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The French Constitutional Council and Deciding to Delegate

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The French Constitutional Council and Deciding to Delegate

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Report

Presented to the Faculty of the Graduate School

of the University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

Master of Arts

The University of Texas at Austin

December 2012

Abstract

The French Constitutional Council and Deciding to Delegate

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The University of Texas at Austin, 2012

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Political actors are often perceived as self-preserving, rational actors who rarely give power away voluntarily. Yet the proliferation of independent constitutional courts presents the puzzle of why politicians are willing to delegate, seemingly irrevocably, authority to institutions that will most certainly constrain the implementation of their policy preferences. A variety of hypotheses purport to explain this phenomenon of judicial empowerment, relying variously on economic factors, electoral strategy, international influences, ideology, and interest groups. My dissertation examines this larger question in light of the sudden transformation of France's Constitutional Council into a potent constitutional court in October of 1974. France, with its long political tradition of hostility to American-style judicial review, provides perhaps the most dramatic example of judicialization. Drawing on research into elite attitudes, parliamentary debates, government and intra-party documents, and extensive newspaper reports, the project evaluates the claims of competing explanations of judicial empowerment in the French context, with an eye to their applicability in other industrial democratic states. It a future comparative inquiry into the genesis of constitutional courts, juxtaposing case studies from France, Israel, and Sweden.

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The French Constitutional Council and Deciding to Delegate

"Institutions, in contrast to satellites, rarely stay in the orbit their creator intended."[1]
--Jean Rivero

1. Introduction

Attention to the so-called "third wave" of democratization in the second half of the twentieth century, cheering on the widespread acceptance of free elections as a prerequisite for regime legitimacy, obscured a parallel phenomenon unfolding in already established democratic regimes: the encroachment of judicial review upon erstwhile sovereign parliaments and presidencies. Through the constitutionalization of rights, and the proliferation of courts capable of enforcing them, the judiciary increasingly both shapes and constrains the policy preferences of elected politicians in developed democracies. The question is a classic one, underlying all institutional change: Why do "rational" politicians willingly surrender power to constitutional courts? What interest do political elites have in creating independent policy-making institutions…for the study of comparative judicial politics has established nothing if not a consensus among political scientists and legal scholars that courts are policy-making bodies…capable of thwarting majoritarian processes? The question is also an important one as the evidence mounts against narrow conceptions of "rationality," or political self-interest. Shapiro (1980) observed in his classic comparative work on courts that politicians "almost never

[1] Jean Rivero, *Le Conseil Constitutionnel et le Conseil d'État* (Paris: L.G.D.J. Montchrestien, 1988), 158. Transcript of a colloquium held in the French Senate on January 21 and 22, 1988.

willingly surrender power."[2] In a more recent work on the European Court of Justice (ECJ), Conant (2002) remarks that "no political institution graciously cedes authority to another."[3] Yet the flag of judicial review advances in a variety of settings, defying such intuitions. This advance appears at present to be inexorable. I am aware of no case where judicial review, once implanted, has been retracted, unless the host democratic regime itself was suppressed.[4] While much ink has been spilled over the rise of the European Court of Justice and its transnational judicial regime, surprisingly little interest had been paid to the *origins* of judicial review within countries until recently. Only in the past few years have book-length studies of the origins of judicial review begun to emerge.[5] This study aspires to help close this persistent deficit in comparative judicial studies.

For reasons I shall elaborate later, the French 5th Republic presents perhaps the most curious cases of judicialization in modern times. The French Conseil Constitutionnel, or Constitutional Council, evolved in the span of five years from the meek institutional handmaiden of a Gaullist President into a controversial and independent judiciary empowered to veto or substantially alter government legislation.

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[2] Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 17.

[3] Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Ithaca: Cornell University Press, 2002).

[4] For a broad look at the phenomenon of judicialization and its various definitions, see Torjborn Vallinder, "When the Courts Go Marching In," in C. Neal Tate and Torjborn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995). I adopt only half of Vallinder's two-part definition: Judicialization is "the expansion of the province of the courts or judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts…" Torjborn Vallinder, "The Judicialization of Politics—A World-Wide Phenomenon: Introduction," 15 *International Political Science Review* 2 (1994), 91.

[5] Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (New York: Cambridge University Press, 2003); Ran Hirschl, *Towards Juristocracy: The Origins and Consequence of the New Constitutionalism* (Cambridge: Harvard University Press, 2004)

Although occasionally decried as an imperial judiciary by disgruntled legislators on both the right and left end of the political spectrum, the Council managed to survive what some political analysts have compared to a "constitutional crisis" in the early 1980s, recalling that which faced the U.S. Supreme Court in the 1930s.[6] Indeed, the Council has prospered and is now an uncontested feature of the French political landscape. The popularity, and more important, legitimacy, of the Constitutional Council today, among politician's as well as everyday citizens, is a *fait accompli*.

My research, focusing on the amendment of the French Constitution in 1974 to implement authentic judicial review,[7] identifies its origins in the convergence of elite values and a struggle to consolidate the institutional structure of France's 5th Republic in a form acceptable to the Left and the Center-Right. In contrast to existing theories focused on "hegemonic preservation,"[8] majority calculations of future electoral

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[6] Leo Hamon, *Les Juges de la loi: naissance et rôle d'un contre-pouvoir, le Conseil Constitutionnel* (Paris: Fayard, 1987); F. L. Morton, "Judicial Review in France: A Comparative Analysis," 36 *American Journal of Comparative Law* 89 (1988).

[7] Certain scholars insist on making a technical distinction between "judicial" and "constitutional" review. The former, characterizing the American model of review, is distinguished by a courts ability to overturn legislation *after* it has been promulgated, i.e. formally enacted and put into effect. The latter, characterizing the French mode of review, involves the invalidation of legislation *before* it is formally enacted and in effect. Such systems of review may be further distinguished by the absence of "concrete" review or the right of ordinary citizens to trigger review. The truly fastidious contest the propriety of calling bodies using this mode of review "courts" and argue that they are in fact councils, organs, or even "third chambers" of the legislature. See Rohr (1995) and Stone (1992). The distinction is plausible, but for purposes of the question posed here, irrelevant. In either case the substantive outcome is the same. Unelected and independent individuals are charged with interpreting the law and neither the legislative nor the executive branches may override their judgments. The dynamics may be different but the impact on policy-making is the same.

[8] Ran Hirschl, *Towards Juristocracy: The Origins and Consequence of the New Constitutionalism* (Cambridge: Harvard University Press, 2004); Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Israel's Constitutional Revolution," 33 *Comparative Politics* 3 (2001).

outcomes,[9] interest group mobilization,[10] and a variety of functional and legalistic approaches,[11] I argue that basic constitutional and institutional values, at the core of which were competing conceptions of presidentialism and judicial power, drove the debates over judicial review. These values transcended narrow partisan divisions, though the debates themselves inevitably accrued the trappings of partisan skirmishing. More controversially, I argue that the 1974 debates over judicial review in France demonstrate a remarkable transformation of fundamental political values among France's political elite, but most strikingly among the cadres of the Left. I further suggest that the 1974 debates mark a pivotal moment in an ongoing process of *elite convergence*, of which the Constitutional Council was both a catalyst and a symptom. A running debate among Council scholars asks whether the Council's enhanced role in the legislative process served to legitimate[12] or antagonize French politics.[13] My conclusion here favors the former rather than the latter proposition.

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[9] J. Mark Ramseyer, "The Puzzling (In)Dependence of Courts: A Comparative Approach," 23 *Journal of Legal Studies* 721 (1994); William Landes and Richard A. Posner, "The Independent Judiciary in an Interest-Group Perspective," 18 *Journal of Law and Economics* 875 (1975).

[10] J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999); Anne-Marie Slaughter and Walter Mattli, *Constructing the European Legal System from the Ground Up: The Role of Individual Litigants and National Courts* (Cambridge: Harvard Law School, 1996); Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," 75 *American Journal of International Law* (1981).

[11] Barry Weingast, "Constitutions as Governance Structures: The Political Foundations of Secure Markets," 149 *Journal of Institutional and Theoretical Economics* 286 (1993).

[12] Louis Favoreu, "Le Conseil Constitutionnel et l'alternance," 34 *Revue française de science politique* 1002 (1984); F.L. Morton, "Judicial Review in France: A Comparative Analysis," 36 *The American Journal of Comparative Law* 89 (1988).

[13] J.T.S. Keeler, "Judicial-Political Confrontation in Mitterrand's France: The Emergence of the Constitutional Council as a Major Actor in the Policy-Making Process" in G. Ross, S. Hoffmann, and S. Malzacher, eds., *The Mitterrand Experiment* (New York: Oxford University Press; Oxford: Polity Press, 1987); Alec Stone, *The Birth of Judicial Politics in France* (New York: Oxford University France, 1992).

2. Selection of Cases

The conditions and countries giving rise to judicial review are diverse. Two broad categories, however, can be distinguished, and it is important that we do so. In the first category are countries where judicial review is established in tandem with the transition to democracy. This category includes cases such as Germany and Japan where independent judiciaries were imposed by an occupying power(s); Eastern Europe, in which constitutional courts were intended to bolster simultaneous economic and democratic transformations, and South Africa with its democratic transition from the system of apartheid in 1994. These cases have one important feature in common. Judicial review was introduced as one part of a massive constitutional overhaul during which practically all institutions were "on the table" and the negotiation of institutional forms was unusually fluid. In such contexts, courts are (a) regarded as a cornerstone of separation of powers and individual liberties conspicuously absent in the prior regime, and/or (b) established somewhat formulaically and without much debate, usually upon the American or German model. Judicial review holds extraordinary and obvious appeal, understandably, for political actors in countries falling into this category. For the question I am posing, such states are less puzzling: motivations are more compelling, institutions are more fluid, and persuasive templates are readily available.[14] When considering states undergoing democratic transitions, existing theories are more likely to be adequate to the task of explaining the adoption of judicial review, a point I shall return to in Chapter 6.

It is the second category, of which France is compelling member, which is more interesting because it is arguably more puzzling. This category comprises countries that are democratic and stable, yet subsequently introduce or drastically enhance the mechanisms of judicial review. France (1974), Sweden (1974), Austria (1975), Canada (1982), New Zealand (1990), and Israel (1992) are members of this group. The introduction or extension of judicial review in these countries, absent the fertile chaos of regime change, puts the question raised above into greater relief: what motivates politicians to do so? In none of these countries did political elites introduce judicial review under emergency conditions or as part of a comprehensive constitutional revision. In these countries, politicians were ostensibly under less pressure and had more time to calculate the costs and benefits of judicial review. Executives, legislators and bureaucratic elites could reflect deliberately and with focus on the potentially adverse impact judicialization might have on the state's existing institutions, and more important, their own prestige and relative influence within the policy process; in short, all those factors that gave them power. Viewed from this perspective the rise of judicial review is more counterintuitive in the second category of states than in the first.

3. Origins of Judicial Review: Existing Explanations

Existing scholarship on judicial review yields a variety of divergent, if sometimes tentative, conclusions concerning its origins. The relevant literature is dwarfed by its counterpart in the area of democratization (with its focus on elections), and consequently much less robust. With many scholars focusing on background conditions and broad, descriptive comparisons, much of the literature may be characterized as quasi-theoretical.[15] Distinct causal explanations are often conflated in order to capture the richness of the historical record. Nevertheless, several plausible theories have emerged as the field of comparative judicial politics begins to assume its rightful seat at the table of comparative political studies.

a. *Theories of Judicial Empowerment*

Several theories, some more empirically grounded than others, purport to explain why politicians do, in fact, willingly surrender power to constitutional courts. They may be classified into several broad categories: *constitutionalism/normative explanations*, *interest group mobilization*, *auto-gestation*, *functionalism/utilitarianism*, *electoral markets*, *bureaucratic monitoring*, *credible commitments*, and *hegemonic preservation*. These various explanations can be further categorized by whether they view the rise of judicial review as primarily endogenous or exogenous. Are the roots of judicial review primarily domestic or international? While some scholars, such as Landes & Posner (1975) and Ramseyer (1994), adopt a more reductionist (and thus more theoretically

[15] The collected essays in Tate and Vallinder, eds., (1995), *supra*, are a classic example.

elegant) explanation of judicial empowerment, others (Weiler 1999) tend to merge two or more hypotheses to capture the complexity of particular cases.

b. The Culture of Constitutionalism

To some, judicialization appears as the logical, even inevitable, outcome of democratization.[16] The safeguarding of individual and minority rights is widely recognized as a cornerstone of viable democracies. Even those most concerned with electoral arrangements in the study of democratization acknowledge that a strong foundation of liberalism (freedom of speech, association, the press, etc.) must accompany routine and frequent elections.[17] Democratic regimes therefore call courts into service to guard against the "tyranny of the majority" and to guarantee that electoral competitions are not deprived of their substance. Constitutional courts exist to "shelter the fundamental rights of citizens"[18] though this principle necessarily exists in tension with the democratic principle of majoritarianism. Crudely put, global judicialization is the Madisonian precept of limited government writ large. Though Madison himself, at pains to address the dilemma of majoritarian excess in a representative government, never turned to the judiciary as a solution, the development of American government ultimately thrust the federal courts into this role. For some, the global expansion of judicial review is yet another example of the "Americanization" of foreign political institutions.

Of course, constitutional theorists, from Locke to Rousseau to Nozick, have long conceptualized constitutional arrangements as a "contract," not only between citizens

[16] Ronald Dworkin, *A Bill of Rights for Britain* (London: Chatto and Windus, 1990).
[17] Andreas Schedler, Larry Diamond, and Marc F. Plattner, *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder: Lynne Rienner Publishers, 1999).
[18] Vallinder, *supra*, n.4.

themselves, but between citizens and their government. Contractarian theories often invoke the principal-agent metaphor with "the people" in the role of principal and politicians playing the role of agents. Constitutions serve to circumscribe the autonomy of the people's agents. Judicial review is one institution which can prevent politicians from violating the people's contract, with courts policing politicians. The objections to contractarian theory as an empirical explanation of constitutional bargains, however, are well-known. Constitutions rarely, if ever, emerge as a result of massive popular participation. Consequently, the notion that constitutions directly reflect the "will of the people" is highly suspect. Politicians are not simply "agents" of the people and bring their own interests to the table when designing constitutions. A substantial body of literature, not to mention a review of the founding of the American republic, demonstrates that political elites embed their own narrow interests into the constitutional structures they themselves are responsible for negotiating.[19] Judges are quite often appointed by the very politicians they are charged with monitoring. Thus while judges are idealized as being objective observers somehow "outside" the constitutional arrangement, they are themselves part of the political elite. A glance at the controversy over "judicial activism" in the United States is enough to raise serious doubts about the umpire function supposedly provided by judges. Contractarian theories of judicial review tend to yield normative rather than empirical insights into the rise of judicial review.

[19] Stefan Voigt, "Positive Constitutional Economics: A Survey," 90 *Public Choice* 11 (1997); Dennis Mueller, *Constitutional Democracy* (New York: Oxford University Press, 1996); John Elster, "Forces and Mechanisms in the Constitution-Making Process," 45 *Duke Law Journal* 364 (1995).

Putting aside the normative problems of the "countermajoritarian difficulty,"[20] an empirical puzzle persists: Why the proliferation of constitutional courts when so many long-enduring democracies have prospered without them? To unravel the puzzle, legal academics have traditionally posited a paradigm shift following World War II. Many attribute the post-war enthusiasm for judicial review to (a) a backlash against the rampant abuse of civil liberties by totalitarian regimes during the 1930s and 1940s, (b) the failure of democratic elections to prevent the rise of such regimes, and (c) the subsequent prestige of American-style judicial review, backed by the influence of American occupation on judicial institution-building in countries such as Germany, Italy and Japan.[21] In the standard account, the post-war responses of states to their own political dysfunctions of the 1930s are encouraged and reinforced by the process of European integration and the meteoric rise of the European Court of Justice and European Court of Human Rights. Transnational norms of judicial review thus come to complement or supplant national experience as the driving force behind judicialization. As the twin jurisprudence of the ECJ and ECHR casts its constitutional net over Europe and requires domestic implementation, the institution of judicial review has evolved from *comme il*

[20] Robert Dahl, "Decision Making in a Democracy: The Supreme Court as National Policy Maker," 6 *Journal of Public Law* 279 (1957); Richard Funston, "The Supreme Court and Critical Elections," 69 *American Political Science Review* 795 (1975).

[21] The extent to which American judicial norms influenced the development of post-war West European judiciaries is a contested issue. Clearly, the influence and appeal of American institutional design was a factor, but for a perspective accenting the endogenous origins of the German and Italian constitutional courts, see, among others, John Ferejohn and Pasquale Pasquino's paper "Constitutional Adjudication: Lessons from Europe", presented at UT School of Law's conference "Comparative Avenues in Constitutional Law", February 27-28, 2004.

faut to *de rigueur*.[22] This movement assumed a truly global dimension with the U.N.'s Universal Declaration of Human Rights and the growing legitimacy of International Criminal Courts for the prosecution of war crimes and crimes against humanity. In short, global integration has homogenized national norms vis-à-vis judicial review in favor of strong review.

A related factor is the revival of natural law theories following World War II. The above-mentioned failure of positive law to protect individual liberties during the inter-war years ushered in a more sympathetic environment to philosophies of law amenable to judicial activism. The revived prestige of traditional natural law theorists such as Kant, Locke and Rousseau has been accompanied by the development of contemporary rights-based theories exemplified by John Rawls' *A Theory of Justice*[23] and Ronald Dworkin's *Taking Rights Seriously*.[24]

While contractarian theories are empirically deficient, explanations of judicial review's origins in a post-war, transnational diffusion of norms acquire traction, particularly in the European context. National acquiescence to a host of international legal regimes constraining national prerogatives, particularly those embodied in the European Convention on Human Rights and the European Union, represent a sea change in elite and popular attitudes toward judicial independence. But the Euro-centric nature of norm-based explanations leaves several questions unanswered. Why have some European states institutionalized domestic judicial review while others have not? What explains the

[22] The self-declared ECJ doctrines such as "Direct Effect" and "Supremacy" have effectively subordinated national courts to pan-European judicial surveillance.
[23] John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971).
[24] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978).

timing of judicial review in those countries that have? How did domestic politics impact the reception of evolving international norms favoring judicial review? Finally, did these evolving norms somehow overwhelm or dovetail with the self-interest of affected elites where judicial review did in fact take root? Generalizations about a "rights revolution" in Europe and beyond raise more questions than they answer.

c. Interest Group Mobilization

The rise of a transnational legal regime holding together the European Union, specifically the impact of transnational judicial review in the form of ECJ and ECHR rulings, has produced attempts to explain the ebb of national sovereignty in a way that minimizes the influence of elected national elites. According to these accounts, a web of individuals spread across national boundaries constitute "consumers" of judicial review who press their policy claims, building up judicial power in cumulative fashion (Alter 1996;[25] Conant 2002;[26] Slaughter;[27] Slaughter, Stone-Sweet, and Weiler 1998;[28] Stein 1981;[29] and Weiler 1999).[30] The societal actors in these accounts are almost exclusively legal or quasi-legal; judges, lawyers and bureaucrats who have a personal or institutional stake in enhanced judicial power. Such accounts illuminate why national courts have, over time, been receptive to the ECJ's expanding authority as a trans-European supreme

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[25] Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001)

[26] Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Ithaca: Cornell University Press, 2002).

[27] Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

[28] Anne-Marie Slaughter, Alec Stone Sweet, and J. H. H. Weiler, eds., *The European Court and National Courts: Doctrine and Jurisprudence—Legal Change in its Social Context* (Oxford: Hart Publishers, 1999).

[29] Eric Stein, "Lawyers, Judges and the Making of a Transnational Constitution," 75 *American Journal of International Law* (1981).

[30] Weiler, *supra*, n. 10.

court. In one variant, judges themselves play a dominant role in championing judicial supremacy. Weiler (1999) offers a "judicial empowerment" thesis crediting the ECJ's burgeoning activism to concerted action by judges of the ECJ and national judiciaries. At first blush, the judges in national courts might seem hostile to the ECJ, viewing it as an institutional competitor. Weiler, however, has persuasively demonstrated that submitting to the tutelage of supranational institutions can enhance the competence of national courts vis-à-vis other national institutions, providing them with an expanded doctrinal arsenal and enhancing their authority relative to other state institutions.[31] Those familiar with the Warren Court's jurisprudence and the landmark decision of Justice Marshall in *Marbury v. Madison*[32] will be familiar with claims that judges, though possessing neither the purse nor the sword, can dramatically extend judicial power on their own initiative. Such claims advance what I call a "heroic" or "auto-gestation" theory of judicial empowerment. These claims appear plausible as judges frequently attempt to expand the influence of their office and rarely shy away from the tool of judicial review when it is on offer. In the case of the 1974 amendment extending judicial review in France, the sitting President of the Constitutional Council, as well as his two predecessors, came out strongly in favor of it.[33] Some evidence suggests that the proposed amendment itself may have been the brainchild of the Constitutional Council's President.[34]

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[31] Weiler , *ibid*.

[32] *Marbury v. Madison*, 1 Cranch 137 (1803).

[33] Joel Boudant, "Le President du Conseil Constitutionnel" in *Revue du droit public*, 3 Mai-Juin (1987).

[34] Although officially sponsored by the President of the Republic, Valery Giscard d'Estaing, Roger Frey, the President of the Constitutional Council, was most likely the true author of the reform. Frey's two predecessors as President of the Constitutional Council disagreed on the full version of the 1974 amendment, opposing the government's text that would have allowed the Council to convoke itself (this

Given the flexibility inherent in the interpretation of texts, it comes as no surprise that judiciaries are prone to institutional mission creep, a fact born out by case study after case study. Judicial review, in particular, however, marks a sea change in the balance of political power among institutions. We should credit this modified "interest-group" based approach with capturing the demand-side of judicial empowerment. But this approach can accurately reflect only half of the story. We must ascribe at least as much importance to the supply-side of judicial politics. Why do *elected* national elites—legislative and executive; those with the ultimate power to weaken their own institutional capacities—accede to the agenda of these interest groups, especially on occasions when such groups lack any significant electoral base or direct support in public opinion? The cases of the ECJ, the ECHR, and their peculiar legal regimes are special. While an interest-group approach has been successful in illuminating the rise of transnational judicial review in Europe, it does not travel easily to national settings, particularly in France where elected officials were key decision-makers and elite hostility to judicial review appeared well-entrenched.

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portion of the amendment was rejected by Parliament). Both, however, endorsed the core innovation of the amendment allowing the Council to exercise judicial review over legislation upon the request of 60 members of parliament.

d. Utilitarian Explanations of Judicial Review

Utilitarian theories offer a needs-based explanation of judicial review. Cappelletti (1980) locates the global trend of judicial activism in this century's increasing socioeconomic complexity and the rise of the modern welfare state.[35] The diversity and intricacy of modern industrial (or post-industrial) societies brings an exponential rise in demands upon the state and increases the frequency of conflicts requiring mediation. Such demands presumably overwhelm the capacity of already stretched legislative resources. Courts emerge as critical first-responders capable of supporting over-worked elected officials. From this perspective, judicial review seems to acquire an evolutionary inevitability in advanced societies.

One interesting variant of this approach is the "ungovernability" thesis.[36] When political issues are sufficiently polarized to make compromise too difficult…or too expensive…for legislatures to broker, legislatures may only be too happy to pass authority to judicial officers with no electoral accountability. Enshrining constitutional rights in written form and placing them under the surveillance of judicial guardians transcends political impasse in "deeply divided societies." Courts can provide third-party dispute resolution where "ordinary" politics breaks down. Graber (1993) is a prominent

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[35] "…I should say that historical pressures are uni-vocal in calling for judicial activism in modern systems of government. This holds true beyond the borders of Europe—and beyond the borders of judicial review itself…the rise of the modern "welfare" government and the parallel increase of socioeconomic interdependence of groups, categories, and classes of citizens demand a corresponding strengthening and growth of the function of "judicial protection" against the awesome power of both "big government" and groups or organizations. In particular, judicial review of legislative action has become an essential element of the the modern Rechstaat or "rule of law." See Mauro Cappelletti, "The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis," 53 *Southern California Law Review* 409 (1980).

[36] Hirschl, *supra*, n.5.

exponent of this approach in his examination of the relationship between the United States Congress and the Supreme Court. In essence, legislators, too inflexible to compromise or too pusillanimous to do so in the teeth of a culturally/ideologically polarized public, will punt uncomfortable issues to judicial institutions. As with all functionalist accounts of change, the ungovernability thesis assumes the inevitability of institutional change. It cannot always illuminate why particular institutional forms are preferable to others or credibly account for the timing of institutional change. Nor does it specify when a society becomes "ungovernable." What constitutes a "deeply divided society" requiring judicial arbitration? Does France in 1974 count? Sweden in 1974? What about Israel in the 1990s? As important, functional accounts exclude the role of agency, the importance of the innovators themselves who have their own political preferences and constraints within which they must operate.

e. "New Institutionalist" Theories/Rational Choice

We may divide institutionalist explanations of judicial empowerment into three distinct arguments: the "Fire Alarm" Mechanism," "Credible Commitments," and "Competitive Electoral Markets." The first variant suggests that judicial review operates as a "fire alarm" mechanism for monitoring bureaucracy.[37] Allowing individuals who feel they have been wronged by government agencies to sue in the judicial system is less costly for the executive and legislative branches than its alternative, the "police patrol" mechanism. It is not evident, however, why a fire alarm mechanism would need to take

[37] Roderick D. Kiewiet and Mathew D. McCubins, *The Logic of Delegation* (Chicago: University of Chicago Press, 1984).

the form of a constitutional court. Regimes lacking constitutional courts (and judicial review) often boast distinguished administrative courts generally acknowledged to have performed well in protecting citizens from the abuse of executive power. The empirical record is also unclear on whether regimes with constitutional courts have outperformed those without them in pushing the frontiers of "civil liberty." To take a contemporary example, the right to legal equality for same-sex unions has not fared demonstrably better in countries with a strong tradition of judicial review than those without them. Among existing countries where same-sex unions are legal, the majority are the result of parliamentary rather than judicial initiative. The bureaucratic monitoring rationale, moreover, is redundant in the case of France where the supreme administrative tribunal, the Conseil d'État has had a long and celebrated record in protecting citizens against administrative abuse. Indeed, the Council of State has long served as a model and inspiration for other judicial regimes. Deeper political or ideological motivations must underpin the French decision to create a court capable of vetoing legislative initiatives originating from the executive or legislative branch.

Another variant proposes that judicial review represents a solution to the "credible commitments" problem.[38] Particularly relevant to democratizing states, the creation of an independent judiciary capable of monitoring the executive and legislative branches' compliance with basic rules of the game bestows a political regime with enhanced credibility in the eyes of political or economic "investors." Under the assumption that

[38] Barry Weingast, "Constitutions as Governance Structures: The Political Foundations of Secure Markets," Journal of Institutional and Theoretical Economics 149 (1993), 286-311; Oliver Williamson, "Credible Commitment: Using Hostages to Support Exchange," 73 *American Economic Review* 4 (1983).

legislation is the product of interest group competition, legislatures may find it in their own interest to bolster judicial independence. This assures investors that subsequent legislatures will not find it easy to rollback legislative concessions made by prior legislatures.[39] The credible commitments approach also diminishes the crucial role played by key political office-holders and is generally assumed to be driven by economic interests. As we will see, it does not map well onto the French experience in 1974.

Perhaps the most compelling and easily applied domestic-based explanation of judicial empowerment is the "competitive electoral market" thesis. Privileging a more traditionally "political" analysis and building on Landes and Posner's (1975) game theory exploration of judicial independence, Ramseyer (1994) argues that rational politicians will keep courts independent under a restrictive set of circumstances: "Fundamentally, whether they keep them (courts) independent…depends on two things: (a) whether they expect elections to continue indefinitely, and (b) if elections continue, whether they expect to continue to win them indefinitely."[40] Politicians will grant courts independence only when they are somewhat confident that elections will continue and they expect to lose elections. In this way they may safeguard their own policy preferences while simultaneously blocking a victorious opposition from using the courts to advance its own policy objectives. The electoral market thesis, however, frames itself in narrowly partisan terms. This partisan-based approach may oversimplify to a fault, neglecting the role of judicial and bureaucratic actors and missing the complexity of cross-cutting cleavages in

[39] William M. Landes and Richard Posner, "The Independent Judiciary in an Interest-Group Perspective," 18 *Journal of Law & Economics* 875 (1975).
[40] Mark Ramseyer, "The Puzzling (In)Dependence of Courts: A Comparative Approach," 23 *Journal of Legal Studies* 721, 722.

multiparty systems. It also presents empirical problems in determining the intentions of political actors. Finally, the long-term/short term dilemma inherent in creating constitutional courts complicates Ramseyer's conditions. While court members are typically political appointees of the government in power, the length of terms judges serve and their jurisdictional opportunities for intervention in the policy process vary widely. How does an elected official determine whether short-term gains will be worth the long-term costs of judicial independence? Still, Ramseyer provides a credible theory of judicial independence that can be tested against the decision of the French Parliament to approve the 1974 constitutional amendment authorizing strengthened judicial review.

e. Hegemonic Preservation

Hirschl (2004, 2001) elaborates upon Ramseyer's election-driven approach by spotlighting the role of political elites in culturally divided societies. Although he presents his "hegemonic preservation" thesis as a departure from the electoral market perspective, it is arguable how far Hirschl moves from the latter's basic assumptions since the prospect of impending electoral defeat plays a pivotal role in his work as well. Hirschl locates the origins of constitutional reform (specifically, judicial review) in "a conscious strategy undertaken by threatened elites seeking to preserve their hegemony vis-à-vis the growing interest of peripheral interest groups in majoritarian policymaking arenas".[41] Hegemonic preservation promises a richer and more nuanced account of judicial review's origins. It admits a greater role for the cultural and ideological values

[41] Ran Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Israel's Constitutional Revolution," 33 *Comparative Politics* 3 (2001), 319.

held by political elites in addition to those elites' short-term electoral interests. For a while, Hirschl's case studies raised questions about how well his thesis travels beyond the Middle East. This is largely an empirical question awaiting testing, though his latest work extends his analysis to several non-Middle Eastern countries. It is problematic that the cases Hirschl considers closely are: (a) in the Middle East (Egypt, Israel, Turkey), (b) cases where the cultural fault-lines dividing hegemonic elites from their opponents are primarily religious or ethnic in nature[42], and (c) include two cases where the extent of judicial independence is suspect due to authoritarian pressures. Still, there is no reason why the basic premise of hegemonic preservation—that elites in a position of declining strength use the judiciary to fight a rearguard action in defense of their policy preferences and values—would not be applicable to countries lacking explosive secular-religious fissures. I thus seek to apply the theory to longstanding democracies such as Canada, France, Sweden, Austria, and New Zealand which embarked on experiments with judicial review.

[42] See Ran Hirschl, "Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales", paper presented at the University of Texas School of Law conference, "Comparative Avenues in Constitutional Law", February 27-28, 2004. Hirschl notes that while secular elites initiated Israel's constitutional revolution in 1992, it was supported by industrial and professional elites who have pursued their own neo-liberal agenda through litigation. The most polarizing conflict confronting the Israeli Supreme Court, however, remains the inherently challenging task of reconciling the Constitution's twin directives requiring a state that is simultaneously Jewish and democratic.

Table: Theories of Judicial Review

Approach	Domestic	International
Cultural/Normative	Contractarian Dworkin (1990)	Post-totalitarian paradigm/ Diffusion of rights norms (Vallinder 1994)
Interest Group Mobilization	Heroic Justice/Auto-gestation Weiler (1999)	Transnational "judicial consumers" (EU) (Slaughter 2004; Conant 2002; Alter 1996)
Functional/Utilitarian	Modernization Theory (Cappelletti 1979) "Ungovernability" Theory (Graber 1993)	Federal Consolidation/Regional Integration (EU-specific) (Cappelletti 1979)
Institutionalist	Credible Commitments (Weingast 1993); Insurance Theory/ Commitment Theory (Ginsburg 2003; Holmes 1988) Fire-Alarm Mechanism (Kiewiet & McCubbins 1991) Electoral Markets (Posner & Landes 1975; Ramseyer 1994)	
Hegemonic Preservation	Elite-driven process/ Divided Societies (Hirschl 2004)	

4. Research Methodology and Preview of the Argument

The project is a focused case study of France's adoption of effective judicial review. This case study is supplemented with a multi-case analysis of several other countries (pre-existing democracies) that have adopted judicial review relatively recently. The chapters that follow draw primarily upon data collected during 10 months in Paris, France. During this time my research focused on a careful examination of (a) the official transcripts of the parliamentary debates and constitutional convention leading to the passage of Giscard's 1974 amendment, (b) newspaper coverage of and political editorials on the subject of the constitutional reform, and (c) official political party documents and policy statements, particularly those of the French Left, articulating elite positions on the Constitutional Council and, more specifically, the role of judicial review in the French political system. Of particular value in obtaining these data were the Bibliothèque Administrative of Paris, the Archives du Socialisme, the CUJAS, and the Bibliothèque d'Information Publique. I was fortunate enough to interview the distinguished François Luchaire, a former member of the Constitutional Council and an outside participant in the debates of 1974. His intimate interaction with several of the key political actors in the October debates, as well as view of the legislature from the perspective of a Council member, made him a valuable resource. While I had hoped to interview directly several of the key participants in the legislative debates, the unfortunate problem of mortality proved a formidable obstacle. Of forty-two legislators on record as having actively participated in the debates, only twelve survived and most of these had retired outside of

Paris. Where interviews were not possible, I attempted to substitute correspondence. What follows is a preview of some of the key arguments, specific to the French case, advanced in the chapters that follow. As my research draws almost exclusively on French sources, the following pages contain a considerable number of quotations. All quotations, unless otherwise noted, are my own.

a. An Intra-Elite Affair.

The most obvious conclusion to draw from the 1974 debates in France over judicial review and the landmark amendment they produced is that they were an exclusively elite-driven phenomenon. The President of the Republic formally announced the project of reform. The evidence points to a member of the Constitutional Council and veritable "Baron of Gaullism," Roger Frey, as the possible inspiration and probable co-author of the reform. The debates themselves attracted little interest from the public, a fact that the opposition ruthlessly exploited at every turn in the debates[43] and that worried not a few of those sympathetic to the Government's project. Following a stream of accusations from the Left branding the Government's reform as a "constitutional diversion" and a "mini-reform", the well-respected independent and legal specialist Pierre Marcilhacy warned: "In having the appearance of turning attention towards a constitutional reform that interests no one, not even specialists like myself, you lose a little of your time and energy".[44] Politicians faced neither pressure from their districts nor

[43] "Why undertake such an adventure to which it is easy to understand the entire country is indifferent?" Edgar Tailhades, *JORF*, Sénat Débats, Oct. 16, p. 1332.
[44] *JORF*, Sénat Débats, Oct. 16, p. 1324.

determined lobbies, an important distinction in cases from some other countries.[45] Many feared rather that the mounting social and economic crisis in France at the time would leave them vulnerable to the accusation that they had fiddled with constitutional parlor games while France's economy burned.

A strong signal of public apathy was Giscard's decision not to bypass the exclusively parliamentary amendment procedure—which required 3/5 of both chambers meeting together to agree upon the text of the amendment in identical terms—and to submit his proposal to a popular referendum. Approval by referendum would have only required a simple majority of Parliament and a simple majority of the public voting in the referendum. Yet the Government was apparently reluctant to "go public" with its reform, a point mocked by Henri Caillavet during the debates when he contended that the limited nature of the reform pitted the "legal country" versus the "real country".[46] At the same time as he was affirming to the press the interest that every Frenchman should have in the outcome of the reform, even then Prime Minister Jacques Chirac conceded that it (the reform) "might appear a bit too technical to interest public opinion".[47] In the absence of a truly "public" debate, however, a lively exchange of opinions and quite specific critiques of the proposed reforms thrived outside of Parliament in the columns of the most prestigious newspapers, notably in *Le Monde* and *La Libération*. Here legislators, ex-politicians, and academics, loosed from the constraints of party discipline or

[45] The absence of a significant industrial or commercial "lobby" on this issue distinguishes the French case from Israel's much-studied constitutional revolution of the 1990s.
[46] "If you couldn't get a Majority in Parliament, would you put it to referendum?" Henri Caillavet, *JORF*, Sénat Débats, Oct. 16, p. 1320.
[47] *Le Monde*, 20-21 October, 1974, p. 7.

parliamentary procedure, carried on an intra-elite dialogue that often prepared the ground for subsequent parliamentary sessions. On several occasions during the floor debates, in both the National Assembly and the Senate, an orator would rise to quote the morning's editorial of this or that *doyen* or statesman in prominent national papers. While coverage in France's flagship media may have offered the French public a window onto the debate over judicial review, the legislative deliberation and decision-making took place in what was almost as close to an elite vacuum as can be imagined. The arrival of judicial review in France was from the top-down. To this limited extent, the French case conforms to Hirschl's "hegemonic preservation" theory, which holds that elite preferences drive judicial empowerment, though the role of "interest groups," broadly defined, was next to negligible. In short—and as my subsequent analysis of the debates will show—the origin of meaningful judicial review in France was not only an intra-elite affair, but an affair that attracted the impassioned interest of only a minority of that elite.

b. Cultural Factors: Judicial Review as a "Home-Grown" Phenomenon

I have mentioned the widely held argument that judicial review proliferates as a result of the diffusion of international norms, the growth of international institutions (such as the EU), a reaction to prior histories of authoritarianism and an "example effect". Certainly, a profound social shift was taking place in post-1968 France, as it was in many other countries. Social liberalism and a culture of rights-talk appeared increasingly ascendant in French political discourse, a trend to which French President Giscard d'Estaing was well-attuned. This cultural transformation was to great degree an international phenomenon, with political elites mediating its impact on policy. The

introduction of judicial review to more effectively safeguard individual and minority rights is consistent with a variety of liberal reforms (abortion, contraception, death penalty, prison reform) introduced in France and other European countries during the late 1960s and 1970s.

It was not, however, a direct result of this liberalization. Many countries in Europe experienced the same cultural shift without implementing judicial review. Moreover, while specific liberal causes had their domestic constituencies and pressure groups in France, judicial review was not one of them.[48] As noted above, there was no popular movement for constitutional reform.

The influence of the European integration, particularly the examples provided by its two celebrated judicial bodies, the European Court of Justice and the European Court of Human Rights (ECHR), strangely enough, seems to have left no footprint on the 1974 debates. The lone voice invoking their relevance was that of François Luchaire, former member of the Constitutional Council, who suggested that the reform amend the Constitution to explicitly guarantee individual rights under the Constitution *and* international treaties. Luchaire went even further, suggesting that the European Convention of the Rights of Man be codified in the Constitution.[49] No parliamentary group introduced such amendments.

Of course, the debates over judicial review did not take place without awareness of the world outside France or alternative models of judicial review. Parliamentarians

[48] Many within the judiciary and the legal academy had, of course, been enthusiasts of expanded judicial oversight of the state. Their influence was felt primarily, however, in the circulation of legally trained and conditioned individuals in and out of the state administration and the political class.
[49] "Les Ambiguïtés de la reforme constitutionnelle" in *Le Monde*, Oct. 8, 1974, p. 9.

frequently invoked comparative examples, but generally for the purpose of advocating or criticizing particular modalities of, not the legitimacy of, judicial review. The debates do betray a sense among several of the participants that France was somehow lagging behind the rest of the industrial democracies in the stability and quality of its liberal institutions, and that it needed to "catch up". This is perhaps most explicit in Chirac's opening speech to both assemblies gathered in the *Congrés du Parlement*. In that address, he urged them to support the government's reform (now whittled down to a single proposal) in the name of "modernization," emphasizing that stronger institutional safeguards for liberty are appropriate to the "dignity of a great country".[50] The American and German high courts were the most frequent examples deployed. Yet even among those committed to a more authentic presidential system, i.e. those desiring to specifically extend constitutional surveillance to the presidency as well as parliament, the American example, in particular, provoked a marked ambivalence. Even Pierre Marcilhacy, presidentialism's grand champion in the Parliament and a figure respected on both sides of the aisle, doubted the receptivity of French political culture to a true system of judicial review. As he wistfully conceded during the Senate debates, "Above the religion of Constitutionalism is the idea that the nation does as it will".[51] The desire to stay true to French political tradition and not go wandering too far abroad permeated the rhetoric of the Right. On this point, the government and the leadership of the UDR strove to maintain a difficult balancing act. On the one hand, the presence of strong misgivings within the ranks of the

[50] *JORF*, Congrés du Parlement, Oct. 21, 1974, p.4.
[51] Pierre Marcilhacy. *JORF*, Sénat Débats, Oct. 16, p. 1324.

UDR…especially among several particularly respected senior members[52]…required them to stress the limited nature of the reforms. In a tip of the hat to these orthodox members, Chirac stressed that the reform was "not a modification of Gaullist principles" but a confirmation of their spirit.[53] On the other hand, they had to demonstrate that the reform was significant enough to move the entire Parliament to Versailles for an extraordinary session (at a moment when economic issues were pressing) to avoid confirming critics' repeated claims that the reform was a sideshow. Clearly, this was not an easy task.[54]

c. The French Case fits neither the "hegemonic preservation" thesis nor the "electoral markets" thesis from which it is derived.

The French case poses several problems for the electoral markets theory, and its more recent variant, the hegemonic preservation thesis. One application of this approach to the French case, occasionally mentioned but not well-supported, is that the Center-Right majority in 1974, spooked by the strong showing of the Left in the 1973 presidential elections, were already thinking of possible "rear-guard" actions against the possibility of the Left's future victory. A variation of this argument, again poorly supported, speculates that certain representatives on the Right sought a strengthened judiciary to protect the interests of property in the event that the Socialists might someday deliver on their promises to nationalize key sectors of the economy. According to this

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[52] A dozen of the most prominent UDR legislators, the so-called "barons of Gaullism," conspicuously broke party discipline and refused to vote on the proposal.

[53] *JORF*, Congrés du Parlement, Oct. 21, 1974, p.3.

[54] The notion that the government had tied itself to the mast of a quite messy constitutional proposal in order to save face was memorably captured by Etienne Dailly: "…if I have correctly understood (the government's argument), I reach the following conclusion: Let us revise; revise well, revise poorly, but revise because, whatever it costs, we must go to Versailles!" *JORF* Sénat Débats (Oct. 16, 1974), p. 1317.

perspective, the super-charged Constitutional Council that emerged from the 1974 amendment was a "Trojan Horse" for the Socialist majority that finally took power in 1980.[55]

Several obvious objections meet this interpretation of the events of October 1974. First, perhaps the strongest *principled* opposition to the 1974 reform came from inside the majority alliance itself. The Gaullist UDR included a deeply conservative nucleus—contemptuously labeled the "Vestal Virgins" by one Socialist critic[56]—who resented any tinkering with de Gaulle's constitutional handiwork. If any representatives of the majority harbored such motivations during the National Assembly or Senate debates, they did not make even oblique references to them over the course of the amendment process, with one exception. The only evidence of hegemonic "intent" is a somewhat vague exchange between an RI and Socialist delegate in the National Assembly and an unsupported (and again, vague) allegation in *La Libération*, the leading Socialist newspaper.

Second, the Gaullists' indispensable ally in parliament, the Independent Republicans (RI), viewed themselves as a rising party, not a receding party, and hoped to someday be a new majority at time of debate. Although the calculations of "rational actors" concerning future events are difficult to identify precisely, there is no reason to believe that the reform's most enthusiastic supporters, the RI, with new elections years distant, clearly divined that a Socialist majority would shatter their blooming "majority of the center" over six years later. Six years is a long time, even in French politics.

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[55] Stone, *supra*, n. 13.
[56] Jean-Pierre Cot. *JORF*, Assemblée Nationale Débats (Oct. 8), p. 4861.

Third, and critically, the Left did not oppose judicial review *per se*. In fact, a preponderance of evidence—in particular the Left's platform as laid out in its Common Program—supports the finding that both the Socialists and the Communists were prepared to go much further in expanding judicial review than Center-Right Government itself. Official Socialist, but especially Communist, platforms and programs advocated a more aggressive overhaul of the Constitutional Council which, if adopted, would have guaranteed even greater judicial independence. Although the Left entered the debate with gusto and went on record to oppose the amendment, its representatives worked constructively in committee to favorably shape the terms of the proposal.

Fourth, the constitutional reform of 1974 simply cannot be viewed outside the context of the Government's (Giscard's, in particular) raft of genuinely liberal reforms. (These reforms encompassed abortion rights, free speech, penal reforms, and lowering of the voting age, among other subjects). The work of both Madelin (1975) and Bothorel (1983) conclude that Giscard was attempting to enlarge his "presidential majority" *toward* the Left—an ironic fact in retrospect given that his majority really depended on the Right, the proposal itself originating with an arch-Gaullist.[57]

d. The real controversy for a majority of the participants in October 1974 was not over ***whether*** *there should be judicial review, but rather what form it should take.*

That question, in turn hinged on the balance of power between the executive the executive and legislative branches. As mentioned above, the political Left in France did not oppose

[57] Henri Madelin, "Le Libéralisme de Giscard" (December 1975), pp. 1157-1170; Jean Bothorel, *Histoire du Septennat Giscardien: Vol. I Le Pharon* (Paris: Grasset, 1983).

the expansion of judicial review on its own terms, particularly as such a move could only bolster their oppositional resources in Parliament. Rather, the record demonstrates that the resistance of the Socialist and Communist leaderships to Giscard's constitutional reform was that it was a "réformette" which failed to go far enough.[58] Of course, the twin partisan objectives of (a) embarrassing the new President, and (b) denying the government credit for liberal reforms were key motives here. But there was more to it than this.

The October debates over the Council's future could not help but reflect an enduring tectonic debate over the nature of executive power under the 5th Republic, dating back to 5th Republic's founding in 1958 and de Gaulle's (arguably) unconstitutional expansion of executive power by referendum in 1962. This debate cut across party lines, as a majority of the Center-Right represented by Giscard's Independent Republicans had vigorously opposed de Gaulle's self-aggrandizing plebiscite along with parties of the Left. For these centrists, the 5th Republic's re-constituted executive branch flirted with authoritarianism. To many the cure lay with the establishment of a "true" presidential regime in place of de Gaulle's lopsided executive edifice. Parliament should be strengthened vis-à-vis the executive branch. Establishing a veritable supreme court was one obvious means of creating a regime where the government might be held accountable to Parliament, and not simply the other way around. The venerable Independent, Pierre Marcilhacy, articulated this pro-parliamentary position most explicitly. Marcilhacy ultimately voted against the constitutional reform,

[58] *JORF*, Assemblée Nationale Débats, October 8, 1974, p. 4956.

after a passionate but nuanced declamation, because he felt it did not provide the prerequisites of an authentic presidential regime; a sufficiently independent supreme court and a vice president.[59]

Previous work on French judicial politics has failed to credit the significance of institutional conflict in the 1974 debates over judicial review. Because the issue of judicial reform implicated Parliament's institutional powers and identity, the debates in some part pitted Parliament against the Government, as well as Right against Left. This inter-institutional conflict can be tied to a more general attempt on the part of Parliament to assert itself vis-à-vis the government in the period from 1971 to 1975.[60] The October debates essentially capped this period of a resurgent legislative branch. Indeed, the 1974 debates marked the *sole* instance of majority discipline breaking down on an important government initiative, when a sufficient number of Gaullists and independents made it clear that the government would have to drop its proposed extension of a right of auto-referral to the Constitutional Council if it expected its more limited right of referral to survive.[61]

e. Auto-gestation: A necessary but insufficient condition.

As I have previously argued, there are many scholars, tellingly concentrated in legal academia, who adopt a "heroic" view of judges and their role in judicial empowerment. Indeed, there are at least two obvious cases that appear to support the

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[59] *JORF*, Congrés du Parlement, Oct. 21, 1974, p.8-9.

[60] See Guy Carcassonne, "La Résistance de l'Assemblée Nationale a l'abaissement de son role," 34 *Revue française de science politique*, 5 (1984), pp. 910-92, and "L'Assimilation progressive par les Centristes," *Revue française de science politique* 4 (1984); pp. 828-843.

[61] Didier Maus, "La Constitution jugée par sa pratique: réflexions pour un bilan," 43 *Revue française de science politique* 4-5 (1984).

hypotheses that individual judges or a particular cluster of justices, through force of will and creative jurisprudence, transform the policy-making role of courts. One has only to think of the United States' John Marshall, that Atlas of "judicial supremacy," or the aggressive path an assertive ECJ cut for itself in the mid-1960s. This perspective is especially common among French in regard to the 1974 reform. For one, the government's reform was inscribed "in the inherent logic of the evolution of jurisprudence".[62] For others it was the Constitutional Council itself that created the conditions of its own reform. Emerging from its over-cautious and inauspicious beginnings, it gradually developed jurisprudence, the *bloc constitutionnel*, which established the Council's respectability. The celebrated decision of July 16, 1971, in particular, showcasing the Council's judicial creativity and, more important, independence from the government, ultimately convinced political elites that it was a legitimate—that is to say, independent—judicial body capable of wielding authentic powers of judicial review.[63] Furthermore, legal academics had kept alive the case for expanding the Council's power of judicial review in a number of articles (Philip, Eisenmann and Hamon 1961, Favoreu 1967) written during the 1960s.

But the apparent origin of such a reform lies with a politician and goes back to 1958. M. Triboulet proposed an amendment to the new constitution during the deliberations of the Consultative Constitutional Committee, the body most responsible for shaping the constitutional contours of the 5th Republic. It would have allowed the

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[62] Loïc Philip, quoted in Joel Boudant, "Le President du Conseil Constitutionnel" in the *Revue du droit public* 3 (Mai-June 1987), pp. 589-676.
[63] Louis Favori, *Vingt ans de saisine parlementaire* (Paris : Economica, 1994).

President of the Republic, the Prime Minister, the Presidents of both the National Assembly and the Senate, *and one-third of either chamber of parliament* to refer legislation to the Council.[64] The amendment did not survive the drafting process. The road to judicial review in France is strewn with the cadavers of reforms similar in scope and purpose to the one that finally succeeded in 1974…some nine such proposals managed to make it to floor debate in the National Assembly prior to that pivotal year.[65] So what made the year 1974 different?

It is certain that the Council brightened its own star by winning wide respect for its jurisprudence in the three years preceding its new grant of power. By contrast, in its earlier years the Right regarded the Council with something akin to indifference while the Left was generous in its contempt for this "derisory cap for a derisory democracy."[66] The other flaw with an auto-gestation explanation of the 1974 amendment is the relative disarray of the Council according to one of its members. François Luchaire, who served as a member of the Council from 1965 to 1974, recollects that the Council suffered from a lack of institutional solidarity and institutional prestige during most of his tenure.[67] The political nature of Council appointments and the hostility of the government's political opposition depressed morale and even made it difficult for the Secrétaire General to get the Council's members to meet together. According to Luchaire, the Council even discussed seriously its own possible demise, as it enjoyed no public support, indeed little

64 *Documents pour servir l'histoire de l'élaboration de la constitution, vol. II*, p. 594.
65 Patrick Juillard, "Difficultés du changement en matière constitutionnelle: L'aménagement de l'Article 61 de la Constitution," 90 *Revue du droit public* (1974), pp. 1703-1772.
66 François Mitterrand. *Le Coup d'Etat permanent* (Paris: Plon, 1964).
67 Interview with M. François Luchaire, former member of the Constitutional Council, November 23, 2003.

public awareness at all.[68] The Council was thus in no position to push an expansionist agenda. Professor Rivero's verdict on the importance of the 1974 reform is succinct: "In 1971 the revolution was made possible: the revolution had not yet taken place."

It is significant, of course, that the President of the Council, Roger Frey, is at least partially responsible for the idea of the 1974 reform. Although Giscard took credit at the time, and certainly attached the prestige of his office to the reform, Frey later claimed credit for its origin.[69] Frey could not possibly, however, take credit for its passage. Indeed, Frey's sympathy for the reform put him at odds with several of his fellow Gaullist barons who remained in parliament and refused to support the amendment.

f. Institutional Deference: The Acquiescence of the Conseil d'État

Since 1958, France has been host to a hydra-headed judiciary. In a sense, France really has three "supreme courts." Along with the Constitutional Council, there is the Cour de Cassation (Court of "breaking" or quashing"). It sits as the highest court of appeals in ordinary civil and criminal disputes. It reverses or confirms the decisions of lower ordinary courts but has no power to review the constitutionality of government acts. The jewel of the French administrative state, however, is the Conseil d'État, or, Council of State. Originating under the Napoleonic regime, it strength derives from the fact that it wears two hats. It is France's highest administrative court, adjudicating suits against state officials. At the same time, it is the paramount advisory body to the French

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[68] "Le Conseil Constitutionnel a 40 ans," a conference organized by the Conseil Constitutionnel, 27-28 October, 1998 (Paris : L.G.D.J., 1998).

[69] Joel Boudant, "Le President du CC" in *Revue du droit public* 3 (Mai-Juin 1987), pp. 589-676. Citing interview with Roger Frey in 1986 during which he described his contribution to the idea of the reform as having been "very important" and that he had conveyed the idea to Giscard, along with other ideas that were included in Giscard's address of May 24 announcing the reform of Article 61.

government. Despite the potential conflict between these two functions, the Council of State has evolved as one of the most independent and highly respected institutions in France, as well as one of the most—if not the most—prestigious tribunals in Europe. Following Conant's (2002) observation that "no political institution graciously cedes authority to another," one might expect to see evidence that the Council of State opposed the Giscard government's proposal widening the right of referral to the Constitutional Council. Several factors suggest why it might interpret its relationship to the Constitutional Council as a zero-sum game.

Because the Council of State acts as the government's official legal advisor, it has a heavy hand in the drafting of all important government sponsored legislation. In fact, Article 39 of the French Constitution mandates that all Government bills be referred to the Council of State for non-binding, secret, advisory opinions before they are introduced to Parliament. When the Constitutional Council strikes down a law that its sister council has approved, it often appears as a reprimand to the Council of State's legal reasoning. This danger is especially acute when the government leaks the advisory opinions of the Council of State to the public in advance. An additional factor is the position that the Council of State enjoyed prior to 1974 as France's paramount legal institution. Although lacking the power of judicial review over ordinary legislation, it had carefully and patiently crafted an impressive rights-based jurisprudence in administrative law rooted in "general principles" of law. With the passage of the 1974 amendment, it was only a matter of time before the Constitutional Council's jurisprudence would begin to impose itself upon, and in some cases come into conflict with, that of the Council of State.

Indeed, the convergence of these two bodies' jurisprudence after 1974 has been an occasionally troubled and still incomplete process. Finally, the members of the Council of State are drawn from (and still represent) the elite of the French civil service. Institutional identity runs deep among Councilors of State, who combine superb legal training and practical political experience, often rotating in and out of Government cabinets as valued advisors. In Chapter Four I provide some particularly vivid examples of the Council of State's disdain for its sister institution in the early days.

There are thus several reasons members of the Council of State might have resented and opposed the 1974 amendment empowering the Constitutional Council. I find parallels to this situation in the reaction of national courts to the European Court of Justice's threat to their autonomy in the 1960s and 1970s (Alter 1996; Slaughter 1998). As in the case of the French Constitutional Council and Council of State, national courts faced certain costs in acknowledging the judicial supremacy asserted by the ECJ. Among these, potential decline of national courts' own prestige and disruption of well-developed bodies of national jurisprudence figured largely.

Despite this, members of the Council failed to oppose the 1974 reform. *To the contrary, evidence supports the conclusion that the Council of State favored the grant of additional avenues of referral to the Constitutional Council*. According to one member of the Senate's Law Commission, members of the Council of State had approached him to express their support for a proposed (and ultimately failed) amendment that would have allowed both the Council of State and the Cour de Cassation to refer constitutional questions to the Constitutional Council at their discretion. Such an amendment would

have essentially transformed the Council into an appellate body. What explains the Council of State's passivity, even solicitousness, in the face its rival's empowerment? I suggest two straightforward explanations.

The first is based on the special character of elite conditioning within the French State. Unlike bureaucrats in the United States, members of the Council of State can circulate freely between Government cabinets, Parliament and the civil service. This lack of institutional segregation, as well as the remarkable prestige and influence of the administrative corps, confers upon most of its members what de Gaulle described as "a sense of State". Given their breadth of experience and training, Councilors are not as likely to identify narrowly with their institutional interests, as in the case of ordinary civil servants, but with the State as a whole. It should be recalled that it was mainly a group of young Councilors of State under de Gaulle's Minister of Justice, Michel Debré (himself a Councilor), that designed the first draft of the 5th Republic's Constitution. It was this draft that hatched their institutional competitor, the Constitutional Council, in 1958. Second, high level members of the Council of State would probably have recognized that they might one day be eligible for service on the Constitutional Council, a capstone position for prominent French public servants. At the very least, the Council of State's modest role in the 1974 Amendment would seem to go against accepted notions about the narrowly self-interested rationales for organizational behavior.

g. Elite Convergence

My principle argument in Chapter Five draws heavily on the elite paradigm as explicated by Field and Higley (1980).[70] The basic premise of the paradigm is that elites drive any significant changes in a society's politics. Elites are defined as "persons who occupy strategic positions in public and private bureaucratic organizations" whose positions allow them "to influence the outcomes of national policies individually, regularly, and seriously" (alternatively, as those persons who individually, regularly, and seriously have the power to affect organizational outcomes").[71] A nation's elites generally divide into two categories. They are either "unified" or "disunified." Elite unity is a prerequisite for modern democratic regimes. In such regimes, elites are consensually unified, meaning that regime stability does not depend on ideological uniformity but rather an agreement to adhere to the basic (peaceful) rules of the game. It is characteristic of the opposition within a state having a consensually unified elite "to take publicly opposed positions while continuing to respect established institutions and procedures."[72]

But how are consensual elites, and thus democratic regimes, established? Not easily, according to Field and Higley. Consensual elites are most often the result of a sudden and decisive negotiated settlement. In such cases, factions that are politically exhausted or facing grave external crisis compact to subordinate their differences and abide by rules and procedures. Though hard to achieve, elite settlements are surprisingly

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[70] G. Lowell Field and John Higley, *Elitism* (Boston: Routledge & Kegan Paul, 1980). See also, Mattei Dogan and John Higley, eds., *Elites, Crises, and the Origins of Regimes* (Oxford: Rowman & Littlefield Publishers, 1998); John Higley, G. Lowell Field, and Knut Groholt. *Elite Structure and Ideology: A Theory with Applications to Norway* (New York: Columbia University Press, 1976).
[71] Field and Higley, *supra* n. 65, pp. 20 and 17.
[72] Ibid, 37.

durable once in place. The overwhelmingly majority of consolidated democracies in existence today are examples of such settlements. The origin of several democratic regimes, however, posed difficulties for the clear bifurcation of Field and Higley's unified/disunified paradigm. A handful of states seem rather to fall somewhere in between these two categories, manifesting neither the instability, the repression, nor the violence typical of disunified elites, but showing no evidence of a sudden elite settlement. In these states, democratic institutions persisted for long periods of time without a basic consensus among elites. Consensus slowly emerged over time as the elite in opposition gradually realized the futility of extra-constitutional and/or violent resistance. France is one of these regimes. How should we characterize these regimes?

Field and Higley identify these hard-to-classify cases as comparatively rare examples of a third category, "imperfectly unified elites." If unified elites "share a commitment to defend and abide by existing institutions and rules of political contest," imperfectly unified elites play by the rules only because they feel they have no other option.[73] Imperfectly unified elites (a) occur only at relatively high levels of socioeconomic development, and (b) consist of two groupings, a dominant Right and a Left in opposition. The Right's dominance makes it unnecessary to overthrow representative institutions, where it enjoys a stable majority, and impractical for the Left to attempt to do so. The ensuing status quo is, however, an uneasy one, with the Left "on record as intending to alter (the status quo) dramatically if and when they obtain

[73] G. Lowell Field and John Higley, "Imperfectly Unified Elites: The Cases of France and Italy," in R. Tomasson, ed. *Comparative Studies in Sociology, Volume I* (New York: JAI Press, 1978), pp. 295-317; 295.

power."[74] The Left either questions fundamental institutions of the regime or is suspected by the Right of paying lip service to them while plotting to destroy them in the event they ever capture power. While armed insurrection is unlikely, the Left attempts to destabilize the government through mobilization of sympathetic mass support taking the form of protests and industrial strikes. The Left's inability to capture political power through the electoral process while clinging to a program of radical reform gradually takes its toll, however, and the Left must ultimately moderate its programs and rhetoric. Slowly and grudgingly, it makes peace with existing political institutions. The imperfectly united elite becomes a consensual unified elite through the process of *convergence*, the ultimate test of which is a peaceful alteration of power from the Right to the Left through the ballot box.

The scenario described above is essentially a portrait of France between 1958 and 1980. Field and Higley's paradigm and description of France enjoys support among a number of French political scientists who have identified what Olivier Duhamel calls a "mouvement de convergence" transforming the French Socialist and Communist parties.[75] This movement was "progressive, implicit, and undeclared."[76] The Left in France during the 1960s and 1970s didn't so much shape the institutions of the 5th Republic as they were shaped by them. Many factors contributed to the Left's

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[74] Ibid, 300.

[75] See Olivier Duhamel, *La Gauche et la Cinquième République* (Paris: PUF, 1980); Henry W. Ehrmann, *Politics in France, 3rd ed.* (Boston: Little, Brown, and Co., 1976); Jacques Kergoat, *Histoire du parti Socialiste* (Paris: La Découverte, 1997); Jacques Moreau, *Les Socialistes et le mythe révolutionnaire* (Paris: Hachette Littérature, 1998); Hugues Portelli, "L'Intégration du Parti Socialiste a la Cinquième République," 34 *Revue française de politique* 4 (August-October, 1984), pp. 816-827.

[76] Duhamel *supra*, n. 70, 545.

transformation into a "loyal opposition." Successful control of local government, particularly in large cities like Paris and Marseilles, prevented the Left's total exclusion from power. The relentless feedback provided by electoral returns pressed an ever more practical party leadership to moderate a revolutionary agenda. François Mitterand's razor's edge loss to Valery Giscard d'Estaing in the 1973 presidential election emboldened the Socialists; power within existing institutions seemed within reach. For the Communists, 1968 had been a chastening year. The Soviet invasion of her socialist sister, Czechoslovakia, compelled the PC to burnish its liberal credentials lest the public conclude it was a fifth column for Moscow. A clear bell-weather of internal transformation was the PS and PC's Common Program of 1974. This document overtly broke with the Left's traditional preference for legislative supremacy and conceded the 5th Republic's presidential regime. It also looked to an enhanced role for the judiciary and placed more emphasis on individual as opposed to "social" liberties. If there was to be a social revolution, it seemed that it would have to arrive in discrete and somewhat "bourgeois" parcels.

5. Elite Convergence and Judicial Review

The real question may not be why political elites chose to extend the power of judicial review, but why the reform failed to go even further than it did. Apart from the objection of orthodox Gaullists within the UDR, the primary objection to the Government's reform program was not that it went too far, but that it did not go far enough. Analysis in Chapter Five will trace a growing consensus among the Centrists and the Left, but most particularly among the Socialists and Communists, for stronger judicial review. This development is evident as early as 1964, and is all the more significant because it unfolded in tension with the Left's residual allegiance to the idea of a strong parliament. The Communists' experience as a party of opposition during the 5th Republic's formative years seems to have induced a particularly striking conversion, at least on paper, to the doctrine of judicial independence. Despite its formal opposition to the Government's proposed amendment in October of 1974, by 1975 it was the Communist program that charted the most detailed and far-reaching proposal for a Supreme Court á *la American*. The Socialists had likewise recognized the need for a "true" Supreme Court in their official party platforms.

If the Left voted against the final text of the Government's proposed amendment at the Palais de Congrés, it was not because they opposed judicial review in principle. Members of the Left participated in committee discussions attempting to influence the ultimate shape of the reform. Nor did the minority oppose it on the basis of strategic foresight: by and large, the perception that under the leaves of this liberal rose the thorns of judicial imperialism…or even a "poisoned chalice" extended by a receding majority of

the (Gaullist) Right…does not seem to have figured significantly into the Left's opposition. The three most common arguments leveled from the benches of the Left during parliamentary debates can be summarized as follows:

(1) The reform of Article 61 was poorly timed. Economic and social problems were pressing and more important. The Government's proposal was merely a "constitutional diversion".

(2) The initial reform went too far. The Government's defeated proposal establishing auto-saisine, giving the Council jurisdiction to initiate review of legislation at its discretion, was anti-democratic and too sweeping.

(3) And yet, the most acceptable provision of the reform, pertaining to the number of parliamentarians required to trigger judicial review, did not go far enough. By leaving selection of the Council's members in the hands of the three Presidents (of the Republic, National Assembly and Senate respectively), the Government left the Council a "political organ" rather than a true judiciary. Amendments proposed by the Socialists and PC (ultimately rejected) aimed simultaneously at de-politicizing the Council's composition and extending its jurisdiction over executive acts.

In Chapter 5, I will explore how the French Left articulated its own vision of judicial review in the years leading up to the 1974 Amendment and in its immediate aftermath. While this vision diverged with regard to details within the Socialist and Communist parties, its essentials were the same. Prior to the constitutional debates over judicial review in 1974, the Left had already officially embraced a liberal or "bourgeois" conception of judicial review…a conception it had opposed since 1946. This conception corresponded exceeded the reforms proposed by the French Center-Right.

To what extent did this shift in policy symbolize an authentic ideological conversion as opposed to a shift in political interest? According to Duhamel (1980), "It is not constitutional choices which fix political positions, but political interests which modify constitutional positions".[77] Does the Left's conversion to judicial review, like its well-explored conversion to presidentialism generally, echo the considerations of a much older French politician, Henry IV, who considered Paris to be worth a mass? While Duhamel's proposition rings true to the average political scientist, I wish to challenge its categorical self-assurance. The causal relationship between constitutional values and political interests in the emergence of the Constitutional Council did not run in a single direction. On the one hand, I argue that the Left's proposed judicial reforms were a principled reconciliation of respect for the parliament with an acknowledgment that they were stuck with a presidential system. If presidentialism was a *fait accompli*, why not temper it with judicial oversight? Second, without meaning to be glib, one might answer the question above: "Does it matter?" Whether the Socialists indeed had experienced an ideological conversion on the road to Damascus or had resigned themselves to an acceptance of the once-despised, liberal notion of judicial independence in a thoroughly rational exercise of electoral calculus is arguably beside the point. Converge the French Left did, as born out by the Socialists' acceptance of the Constitutional Council's authority during the *alternance* of 1981-1986.

[77] Duhamel *supra*, n. 70, 31.

The concept of elite convergence is controversial and somewhat difficult to capture empirically. Only a few cases have been identified.[78] The chapters that follow put the role of judicial review at the heart of elite convergence in France. Chapter Two summarizes the structure and role of the French Constitutional Council under the 5th Republic. It examines the background of judicial review in France, the difficulties faced by the Council in light of traditional hostility to such review, and efforts by the Council to transform itself into a respected legal institution. Understanding the evolution of the Council from its creation in 1958 to the eve of its transformation in 1974 is critical to understanding the parliamentary debates and prospects for reform as they looked in October of that year. Chapter Three draws on official transcripts of the parliamentary debates leading to successful passage of the 1974 Amendment. I examine the issues most important to those actively engaged in the amendment process and competing, sometimes complimentary, motives behind the final votes. I explain why the unanimous "opposition" of the Left in the final vote was, appearances to the contrary, not a rejection of judicial review. I also look at the cross-cutting institutional issues implicated in the debates. In Chapter Four I look at draw on supplementary sources and actors that shed light on the events of October 1974. I look to leading newspapers representing various points in the political spectrum, the opinions of elites and engaged academics outside of Parliament, as well as the official position of the Council of State, the Constitutional Council's primary institutional competitor. What role did non-parliamentary/government

[78] Lowell and Higley, *supra*, n. 65. The authors contend that Denmark and Norway during the 1930s and 40s are successful examples of the elite convergence of imperfectly unified elites. France, Italy, and Japan also belong to this category.

actors, if any, play in resolving the events of October 1974? Chapter Five builds on the previous two chapters, constructing an argument for the expansion of judicial review in France as a symptom of and catalyst for elite convergence. The case rests on official party documents, mainly various party platforms of the Left (including the Common Program), as well as an examination of the centrist agenda pursued by Giscard's Independent Republicans. Judicial review would not have arrived in France without a robust Center-Right party that shared to some degree the Left's healthy skepticism for the institutions bequeathed by General de Gaulle. Chapter 6 compares the elite convergence thesis with competing explanations and looks at similarly situated cases (Sweden, Austria, New Zealand, Canada, and Israel). It seeks to establish how well, if at all, the elite convergence thesis travels. Chapter 7 concludes by analyzing the state of judicial review in contemporary France. The principle of judicial review is now well-established in French politics and the Council, despite its birth pangs, now enjoys unquestioned legitimacy within the political elite. Using relatively recent and untapped polling data from France, I examine the nature of elite support for the Council and draw comparisons as well as contrasts with elite support for the American Supreme Court and judicial review more generally.

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