI. REV. 355 (1994); Rafael La Porta et al., *Judicial Checks and Balances*, 112 JOURNAL OF POLITICAL ECONOMY 445 (2004).

[46] LIJPHART, *supra* note 43.

[47] Lijphart's original dataset had 36 observations. We removed Switzerland, which, because of its very rigid constitution and highly deferential courts, proved to be an outlier disproportionately influencing the results. Note, too, that Lijphart has its Constitutional Rigidity and Activism scales ranging from 1 to 4, whereas these are normalised to lie between 0 and 1 in our analysis.

The relationship is positive and statistically significant by conventional cut-points.[48] Obviously, the correlation is not perfect, as shown by the fact that many data-points are far from the regression line.[49] Yet we clearly see that the most activist courts (USA, Germany, India, and Canada) tend to cluster in the upper right corner of the panel while the least activist ones (such as New Zealand and the UK) tend to cluster in its lower left part.

These results are certainly not indisputable. One may be surprised, for example, to find Israel's judiciary among the least activist or the French constitution as so flexible in comparison with Germany's. However, the correlation is preserved when we use measures developed by other authors, such as Donald Lutz[50] or Rafael La Porta and his team[51] for constitutional rigidity, and Cooter and Ginsburg[52] for judicial activism.

To sum it up, the available empirical evidence suggests that, if the relationship between constitution-makers and constitutional judges is a P-A relationship, then it is a rather dysfunctional one. Not only are the preferences of the principal indeterminate in the majority of cases that constitutional judges are actually called on to adjudicate. But, most of the time, the principal is simply not in position to control her agent. So, inasmuch as we are interested in finding a rationale for judicial review as it exists in today's world, rather than in some imaginary one, this should prompt us to reject the Agent Model and look for a more plausible alternative.

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[48] $p = 0.004$.

[49] $R^2 = 0.228$, which means that the explanatory variable, constitutional rigidity, explains 22 per cent of the variance in the outcome variable, judicial activism.

[50] Lutz, *supra* note 45.

[51] La Porta et al., *supra* note 45.

[52] Cooter & Ginsburg, *supra* note 44.

IV. STRENGTHS AND WEAKNESSES OF THE TRUSTEE MODEL: JUDGES AS POLICY-OPTIMIZERS

The more plausible approach to justifying constitutional review shifts the focus from constitutional interpretation to policy outcomes and recasts the institutional choice as a technocratic one. It bears emphasizing, though, that the two models are not fully commensurable in normative terms. Indeed, the Trustee Model is predicated on distinct normative presumptions and these turns out to be harder to reconcile with democratic principles than those undergirding the Agent Model. As we make clear in the concluding section, democratic and technocratic governance stand in inherent tension and scholars should be honest about it.

Nevertheless, the allure of the Trustee Model does not lie in its resting on unassailable normative foundations. Instead, what makes it attractive is, first, what it does not assume and makes it relatively immune to the sort of empirical objections raised against the Agent Model. First, the Trustee Model does not assume, nor require full determinacy of constitutional language. Trustees are not hired to enforce a specified set of rules but to do what they deem "best" when called upon to make decisions. On that score, the technocratic approach embodied in the Trustee Model is more consonant with the fact that modern constitutions are designed as incomplete contracts. Second, the Trustee Model does not require that judges be apolitical, but only "mainstream". As such, and as we demonstrate below, it offers a more adequate justification for the appointment mechanisms currently in place in constitutional systems around the world. Finally, the Trustee Model does not assume that constitution-makers can prevent judicial drift. On the contrary, it presupposes that constitutions are sufficiently rigid to protect judicial independence.

Many academic proponents of constitutional review now defend the practice along the lines of the Trustee Model. The defence they articulate stresses the institution's instrumental character and its beneficial impact on policy output, notably human rights protection.[53] The detractors of constitutional review, meanwhile, attack the practice by questioning the judges' ability to optimize policy outcomes.[54] The normative debate has thus become largely technocratic in character,[55] although legal scholars have failed to grapple with the underlying empirical implications. In the remainder of this section, we discuss how the Trustee Model accounts for the organizational setting of constitutional courts and examine some empirical evidence on the effect of constitutional review on *de facto* human rights protection.

A. Acting as Autonomous Trustees: The Parameters of Judicial Selection and Independence

As perpetuated by the carefully choreographed rituals of the courtroom, the mythology of judging would have us believe that constitutional judges are benevolent, virtuous and impartial decision-makers, somehow endowed with semi-divine wisdom. Yet the belief that judges can sometimes make more prudent choices than other officials need not rest on the irrational assumption that people somehow become superior beings simply by donning the judicial robe. An illuminating attempt to work out formally the conditions under which decision-making by independent judges may outperform other decision-making arrangements is offered by the work of the two economists Eric Maskin and Jean Tirole. Their formal model of the political process serves to compare the welfare effect of decision-making

[53] Kumm, *supra* note 4; Fallon, *supra* note 16; HENRY JULIAN ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 391 (1998); LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 199 (2006).

[54] See Waldron, *The Core of the Case against Judicial Review*, *supra* note 5; BELLAMY, *supra* note 5.

[55] See Harel & Kahana, *supra* note 6, at 237.

through direct democracy, elected officials and unaccountable judges.[56] Depending on whether elected officials are ready to pander to the electorate to gain re-election, the probability that judicial preferences are congruent with those of the population, the policy expertise of the average citizen and the cost of acquiring information, they demonstrate that there are indeed circumstances in which a country may be better off with judicial decision-making than with other forms of decision-making. To reach these conclusions, though, Maskin and Tirole do not posit that judges possess some special or superior degree of policy expertise. More plausibly, they assume that judges, as other state officials, are specialists in public decision-making. As such they are more likely to have the experience and information to make wise choices than the average citizen, though not necessarily more so than elected representatives. What makes judges different from elected officials is that they have less incentive to pander to the public when they know that a particular action, though popular, is wrong. Independence gives them a longer time-horizon than politicians periodically facing elections. For this reason, they are less likely to postpone decisions that are unpopular but necessary or to sacrifice long-term benefits for reasons of political expediency.[57]

Mirroring the argument for independent central banks put forth by economists, this analysis presupposes that constitutional judges are to some extent insulated from external political pressures. Though all institutions are ultimately endogenous to the political process, several institutional design features seem to afford courts a high degree of political autonomy.

Before examining the factors underpinning judicial independence, care should be taken to distinguish between independence understood as the independence of the individual judge from independence understood as independence of the court or the judiciary as a

[56] See Eric Maskin & Jean Tirole, *The Politician and the Judge: Accountability in Government*, 94 AM. ECON. REV. 1034 (2004).

[57] *Id.*

whole. As to the former, it bears emphasis that, except for a small number of American states, judges in general are not democratically accountable. They are appointed, not elected, and cannot be removed once in office. Constitutional judges typically enjoy life tenure (as in the United States) or serve fixed terms.[58] Fixed terms are generally non-renewable, which removes an incentive for the individual judge to try to please her appointing authority as a way of securing re-appointment.[59] As for the independence of the institution as a whole, which is our more direct concern here, it is a matter of degree and is bound to vary from country to country. Nevertheless, two factors contribute to strengthen it. One, previously discussed, is constitutional rigidity. When political forces are divided and fragmented, a high level of constitutional rigidity means that courts have fewer reasons to fear the wrath of legislative majorities when they make decisions on controversial issues.[60] The other factor, less intuitively, is public support. At first glance, it would seem that judicial autonomy cannot depend on public support, because, if so, judges would have an incentive to pander to the public. But this is not so. Research on the legitimacy of national high courts show that citizens do not automatically withdraw their support when their courts make decisions they

[58] The measure of *de jure* judicial independence developed by Lars Feld and Stefan Voigt includes an indicator of *de jure* term length, which ranges from 0 (no guaranteed tenure) to 1 (lifelong appointment), see Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators*, 19 EUROPEAN JOURNAL OF POLITICAL ECONOMY 497 (2003). For the 71 highest courts vested with the power to review legislative acts covered by the cross-sectional study, the mean of the indicator is 0.74, its median 0.8 and the standard deviation of the mean 0.33. We thank Stefan Voigt for making the data available.

[59] There is empirical evidence that term renewability does influence judicial behaviour, see Magalhães, *supra* note 20; Voeten, *supra* note 34. In the absence of separate opinions, however, term renewability does not seem to affect the conduct of judicial appointees. This applies for the European Court of Justice (ECJ). Given the secrecy surrounding deliberation in the European Court, national governments, who are responsible for appointing ECJ judges, cannot monitor the behaviour of "their" judges and are thus unable to use the power to refuse renewal as an instrument of control.

[60] Strictly speaking, what matters is the number of real veto-players in the constitution-amending process, for which constitutional rigidity is merely a proxy. Arguably, the number of real veto-players in the constitution-amending process is likely to result in large part from the formal constitutional arrangements in place, thus reflecting, to some extent, the number of "institutional" veto-players. What justifies the emphasis on constitutional rigidity in the context of the present essay is that, unlike political fragmentation and the number of real veto-players, which also depend on the distribution of preferences in the electorate as well as among political actors, constitutional rigidity is the product of deliberate institutional design and of deliberate institutional design only.

dislike.[61] The explanation lies in the difference between specific support, i.e. support for particular decisions, and diffuse support, support for the institution. Unpopular decisions may score very low on specific support without affecting the court's level of diffuse support.[62] This may even protect the courts from legislators who would otherwise be in position to reverse their decisions.[63]This being said, judicial power can only outperform representative democracy when judges are not ideologically out of step with the citizens they are meant to serve. This highlights one of the major downsides of decision-making by unaccountable officials: if a judge turns out to have a policy-agenda diametrically opposed to the preferences and values of the rest of society, there is no way to screen her out, at least until the end of her tenure.[64] However, in real-world democracies, the impossibility to weed out noncongruent judges *ex post* is mitigated by the appointment procedure. The power to appoint constitutional judges usually belongs to the legislature and the head of the executive.[65] Giving elected representative an input in the selection of candidates ensures that judicial appointees are not too far from the ideological mainstream.[66]

On this score, the Trustee Model makes better sense of existing institutional arrangements than the Agent framework. The latter would imply that constitutional judges should be selected (a) on the basis of their legal expertise alone if the principals have enough control

[61] James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343 (1998).

[62] *Id.*

[63] See VANBERG, *supra* note 2.

[64] See Eric Maskin & Jean Tirole, *supra* note 57.

[65] Data collected by Lars Feld and Stefan Voigt reveal that most constitutional arrangements providing for constitutional review give some say to either the executive or the legislature or both over judicial appointments. See Feld & Voigt, *supra* note 59.

[66] In defending judicial review and the creation of constitutional courts, Kelsen had already argued that constitutional judges should be appointed by members of the legislature, KELSEN, WER SOLL DER HÜTER DER VERFASSUNG SEIN?, *supra* note 3; Kelsen, *La Garantie Juridictionnelle de La Constitution*, *supra* note 3.

over the courts to prevent judicial drift, or (b) at least chosen so that the courts' preferences reflect those of their principals. While (b) suggests that judicial appointees should be picked by the constitution-makers themselves (hardly a workable proposition when the framers passed away two centuries ago), (a) would be compatible with selection by competitive examination as is common in civil law judiciaries. Neither option, however, constitutes an accurate description of how constitutional judges are appointed, even in continental Europe, although some countries give the judiciary a say in the selection of constitutional court judges.[67] In any case, the weight typically given to elected officials in the appointment process is more in line with the Trustee Model.

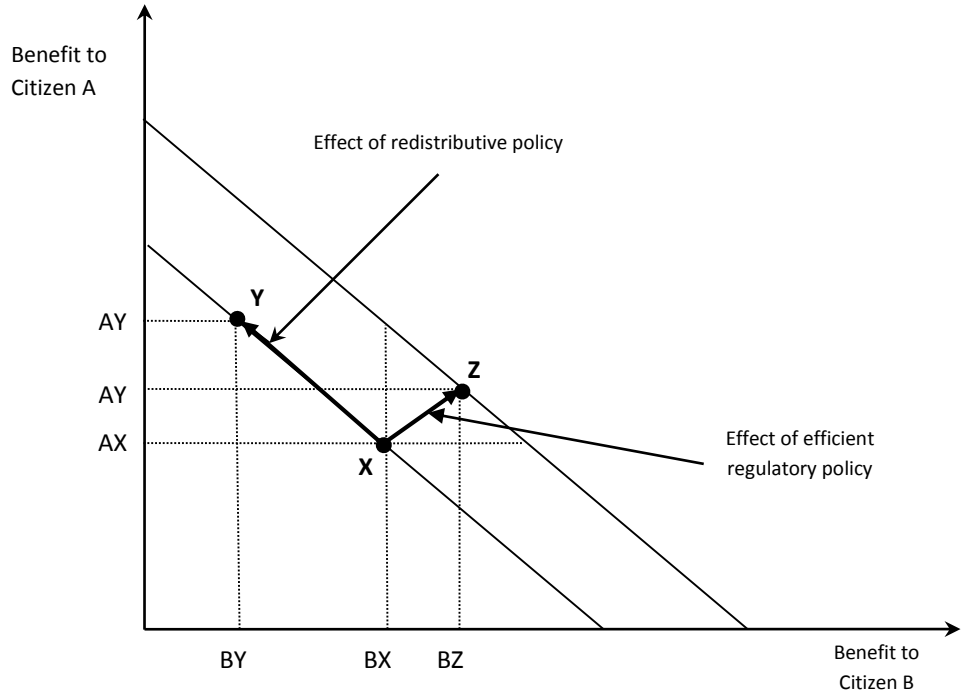
B. Pursuing Efficiency: Does Judicial Review Really Improve Policy Outcomes?

Were it only for the judges' incentive structure and institutional environment, the foregoing discussion would suffice to demonstrate that the Trustee Model constitutes a plausible rationale for the existing practice of judicial review. For the Trustee approach to work, though, it must also be shown that courts do indeed improve policy outcomes and that policy outcomes are susceptible to improvement in the first place.

Arguably, policy optimization should not mean that courts simply redistribute wealth, rights and power from one individual or group of individuals to another. Rather, it should mean that courts improve what everyone gets. This implies that the Trustee Model works better for regulatory than for redistributive policies. As Figure 5 illustrates, regulatory policies can and are supposed to produce outcomes that benefit everyone, whereas redistributive policies necessarily produce winners and losers.

[67] Examples of constitutional settings in which constitutional court judges are partially appointed by judicial councils or by top magistrates from the ordinary courts include Spain, Italy and Bulgaria. See *supra* note 57 and 64.

Figure 5. Redistributive vs. Efficiency-Oriented Policies[68]



[68] Figure 5 is adapted from SIMON HIX & BJORN HOYLAND, THE POLITICAL SYSTEM OF THE EUROPEAN UNION 190 (2011).

A policy moving the outcome from X to Z is an efficient regulatory policy because it improves the welfare of both individual A and B. It is Pareto-optimal in that it improves the overall welfare without making anyone less well off. By contrast, a policy moving the outcome from X to Y is not a regulatory but a redistributive policy. Its effect is to transfer wealth from B to A.

The Trustee approach works in straightforward fashion for regulatory issues, effectively replicating the argument economists make for independent central banks. Politicians running for re-election, economists say, may be tempted to exploit a possible short-term trade-off between inflation and unemployment, even though the long-term effect of doing so is that unemployment returns to its initial level and inflation is higher.[69] So, since low inflation benefits everyone in the long-term, a country will make itself better off by entrusting its monetary policy to an independent central bank.[70] In similar fashion, when elected officials are tempted to pander to the desires of poorly informed voters, an independent constitutional court may be able to veto the adoption of popular but inefficient, if not downright baneful, policies.

The trouble is that in practice constitutional judges do not deal exclusively with regulatory issues. Many questions that judges typically grapple with at the constitutional level involve trade-offs which cannot be addressed without producing winners and losers. Liberty versus security in anti-terrorist legislation is a prime example. Making legislation Pareto-efficient in this context would mean that judges do not go beyond ensuring that the legislature

[69] See SYLVESTER CW EIJFFINGER & JAKOB DE HAAN, THE POLITICAL ECONOMY OF CENTRAL-BANK INDEPENDENCE 4 (1996); Manfred J. M. Neumann, *Precommitment by Central Bank Independence*, 2 OPEN ECON REV 95 (1991).

[70] EIJFFINGER & DE HAAN, *supra* note 70; Neumann, *supra* note 70.

has used the least-restrictive means to achieve its policy goal. Yet courts often go beyond least restrictive means tests, in effect deciding which goal should have priority and which should be sacrificed.[71] This most obviously comes to the fore in cases where judges invoke proportionality (or strict scrutiny in American constitutional law). In the last prong of the proportionality test, sometimes called "proportionality in the strict sense", judges are supposed to balance the interests at stake. Yet there are no clear intersubjective criteria by which this act of balancing could be called an optimization. In its influential work on rights adjudication, Robert Alexy proposes a "law of balancing", which resembles the Kaldor Hicks criterion: when two legal principles or policies conflict, the greater the non-satisfaction of one principle, the greater ought to be the satisfaction of the other.[72] Yet he does not offer anything resembling an intersubjective metric to establish whether the satisfaction of principle A is greater than the non-satisfaction of principle B.[73]

Despite these theoretical objections, there are some policy areas where most people in democratic societies are nonetheless ready to agree that certain outcomes are better than others. Just as few would dispute that economic expansion is better than economic stagnation, most people agree that arbitrary imprisonments, torture and extrajudicial killings are bad and should be prevented to the utmost extent possible.

Now, one claim commonly put forth by the proponents of constitutional review is that it makes for better human rights protection.[74] In many ways, human rights protection is to the

[71] See Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 73 (2008) (documenting the global spread of means-end tests and balancing); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1986).

[72] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 102 (2003).

[73] The problem is familiar to welfare economists, see Joseph Persky, *Retrospectives: Cost-Benefit Analysis and the Classical Creed*, 15 THE JOURNAL OF ECONOMIC PERSPECTIVES 199 (2001).

[74] See Harel & Kahana, *supra* note 6, at 232.

case for constitutional review what price stability is to the rationale for central bank independence. But can we measure the impact of constitutional review on human rights protection and, if yes, does the evidence support the Trustee Model?

There is no gainsaying that measuring human rights protection represents a challenging endeavour. Difficulties stem in part from the absence of consensus over the scope of specific rights.[75] Nevertheless, there is a sense in which some of our rights talk assumes a shared conceptions of rights, as when we deplore China's poor human rights record or praise post-war Germany for taking fundamental rights seriously. Most of the empirical literature on human rights protection seek to piggy-back on this conception of rights, thought to be shared by the international community.[76] Empirical legal scholars have also attempted to measure *de jure* human rights protection (the extent to which rights are explicitly enshrined in the world's constitutions).[77] But what interests us here is the extent to which rights are respected on the ground—that is: *de facto* human rights protection—and whether better protection can be attributed to the existence of constitutional review. Table 1 summarises the data we will use to answer this very question.

[75] A point often recalled by the critics of constitutional review, see e.g. WALDRON, LAW AND DISAGREEMENT, *supra* note 5.

[76] See TODD LANDMAN, PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY (2005); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference*, 111 YALE L.J. 1935 (2001).

[77] See David S Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163 (2011).

Table 1. Judicial Review and Human Rights, Descriptive Statistics

Variable	N	Mean	Mdn	SD	Min	Max	Source
Judicial Review	70	1.3	1.5	0.79	0	2	La Porta et al. (2004)
Constitutional Rigidity	70	2.44	2	0.86	1	4	La Porta et al. (2004)
Constitutional Review Index	70	0.54	0.56	0.32	0	1	Author's calculations based on sources above
Physical Integrity Index (mean 1996-2005)	70	4.58	4.5	2.29	0.13	8	CIRI Project
Empowerment Rights Index (mean 1996-2005)	70	6.40	7.35	3.33	0	10	CIRI Project
Per capita GDP (logged geometric mean 1996-2000)	69	8.17	8.26	1.73	4.89	10.59	World Bank
Ethnic Fractionalization	70	0.40	0.39	0.27	0.00	0.93	Alesina et al. (2003)
Democratization (mean 1996-2005)	70	3.95	7.4	4.52	-58.6	10	Polity IV
Inequality (Gini)	63	40.15	38.16	9.49	24.7	59.5	World Bank
Judicial Independence	64	5.13	5.2	2.51	0.2	8.8	Economic Freedom Index

As measure of *de facto* human rights protection, here, we use data from the Cingranelli-Richards (CIRI) Human Rights Database.[78] The CIRI Database compiles data from the US State Department's *Country Reports on Human Rights Practices* and Amnesty International's *Annual Report*. It synthesises overall respect for fundamental rights through two indices. One, the Physical Integrity Rights Index, is constructed from indicators reflecting the occurrence of acts of torture, the number of extrajudicial killings, the number of people imprisoned because of their religious or political beliefs, and the frequency of disappearance cases.[79] The Empowerment Rights Index, meanwhile, is based on indicators for the protection

[78] David L. Cingranelli & David L. Richards, *The Cingranelli and Richards (CIRI) Human Rights Data Project*, 32 HUMAN RIGHTS QUARTERLY 401 (2010).

[79] The coding protocol for these indicators is available at: http://www.humanrightsdata.org/documentation/ciri_coding_guide.pdf. (Accessed January 7, 2014.)

of rights such as freedom of speech, workers' rights, freedom of movement, freedom of religion, and rights to political participation. In the present analysis, each country is assigned a score equal to the arithmetic mean of the value of the corresponding Index for the year 1996 to 2005, with high scores indicating better human rights protection. The resulting ranking of human rights performances makes intuitive sense. Among the worst performers on the Physical Integrity Index figure China, Iraq and Colombia, while Scandinavian countries score high on both indices.[80]

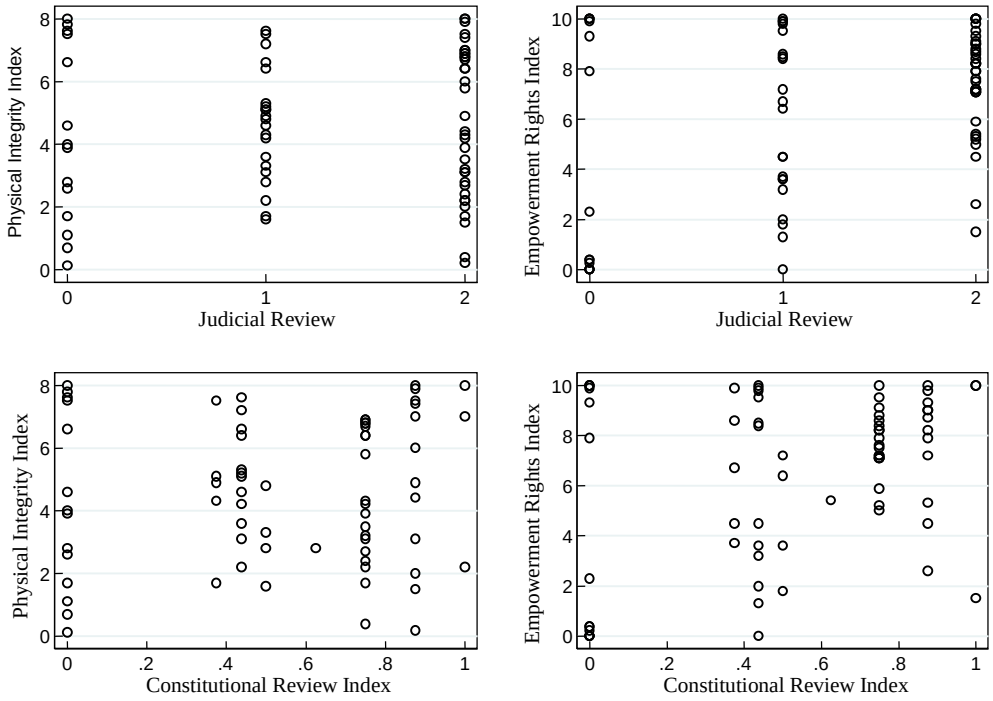
Now, does the value of these two indices correlate with the existence of constitutional review? We borrow our main explanatory variable, 'Judicial Review', from the work of La Porta and his team.[81] Measuring the existence and scope of judicial review across 70 countries, the indicator takes the value 0 if courts do not have any authority to disapply legislative enactments, as in the UK. If access to the constitutional court is restricted and the court's power of constitutional review is limited to certain laws, e.g. to laws not yet promulgated (as in France until 2010), then the indicator takes the value 1. If judicial review extends to all laws, as in Germany and the US, then the country is assigned the value 2. Of course, it may be objected that the institution's mere existence is not sufficient to ensure that courts are effective decision-makers. As seen above, some guarantees of independence are also needed. Unfortunately, there exists no appropriate opinion survey that would allow us to compare the interaction effect of judicial review and public support for the courts on policy outcomes. On the other hand, we do have data on constitutional rigidity and, other things being equal, we should expect to observe better records of human rights protection in countries with judicial review and a more rigid constitution. The Constitutional Review Index

[80] A replication dataset can be obtained from the author upon request.

[81] La Porta et al., *supra* note 45.

is meant to capture this idea. Modified from the index provided by La Porta et al. (2004), it is basically a measure of judicial review with constitutional rigidity operating as a reinforcing factor.[82]

Figure 6.1. Judicial Review, Physical Integrity and Empowerment Rights



[82] Normalised to the unit interval [0,1], the Index is computed as:

$$Constitutional\ Review\ Index = \left(\frac{J}{4}\right)\left(1 + \frac{(C-1)}{6}\right) \qquad (1)$$

Where J is the indicator of judicial review and C is the indicator of constitutional rigidity (which ranges from 1 to 4). (1) makes more sense than the definition used by La Porta et al. where the index is constructed as the sum of the two indicators. Indeed, the latter entails that the Index of Constitutional Review may be greater than zero even when judicial review does not exist! High and medium levels of constitutional rigidity mean that the value of the index for countries such as The Netherlands and China, where judges do not have the power to review legislative acts, is respectively 0.5 and 0.17. The alternative definition considered by La Porta and his colleagues, the product of the two indicators, is not satisfactory either, because it suggests that, unless constitutional rigidity is greater than zero (or greater than 1 in the non-normalised indicator), judicial review does not matter at all. Yet we have seen that public support can indeed compensate for the absence of constitutional rigidity. Note that in the present dataset (1) strongly correlates with the indicator of judicial review (0.98 against 0.87 and 0.72), while the two definitions discussed by La Porta et al. are more closely correlated to the indicator for constitutional rigidity (0.73 and 0.74 against 0.44 for (1)).

How do these measures of constitutional review relate to human rights protection? Figure 6.1 displays the results in the form of scatter-plots. Looking, first, at the two left-hand panels, no clear pattern of relationship between constitutional review and respect for rights to physical integrity emerges from the data. The two right-hand panels, by contrast, reveal a more clearly positive correlation between constitutional review and empowerment rights. Indeed, we can see that countries with both judicial review and high levels of respect for these rights cluster in the upper-right corner of the two panels. These results are confirmed by the pairwise correlations in Table 3 and by regression analysis in Table 2.

Table 2. Regressing Measures of Human Rights Protection on Constitutional Review

	Effect on Physical Integrity Index		**Effect on Empowerment Rights Index**	
	Model 1a	**Model 1b**	**Model 2a**	**Model 2b**
Constitutional Review Index	0.665 [-1.04, 2.37]	0.178 [-1.11, 1,47]	3.809*** [1.49, 6.13]	1.90** [0.08, 3.73]
GDP per capita	-	0.960*** [0.61, 1.31]	-	1.040*** [0.551, 1.53]
Ethnic Fractionalization	-	-0.003 [-1.89, 1,89]	-	-0.929 [-3.60, 1.75]
Democratization	-	0.057 [-0.14, 0.03]	-	0.118* [-0.004, 0.24]
Inequality	-	-0.012 [-0.06, 0.04]	-	0.079** [0.01, 0.15]
Judicial Independence	-	0.143 [-0.09, 0.38]	-	-0,019 [-0.35, 0,31]
N	70	61	70	61
Constant	4.220 *** [3.15, 5.29]	3.198 [-6.63, 0.24]	1.333*** [2.91, 5.80]	-6.116** [-10.98, 10.25]
R^2	0.009	0.618	0.136	0.547
Adjusted R^2	-0.006	0.576	0.124	0.497

Notes: 95% confidence intervals are in brackets. OLS method used. ***p < .01, **p < .05, *p < 0.1.

Model 1a in Table 2 shows that, though positive, the effect of the Constitutional Review Index on the Physical Integrity Rights Index fails to reach statistical significance. The 95%

confidence interval of the variable's coefficient [-1.04, 2.37] includes zero, which means we cannot rule out that the observed positive effect is only due to chance. Model 2a, on the other hand, indicates a both positive and statistically significant effect of the Constitutional Review Index on the Empowerment Rights Index. The value for the main quantity of interest, the variable's coefficient, is 3.809. This can be interpreted as meaning that, on average, a country seeing its score on the Constitutional Review Index increase from 0 to 1 will see its score on the Empowerment Rights Index increase by 3.809 points. Assuming the dataset is representative of the larger population of countries, we can say with 95% probability that the true effect in the population should be between 1.49 and 6.39 points (this time the confidence interval does not include zero).[83]

Table 3. Pairwise Correlations.

	Judicial Review	Con. Rigidity	Con. Review Index	Physical Integrity Index	Empow. Rights Index	Per capita GDP	Ethnic Frac.	Democrat.	Inequality
Judicial Review	1								
Con. Rigidity	0.293**	1							
Con. Review Index	0.978***	0.444***	1						
Physical Integrity Index	-0.073	0.1381	0.094	1					
Empow. Rights Index	0.384***	0.108	0.369***	0.649***	1				
Per capita GDP	-0.037	-0.025	-0.018	0.763***	0.539***	1			
Ethnic Frac.	-0.009	-0.132	-0.043	-0.468***	-0.369***	-0.531***	1		
Democrat.	0.039	-0.199*	0.007	0.268**	0.377***	0.343***	-0.134	1	
Inequality	0.156	-0.139	0.092	-0.359***	-0.071	-0.370***	0.407***	-0.246*	1
Judicial Ind.	-0.106	-0.047	-0.069	0.577***	0.333***	0.647***	-0.301**	0.521***	-0.556***

[83] For both output variables, the results are essentially the same whether we use the raw Judicial Review indicator or the Constitutional Review Index as input variable.

Notes: Negative coefficients indicate a negative relationship, positive coefficients a positive relationship. A zero coefficient implies there is no correlation between the two variables. Significance level: ***p < .01, **p < .05, *p < 0.1.

The difference between physical integrity and empowerment rights can easily be explained by the fact that respect for physical integrity rights is largely independent of legislation. Whereas restrictions to free speech, to worker's rights, to religious freedom or free movement often result from legislation, violations of physical integrity rights typically happen behind closed doors and can rarely be put down to the legislature's action or even to its failure to act. So, admittedly, there is little constitutional judges can do to prevent this kind of human rights abuse.

Even so, the critics of constitutional review could retort that even the positive relationship between constitutional review and empowerment rights is spurious, as countries with constitutional review tend to have better human rights records anyway, for reasons that have nothing to do with constitutional judges. The countries that practice judicial review simply happen to be richer, more democratic, less violent, etc. In short, correlation does not mean causation. Empirical research suggests, indeed, that the relationship between constitutional review and human rights protection may be obscured by a set of potentially confounding factors which have been shown to affect a country's human rights performance. These factors include GDP per capita, democratisation, ethno-linguistic fractionalisation, the perceived independence of ordinary judges and inequality.[84] As shown in Table 3, these factors, notably GDP per capita, are strong predictors of *de facto* human rights protection.

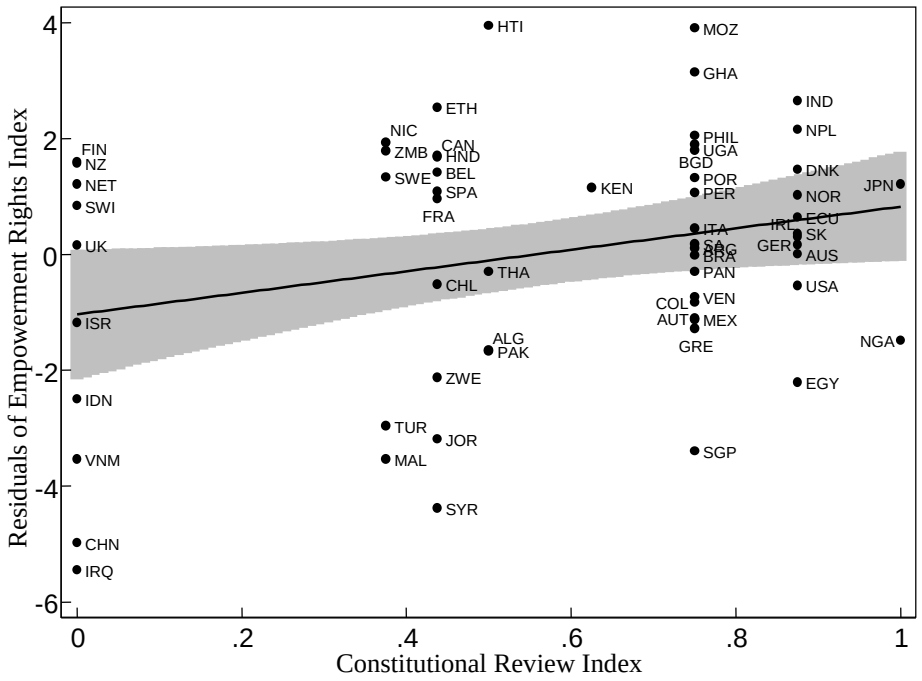
[84] Daniel W. Jr. Hill, *Estimating the Effects of Human Rights Treaties on State Behavior*, 72 THE JOURNAL OF POLITICS 1161 (2010); Linda Camp Keith et al., *Is The Law a Mere Parchment Barrier to Human Rights Abuse?*, 71 THE JOURNAL OF POLITICS 644 (2009); LANDMAN, *supra* note 77.

Nevertheless, it is possible statistically to eliminate the effect of these factors by adding them to the regression equation and see if the Constitutional Review Index remains significant. This is what Model 1b and 2b in Table 2 do, respectively for the Physical Integrity and the Empowerment Rights Index. The two models add five input variables to the regression equation: (1) GDP per capita, (2) ethnic fractionalisation, (3) democratisation,[85] (4) inequality (as measured by the Gini coefficient) and (5) a measure of the perceived independence of courts, which serves to control for the role of ordinary courts in protecting basic human rights.[86] As Model 1b indicates, the effect of the Constitutional Review Index on physical integrity does not become statistically significant as a result (the confidence interval still includes zero). More importantly, though, Model 2b demonstrates that the effect of judicial review on empowerment rights is robust against alternative explanations. The coefficient of the Constitutional Review Index remains positive (1.90) and its confidence interval [0.08, 3.73] does not include zero.

[85] Note that the DEMOC variable from Polity IV codes cases of foreign interruption, of anarchy and of transition respectively -66, -77 and -88, which, to a certain extent, controls for the effect of wars and other instances of violent disruption.

[86] This measure from the Economic Freedom Index is based on the annual *Global Competitiveness Report* question: "Is the judiciary in your country independent from political influences of members of government, citizens, or firms? No—heavily influenced (= 1) or Yes—entirely independent (= 7)." The value for the year 2004 is used, except for Ethiopia and Nepal (2005), and Syria (2006). Note that the correlation with the Constitutional Review Index (-0.092) is neither strong nor positive, which shows that the two indicators do not measure the same construct.

Figure 6.2. Judicial Review and Empowerment Rights after Eliminating the Effect of GDP, Ethnic Fractionalisation, Democratisation, Inequality and Judicial Independence



Notes: The residuals of the Empowerment Rights Index (e) are computed as: e = Empowerment Rights Index – (–5.423 + 1.076(GDP) –0.917(Ethnic Fractionalisation) + 0.115(Democratisation) + 0.84(Inequality) –0.043(Judicial Independence)). The equation of the regression line in the graph is: Residuals Empowerment Rights Index = –1.037 + 1.861(Constitutional Review Index) + e. OLS method is used. 95% confidence interval is shown in grey.

To make the latter result easier to interpret, we regressed the Empowerment Rights Index on the five control variables and then saved the residuals. What we thus obtain is a measure of the respect for empowerment rights that is purged of the impact of the five aforementioned factors. Figure 6.2 illustrates the relationship between constitutional review and this "relativized" measure of human rights protection, which makes allowance for the fact that some countries have it harder than others, because of poverty, lack of democratization and so on. We see here that countries which, given their levels of wealth, democratization and inequality, can be regarded as human rights overperformers (such as India and Ecuador) tend

to score higher on the Constitutional Review Index. On the other hand, the worst human rights underperformers (China, Iraq and Vietnam) ignore any form of constitutional review. The upward regression line highlights the positive, overall effect of constitutional review on empowerment rights.

These findings lend some support to the Trustee Model.[87] But while they are by no means indisputable,[88] they suggest that constitutional courts do not necessarily do worse than other technocratic institutions in terms of output legitimacy. The empirical evidence on the effect of central bank independence on policy outcomes is somewhat mixed. Some economist have argued that making central banks independent has no measurable impact on real economic performances.[89] Even in what is supposed to be their central mission, fighting inflation, the confirmatory evidence is not as overwhelming as one what would believe from the theoretical argument.[90]

V. CONCLUSION: THE UNEASY (TECHNOCRATIC) CASE FOR CONSTITUTIONAL REVIEW

The foregoing analysis warrants the conclusion that the case for constitutional review is stronger, though by no means unequivocal, under the Trustee than the Agent Model. If we treat the two models as ideal-types, then the Trustee Model comes closer to describing, and

[87] Other studies have found a positive and statistically significant relationship between judicial review and human rights protection, albeit using a different set of measures and controls. See La Porta et al., *supra* note 45.

[88] Comparative law scholars will have noticed that the Judicial Review indicator from La Porta et al. incorrectly codes Israel as knowing no form of constitutional review. Recoding Israel as 2, instead of 0, the regression model just reaches statistical significance ($p = 0.05$).

[89] Alberto Alesina & Lawrence H. Summers, *Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence.*, 25 JOURNAL OF MONEY, CREDIT AND BANKING (1993).

[90] Sven-Olov Daunfeldt & Xavier de Luna, *Central Bank Independence and Price Stability: Evidence from OECD-Countries*, 60 OXF. ECON. PAP. 410 (2008).

therefore to justifying, the institution and how it operates in reality. The case for constitutional review, however, remains—to borrow the title of a recent contribution to the normative debate[91]—an uneasy one. For one thing, the empirical data available to test normative justifications of the practice remain limited and of relatively low quality. We see an urgent need for more and better empirical research on the effect of judicial institutions on policy output. There are also other policy areas, beyond human rights, where expect constitutional review might be expected to have a beneficial impact on policy outcomes. These include economic regulation[92] and the democratic process.[93]

But, probably to an even greater extent, what makes the Trustee-based case for constitutional review an uneasy one are the normative foundations on which it is premised. Public opinion across democracies continues to link judicial legitimacy to a legalist picture of adjudication.[94] Citizens still perceive constitutional review through the lens of the Agent Model, making constitutional judges especially reluctant to come out as policy-makers. So we should not expect the judges to embrace the Trustee Model in explicit fashion any time

[91] Fallon, *supra* note 16.

[92] Following Maskin and Tirole, who argue that independent judges are most likely to improve policy outcomes in technical areas where politicians are more tempted to pander to the electorate, we should expect judicial review to show a positive correlation with wealth creation. See Eric Maskin & Jean Tirole, *supra* note 57. Note, though, that Lars Feld and Stefan Voigt find a negative correlation between the establishment of a constitutional tribunal and economic performances.See Feld & Voigt, *supra* note 59.

[93] The "participation-oriented representation reinforcing approach" to judicial review is closely associated with John Hart Ely, see ELY, *supra* note 4, at 87. Research in political economy, though, points to the perverse effect that policy-optimization by competent judges may have on the democratic process, as politicians become free to pander to the electorate in the knowledge that bad, but popular policies will be reversed by the courts, see Justin Fox & Matthew C. Stephenson, *Judicial Review as a Response to Political Posturing*, 105 AM. POL. SCI. REV. 397 (2011).

[94] Studies examining public attitudes towards the judiciary reveal that people who are more educated and more attentive to the courts also tend to be more favourably oriented towards them. Respondents who are more knowledgeable about courts and things judicial are also more likely to subscribe to the mythology of judicial neutrality and objectivity in decision-making. Gibson et al. suggests that one reason why greater awareness of judicial institutions creates a less realistic view of the nature of judging is that more familiarity with the court system implies more exposure to judicial rhetoric, Gibson et al., *supra* note 62, at 345 ("to know courts is to love them, because to know them is to be exposed to a series of legitimizing messages focused on the symbols of justice, judicial objectivity and impartiality").

soon, even if it provides a more accurate account of their practices. This reluctance brings us back to the more fundamental, democratic objection against constitutional review. Rooted in a conception of government that emphasises representation and political equality, the objection is, we believe, irreducibly normative and is not one that can be overcome by any amount of empirical data. This, in turn, suggests that, when uncluttered by controversies about particular rulings, the debate between advocates and opponents of constitutional review cannot but be one between two competing conceptions of political legitimacy that reflect different value orderings. To be sure, scepticism about democracy is not something one easily confess to publicly.[95] And some authors deny that technocratic institutions are antidemocratic. Giandomenico Majone, for one, maintains that EU institutions like the Commission and the Court of Justice do not suffer from a democratic deficit because they essentially deal with regulatory matters. Democratic legitimacy, he argues, is a requirement that only applies to redistributive legislation.[96] Still, what we take to be the best available justification for constitutional review is one that is ultimately predicated on a conception of governance which emphasises expertise and good policy outcomes and which is sceptical of the ability of the democratic process to achieve them. Far from being novel, this sceptical view of democracy has, in fact, a long pedigree in the liberal tradition. It lies, in part, at the origins of our system of representative government.[97] Echoing Sieyès and Madison, Tocqueville famously questioned America's ability to conduct a successful foreign policy because of the tendency of a democracy to "obey its feelings rather than its calculations and to abandon a long matured plan to satisfy a momentary passion". In accordance with this

[95] In that sense, Roberto Unger makes a fair point when he observes that "discomfort with democracy" is one of "the dirty little secrets of contemporary jurisprudence", see ROBERTO M. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 72 (1996).

[96] GIANDOMENICO MAJONE, REGULATING EUROPE (1996).

[97] See BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT (1997).

tradition, constitutional review is—to paraphrase George Bernard Shaw—a device to ensure that we are governed better than we deserve.