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The Rise of World Constitutionalism

Bruce Ackerman

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Turn back the clock sixty years, and glimpse into the future: What were the prospects for constitutionalism as they might have appeared in the late 1930s? What was the potential for judicial reviews?

Grim. The Weimar Constitution had crumbled, as had Austria's ingenious experiment with judicial review. Neither the French nor the English ever had much faith in the power of written constitutions to constrain democratic politics. Nor did a century of Latin American experience suggest anything hopeful. Since Bolivar, generations of liberals south of the border had sought to copy the North American model - only to see its promise of limited government dissolve in caudillismo and class war. And in the United States, the Supreme Court was reeling and would not recover a sense of direction for more than a decade.

Amidst all this wreckage, only England and its overseas dominions offered glimmers of light. In Canada and Australia, New Zealand and South Africa, Westminster democracy was not a lifeless form but a living reality. Yet the lessons to be learned from these successes were bittersweet. The English had never indulged the Enlightenment conceit that a formal constitution was necessary for modern government. It was their culture of self-government, their common sense and decency, that distinguished their evolving commitment to democratic principles - not paper constitutions and institutional gimmicks like judicial review. It took Englishmen centuries to evolve this culture at home, and only Englishmen had managed to transplant it to foreign shores. Indeed, most thoughtful Americans suspected that this Anglo-Saxon heritage largely accounted for their own success and that the elaborate contraption designed in Philadelphia was, if anything, an impediment to further democratic development.

Sixty years later, and how the world has turned. Even the British are debating the need for a newfangled constitution. It is almost politically incorrect to suggest that America's success is rooted in its Anglo-Saxon legal traditions. The Enlightenment faith in written constitutions is sweeping the world. Constitutional courts are powerful forces in Germany and France, Spain and Italy, Israel and Hungary, Canada and South Africa, the European Union, and India. Are we at the giddy top of a bull market or on the brink of world-wide hegemony?

One thing is clear: American constitutional lawyers have treated this question with astonishing

indifference. They were happy to cheer the fall of the Berlin Wall and to celebrate the rise of world constitutionalism with an orgy of junketeering to far-off places dispensing legal lore. But the global transformation has not yet had the slightest impact on American constitutional thought. The typical American judge would not think of *learning* from an opinion by the German or French constitutional court. Nor would the typical scholar - assuming contrary to fact, that she could follow the natives' reasoning in their alien tongues.

If anything, American practice and theory have moved in the direction of emphatic provincialism. Over the past decade, we have been grappling with the original understanding of the Constitution of 1787, The Bill of Rights, and the Reconstruction amendments with new intensity. Whatever the utility of this debate for Americans, it does not engage the texts that have paramount constitutional significance for the rest of the world: the paradigmatic documents written by Western liberals in the traumatic aftermath of the Second World War -- the Universal Declaration on Human Rights, or the European Convention, or the German Constitution.

These beacons of the new era do not appear on American radar screens. Most judges and lawyers in the United States would hardly raise an eyebrow when told, for example, that existing American law on capital punishment or welfare rights offends basic constitutional principles as the rest of the civilized world has come to understand them. What has *that* got to do with the Bill of Rights or the Equal Protection Clause?

We must learn to think about the American experience with constitutionalism in a new way. Until very recently, it was appropriate to give it a privileged position in comparative study. Other experiments with written constitutions and judicial review were simply too short to warrant confident predictions about which, if any, would successfully shape long-run political evolution. But as we move into the next century, such skepticism is not longer justified. Places like Germany or Italy or the European Union or India will be passing the fifty-year mark in their experiments with written texts and constitutional courts; France and Spain will soon be experiencing the distinctive challenges of a second full generation of judicial review. Even if all these initiatives run aground over the next decades, they still add up to a formidable fund of experience for comparative investigation. We must learn to look upon the American experience as a special case, not as the paradigmatic case.

I have tried to be faithful to this precept in the speculations that follow. Rather than ruminate upon two centuries of American history, I have fixed by eyes firmly on the last half-century of world history and have allowed the American story to enter only as a source of supplementary insight. Looking broadly over this half-century, are there patterns that repeat themselves in the successful establishment of written constitutions? If so, do different founding patterns shape the subsequent style and substance of judicial review?

At this stage, there can be no hope of rigorously quantitative answers to such questions. The number of success stories is much too small for statistical analysis, the number of variables much too large. There is no way out but an appeal to old-fashioned insight. Mine is very old-fashioned indeed. In particular, I will be steering clear of efforts to link constitutionalism with social and economic variables - not because there are no such connections, but because I do not have any clever linkages to propose. I will focus instead on more humdrum legal and political variables.

I begin by distinguishing two scenarios: the "federalism" scenario and the "new beginning" scenario. As the discussion proceeds, I will be returning repeatedly to the possible relationships between the two founding patterns and the ongoing practice of judicial review.

FEDERALISM: FROM TREATY TO CONSTITUTION (AND VICE VERSA)

In the standard case, a group of states delegates a set of functions to an embryonic center by means of a treaty. But this "treaty" turns out to be different from most. Member states find it increasingly difficult to evade the commands of the emergent center. By one means or another, the center seeks to establish that the treaty trumps subsequent inconsistent laws enacted by individual states on the periphery. If courts accept this view, the treaty begins to take on the status of a constitution. When confronting an ordinary act of domestic legislation, judges begin to take it upon themselves to determine whether it is consistent with overriding treaty/constitution. If it is not, then it is not law, despite the efforts by formerly sovereign state to free themselves from their obligations to the center.

The (uncertain) transformation of a treaty into a constitution is at the center of the European Union today; it was also at the center of the American experience between the Revolution and the Civil War. To expand our analytic framework beyond these familiar cases, consider two variations on the federalism scenario.

Prospective Federation. The first variation involves the dynamics of prospective, or potential, federation,, exemplified by the embryonic constitutionalisms of Eastern Europe. These countries have overriding military and economic interests in joining existing quasi-federations organized by treaty/constitutions. This gives their judiciary an enormous advantage in elaborating constitutional norms that parallel those developed by the European Union (and associated entities like the Council of Europe). While parliaments and presidents will predictably resist judicial interventions, they are painfully aware the highly visible confrontations with their domestic constitutional courts will gravely threaten prospects for early entry into the EU, which is already looking for excuses to defer the heavy economic costs that admission of the East entails.

A politician considering whether to defy a particular judicial judgment cannot, therefore, realistically engage in a *narrow* cost-benefit analysis in the hope of enlisting all social interest concretely disadvantaged by a court's efforts to protect human rights. Instead, he must engage in a broader analysis, taking into account the economic and military benefits that may be lost if domestic political defiance of the court leads to exclusion from the federation.

This helps account, I think, for the remarkable success of the Hungarian Constitutional Court in establishing itself despite the weak textual foundations for its aggressive development of fundamental rights. It also suggests a source of strength in other Eastern European countries with reasonable prospects for admission - notably the Czech Republic and Poland.

The dynamics of prospective federation do not always lead to the enhancement of the judiciary. In Turkey, for example, they may lead to military takeover in an effort to forestall an Islamic turn. Granted, such a takeover would end all hope for full EU membership; but it would probably serve to sustain associate status, as well as membership in NATO. A similar dynamic is visible in Algeria. This is not the last time we will be comparing courts and militaries as ultimate guardians

of the Constitution.

From Constitution to Treaty. I have been supposing that the treaty comes over time to assume more and more aspects of a constitution. But the federalism dynamic can work in the opposite direction. Under the devolutionary variant, the national constitution takes on more treatylike features as decentralizing elements become more prominent. This is one way of understanding Canada's famous procedure allowing provinces to exempt their legislation from the Charter of Rights. As in a treaty, acts by Quebec's legislature trump prior norms rooted in the Charter - although only for a fixed period, at which point the province must once again invoke the exemption procedure.

Such an exemption clause may be administered in more or less treatylike ways. A province may be allowed to override only after a sober and particularized consideration of the values at stake; or it may be allowed to escape constitutional limitations without engaging in a searching inquiry. By allowing Quebec to choose the latter option, Canada's court authorized a step toward a more treatylike constitution.

We will be seeing more devolutionary scenarios in the future, as formerly unitary states take on more prominent federalist dimensions. Germany, Spain, and Italy (and England and France?) may well be caught in two scenarios at once, with power increasingly relocated to a new center in Brussels and new regional peripheries. This process is already very advanced in places like Belgium.

I shall be inviting the reader to reflect further on the implications of federalism scenarios on the practice of judicial review. But I want to turn next to a different, but not necessarily incompatible, constitutional dynamic.

"NEW BEGINNING"

The hallmark of the federalism scenarios is the existence of multiple centers of powering an *on-going project of intensive coordination* that is (a) far more engaging than those envisioned by the traditional treaty, but (b) less than that envisioned by the classical unitary state. This on-going collaboration generates functional imperatives that can be exploited by the emergent center and associated courts to establish "higher law" for the purpose of steering and constraining the component parts of the system.

The New Beginning scenario deals in expressive symbols, not functional imperatives. Under this scenario, a constitution emerges *as a symbolic marker of a great transition in the political life of a nation*. For example, it is impossible to understand the remarkable success of the German Constitutional Court - both in jurisprudential terms and in terms of effective authority - without recognizing that the Basic Law has become, in the society at large, a central symbol of the nation's break with its Nazi past.

This point, once again, forces politicians beyond narrow cost-benefit analyses in deciding whether to defy particular judicial decisions. This time, the broader costs incurred are symbolic. A rational, vote-maximizing politician must consider that many groups disadvantaged by a judicial decision will find it unacceptable to associate themselves with the Nazi past even symbolically; and many other groups, who are uninvolved in the particular dispute, will mobilizes themselves in defense of

the Basic Law's marker of a new beginning in German history. In this scenario, constitutions may become symbolic capital of great consequence in the subsequent judicial struggle for political authority.

How, then, do constitutions acquire the status of culturally significant symbols?

Germany as a Special Case. I begin with Germany, but not because it provides a standard case. The Basic Law was written at a time when Germans were, of course, very aware that they were at a decisive turning point in their history - *"Stunde Null,"* or the Zero Hour. But it was also a time of tremendous personal privation, public confusion, and military occupation. Rather than serving as a positive symbol of a new beginning, the Basic Law could well have suffered the same fate as the Versailles Treaty and the Weimar Constitution, becoming symbols of national disgrace, which should be overthrown at the earliest opportunity. Indeed, the Basic Law was self-consciously proposed as a provisional constitution, and its proponents refused Allied requests/demands that it be ratified by popular referendum - for the good reason that it might not have survived such a popular test, especially in Bavaria.

The symbolic success of the Basic Law, then, is both truly remarkable and not readily replicable. During the first post-war generation, West Germany was on probation; if the German Constitutional Court had been assailed from within, this would have signaled to the Allies the need for further direct intervention. Germany's probationary period also turned into a period of tremendous economic prosperity, which served to broaden and deepen the regime's internal support throughout the 1950s.

This political-economic context made it possible for Germany's elites to deploy their great legal tradition with symbolic effect - retroactively transforming the "provisional" Basic Law into a great marker of the nation's repudiation of its Nazi past. The fact that the early Constitutional Court was not tainted by judges who were Nazi collaborators also distinguished it from many other parts of the German government and judiciary - and thereby endowed its judgments with special symbolic standing to those (increasing) numbers of Germans who were emphatic supporters of a clean break with the past.

Much more can be said about this fascinating case; I have said enough to suggest why it is not typical. Most cases of symbolic success involve a more "triumphalist" scenario.

The Triumphalist Scenario. The standard triumphalist scenario has its cultural roots in the Semitic religions. Judaism, Christianity, and Islam all divide chronological time into a Before and an After, and focus on the activities of great revolutionary leaders - Moses, Jesus, and Mohammed - who mobilized followers to achieve a decisive breakthrough of collective meaning. This positive understanding of a new beginning was then secularized during the Enlightenment, particularly by the American and French revolutionaries who aimed for an analogous breakthrough in the world of political meaning. Before, George III or Louis XVI imposed a dark age of despotism upon us; but Now, the People organize themselves for a new age of political freedom.

It is here, of course, where constitutions come in to mark the transition from the Before to the After - stating the principles by which the People henceforth will govern themselves. Within this framework, judicial review appears as a possible (but not inevitable) institutional device to prevent

collective backsliding: although "We the People" have emerged into a new age, it is all too easy for us to lose our way, and the judges are there to make it harder to regress. Over the past two centuries, this set of ideas has proved to be one of the West's most important exports - playing itself out in fascinating variations all through Europe and Latin America during the 1800s and cascading over the entire globe during the last century.

But not without competition. In retrospect, it is possible to mark the failed European revolutions of 1848 as a decisive turning point. Increasingly (though not invariably), liberal constitutionalists turned away from revolution, and revolutionaries turned away from constitutions as the supreme achievement of popular sovereignty. And then came 1917: Instead of placing their faith in a constituent assembly formulating a constitutional text, the Bolsheviks put their faith in a ruling party to serve as a continuing vehicle for the collective breakthrough. Their apparent success inspired many other revolutionary movements to look upon the party, not the constitution, as the great achievement that would serve to institutionalize their political success. This symbolic substitution of a party for a constitution is a common theme that links Lenin and Mao to Hitler and Mussolini and a host of national liberation movements since World War II.

The prominence of the Bolshevik model should not blind us to important twentieth century cases in which movements followed earlier American and French precedents. Consider India. Here is a country that, by the standard criteria of political science, should never have been able to sustain constitutional democracy. Mass impoverishment and illiteracy, linguistic diversity, and bloody religious strife seem inauspicious auguries. And yet, for half a century now, it has managed to confound expectations. Even if its constitution falls apart in the next generation, how do we account for this success in sustaining a liberal democracy?

One may discern a five-stage dynamic. First, there was the long and successful struggle of the Congress Party to mobilize a transethnic political movement with a mass base. This led, second, to a situation at the time of independence in which the Congress Party was a credible vehicle of popular sovereignty. Third, and crucially, Gandhi and Nehru rejected the hegemonic party model and supported a serious effort to write a constitution to memorialize the fundamental commitments of the Indian people's breakthrough into independence. Fourth, the energies of the revolutionary Congress Party slowly ebbed as it became a haven for political opportunists interested in government jobs. This led, fifth, to the increasing prominence of the constitution, and its judicial institutions, as the guardians of the nation's fundamental constitutional commitments.

I will call this a *triumphalist scenario* (which contrasts with the German scenario involving *catastrophic defeat*). The key is a process similar to, but different from, those emphasized by Max Weber. During the movement for national independence, the Congress Party organized an enormous amount of focused political energy and commitment among millions of Indians. In this respect, the party resembled a secularized version of a Weberian *charismatic movement*. As Weber emphasized, such movements cannot sustain themselves indefinitely. Their partisans' excited aspirations for spiritual renewal give way, in time, to more mundane concerns with physical sustenance. As the first generation of true believers is displaced by (corrupt) apparatchiks, the *bureaucratization of charisma* takes its remorseless toll. While the Congress Party has not escaped this Weberian fate, the Gandhi/Nehru decision in favor of the constitution also permitted something I shall call the *constitutionalization of charisma*-in which the

constitution has served as a powerful (though far from all-powerful) symbol of national identity and democratic commitment.

A similar dynamic is currently at work in South Africa. Communism's collapse in 1989 helped undermine the appeal of Bolshevik model of party hegemony within the African National Congress. This allowed Nelson Mandela to make the negotiation of a constitution, not the consolidation of ANC rule, the fundamental act of a new beginning in South African political identity. Given an equal act of statesmanship by F.W. DeKlerk, we have seen the successful reenactment of the liberal revolutionary scenario. It is no surprise that the new constitutional court is already exploiting this situation with judgments that seek to redeem the South African constitution's promise of a new political beginning. I do not mean to suggest that his promise is secure, or that courts are enough to redeem it. My point is simply that the new beginning scenario can transform the constitution into a symbol that political actors no longer treat within the framework of a narrow cost-benefit analysis.

I have drawn my first two triumphalist cases from Asia and Africa. But if we turn to modern Europe, we find similar scenarios at work. Consider France. After its military defeat at the hands of the Nazis, it too suffered through the equivalent of a national liberation movement. For our purposes, Charles de Gaulle is the functional equivalent of Gandhi and Mandela; and he, too, managed ultimately to constitutionalize charismatic authority during the founding of the Fifth Republic. On a personal level, the analogy with Mandela is quite close: The "Hero of the Free French" returned from internal exile to appeal to the nation at a moment of crisis. But de Gaulle's relationship to the party system was different: The challenge for Mandela was to assert real control over an already organized political movement; the challenge for the General was to organize a new party to serve as a reliable political base. The crucial point, in both cases, is that the two leaders rejected the hegemonic party model. In the French case, however, the constitution did not emerge from a complex negotiation between well-established political formations. Instead, de Gaulle successfully appealed to the nation to support his new beginning by affirming a new constitution in a popular referendum.

Similar triumphalist scenarios might have been played out in the aftermath of the "Revolutions of 1989." The most congenial setting was Poland, but Lech Walesa did not prove to be a Mandela or de Gaulle. Rather than leading the Solidarity movement into a constituent assembly, he did his best to split it up before it could give birth to a constitution. Eight years later, Poles have no compelling political symbol that memorializes their decade of triumphant sacrifice. Neither a party nor a constitution serves as a living monument to their great achievement in national self-definition.

In Czechoslovakia, the prospects for a triumphalist scenario were never good, since a national movement on a Solidarity-like scale did not exist. Nonetheless, Vaclav Havel did a spectacularly poor job in using the materials at his disposal to constitutionalize the charisma he had earned as an anti-Communist spokesman.

Hungary provides a study in contrast. While the hard-line regimes in Poland and Czechoslovakia had provoked organized resistance movements, "until 1987 there was virtually no significant organized political opposition, and associational life in civil society was quite weak," according to Juan Linz and Alfred Stepan. But the Kadar regime had incorporated many moderate groups into

both governmental and business sectors - and these regime elements sought to strike a deal with democratizing moderates as the latter emerged in 1988 and 1989. The bargain that came out of the ensuing Roundtable discussions did not take the form of a comprehensive constitutional proposal, much less an effort at its popular ratification. Instead, the Roundtable actors hammered out some important constitutional amendments, which were then approved by the Communist parliament. This created a serious legitimacy problem once this parliament was displaced by democratic successors: Why should the democratic assemblies be constrained by a constitution devised by Communists at the insistence of an unelected Roundtable?

But the country's constitutional court, under the leadership of Chief Justice Solyom, has not let this question block its path. Instead, it has sought to fill the legitimacy gap with a flood of human rights decisions that symbolize the broad desire among many Hungarians to affirm their "European" identities. Up to the present, these decisions have not been based on a constitutional text that has gained the considered approval of the broader Hungarian population; but it is possible that the court's hyperactivity may help provoke a new round of constitutional politics leading to the enactment of a new text that codifies many of the decisions of the Solyom Court. If this happens, we may see a new variant of triumphalism under judicial leadership.

Russia provides another fascinating case. In contrast to other Eastern European leaders, Boris Yeltsin has invested substantial resources in constitutionalizing his charisma. Whatever its technical imperfections, the new Russian Constitution has lived through its first great test. Without its prior approval by the people through a special referendum, would we have seen the first democratic election in Russia since the vote for the constituent assembly of 1918?

I doubt it. Without the prior referendum in support of the constitution, it would have been far easier for Yeltsin to spin into an autocratic course. After all, he had destroyed his old parliamentary antagonists though military means, and had used force in dealing with the Chechens. Given his growing unpopularity, he was in great danger of succumbing to the normal temptation of a charismatic leader who has lost his appeal to the masses: further militarization.

But Yeltsin had already invested a great deal of his symbolic capital in the new constitution; as a consequence, he did not adopt a narrow cost-benefit analysis of his political situation; he chose to stay on democratic course. The result has been another self-conscious decision by a strong majority of Russians against "turning the clock back." The recent election not only returned Yeltsin to the Kremlin but reaffirmed the constitution as a symbolic marker of a "new beginning" that may endure after Yeltsin's death.

It would be silly to be optimistic about Russia's future. While there are elements of the triumphalist scenario at play, there are many respects in which Russia has suffered a catastrophic defeat in world politics. It remains possible that the new Russian constitution, like Germany's Weimar constitution, will ultimately become a symbol of national humiliation rather than a marker of a proud break with the Communist past. But can there be any doubt that Russia would be in an even worse situation today if Yeltsin had followed the course of Walesa and Havel, who failed to appreciate the central importance of consitutionalizing charisma?

Another significant variant on the triumphalist scenario is playing itself out in Mexico. During and after its twentieth century revolution, the country first saw the articulation of the social

democratic Carranza Constitution of 1917 - note the year! - and then the development of a hegemonic Party of the Institutionalized Revolution - note the name!- in the late 1920s. Despite its overwhelming dominance, the PRI did not altogether debase the symbols of constitutionalism in the manner, say, of Stalin's Russia. Instead, the PRI continued to coexist, symbolically at least, with the Carranza Constitution (as amended). Of course, in the real world, the PRI ensured its dominance by extraconstitutional means, through electoral fraud and the systematic corruption of judicial and bureaucratic authority. Nonetheless, the Carranza Constitution has endured as a symbol of the Mexican people's affirmation of popular sovereignty during its revolutionary struggle against the Diaz regime. But it is hard to say how much of this symbolic capital remains, or whether it can be creatively deployed in aid of the contemporary transition from PRI hegemony to a more genuine liberal democracy.

The Problem of the Maximal Leader. From the days of Washington and Bolivar, a single revolutionary leader has often emerged in the eyes of the masses as *the* symbolic representative of the movement's yearnings for political redefinition. For obvious reasons, these "maximal leaders" are often military men; but this is not inevitable (consider, for example, Gandhi or Mandela). Nor is it inevitable that any such leader emerge from the revolutionary elite as a whole.

But when he does, his existence generates a serious problem for the rest of the leadership group. The maximal leader's personal charisma is a threat to their own future, as well as the future of liberal democracy. At the same time, the leader's following among the masses provides the new regime with an enormous asset it cannot easily do without. How, then, to organize the constitution in a way that preserves the asset while reducing the threat?

The time-honored technique is to establish a presidential, rather than a parliamentary, form of government. Presidentialism promises to carve out a space for the maximal leader and thereby preserve an independent stage upon which other leaders can display their talent in the legislature. Of course, this promise may prove illusory - either the maximal leader, or the rest of the elite, may become impatient with the constitutional limitations imposed upon their respective offices. But at the moment of constitutional creation, these conflicts may be deferred through ambiguities. The crucial point is that presidentialism provides a mechanism through which the maximal leader may be "kicked upstairs" (or may kick himself upstairs), allowing other leaders to exercise independent authority they would not otherwise possess.

We see this dynamic in play in both the United States and France -- countries that provide competing models of presidentialism for other nations considering their constitutional options. George Washington and Charles de Gaulle were maximal leaders. Perhaps because of their military backgrounds, both were quite disdainful of normal civilian politics; but because of their republican predilections, they were unwilling to take the path toward military dictatorship. As a consequence, they were willing participants in constitutional projects through which their personal charisma could be constitutionalized as presidencies, thereby allowing a large space of the political ambitions of sub maximal leaders. Of course, once Washington and de Gaulle left the political stage, the constitutional arrangements remained behind to shape the next generation of politics --which may be dominated by politicians without any claim to the charismatic authority of the founding generation. I will leave this larger point to another essay, contenting myself with presidentialism's implications for judicial review.

Quite simply, presidentialism provides a new opening for the development of strong constitutional courts -- for many of the same reasons at work in the federalism scenario(s). Just as the creation of independent powers at the center and the periphery increases the functional need for a relatively impartial judge to coordinate the on-going institutional interactions, so does the creation of a powerful president and an independent legislature.

This functional dynamic is very visible in the early history of the French Fifth Republic. De Gaulle's constitution deprived the Chamber of Deputies of its plenary legislative competence, reserving certain domains for presidential lawmaking. The Constitutional Council was created for the purpose of policing this new line between the chamber and the president.

Originally, the council guarded the line in only one direction: it could respond to a president's complaint against statutes that invaded his prerogatives, but the Chamber of Deputies was given no similar right to invoke the council's jurisdiction. With de Gaulle's departure from the scene, however, the country confronted the longer-run implications of his successful exercise of charismatic authority. Would it return to the traditions of the Third and Fourth Republics or continue down the path marked by the new constitution? It took the second option, but the role of the Constitutional Council was soon modified to reflect a more equal balance between presidential and legislative authorities. President Giscard gave up de Gaulle's effective monopoly over the invocation of the council's jurisdiction, allowing a small proportion of the deputies (or senators) a similar right to challenge a statute's constitutionality. This transformed the council from a watchdog of executive authority into a body that could play a much more independent role. Not only could it defend the chamber against the president, but it could also challenge the prime minister's control over the chamber, since a small legislative minority could now go before the council and successfully invalidate the prime minister's statutory program on constitutional grounds. The reforms weakened not only the presidency but also its principal antagonist -- the prime minister -- to the advantage of a third intermediating force.

Such case studies reinforce the relevance of recent work in public choice theory, which explores the ways in which the separation of powers between the legislative and executive provides the courts with constitutional space for independent action. I want to emphasize, however, that the judiciary is by no means the only institution that may exploit the tensions generated by presidentialism. To the contrary, South America is full of cautionary tales in which the principal institutional beneficiary of the conflict between president and legislature is the military, not the judiciary.

The obvious difference between judges and generals should not conceal some sobering similarities in their efforts at symbolic legitimation. Just as a court may exploit the conflicts between the executive and legislature to impose constitutional principles elaborated by the people, the South American military has often justified its intervention in similar terms, presenting itself as the ultimate safeguard of the nation's fundamental principles endangered by squabbling politicians. There are, of course, many important differences between judicial and military interventions. Judges operate piecemeal, whereas generals take over the entire government; when judges intervene, they tend to operate in behalf of internationally recognized norms of human dignity, whereas the military tend to regulate society at the expense of those norms; and so forth.

Nonetheless, the common root in presidentialism provides me with one reason for urging us to move beyond the Marxist belief that it is the economic organization of society that largely determines its political-legal system. If any factor is worth singling out, it is the military -- the stronger the military, the less likely that courts can play the role of a third, intermediating force between legislature and the executive.

This point has been obscured by the United States' recent rise to military hegemony; but this modern period was preceded by 150 years of American history in which the military played a relatively peripheral role. Generally speaking, judicial review is associated with weak militaries -- either because, as in Western Europe, the crucial military decisions were made by extra-European powers, or because as in India, the dominant political movement adopted an emphatically nonviolent ideology. Weak militaries seem to be present, moreover, in some of the more recent founding efforts -- in Eastern Europe, Canada, and Mexico. But there are less auspicious cases as well: If the Russian president and Duma renew fierce combat, the army is far more likely than the courts to play a decisive (and disastrous) role as a third institutional force.

COMBINED SCENARIOS

My two scenarios - federalism and new beginning - are analytically independent of one another. A nation may delegate some functions to an emerging center without experiencing much sense of a new beginning. But it should be clear that both scenarios can happen at once. Two obvious examples are: (1) the United States from the 1780s through the 1860s, and (2)the European Union from the 1950s to the present

America's early history reveals the characteristic ambiguities of the federalism scenario. By 1781, all thirteen states had signed Articles of Confederation, promising that they "shall be inviolably observed by every State, and the union shall be perpetual." Was this a treaty or a constitution? Some said one thing; others, the other. Although the enactment of the more famous Constitution of 1787 shifted the balance away from a treatylike document, large ambiguities remained and opened up an on-going debate. In 1860, the South's rejection of the Union was therefore open to two interpretations - it was either seceding from the Union or denouncing the treaty of 1787. The issue was not even decided by the wartime victory of the Union; if President Andrew Johnson had won his epic struggle with his congressional antagonists, the treaty interpretation might have survived after the Civil War. Only the ratification of the Fourteenth Amendment, over the protest of Southern whites, finally shifted the balance decisively toward the constitutional understanding.

When we inspect the mechanism by which the treaty interpretation of the American Union was rejected, we find the new beginning scenario in evidence. During both 1787-90 and 1865-68, the Federalist partisans of the Constitution and the Republican partisans of the Reconstruction Amendments sought to legitimize their new, more nationalistic texts by invoking variations of the triumphalist themes we have examined previously: George Washington and Abraham Lincoln are the same sort of figures as Gandhi and Nehru, Mandela, and de Gaulle.

A similar conjunction of the two scenarios is visible today in Europe. The Treaty of Rome, like the Articles of Confederation, was negotiated and approved by sovereign states without any of the plebiscites and constitutional conventions that characteristically accompany a new beginning. Over the next generation, however, the treaty was converted (largely by judges) into a more

constitution-like document. This process of constitutionalization was, in turn, advanced by the response to the Maastricht Treaty - whose fate was in large measure determined by the French referendum regarding its adoption. As in America in 1787, the constitutional destiny of Europe was no longer being resolved by a small political elite negotiating a classical treaty; it was made a matter of mass political debate and focused popular decision.

Within this new popular arena, questions of European identity inevitably became salient. For the diplomatic elite, Maastrihct was only one more step in the further integration of Europe; but for average Frenchmen, the referendum posed a very different question: Should they support a new beginning that expressed a European identity that began to rival their older, French identity? A similar question was at issue in the American debate between Federalists and Anti-Federalists at the conventions held between 1787 and 1790 in each of the thirteen states. Moreover, as in the French referendum, the voters of Virginia and other states gave a *very* narrow endorsement to a constitutional form that ultimately embraced an entire continent. Nevertheless, this narrow victory proved sufficient to sustain the project for succeeding generations.

While my crystal ball is cloudy on future of Europe, I will hazard one prediction: Any additional large steps down the road to further federation will be accompanied by more extensive uses of referenda and other constitutive processes associated with new beginnings. If Maastricht turns out to be the high point of centralization, and devolution scenarios become the order of the day, I would envision a regression toward more treatylike forms of negotiation and ratification, and no more referenda.

DIFFERENT CREATIONS, DIFFERENT COURTS?

Comparative constitutional law is in its infancy, opening up many possibilities for a false start. One mistake is nominalism: Many institutions call themselves constitutional courts, but this hardly makes them similar. Important differences are frequently obliterated by loose talk invoking a common label.

At the same time, we should resist the temptation of a provincial particularism. Here the constitutional scholar firmly locates, say, the Canadian Court in Canadian realities and dismisses out of hand the very idea that its activities may be illuminated by goings-on in India. In opposition to both nominalism and particularism, I will be offering up some pragmatism. My aim is to identify (a) one or another *common problem* confronting different constitutional courts, and then follow up by specifying (b) different *coping strategies* these courts have adopted as they have tried to solve the problems. Once we have gained some clarity on these two issues, we may hope for a deeper insight into the comparative value of competing coping strategies.

My general approach should be familiar. Much of the best comparative scholarship follows a similar method, first defining a common problem - for example, the protection of freedom of speech - and then considering different doctrinal solutions proposed by different courts, before passing a considered judgment on the best approaches. But these inquiries have generally proceeded in an overly legalistic framework, without considering how courts have been trying to cope with more general problems posed by their political and institutional environment.

The two scenarios I have been discussing are meant to help define the opportunities and dangers

that courts confront during the early stages of constitutional development. Broadly speaking, the two scenarios reward different styles of judicial activity. The federalism scenario rewards a *coordinating style* of adjudication; the new beginnings scenario rewards a *redemptive* style.

The coordination style emphasizes the virtues of prudence. It eschews the premature elaboration of rigid and broad principles, which may be undermined over time by the shifting balance of power between periphery and center. Judicial aversion to large principles may be exacerbated if different cultures and legal traditions govern the different states on the periphery. In this case, the confident judicial pronouncement of some broad principle at the center may be at odds with one or another of the constituent cultures. This too will breed a great deal of caution and only an episodic and uncertain engagement with high principle.

The new beginning scenario invites a different judicial orientation, Here the court seeks to demonstrate that the solemn commitments made by the people in their constitution are not merely paper promises that can be conveniently pushed to one side by those in power. Given this aspiration, the redemptive court is not embarrassed by the need to state broad constitutional principles and to vindicate them in ways that ordinary men and women will appreciate. To the contrary, such dramatic decisions establish that the new beginning is not empty political rhetoric but a living reality of social life. Of course, a redemptive court will recognize the virtues of prudence in special situations. But, as a general rule, the articulation and vindication of constitutional principles will be given much greater prominence.

The presidentialist variant of the new beginning scenario may define one important contextual exception. A system dominated by a charismatic president and independent legislature will predictably experience extraordinarily high levels of institutional conflict. If the judges try to resolve these conflicts by emphatic application of broad principles, they may quickly find that the court is committing institutional suicide. Such a prospect may well engender the kind of cautious and interstitial adjudications that the coordinating style commends across the board.

Of course, there is no guarantee that a constitutional court will adopt the style that best fits its situation. The Russian Court, for example, did commit virtual suicide in the early struggle between Boris Yeltsin and parliament, and the court's defeat will cast a shadow on judicial review in Russia - and perhaps other nations in the former Soviet Union as well - for a long time to come. Nonetheless, I do detect a broad tendency for the founding scenario to shape the course of early constitutional adjudication.

Consider the United States. Despite the fame of *Marbury v. Madison*, the case involved institutional minutiae of little interest to ordinary Americans. From the Founding to the Civil War, it remained a fair question whether the federal Union was established by a treaty or a constitution; and during that time, the Supreme Court was largely a coordinating court - refused to apply the Bill of Rights to the states, and concentrating upon an effort to coordinate the struggle of the federal center to establish an uncertain institutional superiority over the states on a shifting set of issues.

Contrast the U.S. Supreme Court's caution with the early adoption of the redemptive style by the German Constitutional Court in its *Lüth* decision of 1958. The civil courts had interpreted the German Civil Code as authorizing an injunction against an effort to organize a boycott against

films produced by a notorious Nazi movie director. In vindicating the free speech rights of the anti-Nazi boycotters, the Constitutional Court accomplished two things at once. It not only redeemed the constitutional promises of a new beginning in a way that ordinary Germans could immediately understand; it also redeemed the Basic Law in a way especially relevant to German lawyers, who had previously treated the Civil Code as the central text of their tradition. By declaring that the Code must henceforth be read in the light of the values established by the Basic Law, the justices redeemed the new beginning to lawyers and laymen alike. The U.S. Supreme Court did not regularly hand down decisions like *Lüth* until well after the Republic experienced a second "new birth of freedom" after the Civil War.

I do not want to claim too much for the shaping power of the two scenarios that have characterized the rise of modern constitutionalism. A host of other factors intervene. For example, the judges socialized into the Anglo-American legal tradition of common-law reasoning will deal with the two scenarios in ways quite different from judges socialized into the Franco-German tradition of architectonic legal reasoning. But am I wrong in suggesting that constitutions marking a new beginning in political life pose qualitatively differing juridical challenges from those emerging from a mover federalist dynamic?