Celebrating the "Idea" of a Written Constitution: A Response to Sanford Levinson's Constitution Day Lecture 2019

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* Associate Professor of Political Science at Northeastern University. My students and I have been reading the provocative works of Professor Sanford Levinson for years. I am grateful to the editors of the Northeastern University Law Review for the opportunity to respond to him here.

In "Celebrating the Founders or Celebrating the Constitution," Sanford Levinson asks what is worth celebrating—the Founders or the Constitution itself? He makes a strong case for celebrating the Founders because they ultimately had the courage to make the difficult decisions and compromises without which there would not have been a Constitution to commemorate.

The question "what is worth celebrating on Constitution Day?" and Levinson's answer, the Founders, led me to think that it is not just the Founders, but the novel ideas they championed that are especially deserving of veneration. One particular idea worth lauding is that of a written constitution as "the supreme law of the land."[1] Though not fully comprehended during the founding period, the idea of coupling a written constitution as supreme law with independent courts would give rise to the institution of judicial or constitutional review which would later help maintain constitutional democracies, both here in the United States and around the globe.

America's greatest contribution to democratic theory and the practice of governing may very well be this idea of coupling a written constitution with the institution of judicial or constitutional review. "Judicial review," the late, great constitutional scholar Edward S. Corwin once observed, "represents an attempt by the American Democracy to cover its bet."[2] To "cover a bet" is to provide insurance against some future peril.[3] An institution capable of covering a nation's bet on democracy when the democratic institutions and processes falter is thus a valuable insurance policy held by citizens of a democracy.

Judicial review, or the power of courts to declare null and void the acts of coordinate branches of the national government and the acts of the state governments that violate the Constitution, is, of course, not explicitly provided for in the Constitution. You would expect to find it in Article III in connection with the discussion of judicial power, but it is absent. Most modern constitution writers do not leave the power of judicial review to chance. The drafters of the South African Constitution, for example, made it clear that this function would be part of the new, post-Apartheid constitution:

1 U.S. CONST. art. VI, cl. 2.

2 Edward S. Corwin, *Book Reviews*, 56 HARV. L. REV. 484, 487 (1942) (reviewing BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW (1942)).

3 *See* RICHARD A. SPEARS, MCGRAW-HILL'S DICTIONARY OF AMERICAN IDIOMS AND PHRASAL VERBS 128 (2005).

"The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional. . . . "[4]

To the limited extent that discussions of judicial review occurred at the 1787 Philadelphia Convention, they were in the context of Madison's proposed executive-judicial council of revision which would review congressional legislation.[5] As for the origins of judicial review, I am persuaded by the constitutional historian Jack Rakove's explanation: "Judicial review is better conceived as an alternative to James Madison's proposed congressional negative on state laws than to the council of revision with which he hoped to improve the quality of lawmaking and legislation alike."[6] Immediately after Madison's proposed negative on state laws was rejected, the Convention adopted the Supremacy Clause, which would effectively perform the same task.[7] This historical account posits that judicial review was the solution to two problems: (1) how to enforce the supremacy of a constitution over ordinary legislative enactments, and (2) how to keep Congress from encroaching on the states and the states from enacting laws that conflict with the Constitution. It was, thus, on the foundations of the idea of a written constitution as the supreme law of the land, enforced by judges who "shall hold their offices during good behavior, and shall . . . receive . . . compensation, which shall not be diminished during their continuance in office,"[8] that the American innovation of judicial or constitutional review rests.

The notion that judicial review in American constitutional history began with Chief Justice John Marshall in *Marbury v. Madison* has been thoroughly debunked elsewhere.[9] Judicial review was certainly understood and exercised by state courts operating under the

4 S. Afr. Const., 1996, ch. 8, § 167, cl. 5.

5 *See* 1 Records of the Federal Convention of 1787, at 93–105 (Max Farrand ed., 1911).

6 Jack N. Rakove, *Once More into the Judicial Breach*, 72 Geo. Wash. L. Rev. 381, 382 (2003).

7 *See* 2 Records of the Federal Convention of 1787, at 27–29 (Max Farrand ed., 1911).

8 U.S. Const. art. III, § 1.

9 5 U.S. 137 (1803); *see, e.g.*, Keith E. Whittington, Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present 23 (2019); Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 Wake Forest L. Rev. 553 (2003).

first state constitutions not long after independence was declared and the colonial charters replaced.[10] It was explained by Alexander Hamilton in *Federalist No. 78* to be "essential in a limited Constitution":

> By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[11]

The better case for recognizing judicial review's inception after 1789, the year the U.S. Constitution was put into effect, is probably *Hylton v. United States*.[12] In his opinion in this case, Justice William Paterson wrote: "The question is whether a tax upon carriages be a direct tax? If it be a direct tax, it is unconstitutional, because it has been laid pursuant to the rule of uniformity, and not to the rule of apportionment."[13] Although it is a less intriguing case than *Marbury v. Madison*, the U.S. Supreme Court's review of the Carriage Act and unanimous decision that Congress's tax on carriages was constitutional, conforming to the requirement on indirect taxes in Article I, Section 8, were exercises of judicial review just the same.

Although *Marbury v. Madison* may enjoy an outsized status in American constitutional history, Chief Justice Marshall's reasoning is noteworthy for its explanation of the logic of judicial review. Judicial review, he explains, rests on the idea of a written constitution as

10 Edward Corwin argued that judicial review appeared in independent America in a 1780 Supreme Court of New Jersey case, *Holmes v. Walton*. *See* Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 521 (1925). This case, which was unreported, is cited in *State v. Parkhurst*, 9 N.J.L. 427, 445 (1827). Another instance of judicial review exercised by a state court before 1803 includes *Whittington v. Polk,* 1 H & J 236 (Md. 1802).

11 THE FEDERALIST NO. 78, at 228 (Alexander Hamilton) (Roy P. Fairfield ed., Johns Hopkins Univ. Press 2d ed. 1981) (1966).

12 3 U.S. 171 (1796).

13 *Id.* at 176.

"superior, paramount law."[14] In the words of Chief Justice Marshall:

> The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law: if the latter part be true, then written Constitutions are absurd attempts, on the part of the people to limit a power in its own nature illimitable.
>
> Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution, is void.
>
> This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society.[15]

It is the Founders' idea of a written constitution as supreme law that I choose to celebrate on Constitution Day.

This fundamental principle of America's constitutional democracy would be widely adopted by constitution makers in countries across the globe.[16] Levinson points us to Madison's *Federalist No. 14*, quoting at length from the concluding paragraph which encourages the citizens of New York to adopt the proposed Constitution because of its novel innovations:

> Happily for America, happily, we trust, for the whole

14 Marbury v. Madison, 5 U.S. 137, 177 (1803).

15 *Id.*

16 *See, e.g.*, Art. 31, Constitución Nacional (Arg.); Nihonkoku Kenpō [Kenpō] [Constitution], art. 98 (Japan); Grundgesetz für die Bunderepublik Deutschland [GG] [Basic Law] [Constitution], art. 1, 19, 20, 79 (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html.

> human race, they pursued a new and more noble course. They accomplished a revolution. . . . They reared the fabrics of governments which have no model on the face of the globe.[17]

How very prescient Madison was on how far the benefits of this "new and more noble course" would be. The idea of a written constitution as the supreme law of the land coupled with independent courts exercising the power of judicial review has been one of America's most important transnational legal exports. The American idea of entrusting courts with the maintenance of the "higher law" principles embodied in a written constitution spread rapidly after the end of the second World War. In "The Global Spread of Constitutional Review," international law and political science professor Tom Ginsburg explains that the best evidence that this innovation of the American constitutional regime has taken off is the fact that "158 out of 191 constitutional systems include some formal provision for constitutional review."[18] The form judicial review has taken in the countries that have adopted the idea has not always been the same. Some have opted for the American version of "strong-form" judicial review, which empowers courts to set aside or declare null and void acts found to violate the constitution, bill of rights, or some other higher law principles. Once rare, "strong-form" judicial review has gradually become the norm.[19] Others, including the United Kingdom, New Zealand, and to some extent Canada, retained or opted for "weak-form" judicial review, where the courts' determination that a particular law is incompatible with the nation's constitution or statutory bill of rights can be overridden by a subsequent act of

17 THE FEDERALIST NO. 14, at 28 (James Madison) (Roy P. Fairfield ed., Johns Hopkins Univ. Press 2d ed. 1981) (1966).

18 Tom Ginsburg, *The Global Spread of Constitutional Review*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 81 (Keith Whittington, R. Daniel Keleman, and Gregory A. Caldiera, eds., 2008).

19 *See, e.g.*, BUNDES-VERFASSUNGSGESETZ [BV] [CONSTITUTION] BGBL NO. 1/1930, art. 140 (Austria) (granting Constitutional Court authority to rescind laws as unconstitutional); GG, *supra* note 16, at art. 93 (granting Federal Constitutional Court authority to rule on compatibility of law with Basic Law); Art. 136 Costituzione. [Cost.] (It.) [CONSTITUTION] (stating that when Italian court declares constitutional illegitimacy of a law, law ceases to have effect); CONST. OF PAN. art. 206 (1972) (granting the Supreme Court of Justice the authority to issue binding rulings on the constitutionality of laws); USTAVA REPUBLIKE SLOVENIJE [CONSTITUTION], art. 160 (Slovn.) (granting the Constitutional Court power to decide constitutionality of laws).

Parliament.[20] In the case of the United Kingdom, the 1998 Human Rights Act gave courts the power to make "declarations of incompatibility," but left the matter of altering or repealing the suspect act to Parliament. [21]

Some countries, such as France and Germany, permit "abstract judicial review," which gives courts the power to review challenged acts before they go into effect.[22] Other countries require "concrete review," or the requirement that judicial review only be exercised in real, live cases and controversies in the normal course of litigation.[23] And while some countries have centralized the unique function of judicial review in a special, constitutional court, others have left it to courts at all levels of the judicial system.[24] The American version of strong-form, decentralized, and concrete judicial review has not been adopted in precisely the same way in all places, but the introduction of judicial review in the post-World War II era, even weak-form judicial review, gradually transformed the role of courts world-wide and increased their political significance. In the post-World War II era, "rights review," that is, the work of courts in enforcing the fundamental rights and liberties often contained in bills of rights, has joined separation of powers and federalism review as a function courts are expected to perform in constitutional democracies.[25]

20 *See* Human Rights Act 1998, c. 42 § 4 (UK) (granting courts the power to make declarations of incompatibility, but noting that such declarations are non-binding and do not affect the "validity, continuing operation or enforcement of the provision"); Constitution Act 1986, s 15 (N.Z.) (recognizing Parliament as the country's supreme legal authority); Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 33 (U.K.) (Canada) (granting Parliament the authority to declare an act of Parliament or of the legislature valid notwithstanding earlier grants of individual freedoms); *see also* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 Am. J. Comp. L. 707 (2001).

21 Human Rights Act, *supra* note 20.

22 *See* Alec Stone, The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective 226 (1992); Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 13–14 (2d ed. 1997).

23 *See* Michael C. Dorf, *Abstract and Concrete Review*, *in* Global Perspectives on Constitutional Law 3–14, (Vikram David Amar, Mark V. Tushnet, eds., 2008).

24 *See* Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases 9–10 (2003).

25 *See* Miguel Schor, *Mapping Comparative Judicial Review*, 7 Wash. U. Global Stud. L. Rev. 257, 265 (2008).

In recent years, scholars have developed several theories explaining how courts acquired and managed to keep the power of judicial review, even though it is occasionally used against powerful government institutions. In *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Tom Ginsburg argues that in times of political uncertainty, when no party can expect to hold on to power, "all parties will prefer to limit the majority and therefore value minoritarian institutions such as judicial review" as a form of insurance against the prospect of future electoral loss.[26] In *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, law and political science professor Ran Hirschl argues that political elites, fearing the loss of power, will seek to preserve their hegemony by placing like-minded judges on the bench and empowering them to review and, when appropriate, strike down acts of future governing majorities.[27] The judicial review as political insurance and the hegemonic preservation theory both suggest that judicial review exists because it is, in fact, supported by powerful political actors within the political system.

Not all scholars view the expansion of judicial review in the post-World War II era as a positive development. Allowing unelected judges the last word on the legality of action taken by politically accountable governments raises fears of democratic deficit and democratic debilitation. Despite the concerns associated with the counter-majoritarian difficulty and warnings about judicial supremacy, the advent of judicial review and the increased political significance of courts in many countries around the globe have undoubtedly produced positive outcomes. By upholding the constitutional provisions and basic fundamental rights that make democratic life possible, courts exercising judicial review can be understood to be advancing and promoting democracy.

Toward the end of his lecture, Levinson makes a strong case for holding another constitutional convention to address "the genuine threats posed to us should there be a shift among the various tectonic plates embedded in the Constitution."[28] That the Constitution itself is vague on how a new convention would be organized,

26 TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 25 (2003).

27 RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 12 (2004).

28 Sanford Levinson, *Celebrating the Founders or Celebrating the Constitution: Reflections on Constitution Day, 2019*, 12 NE. U. L. REV. 375, 386 (2020)..

he points out, "is one of the great defects of the Constitution."[29] Levinson maintains a more sanguine view than I of how this new convention would turn out in our hyper-partisan, increasingly polarized nation today. For that reason, I prefer to place my money on what has long been America's preferred method of constitutional change—change through judicial interpretation.

In his famous speech "The Spirit of Liberty," delivered in New York's Central Park at a time of war when the survival of democracies were at stake, Judge Learned Hand told his audience of 1.5 million people that the essence of liberty was an idea that must be kept alive in the hearts of the people:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon law, and upon courts. These are false hopes;. . . Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it. . . .[30]

That Levinson would agree with this point is clear from his admonition that "we unwisely 'venerate' the Constitution."[31] Celebrating the *idea* of a written constitution—and not the Constitution itself—may remind us that the best hope for constitutions is that they embody the democratic ideas and values of the people being constituted, and that these ideas must live like the spirit of liberty in the hearts of citizens and government officials alike.

For the American innovation to work, there must be belief in rule of law and respect for the independence of courts. Scholars examining how courts maintain their independence and uphold the rule of law, often against powerful forces determined to interfere, have found that the formal, legally defined provisions for judicial independence are often not enough to ensure independence in fact. Just as important to the maintenance of judicial independence are the unwritten norms and traditions, rooted in political culture, that protect the autonomy of judicial action from undue influence of powerful political actors who have lost the "spirit of liberty."

29 *Id.* at 387.

30 Gunther Gerald, Learned Hand: The Man and the Judge 547–52 (1994).

31 Levinson, *supra* note 28, at 390.