with 161 cases, most of which were of crucial constitutional significance. Bill of Rights cases account for 53 percent (85 of 161) of all reported SACC cases; landmark federalism and separation of powers judgments make up an additional 25 percent (40 of 161) of the SACC caseload. From the Court's critical appraisal of the new constitution to its outlawing of the death penalty, in present-day South Africa there have been very few salient political controversies not contemplated by the Court.

In sum, the adoption of constitutional catalogues of rights in Canada, New Zealand, Israel, and South Africa ushered in a new constitutional era in these countries. In each case, the constitutionalization of rights and the fortification of judicial review marked a shift from traditional principles of parliamentary sovereignty toward a new regime of constitutional supremacy and active judicial review.

Judicial empowerment through the constitutionalization of rights and the establishment of judicial review may shed light on an often-overlooked aspect of constitutional politics: the political origins of constitutionalization. Although the adoption of a constitutional catalogue of rights provides the necessary institutional framework for the judicialization of politics, it is certainly insufficient in and of itself to generate the high level of judicialized politics seen in present-day Canada, New Zealand, Israel, and South Africa. How then can the increasingly common transfer of power from majoritarian policy-making arenas to national high courts through constitutionalization be explained? The following chapters address this frequently overlooked puzzle of the political origins of constitutionalization.

CHAPTER 2

The Political Origins of Constitutionalization

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.
>
> U.S. Supreme Court Justice Robert H. Jackson, West Virginia State Board of Education v. Barnette (1943)

Conventional Theories of Constitutional Transformation

Extant theories of constitutional transformation may be grouped into three major categories: evolutionist theories, functionalist explanations, and institutional economics models. Most scholars of constitutional politics agree that there is a strong correlation between the recent worldwide expansion of democracy and the contemporaneous global expansion of judicial power. Indeed, with a few notable exceptions (such as Egypt and Pakistan, which maintain relatively autonomous and influential national high courts), the expansion of judicial power has taken place primarily in democratic polities. Over the past three decades, three major waves that established and consolidated democracy took place: in Southern Europe in the late 1970s; in Latin America in the 1980s; and in Central and Eastern Europe in the early 1990s. These movements brought with them an expansion of judicial power in most of these new democracies, primarily through the constitutionalization of rights and the establishment of relatively autonomous judiciaries and supreme courts armed with judicial review practices.

Indeed, by its very nature, the existence of a democratic regime implies the presence of a set of procedural governing rules and decision-making processes to which all political actors are required to adhere. The persistence

and stability of such a system in turn requires at least a semiautonomous, supposedly apolitical judiciary to serve as an impartial umpire in disputes concerning the scope and nature of the fundamental rules of the political game. Similarly, judicial review is a prerequisite of viable democratic governance in multilayered federalist countries (for example, the United States, Germany, Canada, India, and Australia), and in emerging supranational polities (for example, the European Union). Moreover, the transition to and consolidation of democracy entails the establishment of some form of separation of powers between the major branches of government and between the central and provincial or regional legislatures.

In short, the existence of an independent and active judiciary appears to be a necessary condition for, and an inevitable by-product of, the proliferation of democracy during the second half of the twentieth century. The expansion of judicial power has indeed been associated with political and economic liberalization in postauthoritarian or quasi-democratic polities. However, the democratic proliferation thesis has certain shortcomings. The widespread transition to democracy cannot provide a coherent explanation for the significant variations in judicial power among new democracies. What is more, the expansion-of-democracy thesis fails to account for the significant variations in the timing, scope, and nature of the expansion of judicial power among established democracies.

EVOLUTIONIST THEORIES. The evolutionist approach to legal change stresses the inevitability of judicial progress and the importance of invisible and endogenous macrofactors in explaining the expansion of judicial power through constitutional reform. Some evolutionist theories suggest that legal development is linked to a polity's passage from one socioeconomic stage to another. Early legal transformation theorists, such as Adam Smith, argued that development of genuine contract and property concepts could only occur alongside the consolidation of agriculture. More recent evolutionist theories of legal transformation emphasize cultural variations among societies as a determinant of legal development.[1] Other theories positing inevitable judicial progress and legal development by stages have also emerged within more general theories of economic and political development.[2]

The most widely held thesis associated with this approach defines the trend toward the constitutionalization of rights and the fortification of judicial review as an inevitable by-product of a new and near-universal prioritization of human rights in the wake of World War II.[3] According to this view, the presence of an effective, written bill of rights is the crowning proof of constitutional development. The greatest proof of democracy's triumph in our times, it is argued, stems from the increasing acceptance and enforcement of the idea that democracy is not equivalent to majority rule; in a real democracy, minorities should possess legal protections in the form of a written constitution unchangeable even by parliament. According to this view, a constitutional bill of rights is part of fundamental law. Judges, who are removed from the pressures of partisan politics, are responsible for enforcing such rights through active judicial review.

The conception of constitutional transformation that stems from the social contract school of thought views constitutions and judicial review as procedural devices that free and equal people agree to voluntarily impose upon themselves to protect their equal, basic rights.[4] Realizing the occasional temptation of popular majorities to adopt measures that infringe on the basic rights of some members of the polity while not having an a priori indication of whose rights might be restricted by such potential measures, members of a polity might rationally choose to entrench the fundamental rules of the political game and the basic rights of its participants by granting a nonlegislative body that is insulated from majoritarian politics the power to review legislation. In so doing, members of the polity (or its constituent assembly) provide themselves with precautions, or precommitments, against their own imperfections or harmful future desires, and tie themselves into their initial agreement on the basic rules and rights that specify their sovereignty.[5] Proponents of this approach often regard the constitutionalization of rights and the establishment of judicial review as reflecting polities' and politicians' genuine "maturity" and deep commitment to a universal notion of human rights.

In its more empirically grounded variant, the evolutionist approach regards the constitutionalization of rights and the establishment of judicial review as fortifying the separation of powers among the executive, the legislature, and the judiciary. According to this view, confidence in technocratic government and planning has waned, and from this has grown a consequent desire to restrict the discretionary powers of the state. The result has been a diffusion of judicial power over the past several decades.[6] In its countermajoritarian guise, this approach stresses that by increasing "access" for special interest groups, the constitutionalization of rights and the establishment of active judicial review promote the diffusion of political power, add veto mechanisms, restrict the maneuvering of policymakers, and

limit the power of majorities in legislatures.[7] According to this view, independent courts, especially those armed with judicial review practices, not only monitor untrustworthy executive and legislature bodies but also facilitate the political representation of diffuse but well-organized minorities. This representation creates opportunities for certain groups to participate in policy-making that might otherwise be closed to them in majoritarian parliamentary politics.[8] Proponents of this approach therefore regard the constitutionalization of rights and the fortification of judicial review as the outcome of successful efforts by well-organized minority groups to protect themselves against the systematic threat of majoritarian political whims and to increase their impact on public policy outcomes.

FUNCTIONALIST EXPLANATIONS. Like the evolutionist approach, functionalist (or systemic need-based) explanations cast constitutional transformation as an organic response to pressures within the political system itself. These explanations emphasize the absence of human agency and the ineluctability embedded in any legal progress. They also recognize particular ways in which legal innovations can follow from demonstrations of social need. The best-known functionalist explanations for legal change focus on increases in systemic efficiency as the end products of such change. Some institutional economists, for example, posit a systemic efficiency-driven process of legal transformation, in which inefficient legal rules would more likely be litigated while new, efficient rules would persist once established.[9] Equivalent arguments have been made for legal changes in tort law and contract law, and even in the legal organization of a society to allow for modes of production that increase the rate of return on capital. Douglass North and Robert Thomas's analysis of the demise of feudalism in Europe illustrates the logic of this argument. During the Middle Ages, feudalism remained stable as long as land remained the scarce resource. Although lords could offer more rights to laboring serfs, it was not in their interest to do so. Following the Black Death, however, labor became the scarce resource. Lords facing competition for labor for the first time attempted to lure workers by offering them more attractive working conditions. This in turn stimulated labor force mobility, thus destroying feudalism in Western Europe.[10]

In its most common version, the functionalist approach suggests that the expansion of judicial power derives from a structural, organic political problem such as a weak, decentralized, or chronically deadlocked political system. The less functional the political system is in a given democracy, the

tionalization is seen as the best possible way of overcoming political ungovernability and ensuring the unity and "normal" functioning of such polities.[12] In its "consociational" variant, the needs-based explanation of constitutional transformation emphasizes political necessity in the development of mechanisms such as mutual veto and proportional representation, characterizing them as inevitable constitutional solutions that allow fragmented polities to function. According to this logic, expansion of judicial power in polities facing political polarization is the only institutional mechanism that enables opposition groups to monitor distrusted politicians and decision-makers.

The explanation commonly given for the unprecedented judicialization of Israeli politics in recent years provides a perfect illustration of the idea that systemic needs are the main cause of judicial empowerment. In a marked change from the norms of Israel's early decades of independence, the judiciary, in particular the Israeli Supreme Court, has recently become one of the most significant actors in Israel's political arena. From the early 1990s onward, the Court has increasingly exercised its power at the expense of politicians and administrators. The Court has gained the authority to review primary legislation, political agreements, and administrative acts; it monitors almost every aspect of public life in Israel. Israeli society is characterized by deep social and cultural cleavages[13] as well as by a political deadlock between the two major electoral blocs dating back to the late 1970s. According to the systemic needs explanation of judicial empowerment, this structural inability to deal with the social and cultural rifts besetting Israeli society and the stalemate faced by Israel's majoritarian politics corroded the authority of the Knesset and the government. This in turn led to the systemic dependency of the Israeli polity on a dominant, seemingly apolitical body of professional decision-makers: the Supreme Court judges.[14]

Another functionalist (or systemic needs-based) explanation emphasizes the general proliferation in levels of government and the corresponding emergence of a wide variety of semiautonomous administrative and regulatory state agencies as the main driving forces behind the expansion of judicial power over the past few decades. According to this thesis, independent and active judiciaries armed with judicial review practices are necessary for efficient monitoring of the ever-expanding administrative state. Moreover, the modern administrative state embodies notions of government as an active policy-maker, rather than a passive adjudicator of conflicts. The state therefore requires an active, policy-making judiciary.[15]

Along the same lines, scholars of judicial politics view the rapid growth

of supranational judicial review in Europe as an inevitable institutional response to complex coordination problems deriving from the systemic need to adopt standardized legal norms and administrative regulations across member-states in an era of converging economic markets.[16] A similar standardization rationale may explain what may be called the incorporation scenario of constitutional reform. In this view, the constitutionalization of rights and the establishment of judicial review in member-states of supranational economic and political regimes (the European Union, for example), as well as signatory states to transnational trade and monetary treaties, occurred through the incorporation of international and trans- or supranational legal standards into domestic law. Recent examples of this scenario of constitutionalization include the incorporation of the European Convention on Human Rights provisions into Danish law in 1993, into Swedish law in 1995, and into British law through the enactment in Britain of the Human Rights Act 1998—the first rights legislation introduced in the United Kingdom in three hundred years.

While the constitutional evolution and functionalist theories just outlined account for some factors involved in the development of juristocracy, none analyzes the specific political vectors behind any of the constitutional revolutions of the past several years in a comparative, systematic, and detailed way. Moreover, none of these theories accounts for the *precise timing* of constitutional reform. If we apply these theories to a concrete example, they consistently fail to explain why a specific polity reached its most advanced stage of judicial progress at a specific moment and not, say, a decade earlier. Like the democratic proliferation thesis, both the constitutionalization in the wake of World War II thesis and its corresponding constitutionalization as precommitment argument fail to account for the significant variations in the timing, scope, and nature of constitutionalization. It is hard to see, for example, why members of the Canadian polity in 1982, or members of the Israeli polity a decade later, chose to take steps against their own imperfections in the year they did and not earlier or later. What is more, the constitutionalization as precommitment argument is based on a set of hypothetical and speculative presuppositions concerning the origin of constitutions and judicial review that at the very best provide an ex post facto normative justification for their adoption. Moreover, if a given polity is indeed structurally ungovernable, it is difficult to see how the successful entrenchment of a bill of rights and the establishment of judicial review in that polity

can be explained, given the failed earlier attempts to enact a constitutional catalogue of rights. Furthermore, both legal evolution and systemic needs-based theories of judicial transformation tend to ignore human agency and the fact that legal innovations require legal innovators—people who make choices as to the timing, scope, and extent of legal reforms. Both explanations overlook the crucial self-interested intervention by political power-holders who are committed to judicial expansion in an attempt to shape the institutional setting to serve their own agendas.

INSTITUTIONAL ECONOMICS MODELS. Another utilitarian approach—the institutional economics-derived theory of constitutional transformation—sees the development of constitutions and judicial review as mechanisms to mitigate systemic collective-action concerns such as commitment, enforcement, and information problems. One such explanation sees the development of constitutions and independent judiciaries as an efficient institutional answer to the problem of "credible commitments."[17] Political leaders of any independent unit want to promote sustainable long-term economic growth and encourage investment that will facilitate the prosperity of their polity. Two critical preconditions for economic development are the existence of predictable laws governing the marketplace and a legal regime that protects capital formation and ensures property rights. The entrenchment of constitutional rights and the establishment of independent judicial monitoring of the legislative and executive branches are seen as ways of increasing a given regime's credibility and enhancing the ability of its bureaucracy to enforce contracts, thereby securing investors' trust and enhancing their incentive to invest, innovate, and develop.

Indeed, as Max Weber noted, the fundamental building block of every successful capitalist market is a secure "predictability interest."[18] Without this, potential investors lack the incentive to invest. Scholars have shown how entrenched legal rights that enhance investors' trust have led to economic growth in various historical contexts. Douglass North and Barry Weingast, for example, have illustrated how limitations on rulers' power in early capitalist Europe increased legal security and predictability, thereby allowing certain polities to borrow capital from external lenders, who were protected by law from the seizure of their capital.[19] More recent empirical studies have established a statistical link between the existence of institutional limitations on government action (rigid constitutional provisions and judicial review, for example) and rapid economic growth.[20]

A second institutional economics explanation suggests that judicial review may constitute an efficient "fire alarm" mechanism for monitoring the bureaucracy.[21] Legislators routinely delegate discretion over public policy programs to bureaucrats but must try to ensure that these bureaucrats implement the programs as they were intended. Investments in measures that enhance judicial independence are accordingly interpreted as efforts by executive branch leaders to avoid the high costs of constant central supervision of bureaucratic agencies (or a "police patrol" mechanism). Adopting a decentralized "fire alarm" monitoring model allows those who feel they have been treated unfairly to sue through the courts. In a similar vein, recent studies have emphasized the utility of judicial review as a mechanism for conveying information to legislatures about judicial policy preferences vis-à-vis legislative policy preferences as well as information concerning the actual effects of legislation.[22] The information-conveying function of judicial review is likely to increase in cases of a priori, abstract judicial "preview" such as that exercised by the French *Conseil Constitutionnel* or by the Canadian Supreme Court in the reference procedure.[23]

Even if the constitutionalization of rights and the establishment of judicial review do indeed mitigate problems of information, commitment, and enforcement, as suggested by these institutional-economics-driven explanations for judicial empowerment through constitutionalization, however, these explanations fail to explain how prosperous democratic polities managed to successfully address commitment and enforcement problems prior to the establishment of judicial review. Nor do they demonstrate why a certain polity would choose to adopt such efficient mechanisms at a particular point in time.

Thinking Critically about the Political Origins of Constitutionalization: The Strategic Approach and the Hegemonic Preservation Thesis

A realist, strategic approach to judicial empowerment focuses on various power-holders' self-interested incentives for deference to the judiciary. It makes four preliminary assumptions. First, legislative deference to the judiciary and judicial empowerment through constitutionalization do not develop separately from the concrete social, political, and economic struggles that shape a given political system. Indeed, the expansion of judicial power is an integral part and an important manifestation of those struggles and

cannot be understood in isolation from them. Second, when studying the political origins of constitutionalization (as well as the political origins of other institutional reforms), it is important to take into account events that did *not* occur and the motivation of political power-holders for *not* behaving in certain ways. In other words, the political origins of constitutional reform cannot be studied in isolation from the political origins of constitutional stalemate and stagnation. Third, political and legal institutions produce differential distributive effects: they privilege some groups and individuals over others. Other variables being equal, prominent political, economic, and judicial actors are therefore likely to favor the establishment of institutional structures most beneficial to them. And fourth, because constitutions and judicial review hold no purse strings and have no independent enforcement power but nonetheless limit the institutional flexibility of political decision-makers, the voluntary self-limitation through the transfer of policy-making authority from majoritarian decision-making arenas to courts seems, prima facie, to run counter to the interests of power-holders in legislatures and executives. Unless proven otherwise, the most plausible explanation for voluntary, self-imposed judicial empowerment is therefore that political, economic, and legal power-holders who either initiate or refrain from blocking such reforms estimate that it will serve their interests to abide by the limits imposed by increased judicial intervention in the political sphere.

Political power-holders may profit from an expansion of judicial power in a number of ways. First, from the politicians' point of view, delegating policy-making authority to the courts may be an effective means of reducing decision-making costs as well as shifting responsibility, thereby reducing the risks to themselves and to the institutional apparatus within which they operate. If delegation of powers can increase credit and/or reduce blame attributed to the politician as a result of the policy decision of the delegated body, such delegation can be beneficial to the politician.[24] The removal of policy-making power from legislatures and executives and its investiture in courts may become attractive for political power-holders when disputes arise that they consider undesirable as open public debates, primarily because they present no-win political dilemmas (such as the dispute over abortion policy in the United States, the debate over same-sex marriage in Canada, or the question of "who is a Jew" in Israel). As Mark Graber and others have shown, ruling national coalitions in the United States have been inclined to defer to the U.S. Supreme Court primarily when they have reached a political deadlock, faced a no-win decision, or have been unwilling or unable to

settle contentious public disputes in the political sphere. Deference to the judiciary, in other words, is derivative of political, not judicial, factors.[25]

Second, when politicians seek to gain public support for contentious views by relying on national high courts' public image as professional and apolitical decision-making bodies, or when they regard public disputes in majoritarian decision-making arenas as likely to put their own policy preferences at risk, diverting responsibility to the courts may become an attractive option. The threat of losing grip on pertinent policy-making processes and outcomes may be a strong driving force behind attempts to transfer power to courts. Accordingly, a strategic, political-power-oriented explanation for voluntary, self-imposed judicial empowerment through the constitutionalization of rights and the establishment of judicial review suggests that political power-holders who either initiate or refrain from blocking such reforms estimate that it enhances their absolute or relative political power vis-à-vis rival political actors. Political actors who voluntarily establish institutions that appear to limit their institutional flexibility (such as constitutions and judicial review) may assume that the clipping of their wings under the new institutional structure will be compensated for by the limits it might impose on rival political elements. In short, those who are eager to pay the price of judicial empowerment must assume that their position (absolute or relative) would be improved under a juristocracy. Such an understanding of judicial empowerment through constitutionalization as driven primarily by strategic political considerations may take a "thin" or a "thick" form.

The thin version employs party-based "electoral market" logic to explain judicial empowerment. In their seminal work of 1975, William Landes and Richard Posner argued that, other variables being equal, legislators favor the interest groups from which they can elicit the greatest investment through lobbying activities. A key element in maximizing such investment is the ability of legislators to signal credible long-term commitments to certain policy preferences. An independent judiciary's role in this regard is complementary to parliamentary procedural rules—it increases the durability of laws by making changes in legislation more difficult and costly. A judiciary that is overtly subservient to a current legislature (or expressly biased against it) can nullify legislation enacted in a previous session (or in current legislation), thereby creating considerable instability in legal regimes. In such legally unstable settings, selling legislation to powerful interest groups may prove difficult from the politicians' point of view. The potential threat

of instability or loss of mutual profits and power may therefore result in support for judicial empowerment vis-à-vis legislatures.[26]

Observing variations in the degree of judicial independence among industrial democracies, Mark Ramseyer develops Landes and Posner's argument into an "electoral market" model, which suggests that judicial independence correlates to the competitiveness of a polity's party system.[27] When a ruling party expects to win elections repeatedly, the likelihood of judicial empowerment is low. Since rational politicians want long-term bargains with their constituents, they lack the incentive to support an independent judiciary when their prospects of remaining in power are high. However, when a ruling party has a low expectation of remaining in power, it is more likely to support an independent judiciary to ensure that the next ruling party cannot use the judiciary to achieve its policy goals. In other words, under conditions of electoral uncertainty, the more independent courts (or other semiautonomous regulatory agencies) are, the harder it will be for the successive government to reverse the policies of the incumbent government.[28] Therefore, in Japan, for example (where a single party ruled almost uninterruptedly for more than four decades following World War II), judicial independence is weaker than it is in countries where there is an acknowledged risk that the party in power might lose control of the legislature in each election.

The electoral market thesis is quite insightful when it is used to analyze the politics of constitution-making processes during periods of regime change and political transition. Judicial review, argues Tom Ginsburg, is a solution to the problem of uncertainty in constitutional design. By providing "insurance" to prospective electoral losers, judicial review can facilitate transition to democracy.[29] As Pedro Magalhaes notes, "When the political actors that dominate the constitution-making process expect to lack control over legislatures in the future, judicial review of legislation may emerge as an institution designed to protect their interests."[30] The transition to democracy in Spain and Portugal in the mid-1970s, for example, was characterized by lack of a single core of postauthoritarian political power, thereby leading to the rapid adoption of strong constitutional review mechanisms. In Greece, by contrast, the postauthoritarian constituent process was dominated by a single party (Constantine Karamanlis's New Democracy), which enjoyed over 70 percent of the seats in the assembly and did not have to worry about elections following the approval of the new constitution. "The result," notes Magalhaes, "was that Greece, with similar authoritarian and

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civil law legacies as Spain and Portugal, and involved in an almost simultaneous democratic transition, remained the only southern European democracy without constitutional review of legislation."[31] The same rationale may explain the substantial increase in the power and autonomy of the Supreme Court of Mexico in 1994 as a calculated attempt by the then ruling party (*Partido Revolucionario Institucional,* or PRI) to lock in its historic influence over Mexico's political sphere before the PRI's increasingly popular political rivals (and eventually winners of the 2000 presidential election) were able to gain control over the country's crucial policy-making arenas.[32]

In a similar vein, the literature on the political origins of other relatively autonomous agencies (such as central banks, for example) suggests that the autonomy of these agencies in advanced industrial countries is simply a function of government politicians' time horizons. The longer the horizon of their time in power, the more government politicians will desire the greatest possible control over economic policy. This implies a consequent loss of independence for the agency in question. By this logic, short horizons or forthcoming elections can lead politicians who fear losing their office to increase central bank independence in order to limit the future options of their political opponents.[33]

While the electoral market ("thin") strategic explanation contributes significantly to an understanding of the conditions under which judicial empowerment is more likely to occur, especially at times of political transition, it still does not provide a full understanding of constitutionalization and the accompanying emergence of judicial review. For one, this model does not provide a full explanation for the rise of judicial power in the premier case of modern constitutionalization—the pre-electoral market, late-eighteenth-century United States. More importantly, this model is based on a somewhat simplistic perception of politics as limited to the partisan electoral market. Such a minimalist understanding of politics does not capture the full picture of constitutional politics in ethnically or culturally divided "new constitutionalism" polities (e.g., Canada or South Africa), or in countries such as Israel, India, Egypt, or Turkey (to name but a few examples) where the fundamental tension between secularist, cosmopolitan values and religious particularism has been at the forefront of political struggle for decades. The political hegemony and cultural propensities of ruling elites and the urban intelligentsia in these and other fragmented polities have been constantly challenged by alternative worldviews, belief systems, and policy preferences. These nuanced and complex political struggles cannot be easily re-

ating under conditions of political uncertainty at times of regime change. Third, the electoral market model ignores influential economic stakeholders' and judicial elites' own contribution to the constitutionalization of rights and the establishment of judicial review.

As will be discussed in more detail in the next chapter, the 1992 constitutional reform in Israel was initiated and carried out by an ad hoc cross-party coalition of leading Knesset members. Those supporting this reform included not only long-standing rivals from the country's two largest political parties—the Likud (Unity) party, which was in power in 1992, and the Labor party, which was the main opposition party in 1992—but also representatives of the leftist opposition party Meretz and parliament members who represented the policy preferences of the secular bourgeoisie. Clearly, this example demonstrates that the reductive partisan competition model fails to account for certain social and cultural forces. A more nuanced explanation of the political origins of constitutionalization is necessary if we are to fully understand judicial empowerment in countries where it has occurred. Our explanation must ignore neither agency nor the role of economic and judicial elites, and it must reflect the political reality in internally fragmented, rule-of-law polities in a "thick" way that captures a broader picture than the mere electoral market aspect of politics.

Such a "thick" strategic explanation, which I term the hegemonic preservation thesis, suggests that judicial empowerment through constitutionalization is best understood as the by-product of a strategic interplay between three key groups: threatened political elites who seek to preserve or enhance their political hegemony by insulating policy-making processes from the vicissitudes of democratic politics; economic elites who may view the constitutionalization of certain economic liberties as a means of promoting a neoliberal agenda of open markets, economic deregulation, antistatism, and anticollectivism; and judicial elites and national high courts that seek to enhance their political influence and international reputation. In other words, strategic legal innovators—political elites in association with economic and judicial elites who have compatible interests—determine the timing, extent, and nature of constitutional reform. To be sure, demands for constitutional change often emanate from various groups within the body politic. However, unless hegemonic political and economic elites, their parliamentary representatives, and the judicial elite envisage absolute or relative gain from a proposed change, the demand for that change is likely to be blocked or quashed.

When facing possible threats to their policy preferences in majoritarian

decision-making arenas (such as a growing influence on the part of historically disenfranchised or underrepresented groups and interests in democratically elected policy-making bodies), elites who possess disproportionate access to, and influence over, the legal arena may initiate a constitutional entrenchment of rights in order to transfer power to supreme or constitutional courts. Typically, such proconstitutionalization elites are made up of the urban intelligentsia, the legal profession, and the managerial class. They often represent historically hegemonic enclaves of political and economic power-holders, who tend to adhere to an agenda of relative cosmopolitanism, open markets, formal equality, and Lockean-style individual autonomy. Based on the essential tendency of classic civil liberties to protect individual freedoms, as well as on the courts' record of adjudication and justices' ideological preferences, these elites can safely assume that their policy preferences will be less effectively contested.

This type of hegemonic preservation through the constitutionalization of rights or an interest-based judicial empowerment is likely to occur when the judiciary's public reputation for professionalism, political impartiality, and rectitude is relatively high; when judicial appointment processes are controlled to a large extent by hegemonic political elites; and when the courts' constitutional jurisprudence predictably mirrors the cultural propensities and policy preferences of these hegemonic elites. Under such conditions, judicial empowerment through the constitutionalization of rights and the establishment of judicial review may provide an efficient institutional means by which political elites can insulate their increasingly challenged policy preferences against popular political pressure, especially when majoritarian decision-making processes are not operating to their advantage.

This counterintuitive argument has striking parallels in works concerning the political origins of empowerment of other semiautonomous institutions, such as central banks, environmental regulatory bodies, and supranational treaties and tribunals. Variances in the capacities of early central banking institutions in developing countries, for example, were shaped by the changing financial interests of those in a position to voluntarily delegate authority to central banks: government politicians and private banks.[34] Similarly, varying degrees of support by existing firms toward proposed environmental regulatory policies can be explained by the different limits and costs such policies impose upon new firms. Because environmental regulation typically imposes more stringent controls on new firms, it restricts entry into the marketplace and potentially enhances the competitive position of exist-

A similar rationale for judicial empowerment at the supranational level is put forward by the "intergovernmentalist" thesis concerning the evolution of the European Court of Justice (ECJ).[36] According to this thesis, member states choose to create (and selectively abide by the limits imposed by) supranational institutions primarily because these institutions help them surmount problems arising out of the need for collective action and also help them overcome domestic political problems. National governments of the EU member-states have not been passive, unwilling victims of the process of European legal integration; they consciously transferred power to the Court, and they have supported the Court when it has taken a proactive stance. Moreover, the selective implementation of ECJ rulings by member-states derives from domestic political considerations by national governments (such as a greater willingness to implement ECJ judgments that favor certain constituencies whose political support is essential for governments and ruling coalitions).

Other works have similarly suggested that in newly established democracies in post–World War II Europe, governments committed to international human rights regimes (the European Court of Human Rights, for example) as a means of locking in fundamental democratic practices in order to protect against future antidemocratic threats to domestic governance.[37] Governments resorted to this tactic when the benefits of reducing future political uncertainty outweighed the "sovereignty costs" associated with membership in such supranational human rights enforcement mechanisms. The same logic may explain the voluntary incorporation of major international treaties and covenants protecting fundamental human rights and civil liberties into embattled democracies' constitutional law (as happened in Argentina in 1994); or the constitutionalization of rights and the corresponding establishment of full-scale constitutional review following years of political instability and recurring military coups d'état (as happened in Thailand in 1997).[38] Likewise, Miles Kahler has suggested that the precision of the North American Free Trade Agreement (NAFTA), for example, was "part of the Mexican government's strategy to bind successor governments to its policies of economic openness."[39] Hence, Andrew Moravcsik notes, "governments may turn to international enforcement when an international commitment effectively enforces the policy preferences of a particular government at a particular point in time against future domestic political alternatives."[40] In other words, self-interested political incentives—rather than the altruistic considerations of political leaders or universal commitment to a morally elevated conception of human rights—provided the major impetus for the

commitment by various countries to binding supranational human rights and free trade regimes.

Under specific circumstances, then, political power-holders may choose to enhance their position by voluntarily tying their own hands. Such a strategic, counterintuitive self-limitation may be beneficial from the point of view of political power-holders when the limits imposed on rival elements within the body politic outweigh the limits imposed on themselves.

Influential proconstitutionalization political elites in rule-of-law polities, however, do not operate in a political or institutional vacuum. To effectively promote their judicial empowerment interests, they must secure the cooperation of economic and judicial elites with compatible interests. Indeed, judicial empowerment through the constitutionalization of rights may serve the interests of influential coalitions of domestic economic elites—powerful industrialists and corporations—who gain added impetus toward less government regulation and reduced social spending by global economic trends. Most constitutional catalogues of rights place boundaries on government action and protect the private sphere (human and economic) from unjustified state intervention. Historically, the rights of landowners, big business, and economic investors were secured long before the rights of workers or women, let alone the poor. Moreover, the modern history of constitutional rights jurisprudence suggests that national high courts also tend to conceptualize the purpose of rights as protecting the private sphere from interference by the "collective," often understood as the state and its regulatory institutions. Economic elites may therefore view the constitutionalization of rights, especially property, mobility, and occupational rights, as a means of removing market rigidities (such as trade barriers and collective bargaining), promoting privatization and economic deregulation, or simply as a way of fighting what their members often perceive to be the harmful large-government policies of an encroaching state.

Under specific circumstances, international political economy factors may also push domestic economic elites to advocate constitutionalization as a means of placing economic liberties and rules allowing for free movement of transnational capital beyond the reach of majoritarian control.[41] For example, the protection of the economic sphere, through the constitutionalization of mobility, property, occupational, and trade rights as well as the establishment of independent judiciaries that function as checks on (often "unpredictable") domestic politics and (often "arbitrary") state action, has long been viewed by transnational economic bodies such as the International Monetary Fund as a primary indicator of successful markets and sustained economic growth.[42] The incorporation into domestic law of these and other legal norms endorsed by transnational trade and monetary regimes is often a prerequisite imposed on countries striving to become members. New democracies (such as those in the former Eastern Bloc) that rely heavily on foreign aid and investment are likely to bow to pressure from leading western democracies, economic corporations, or transnational governing bodies to promote the rule of law by emulating the constitutional fundamentals of liberal democracies. Adopting a constitutional catalogue of rights and establishing judicial review may therefore serve as a means to demonstrate a willingness to accept the required legal standards for joining supranational economic regimes. The restriction of legislative power through the constitutionalization of rights and the establishment of judicial review may also enhance a given regime's international economic credibility.

In short, the global trend towards constitutionalization concerns more than preservation of increasingly threatened values of core social groups. As Stephen Gill observes, "[n]ew constitutionalism is a macro-political dimension of the process whereby the nature and purpose of the public sphere has been redefined in a more privatized and commodified way . . . it can be defined as the political project of attempting to make trans-national liberalism, and if possible liberal democratic capitalism, the sole model for future development. It is therefore intimately related to the rise of market civilization."[43]

The transfer of power to the courts may also serve the interests of a supreme court seeking to enhance its political influence and international profile. As the recent strategic revolution in the study of judicial decision-making has established, judges may be precedent followers, framers of legal policies, or ideology-driven decision-makers, but they are also sophisticated strategic decision-makers who realize that their range of choices is constrained by the preferences and anticipated reaction of the surrounding political sphere.[44] Justices tend to vote strategically to minimize the chances that their decisions will be overridden; if the interpretation that the justices most prefer is likely to elicit reversal by other branches, they will compromise by adopting the interpretation closest to their preferences that could be predicted to withstand reversal.[45] Accordingly, quite a few landmark decisions of the U.S. Supreme Court have not been merely acts of professional, apolitical jurisprudence (as doctrinal legalistic explanations of court rulings often suggest) or reflections of its justices' ideological preferences and values (as "attitudinal" models of judicial behavior might suggest), but also a reflection of their strategic choices.

Short-term policy considerations represent merely one possible motivation for strategic behavior by courts. Supreme Court judges may also be viewed as strategic actors to the extent that they seek to maintain or enhance the Court's institutional position vis-à-vis other major national decision-making bodies.[46] Courts may realize when the changing fates or preferences of other influential political actors, as well as gaps in the institutional context within which they operate, might allow them to strengthen their own position by extending the ambit of their jurisprudence and fortifying their status as crucial national policy-making bodies.[47] As recent studies have shown, the establishment of an international rule of law in Europe was driven in no small part by national judges' attempts to enhance their independence, influence, and authority vis-à-vis other courts and political actors.[48]

Expansion of judicial power through the constitutionalization of rights and judicial review may also support the interests of a supreme court seeking to increase its symbolic power and international prestige by fostering its alignment with a growing community of liberal democratic nations engaged in judicial review and rights-based discourse. In this respect, note that the past several decades have seen an accelerating trend toward intercourt borrowing and the establishment of a globalized, non-U.S.-centered judicial discourse. This trend has been described by Mary Ann Glendon as "a brisk international traffic in ideas about rights" carried on through advanced information technologies by high court judges from different countries.[49] In its first landmark rights decision (*Makwanyane*, 1995—determining the unconstitutionality of the death penalty), the South African Constitutional Court examined in detail landmark rulings from Botswana, Canada, the European Court of Human Rights, Germany, Hong Kong, Hungary, India, Jamaica, Tanzania, the United Nations Committee on Human Rights, the United States, and Zimbabwe. As one commentator recently noted: "Constitution interpretation across the globe is taking on an increasingly cosmopolitan character, as comparative jurisprudence comes to assume a central place in constitutional adjudication."[50] In short, according to Anne-Marie Slaughter, "Courts are talking to one another all over the world."[51] Similarly, judicial empowerment through constitutionalization may elevate the symbolic status of a fairly cohesive professional stratum of judges, law professors, human rights organizations, litigation-oriented nongovernmental organizations (NGOs), top lawyers, and law firms. Not surprisingly, the legal profession has been one of the major advocates of judicial empowerment.

The support of influential political elites remains the key factor in judicial empowerment through constitutionalization. Supreme courts in relatively open, rule-of-law polities would prefer to have an enhanced political influence and international profile. Likewise, economic elites have a near-permanent interest in extended protection of the private sphere and entrenchment of economic freedoms. It is political power-holders who are least likely to provide constant support for constitutionalization and the corresponding expansion of judicial power, because these changes are likely to lessen their room for political maneuvering. Thus, political power-holders—not economic or judicial elites—are the primary catalyst and driving force behind constitutionalization.

Judicial power does not fall from the sky; it is politically constructed. I believe that the constitutionalization of rights and the fortification of judicial review result from a strategic pact led by hegemonic yet increasingly threatened political elites, who seek to insulate their policy preferences against the changing fortunes of democratic politics, in association with economic and judicial elites who have compatible interests. The changes that emerge reflect a combination of the policy preferences and professional interests of these groups.

Given that there are at least three distinct groups whose ability to gain power and influence is contingent on judicial empowerment through the constitutionalization of rights, it becomes evident that the hegemonic preservation explanation does not depend on the existence of any systemic social need. Nor does it assume any necessary evolution in a progressive direction. This explanation is not deterministic, but actor-oriented; and, unlike extant microfoundational theories of judicial independence, it does not depend on the competitiveness of the party system. While most existing theories of constitutional transformation focus on universal or organic macro-explanations for this increasingly common phenomenon, a realist approach to constitutionalization emphasizes human agency and specific political incentives as the major determinants of judicial empowerment. Such an approach suggests that the expansion of judicial power through the constitutionalization of rights and the establishment of judicial review reflects appropriation of the rhetoric of social justice by threatened elites to bolster their own position in the ongoing political struggles of a specific polity. In the next chapter, I illustrate the hegemonic preservation thesis in action in four new constitutionalism polities—Israel, Canada, New Zealand, and South Africa.

CHAPTER 3

Hegemonic Preservation in Action

> "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "who is to be master—that's all."
>
> Lewis Carroll, *Through the Looking Glass and What Alice Found There*

The 1992 Constitutional Revolution in Israel

The recent history of constitutional politics in Israel presents a near-ideal illustration of my explanation of judicial empowerment. The hands that guided the 1992 constitutionalization of rights and the establishment of judicial review in Israel were entirely visible; the process was steered by an ad hoc cross-party coalition of politicians representing Israel's historically hegemonic (albeit increasingly challenged) secular Ashkenazi elite in association with economic and judicial elites who had compatible interests. This triadic strategic alliance, of which the political component was the most active, determined the timing, scope, and nature of the 1992 constitutional revolution. It has also been the major coalition opposing the constitutionalization of subsistence welfare rights and the creation of a more democratically representative Supreme Court. It was driven primarily by a self-interested agenda—not by its members' subordination to some invisible evolutionist or structural forces nor by their devotion to some elevated vision of human rights or national unity.

The 1992 constitutional entrenchment of rights and the establishment of judicial review in Israel were initiated and supported by politicians repre-

senting Israel's secular Ashkenazi bourgeoisie, whose historic political hegemony in crucial majoritarian policy-making arenas (such as the Knesset) had become increasingly threatened. The political representatives of this group found the delegation of policy-making authority to the Court an efficient way to overcome the growing popular backlash against its ideological hegemony and, perhaps more important, an effective short-term means of avoiding the potentially negative political consequences of its steadily declining control over the majoritarian decision-making arena. A brief survey of the key events that have shaped Israel's constitutional history since the establishment of the state is necessary in order to understand this claim.

The state of Israel was founded on May 14, 1948, as a "Jewish and Democratic" state. As we have seen in earlier chapters, the major constitutional challenge Israel has faced since its foundation has been the creation of an ideologically plausible and politically feasible synthesis between these two seemingly contradictory terms (especially given that approximately one-fifth of Israel's citizenry consists of non-Jews).[1] And as we have seen in Chapter 1, even within the Jewish population itself, the exact meaning of Israel as a Jewish state has been highly contested with a secular, relatively cosmopolitan lifestyle and ideological preferences striving to maintain their hegemony vis-à-vis embedded symbols of Jewish tradition, religiosity, and exceptionalism. While historically the Orthodox stream of the Jewish religion has long enjoyed the status of being the sole branch of Judaism formally recognized by the state, a series of landmark Supreme Court of Israel (SCI) rulings over the past several years have altered the long-standing status quo.[2]

Throughout its existence, Israel has also struggled with social divisions based on ethnicity and national origin. There are the fissures between Mizrahi or Sephardi Jews (mostly Jews of North African and Mediterranean origin) and the generally better-off Ashkenazi Jews (mostly Jews of European descent). Further social heterogeneity comes from Israel's vibrant immigrant community, with approximately one million immigrants who arrived from the former Soviet Union during the 1990s forming the majority. A sizable minority of Jewish immigrants also came from Ethiopia. Their reception opened the polity up to charges of skin-based racism for the first time. The final twist of variety in this divided polity is the growing community of non-Jewish foreign workers residing in Israel (estimated at 300,000 or more), approximately two-thirds of whom have entered the country illegally.

The 1948 Declaration of Independence of the State of Israel created temporary governmental institutions. A Constituent Assembly was simultaneously formed and invested with the power to draft a constitution that would eventually establish permanent governing institutions. In 1949, the Constituent Assembly changed its name to the Knesset and established itself as the legislative body of the state of Israel. After a year of debates over the merits of a constitution, it became apparent that the religious parties were opposed to the idea of an entrenched constitution because it would invest the ultimate source of sovereignty in the citizenry rather than in God or Jewish law. Mapai—the primary component of today's Labor Party and the unchallenged secular ruling party at the time—was also unwilling to proceed with drafting a constitution, partly to avoid jeopardizing the tenuous secular/religious coalition government, but primarily because Mapai leaders, notably David Ben-Gurion, had no political incentive to transfer policy-making authority to the judiciary and no desire to impose any limitations on their own power. Thus, to preserve political power while simultaneously pursuing a constitutional dialogue, in 1950 the first Knesset adopted a compromise known as the Harari Resolution. This enabled the Knesset both to evade its obligation to compose a written constitution and to preserve its power to enact one through the adoption of a series of Basic Laws. The resolution stated: "The constitution shall be composed of individual chapters in such a manner that each of them shall constitute a basic law in itself. The individual chapters shall be brought before the Knesset . . . and all the chapters together will form the State Constitution."[3]

In the years leading up to 1992, the Knesset passed nine Basic Laws, concerning primarily the powers vested in the various branches of government.[4] None of these laws provided any entrenched constitutional protection of basic rights and liberties, just as none formally established any type of judicial review. In the absence of a civil rights tradition and the necessary constitutional framework for actively reviewing primary legislation, the Supreme Court was limited in the pre-1992 era to judicial interpretation of administrative acts, informed by an "implied bill of rights" doctrine.[5]

Beginning in the late 1950s, numerous attempts were made by civil libertarian politicians and interest groups to pass a bill of rights. Until 1992, all of these attempts failed. Standard explanations for Israel's repeated failure to enact a bill of rights before 1992 include the British colonial legacy of parliamentary sovereignty, steady opposition from the religious parties, and the lack of consensus among Israel's Jewish secular and religious populations regarding Israel's definition as a Jewish and democratic state (terms that many believe to be mutually exclusive and that therefore deny, prima facie, any meaningful protection of religious minority rights by a constitutional bill of rights).

While these explanations are persuasive, they reveal only part of the picture. The British tradition was far more pervasive in India than in Israel, yet at the same historical moment of Israel's founding, the new Indian Congress was enacting a detailed and wide-reaching constitution. Moreover, every country that has adopted substantive judicial review, from eighteenth-century America to twentieth-century South Africa, has done so in opposition to a prior tradition—including, most recently, Canada in 1982, New Zealand in 1990, many former Eastern Bloc countries in the early 1990s, and the United Kingdom in 1998.

In Israel, the religious parties' opposition to the constitutional entrenchment of rights was certainly not insurmountable. At least until the mid-1980s, they were a minority, whose opposition could have been overcome by combining several factions of the majority secular forces. The difficulty in defining Israel as both Jewish and democratic proved not to be a major stumbling block to a bill of rights; this dual definition has not changed since the state's foundation, and in fact was reentrenched by the Basic Laws adopted in 1992. The most plausible explanation for the failure to enact a bill of rights in Israel before 1992 is that political power-holders in the pre-1990s legislature were disinclined to delegate power to the judiciary as long as their political hegemony and control of parliament remained almost unchallenged. That constitutional reforms have taken place since 1992 in spite of the continued presence of the long-standing obstacles just mentioned suggests that the political incentives driving the parliamentary representatives of the primarily Ashkenazi secular elite were what changed.

During the first three decades of Israel's independence, when its control of Israeli politics was virtually undisturbed, Ben-Gurion's Mapai opposed the adoption of a bill of rights and repeatedly championed the democratic character of parliamentary sovereignty and majority rule. Highly critical of the constitutional role of the Supreme Court in the United States, Ben-Gurion said in a frequently cited speech: "Do we need a Constitution like the Americans? By all means let us profit from the experience of others and borrow laws and procedures from them, provided they match our needs . . . [I]n a free state like . . . Israel there is no need for a bill of rights . . . we need a bill of duties . . . duties to the homeland, to the people, to *aliyah*, to building the

land, to the security of others, to the weak."[6] In a debate about due process and emergency regulations, Ben-Gurion went on to say: "Every jurist knows how easy it is to weave juridical cobwebs to prove anything and refute anything . . . as a law student I know that no one can distort any text and invent far-fetched assumptions and confusing interpretation like the jurist."[7] As Gary Jacobsohn notes, "for historians and legal scholars, even those inclined to resist cynicism, it is relatively easy to accept the allegations of Menachem Begin, then the leader of the minority Herut movement, that Ben-Gurion's opposition to a constitution was fundamentally attributable to his fear of losing all or some of his power." As Begin pointed out in a debate in the First Knesset, "if the Constituent Assembly legislates a constitution, then the government will not be free to do as it likes."[8]

In short, as long as Israel's secular Ashkenazi elite remained virtually unchallenged in their control of parliament, they had no reason to undermine their position by delegating power to the judiciary through the entrenchment of rights and the establishment of judicial review. This led to a constitutional stalemate, which persisted from the early 1950s until the late 1980s.

But as Israel's secular Ashkenazi bourgeoisie and its political representatives increasingly lost their grip on Israeli politics, their attitude toward judicial review changed. In the early 1990s, a group of Knesset members, representing a primarily secular, neoliberal ideological agenda, reacted to the continuous decline of their popular support by forming an ad hoc cross-party parliamentary coalition that initiated and carried out an institutional empowerment of the judiciary. Draft legislation was submitted to the Knesset by Knesset Member (MK) and law professor Amnon Rubinstein (of the liberal, left-wing Meretz party, then in the parliamentary opposition) in the summer of 1991, with the tacit assent of the Justice Minister Dan Meridor (of the right-wing Likud party). This initiative culminated in the 1992 enactment of two basic civil rights and liberties laws—Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation—as well as the amendment of Basic Law: The Government.[9] These enactments paved the way for active judicial review in Israel by awarding the Supreme Court the authority both to monitor closely Israel's political arena and to rescind any "unconstitutional" primary legislation enacted by the Knesset.

A comprehensive survey of parliamentary records reveals that of the leading group of 32 MKs who consistently advocated and supported the new laws in the Knesset pre-enactment debates (from the preliminary debates in

April-May 1991 to their official enactment in March 1992), 18 were Labor MKs, 8 were Likud MKs, and 6 were Meretz MKs (a rare cross-party coalition)—all of whom supported a clear secular, neoliberal agenda and many of whom held legal qualifications.[10] Of the original 32 supporters, 28 voted consistently against increasing state funding for various religious and ultra-Orthodox educational institutions, 25 voted consistently for the privatization of various public services (including the commodification of Israel's electronic media, health, telecommunication, and banking services), and 26 were professionals (lawyers, doctors, managers, and so on). The 21 MKs who consistently opposed the adoption of the new Basic Laws in the pre-enactment parliamentary debates were all representatives of either the orthodox religious parties, the extreme right-wing parties, the communist party, or the Arab-Israeli population.[11]

What were the political origins of this historic constitutional breakthrough and the astonishing change of heart among the major political representatives of Israel's secular bourgeoisie? Whereas Israel's historically hegemonic secular Ashkenazi bourgeoisie has faced a continuous decline in its political representation since the early 1980s, marginalized groups, such as residents of peripheral development towns and poor urban neighborhoods (mainly Mizrahi Jews and blue-collar immigrants from the former Soviet Union), Israeli-Arabs from ethnically mixed towns, and lower-income religious groups, have steadily gained political power during this period (see Table 3.1). The constant exclusion of these marginalized groups from privileged localities, networks, resources, and opportunities has reinforced their opposition to the historically dominant Ashkenazi bourgeoisie. In addition, Israel experienced an unprecedented 20 percent population increase between the mid-1980s and the early 1990s, with the absorption of more than 800,000 immigrants, most of them from the former Soviet Union.[12] Over the period 1989–1991 alone, and in accordance with Israel's Law of Return, more than 450,000 newly arrived immigrants became members of the Israeli citizenry, thus gaining rights to vote and fully participate in Israel's public life. Not surprisingly, these new immigrants have gradually begun to take part in Israel's political life, establishing new political parties that represent their particular interests (for example, in the fields of employment, education, and housing).

In the late 1980s and early 1990s, the levels of segregation and inequality in Israeli society rose to unprecedented heights, further alienating these marginalized groups from the (largely) Ashkenazi establishment. Israel's

Gini Index (0 = perfect equal income distribution) worsened, from 0.222 in 1982 to 0.298 in 1991 to 0.314 in 1994 and to a record high of 0.356 in 2000, making Israel's wealth distribution one of the three most unequal among western countries (third only to New Zealand and the United States).[13] The demographic distribution of poverty has also remained unchanged since Israel's establishment: the cities with the largest populations of ultra-Orthodox Jews, Arab-Israelis, new immigrants from the former Soviet Union, and Mizrahi Jews (not to mention undocumented foreign workers) remain those with the highest levels of poverty. In some Arab-Israeli villages and townships, ultra-Orthodox communities, and in so-called development towns (whose residents are almost exclusively Mizrahi Jews and blue-collar immigrants from the former Soviet Union), the level of poverty has grown to over 40 percent. The unemployment rate in these towns has risen sharply, to about 20 percent, twice Israel's average, as many textile and manufacturing factories in peripheral areas have closed their doors. In 1991, unemployment among the second-generation Ashkenazi population stood at 4.9 percent, but it was 13.2 percent among the second-generation Mizrahi population. In that year, 72 percent of the second-generation Ashkenazi population worked in white-collar occupations, while among the second-generation Mizrahi population, this figure was 46 percent. In 1975, 25 percent of the Israeli-born Ashkenazi population were college graduates, compared to 6 percent of the Mizrahi population; in 1992, the ratio was almost the same, although levels were higher: 41 percent and 11 percent respectively.[14]

These and other socioeconomic and demographic developments have brought about a growing antagonism among peripheral groups toward the core elites. Some Mizrahi Orthodox rabbis have garnered wide popular support in poor neighborhoods, becoming political spokesmen who publicly challenge Israel's relationship with the non-Orthodox diaspora Jewry worldwide and, more important, the rule of (secular) state law. A clear manifestation of this trend was reflected in the 1995 assassination of Prime Minister Yitzhak Rabin (a representative and symbol of the Ashkenazi secular bourgeoisie) by a young religious Mizrahi Jew from a poor neighborhood. The assassin was backed by a Halakhic verdict issued by Orthodox rabbis who opposed the peace process led by Rabin—a process that had enjoyed wide support among the secular bourgeoisie.[15]

Antagonism toward the core values and policy preferences of the Ashkenazi secular high-income elite rapidly found its way into the Knesset. This

can be seen in the number of seats won by parties that represent, by and large, the policy preferences of marginalized minority groups in Israeli society, as compared to seats won by Knesset members who represent the policy agenda of the secular bourgeoisie (Labor, Meretz, the Liberal Party's section of Likud, and others).

As Table 3.1 indicates, the bloc of Knesset members representing the secular bourgeoisie's policy preferences consists mainly of the Labor Party (identified mainly with the secular Ashkenazi establishment), Meretz (identified mainly with the secular urban intelligentsia and the Kibbutzim), and the segment of the Likud party identified with populist secularism and a deregulatory economic policy. This bloc lost more than one-third of its relative combined electoral power between 1981 and 1999 (from 95 MKs in 1981 to 62 in 1996 and 58 in 1999).[16] This continuous decline of the secular bourgeois power base has been accompanied by a dramatic increase in the electoral power of parties representing disadvantaged minorities in Israeli society. Together, parties representing marginalized groups in Israel more than doubled their combined electoral power between 1981 and 1999 (from 25 MKs in 1981 to 58 in 1996 and 62 in 1999). The Shas party alone (representing Orthodox religious Mizrahi residents of development towns and poor urban neighborhoods) increased its power impressively, from 4 Knesset seats in 1984 (63,600 votes) to 10 in 1996 (260,000 votes) and 17 in 1999 (430,000 votes), making it the third largest party in the fifteenth Knesset and leaving it only two seats shy of the Likud's 19 seats.[17] Shas's impressive electoral success was quickly translated into powerful policy-making positions in the government and the public service. For over a decade (from 1988 to May 1999), Shas had control over both the Ministry of Labor and Social Affairs and the strategically powerful Ministry of Interior (responsible for local government, budgetary allocations for Israel's municipalities, and the population administration that controls the registration of new immigrants). Shas was the second largest partner (after the Labor Party) in the new governing coalition established by Ehud Barak following the 1999 election, and its ministers held four crucial policy-making portfolios, including National Infrastructure, Labor and Social Affairs, and the Ministry of Health. Drawing on its increasing political power, Shas has been able to secure government funding for its increasingly popular semiautonomous education network. The results of Israel's 1996 and 1999 elections clearly illustrate that parties representing the Arab-Israeli population, immigrants from the former Soviet Union, Orthodox religious voters, and Mizrahi resi-

Table 3.1 Number of Knesset seats won by different categories of parties (total = 120)

Number of seats	1981	1984	1988	1992	1996	1999
Knesset members representing a secular bourgeoisie policy agenda						
Labor[a]	47	44	39	44	34	21[b]
Likud Knesset members representing a secular bourgeois policy agenda[c]	43	35	33	24	15	15
CRM/Shinui/Meretz	3	6	10	12	9	16
Other Knesset members representing a secular bourgeois policy agenda[d]	2	4			4	6
Total	95	89	82	80	62	58
Knesset members representing the policy preferences of "peripheral" groups						
Religious parties[e]	13	17	18	16	23	27
Right-wing parties[f]	3	6	7	11	10	4
Arab and Communist lists	4	6	6	5	9	10
Ex-Soviet immigrants lists[g]					7	10
Likud, Labor, and other Knesset members identified primarily with Mizrahi Jews' policy agenda[h]	5	6	7	8	9	11
Total	25	35	38	40	58	62

Source: Adapted from the official results of Israel's 1981, 1984, 1988, 1992, 1996, and 1999 national elections.

a. The Labor Party's list for the 1996 general elections, for example, included Knesset members representing policy preferences of Mizrahi Jews in development towns and poor neighborhoods (e.g., E. Ben-Menahem and A. Peretz) as well as a Knesset member representing the small community of Ethiopian Jews (A. Masalla). However, as the Labor Party has in general long been associated with the policy preferences of the secular Ashkenazi bourgeoisie, I count all Labor's Knesset members in this category. Moreover, all of the above three MKs lost their seats on the Labor Party's list for the 1999 general elections.

b. Following the 1999 general elections, the Labor Party held 26 seats in the 15th Knesset. However, at least 5 Labor Party MKs represented the policy preferences of Mizrahi Jews in development towns and poor neighborhoods (e.g., the Gesher faction).

c. Note that the Likud (Union) party was established as an alliance between Herut (Freedom—a nationalist party) and the Liberal Party and has been headed by a group of ideologically diverse personalities. Therefore, Likud has always been a very loose alliance between politicians officially committed to different and sometimes opposing policy preferences. The section of Likud that represents the policy agenda of the secular right-wing bourgeoisie has included leading figures such as A. Sharon, D. Meridor (who joined the Center Party in 1999), E. Olmert, L. Livnat, T. Ha'Negbi, R. Rivlin, R. Milo (who joined the Center Party in 1999), M. Arens, U. Linn, Y. Aridor, S. Erlich, Y. Modai, M. Nissim, G. Pat, Z. Shoval, A. Sharir, P. Grupper, Y. Horowitz, and others who represent explicitly secular, neoliberal policy preferences. Note also that most of Likud's leading figures since the party's establishment have been secular Ashkenazi leaders—including, among others, M. Begin, Y. Shamir, M. Arens, A. Sharon, and B. Netanyahu.

d. For example, Ometz, Yahad, The Third Way (1996), Center Party (1999).

e. This category includes the National Religious Party (NRP), Aguda parties, Shas, and Tami (in 1981 and 1984).

f. This category includes Tehiya and Tzomet (for 1996, Tzomet is included in the Likud vote), Kach (1984), Moledet (since 1988), and National Union in 1999. See text note 16 for the classification of Tzomet.

g. Israel Ba'Aliyah in 1996 and 1999, and Israel Beiteinu in 1999.

h. This category includes primarily Likud Knesset members explicitly identified with the policy preferences of Mizrahi Jews in development towns and poor neighborhoods. This section comprises, inter alia, the Levi-Magen faction, which was established in the mid-1980s and eventually left the Likud in 1995 to form Gesher (Bridge). Gesher formed a united list with the Likud before the 1996 elections and got 7 seats as part of the Likud list. In 1997, however, Gesher left the coalition, accusing Netanyahu's government of ignoring the policy preferences of blue-collar Mizrahi voters. In the 1999 general elections, the Gesher faction was part of the Labor Party's list and won 3 seats. The new One Nation party, led by MK A. Peretz (who left the Labor Party in 1998 after accusing the party of ignoring the needs of poor Mizrahi workers), won 2 seats in the 1999 general elections.

dents of peripheral development towns have become significantly stronger as an electoral force.

A similar pattern is evident in another important majoritarian decision-making arena in Israel: municipal elections. The 1989, 1993, and 1998 municipal elections reflected a weakening of power for the two dominant parties in an arena they had long monopolized. Candidates representing the policy preferences of religious voters have become influential political actors in several urban centers traditionally dominated by the secular Ashkenazi establishment as well as in numerous development towns and peripheral local authorities. The high point of this trend was the election in 2003 of the ultra-Orthodox Torah Jewry candidate as the Mayor of Jerusalem. Another illustration of the gradual change in Israel's power structure is the fact that in the summer of 2000, the Knesset elected a Mizrahi politician, Moshe Katsav (who was born in Iran and raised in a peripheral development town), for the primarily ceremonial position of State President. What makes this appointment all the more indicative of Israel's changing political power structure is the fact that Katsav defeated Shimon Peres, a veteran Labor politician and the "old establishment" candidate for the post, and replaced Ezer Weitzman, another representative of Israel's Ashkenazi elite and a nephew

of Haim Weitzman, one of Israel's founding fathers and its first President. In sum, this electoral trend represents a large-scale backlash against the country's dominant, mainly Ashkenazi, secular bourgeois core, a group that, since the country's establishment, has managed to alienate most peripheral groups through socioeconomic policies that have intensified Israel's internal ethnic and class divisions.

Well aware of the backlash eroding its hegemony, representatives of the Ashkenazi secular bourgeoisie in the Knesset initiated and promoted Israel's 1992 constitutional revolution in order to transfer the main locus of political struggle from parliament, local government, and other majoritarian decision-making arenas to the Supreme Court, where their ideological hegemony is less threatened. Until the early 1980s, the dominance of the Ashkenazi secular bourgeoisie in the Knesset and the fact that its ideological and policy preferences enjoyed an uncontested hegemonic position created a strong disincentive to delegate policy-making authority from the Knesset to the Supreme Court. When this platform began to erode in the mid-1980s, the incentive structure gradually changed. By 1992, judicial empowerment had become an increasingly attractive alternative means of maintaining the dominance of the Ashkenazi elite.

The intentional empowerment of the judiciary was also supported by leading economic figures in Israeli society, mainly powerful industrialists and economic conglomerates who have used Basic Law litigation since 1992 to promote their own material interests. These forces joined the representatives of the high-income stratum and Israel's managerial class to create an influential coalition, which initiated and advocated the delegation of policy-making authority to the judiciary. The Ashkenazi secular bourgeoisie was motivated by serious popular challenges to its political and cultural hegemony and its growing political vulnerability in parliament vis-à-vis representatives of marginalized groups in the Israeli society. The economic elite supported the delegation of power to courts as a means of liberalizing Israel's economic policies and to fight what its members understood to be a highly regulated market with "large government" economic policies that did not fit the emerging neoliberal global economic order.

Almost all of Israel's leading economic figures believed that the country's centrist economic structure required liberalization and viewed constitutionalization as an effective means of achieving that goal. Aharon Dovrat (at the time the chairman of Klal, Israel's largest economic conglomerate), Dan Proper and David Moshevitz (then among the owners of two of Israel's

top food production conglomerates), Al Schwimer (businessman and founder of Israel's aviation industry), and many other top industrialists and businessmen strongly supported (both verbally and financially) the constitutionalization campaign. Also among the forces that publicly supported Israel's constitutional revolution were the country's major economic organizations, including the Chambers of Commerce and Manufacturing. MK Uriel Linn (Likud), one of the vocal advocates of the 1992 constitutional revolution, was appointed president of the Chambers of Commerce Union in January 2003. Indeed, the proconstitutionalization stance of Israel's economic elite is not surprising given the American experience of "market friendly" constitutional jurisprudence. The U.S. Supreme Court—the most frequently cited producer of constitutional rights jurisprudence in the western world—has long been a zealous guardian of economic liberties and has maintained its historic position on the right of the American spectrum of economic thought.

As in other western countries, there has also been a sustained attempt by economic elites in Israel in recent years to dismantle the country's local version of the Keynesian welfare state and to install market-oriented economic policies. Over the past two decades, the developing Israeli economy, funded to a large extent by foreign aid and other external financial resources, has gradually weakened the economic authority of the Histadrut (Israel's major labor union) in favor of private business interests.[18] As a result, the Israeli economy has been moving rapidly toward a neoliberal structure that reflects and promotes an individualist, limited government and a free-market worldview. Characteristic changes of this process include the historic commodification of the health-care market (a new Medicare Law was passed by the Knesset in 1994); the dramatic rollback of the state from the social welfare arena; the privatization of media and telecommunication services; the privatization of state-owned banks (including Israel's largest bank, Bank Ha'Poalim, in August 1997) and publicly owned industrial conglomerates (including the dramatic shrinkage in the late 1980s and the subsequent privatization of Koor, Israel's largest industrial megaconglomerate); the emergence of private medical services and private higher education institutions; the gradual deregulation of the land, land actuary, and pension funds markets; the removal of state monopoly over agricultural exports; the deregulation of the foreign currency market (completed in May 1998); and the extensive liberalization of the capital markets and the accompanying removal of barriers on the borrowing of foreign capital and on foreign owner-

ship of corporate assets in Israel. Beginning in the late 1980s, the local market has been opened up to multinationals and imported goods, marketing and consumption patterns have become "Americanized," and a "stock exchange culture" has arisen. Indeed, the Israeli stock market has become one of the most important and widely referred to public institutions (much like many of its counterparts in the West) and more than quadrupled its overall value from early 1989 to early 1994 alone. In short, the free-market values of individualism, consumerism, and economic liberalization have gained the status of cultural totems.

These transitions have been accompanied by changes in the traditional power bases of the labor movement and a reorganization of the Histadrut. The reorganization resulted in a sharp drop in labor union membership and a corresponding decline in the Histadrut's (and the historic labor movement's) political significance. Patterns of political competition and political marketing have also been Americanized, mainly due to the amendment of Basic Law: The Government in 1992, which allowed for the establishment of a new electoral system in Israel. The shift toward a neoliberal ethos in present-day Israel is also evident in the labor and welfare spheres. It is estimated that over 500,000 foreign workers have entered Israel since the late 1980s. Of these, approximately one-third did so lawfully. As of 2003, there were 300,000 foreign workers in Israel, accounting for about 10 percent of Israel's civilian labor force—the highest proportion of foreign employees in the developed world. According to the State Comptroller's office, over 70 percent of these workers receive less than minimum wages.[19] The number of unregulated human-power agencies and private employment services has increased, circumventing of statutory labor provisions by individual and special labor contracts labor has proliferated, collective bargaining agreements have become less common, the status of the right to strike has been eroded, and minimum-wage and other mandatory social security laws are no longer rigorously enforced. Alongside these changes, a so-called structural unemployment of approximately 10 percent has established itself in recent years. All these phenomena are indicators of Israel's movement toward a variant of the neoliberal market economy over the past two decades. And it was precisely this pervasive "Thatcherite," proliberalization worldview that fuelled Israel's economic elite in its vocal support for constitutionalization.

A clear illustration of the shift to the market-friendly, "small state" impulse behind the 1992 constitutionalization of rights in Israel can be seen

in the last-minute exclusion from the purview of the two new Basic Laws of provisions protecting a number of subsistence social and economic rights, as well as workers' rights to unionize, bargain collectively, and strike. Reacting to an outcry by several leading academics committed to a traditional Keynesian welfare state agenda (most notably, by renowned labor law professor Ruth Ben-Israel of Tel-Aviv University), the initiators of the constitutional reform added to the proposed laws tentative provisions protecting workers' freedom of association and the unqualified right to humane social and economic living conditions. However, an invisible hand eliminated the added provisions just before the final version of the new laws was submitted for legislative approval. Responding to socialist critics, the government pledged to amend the new laws at a later stage so as to include the eliminated provisions or even to enact a complementary law, Basic Law: Social Rights. However, none of these proposals have come to fruition. This meant that workers' rights were left unprotected under Israel's new constitutional order while employers' rights were granted formal constitutional protection (see my detailed discussion of this issue in Chapter 4). Moreover, this meant that no positive constitutional obligation was placed on the government to promote the provision of basic health care, housing, or education to all.

The coalition that sought to delegate power to the judiciary was also strongly supported by the Israeli legal elite, almost all of whom belong to the same social stratum as, and have close ties with, the secular Ashkenazi political establishment. Prominent figures in Israel's legal academy, Israel's top lawyers, and most of the Supreme Court justices (led by then–Deputy Chief Justice and now Chief Justice Aharon Barak) took a strongly positive position in the debate over the entrenchment of rights and the establishment of judicial review and enthusiastically supported efforts to delegate power to the judiciary.[20] Prominent constitutional law professors Uriel Reichman and Baruch Bracha led the constitutionalization campaign within the legal academy. As early as 1986, they established a not-for-profit organization called Constitution for Israel, which sought to promote the idea of comprehensive constitutional reform. Throughout the late 1980s, Reichman, Bracha, and several other constitutional law professors drafted a series of detailed proposals for changing Israel's system of government from a parliamentary to a constitutional democracy. These proposals served as the basis for the two new Basic Laws adopted in 1992 as well as for the amendment of Basic Law: The Government. Almost all of the draft proposals pertaining to the constitutionalization of rights and the fortification of judicial review had

been submitted to Justice Barak for comments and tacit approval prior to their release. The proposals, which had gained some of the Supreme Court justices' implicit approval, were also forwarded for review to prominent constitutional law scholars such as Owen Fiss, Cass Sunstein, and others. A special conference was held at Yale Law School (where Justice Barak has had close academic ties for over two decades) to discuss the apparent merits and disadvantages of the various constitutionalization proposals in light of Israel's complex political and social reality.

Not surprisingly, the adoption of the two new Basic Laws in 1992 was met with enthusiasm by Israel's judicial elite. Aharon Barak, generally viewed as the judicial mastermind behind the 1992 constitutional revolution, has stated on numerous occasions that the enactment of the two new Basic Laws marked the beginning of a new era in Israel's constitutional history. "Like the United States, Canada, Germany, and other leading constitutional democracies," he asserted, "we now have a constitutional defense for Human Rights. We too have the central chapter in any written constitution, the subject-matter of which is Human Rights . . . We too have judicial review of statutes which unlawfully infringe upon constitutionally protected human rights."[21]

Until 1992, the Knesset retained formal legislative powers that only a few parliaments in democratic countries held during the same period; after the enactment of the new Basic Laws in 1992, the balance of powers between the branches changed, enabling the Supreme Court to begin scrutinizing legislative and administrative acts. The transition to juristocracy in the post-1992 era has not been merely theoretical. As we have seen in Chapter 1, the constitutional revolution brought about a dramatic increase in the frequency and expansion in scope of judicial review as well as a significant acceleration of the judicialization of politics.

The seemingly counterintuitive voluntary delegation of authority from the Knesset to the judiciary through the entrenchment of rights and the establishment of judicial review decreased the significance of majoritarian politics in determining the public policy agenda. The locus of political struggle was gradually transferred to an ostensibly apolitical arena, where the ideology of the "enlightened public"—the ruling elite of Israel and its secular, cosmopolitan, Ashkenazi constituency—has traditionally enjoyed clear dominance. This alliance between the Supreme Court, Israel's neoliberal economic elite, and the secular bourgeoisie initiated the constitutional revolution and the transition to juristocracy, not only as a way to advance human rights in Israel or as a solution to a systemic ungovernability crisis, but also (if not primarily) as a means of protecting the hegemony of the alliance and promoting the policies favored by its members.

Factors Facilitating the Delegation of Power to Courts

In general, three factors may facilitate conscious judicial empowerment and reduce the short-term risk of those who voluntarily hand policy-making authority over to the judiciary. The first of these factors is a sufficient level of certainty among those initiating the transition to juristocracy that the judiciary in general, and the Supreme Court in particular, are likely to produce decisions that will serve their interests and reflect their ideological preferences. As will be seen in subsequent chapters, the adjudication of the Israeli Supreme Court poses only a minimal threat to the interests and ideological preferences of those who initiated the formal expansion of judicial power in Israel. Indeed, the SCI—either as a result of its members' ideological preferences or their strategic behavior, or some combination of these and other factors—has long been inclined to rule in accordance with Israel's national metanarratives and its prevailing ideological and cultural propensities. The adjudication of the SCI, and perhaps more important, the ideological premises and historical metanarratives upon which its adjudication tends to be based, are much closer to the shared values of Israel's urban, secular, well-off Ashkenazi bourgeoisie than to the values and interests of any other group in Israeli society. As numerous works have shown, the SCI has a relatively poor record in terms of protecting the rights of the Arab-Israeli citizens of Israel, let alone the rights of Arab residents of the Occupied Territories.[22] With a few notable exceptions, it has affirmed and legitimized state action against Arab citizens and noncitizens, including actions in clear violation of international law norms and treaties, in the name of protecting Israel's national security interests. As Ian Lustick observes, the Court's jurisprudence on these matters "hardly makes a dent in the massive array of institutionalized procedures and laws which bar Arab citizens (not to say non-citizens) from anything approaching equal access to economic resources or civil rights."[23]

On the socioeconomic front, the Court tends to interpret the newly enacted Basic Laws from a neoliberal perspective, which advocates immunizing the economic sphere against state intervention. As I show in Chapter 4, its decisions have reflected the prevailing social and economic ideology that

privileges individualism, efficiency, and nominal equality, and that calls for the removal of "market rigidities" and for the state's withdrawal from labor relations, as well as from collective social and welfare spheres. The Court's standard line of interpretation entirely ignores positive social rights and, predictably, privileges individual liberty over collective rights.

Moreover, according to recent interpretive studies, the imagined "enlightened public"—a frequently used criterion by which the reasonableness of specific acts is assessed by the SCI—closely conforms to the characteristics of the secular Ashkenazi bourgeoisie and their ideological preferences.[24] These studies also suggest that the Court's conception of the rule of (secular) law, with its deep-rooted orientation toward western liberalism and formal reasoning, necessarily precludes the potential accommodation of alternative hierarchies of traditional or religious interpretation.

The Court's reluctance to grant support to "peripheral" interests also derives from its stake in retaining its status as the one and only legitimate interpreter of Israel's laws vis-à-vis the perceived menace of alternative interpretation systems—such as the traditional rabbinical authorities, which are well established within the ultra-Orthodox and ultranationalistic communities in Israel and are now gaining support among poor Mizrahi populations in peripheral areas as well. The deep reluctance of the Supreme Court to recognize the legitimacy of alternative (primarily religious) interpretation systems is one of the main reasons for its appeal to the secular urban bourgeoisie, the managerial class, and these groups' political representatives.

A second factor that reduces the short-term risk for political elites who delegate power to the courts is their general control over the personal composition of national high courts. Compared with the United States, for example, the appointment of judges in Israel is, at least formally, an independent process. Judges (including Supreme Court justices, currently fourteen in number—twelve permanent appointees and two adjunct judges) are selected by a nine-member appointments committee, which consists of the president of the Supreme Court and two other justices of that court, two practicing lawyers who are members of the Israel Bar Association, two members of the Knesset elected in a secret ballot by majority vote, and two ministers, one of whom is the Minister of Justice (who also chairs the committee and must approve the appointments). In practice, however, since the establishment of the state, almost all of the appointments committee's members have been representatives of the secular elite. Moreover, almost all of Israel's justice ministers over the last two decades have supported a clear liberal and deregulatory agenda. Furthermore, all nine political figures (representing five different political parties) who served as justice ministers during the past two decades were among the main initiators and supporters of the 1992 constitutional revolution in Israel.[25] The incumbent minister—Yosef Lapid—is one of the more outspoken antireligious politicians in Israel.

As one would expect, Israel's judicial elite is similar to the country's traditionally hegemonic social and economic forces in its demographic characteristics. Of the thirty-six judges who served on the Court during the country's first forty-five years, all were Jews and thirty were Ashkenazi.[26] The very first Arab-Israeli Supreme Court judge was appointed for a twelve-month limited term in March 1999 and left the bench in 2000. Another Arab-Israeli jurist was appointed Acting Supreme Court judge in April 2003. Moreover, until recently the occupant of the customary chair reserved for a religious Justice on the Supreme Court was a tort law professor born in Germany, whose views were more in line with what the Court has often described as the secular, western "enlightened public" than Orthodox Judaism, much less other minorities in the Israeli society.[27]

Not surprisingly, the SCI accepted its institutional empowerment enthusiastically and reacted with a strong inclination to use its legitimacy and its newly gained policy-making authority to promote the economic, political, and cultural agenda of the social forces that had initiated the constitutional revolution. In a series of landmark decisions in the aftermath of this revolution, the SCI has pursued a distinctly antireligious, if not libertarian, agenda.

As will be seen in subsequent chapters, in its recent constitutional adjudications the SCI has advanced an explicitly anticollectivist and deregulatory interpretation of the new Basic Laws. Moreover, the Court's recent constitutional jurisprudence also establishes a clear pattern of favoring secular or secularizing solutions to highly contested matters pertaining to the secular-religious rift. Several highpoints of this line of antireligious adjudication (all of which are discussed in detail in subsequent chapters) have been the subjection of the adjudication of all rabbinical courts, including the Great Rabbinical Court, to the constitutional principles stated in the two new Basic Laws and to a corresponding review by the Supreme Court; the overturn of a series of rulings by the rabbinical court system pertaining to personal status, family law, and religious education; the Court's series of rulings declaring unconstitutional (on equality grounds) the exclusion of women and non-Orthodox representatives from religious councils and the electoral groups that selected candidates for religious councils;[28] the Court's redefini-

tion of "prayer rights" in holy sites, including the abolition of a centuries-old practice that allowed men only to hold prayer services at the Western Wall; and landmark rulings protecting certain rights to formal equality for those with nontraditional sexual preferences. The two pinnacles of the Court's distinctly antireligious establishment adjudication have been the full recognition of non-Orthodox conversions to Judaism performed in Israel and abroad (thereby altering one of the cornerstones of the historic status quo concerning religious matters); and the close constitutional scrutiny of an arrangement that had been in place since the establishment of the state whereby Orthodox yeshiva students received draft deferments.

But the SCI's antireligious adjudication has not been limited to matters of religious establishment. In 1995, the Court stated that political agreements are justiciable and may be nullified on constitutional as well as natural justice grounds. Accordingly, the Court declared void a coalition agreement between the Labor Party and the Shas Orthodox Party (which had not been made public prior to the elections) that considered potential legislative reaction to antireligious judicial activism.[29] This agreement was practically imposed on the Labor Party leadership as Shas's precondition for joining the Rabin government. A few months later, the Court ordered the prime minister to discharge a minister and a deputy minister—prominent members of Shas—who had been accused of conducting unlawful acts.[30] In a similar spirit, the Court went on to nullify a series of governmental policies and budgetary provisions supported by the increasingly powerful Mizrahi Orthodox parties that aimed at enhancing the political voice and socioeconomic status of these parties' constituencies.[31] In short, the Supreme Court has offered Israel's threatened secularist-libertarian elites a safe haven amidst the growing influence of traditionally peripheral groups in Israel's majoritarian policy-making arenas.

A third factor that reduces the short-term risk for those who voluntarily hand power over to courts is the existence of widespread public trust in the political impartiality of the judiciary. The appearance of consistent political dependence bias would collapse the distinction between law and politics on which the fundamental legitimacy of the separation of powers system depends.[32]

As Table 3.2 indicates, in the years prior to the 1992 constitutional revolution, the SCI enjoyed a high level of legitimacy in Israeli public opinion compared to other important public bodies. According to a 1991 study conducted by the International Social Science Program (ISSP), which investi-

Table 3.2 Degree of national legitimacy of leading Israeli institutions before 1992

Institution	Positive contribution (%)	Positive and negative (%)	Negative contribution (%)
Israeli Defense Force	94.9	4.0	1.1
State Comptroller	91.1	7.0	1.9
Supreme Court	**83.6**	**10.2**	**2.1**
Police	75.2	19.9	4.8
Knesset	57.7	32.8	9.6
Government	51.6	35.8	12.6
Media	37.3	40.7	22.0
Parties	25.1	25.9	29.0

Source: Adapted from Gad Barzilai et al., *The Israeli Supreme Court and the Israeli Public* (Tel-Aviv: Papyrus, 1994) [Hebrew]. The data rely on a scientific poll that was conducted by the authors in July 1991 among a representative sample of the adult Jewish population in Israel. See Barzilai et al., 67–73 and 207–224 for further analysis.

gated the level of citizens' trust in the rule of law and the court systems in their countries, Israel ranked number one, ahead of America, Britain, and Germany.[33] Almost 70 percent of Israelis expressed high levels of trust in their legal system.[34] In another comprehensive public opinion survey conducted in 1994, 85 percent of Israelis expressed high levels of trust in the SCI (second only to the Israeli Defense Force), whereas only 41 percent and 21 percent of Israelis expressed high levels of trust in the Knesset and Israel's political parties respectively.[35] This widespread public trust in the courts' impartiality (as contrasted with political actors' vested interests) has encouraged political actors to transfer political controversies to the legal arena.

Although these factors may encourage conscious judicial empowerment by reducing the short-term risks to those who voluntarily hand over policy-making authority to national high courts, we should note an important caveat. Political power-holders tend to be myopic: they seek to advance their particular short-term interests without much regard for the potentially unfavorable long-term consequences to the institutional apparatus within which they operate. Moreover, they often underestimate the unfavorable long-term consequences of the policies they advocate, especially when their immediate gain as a result of adopting these policies is significant. Politics, however, is an ongoing, multidimensional, and reflective environment, which may yield unintended consequences even in cases of

the most carefully designed institutions and policies. At least one such possible unintended long-term consequence of the judicialization of politics through the constitutionalization of rights and the establishment of judicial review comes to mind: the threat to the judiciary's public image as politically impartial.

While the delegation of policy-making authority to courts increases the courts' formal capacity for active participation in the political arena in the short term, the abrupt change in the balance of power between the judicial branch and other branches of government may have a negative long-term effect on the popular legitimacy accorded to the courts' decisions. Courts have historically enjoyed professional autonomy and a large measure of protection from political interference. However, as they exercise their newly awarded authority, they may come to be seen as active political bodies attempting to forward their own political agendas, rather than neutral arbiters. The delegation of power to courts may therefore pose a long-term threat to the legitimacy, impartiality, and independence of the judiciary.

In Israel, the negative impact of the judicialization of politics on the Supreme Court's legitimacy is already beginning to show its mark. Over the past decade, the public image of the SCI as an autonomous and politically impartial arbiter has been increasingly eroded, as political representatives of minority groups have come to realize that political arrangements and public policies agreed upon in majoritarian decision-making arenas are likely to be reviewed by an often hostile Supreme Court. As a result, the Court and its judges are increasingly viewed by a considerable portion of the Israeli public as pushing forward their own political agenda, one identified primarily with the secular-liberal sector of Israeli society.

Opposition to the Court's adjudications seldom comes from the secular bourgeoisie or from proponents of the emerging neoliberal economic order in Israel. Rather, most political opposition to the Court so far has come from representatives of peripheral minorities, mainly orthodox religious circles and poor Mizrahi Jews, who accuse the Court of forwarding its own political agenda. In August 1996, for example, Aharon Barak was accused by religious circles in Israel as being "the driving force behind a sophisticated campaign against Jewish life in Israel." They added, "We must not waste our shells. We must take off the gloves and argue with him up front. To present him as he really is, as one who is creating a 'judicial revolution.'"[36] And in the summer of 1997 police and orthodox Jews clashed in Jerusalem after the Supreme Court decision in the Bar-Ilan Road affair, which suspended a

government ban on vehicular traffic on a busy thoroughfare that marks the boundary between secular and Jewish Orthodox neighborhoods in Jerusalem during the Jewish Sabbath.[37]

Another major controversy erupted in the fall of 1997 over the Court's rulings that established the right of women and non-Orthodox Jews to serve on religious councils. The deep resentment of the Orthodox religious community toward the Israeli judiciary further intensified in 1999, following the conviction of former MK Arieh Deri (then the leader of Shas) on charges of bribery, fraud, and breach of fidelity by the Jerusalem District Court. This conviction (which led ultimately to Deri's resignation from the political leadership of Shas) was characterized by Shas's leaders as the outcome of a secular Ashkenazi establishment conspiracy against the whole Mizrahi Orthodox community. Fierce verbal attacks on the judiciary by Orthodox Mizrahi religious leaders resumed in the wake of the Supreme Court's rejection of Deri's appeal in the summer of 2000. In response to this decision, Shas's leadership declared that the closure of the Deri case was "the signal for the start of the Mizrahi Jewry's revolution" and that the Supreme Court's decision was "another twist of the knife that has been stuck in the Mizrahi body for fifty-two years."[38]

In February 1999, following a Supreme Court decision that expressed dissatisfaction over the delay in convening the mixed religious councils, an unprecedented uprising against the secular legal establishment in Israel in general and the Supreme Court in particular erupted in Orthodox circles. The uprising reached its zenith when some 250,000 people attended a mass demonstration against the Court in Jerusalem. The demonstration was headed by most of the Orthodox religious leaders in Israel.[39] In his public speech at this event, Rabbi Ovadia Yosef, the spiritual leader of Shas and the most important Mizrahi religious leader in Israel, went so far as to declare, "The justices of the Supreme Court are wicked, stubborn, and rebellious . . . they are empty-headed and reckless . . . they violate Shabbat . . . and they are the cause of all the world's torments . . . The justices are slaves who now rule us . . . they are not worthy of even the lowest court . . . Any seven-year-old boy is better versed in the Torah than they are."[40]

Rabbi Yosef also attacked Justice Minister Tzakhi Ha'Negbi, one of the supporters of the new Basic Laws, calling him an "enemy" who "loves those people and made them judges. Did they hold elections? Who says the nation wants wicked judges like these?" Rabbi Moshe Gafni, an ultra-Orthodox MK, stated that the Court's interpretation of the 1992 Basic Laws was "a

complete fraud" and vowed that "these are the last Basic Laws that will pass the Knesset." Menachem Porush, one of the Ashkenazi ultra-Orthodox religious leaders, threatened the court, saying that "if after this demonstration the Supreme Court is not convinced to cease involvement in church-state issues, there will be war . . . The people who were here are ready to invade any space."[41]

These clashes between the Court and religious groups highlight Orthodox Jewish concerns that the Court will erode religious authority in areas where religious and civil laws are in conflict. In the political arena, leaders of several minority groups have called for the Knesset to alter the Basic Law: Judiciary in order to limit the scope of the Court's adjudication. However, placing such a limit on the Court's adjudication would run counter to the interests of influential elites in the Israeli polity, and there have not yet been any legislative amendments in this area. Moreover, in December 1999, the Knesset passed a resolution recognizing the need for judicial review of laws, and called on political figures to exercise personal restraint in their dealings with judicial authorities and to respect the independence of the courts. Not surprisingly, the resolution was initiated by MKs Dan Meridor (Center Party) and Amnon Rubinstein (Meretz), and was supported by an ad hoc coalition representing Israel's secular population; all the religious parties opposed it.

Another telling illustration of the fierce opposition to the Supreme Court in religious circles (as well as the tight cooperation between Israel's judicial elite and its secular bourgeoisie) is the recent failure of a proposal to establish a new, more democratically representative constitutional court in Israel. Reacting to the series of antireligious rulings by the Supreme Court over the past decade, in late 2001 a number of Knesset members representing radical right, ultra-Orthodox, and Mizrahi constituencies put forward a motion to establish a new constitutional court, which would remove constitutional matters from the jurisdiction of the current Supreme Court and whose composition would proportionally reflect the demographics of Israeli society. Rather than being comprised strictly of professional judges, the proposed court would have included academics, Jewish and Muslim religious court judges, and a representative of immigrants from the former Soviet Union. The motion failed to garner a parliamentary majority and was ultimately rejected by a margin of 59 to 37 Knesset members. Not surprisingly, the opposition to the bill came from a cross-party coalition of Knesset members representing secular, liberal, and fairly cosmopolitan agendas. It was led by

Justice Minister Meir Shetreet (Likud) and Ophir Paz (Labor), the chairman of the Knesset Constitution, Law, and Justice Committee. All Likud and Labor ministers, as well as the supposedly hawkish (albeit secular, Ashkenazi, and affluent) prime minister Ariel Sharon, voted against the proposed bill. Though the government had decided to oppose the bill, six ministers—all representing radical right and ultra-Orthodox parties—defied this decision and voted in favor of the motion.

Following the defeat of the proposed bill, its supporters issued a series of public statements, lambasting Chief Justice Barak, who had lobbied vigorously against the bill. Minister Avigdor Liberman of the extreme right-wing National Union Party wrote that when he saw the Court spokeswoman sitting in the Knesset reporting directly to Barak on every MK that entered the plenum, he understood "the network of pressure and threats that the palace of justice was applying to the public's representatives." Another sponsor of the bill, MK Yigal Bibi (NRA), suggested that "Aharon Barak extorted politicians . . . there was a bitter, violent fight here, whose outcome destroys Israeli democracy."[42] Bibi also accused Justice Minster Shetreet and MK Paz of setting up a "war room" with Barak to pressure MKs into opposing the bill—charges that were vehemently denied by the furious Shetreet and Paz.

Studies of the dynamics of public support for the U.S. Supreme Court have shown that an active and occasionally controversial Supreme Court can maintain a high level of stable aggregate public support.[43] According to these studies, the U.S. Court "would enter precarious turf only if it were to rule against the tide of public opinion at an extremely frequent rate."[44] Indeed, recent public opinion polls suggest that in spite of the U.S. Supreme Court's crucial role in determining the outcome of the 2000 presidential election—perhaps the most glaring example of the judicialization of politics in the United States—the American public continues to view the Court as a relatively impartial and apolitical decision-making body. In short, due to the diffuse nature of public support for established national high courts, the political sphere's occasional deference to the courts is not likely to erode the judiciary's legitimacy.

There can, however, be little doubt that the unprecedented and continuous involvement of the SCI in almost every aspect of Israel's public life, the Court's increasing identification with specific social sectors in the Israeli polity, and the overt resentment among religious circles toward the Court in general and toward Chief Justice Barak in particular have eroded the SCI's public image as an apolitical decision-making body. The decline in the

Court's legitimacy indicates that over the long term the ruling elites' attempt to draw on the judiciary's widespread legitimacy to maintain their political hegemony may prove to be a double-edged sword.

In sum, the empowerment of courts in Israel through the constitutional revolution of 1992 marked an abrupt change in the balance of power between the judiciary, the legislature, and the executive. While the legislative and executive branches of government enjoyed clear dominance as Israel's most important policy-making arenas until the late 1980s, in Israel's post-constitutional revolution era, there is scarcely a public policy question that does not sooner or later turn into a judicial question. At first glance, this shift may seem to run counter to the interests of the legislature and the executive. In practice, however, the judicial empowerment and judicialization of politics in Israel can best be understood as a planned strategy on the part of Israel's ruling elite and its bourgeois constituency—a relatively coherent social class of secular neoliberals of European origin, composed of politicians, businesspeople, and professionals striving to maintain their political hegemony. This social stratum and its political representatives initiated and carried out the 1992 constitutional revolution primarily in order to insulate and enhance their policy preferences vis-à-vis the vicissitudes of democratic politics in Israel. The primary political motivation for this initiative was a strong interest in preserving the political and cultural hegemony of the ruling elite and its secular bourgeois constituency, as well as entrenching Israel's contested western, relatively cosmopolitan identity. Indeed, the constitutional revolution of 1992 generated an extensive judicialization of politics in Israel and enhanced values and policies favored by those who initiated the reforms at the expense of the ideological and policy preferences of peripheral groups. Relying on the one hand on the SCI's reputation for rectitude and political impartiality and, on the other hand, on the Court's inclination to rule in accordance with the values of the "enlightened public," the forces behind Israel's constitutional revolution were able to transfer sensitive political and cultural issues to the legal arena and reduce some of the growing costs they were being obliged to pay in complying with the rules of the game of proportional political representation. While the delegation of policy-making authority to the judiciary has brought short-term political relief to Israel's ruling elite and its bourgeois constituency, the unprecedented judicialization of politics has also led to a gradual politicization of the law, thus unintentionally planting the seeds for a long-term erosion of both the judiciary's legitimacy and the ruling elite's future institutional maneuvering

The Hegemonic Preservation Thesis in Canada, New Zealand, and South Africa

My explanation for the conscious judicial empowerment witnessed in Israel may shed light on the political rationale behind judicial empowerment through constitutionalization in other countries as well. Let us consider the hegemonic preservation thesis as it may apply to the constitutional politics of Canada, New Zealand, and South Africa.

The Political Origins of the Canadian Charter

As described earlier, the legislative power of the Canadian Parliament and the provincial legislatures enjoyed few formal restrictions prior to 1982. The enactment of the Constitution Act 1982, which included the Charter of Rights and Freedoms, began a new era in Canadian constitutional law and politics.

The passage of the Constitution Act 1982 was the culmination of a long and arduous political battle. Its origins may be traced to the rise of Quebec nationalism in the 1960s. From the mid-1960s to the early 1980s, Justice Minister and later popular Prime Minister Pierre Elliot Trudeau (a bilingual former Montreal lawyer and law professor) was the most vocal and influential advocate of a constitutional bill of rights. Trudeau was a civil libertarian sincerely committed to protecting individual rights. However, his fight for constitutionalization was not merely a reflection of his commitment to an elevated vision of civil liberties, but also part of a broader strategic response to the growing threat of Quebec separatism and other potentially power-diffusing demographic changes in Canadian society.[45] The federal government expected the proposed constitutionalization of rights and fortification of judicial review to encourage national unity in a number of ways. Such a bill would presumably shift national political debate away from regional concerns and growing calls for expanded group and province-based self-determination and toward universal questions of individual rights. The federal government also anticipated that Trudeau's proposed constitutional overhaul might succeed in subordinating provincial legislation (such as Quebec's) to core policy standards interpreted by a national institution, the Supreme Court.

Political pressure to entrench individual rights in the Canadian constitution has existed in Canada since at least the 1930s. Examples include the "implied bill of rights" doctrine developed by the Supreme Court of Canada

(SCC) in the Alberta Press case,[46] the nonentrenched Bill of Rights of 1960,[47] and the mini-charter of rights included in the Victoria Charter of 1971.[48] However, all the pre-1982 attempts to grant entrenched constitutional status to basic rights failed, mainly due to federal power-holders' disinclination to replace the traditional governing principles of parliamentary sovereignty with principles of constitutional supremacy as long as their political hegemony and control of central policy-making mechanisms remained almost unchallenged. However, the rise of Quebec nationalism in the mid-1960s, and especially the victory of the separatist Parti Québécois government under the charismatic leadership of René Lévesque in 1976 (which led to the Quebec referendum of 1980), changed the political incentive structure.

The immediate catalyst for the final round of constitutional negotiations that led to "patriation" and the entrenchment of rights in 1982 was the Quebec referendum on sovereignty association. In May 1980, the separatist Parti Québécois government, led by Premier Lévesque, sought to negotiate sovereign political status for Quebec while preserving economic association with the rest of Canada. Quebec voters ultimately rejected Lévesque's plan in a referendum, but the idea of patriating the constitution was given new momentum by the referendum campaign. Federalists attempted to fight the separatist movement in Quebec, calling for constitutional renewal as a means of both placating and promoting the concerns of francophone citizens of Quebec. This new momentum enabled Prime Minister Trudeau to initiate unilateral patriation of the constitution in spite of a constitutional convention requiring provincial consent for such an amendment. In October 1981, following extensive negotiations between Trudeau and the provincial premiers, all the provinces except Quebec accepted the proposed constitutional provisions, and in April 1982, the Constitution Act 1982 came into effect, marking the beginning of a new constitutional era in Canada.

Like most scholarship on the expansion of judicial power in Israel, mainstream studies of the expansion of judicial power in Canada in the 1980s tend to stress the deep commitment of political leaders (primarily Prime Minister Trudeau) to the protection of fundamental civil liberties through judicial review, as well as functional necessity (in this case, political ungovernability) as the major catalysts for the adoption of the Charter. Because it expressed the common values of Canadians, the Charter was seen as an instrument for promoting national unity. Judicial review had been pushed to the center of the policy-making arena due to the political decision-makers' inability to cope with a range of contentious problems that were generated by the organic nature of Canadian federalism.

Nevertheless, there is broad consensus among critical scholars of Canadian constitutional politics that the enactment of the Charter was, at least in part, a self-interested maneuver initiated by elites who found majoritarian politics not to their advantage at that particular time.[49] According to these studies, the enactment of the Charter did not stem from the humanitarian or democratic impulses of its sponsors. Rather, it stemmed primarily from the desire to preserve the institutional and political status quo and to fight the growing threats to the anglophone establishment and its dominant Protestant, business-oriented culture presented by the Quebec separatist movement and other emerging demands for provincial, linguistic, and cultural autonomy (which stem in turn from dramatic changes in Canada's sociodemographic composition over the past five decades).

As was the case in Israel, New Zealand, and South Africa, calls for the adoption of an American-style constitutional catalogue of protected civil liberties in Canada were strongly supported by an influential coalition of neoliberal economic forces (mainly powerful domestic industrialists and American economic conglomerates), who viewed the constitutionalization of rights as a means to promote economic deregulation. Fierce political resistance prevented the inclusion of a property clause in the Charter. However, a few years later, the very same coalition successfully advocated the entrenchment of business-friendly economic freedoms, liberalized trade rules, and a new foreign investment regime in the form of the transnational NAFTA (primarily NAFTA's Chapter 11), thereby circumventing the lack of an explicit property clause in the Charter.[50] As recent studies have shown, economic corporations have been by far the most active organized interest litigants in the past two decades, drawing on Charter provisions to challenge regulations governing banking, international trade, foreign ownership of economic enterprises, and consumer and environmental protection regulations.[51]

In addition, in spite of Canada's long-standing image as a generous welfare state, the global trend toward neoliberalism has not left the Canadian economy untouched. Whereas until the early 1980s the Keynesian economic orthodoxy had provided the underlying intellectual paradigm for Canada's economic and social welfare policy, over the past two decades the resurgent neoliberal worldview has become the social and economic model of thinking. This has been translated into sharp cuts in governmental bud-

gets allocated to welfare, unemployment benefits, health care, and education, and has resulted in the state's pullback from formerly state-controlled public services and in an increasing commodification of the remaining services. As will be seen in subsequent chapters, the constitutionalization of rights has posed no impediment to these developments. In fact, the opposite is true.

As in Israel, the goals of entrenching the central government's policy preferences and liberalizing the economy were achieved in Canada partly by means of a deliberate delegation of policy-making power to the SCC by representatives of established interests in the national executive and legislature. As with the 1992 constitutionalization of rights in Israel, the Canadian Charter and the SCC have not served as decentralizing institutions that perform a checking or blocking function. Instead, threatened elites—who have easier access to and greater influence upon the legal arena—have transferred policy-making authority from majoritarian decision-making arenas to the Supreme Court primarily in order to preserve their hegemony. A few examples will help to illustrate this pattern.

To begin with, we might consider Trudeau's "change of heart" between the early 1960s and the mid-1970s. In a talk given to the Canadian Political Science Association in 1964, when he was still a law professor, Trudeau praised the Canadian constitution for doing without American-style "frills":

> The authors of the Canadian federation arrived at as wise a compromise and drew up as sensible a constitution as any group of men anywhere could have done. Reading that document today, one is struck by its absence of principles, ideals, or other frills; even the regional safeguards and minority guarantees are pragmatically presented, here and there, rather than proclaimed as a thrilling bill of rights . . . By comparison [to the United States], the Canadian nation seems founded on the common sense of empirical politicians.[52]

But a few years later, as Minister of Justice in Lester Pearson's government, Trudeau became fully committed to an entrenched bill of rights; and once he took the reins as prime minister, he became the driving force behind the adoption of the Charter and the fortification of judicial review.

In 1971, Trudeau and the provincial premiers reached an agreement to revise the constitution and entrench a charter of rights (known as the Victoria Charter). This agreement ultimately failed because of the objections of Quebec and Alberta. The opposition of these provinces to the proposed constitutional reform was certainly not insurmountable, as the 1982 constitutionalization saga illustrated only a decade later. However, as the separatist threat was still in its formative stages, the plan's failure removed constitutional reform from the center stage of Canadian politics until 1976, when the election of a separatist government in Quebec provoked additional demands for constitutional reform.

Or consider the opposition of Trudeau's government to the inclusion of the "notwithstanding clause" in the Charter. As mentioned in this book's introduction, this clause (section 33) establishes formal limitations on the rights and freedoms protected by the Charter by enabling elected politicians in either the federal parliament or the provincial legislatures to legally limit rights and freedoms protected by the Charter's fundamental freedoms, due process, and equality rights provisions by passing a renewable overriding legislation valid for a period of up to five years. In other words, any invocation of section 33 essentially grants parliamentary fiat over these rights and freedoms. This means that both the federal Parliament (with regard to federal matters) and the provincial legislatures (with regard to matters within provincial jurisdictions) are ultimately sovereign over these affairs.

One would assume that Trudeau and his ministers, as elected politicians, would advocate, if not initiate, the adoption of the notwithstanding clause as a means of retaining legislative power—or at least as a way to mitigate the tension between rigid constitutionalism and fundamental democratic governing principles. However, such a clause was not part of Trudeau's original plan for constitutional reform. In fact, throughout the federal-provincial negotiations leading up to the adoption of the Constitution Act 1982, Trudeau's government zealously advocated an unconditional transition to juristocracy. Only when it became clear that leading provincial premiers would not endorse the proposed constitutional pact unless a notwithstanding clause was adopted did Trudeau reluctantly accept the inclusion of such a provision. It is now generally agreed that without this compromise (reached early in November 1981), the Charter would not have been adopted.

In contrast to its opposition to the inclusion of the notwithstanding clause, Trudeau's government insisted on enacting section 23, which imposes detailed obligations on provincial governments to provide minority language education facilities at public expense, thus parrying Quebec's attempts to make immigrants to the province enter the French educational system. This section (along with all other Charter provisions dealing with

language rights) has been formally excluded from the purview of the Charter's override clause and is therefore not subject to legislative override. The enactment and judicial interpretation of this section clearly were part of the Canadian federal government's constitutional war against the separatist movement in Quebec in general and the famous Bill 101 in particular.[53]

As in Israel, the delegation of authority to the SCC has been tied to the Court's inclination to rule, by and large, in accordance with hegemonic ideological and cultural propensities. Based on a customary constitutional convention, the judges of the SCC are nominated to the bench according to a provincially representative formula, whereby three justices represent Ontario, three come from Quebec, two from the western provinces (one is usually from British Columbia), and one from the Maritime provinces. The selection and nomination process itself, however, is controlled exclusively by the federal government and the prime minister. Appointees to the bench and to the chief justiceship are virtually handpicked by the prime minister and his or her advisors. Judges selected through this explicitly political nomination process are not likely to hold policy preferences that are substantially at odds with those held by the rest of the political elite.[54]

According to a long-standing constitutional convention, the person appointed to the position of Chief Justice of Canada is the most senior Supreme Court judge serving at the time of vacancy. In 1973, when his judicial empowerment plan began to crystallize, Trudeau took the liberty of ignoring this convention and appointing Justice Bora Laskin to the top judicial position in spite of the fact that Laskin had joined the bench only three years earlier. By the time of his appointment as Chief Justice, Laskin had already established his reputation as a vigorous advocate of judicial activism, national unity, and centralized federal policy-making. Bora Laskin's appointment paid enormous dividends to those who selected him: his chief justiceship (1973–1984) lasted through the most tumultuous period in modern Canadian politics and was a true watershed in terms of judicial activism and the transformation of the Court into one of the major policy-making bodies in present-day Canada.

Indeed, in its federalism jurisprudence over the past several decades, the SCC has generally tended to adopt values and policies favored by the national government at the expense of the provinces' political autonomy. By overturning many of the Judicial Committee of the Privy Council's decentralizing rulings concerning the federal-provincial distribution of legislative powers, the SCC had already fortified the federal government's powers prior

to the constitutional revolution of 1982. Most of the Court's centralizing rulings throughout the 1960s and 1970s drew on an expansive reading of the BNA Act's section 91 (which establishes the federal government's residual and overarching responsibility to enact laws and regulations for the "peace, order, and good government" of the country)[55] as well as on an expansive reading of section 91's "trade and commerce" clause (which grants the federal government exclusive legislative powers in regulating trade and commerce) combined with a narrow reading of the provinces' legislative powers in the areas of "property and civil rights" (section 92(13) of the BNA Act) and "matters of local nature" (section 92(16) of the BNA Act).[56]

This general trend has not changed dramatically over the past few decades. Over the 1997–2002 period alone, for example, the federal government won seventeen significant victories and lost only three substantive appeals to provincial governments. During the same period, the provinces had twelve significant statutes and regulations struck down.[57] Taken as a whole, it would be fair to say that the Court's federalism jurisprudence over the past few decades has turned it into a centralizing policy-making body, primarily by transcending traditional (provincial) jurisdictional boundaries into a "one rule fits all" policy regime. Its rulings reflect and promote a set of cultural propensities, moral standards, and policy preferences imposed from the center on an otherwise exceptionally diverse, multiethnic, multilinguistic polity with thirteen provinces and territories stretching from the Atlantic to the Pacific to the Arctic Ocean. Moreover, as my analysis in Chapter 4 indicates, the chief beneficiaries of Charter politics and litigation have been hegemonic ideas of "negative" liberty rather than progressive notions of distributive justice.[58]

A clear manifestation of the central government's tacit (if not explicit) encouragement of judicial activism is the gradual transfer of the struggle over Quebec's political future from pertinent majoritarian decision-making arenas to the SCC. The Court has indeed become an important, if not the most important, decision-making arena for dealing with the question of Quebec secessionism. As will be shown in subsequent chapters, in all of its decisions concerning the Quebec question the SCC has expressed an explicit antisecessionist impulse. In one of the most important judgments in its history (detailed in Chapter 6), the Court ruled in 1998 that a potential unilateral secession by Quebec would be unconstitutional under both domestic and international law. At the same time, the Court upheld the federal policy of enhancing the status of language and education rights of linguistic minor-

ities, be these the rights of francophones living outside Quebec or anglophones living in Quebec.

As in Israel, the voluntary delegation of authority to the SCC has depended, among other things, on the Court's reputation for expertise, rectitude, and political impartiality. Unlike the Israeli experience, however, there seems to have been only a minor decline in the perceived legitimacy of the SCC (at least among anglophone Canadians) over the past fifteen years in spite of the Court's emergence as a major policy-making body. A comprehensive public opinion survey conducted in 1987, for example, found that no fewer than 90 percent of anglophone and 70 percent of francophone respondents said they had heard of the Charter, and a substantial majority within each group thought the Charter was "a good thing for Canada." In another public opinion survey conducted in 1999, more than 87 percent of the respondents said they were aware of the Charter and 82 percent thought it was "a good thing for Canada."[59] Almost 80 percent of the respondents in the same survey said they were somewhat or very satisfied with the SCC's performance. Moreover, both in 1987 and in 1999, more than 60 percent of the respondents thought that the courts were the most reliable institution in Canada and should have the final say when a law or administrative act was found to be in conflict with Charter provisions.[60] A public opinion survey conducted in July 2001 found that although seven in ten Canadians believed SCC rulings to be influenced by partisan politics and felt that the Court was likely "to line up on the side of the federal government because the judges were appointed by it," an overwhelming majority strongly approved of the Court.[61] That said, public support for the Court appears to be less susceptible to populist criticism in the historic bastions of English Canada (Ontario and the Maritime provinces) than in Quebec and in the west, where uproars over excessive judicial activism and legal elitism are fairly common.

In sum, in spite of the significant dissimilarities between the Canadian and Israeli sociopolitical scenes and their constitutional legacies, there are striking parallels in the political rationales that have supported judicial empowerment through constitutionalization in the two countries.

The Origins of the 1990 Rights Revolution in New Zealand

Just fifteen years ago, New Zealand's political system was described by leading political scientists as "a virtually perfect example of the Westminster model of democracy" and "the only example of the British majoritarian democracy system left."[62] The enactment of the New Zealand Bill of Rights Act (NZBORA) in 1990 marked an abrupt change in the balance of power between the judiciary, the legislature, and the executive in what had been important policy-making arenas until the late 1980s, and symbolized the demise of the "last Westminster system."[63] Along with other new civil liberties laws, the Bill of Rights Act was intended to fence off a set of fundamental freedoms from the vicissitudes of New Zealand's increasingly volatile political system.[64] The driving force behind the 1990 constitutionalization of rights in New Zealand was provided by a coalition of economic actors who were pushing for neoliberal economic reforms, together with disparate sections of elites seeking to preserve and enhance their power vis-à-vis the growing presence of "peripheral" interests in majoritarian policy-making arenas.

New Zealand fully inherited the doctrine of parliamentary supremacy in 1947 when Britain removed its last constraints on New Zealand's legislative powers. Along with the British Westminster system of government, New Zealand's pre-1990 constitutional organization was heavily influenced by the traditional British distrust of American-style judicial review and of fundamental rights and proclamations of social or state policy. In short, until the late 1980s, New Zealand's constitution replicated the British parliamentary system and the British common law tradition in almost every respect.

After decades of almost undisturbed consensus in favor of white hegemony and an expanded welfare state, New Zealand's stable political system began to change in the early 1970s, when a combination of newly emerging interests and changing international economic conditions started to make its presence felt in New Zealand's majoritarian policy-making arenas. First, the traditional ties between New Zealand and Britain began to erode in the early 1970s, as Britain—the destination of the bulk of New Zealand's exported goods during the 1950s and 1960s—edged closer to economic union with Europe.[65] Reacting to this change, New Zealand's economic elite was forced to shift away from its traditional ties with Britain in order to search for new markets in the Pacific basin. This was reflected in the signing of the 1983 Closer Economic Relations (CER) agreement with Australia, similar bilateral free trade agreements with Singapore and Hong Kong, and New Zealand's joining multilateral economic groups such as the Asia-Pacific Economic Conference (APEC) and the South Pacific Forum. New Zealand also gradually transformed the nature of its domestic mass production—from a

primarily agricultural emphasis on wool, meat, and dairy to an emphasis on fisheries, tropical fruits, and incoming tourism. In order to fund this overhaul of New Zealand's production structure, the government had to borrow huge amounts of money from international sources, and public spending had to be cut back drastically. The abandonment of the local version of the welfare state and the transition to a neoliberal economic order became inevitable.[66]

As a result, between 1984 and 1994 New Zealand underwent radical economic reform, moving from what had likely been the most protected, regulated, and state-controlled system of any capitalist democracy to a nearly opposite position at the open, neoliberal, free-market end of the spectrum. Indeed, the sweeping transition from orthodox Keynesianism to "Thatcherite" neoliberalism in New Zealand has become the textbook case of such transitions in the international political economy literature.

This historical shift in New Zealand's economic policy was marked by the introduction of a new nexus of laws that restricted the government's ability to intervene in the economy and in the private sphere more generally. Two pinnacles of this new legislative framework (in addition to the NZBORA 1990 itself) were the Employment Contracts Act (1991), which repealed New Zealand's previous legislative industrial-relations framework (that had been in place for nearly a hundred years) in an attempt "to promote an efficient labor market"; and the Fiscal Responsibility Act (1994), which set out generic principles for neoconservative fiscal policy, "including that government expenditure should not exceed its revenue over a reasonable period of time."[67]

The state's wholesale retreat from the economic sphere brought about extensive deregulation and privatization of New Zealand's telecommunication, transportation, forestry, and tourism industries; wholesale removal of barriers on import and export of goods and services; removal of subsidies from the manufacturing, food processing, and agricultural sectors; large-scale layoffs in the public sector; the commodification of numerous social services, including fundamental welfare, education, housing, and health care services; a severe erosion of labor unions and collective bargaining; and active encouragement of foreign investment and ownership. These far-reaching reforms, introduced over several years, all shared the characteristic ideological and rhetorical underpinnings of neoconservative economics at its extreme. Not surprisingly, during the same period, New Zealand witnessed a dramatic rise in the level of economic inequality; an unprecedented increase

in the proportion of foreign ownership of corporate assets, media, and public services; and a sharp drop in trade union membership.

In the political arena, these changes were shaped by and reflected in the rise of new political parties representing an explicit neoliberal stance (for example, the libertarian New Zealand Party, which has quickly become the third political power in New Zealand), the adoption of "market friendly" economic positions by the conservative National Party, and a quick conversion to neoliberalism by the established Labour Party. Indeed, by the late 1980s, writes Raymond Miller, Keynesian social democratic doctrines had been so discredited by the Labour government "as to be deemed by one commentator to be virtually 'irretrievable'."[68]

As in a number of formerly social democratic countries, the new generation of New Zealand's Labour leaders—party leader David Lange (a lawyer), deputy leader Geoffrey Palmer (a law professor), and other leading figures in the 1984–1990 Labour government—were university educated and professionally trained. "Unlike earlier generations of Labour leaders," notes Miller, "they were imbued with that mixture of personal ambition, individualism, and social liberalism" often associated "with the upwardly mobile middle class."[69]

The rise of neoliberalism in New Zealand during the 1980s was accompanied by the growing presence of "peripheral" interests on New Zealand's public agenda. Consider, for example, the following demographic facts. In the late 1970s, over 90 percent of New Zealand's population identified themselves as being of European descent. By the mid-1990s, however, less than three-quarters of New Zealanders indicated that they were of European descent. During the past two decades, this group not only declined as a proportion of the population but also fell in absolute numbers. Over the same period, New Zealand's other major ethnic groups increased significantly both in size and as proportions of the population. By 1995, New Zealand's Maoris made up over 15 percent of the population. From less than 1 percent in 1945, the combined figure for people originating from the Pacific islands and people of Asian descent rose to 2.2 percent in 1971, to 5.2 percent in 1986, to 9.6 percent in 1996, and to just over 11 percent in 2001, each group making up over 5 percent of New Zealand's population. Over the past two decades alone, the Maori and Pacific Islander populations have both grown by more than 50 percent. And between 1980 and the late 1990s, New Zealand's Asian population grew by more than 250 percent, primarily as a result of increased immigration. Between 1955 and 1975, New Zealand

granted citizenship to less than 20,000 applicants (approximately 2,000 per year); in contrast, over 450,000 new citizenship applications were granted between 1976 and 2000, with an annual average of over 18,000.

In addition to these demographic changes, by the late 1980s there was a growing public awareness among the Maori of the significance of the Treaty of Waitangi (the 1840 pact between Maori chiefs and the British that opened the way for European colonization) and of unresolved Maori grievances, especially over the unjust expropriation of their land. This led to the expansion in 1985 of the Waitangi Tribunal's jurisdiction, enabling the inclusion of Maori grievances pertaining to the post-1840 era (rather than grievances pertaining to the post-1975 period only, as permitted by the Treaty of Waitangi Act 1975).[70] Vocal Maori demands for compensatory redistribution of land, fisheries, natural resources, and so forth, as well as honorable treatment of the Maori language and heritage, coincided with growing demands from established immigrants from the Pacific Islands, Asia, and the Mediterranean for the adoption of multicultural policies in education and language, and with calls from environmentalist, feminist, and militant antinuclear movements for the accommodation of their policy preferences.

As in Israel, these new interests rapidly found their way into New Zealand's parliament. Over the past several decades, Maori representation in New Zealand's parliament increased from only 3 percent to 15 percent (their approximate proportion of New Zealand's population). The representation of Pacific Islanders (6 percent of the population) and Asian (5 percent) has also been improved. The Green Party became a meaningful political force, primarily in the 1980s and early 1990s. In the ten elections held between 1943 and 1969, only two minor parties won 2 percent or more of the national vote on seven occasions. By contrast, in the ten elections between 1972 and 1999, ten different minor parties reached at least 2 percent of the vote on a total of twenty-two occasions. In addition, the militant Mana Motuhake faction, founded in 1980, became the principal contender for four designated Maori electorates in the pre-MMP electoral system. Overall, the minor parties' average vote share rose from 7.5 percent in the period 1943–1969 to 19.5 percent in 1972–1999. Consequently, the average share of the popular vote gained by the winning party (either the socialist Labour Party or the populist National Party) fell from 48.1 percent to 42.5 percent.[71] In the 1996 national elections, for example, the two largest parties received a joint 62 percent of the vote (National—33.8 percent, Labour—28.2 percent) as compared with 91 percent in 1975 and 79 percent in 1984. The

breakdown of support for the two major political parties was accompanied by a sharp increase in the degree of electoral volatility (fluctuations in voting results between elections) and by a marked decline in the membership of the major political parties. Whereas in 1963, 89 percent of the voters voted for the same party that they had supported in 1960, the comparable figure for the 1987 and 1990 elections was 64 percent.[72] And whereas in the 1960s and 1970s both major parties claimed over 200,000 members each in election years, by the 1990s the National Party, for example, was reported to have fewer than 50,000 ordinary members during election years, with the Labour Party claiming even fewer. Needless to say, these developments troubled social conservatives and increased the threat to established interests. The push toward judicial empowerment followed.

In 1968 Geoffrey Palmer, then a young academic, had in his own words "recently returned from studying the mysteries of the United States Constitution." He warned against a Bill of Rights on the grounds that it was not needed, would catapult the judiciary into political controversy, and would be "contrary to the pragmatist traditions of our politics."[73] But two decades later, when the white bourgeoisie's control over New Zealand's major policy-making arenas was challenged, that same speaker—now Sir Geoffrey Palmer—in his capacity as Minister of Justice in the two-term Lange Labour government (1984–1989) and later as Prime Minister (1989–1990) initiated and championed the empowerment of New Zealand's judiciary through the enactment of the 1990 New Zealand Bill of Rights Act.

In the second half of the 1980s, the very same politicians who introduced comprehensive neoliberal economic reform in New Zealand in 1984,[74] as well as other politicians representing the policy preferences of the country's white, urban, high-income constituents, reacted to the changing economic and demographic conditions and the growing popular political pressure on New Zealand's majoritarian policy-makers by initiating and carrying out what scholars have described as "the rights revolution of New Zealand," the hallmark of which was the 1990 enactment of the NZBORA.[75]

The White Paper proposed by the Labour government in 1985 advocated a fully entrenched bill as supreme law, controlling parliamentary legislation through judicial review. It documented the limited nature of existing checks on parliamentary and executive power, appealing to New Zealand's obligations under the International Covenant on Civil and Political Rights (ICCPR). The authors considered the proposed bill a vital check on New Zealand's legislature and executive power. However, the White Paper bill failed

to garner political support, and by late 1987 it was evident that public opinion was against the proposed Bill of Rights. This fierce opposition forced Geoffrey Palmer to abandon his original proposal for an entrenched bill; instead, he introduced a nonentrenched version—the New Zealand Bill of Rights Act 1990. This was introduced in October 1989 and became law on August 28, 1990. Given the ideological preferences that surrounded the Bill of Rights initiative, it is not surprising that in spite of the Justice and Law Reform Committee's suggestion that social rights be included in the NZBORA,[76] their inclusion was successfully opposed by Palmer, and these rights were ultimately omitted from the NZBORA. In contrast, even the explicit inclusion of property rights guarantees in the bill did not prevent Palmer from saying that "unless the New Zealand system pays better attention to the taking of property, international law issues could arise that could have serious consequences. Furthermore, the effect on the investment climate is not likely to be favorable."[77]

The NZBORA, although not entrenched, has gained sufficient legal and political authority to allow the courts to exercise most of the powers of scrutiny and control that they would have had under a system of full-scale judicial review. As we have seen in earlier chapters, the New Zealand Court of Appeal (NZCA) has taken the liberty of expanding the scope of review power that has been delegated to it by the nonentrenched bill by according it a de facto entrenched status. Drawing on this expansive interpretive approach, the NZCA has gradually become one of the country's most significant policy-making bodies, dealing with the most salient moral dilemmas and political controversies on New Zealand's public agenda.[78]

The Court's generous interpretation of its judicial review powers under the NZBORA reflects the current Chief Justice Dame Sian Elias's view, expressed prior to her elevation to the bench, that "it is time to recognize that the notion of arbitrary parliamentary sovereignty represents an obsolete and inadequate idea of the New Zealand Constitution."[79] The bill's de facto entrenched status appears to match the expectation of Geoffrey Palmer, the act's author, that the Bill of Rights, although formally nonentrenched, would gradually acquire sufficient legal and political authority to allow the courts to exercise at least some of the powers of scrutiny and control that they would have had under a system of full-scale judicial review. Indeed, as Palmer has recently stated, the Bill of Rights "has been more effective than many had thought it would be."[80]

In sum, the enactment of the NZBORA, along with other new laws, such as the Human Rights Act of 1993 and the Privacy Act of 1993, was intended not only to elevate New Zealand's traditional set of classic civil liberties to the status of prime constitutional rights, but also to empower New Zealand's judiciary by delegating policy-making authority from parliament to the NZCA. Not surprisingly, the judicial elite and the oligarchy of wealth and political power, seeking to preserve their hegemony and to increase their impact on policy-making outcomes, quickly endorsed the constitutional change. Opposition to the enactment of the NZBORA came mainly from leftist opponents of privatization and from Maori activists who perceived the measure as a threat to the status of the Treaty of Waitangi and the success of future Maori land claims.

The Origins of South Africa's Constitutional Revolution

Yet more evidence to confirm the hegemonic preservation thesis is found in the struggle of South Africa's white ruling elite during the late 1980s and early 1990s to ensure the inclusion of an entrenched Bill of Rights and active Constitutional Court in the post-apartheid political pact in South Africa.[81] South Africa's human rights record was nothing short of appalling for the better part of the last century. The notorious apartheid regime symbolized one of the last bastions of European colonialism and white supremacy in the post–World War II era. It is a well-documented, undisputed fact that until the early 1990s the National Party–controlled political system in South Africa functioned so as to entrench the privileges of white inhabitants while depriving black South Africans of even the most basic human rights. Explicitly discriminatory policies included: the Population Registration Act (1950), which classified every citizen into one of four racial categories (African, Coloured, Indian, or White); the prohibition of interracial sex and marriage; a strict racial segregation in the entire public domain; large-scale forced removals in thriving multiracial neighborhoods; bans on any meaningful political participation for nonwhites; the creation of the notorious Bantustans (effectively impoverished rural ghettoes); and the almost exclusive allocation of material resources to white communities (who form approximately one-seventh of the population). These policies and many others similar in nature promoted and reflected a reality of severe political, legal, social, and economic inequality between white and black South Africans.

Until 1990, when President F. W. de Klerk lifted the ban on the African

National Congress (ANC) and released its most prominent leader, Nelson Mandela, from prison, South Africa had excluded the vast majority of its population from participation in democratic politics, favoring instead a strict and select parliamentary sovereignty. Prior to the adoption of the post-apartheid constitutional order, South Africa had had three previous constitutions, adopted in 1910, 1961, and 1983. These constitutions showed little or no awareness of the multiethnic and multilingual nature of South African society, catering almost exclusively to the white, Christian, Afrikaans minority instead. Indeed, prior to the enactment of the 1993 interim Bill of Rights (replaced by the final Bill of Rights in 1996), very few countries in the post-war era had seen a wider and more tragic gap between popular will and constitutional arrangements than that which prevailed in South Africa. Up until the democratic election of 1994, South Africa excluded over 80 percent of its population from any meaningful participation in democratic politics while strictly adhering to parliamentary sovereignty.

Calls for entrenched rights and for the establishment of active judicial review were strongly and consistently opposed by South Africa's ruling elites throughout the twentieth century. Until the late 1980s, the National Party (NP) leaders insisted that a bill of rights should not form part of any future constitutional order in South Africa, arguing that an emphasis on individual interests would be inconsistent with the political and religious tradition of Afrikanerdom, which preferred to emphasize the state and other supposed communitarian values over individual interests. The long-standing antagonism toward judicial review echoed former Boer President Paul Kruger's famous century-old declaration that the power of the courts to test legislation was "a principle invented by the Devil!"[82]

Accordingly, the South Africa Amendment Act 1958 provided that "no court of law shall be competent to enquire into or to pronounce upon the validity of any law passed by parliament." Prime Minister Hendrick Verwoerd rejected calls for the adoption of an entrenched bill of rights by the Natal Provincial Council, stating that it would be unthinkable, as "no suggestion was made as to how right could be effectively guaranteed without sacrificing the sovereignty of Parliament."[83] The passage of the 1961 Republican Constitution secured the dominance of parliamentary sovereignty. Section 59 specifically incorporated the language of the South Africa Amendment Act, thus constitutionalizing the exclusion of the courts from substantive review and explicitly limiting any judicial review over substantive legislative enactments affecting the language clause, which guaranteed

the equality of English and Afrikaans. A similar attitude toward the constitutionalization of rights and the establishment of judicial review was reflected in the 1983 constitution.

By the early 1980s, however, apartheid had entered a crisis born of its own contradictions and of new pressures emanating from a changing world. Domestically, the excessive costs of enforcing apartheid through a maze of social controls amidst continued violence and economic recession rendered it an unworkable scheme. As white professionals began to emigrate in the 1970s and 1980s, the country encountered shortages in the skills necessary to operate its sophisticated economy. In spite of the large presence of multinational corporations, which had always viewed South Africa as something of a gold mine (both literally and metaphorically), pressure from the international community in the form of economic and diplomatic sanctions sent a signal to the National Party that the pursuit of steps toward the abolition of at least some of their apartheid policies was necessary.

The adoption of the 1983 Constitution marked the first step in this direction. In the face of increasing internal resistance and international isolation in the early 1980s, the South African government looked to the political recuperation of the "Indian" and "coloured" communities (but not the huge African majority) as a means of broadening its social base. The outcome of this shift in policy was the adoption of the 1983 Constitution, which extended the franchise to "Indians" and "coloureds" in a tricameral legislature, with its jurisdiction distributed according to a vague distinction between "particularistic" and "general" affairs. However, two mechanisms ensured that power remained safely in the hands of the dominant white party. First, the running of government was effectively centralized under an executive State President who had extraordinary powers in both the executive and the legislative arenas. Second, all significant decisions within the legislature (the election of President, for example) would automatically be resolved by the 4:2:1 ratio of white, "colored", and "Indian" representatives, which ensured that even if the "Indian" and "colored" Houses of Parliament voted in unison, the will of the white House would prevail. Resistance from the two targeted communities, as well as an escalation of rebellion in the black community, sealed the fate of the 1983 Constitution. The attempt to preserve white hegemony amidst an uprising of the black African majority while maintaining the principle of parliamentary supremacy was put to rest, and the idea of constitutional entrenchment of rights and the establishment of judicial review was rediscovered by the white elites.

Within a few years, it became clear that the days of legalized racial segregation were numbered. Cut off from flows of international capital, the South African economy began to shrink during the 1980s, driving the government to seek to rehabilitate itself in the eyes of the Western world. Meanwhile, the collapse of communism in the Eastern Bloc deprived the ANC of its main sources of political, financial, and military support. Driven by their intertwined self-interests, the two sides forged a relatively peaceful political transition that granted black majority rule in return for "a continued place for whites in South Africa's economic sun."[84]

When it became obvious that the apartheid regime could not be sustained by repression, the incentives of political and economic power-holders among the white minority rapidly changed, and a sudden conversion to the supposed virtues of a bill of rights followed. The call to institute a bill of rights came from the old enemies of constitutionalization—the National Party government and other political representatives of the white minority, who suddenly appeared to discover the charms of entrenched rights and judicial review while hastily abandoning their historic commitment to parliamentary sovereignty. By reconciling themselves to the idea of an entrenched constitution that would include a constitutional catalogue of rights and a constitutional court with powers of active judicial review, the apartheid government hoped to maintain some of the privileges enjoyed for so many decades by whites. Conscious judicial empowerment through constitutionalization followed.[85]

In April 1986, only two years after publicly declaring that a bill of rights would be inconsistent with the political and religious tradition of Afrikanerdom, Minister of Justice H. J. Coetsee asked the South African Law Commission to investigate the subject of "group and human rights." The resulting research was made public in March 1989 when the Law Commission released a widely disseminated Working Paper, in which it recommended that South Africa should adopt an entrenched bill of rights. A further Interim Report on Group and Human Rights was published by the Law Commission in August 1991, in which it reiterated its support for the idea of adopting an entrenched bill of rights and included a draft charter for discussion.[86] The commission in this way hoped to bolster some of the privileges reserved for so long for mostly white elites. Ironically, the Law Commission, on which not a single black person was represented, concluded its report by declaring, "No matter who governs this country, it goes without saying that if we are to avoid dictatorship—even the dictatorship of a democratic majority—we need such a bill."[87] The quick abandonment of the anti–bill of rights rhetoric by the National Party and other representatives of the white elite was completed in February 1990 when President F. W. de Klerk officially announced in Parliament that a future constitution would need to include a bill of rights as proposed in the Law Commission's Working Paper.

As we have seen in Chapter 1, the lifting of the ban on the ANC brought white elites and the black majority into public engagement for the first time. The Convention for a Democratic South Africa (CODESA) was launched in December 1991 to negotiate a democratic transition, but these negotiations collapsed in mid-1992 and were followed by escalating violence and mass social upheaval. In 1993, the parties entered into a series of bilateral negotiations that yielded an agreement on a two-phase transition to democracy through constitutional reform. The first stage was the drafting of the 1993 interim Constitution (which came into force in April 1994). The second phase, which completed South Africa's constitutional revolution, was the drafting of the 1996 final Constitution by the Constitutional Assembly.[88]

By 1991, most white constituencies had accepted the idea of a bill of rights in its entirety, adopting a view that called for the abandonment of traditional parliamentary supremacy and the establishment of judicial review. The National Party eventually published its own version of a "Charter of Fundamental Rights" in February 1993, keenly advocating a transitional bill of rights that would constrain the power of the National Assembly and in which the National Party would have a minority representation. The draft proposal of the Charter stated that

> the object of the Charter is not to create or regulate legal relations amongst persons themselves. The main purpose of the Charter is to protect individuals against abuse of power by state authorities. It is not intended as a direct source of rights and obligations among individuals themselves, for example, for a dissatisfied employee to sue his employer on the grounds of alleged infringement of his fundamental rights. The Charter is a standard with which the acts of state authorities towards a citizen must comply.[89]

Both the 1993 interim Constitution and the 1996 final Constitution possess two distinct features that are unprecedented in South African constitutional history. First, the Constitution entrenches constitutional supremacy and a sovereign Bill of Rights. Legislative and executive acts of government can now be declared invalid if they are found to violate fundamental human rights. Second, the Constitution established a Constitutional Court

with final jurisdiction over constitutional matters. Roelf Meyer, the National Party government's chief constitutional negotiator, summed up the outcome of the first stage of constitutionalization from the NP's point of view: "we wanted to build in an assurance that the Constitution be based on the principles of a constitutional state. We wanted individual rights and a Constitutional Court. So we got what we wanted."[90]

The real battle over the constitutionalization of rights in the new South Africa revolved around three major bones of contention: the scope and nature of property rights, workers' rights, and minority language educational rights under the final Bill of Rights. Throughout the pre-1996 negotiations, the National Party and the Democratic Party (both holding a base of substantial business support) advocated the constitutional entrenchment of the strongest possible protection of individual property rights (including explicit antiredistribution provisions) alongside the narrowest viable protection of workers' rights to strike, unionize, and bargain collectively. The ANC meanwhile advocated a constitutional guarantee for extensive land reform through expropriation, thereby allowing for erosion of the traditional status of property rights. It also argued that, given the stark power imbalances between employers and employees, employees' rights to strike should be constitutionally entrenched, whereas employers' rights to lockout should not.

The long and arduous negotiations culminated in a package deal adopted early in May 1996. The NP won out conclusively on the property rights front, ensuring that the state was barred from implementing "arbitrary or unreasonable" land redistribution measures.[91] Moreover, any departure from the Bill of Rights' "property clause" was made subject to judicial scrutiny of its constitutionality vis-à-vis the Constitution's "limitation clause" ("limitation is reasonable and justifiable in an open and democratic society").[92] Employers' rights to lockout were not included in the final Bill of Rights, but the Labour Relations Act continues to permit employers' recourse to lockout. In return for these concessions, the NP accepted the ANC's insistence on the exclusion of any state duty to fund single-language schools, particularly Afrikaans-language institutions, in post-apartheid South Africa.[93]

The NP's hard line and ultimate victory on the property clause front reminds us that the struggle against the apartheid regime was not limited to voting and legal segregation—it also concerned economic and social inequality.[94] Not only was South Africa legally racist, it also had one of the world's worst situations of material inequality, with the white minority (ap-

proximately 15 percent of the population) owning 87 percent of the land and earning on average eight times the income of the black African majority (approximately 75 percent of the population), and with the top 5 percent of the population consuming more than the bottom 85 percent, resulting in a Gini coefficient of 0.61 (matching Brazil and Nigeria as major developing countries with the highest levels of inequality).

The nexus of provisions and institutions established by the apartheid regime divided the land of South Africa into zones of racial exclusivity, whereby one-eighth of the land was set aside for black South Africans while the remaining seven-eighths of the land was for the exclusive use of people classified as "other than Black." This outrageously unequal land distribution was accomplished, inter alia, by means of the forced and brutal relocation of about 3.5 million people from the early 1960s until the mid-1980s. Furthermore, economic resources were allocated in a deliberately discriminatory manner through a program of institutionalized inequality that purchased white prosperity at the expense of the vast majority of black South Africans. State expenditure was heavily biased in favor of white inhabitants, while the allocation of land and other natural resources ensured that whites would always be those most favored by the allegedly "invisible hand" of the market. The result was the creation of an orchestrated and self-perpetuating imbalance in distribution of income among the different ethnic groups in South Africa. In 1990, just a few months before the formal abolition of apartheid, 95 percent of the productive capital in the country was held by four white conglomerates. As Michael Mandel notes, this oligarchy of wealth is one of the things the white elite attempted to protect through "a classic property-protecting Bill of Rights."[95] In sum, the white elite and its parliamentary representatives, faced with the inevitable prospect of an ANC-controlled parliament, endorsed a bill of rights as a means of fencing off certain aspects of their privilege from the reach of majoritarian politics.

Yet if the claim that anti-redistribution and pro–status quo interests informed the entrenchment of a constitutional catalogue of rights and the establishment of judicial review in South Africa is correct, how can we explain the fact that by the early 1990s, even before de Klerk had committed to a negotiated settlement and a bill of fundamental rights, Nelson Mandela and the ANC had declared themselves converts to the idea of constitutional limitations on sovereignty through the adoption of a constitutional bill of rights? This was a far cry from the socialist action program of the Freedom Charter advocated by the ANC throughout the era of apartheid.[96] I would

suggest that this change can be explained by the ANC's gradual transformation from a revolutionary opposition movement to a governing party (by the time the 1996 constitutional pact was signed, the ANC had been in power for over two years); and, more specifically, by international economic pressure, together with the ANC's need to prevent capital flight and to attract foreign investment. Without a constitutional guarantee of property rights, for example, the new regime in South Africa would have been unable to reassure domestic and international economic elites that regardless of significant changes their predictability interest would remain secure. Massive, almost unconditional public support also helped the ANC's leadership to renege on its long-term commitment to adopting a progressive, redistribution-oriented constitutional regime.

However, the ANC did not "sell out" the revolution in South Africa, because the revolution never actually materialized. Instead, there was a negotiated settlement, designed in no small part to head off the possibility of revolution. As Ian Shapiro notes, "The political pact that led to the transition seems underwritten by an implicit social contract between the new political elite and those with economic power: the still overwhelmingly white landed and business elites."[97] The ANC government has so far avoided putting large-scale expropriation or increases in taxation on the table, it has not advocated any significant redistribution of material wealth or land, it has not interfered with the self-protection of gated communities, and it has tended to toe the line as far as neoliberal economic reform is concerned. This has resulted in an unemployment rate of nearly 30 percent (up from 17 percent in 1995) and growing disillusionment among South Africa's poor black population.[98]

The introduction in July 1996 of the Growth, Employment, and Redistribution (GEAR) program (a set of explicitly neoliberal economic policies) as well as the ANC government's continued support for the strict constitutional protection of negative liberties at the expense of positive subsistence rights simply reflect the ANC's commitment to "business-friendly" policies. The GEAR strategy reinforced the government's emphasis on fiscal restraint, containment of inflation, and export promotion as ways to enhance competitiveness. The liberalization of foreign exchanges, the privatization of state enterprises, and the creation of a conducive and enabling environment for foreign investment were all recognized as crucial economic goals. Moreover, GEAR recommended greater labor market flexibility, possibly via a two-tier system involving the deregulation of semi- and unskilled work, and

the exemption of small business from provisions of labor legislation. These business-friendly measures have been accompanied by continuous erosion in the political significance of the Congress of South African Trade Unions (COSATU)—the single largest trade union, which aligned formally with the ANC and the South African Communist Party—in an era in which the ANC is no longer an opposition party.

Attempts by the political representatives of white settlers and domestic elites to protect their joint interests through the constitutionalization of rights, especially property rights, is not new to the African continent. As recent work has shown, British colonial decision-makers and domestic elites did not trust that the new political authorities in many soon-to-be-decolonized African countries would protect the interests of their principal constituencies—white settlers, urban intelligentsia, and foreign investors—and were therefore eager to establish seemingly autonomous judicial systems and land registration apparatus and to adopt entrenched constitutional catalogues of rights in these countries prior to completion of the decolonization process.[99] While for many years Britain was unwilling to incorporate the provisions of the European Convention on Human Rights into its own legal system (let alone to enact a constitutional bill of rights of its own), it did enthusiastically promote the entrenchment of European Convention rights in the "independence constitutions" of newly self-governing African states as devices for protecting established interests from the "whims" of independent majoritarian politics. The constitutionalization of rights in the Gold Coast (Ghana) in 1957, Nigeria in 1959, and Kenya in 1960 (to name only three examples) followed this pattern.

Consider too the timing of the June 1991 constitutionalization of rights in British-ruled Hong Kong, which took place less than two years after the British Parliament had ratified the Joint Declaration on the Question of Hong Kong, whereby Britain was to restore Hong Kong to China in July 1997; and the establishment of judicial review in Egypt in 1979 amidst a resurgence in Islamic fundamentalism, followed by the crucial role of the Egyptian Supreme Constitutional Court in advancing a relatively liberal interpretation of Shari'a (Islamic law) rules.[100]

As my analysis of the 1992 constitutional revolution in Israel and my brief discussion of other constitutional reforms suggest, the constitutional entrenchment of rights and the establishment of judicial review do not develop in isolation from a country's central political struggles and economic

interests. To best serve their own interests, hegemonic political, economic, and judicial elites attempt to shape the institutional structure within which they operate. Constitutional reform is one such arena in which these power struggles occur. Because entrenched rights and judicial review (like other semiautonomous, professional policy-making institutions, such as central banks, electoral committees, transnational trade organizations, supranational financial bodies, and judicial tribunals) are self-enforcing institutions that usually limit the flexibility of political decision-makers, the actors who voluntarily establish such institutions must have an interest in abiding by such limits. Moreover, because bills of rights and judiciaries lack the independent power to enforce their mandates, their authority depends mainly on the degree to which elites find judicial empowerment beneficial to their own political, economic, and cultural hegemony.

Governing elites in divided, rule-of-law polities face a constant struggle to preserve their hegemony. Such elites are likely to advocate a delegation of power to the judiciary when the following three conditions exist: when their hegemony and control over crucial majoritarian decision-making arenas are increasingly challenged by peripheral groups and their policy preferences; when the judiciary in that polity enjoys a relatively high reputation for rectitude and political impartiality; and when the courts in that polity are generally inclined to rule in accordance with hegemonic ideological and cultural propensities.

In many countries (such as Israel, New Zealand, and South Africa), the intentional empowerment of the judiciary by threatened but still dominant political powers has been strongly supported by influential coalitions of domestic neoliberal economic forces that view the constitutionalization of rights as a means of promoting economic deregulation, and by national high courts seeking to enhance their political influence and international profile. Indeed, the contemporaneous emergence of a neoliberal economic order and the movement toward constitutionalization in these countries is anything but accidental or fortuitous. On the contrary, the two trends go hand in hand and in fact complement each other; they share a common adherence to a "small government" worldview, a commitment to an expansive conceptualization of the private sphere, and an uneasy attitude, even hostility, toward the less than predictable political sphere.

The causal mechanisms behind the trend toward constitutionalization and judicialization in divided polities have not been adequately delineated by the major theories of constitutional transformation. The democratic expansion, evolutionist, functionalist, new institutionalist, and electoral market models cannot provide a full explanation for the recent history of constitutional entrenchment of rights and judicial review in Israel, Canada, New Zealand, and South Africa. My brief analysis here of constitutional politics in these four countries reveals that their constitutional revolutions, while admittedly different from each other in scope and context, can be more productively analyzed in terms of an interest-based hegemonic preservation approach—that is, judicial empowerment through the constitutionalization of rights and the establishment of judicial review is often a conscious strategy undertaken by threatened political elites seeking to preserve or enhance their hegemony by insulating policy-making from popular political pressures, and supported by economic and judicial elites with compatible interests. Moreover, the hegemonic preservation thesis serves as a reminder that seemingly humanitarian constitutional reforms often mask an essentially self-serving agenda. The constitutionalization of rights, in other words, is often not so much the cause or a reflection of a progressive revolution in a given polity as it is a means by which preexisting and ongoing sociopolitical struggles are carried out.