

Session I:
Democratization and Reform:
Constitutional Systems and Democratic Government

Gregory Mahler¹
December, 2007

The Idea of Democratic Government

Aristotle provided us with terms that are still used today to discuss both “good” government and “bad” government. The Aristotelian forms of good government are the polity (rule by many in the general interest), the aristocracy (rule by a few in the general interest), and kingship (rule by one in the general interest). The divisions of bad government are tyranny (self-interest rule by one), the oligarchy (self-interest rule by a few), and the democracy (self-interest rule by many). Aristotle provided what has come to be regarded as the “classical” division of systems of government, based upon two dimensions: the number of rulers in a system, and in whose interest the rulers rule. This framework is summarized in this Table.

| |
|--|
| Insert Table on Aristotelian Classification Here |
|--|

If a constitution, written or not, is perceived as a framework establishing the skeleton of a political system, the manner in which it is constructed, and the means by which it will operate, then an ideology should be perceived as the goals of that framework. To what end does the regime exist? What is its reason for being? What does it offer, distinct from other regimes, to justify its existence? These are all questions that are addressed by ideologies. What the regime wants to do, in a very general philosophical sense, is included in an ideology; how the regime will operate to achieve these ends is addressed through the constitutional structure of the regime.

¹ This is substantially taken from my book Comparative Politics: An Institutional and Cross-National Approach (5th ed., Prentice Hall, 2007), chapters 1, 2, and 6.

While knowledge of the constitutional structure of a regime and its ideology does not tell us everything that is important to know about that system, it tells us a great deal. It gives us an indication of the type of public policy that we can expect to see in that setting, and how that public policy is likely to be enacted. It also indicates the range and amount of political behavior that we are likely to encounter. It is a good beginning.

Constitutions as Political Structures

One of the first things that an interested student of comparative politics will find as he or she peruses the literature in the discipline is the heavy emphasis that is placed on the state or the nation as the unit of analysis. This is not to say that all comparative research takes place on this level; certainly a good deal of research has focused upon individuals, or policy, or developing and developed societies, and so on, but the state is a common subject of study.

Many characteristics of the state can be taken as the focus for a comparative study. Constitutionalism is one of these characteristics. It may be useful to think of constitutions as "power maps"¹ for political systems. That is, it is often the constitution of a nation that tells us the political environment within which government operates, and that describes the manner in which power is distributed among the many actors in the political environment. We look to the constitution for an explanation of who has the power to do what, what the limitations on power are in a given state, and what the relationships are between and among the many political actors we may find in a given state. While these may change over time for a specific individual in a position of authority, or may change over time as *different* individuals occupy positions of authority, they are significant "markers" for the political regime. Although it is true that in some

Session I: Constitutional Systems and Democratic Government

political systems the constitution is not of much help in understanding how the regime operates on a day-to-day basis, in most of today's nation-states the constitution does provide us with information that will contribute to our understanding of the operation of politics. The idea of a constitution as a fundamental expression of the power relationships in a political regime dates back to the time of the Greek and Roman republics; constitutions were the focus for comparison in Aristotle's major studies of political systems.

Written and Unwritten Constitutions; Constitutional and Unconstitutional Government

Studies of constitutional governments often rely on the structure or form of those written documents that we call constitutions. Yet, government with a written constitution is not the same thing as a constitutional government. A written constitution is essentially a basic expression of the ideas and organization of a government that is formally presented in one document. Some constitutions are quite short--the U.S. Constitution, for example-- while others are much longer, such as the constitution of India, the (now nonexistent) constitution of the former Soviet Union, or the constitution of Switzerland.² Some written constitutions are contained in one document, such as the Swiss Constitution, while others are found in several documents, such as the Canadian Constitution, which includes a "Constitution Act" as well as several other pieces of legislation and historical documents.

On the other hand, constitutional government can best be described as limited government. That is, there are certain things that the government may not do, whether it wants to or not; there are certain parameters beyond which the government may not go. The First Amendment to the American Constitution is a clear example of this principle, stating in part that

"Congress shall make no law...abridging the freedom of speech..." (italics added). This is an explicit limitation upon the powers of government to act in a specific field of interest.

The fact of the matter is that we can find governments without written constitutions that can properly be called constitutional regimes, and conversely we can find governments that do have written constitutions that do not properly fit within the behavioral parameters we have set for a regime to be called a constitutional government. Several examples may help to make this clear.

The British government does not possess a document called "The Royal Constitution," or some such name, that serves as the basic and central document for the political structures of the British political system. British political history points to a number of different documents that are part of the body of what is referred to as British constitutional law. These documents include the Magna Carta (1215), the Bill of Rights (1689), the Act of Settlement (1701), and certain other special acts of the British Parliament. On the other hand, scholars agree that Britain does possess a constitutional government. There are limits beyond which the British government may not go. Yet Britain does not have a single, written document that can be called a written constitution.

Although the Soviet Union had until its demise in 1991 a relatively new (1977) constitution that was highly detailed and specific,⁴ many argued that the Soviet regime should not have been called a constitutional government, because there were, until the very final days of the regime (and it could be argued that even at that time this was a doubtful proposition) no effective limitations on governmental power. Rights were conditional: Article 39 of the Constitution stated that "the exercise of rights and liberties of citizens must not injure the interests of society and the state";⁵ Article 47 stated that "USSR citizens, in accordance with the goals of communist construction, are guaranteed freedom of scientific, technical, and artistic cre-

ation...";⁶ Article 51 stated that "in accordance with the goals of communist construction, USSR citizens have the right to unite in public organizations..."⁷ These few examples, which were typical of the document as a whole, show that expressions of rights did exist; however, they were always conditional, with the clear implication-- that was shown to be the case in practice-- that if the government believed that the "goals of communist construction" were not being served, the rights in question might be lost.

There is one other, more subtle, distinction between these types of regimes that should be made explicit here. One type of constitution gives rights, and the other recognizes rights. This is not merely a semantic difference. The Soviet Constitution in stating that the government gave citizens certain rights, implied that the government also had the power to take away these rights. If rights come from the state, the state can certainly take them away. In the (unwritten) British - Constitution, or the (written) U.S. Constitution, rights are not given; they are recognized, by limiting what the government can do. The Constitution of the United States does not state that "citizens are given the right to free speech," although some people assume that it does. What is written in the Constitution is that "Congress shall make no law...abridging freedom of speech, or of the press..."; these rights and freedoms appear to already exist and belong to the people, and the Constitution recognizes this fact by forbidding the Congress to limit them. This is quite different from what was the case in the USSR.

While this is no longer the case in terms of the Soviet Constitution, this same pattern of "giving" rights rather than "recognizing" rights can sometimes be seen in newly developing nations, and has led to the same tensions in those settings that existed in the Soviet Union.

However, even the existence of a written constitution in a constitutional culture of limited governmental power ("constitutional government") does not absolutely guarantee either limited or unlimited individual rights. Freedom of speech is not absolute in either the United States or

Britain, to take two examples; in both systems there is substantial judicial precedent documenting instances in which government can, in fact, restrict individuals' speech.⁸

Beyond this, even if we are examining a polity with a clear history of distinct constitutional protection of individual rights, short-term forces may occasionally motivate a polity to abrogate those rights: Japanese-Americans who lived in California shortly after Japan attacked Pearl Harbor were denied substantial "due process," lost their homes and most of their possessions, and were sent to "relocation camps" for the duration of the World War II. The U.S. Supreme Court ruled at that time that this action on the part of the U.S. Government was permissible because of the emergency situation posed by the war.⁹

When we discuss constitutional governments, then, we are really not talking about whether there exists a single, specific document; rather, we are interested in a kind of political behavior, political culture, political tradition, or political history. The British Constitution is really a collection of documents and traditions, bound together in an abstract way. The U.S. Constitution is a single document, with subsequent judicial interpretation and expansion. The forms may vary, but the behavioral results are the same: Limits are imposed upon what governments may do.¹⁰

What Do Constitutions Do?

"Constitutions are codes of rules which aspire to regulate the allocation of functions, powers, and duties among the various agencies and officers of government, and define the relationship between these and the public."¹¹ Do constitutions make a difference? We have just argued that having a written constitution may not guarantee the behavior of a regime; does having any constitution matter? Today, more and more political scientists are putting less

emphasis on a constitution as a significant structure in a political system. They argue that too often constitutions-- whether written or unwritten--are not true reflections of the manner in which a political system operates, and therefore the constitution is of little use or value.⁰

Furthermore, in many instances, constitutions omit discussions of political structures of the regime that are crucial to the operation of that regime. For example, political parties are nowhere mentioned in the (written) U.S. Constitution, yet it is difficult to conceive of government operating in the United States without political parties. To take another example, the (written) Canadian Constitution fails to mention the prime minister as a significant actor in the political system at all,¹³ yet there is no doubt that this is the single most important office in the Canadian political arena. The (written) constitution of the former Soviet Union guaranteed certain rights, but practice indicated that these guarantees were hollow, indeed. Given all of this, why is it that constitutions seem to be universally accepted as necessary to a political system? If a political structure is so pervasive, it must perform a very important function for the political systems in which it is found.

Several functions can be attributed to those political structures that we call constitutions, whether they are written or unwritten, whether they are followed or not, wherever they may be found. First, they serve as an expression of ideology and philosophy. Very often this kind of expression is found in a preamble to the constitution in question. For example, the preamble to the Canada's Constitution Act of 1867 indicated that Canada would have a constitution "similar in principle" to that of Britain. This "similar in principle" clause was seen by scholars as incorporating--all by itself--all of the hundreds of years of British constitutional tradition into the Canadian political realm, and accordingly was regarded as being quite significant.¹⁴

Second, constitutions serve as an expression of the basic laws of the regime. These laws play a central role in the regime and are often so special that they can be modified or replaced

only through extraordinary amendment procedures; sometimes they cannot be amended at all, for example the clause in the German constitution guaranteeing human rights). Whereas an ordinary law can usually be passed with a "simple majority" approval of the legislature--a majority of those present and voting at the time-- basic laws of the regime expressed in the constitution usually require special majorities of the legislature (two-thirds or three quarters, for example) for approval. These special laws usually focus upon the rights of citizens -- rights concerning language, speech, religion, assembly, the press, property, and so on.

Third, constitutions provide organizational frameworks for governments. Although they may not actually contain diagrams to explain how the various parts of the government interact with or relate to each other, these relationships are often explained in the text of the document. It is common for constitutions to contain several sections, and to devote a section each to the legislative branch of government, the executive branch of government, the judicial branch of government, and so on. Constitutions will discuss power relationships among the actors in the political system, covering the legislative process, the role of the executive in policy formation, checks and balances among the actors. They may include discussion of impeachment of the executive and dissolution of the legislature, and perhaps discussion of succession as well.

Fourth, constitutions usually say something about the levels of government of the political system. They discuss how many levels of government there will be, and whether nations will be federal, confederal, or unitary. They often will describe what powers fall within the jurisdiction of the national government, and what powers do not belong to the national government.

Finally, constitutions usually have an amendment clause. No matter how careful and insightful the authors of a constitution try to be, they usually recognize that they cannot foretell the future with a sufficiently high degree of accuracy. Accordingly, constitutions invariably

need to be amended or altered at some point down the road. A constitution must contain directions for its own modifications; failure to do so might mean that when change becomes necessary, the entire system could collapse for want of a mechanism of change.

Constitutions, then, whether written or unwritten, play an important role in the regimes in which they are found. Some constitutions will be more important in one of the functions described above than in others. For example, the constitution of the Islamic Republic of Iran may be more important as an expression of ideology (and theology) than as a real organizational diagram of the government.¹⁵ Similarly, the American Constitution is more important as an expression of governmental organization and as a guideline for the power relationships of the regime than as an expression of the philosophy of the regime; the latter is usually said to be better expressed in the Declaration of Independence and the Federalist Papers than in the Constitution.

The Separation of Powers

The notion that centralized power is dangerous -- that power must be a check on power -- reached maturity in the eighteenth century, and its first full-scale application was to be found in the Constitutional Convention in Philadelphia in 1787. There, delegates to the federal convention continuously cited "the celebrated Montesquieu," John Locke, Thomas Hobbes, and others,³⁷ in support of the idea that political power, in order to be safe, had to be divided. The legislature needed to have a check on the executive, the executive on the legislature, and so on. Many of the ideas of John Locke were adopted and found in The Federalist (especially Number 47), among other places, and expressed the philosophy that the executive force had to be kept separate from the legislative force.³⁸

Constitutions express the power relationships among the many actors in political regimes. The American Constitution is explicit about the degree to which the president can take control of the work of the legislature (literally, he cannot), and the degree to which the Congress can take control of the work of the president (literally, it cannot). The situation, however, is one that can rapidly devolve into a stalemate: The President can veto work of the Congress, and Congress can refuse to pass legislative requests of the president, but neither can force the other to do anything. In other regimes the lines are much less clearly drawn. For example, in France the president can, under certain circumstances simply issue decrees that have the force of legislation.

Hindsight tells us that the explicit lines that were drawn by the Founding Fathers to separate the executive and legislative branches of government were not absolutely necessary to ensure democratic government. There are other power relationships that are used elsewhere that have proven to be just as democratic and just as stable.

In fact, although the idea that centralized power was inherently dangerous was popular at the time of the foundation of the American republic, today many countries (some of them European) have had fairly successful experiences with centralized power structures. Thus the notion that centralized power must be a bad thing is not, in and of itself, one that is universally shared today.

John Locke on Political Institutions

In 1690 John Locke published his Second Treatise on Government, in which he discussed the "true original, extent, and end of civil government." In his discussion of why individuals would leave the "state of nature" and join society, Locke suggested that the prime motivation for people doing such a thing was the preservation of "their lives, liberty, and estates, which I call by

the general name, property."¹ (This phrase was subsequently amended by Thomas Jefferson in the Declaration of Independence to read "life, liberty, and the pursuit of happiness.")

There are "many things wanting" in the state of nature, Locke suggested, and it was these missing structures that would prompt individuals to join society:

(Section 124) First, there wants an established, settled, known law...

(Section 125) Secondly, In the state of nature there wants a known and indifferent judge, with authority to determine all differences according to the established law...

(Section 126) Thirdly, In the state of nature there often wants power to back and support the sentence when right...

(Section 127) Thus mankind notwithstanding all the privileges of the state of nature, being but in an ill condition while they remain in it, are quickly driven into society... And in this we have the original right and rise of both the legislature and executive power as well as of the governments and societies themselves.²

The Executive Roles

What does an executive do in a political system? In his classic study of the American presidency, Clinton Rossiter listed ten distinct, identifiable roles that the president is expected to play in the American political arena:

- | | |
|-----------------------|-------------------------------|
| 1. Chief of State | 6. Chief of Party |
| 2. Chief Executive | 7. Voice of the People |
| 3. Commander-in-Chief | 8. Protector of Peace |
| 4. Chief Diplomat | 9. Manager of Prosperity |
| 5. Chief Legislator | 10. World Leader ² |

When we look at this list of duties that the president must perform, we must marvel that anyone is able to handle the demands of the office. Indeed, this was one of the major themes of

Rossiter's study. Wouldn't a political system be more efficiently run if it hired a crew of executives to handle all of these jobs, one job to a person? Actually, the concept of a multiple executive is not new at all, and in a number of different contexts in the history of political systems the multiple executive has been tried. At the Federal Convention in Philadelphia in 1787, where the American Constitution was created, the idea of a multiple executive was suggested. It was rejected, however, because history had shown that it might tend to (1) cause divisiveness when a difficult decision needed to be made, and (2) obscure responsibility, or culpability, in that blame for a bad decision might be difficult to attribute to a single individual.³

In point of fact, Rossiter's list of ten roles for the president may be more detailed than is necessary. Political history has shown that we really only need to separate the executive role into two components: a symbolic role, and a political role.⁴ In the symbolic role, the executive represents the dignity of the state. The executive lays wreaths on tombs, attends funerals, makes national proclamations, and generally serves a ceremonial function. In the political role, the chief executive "manages the national business," and makes the hard political decisions that need to be made. In this context the chief executive can be seen to be chief of the executive branch of government, the ultimate decision maker in a huge pyramid of decision-makers, the owner of the desk where "the buck stops."⁵

There are, generally speaking, four approaches to the executive institution that are found in political systems around the world, two of which we shall examine at this time. This is not to suggest that all political systems correspond precisely to one or the other of these four models; rather, it suggests that virtually all political systems are modeled after one or the other of the four general plans.

One general type of political executive can be referred to as the presidential model of executive, and the other type of political executive can be referred to as the "Westminster" par-

liamentary-cabinet form of executive. Later, if you would like, we could add discussion of the French parliamentary-cabinet model and the collective executive model (although the model that was developed in the former Soviet Union has become virtually extinct within the last few years); these are variations on the two models we shall discuss here.

The Legislative Roles

There are a number of different "pathways to parliament."³⁹ Legislators may ultimately arrive in their legislative positions in any of a number of ways. Some legislators, of course, are not elected by the public at all, but are appointed by some individual or political body. Others are elected. In this section we want to examine how legislators come to play their roles.⁴⁰

Many reasons have been suggested as providing a rationale for the study of legislatures, including the fact that the "function of a legislature is to make the values, goals, and attitudes of a social system authoritative in the form of legislative decisions," the fact that the legislators serve as role models for the public and in this way serve an educative function for society generally, and the fact that legislatures can be useful to society "by allowing for the expression of grievances in a public forum."⁷ As a very general rationale, we may assert that "the very prevalence of legislative institutions...may be construed as affording prime facie evidence of their relevance for inquiry."⁸

There are two major methods by which the public elects legislators, whether the legislators involved are in the upper house or the lower house of the legislature. One method we can refer to as "district-based" elections; the other method can be called "proportional representation" elections. Each of these methods affects the political system in which it is found.⁴¹ There are a number of variations for each of these general methods (which vary on a

country-by-country basis, as we shall see when we talk about it in detail later today), but the broad principles are the same.

The Judicial Roles and the Rule of Law

After our discussion of legislative and executive structures, the structure of government suggested by John Locke in 1690 that remains to be discussed is "a known and indifferent judge, with authority to determine all differences according to the established law."¹ One of the functions that was ascribed to constitutions was that they serve as an expression of the basic laws of the regime. At this point of our inquiry we should say something about the function of legal systems in political processes and the importance of legal culture in general, as well as something about the role of judges and courts in political systems.

Of the three major Lockean governmental structures--the legislature, the executive, and the judiciary--that can be observed on a cross-national basis, courts and legal systems generally continually receive the least attention in introductory texts and comparative studies,² unless, of course, the study in question explicitly focuses upon the judiciary or the law.³ Why is this the case? Two possible suggestions can be offered here.

First, as far as systemic characteristics and political institutions go, legal systems and courts may be the most system-specific. That is, although both executives and legislatures have structural idiosyncrasies, and have behavior that varies on a country-by-country basis, we can still make a number of useful generalizations about both their structures (for example, "presidential" systems as compared with "parliamentary" systems) and their behavior (for example, a system with high party discipline compared with a system with low party discipline). This level of generalization is hard to achieve with legal systems and courts. Although we can speak of constitutional regimes--governments of laws, not ruled by individual whim--we very

quickly get to the point at which individual system-level characteristics of judiciaries must be discussed; consequently generalizability is low.⁴

Second, while executives and legislatures are undoubtedly part of the political process, in many political systems the courts are explicitly excluded from the political arena.⁵ This is not a refutation of Locke's argument that courts (judges) are necessary to society; it simply limits the role of the judges and the courts to one of arbitration or mediation. They are not, it is claimed, part of the law-making or policy-making process, specifically, or the political arena, generally. (It should be noted, in fact, that Locke suggested the function of the judge was to "determine all differences according to the established law," [emphasis added] not to actually make the law or public policy.) Accordingly, many political scientists have left the judiciary out of their studies of the political arena and the policy-making process generally.

In explaining the almost-nonpolitical role of the courts, one study pointed out that courts "logically and historically, have been undemocratic institutions. An increased role for the courts, then, could render a political order less democratic."⁶ Thus, although the courts have often been significant in maintaining individual rights, they have often kept a low profile in their respective polities, thereby generating relatively little scholarship on their comparative political impact.

Although courts are often "nonpolitical" in nature, they do play a significant role in political systems. In many systems courts play a role through judicial review in shaping the law. In other systems the role of the courts may be more circumscribed, but they still interpret statutes, hear cases involving government leaders, and, generally, participate in official government action.

Courts are, in sum, part of every political system, and the politics of none can be understood without an appreciation of their role. Yet modern political science has tended to downplay or even ignore judicial institutions, and to the extent that it

has done this, its analyses of politics remain incomplete. As we more fully comprehend the roles of courts in each modern democracy, we will be in a better position to construct genuine comparative theories both about courts themselves and modern political development.⁷

The Idea of Law

The idea of law tends to be assumed whenever we think of politics. That is, there is an implicit (Western, ethnocentric) assumption that political systems are based, to varying degrees, upon the rule of law. We hear the phrase that we should want “a government of law, and not of men.” What does this mean? It means that individual desires will not be substituted for appropriately-developed law. This assumption is made because so many of our contacts with government come in relation to governmental rules, regulations, and administrative guidelines. It is almost impossible to think of government existing without laws; the "authoritative allocation of values" with which politics is concerned deals with laws.

Law is generally regarded as one of the greatest achievements of civilization.⁸ It is concerned with basic rules of conduct that reflect to some degree the concept of justice. These rules concern the relationships of the individual with government and with other individuals. An ideal of justice frequently expressed is that the government should be a government of laws and not of men.⁹ Whether this goal can always be achieved is questionable, as laws are made and administered by human beings. But in practice this ideal is generally interpreted to mean a legal system that treats everyone equally and that is not subject to change through the arbitrary acts of a dictator, or even the whim of transient majorities.¹⁰ Hence, even in the seventeenth century, John Locke saw law as being the principal attraction of society: "Thus mankind, notwithstanding

all the privileges of the state of nature, being but in an ill condition while they remain in it, are quickly driven into society ... [They] take sanctuary under the established laws of government."¹¹

There are a number of different kinds of law to which the interested student can find reference, including positive law, divine law, moral law, natural law, and scientific law,¹² among others. Scientific laws refer to observations and measurements that have been empirically determined and that focus upon physical, biological, and chemical concepts, not social questions. Moral laws refer to precepts or guidelines that are based upon subjective values, beliefs, and attitudes, focusing upon behavior: the proper way of doing things. We must note, however, that moral laws, unlike scientific laws, will vary depending upon the value system used to construct them. Divine law, as well, will be seen to vary depending upon the religious or theological conceptual framework from which it is said to be derived.

The two major approaches to law with which we as social scientists are concerned are natural law and positive law. Natural law refers to a body of precepts governing human behavior that is "more basic than man-made law, and one that is based on fundamental principles of justice."¹³ The type of law with which governments are most concerned is positive law, which can be said to have three major identifiable characteristics: (1) It is man-made law, (2) it is designed to govern human behavior, and (3) it is enforceable by appropriate governmental action.

Conflict has erupted throughout human history when natural law and positive law appear to conflict. Political philosophers from the time of Cicero (106-43 B.C.) – including John of Salisbury, Thomas Aquinas, Thomas Hobbes, John Locke, Jean-Jacques Rousseau, David Hume, Jeremy Bentham, and Karl Marx – through philosophers of the present day have dealt with this thorny issue.¹⁴ What is the individual to do when the law of the state tells one to do one thing, but one's perception of natural law, of the fundamental standard of "rightness," says to do

something else? Many have argued that human laws (positive laws) that conflict with natural laws (or religious laws) are null and void. St. Augustine's "two sword" theory in the early fifth century was one attempt to resolve this conflict.¹⁵ Augustine argued that natural law and divine law were the same thing: The laws of nature are God's laws. Individuals are required to obey earthly (positive) law only insofar as it does not conflict with natural law. When natural law and positive law conflict, it is the law of God that must be obeyed, according to Augustine.

Legal Cultures

The concept of a "culture" is one that has been developed primarily by sociologists and anthropologists. A legal culture can be considered to be:

a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is, or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression.¹⁶

The concept of a legal culture, then, focuses upon the beliefs, attitudes, and values of society relative to the law and politics.¹⁷

These values have to do with the nature and process of justice in the political system, the concept of equality, and, more basically, the nature of law in the regime itself. The latter includes the very fundamental question of law and its influence on government policy.

We mentioned earlier the idea that political systems should be "governments of law and not of men." This reflects one of the most central questions of any political regime: Is the government bound to obey its own laws, or is it permitted to go beyond the laws in its execution

of public policy? The reader will recall that in our discussion of constitutions and constitutional government one of the dividing lines between (behaviorally) constitutional and unconstitutional regimes was the degree to which the behavior of regimes was limited, controlled by law. Are there limits beyond which the government absolutely may not go? Or, conversely, is the function of law perceived to be primarily that of controlling individual behavior, keeping individuals "under control," while the government may do whatever it wishes?

It is precisely this type of normative, philosophical question that is addressed by the concept of the legal culture. This explains why legal cultures are so difficult to study: They are blends of philosophy, sometimes quite complex, and cannot readily be described in only a few words. To appreciate fully the legal culture of a political system, we must understand its political and social history, its political structures, and the political values and attitudes dominant in that political system at any given time.

A nation's legal culture will shape the role that the law and legal institutions play in the political realm. For example, the fact that the United States is "the most litigious country in the world"¹⁸ suggests that Americans are more likely to look to the courts for the resolution of conflict than might citizens of other polities. On the other hand, "the Japanese legal culture puts a premium on informal settlement of legal disputes based on informal controls and social sanction without legal procedure." Japanese citizens are thus hesitant to resort to the courts to resolve political issues, although "when the traditional means of conciliation and mediation fail, the Japanese become very determined to exhaust all avenues of legal device and remedy."¹⁹

Although political cultures do vary on a nation-by-nation basis, there are certain "families" or groupings of legal cultures that may be suggested here for purposes of generalization. These are: (1) the Romano-Germanic family; (2) the family of the common law; (3) the family of socialist law; and (4) the non-Western legal families.²⁰

The Romano-Germanic approach to law, sometimes referred to as "code" law, has developed from the basis of Roman law at the time of Justinian (A.D. 533).²¹ This type of law, as contrasted with common law, is based upon comprehensively written legislative statutes, often bound together as "codes." The Code Napoleon was just such a bound collection; the Emperor Napoleon (reigned 1804-1815) decided that law throughout his empire needed to be standardized, and he had a single, comprehensive set of laws assembled and disseminated. The Code Napoleon influenced legal structures from Europe to North America to Asia. The French legal system is characteristic of a code law system, and in North America today the legal systems of Louisiana and Québec have similar characteristics, evidence of their (French) colonial heritage.

The common law system, found in England and countries modeled on English law (including the United States), is sometimes called "Anglo-American" law,²² and has been referred to as "judge-made law."²³ This is not to suggest that today's laws in these political systems are not made by the legislatures of those systems or, conversely, that today's laws are made by judges in those systems. Rather, the term suggests that when the science of the law was being developed in England in the twelfth century, it was the judges who made decisions. Today judicial precedent plays a major role in common law nations--the process is referred to as stare decisis (to stand by things decided).²⁴ A judge may use a previously adjudicated case as a guide for his or her decision, but the judge may decide that there are new characteristics involved in the case at hand that require deviation from earlier decisions. Of course, today the legislature plays a highly significant role in designing the laws the judge is applying to the specific situation.

The differences between the code law systems and the common law systems can easily be overstated, but two main characteristics should be pointed out. First, judges play a slightly less significant role in decision making in the code law systems, with correspondingly greater

influence exercised by the legislature. Second, the common law system, characteristic of Anglo-American nations, tries to minimize the likelihood of an innocent person being convicted by setting up various procedural and substantive safeguards. The code law systems, characterized by the system found in France, "lays more stress on preventing a guilty person from escaping punishment."²⁵

Socialist law derives from a different philosophical root.²⁶ Karl Marx and his philosophy assumed that law was a tool of the state in capitalist societies, and that it was used to oppress the working class. Marx argued that in a perfect socialist state there would be no need for law at all, once the economic ills of society were cured. In fact, of course, things have not turned out to be quite as simple as Marx thought they would. Law in the former Soviet Union, perhaps the best example of a socialist system, played, if anything, a greater role than in Western democracies.²⁷

In the second and third quarters of the 20th Century Soviet Marxists saw law as a tool of the state, to be used to work toward a socialist society. The state could (and should) use law to further its ends. This resulted in a kind of twisted logical circle: Law exists to further the interests of citizens. The state knows better than any individuals what the interests of the citizens are. Anything the state does, therefore, must be legal. Thus law becomes simply another instrument of state policy. When we discussed the former Soviet constitutional system in Chapter 2 we indicated the difference in approaches to civil and political rights in the former Soviet Union and Western democracies.

In non-Western legal systems, such as those of some developing nations, legal cultures are quite different and depend upon (1) local traditions and customs, (2) the legal culture of the colonizing power (if any) that controlled the political infrastructure prior to independence, and (3) the degree to which the colonizing power permitted autonomy and development during the colonial era. In some non-Western systems religious law, especially Islamic law, now has a

major role in the general legal framework of the regime. In others, religious and tribal laws are blended with colonial legal values. Elsewhere, developing nations have completely forsaken their traditional legal cultures and have opted instead for modern legal structures and processes.²⁸ To take just one example, the legal culture found in Israel today is a blend of Turkish law and British law (former colonial powers in the Middle East), religious law (including Jewish, Moslem, and Christian components), as well as contemporary legal and judicial values.²⁹

Judiciaries in the Political Arena

The judiciary may, in many political systems, engage in a law making function of a sort, by interpreting laws made elsewhere. As a general rule, however, the courts prefer to stay out of the political arena.

In some political matters the judiciary is unable or unwilling to act. Courts may be excluded from jurisdiction in certain subjects, as in Switzerland where federal laws cannot be challenged in the courts, or in France where actes de gouvernement remain outside the province of the courts.⁴³

Even in the United States, where the U.S. Supreme Court is among the most politically active high tribunals in the world, the Court is hesitant to inject itself into the political arena, often deciding controversial cases in the most "narrow" manner possible to avoid political controversy. In addition to making decisions in politically controversial cases, courts may be involved in the political process by issuing writs, court orders, or injunctions in politically sensitive matters.

Although the U.S. Supreme Court has endeavored to avoid highly visible and highly politicized cases throughout American history, on occasion it has not been possible to avoid the spotlight completely. The presidential election of 2000 was one such instance in which the Court

had to play a highly visible, highly political, and highly significant role in the outcome of the election. While many decried the Court's role as an "undemocratic" institution in making a decision that effectively decided who would be the victor in the election, most commentators were agreed that the legitimacy of the Court was highly significant for most Americans in helping to provide a (relatively) swift and definitive outcome to the controversy.⁴⁴

Clearly, however, the most direct interaction between the courts and other political structures in a regime comes through the pattern of behavior that we refer to as judicial review. Judicial review is the process by which courts are in the position to rule upon the propriety or legality of action of the legislative and executive branches of government.⁴⁵ More specifically:

judicial review refers to the judicial power to decide on the constitutionality of activities undertaken by other governmental institutions, most notably those decisions, laws, and policies advanced by executives and legislatures.⁴⁶

As is indicated in this Table, the concept of judicial review exists in only a clear minority of the nations in the world, and where it does exist, the extent of its scope and ability to review the actions of other governmental structures varies. That is, not all of the courts listed in the Table are as powerful in their respective political systems as is the Supreme Court in the United States.⁴⁷

| |
|--|
| Table Here: "Some Countries Whose Political Systems Include Judicial Review" |
|--|

The idea of judicial review, although most strongly institutionalized today in the United States, was not, as some scholars have suggested, "invented" in American colonial days, or with the decision of Chief Justice John Marshall in the case of Marbury v. Madison in 1803.⁴⁸ We can go back to the time of Plato to find discussion of judicial review, in a primitive sense, when Plato discussed the establishment of a "nocturnal council of magistrates" to be the "guardians of

our god-given constitution."⁴⁹ Charles G. Haines, a leading scholar of American constitutionalism, has argued that:

the practice of English colonial administration agencies and of the assertion of authority by the Privy Council influenced the [American] colonists in that they realized the possibility of having their judgments reviewed and in certain instances their statutes invalidated by a superior tribunal.⁵⁰

Although judicial review may not exist at the present time in all judicial systems,⁵¹ there clearly is an ingredient of change that we must keep in mind. For example, most studies take it as a given that there is no judicial review in Great Britain, and that the fundamental principle underlying the operation of British politics is that of parliamentary supremacy. While this is true, it also has recently been pointed out that the role of the courts in the British political culture has changed, and that this reflects "deep-seated changes occurring in the institutional fabric of British government," especially in the realm of administrative law. It has been shown that "until twenty years ago judges took an extremely restrained position vis-à-vis administrative agencies," but more recently scholars have noted "an embryonic move toward judicial activism."⁵² Although this is not meant to suggest that British courts will soon be nullifying Acts of Parliament, it does illustrate the fact that all political institutions, courts included, can change over time.

Theodore Becker, in his comprehensive cross-national study of judicial politics, indicated three dimensions along which we can locate judicial systems. First, there are different types of "judicial reviewing organs." Second, there are differences in the processes by which questions of constitutionality can reach the courts. Third, there are differences in the type of proceedings and ranges of jurisdiction of the reviewing courts.⁵³

There are two major types of judicial review mechanisms today. One, in the American model, uses the regular courts to make decisions. Judicial review is simply added to the other duties performed by the courts in the political system. The other major type of judicial review structure comes from Europe and provides a special constitutional court or reviewing body to perform the judicial-review function. The Constitutional Court found today in France is a good example of this.⁵⁴

Political systems vary as well in the question of who can initiate suit. In the United States, only someone "injured" by an act can initiate suit. The U.S. Supreme Court will not issue an advisory opinion, or permit an uninvolved party to commence litigation; the Supreme Court of Canada will. In some political systems, those affected by an act are specifically not permitted to initiate a suit. Rather, only specific governmental agencies may apply for judicial review. In still other systems, the access to the judicial review process is very liberal, and anyone can bring a case into the reviewing process. In Colombia, for example, "anyone could introduce a petition of unconstitutionality directly to the Supreme Court, without even having to prove a case or controversy existed, or that he had any real or personal interest in the constitutionality of the law in question."⁵⁵

The third dimension of distinction according to Becker deals with the scope of jurisdiction of the courts. Americans are familiar with a judicial system that exercises a very broad range of judicial review. Elsewhere, this breadth is not necessarily the case. In Italy, it has been pointed out, although there is no direct judicial review, the strength of the system of administrative courts results in the "potential political impact" of the courts remaining strong.⁵⁷

Judicial review is far from a universal practice. In the still-developing political structure in Russia judicial review is explicitly *not* a part of the regime.

In Russia the judgments of courts in concrete cases do not set precedents. In other words, the Russian legal system is not based on judge-made law. A Russian court of general jurisdiction cannot nullify a statute holding it unconstitutional; in other words, the judiciary in Russia in general has no functions of judicial review, with one exception – in 1991 the Constitutional Court of Russia was established. The Constitutional Court is vested with the power of constitutional review, i.e., it can, upon motion of an interested governmental organization, hold a statute or an executive enactment unconstitutional, or give its interpretation of the Constitution. It is also the rule that whenever an issue of constitutionality of an act involved in a case is raised during proceedings before a regular court, such an issue is automatically referred to the Constitutional Court.

The Supreme Court of Russia does not have the right of judicial review, but has the right of legislative initiative and may submit its conclusions concerning the interpretation of laws. The highly authoritative view of the Supreme Court is always taken into consideration by lawmakers.⁵⁸

The justification of judicial review--a practice many condemn as undemocratic in that it permits an (often) unelected and therefore "irresponsible" judiciary to reverse or nullify actions of democratically elected legislators and executives--is basically that there is inevitably some degree of uncertainty about constitutional matters, whether they be powers of an executive or parameters of permissible legislation. As well as being structural blueprints of a regime, constitutions in effect provide limitations upon what government may or may not do in a political environment. The authors of a constitution do not have unlimited foresight, and therefore it is inevitable that eventually, even sincere, honest, ethical individuals of good will (not to mention dishonest and unethical individuals) will disagree over what is permissible

governmental behavior and what is impermissible governmental behavior. At that time the court is the appropriate organ of government to step into the picture and help to resolve the conflict.

Concluding Comments: Constitutional Systems and Democracy

What kind of system is “best” for democratic government? I hope that what you will conclude by the time we have finished our conversation is that there is no single “best” system. We can have stable democratic government with presidential systems or with parliamentary systems. We can have stable democratic government with single-member district voting, or with proportional representation voting. We can have stable democratic government with unicameral legislatures or with bicameral legislatures, with federal structures or with unitary structures, and the list goes on and on.

The key to democratic government is a respect for the people. This is the “demos” in “democracy.” Only when trust and respect is put in the people, and the people are committed to following the rules of the regime can we have the kind of stable democracy that gives security, even in the most troubling times. The best example I think I can offer of this is the 2000 election in the U.S., that George Bush lost, and the fact that there wasn’t a civil war that came out of that system. The U.S. had procedures in place to handle an election, and they were followed, even though they ended up being undemocratic.

Thank you for your time and attention.

1. Ivo Duchacek, Power Maps: Comparative Politics of Constitutions (Santa Barbara, Cal.: Clio Press, 1973). See also for a very good work that asks about the philosophical premises underlying written constitutions the recent work by Larry Alexander, Constitutionalism: Philosophical Foundations (Cambridge: Cambridge University Press, 2001).

2. "The Swiss Constitution of 1848 as amended in 1874 and in subsequent years is a written document like that of the U.S.A., although it is double in size to that of the American Constitution." See Vishnoo Bhagwan and Vidya Bhushan, World Constitutions (New Delhi: Sterling Publishers, 1984), p. 321.

4. See Robert Sharlet, The New Soviet Constitution of 1977 (Brunswick, Ohio: King's Court Communications, 1978).

5. Ibid., p. 89.

6.
Ibid., p. 92.

7. Ibid., p. 93.

8. This is a very important issue, and one that has received a great deal of attention in many societies. A 1999 volume by Karen Alonso, Schenck v. United States: Restrictions on Free Speech (Springfield, NJ: Enslow Publishing, 1999) reviews these issues in the United States. An article in the United Kingdom discussing this can be found in Salmon Rushdie, "Rushdie on Censorship," Editor and Publisher 126:13 (March 27, 1993), p. 6. A similar question in the American context is discussed in "Protecting 'Free Speech'," The Christian Science Monitor 85:88 (April 2, 1993), p. 20.

9. For discussion of this episode of American history, see Roger Daniels, Prisoners Without Trial: Japanese Americans in World War II (New York: Hill and Wang, 1993); David Takami, Executive Order 9066: 50 Years Before and Fifty Years After (Seattle, Wash.: Wing Luke Asian Museum, 1992); or Roger Daniels, Sandra Taylor, and Harry Kitano, eds., Japanese Americans: From Relocation to Redress (Seattle, Wash.: University of Washington Press, 1991).

10. Two good examples of recent comparative study of constitutions are: Marian McKenna, ed., The Canadian and American Constitutions in Comparative Perspective (Calgary, Alberta: University of Calgary Press, 1993), and Preston King and Andrea Bosco, eds., A Constitution for Europe: A Comparative Study of Federal Constitutions and Plans for the United States of Europe (London: Lothian Foundation Press, 1991).

11. S. E. Finer, ed., Five Constitutions (Sussex: Harvester Press, 1979), p. 15.

0.12. Ibid.

13. The position of Prime Minister is mentioned in the Prime Minister's Residence Act -- establishing an Official Residence for the Prime Minister -- and the Prime Minister's Salary Act -- that authorizes the Prime Minister to receive a higher salary than other cabinet members -- but the precise method of selection, powers, and similar important descriptions of the position are not included in constitutional documents. See Robert J. Jackson and Doreen Jackson, Politics in Canada: Culture, Institutions, Behavior and Public Policy (Toronto: Prentice Hall Canada, 2001).

14. Richard Van Loon and Michael Whittington, The Canadian Political System (Toronto: McGraw-Hill Ryerson, 1976), pp. 169-170.

15. See John L. Esposito and R. K. Ramazani, Iran at the Crossroads (Boston: Macmillan, 2001), David Menashri, Post-Revolutionary Politics in Iran: Religion, Society and Power (London: Frank Cass, 2001), or Samih Farsoun and Mehrdad Mashayekhi, eds., Iran: Political Culture in the Islamic Republic (New York: Routledge, 1992).

37. See especially Paul Spurlin, Montesquieu in America: 1760-1801 (Baton Rouge: Louisiana State University Press, 1940); John Loy, Montesquieu (New York: Twayne, 1968); Arthur Prescott, Drafting the Federal Constitution (Baton Rouge: Louisiana State University Press, 1941); and Clinton Rossiter, 1787: The Grand Convention (New York: Macmillan, 1966).

38. See John Locke, Second Treatise on Civil Government (especially chap. 13, "Of the Subordination of the Powers of the Commonwealth," pp. 87-94) in Ernest Barker, Social Contract: Essays by Locke, Hume & Rousseau (New York: Oxford University Press, 1970).

1. In Sir Ernest Barker, ed., Social Contract: Essays by Locke, Hume, & Rousseau (New York: Oxford University Press, 1970), p. 73.

2. *Ibid.*, pp. 73-77.

2. Clinton Rossiter, The American Presidency (New York: Mentor, 1960), pp. 14-40 *passim*. A new edition of this was published by the Johns Hopkins University Press in 1987.

3. See James Madison, Notes on Debates in the Federal Convention of 1787 (Athens, Ohio: Ohio University Press, 1966), *passim*.

4. The first chapter in Dennis Soden's book The Environmental Presidency focuses on presidential roles and how different roles affect policy. See Dennis Soden, The Environmental Presidency (Albany: State University of New York Press, 1999). For a much older treatment of this, see Joseph LaPalombara, Politics Within Nations (Englewood Cliffs, N.J.: Prentice Hall, 1974), pp. 190-196.

5. "The Buck Stops Here" was an unattributed quote on a sign that was kept on the desk of President Harry Truman.

39. See David Farrell, Comparing Electoral Systems (Basingstoke: Macmillan Press, 1998). The classic on this subject is Austin Ranney, Pathways to Parliament (Madison, Wi.: University of Wisconsin Press, 1965). A good study of African electoral systems can be found in Timothy Sisk and Andrew Reynolds, Elections and Conflict Management in Africa (Washington, D.C.: United States Institute of Peace, 1998).

40. A very good review essay dealing with elections is by Lyn Ragsdale, "Legislative Elections and Electoral Responsiveness," in Loewenberg, Patterson, and Jewell, Handbook, pp. 57-96.

See also Andre Blais, "The Classification of Electoral Systems," European Journal of Political Research 16:1 (1988), pp. 99-110.

7. Allan Kornberg, Canadian Legislative Behavior (New York: Holt, Rinehart & Winston, 1967), p. 2. See also Frank Baumgartner, "Parliament's Capacity to Expand Political Controversy in France," Legislative Studies Quarterly 12 (1987), pp. 33-54.

8. Allan Kornberg, Harold Clarke, and George Watson, "Toward a Model of Parliamentary Recruitment in Canada," in Legislatures in Comparative Perspective, ed. Allan Kornberg (New York: David McKay, 1973), p. 271.

41. See David Canon, "Electoral Systems and the Representation of Minority Interests in Legislatures," Legislative Studies Quarterly 24:3 (1999): 331-385. See also Arend Lijphart, "The Political Consequences of Electoral Laws, 1945-1985," American Political Science Review 84:2 (1990), pp. 481-496.

1. See Locke's Section 125 in Sir Ernest Barker, ed., Social Contract: Essays by Locke, Hume, & Rousseau (New York: Oxford University Press, 1970).

2. For example, Joseph LaPalombara's Politics Within Nations (Englewood Cliffs, N.J.: Prentice Hall, 1974) had fourteen chapters, with chapters on legislatures, executives, bureaucracies, interest groups, political parties, participation, and so on, but judiciaries and courts were not discussed.

3. See, for example, Glendon Schubert and David J. Danelski, eds., Comparative Judicial Behavior (New York: Oxford University Press, 1969); or Theodore L. Becker, Comparative Judicial Politics (Chicago: Rand McNally, 1970).

4. See, for example, Stuart Nagel, ed., Handbook of Global Legal Policy (New York: M. Dekker, 2000), for an example of a volume that tries to extract some cross-national principles from a number of country-focused chapters. A volume that endeavors to seek international trends is by C. Neal Tate, The Global Expansion of Judicial Power (New York: New York University Press, 1995).

5. See, for two different types of discussions of this issue, Frederick Lee Morton, Law, Politics, and the Judicial Process in Canada (Calgary: University of Calgary Press, 1992); or Thomas M. Franck, Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs? (Princeton, N.J.: Princeton University Press, 1992).

6. Jerold Waltman and Kenneth Holland, "Preface," in The Political Role of Law Courts in Modern Democracies, ed. Jerold Waltman and Kenneth Holland (New York: St. Martin's Press, 1988), p. vi.

7. Jerold Waltman, "Introduction," in Waltman and Holland, Political Role of Law Courts, p. 5.

8. Discussion of "The supremacy of Lex" and related issues is included in the volume edited by W. E. Butler, Perestroika and the Rule of Law: Anglo-American and Soviet Perspectives (New York: St. Martin's Press, 1991). This is one of the central premises of the work of John Rawls, perhaps the best known of contemporary scholars in this area. See John Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1971), and John Rawls, Justice as Fairness (Cambridge: Harvard University Press, 2001).

9. This passage became well known when it was used by John Adams in 1774 in the Boston Gazette, number 7. Adams credited this formulation to the philosopher James Harrington (1611-1677), the author of the work The Commonwealth of Oceana (1656). See Bartlett's Familiar Quotations (Little, Brown and Co., 1980) as included in Microsoft Bookshelf, 1991 Edition CD-ROM Data Base.

10. Herbert Winter and Thomas Bellows, People and Politics (New York: John Wiley and Sons, 1977), p. 307.

11. See Locke's Section 127 in Barker, Social Contract, p. 74.

12. For an example of writing on natural law, see Robert P. George, Natural Law (Burlington, VT.: Ashgate Press, 2001), Robert George, In Defense of Natural Law (Oxford: Oxford University Press, 2001), Alexander D'Entreves, Natural Law: An Introduction to Legal Philosophy (Transaction Publishers, 1993) or Yves Simon, The Tradition of Natural Law (Fordham University Press, 1992). On moral law see Roslyn Muraskin and Matthew Muraskin, Morality and the Law (Upper Saddle River: Prentice Hall, 2001), Larry Alexander and Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law (Durham: Duke University Press, 2001), David Dyzenhaus and Arthur Ripstein, Law and Morality: Readings in Legal Philosophy (Toronto: University of Toronto Press, 2001), Robert George, Making Men Moral: Civil Liberties and Public Morality (New York: Oxford University Press, 1993). On divine law see Milner Ball, The Word and the Law (Chicago: University of Chicago Press, 1993).

13. Winter and Bellows, People and Politics, p. 308.

14. See George Sabine, A History of Political Theory (New York: Holt, Rinehart and Winston, 1961), p. 942.

15. Sabine, History of Political Thought, pp. 194-6.

16. John Merryman, The Civil Law Tradition, quoted in Henry Ehrmann, Comparative Legal Cultures (Englewood Cliffs, N.J.: Prentice Hall, 1976), p. 8.

17. See Csaba Varga, ed., Comparative Legal Cultures (New York: New York University Press, 1992), or John Merryman and David Clark, Comparative Law: Western European and Latin American Legal Systems Cases and Materials (Michie Company, 1993).

18. Kenneth Holland, "The Courts in the United States," in Waltman and Holland, The Political Role of Law Courts, p. 7. See Austin Sarat and Thomas Kearns, Law in the Domains of Culture

(Ann Arbor: University of Michigan Press, 2000), or Mahmood Mamdani, Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture (New York: St. Martin's Press, 2000).

19. Hiroshi Itoh, "The Courts in Japan," in Waltman and Holland, The Political Role of Law Courts, p. 211.

20. Ehrmann, Comparative Legal Cultures, p. 13. This and the following several paragraphs are based on more extended material in Ehrmann, and Winter and Bellows, People and Politics, pp. 309-10 and 319-22.

21. A good discussion of this can be found in Martin Shapiro, Courts: A Comparative and Political Analysis (Chicago: University of Chicago Press, 1981), chapter 3: "The Civil Law System and Preexisting Legal Rules."

22. A thorough discussion of the assumptions of the Anglo-American legal process can be found in Mirjan R. Damaska, The Faces of Justice and State Authority (New Haven: Yale University Press, 1986), or Edgar Bodenheimer, John Oakley, and Jean Love, Anglo-American Legal system: Introduction, Readings, and Cases (West Publishing, 1988).

23. On common law more generally, see James Stoner, Jr., Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism (University Press of Kansas, 1992), or Gerald Postema, Bentham and the Common Law Tradition (New York: Oxford University Press, 1989). See also Jedediah Purdy, For Common Things: Irony, Trust, and Commitment in America Today (New York: Vintage Books, 2000).

24. See Harold Spaeth and Jeffrey Segal, Majority Rule or Minority Will: Adherence to Precedence on the U.S. Supreme Court (Cambridge: Cambridge University Press, 2001), Wesley N. Hohfeld, David Campbell, and Phillip Thomas, Fundamental Legal Conceptions as Applied in Judicial Reasoning (Burlington, VT: Ashgate, 2001), and P. S. Atiyah and Robert Summers, Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory, and Legal Institutions (New York: Oxford University Press, 1991).

25. Winter and Bellows, People and Politics, p. 316.

26. See Christine Synowich, The Concept of Socialist Law (New York: Oxford University Press, 1990) for a full discussion. See also Bruce Arrigo, Social Justice/Criminal Justice: The Maturation of Critical Theory in Law, Crime and Deviance (Belmont, Ca.: Wadsworth, 1999).

27. For discussion of this relationship, see Maria Los, Communist Ideology, Law, and Crime: A Comparative View of the U.S.S.R. and Poland (New York: St. Martin's Press, 1988).

28. See Alan Watson, Legal Transplants: An Approach to Comparative Law (Athens: University of Georgia Press, 1993), Martha Field and William Fisher, Legal Reform in Central America: Dispute Resolution and Property Systems (Cambridge: Harvard University Press, 2001), or

Katharina Pistor, The Standardization of Law and Its Effect on Developing Economies (New York: United Nations, 2000), for a full discussion of the wide range of legal systems in the world.

29. See Gregory Mahler, Israel: Government and Politics in a Maturing State (New York: Harcourt, Brace, Jovanovich, 1990), pp. 187-190.

43. Curtis, Comparative Government, p. 107. See Kanishka Jayasuriya, Law, Capitalism, and Power in Asia: The Rule of Law and Legal Institutions (London: Routledge, 1999).

44. The literature in this area is still growing. See Howard Gillman, The Votes that Counted: How the Court Decided the 2000 Presidential Election (Chicago: University of Chicago Press, 2001), Abner Greene, Understanding the 2000 Election: A Guide to the Legal Battles that Decided the Presidency (New York: New York University Press, 2001), Alan Dershowitz, Supreme Injustice: How the High Court Hijacked Election 2000 (New York: Oxford University Press, 2001), or E. J. Dionne and William Kristol, eds., Bush v. Gore: The Court Cases and the Commentary (Washington, D.C.: Brookings Institution Press, 2001).

45. See Donald Jackson and Neal Tate, eds., Comparative Judicial Review and Public Policy (Greenwood Publishing, 1992), Donald Lively, Judicial Review and the Consent of the Governed: Activist Ways and Popular Ends (McFarland and Company, 1990), or Sylvia Snowiss, Judicial Review and the Law of the Constitution (New Haven: Yale University Press, 1990).

46. Monte Palmer and William Thompson, The Comparative Analysis of Politics (Itasca, IL: F.E. Peacock, 1978), p. 136.

47. See David O'Keeffe and Antonio Bavasso, Judicial Review in European Union Law (London, 2000).

48. Three good references to this decision and its impact can be found in Bernard Schwartz, A History of the Supreme Court (New York: Oxford University Press, 1993), Edward White, The Marshall Court and Cultural Change (New York: Oxford University Press, 1991), and Maureen Harrison and Steve Gilbert, eds., Landmark Decisions of the United States Supreme Court (Excellent Books, 1992). A very good new study of the topic in the United States is Louis Michael Seidman, Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review (New Haven: Yale University Press, 2001).

49. Becker, Comparative Judicial Politics, p. 206.

50. C.G. Haines, The American Doctrine of Judicial Review (New York: Russell and Russell, 1959), p. 44, cited in Becker, Comparative Judicial Politics, p. 218.

51. See the new journal published by John Wiley and Sons titled Judicial Review: Mapping the Developing Law and Practice of Judicial Review, edited by Michael Fordham in London.

52. Jerold Waltman, "The Courts in England," in Waltman and Holland, The Political Role of Law Courts, pp. 119-20.

53. Becker, Comparative Judicial Politics, p. 206.

54. This is discussed in Peter Hall , Jack Hayward, and Howard Machlin, eds., Developments in French Politics (St. Martin's Press, 1990), and Ian Derbyshire, Politics in France: From Giscard to Mitterand (Chambers, 1992).

55. Becker, Comparative Judicial Politics, p. 208.

57. Giuseppe Di Federico and Carlo Guarnieri, "The Courts in Italy," in Waltman and Holland, The Political Role of Law Courts, pp. 170-171.

58. Vasily Vlasihin, Introduction to the Legal System of Russia. American Bar Association, Central and East European Law Initiative (1994), internet document at <http://darkwing.uoregon.edu/~jbonine/review.html>.