# Hirschl, Ran. *Towards Juristocracy*. Cambridge: HUP, 2004.

***Thesis and Summary:***

Why have so many countries adopted Charters of Rights in the post-war era? The common answer is that such Bills/Charters are a reflection of a progressive movement away from majoritarian democracy and toward the accommodation of minorities and the improvement of the lives of have-nots. In *Towards Juristocracy*, Ran Hirschl disputes this common view, arguing that the increasing constitutionalization of countries such as Canada reflects an attempt on the part of political, economic, and legal elites to retain hegemonic power.

In chapter two, Hirschl lays out the theoretical basis for his “hegemonic preservation thesis”. After critiquing a number of rival views – evolutionary theorists, functionalist theorists, economic-institutional models, and “thin” versions of elite theories – Hirschl presents his own thesis, according to which constitutionalization occurs as a result of strategic interaction among three sets of elites: political elites (who have some incentive to protect a given set of policy options from majoritarian politics), economic elites (who want to preserve the private sphere from state intervention), and legal elites (who wish to enhance their prestige and reputation). In the third chapter, Hirschl begins to flesh out this theory by explaining how Canada’s elites were well-served by the Charter: legal elites by their gain in prestige, economic elites by enabling them to challenge regulations of various kinds, and political elites by creating a nationalizing institution (or strengthening it) – the SCC.

Hirschl then explains that the decisions of the SCC (with a few exceptions) have favored a negative, Lockean (or even Hobbesian) understanding of rights: rights as limits to the intervention into political life by the state. This interpretation has generally favored those who are already powerful within a capitalist democracy (particularly corporations), but it can also be helpful for those (such as same-sex marriage activists) who are advocating for negative rights. The Charter has been beneficial for those seeking enhanced individual freedoms, and it has been of benefit to certain marginalized identity groups, but it has failed improve the lives of those who are at the bottom end of the socioeconomic ladder.

In his conclusion, Hirschl states his argument in frank terms: “put bluntly, [constitutionalization] can best be understood as an attempt to defend established interests from the potential threats posed by the voices of cultural divergence, growing economic inequality, regionalism, and other centrifugal forces that have been given a public platform through the proliferation of representative democracy”.

***Methodology and Theoretical Perspective***

Hirschl’s book is comparative, drawing upon four related cases (Israel, Canada, New Zealand, and South Africa) in order to develop a theory of constitutionalization which he calls the “hegemonic preservation thesis”. According to Hirschl, constitutionalization occurs when hegemonic elites – political, economic, and legal – feel the need to insulate their status-quo policy preferences from the vagaries of democratic politics. Hirschl’s evidence for this thesis is primarily qualitative (political history, readings of key cases, etc.) and occasionally quantitative (measures of income inequality, percentage of negative rights cases versus positive rights cases, and so on). Unlike many works in this sub-field, which tend toward the polemical, Hirschl attempts to be rigorous in his construction and testing of his theoretical model. (However, in contrast to scholars such as Miriam Smith, Hirschl never recommends that normative concerns be separated from such studies, and he is himself quite obviously motivated by a normative commitment to egalitarian progressivism).

Hirschl’s argument rests on the relatively uncontroversial assumption that those who possess power will not abandon that power willingly and will attempt to generate political outcomes which are in their own interests and stall political outcomes which run against their interests. Beyond this foundational claim, Hirschl’s argument seems to rest on two further assumptions. First, he has to assume that there is in fact a clear difference between the interests of political, economic, and legal elites and the interests of the *demos*, i.e. that the *demos* is opposed to Lockean liberalism, capitalist markets, and so on and would overturn the status quo if it were granted the power to do so. Second, he has to assume that there is a clear difference between economic progressivism (which has been wholly unsuccessful in the constitutional/rights era) and identity progressivism (which has had very real success in the constitutional rights/era). Any/all of these assumptions may well be defensible, but Hirschl does not appear to provide a great deal of evidence in their defense within *Towards Juristocracy*.

***Comparison with Other Readings and Contribution to the Literature***

Hirschl occupies an interesting place in the debates about the Canadian Charter. With the exception of a few comments in his conclusion, Hirschl would seem to agree with Morton and Knopff regarding the ascendance of identity groups post-Charter; like Morton and Knopff, Hirschl argues that minority groups (and libertarians) have been successful in their Charter challenges. (In a sense, Morton and Knopff’s work could be seen as a supplement to Hirschl’s account of “legal elites” – but legal elites are only one part of the story for Hirschl, whereas they are pretty much the whole story for Morton and Knopff) However, Hirschl also agrees with Mandel (though Hirschl is considerably less polemical) about the negative socioeconomic consequences of the Charter. The reason for Hirschl’s awkward fit within the literature has to do with his more sophisticated conception of rights: negative rights have done well in the Charter era, including rights such as same-sex marriage, because they are in keeping with Lockean individualism, but positive rights (such as a right to health care or a basic income) have not done well because they contradict such individualism.

In some respects, Hirchl’s underlying argument about the causes of the Charter revolution in Canada resemble Morton and Knopff – both explanations are basically elitist in nature – but Hirschl identifies a broader set of political, economic, and legal elites behind the revolution.

***Relevant Exam Questions***

This book is relevant for questions about the relationship between Parliament and the judiciary before and after the Charter. It is also relevant for any questions about the politics of the Charter itself, the political changes wrought by the Charter, and the effect of the Charter on the “democratic deficit” in Canada.

***Detailed Notes:***

*Introduction*

1 The world has recently witnessed an astonishing transition to *juristocracy*; according to many theorists, this has to do with the post-war consensus that democracy entails more than majority rule; typically described as progressive

5 The three questions of the study:

1. What are the political origins of the recent trend toward constitutionalization; to what extent is it a reflection of a genuinely progressive movement?
2. What is the impact of the constitutionalization of rights and the fortification of judicial review on attitudes toward progressive notions of distributive justice?
3. What are the political consequences of judicial empowerment?

7-10 Six broad scenarios of constitutionalization in the post-WWII era:

1. The “reconstruction” wave: political reconstruction in the wake of WWII (Japan, Italy, Germany, France)
2. The “independence” scenario: part of decolonization (e.g. India)
3. The “single transition” scenario: transition from a quasi-democratic or authoritarian regime to a democracy (Greece in 1975, Portugal 1976, etc.)
4. The “dual transition” scenario; transition to democracy and market economy (e.g. Poland in 1986)
5. The “incorporation” scenario: incorporation of international standards into domestic law in Denmark in 1993 and Sweden in 1995
6. The “no apparent transition” scenario: no apparent fundamental changes in the regimes, but the adoption of new constitutions: Canada, New Zealand, Israel

11 The basic thesis: the most plausible explanation for voluntary self-imposed judicial empowerment, which is what the recent changes represent, is that political, economic, and legal power-holders believe that it serves their interests to abide by those limits; three elites in particular are supportive of the changes:

1. political elites, who want to preserve their hegemony by insulating policy making from democratic politics while professing support for democracy
2. economic elites, who view the constitutionalization of rights (esp. property, mobility, and occupational rights) as a way to promote free-market agenda
3. judicial elites who seek to enhance their reputation and influence

Strategic legal innovators – political elites in association with economic and judicial elites who have compatible interests – determine the timing, extent, and nature of constitutional reforms

12 Elites that have disproportionate access to the legal arena are in fact better served by the courts and who find strategic drawbacks in majoritarian decision-making processes

*Chapter One: Four Constitutional Revolutions*

17-30 Introduction to the four cases:

1. Canada, 1982: the Charter contains detailed language intended to discourage courts from taking narrow views of the guarantees; quantitatively, the impact of the Charter has been revolutionary: constitutional cases rose from 5.5% (1972-1981) to 21.3% (1982-1991), of which 80% were Charter cases; this cannot be attributed solely to the Charter (willingness of national political actors to transfer policy-making authority; statutory change which shifted SCC from “appeals by right” to “discretionary leave”, granting the court more discretion; change in rules of standing and intervener status)
2. Israel, 1992: The new Basic law is basically an official bill of rights; as in Canada, the effect of the new Basic Laws have been significant, and the scope of the issues brought before the court has changed significantly
3. New Zealand, 1990: Until the NZBORA, New Zealand was thought of as one of the last bastions of true Westminster government; the NZBORA is an ordinary statute, but in practice they provide the basis for judicial review (and has been elevated by the NZ Court of Appeal to a de facto constitutional status)
4. South Africa, 1993-1996: Once again, the court became very important in the transition to multi-racial democracy in South Africa

*Chapter Two: The Political Origins of Constitutionalization*

31-38 Three major theories of constitutional change:

1. Evolutionist Theories: stresses the inevitability of judicial progress; some claim that it’s a part of a transition from one socioeconomic stage to another; the most widely-held version emphasizes the trend as the byproduct of the emphasis on human rights after WWII; another view is that confidence in technocratic government has waned, leading to a desire to restrict the discretionary power of the state; the outcome is successful efforts by minority groups to protect themselves
2. Functionalist Explanatinons: Transformation is an organic response to pressures within the political system itself; emphasis on a wide number of state agencies and the expanding administrative state: active judiciaries are necessary to monitor the ever-expanding administrative state

These two theories account for some factors, but none of them accounts for the precise *timing* of the constitutional reforms; they consistently fail to explain why one country reaches a given stage before another one; both explanations overlook interventions by important and specific power-holders

1. Institutional economics models: constitutional transformation as a mechanism to limit collective action concerns; courts may also serve an efficient “police patrol” mechanism; the problem is how prosperous democracies address these issues before the establishment of judicial review, nor why they choose it at a certain point in time

38-49 The “hegemonic preservation thesis”: the realist, strategic approach focuses on power holders self-interested incentives for deference to the judiciary; it makes four preliminary assumptions:

1. Legislative deference to the judiciary doesn’t develop separately from concrete social, political, and economic struggles; the expansion of judicial power is part of these struggles and can’t be understood apart from them
2. When studying the political origins of constitutionalization, we must take into account events that did *not* occur; can’t understand constitutional reform without understanding constitutional stalemate and stagnation
3. Political and legal institutions produce differential distributive effects: privilege some groups and individuals over others
4. Courts do not hold the purse strings but still constrain the flexibility of decision-makers, so the voluntary transfer of power to the courts seems to run counter to the interests of power-holders in legislatures and executives: the best explanation would seem to be that it is in the interests of those power-holders to abide by those limits

How might a political power-holder benefit from the expansion of judicial power? (1) delegating policy-making authority to courts may reduce decision-making costs and shift responsibility; it may be attractive for disputes that they don’t want to address (e.g. same-sex marriage in Canada) and (2) when politicians seek to gain support for contentious views by relying on the SC’s image as professional and apolitical

These strategic considerations can be understood in both a “thin” and a “thick” version

1. “Electoral Market” logic: judiciary increases the durability of laws by making legislative changes more difficult and costly; judicial independence is weaker in countries ruled by a single party; under uncertaintly, a party is more likely to want to support an independent judiciary to make their laws harder to change
2. A “thick” version must capture a broader picture. This is the “hegemonic preservation thesis” which suggests that judicial empowerment is best understood as the by-product of a strategic interplay between: threatened political elites who wish to insulate policies from democratic politics; economic elites who advocate open markets, deregulation, etc; and judicial elites who seek to enhance their reputation

The thick version is counter-intuitive, but it suggests that elites can insulate their increasingly challenged policy preferences against popular political pressure (has striking parallels in work about regulatory bodies and other semi-autonomous institutions)

*Chapter Three: Hegemonic Preservation in Action*

53-74 Detailed discussion of the case of Israel

75-82 The Political origins of the Canadian Charter

The origins of the constitutional battle can be traced to the rise of Quebec nationalism in the 1960s; Trudeau, sincerely committed to protecting individual rights but also part of a broader strategic response to the threat of Quebec separatism

Canadian Government wanted constitutionalization to shift debate away from regional concerns and toward questions of individual rights and to subject the provincial governments to core policy standards interpreted by a national institution: the SCC

All previous attempts to emphasize rights had failed (the “implied rights” of the Alberta Press case, Diefenbaker’s Bill of Rights, the rights in the Victoria Charter) because federal power-holders were disinclined to replace parliamentary sovereignty with constitutional supremacy; the victory of Levesque’s PQ in 1976 changed all this

The momentum of the 1980 referendum failure allowed Trudeau to initiate unilateral patriation, and ultimately to bring the Constitution Act in 1982 with all the provinces except Quebec

Most theorists emphasize the deep commitment of political leaders (esp. Trudeau) to the protection of civil liberties and the functional necessity (i.e. political ungovernability) as the major catalysts for the Charter: political decision-makers were unable to cope with the contentious problems; still, there is also some consensus that it was in the interests of political elites who found majoritarian politics not to their advantage: attempt to fight the growing threats to the Anglophone, protestant, business-oriented establishment posed primarily by Quebec separatism

As in other cases, the Charter was supported by domestic industrialists and American economic conglomerates who viewed the Charter as a means for deregulation; economic corporations have also been by far the most active organized interest litigants, using the Charter to challenge regulations on banking, trade, foreign ownership, and consumer/environmental protection; the SCC has indeed generally tended to favor the national government; above all, the court has become an important, if not the most important, decision-making arena for dealing with Quebec secessionism

82-89 Details from New Zealand

89-99 Details from South Africa

*Chapter Four: Constitutionalization and the Judicial Interpretation of Rights*

108-18 Criminal due process rights: the greatest part of judicial activity under the Charter has been criminal procedure questions; in Canada, examples include *Askov* (1990) and *Stinchcombe* (1991); there has been a general trend toward a generous interpretation of procedural rights; indeed, the protection of formal procedural rights is considered the signal triumph of rights adjudication in all four case countires

118-25 Demarcating the private sphere: all four courts have used the new framework to fortify and expand the boundaries of the private sphere, most of which reflect a judicial commitment to a small-government worldview; the courts have drawn on expression and privacy provisions to minimize government involvement and censorship

125-39 Subsistence social and economic rights: rights to education, health care, housing, etc. and many libertarians say they’re not rights at all; Canadian activists have attempted to initiate the entrenchment of a social charter; even in those cases which seem to promote positive rights, such as *Schachter* and *Eldridge*, the negative character of the Charter’s equality rights remains largely unaltered

139-46 Workers’ Rights: freedom of association, occupation, expression can be interpreted in favour of labor unions and workers’ rights, or they can protect the private sphere by granting priority to economic association and free bargaining; in Canada, association has been interpreted in such a way as to deny it meaningfully to workers; the SCC has also made clear that workers have the right *not* to join a union; an exception is *Dunmore* (2001) in favor of agricultural workers, but it’s unclear whether this is a trend.

146-48 Some themes can be drawn out of these changes:

1. Common tendency toward a narrow conception of rights which emphasizes Lockean individualism and antistatism; conceptualize the rights as negative liberties
2. Judicial interpretation depends on the ideological atmosphere and their interpretation in present-day capitalist democratices often reflects and promotes a certain range of meanings
3. All of the fundamnetals of neoliberal thinking owe their origin to ideas of anti-statism, protection of the private sphere, and so on – the national courts and more in favour of rights along these lines; even progressive adjudications with regard to sexual preference are based on the same logic of negative rights: so social injustice may be reduced only in those areas congruent with Lockean liberalism

*Chapter Five: Rights and Realities*

153 In zealously protecting the private sphere, the constitutionalization of rights has served as effective means for shielding the economic sphere from the potential hazards of regulation and redistribution

168 Any simple and sweeping claims about the positive effects of constitutionalization need to be viewed skeptically; there is much to question here. Whereas the constitutionalization of rights does have crucial importance in affirming marginalized identities and enhancing individual freeds, its impact on the socioeconomic status of disenfranchised groups is often exaggerated

*Chapter Six: Constitutionalization and the Judicialization of Mega-Politics*

169 Political deference in all four case countries has reached unprecedented heights, and includes the transfer of crucial nation-building challenges (such as the future of Quebec and the Canadian federation)

179-82 The SCC has become a key player in the debates about Quebec’s place in the federation, and in nearly all of its important rulings, the SCC has sided with the policy preferences of the federal government: the *Patriation Reference* (1981), the *Quebec Veto Reference* (1982), the *Quebec Protestant School Board* (1984); the federalists in particular have been able to translate the question of Quebec’s political status into a judicial question

195-99 Something similar has happened with Aboriginal rights, which have also been judicialized; the SCC has become the central arena for claims to recognition, land, and voice by Canada’s indigenous population: many of the issues are not primarily legal dilemmas: the effect is to lure activists away from political processes and the pacifying nature of the system defuses claims to restorative justice that have potentially revolutionary implications (such as indigenous peoples’ rights)

210 In principle, delegation to the courts may reduce legislators’ impact and control, and judicial empowerment may allow judges to become less accountable; however, national high courts tend to adhere closely to prevalent worldviews, national metanarratives, and the interests of influential elites, and when they do deliver groundbreaking rulings, they are not likely to transform a political community, since they won’t survive the resistance of a still more powerful political sphere; thus the goal has been achieved: policy preferences have been insulated against popular political pressures without risking the perils of delegating power to courts

*Conclusion: The Road to Juristocracy and the Limits of Constitutionalization*

213 The goal in the book has been to advance a notion of judicial empowerment through constitutionalization as driven primarily by political interests to insulate certain policy preferences from popular pressures; at the very least, it’s a convenient refuge for politicians seeking to avoid making difficult no-win decisions

Constitutionalization is seldom driven by politicians’ genuine commitment to progressive social justice or universal rights: in many cases, it’s an attempt to maintain the status quo and to block attempts to challenge it; this is part of a larger attempt on the part of political elites to insulate policy-making from democratic politics

217 “Put bluntly, it can best be understood as an attempt to defend established interests from the potential threats posed by the voices of cultural divergence, growing economic inequality, regionalism, and other centrifugal forces that have been given a public platform through the proliferation of representative democracy”