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Constitutionalism, Judicial Review, and Progressive Change

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Constitutionalism, Judicial Review, and Progressive Change

Linda C. McClain* and James E. Fleming**

I. Introduction: Against Juristocracy

We want to begin by marveling at the ambition, erudition, and passion of Ran Hirschl's powerful and sobering book, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*.¹ Hirschl's aim, roughly, is nothing less than to do for the world what Gerald Rosenberg set out to do for the United States in *The Hollow Hope: Can Courts Bring About Social Change?*² That is, he aims to dispel what he views as the hollow hopes that constitutionalism and judicial review will bring about progressive change around the world.

At the outset, though, we should note two differences between Hirschl's and Rosenberg's projects. One, Rosenberg pointedly asked the question “*Can courts bring about social change?*” and answered in the negative, whereas Hirschl instead asks “*Have courts brought about progressive*

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¹RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004). Citations to particular pages of this book will be indicated in text in parentheses.

²GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

economic change?” and concludes that they have not. Two, Rosenberg argued that courts cannot bring about *liberal* social change, whereas Hirschl argues that courts have not brought about *progressive* economic change: Rosenberg focused on the hollow hopes of liberals for social change securing, e.g., racial equality (*Brown v. Board of Education*³) and women’s reproductive freedom (*Roe v. Wade*⁴), while Hirschl focuses on hollow hopes for progressive economic change furthering distributive justice and securing welfare rights.

Hirschl develops powerful and provocative arguments about the origins and consequences of the new constitutionalism – the “rapid and astonishing transition to what may be called *juristocracy*.” (1) By this coinage, he refers to the transfer of “an unprecedented amount of power from representative institutions to judiciaries,” evident in the increasing adoption of judicial review, even in countries that historically have resisted it. (1) The book is certain to engender serious engagement with these arguments and it deserves to do so. In critiquing Hirschl’s analysis of constitutionalism and judicial review, we shall focus on the three points sketched below. The first two emphasize American constitutional theorists and jurists and the third looks primarily at constitutionalization in Canada and South Africa. Although Hirschl’s focus is not on American constitutional theorists and jurists or on American constitutional practice, he does suggest that American justifications and practice of constitutionalism and judicial review have inspired other countries to adopt constitutional limitations and judicial review. Thus, they are a brooding omnipresence and warrant analysis for this reason.

1. *Since when are constitutionalism and judicial review paths to progressive economic*

³347 U.S. 483 (1954).

⁴410 U.S. 113 (1973).

change? Here we concede for the sake of argument that courts have not brought about progressive economic change, but we question whether liberals and progressives in American constitutional law ever harbored any hollow hopes that courts would do so.

2. *The missing discourse of taking constitutions seriously outside the courts.* Here we concede that some American liberals and progressives have viewed the American Constitution as securing welfare rights, but we contend that they have conceived these rights, not as judicially enforceable, but as what Lawrence G. Sager calls “judicially underenforced norms.”⁵ These American liberals and progressives have looked to legislatures, executives, and citizens generally more fully to enforce these constitutional norms by taking the Constitution seriously outside the courts. Strikingly, Hirschl’s analysis is so court-centered that he overlooks such discourse.

3. *The neglected content of progressive social change.* Here we suggest that Hirschl defines progressive change too narrowly, as concerned with economic change, distributive justice, and welfare rights. If he defined progressive change more broadly, to include challenges to the unequal distribution of power and resources on the basis of gender and efforts to alter patterns of gender inequality in institutions of civil society, such as the family, we might find that constitutionalization and judicial review in the four countries he analyzes have been instrumental in bringing about some progressive social change.

We also want to suggest that to some extent Hirschl is documenting the worldwide resurgence of neoliberalism and anti-progressive views and their consequences in constitutional law. What are the primary culprits for these developments? Is the problem *the failure of constitutionalism*

⁵LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004).

and judicial review to pursue progressive views or rather *the resurgence of neoliberalism and anti-progressive views*? It is arguable that constitutionalism and judicial review of the form Hirschl documents and criticizes are primarily consequences of those larger intellectual and political developments. That is, the primary fault may lie with those developments, not with constitutionalism and judicial review as such.

II. Hirschl's Critique of Constitutionalization and Judicial Review

What, precisely, is Hirschl's charge against constitutionalization and judicial review? Proponents of judicial review, he claims, associate it with "liberal and/or egalitarian values" and portray it as "a reflection of progressive social or political change." (2) But the constitutionalization of rights and judicial empowerment through such constitutionalization is a strategy of "hegemonic preservation" by a confluence of elites: political, economic, and judicial elites. (11) Hirschl contends that the "strategic interplay" between such elites – (a) "threatened political elites" seeking to insulate policy making and their own policy preferences from the "vicissitudes of democratic politics," (b) "economic elites" seeking to limit government and to promote a "a business-friendly," free-market regime, and (c) "judicial elites and national high courts" seeking "to enhance their political influence and international reputation" – determines "the timing, extent, and nature of constitutional reform." (12)

This strategy, Hirschl contends, does not advance, and may impede, the pursuit of "social justice." (3) He puts to an empirical test the "near sacred" belief that "judicially affirmed rights are a force of social change removed from the constraints of political power" (1) by looking at constitutionalization in four countries: Canada, Israel, New Zealand, and South Africa. His book is in the nature of an expose of the role of political elites in the embrace of constitutionalization and

judicial review to entrench and preserve their own power.

Several definitional questions arise. What does Hirschl encompass in the term “social justice”? What is his definition of “progressive social or political change”? And does he treat constitutionalization and judicial review as synonymous, thus not leaving room for any idea of taking constitutions seriously outside the courts?

Hirschl contends that “once we have settled on a given normative meaning of the term ‘social justice’ (be it a collectivist-egalitarian, individualist-libertarian, *or any other understanding of the term*),” determining whether democracy or constitutionalization better leads to its pursuit is empirical. (3, emphasis added). His account centers on distributive justice: he investigates the impact of constitutionalization of rights on high courts’ interpretive attitudes toward “progressive or egalitarian notions of distributive justice.” (14) Do rights, he asks, protect and advance “progressive notions of social justice” with respect to employment, housing, health, income distribution, and education? (14)

In contending that the answer is, generally, no, Hirschl finds that high courts are more willing to protect negative liberties than to recognize positive rights. For example, the U.S. Supreme court has an “impressive record” of protecting “classic civil liberties,” but “has been anything but a bastion of progressive notions of distributive justice.” (101) As proof of the failure of constitutionalization in other countries to advance progressive change, he points out that, in Israel, this process admitted “no positive constitutional obligation” to “promote the provision of basic health care, housing or education to all,” and it excluded “subsistence social and economic rights” as well as workers’ rights. (63) Turning to South Africa, he reports that, in reaching a settlement allowing it to govern, and in compromising to reassure economic elites, the leadership of the African National Congress (“ANC”)

renege on its “long term commitment to adopting a progressive-redistribution-oriented constitutional regime.” (96) Subsequently, the government has supported “strict constitutional protection of negative liberties at the expense of positive subsistence rights.” (96) Thus, although South Africa alone, among his four examples, includes positive rights in the constitution, its government has taken insufficient measures to realize them.

In explaining the limits of constitutionalism, Hirschl draws a contrast between “classic’ first generation’ negative liberty” in the private sphere, which the courts zealously protect, and “classic positive or ‘second generation’ rights,” such as “subsistence, social and economic rights such as the right to health care, basic housing, education, social security and welfare, and an adequate standard of living,” which they generally do not recognize or promote. (102) Put differently, courts zealously protect rights to “freedom from interference,” but fail to protect “freedom to act in a positive way (entailing the provision by some individual of a valued service).” Also neglected are “collective” or “third generation” rights, which refer to “communal, rather than individual, entitlement to public goods.” (105)

Drawing on basic needs arguments (like John Rawls’s⁶) and the human capabilities approach (pioneered by Amartya Sen⁷), Hirschl intimates his own vision of how a progressive ideal should inform catalogues of positive constitutional rights: governmental has an affirmative obligation to provide persons the resources or essentials to live a decent life – “essential preconditions to the enjoyment [sic] of any other rights and freedoms.” (126) He sharply disagrees with arguments that

⁶See JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, THE LAW OF PEOPLES (1999).

⁷See AMARTYA K. SEN, INEQUALITY REEXAMINED (1992); *see also* MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000).

negative liberties should be justiciable, while positive rights should rest within the exclusive discretion of legislatures or executives. (127) (We return to this matter in considering the missing discourse of taking constitutions seriously outside the courts.) He argues that it is possible to construe constitutional rights in certain constitutions as implicitly “protecting fundamental subsistence social and economic rights,” but that high courts have “effectively deprived” such positive rights of their “binding force” by not regarding them as “essential components of full citizenship.” (128)⁸

The most striking example Hirschl offers is the interpretation of “human dignity” by Israel’s high court. He juxtaposes Justice Barak’s protection of the right to property as connected to human dignity – due to its role in enabling “security,” “individual financial freedom,” “interpersonal cooperation,” and a person “activat[ing]” the autonomy of his personal will” (139) – with his startling conclusion that “[s]ocial human rights such as the right to education, to health care, and to social welfare are, of course, very important rights, but they are not, so it seems, part of ‘human dignity.’”(136)

Through these and other examples, Hirschl takes aim at the role of constitutionalism in supporting, rather than challenging, the economic status quo, which favors the very elites who turn to constitutions and to courts as a means of “hegemonic preservation.” Negative liberty claims depend, for full realization, on “a broad definition of the private sphere by way of halting an encroaching state.” (102) By contrast, positive rights claims (for example, workers’ rights to

⁸Drawing on Sen’s work, Hirschl contends that “constitutionalisation” has “failed to promote the notion that no one can fully enjoy or exercise any classic civil liberties in any meaningful way if he or she lacks the essentials for a healthy and decent life in the first place.” (151)

unionize and strike) entail “greater state activity in amending disturbing market failures in the realm of distributive justice.”(102) At odds with a progressive vision of positive rights is what Hirschl calls an “antistatist conception of human rights.”(136) This neoliberal position “emphasizes the autonomy of the economic sphere and its property rights and at the same time calls for the state’s withdrawal from all labor relations and collective social and welfare spheres.” (146) To illustrate, Hirschl points to high court rulings in Canada, Israel, and New Zealand concerning freedom of association and freedom of occupation. (139-46)

In sum, Hirschl defines progressive change primarily in terms of economic redistribution and concludes that juristocracy does not bring about such change. Proponents of the rights model, he challenges, cannot point to evidence that “bills of rights, litigation, or jurisprudence has ever been responsible for long-lasting and effective redistribution of resources and opportunities, let alone sustained equalization of basic living conditions.” To the contrary, constitutionalization of rights has often “served as an effective means for shielding the economic sphere from the potential hazards of regulation and redistribution.” (153) Thus, “the impact of constitutionalization on the creation of meaningful, enduring protection of the lower socioeconomic echelons of capitalist society is often overrated,” for judicial interpretation of rights possesses limited capacity to “advance progressive notions of distributive justice in arenas such as employment, health, housing, and education – areas that require greater state intervention and more public expenditure and wealth redistribution.” (148)

Hirschl’s passionate attention to issues of economic redistribution is admirable, but his conceptions of “social justice,” distributive justice,” and of what is “progressive” are too narrow. These conceptions lead, in turn, to overlooking ways in which constitutionalization in the four countries he studies has played a role in fostering social justice, more broadly conceived. We focus

on Canada and South Africa. As a related point, by practically conflating judicial review with constitutionalization, and arguing that the former eviscerates the deliberative democratic processes by removing certain issues from those processes, Hirschl overlooks important effects of constitutionalization besides judicial review. For example, adopting a constitution authorizes legislative bodies to pass laws aimed at fostering constitutional commitments, spurs citizens and advocacy groups to seek political and legal reform, and informs the decisions of judges in matters not directly implicating the constitution.

Finally, in attributing the political origins of constitutionalization to a strategy of preservation by elites, Hirschl's account seems to render insignificant the role played in the constitution-making process by groups – not part of the trio of elites – such as women's organizations that actively worked to ensure that constitutional regimes would include core commitments to equality. So, too, in contending that this confluence of elites shapes the effects of constitutionalization, Hirschl's account may overlook the role of other constitutional actors in shaping constitutional interpretation. Further, although Hirschl makes a telling case concerning the impact of neoliberalism in hindering gains in substantive equality, his steady focus on elites may divert attention from other reasons why securing progressive social change is difficult, not the least of which is trying to reconcile seemingly conflicting constitutional commitments. A broader view of progressive constitutionalism, we submit, warrants a less grim assessment than Hirschl offers. In the words of one Canadian feminist scholar, perhaps the more appropriate stance is one of "equivocation and celebration."⁹

III. Since When Are Constitutionalism and Judicial Review Paths to Progressive Economic Change?

⁹Diana Majury, *The Charter, Equality Rights, and Women: Equivocation and Celebration*, 40 OSGOODE HALL L.J. 297 (2002).

The primary target of Hirschl's attack is the claim that constitutionalism and judicial review offer great promise for bringing about progressive economic change. Let us concede that they have not in fact brought about such change. But since when are constitutionalism and judicial review paths to progressive economic change? Has anyone in American constitutional law argued that they are? No one to our knowledge has done so.

Let us begin with a multiple choice question about American constitutional theorists and jurists: Who in American constitutional law has held the greatest hopes for constitutionalism and judicial review as promising to bring about social change?

1. Liberals
2. Libertarians
3. Conservatives
4. Feminists
5. Progressives

The best answer? If you answered 1, Liberals, you get full credit. That is the best answer. If you answered 5, Progressives, you get no credit. That is the worst answer. If you answered 2, 3, or 4, you get partial credit.

In short, in American constitutional law, progressives have been the least likely folks to harbor hollow hopes about constitutionalism and judicial review bringing about progressive change. That is not necessarily to say that Hirschl has written a whole book criticizing a straw person. After all, he is not primarily criticizing American constitutional theorists and jurists. It certainly could be the case that liberal (as distinguished from progressive) court lovers in America have inspired progressives in other countries to become court lovers who have hollow hopes about the promise of

courts to bring about progressive change. Indeed, as noted below, when Hirschl cites scholars who seem to harbor or to inspire such hopes, he usually cites American scholars. Hence, in this section, we will focus on the arguments of such scholars.

To be sure, liberal court lovers in American constitutional law have argued that constitutionalism and judicial review are paths to *liberal* social change, e.g., to attaining racial equality and women's reproductive freedom. (These court lovers are the primary targets of Rosenberg's attack.) But let's draw two distinctions here. One, the distinction between *liberal* and *progressive*. And two, the distinction between *social change* and *economic change*. For now, we have said all we plan to say on the latter distinction. We will return to it in Section V, in criticizing Hirschl's conception of progressive change as being too narrowly focused on economic change as distinguished from social change, e.g., concerning gender norms and family law.

We want to sketch a schematic distinction between liberals and progressives. Let's say that liberals *fear the state* and view constitutionalist limitations on the state and judicial review enforcing such limitations as protecting them from the state. This is the much-vaunted "freedom from," or negative liberty, that liberals are said to cherish. Such liberals also view the private realm, free from state interference, as a realm of freedom. Throughout the book, Hirschl understands liberals in this sense.

By contrast, let's say that progressives *love the state* because they hope through using political power to pursue distributive justice and to provide for everyone's basic needs or to foster everyone's capabilities. Such progressives also *fear private power* and view the private realm, shielded from state protection, as a realm of domination and oppression. Throughout the book, Hirschl characterizes progressives in this way.

Obviously, this contrast is overdrawn. It is easy to think of many liberal progressives or progressive liberals – we count ourselves among them – who blur or challenge this distinction. Still, for analytic purposes, we will accept this distinction. Hirschl himself evidently is a progressive for whom the distinction is real and important.

Are liberal court lovers guilty of viewing constitutionalism and judicial review as paths to progressive economic change? Let's look briefly at the work of three of the biggest liberal court lovers we can think of, Ronald Dworkin, Lawrence Sager, and Charles Black. Each illustrates a somewhat different, though characteristic, response to this question. First, consider Dworkin, liberal court-lover extraordinaire. When Hirschl wants to cite to a particular court-lover who believes that courts will secure rights and promote justice, he usually cites Dworkin, and with good reason. (2-3, 150) Dworkin propounds a moral reading of the American Constitution as a scheme of abstract liberal principles of justice, and he argues that courts should aggressively enforce such principles against legislative and executive encroachment.¹⁰ He also has advocated a bill of rights for Britain.¹¹

Yet, notably, Dworkin does not believe that the American Constitution perfectly embodies a liberal conception of justice. For one thing, he argues that the Constitution does not secure economic justice or distributive justice.¹² (Dworkin himself, however, develops a full-blown liberal theory of economic justice that we as a people, acting through the legislative and executive branches,

¹⁰*See, e.g.*, RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996) [hereinafter DWORKIN, *FREEDOM'S LAW*].

¹¹RONALD DWORKIN, *A BILL OF RIGHTS FOR BRITAIN* (1990).

¹²DWORKIN, *FREEDOM'S LAW*, *supra* note 10, at 36.

are morally obligated to pursue¹³). For another, Dworkin argues that the Constitution does not even secure welfare rights, or persons' minimal subsistence needs for food, shelter, health care, and livelihood.¹⁴ (Dworkin again, though, argues that it is incumbent upon legislatures and executives, as a matter of justice though not constitutional entitlement, to secure such needs for all.)

Indeed, Hirschl acknowledges that Dworkin argues that the American Constitution does not secure distributive justice or welfare rights. (125) But he takes the occasion to criticize Dworkin for the thinness of this view. Instead, this acknowledgment should have prompted Hirschl to reexamine his assumption that liberal court lovers believe that constitutionalism and judicial review will promote progressive economic change.

Second, what of Sager, liberal justice-seeking constitutionalist perhaps second only to Dworkin in his court-loving propensities? According to Sager's justice-seeking account, the Constitution embodies general moral concepts and judges exercise independent normative judgment in interpreting it; indeed, judges are partners with, rather than merely agents of, the constitutional founders and amenders, and their joint project is to bring our political community closer to realizing justice.¹⁵ Yet Sager reflects upon the thinness of constitutional law and, more particularly, the moral shortfall of the judicially enforced Constitution. According to Sager's "underenforcement thesis," certain constitutional principles required by justice are judicially underenforced, yet nonetheless may impose affirmative obligations outside the courts on legislatures, executives, and citizens generally

¹³RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 11-119 (2000).

¹⁴DWORKIN, *FREEDOM'S LAW*, *supra* note 10, at 36.

¹⁵SAGER, *supra* note 5, at 70-83.

to realize them more fully.¹⁶

This view helps make sense of the evident thinness or moral shortfall of judicially enforceable constitutional law as compared with our thicker or richer commitments to justice. For example, instead of saying that the Constitution does not secure welfare rights – the move that Dworkin makes – we can say, with Sager (and Frank Michelman), that the Constitution *does* secure rights to minimum welfare, but it leaves enforcement of those rights in the first instance to legislatures and executives. Once a scheme of welfare rights and benefits is in place, courts have a secondary role in enforcing it equally and fairly.¹⁷ Sager also applies his underenforcement thesis to analyze the constitutional obligation to repair the harms of historic injustice, including entrenched racial and gender disadvantage.¹⁸

Sager distinguishes (1) judicially enforceable constitutional law (or the judicially enforced Constitution) from (2) the domain of constitutional justice, which he in turn distinguishes from (3) that of political justice and (4) that of morality generally.¹⁹ Imagine a series of progressively thicker concentric circles representing these four domains. And note that the latter three domains are not judicially enforceable but are left to enforcement in the Constitution outside the courts, by legislatures, executives, and citizens generally.

We have noted that Sager views welfare rights as falling within the domain of constitutional

¹⁶*Id.* at 84-128.

¹⁷*Id.* at 95-102; Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 684-85.

¹⁸SAGER, *supra* note 5, at 84-128.

¹⁹*Id.* at 129-60; Lawrence G. Sager, *The Why of Constitutional Essentials*, 72 FORDHAM L. REV. 1421, 1423-29 (2004) (using concentric circles to illustrate these four domains).

justice but outside the domain of the judicially enforced Constitution. Where does he put more ambitious commitments to distributive justice? Those commitments lie in the domain of political justice, beyond the domain of constitutional justice. Commitments in that domain are morally incumbent, though not constitutionally obligatory, upon legislatures and executives. Sager does not look to courts to further economic justice or distributive justice. Clearly, Sager, though he is an avowed justice-seeker and court-lover, does not harbor hollow hopes that constitutionalism and judicial review will bring about progressive economic change.

To what institutions does Sager look for vindication of welfare rights and pursuit of distributive justice? To legislatures and executives. According to Sager, legislatures and executives are under affirmative constitutional obligations to secure welfare rights. And we should view those institutions as being under moral obligations to pursue distributive justice.

Hirschl does not consider Sager's justice-seeking account, with its rich and subtle view of the thinness of the judicially enforced Constitution, or views like it. That is a significant omission, to which we will return in the next section, on the missing discourse concerning constitutions outside the courts.

Notwithstanding the counter-examples of Dworkin and Sager, two of the biggest liberal court lovers around, Hirschl may insist that there surely are some liberal constitutional theorists or jurists who believe that constitutionalism and judicial review promise to bring about progressive economic change. Or, failing that, that surely some progressives entertain such hopes.

We know of no liberals who believe that the Constitution secures distributive justice. Not John Rawls, who, like Dworkin and Sager, argues that principles of *distributive justice*, though required by justice, are not "constitutional essentials" in a constitutional democracy like that of the

United States, and certainly are not judicially enforceable in the absence of legislative and executive action.²⁰ Rawls, like Sager and Michelman, does argue that *welfare rights* are “constitutional essentials.”²¹ Yet he no more than they argues that such rights are judicially enforceable in the absence of legislative and executive action.

But surely Black, a passionate champion of “the constitutional justice of livelihood”²² and many other good things, believed that constitutionalism and judicial review promise progressive economic change. He does argue that the Constitution (in the Preamble, the Ninth Amendment, and the empowerment of Congress to provide for the general welfare), together with the Declaration of Independence, commit us to pursuing a constitutional justice of livelihood, or to securing constitutional rights to minimal subsistence (short of full distributive justice). Even Black, however, stops short of arguing that the constitutional justice of livelihood is judicially enforceable in the first instance. Instead, he argues that the Constitution imposes affirmative obligations upon legislatures and executives, especially those of the federal government, to afford minimal entitlements in order to provide for the general welfare. In this vein is also the ambitious book of Sotirios A. Barber, *Welfare and the Constitution*.²³

So far, we have focused on liberals as distinguished from progressives, though all of these liberals, like progressives, are strongly committed to views that the state has affirmative obligations to pursue distributive justice (as opposed to being anti-statists who fear the state and love their

²⁰JOHN RAWLS, *POLITICAL LIBERALISM* 229 (1993).

²¹*Id.* at 228-29.

²²CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM* 131-39 (1997).

²³SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* (2003).

negative liberties). Next, we shall turn to American constitutional theorists who are undoubtedly progressives, or at least more progressive than liberal. Are there progressives who believe that constitutionalism and judicial review promise to bring about progressive economic change? Not to our knowledge.

Let's consider several prominent progressives: Mark Tushnet, Robin West, and Mary Becker. And let's include Cass Sunstein here. Each illustrates certain characteristic progressive conceptions. Progressives in American constitutional law, to put the matter dramatically and colloquially, have tended to hate judicial review even if not to hate the Constitution.²⁴ In earlier generations, progressives were traumatized by the era of *Lochner v. New York*²⁵ – and the Supreme Court's aggressive judicial protection of a libertarian conception of economic liberties against progressive legislation by both the national government and the state governments. Hence, they viewed constitutionalism and judicial review with great suspicion: even if they did not call for abolition of judicial review, they did advocate judicial deference to the political processes, especially to the national political processes.

Some may think that the Warren Court changed all this, and turned progressives like liberals into court lovers. We don't think so. Progressives of today still typically are quite wary of the legacy of *Lochner*, and they typically fear, in Sunstein's well-known formulation, that courts are more likely to enforce *status quo neutrality* against progressive change than they are to vindicate basic liberties that are preconditions for a progressive deliberative democracy, including freedom from desperate

²⁴Cf. Michael Herz, "Do Justice!": *Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996) (referring to Justice Oliver Wendell Holmes, Jr.'s positivist conception of law as that of a "justice-hater").

²⁵198 U.S. 45 (1905).

conditions or welfare rights.²⁶ Furthermore, Sunstein has been tireless in warning that liberal court lovers who expect courts to be a forum of principle vindicating liberal moral principles (much less progressive moral principles) suffer from myopia caused by idolatry concerning the Warren Court. He argues that, historically, legislatures and executives have been superior fora to courts for realizing liberal or progressive commitments. Accordingly, Sunstein calls for judicial minimalism, or for courts to leave things undecided in order to allow democratic deliberation to proceed, even when courts are enforcing what are undoubtedly judicially enforceable constitutional commitments.²⁷ Sunstein also argues, like Sager, Michelman, Rawls, and Black, that the Constitution does protect welfare rights, but that such rights are judicially underenforced: Their fuller enforcement lies in the Constitution outside the courts, where legislatures and executives are under affirmative obligations to secure them.²⁸

Another characteristic progressive move is powerfully illustrated by Mark Tushnet. Far from arguing that constitutionalism and judicial review promise to bring about progressive economic change, Tushnet calls for “taking the Constitution away from the courts.”²⁹ He argues that the Constitution – not just positive welfare rights but even negative liberties – is self-enforcing through the political processes. He also argues that the Constitution is quite thin – even thinner than Sager contends. And so, far from committing us to judicial pursuit of distributive justice or even protection

²⁶See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 68-92 (1993).

²⁷CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

²⁸SUNSTEIN, *supra* note 26, at 137-40; CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

²⁹MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

of welfare rights, the thin Constitution commits us to vindicating the principles of the Declaration of Independence and to the parts of the Constitution's Preamble that resonate with the Declaration: "establish Justice, ensure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to . . . our [P]osterity." For Tushnet, it is up to the people themselves, not courts through judicial review, to reflect upon and vindicate their understandings of these commitments.

Robin West, though she does not go all the way with Tushnet in advocating taking the Constitution away from the courts, illustrates a more general characteristic progressive move: She argues that the Constitution does embody abstract progressive commitments, and does impose affirmative obligations to secure positive liberties, equality, and justice, but she calls for legislatures and executives rather than courts to vindicate these commitments.³⁰ Once again, we come to progressive calls for taking the Constitution seriously outside the courts.

Finally, Mary Becker illustrates another not uncommon progressive move: Again, to put it dramatically and colloquially, she not only hates judicial review (as many other progressives do), she also hates the Constitution (unlike many progressives). More precisely, Becker not only harbors no hollow hopes that constitutionalism and judicial review will bring about progressive economic and social change, she also argues that the Constitution in many respects protects the wrong rights and stands in the way of progressive change.³¹ Her focus is less on how the American Constitution thwarts the pursuit of distributive justice and welfare rights than on how the Constitution and judicial

³⁰ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM* (1994).

³¹Mary Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453 (1992); Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 FORDHAM L. REV. 2007 (2001).

review enforcing constitutional rights have actually harmed women.

Obviously, we have not canvassed all liberals and progressives to see if anyone in American constitutional law really believes that constitutionalism and judicial review promise to bring about progressive economic change. But we have discussed prominent liberal court-loving accounts that view the Constitution as embodying abstract commitments to justice; prominent liberal and progressive arguments that the Constitution protects welfare rights; and characteristic progressive moves. None of the constitutional theorists whom we considered harbors hollow hopes that constitutionalism and judicial review will bring about progressive economic change. Hirschl seems to presume that American constitutional theorists and jurists have inspired theorists and jurists in other countries to justify constitutionalism and judicial review on the ground that they will help bring about progressive change. Yet he does not analyze particular arguments by particular scholars or jurists in other countries contending (or even presupposing) that they will help do so.

And so, we return to our opening challenge to Hirschl: *since when are constitutionalism and judicial review paths to progressive economic change?*

IV. The Missing Discourse of Taking Constitutions Seriously Outside the Courts

In making our first point, we already have previewed our second, concerning the missing discourse of taking constitutions seriously outside the courts. Dworkin, for Hirschl, exemplifies liberal constitutionalism. Thus, Hirschl remarks on Dworkin's focus on the courts as guarantors of constitutional rights and exclusion of certain positive rights from the ambit of constitutional rights. (127) As we have shown, however, significant strands of liberal and progressive constitutional theory are less centered on courts and more receptive to positive constitutional rights. Above, we saw that every liberal or progressive constitutional theorist we examined who believes that the American

Constitution secures welfare rights also argues that such rights are not judicially enforceable in the first instance, in the absence of legislative and executive action. All argued that welfare rights impose affirmative constitutional obligations upon legislatures and executives to secure them in the realm of the Constitution outside the courts. (To be sure, many liberals and progressives would leave the Constitution out of it and simply argue for distributive justice and welfare rights on the basis of justice or normatively attractive policy.) On these theorists' views, assessing the impact of constitutionalism would require looking at the fate of constitutional rights not only as interpreted by courts but also as implemented by legislatures and executives.

Hirschl completely ignores this discourse – the very core of progressive constitutional discourse in the United States in recent years, as well as the locus of liberal constitutional discourse concerning welfare rights. In adopting a court-centered methodology, Hirschl overlooks the interplay of courts and legislature in implementing constitutional rights. His failure to engage with such discourse about constitutions outside the courts is the greatest theoretical shortcoming of the book. And his failure to do so is doubly problematic for his critique. For one thing, as we have seen, he mistakenly believes that liberals and progressives look to constitutionalism and judicial review to pursue distributive justice and to secure welfare rights. We already have said enough on this point. For another, Hirschl presumes that we are going to have to look to legislatures and executives, not to courts, to pursue distributive justice and to secure welfare rights – yet he evidently does not view legislatures and executives securing welfare rights as discharging obligations grounded in the Constitution as distinguished from obligations rooted in justice. If so, his account may imply that if welfare rights are not judicially enforceable, they are constitutionally gratuitous rather than constitutionally obligatory as far as legislatures and executives are concerned. Put another way, his

account may entail that welfare rights are purely a matter of justice or morality, not constitutional commitment. The lesson we take from the liberals and progressives we have discussed is that there are good reasons instead to view the American Constitution as embodying commitments to welfare rights but as leaving their enforcement to legislatures and executives.

Hirschl may view the judicial underenforcement thesis and conceptions of taking constitutions seriously outside the courts as cop outs – again, he pointedly questions arguments that negative liberties should be justiciable, while positive rights should rest within the exclusive discretion of legislatures or executives (127) – but he should not. Only a committed court-lover should view such conceptions as cop outs. Hirschl instead should be heartened by these conceptions. For they entail that important questions of distributive justice should be addressed by legislatures and executives in the first instance, not by courts. And these conceptions entail confidence in the capacities of legislatures and executives, more than courts, to honor and to further commitments to distributive justice.

V. The Neglected Content of Progressive Social Change: Whither Gender Equality?

Thusfar, we have focused on Hirschl's conception of progressive change as progressive economic change as distinguished from social change. But there are also, in Hirschl's rendering of the contrast between neoliberalism and progressivism, glimmerings of a broader view of progressive social justice that includes more than economic redistribution. For example, Hirschl contends that high courts "tend to regard state regulation as a threat to human liberty and equality, and more so than the potentially oppressive and exploitative social relations and institutions of the so-called private sector." (146-47). This passage brings to mind prominent feminist accounts of progressive constitutionalism as fearing private power as a source of oppression.

For example, writing of the American constitutional debate, West suggests a basic contrast between conservative and progressive constitutionalism. She focuses on how they assess various forms of social and private power – and the normative authority to which they give rise – and whether the Constitution and constitutional adjudication should be a means of preserving or challenging such power and authority:

Progressive constitutionalists . . . view the power and normative authority of some social groups over others as the fruits of illegitimate private hierarchy and regard the Constitution as one important mechanism for challenging those entrenched private orders. Where the conservative is likely to see in a particular social or private institution a source of communitarian wisdom and legitimate normative authority, the progressive is likely to see the product of social or private hierarchy, and the patterns of domination, subordination, and oppression that inevitably attend to such inequalities of power.³²

Thus, while Hirschl's book focuses overwhelmingly on private power in the form of unjust economic relations, West's definition encompasses social and private power more broadly. In particular, feminists have focused on problems of sex inequality and domination in "private" life, including not only families but also other institutions of civil society. Crediting such feminist views, one of us has developed a vision of government's formative responsibilities that includes not only *freedom from*, or a right to noninterference by government, but also *freedom to*, or affirmative obligations of

³²WEST, *supra* note 30, at 212-13.

government to provide for certain basic needs and address problems of unjust hierarchy.³³ But, as mentioned above, for progressives like West, implementing a progressive constitutionalism should fall more to citizens, legislatures, and executives than to courts. On this view, the best measure of the impact of constitutionalism would look not narrowly at adjudication, but broadly at issues intimated by the coinage “constitutions outside the courts.”

Might Hirschl’s analysis reach different conclusions if he approached the impact of constitutionalism with a broader conception of progressive social justice in mind? Such a conception should include the important interplay between freedom to and freedom from. It should also include a focus on questions of distribution of private and social power, not just economic redistribution. For example, what is the impact on such power relations of the embrace of a constitutional guarantee of sex equality and an anti-discrimination principle?

Neither sex equality nor the redistribution of power within the family and civil society in light of sex equality is among the “four key issues” that Hirschl studies in assessing the consequences of constitutionalization for advancing “progressive concepts of distributive justice.” His sampling includes two categories of negative, or procedural rights (criminal due process rights and jurisprudence concerning freedom of expression and “formal equality in the context of sexual preference”) and two categories of positive rights (subsistence social and economic rights and freedom of association and occupation with respect to labor relations). (102) Why this omission? Opening pathways to liberty and equality previously denied to women would seem to be a form of “distributive” justice. Reviewing regulations of the family in light of constitutional principles often

³³See LINDA C. McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (forthcoming 2005).

leads to adjustment of rights and responsibilities as between women and men and, in this sense, might be redistributive of power. Moreover, progressive feminist scholars (for example, West and Becker), in their critique of court-centered constitutionalism, share Hirschl's concern about courts' inattention to the private sphere as a source of oppression and exploitation. On these feminist views, one measure of the potential – of lack thereof – of courts to foster progressive social change would be the impact of judicial review on addressing domination in the private sphere.

The absence of gender as a salient category of analysis in Hirschl's book appears to reflect a bigger limitation of much comparative constitutional law. In their recent collection, *The Gender of Constitutional Jurisprudence*, feminist scholars Beverly Baines and Ruth Rubio-Marin contend: "There is a hug gap – a gender gap – in contemporary constitutional analysis."³⁴ In such analysis, questions about women as constitutional agents and when and how the constitution-making and constitution-interpreting processes can recognize and protect women's rights slip through the cracks because they do not seem to fit typical categorization of the issues (for example, federalism, judicial review, and the like).³⁵ We accept that feminist constitutionalism is not Hirschl's project and do not fault him for not writing the book that feminist comparative constitutionalists might have written. However, to the extent his book claims to offer an assessment of the potential of constitutionalism to bring about progressive social change, the omission of gender as a meaningful category limits the book's diagnostic value.

We contend that constitutionalism's impact upon redistributing power between women and

³⁴Beverly Baines and Ruth Rubio-Marin, *Introduction: Toward a Feminist Constitutional Agenda*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 2* (Beverly Baines and Ruth Rubio-Marin, eds., 2005).

³⁵*Id.* at 2-3.

men in the private sphere – for example, in families and other institutions of civil society – should fit within the umbrella concept of progressive social change. If we are correct, then Hirschl’s omission of these topics points to work that remains to be done in order to offer (as he puts it) “a realistic assessment of current potential for advancing progressive concepts of social justice through constitutionalization of rights and rights litigation.” (101) We now illustrate the difference that such a broader conception of progressive social change might make by looking at some specific issues of sex equality in Israel, Canada, and South Africa.

Israel: Religious Family Law and the Controversy Surrounding “the Women of the Wall”

In studying juristocracy in Israel, Hirschl gives some attention to the impact of constitutionalization on the status of women in family law and civil society. (We put to one side, for the moment, his discussion of gains in formal equality for gay men and lesbians.) But, here, his purpose is to illustrate the hegemonic preservation thesis at work: “antireligious” adjudication by Israel’s high court provides a “safe haven” for threatened “secularist-libertarian elites” amidst “the growing influence of traditionally peripheral groups in Israel’s majoritarian policy-making arenas.” For example, that court has overturned rulings by the rabbinical court system pertaining to family law, declared 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,” and redefined prayer rights, “including the abolition of a centuries-old practice that allowed men only to hold prayer services at the Western Wall.” (67-68)

Hirschl’s analysis of these cases is puzzling and problematic. Judged by the broader conception of progressive social justice we propose, at least some of these outcomes seem progressive. In Israel, both a Jewish and democratic state, there is no formal separation of church and

state, and religious courts have long had jurisdiction over matters of personal status including family law. Patriarchal aspects of Orthodox Judaism's law pertaining to marriage and divorce stand in tension with national and constitutional norms of gender equality and women's equal status under the law – a tension resolved in the earlier, nation-building stage by exempting family law and personal status law from the reach of such norms.³⁶ As Baines and Rubio-Marin argue, of particular concern to feminists has been such decisions “to recognize customary or religious jurisdiction over certain relationships, often including those which are the most intimate and intense, such as marriage, divorce, custody, property, and succession.”³⁷ In other writing, Hirschl himself argues that, in giving religious communities in Israel this jurisdiction, “the state has granted these communities a license to maintain intragroup practices that disproportionately injure vulnerable group members, such as women” and he has identified “the fundamental problem of women's heightened vulnerability to gender discrimination in the religious divorce process.”³⁸ Viewed in this light, it seems at least arguable that efforts by Israel's high court to limit religious courts' authority and insist upon compliance with norms of gender equality are progressive by challenging forms of hierarchy in the “private” sphere that have been sanctioned by the state. Indeed, in an essay included in Baines and Rubio-Marin's volume, Hirschl and Ayelet Shachar conclude that “a major obstacle to establishing women's full participation as equals in all spheres of life in Israel . . . continues to be

³⁶Ruth Halperin-Kaddari, *Women, Religion, and Multiculturalism in Israel*, 5 UCLA J. INT'L L. & FOR. AFF. 339, 343-49 (Fall 2000/Winter 2001); Frances Raday, *Culture, Religion, and Gender*, 1 I. CON. 663 (2003).

³⁷Baines and Rubio-Marin, *supra* note 34, at 12.

³⁸Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1840-41 (2004) (citing AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (2001)).

the intersection of gender and religious/national tensions,” and use the label “progressive” to refer to efforts at law reform that would redress such gender inequality.³⁹ Hirschl and Shachar usefully acknowledge obstacles to securing gender equality, both in the form of “intragroup pressure” that women face when they seek remedies for constitutional rights violations by other group members (including family members) and in the form of strong resistance by religious authorities and legislators to judicial opinions that we might call “progressive” with respect to sex equality.⁴⁰ In Hirschl’s book, by contrast, gender equality does not clearly feature as progressive, and judicial efforts to advance it seem to fit uneasily as evidence of the hegemonic preservation thesis at work.

The “Women of the Wall” controversy also seems to call for a different interpretation than that offered by Hirschl. He contends that it illustrates how the move to constitutionalization has shifted the burden of addressing Israel’s “secular-religious cleavage” to the courts. As he recounts the controversy: several years of political deliberation failed to solve the problem that a group of observant Jewish women, “Women of the Wall,” sought the right to pray together at the Western Wall “in a *minyan* – a religious quorum traditionally reserved for men.” (176) This practice was not “acceptable to ultra-Orthodox Jews” and therefore the “Rabbi of the Wall” (a state-nominated official authorized to regulate prayer at the Wall) prohibited it. Initially, Hirschl recounts, the high court ruled that, when gender equality and religious beliefs conflict, the latter should be given preference to avoid confrontations at the Wall. But the court urged government to find a fair solution.

³⁹Ran Hirschl and Ayelet Shachar, *Constitutional Transformation, Gender Equality, and Religious/National Conflict in Israel*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE*, *supra* note 34, at 205, 220. References to “progressive” in the context of advancing gender equality appear *id.* at 210, 215, 220, 224.

⁴⁰*Id.* at 223.

When subsequent efforts failed to yield an acceptable agreement, the court once again heard the equality-based challenge by the Women of the Wall. This time, it “reversed its original decision,” ruling in favor of the Women of the Wall and ordering government to make the technical arrangements for them to “pray as they wished while minimizing the disturbance to other worshippers.” After a government appeal, the court issued a revised ruling ordering that government designate the adjacent area of Robinson’s Arch for the group’s prayer. (176)

First of all, it seems inapt to characterize a dispute between groups of observant Jews over prayer rights as illustrating a “secular-religious cleavage.” Perhaps it might appear so from the perspective of those Orthodox Jews who regarded any apparent deviation from tradition and custom as a step towards secularism. However, the dispute seems to be an example of religious dissent, that is, a struggle over how best to interpret religious tradition. The Women of the Wall, for example, argued that even though the practices they embraced – wearing prayer shawls, carrying a Torah scroll, and praying together out loud – conflicted with certain interpretations of Orthodox Judaism, other interpretations of Jewish law allowed their practices.⁴¹ They situate themselves within the development of halakhic women’s prayer groups (that is, women’s *tefilah* groups within Orthodox Judaism).⁴² Indeed, although Women of the Wall includes Jewish and Israeli women from different strands of Judaism, they consciously have not sought to form a *minyan* and instead have sought to

⁴¹Halperin-Kaddari, *supra* note 36, at 358-59; Karen R. Long, *Jewish Women Hit Wall When Praying at Holy Site*, HOUSTON CHRON., April 12, 2003, at 4. Our account draws on the personal recollections by members of WOW and the International Women of the Wall groups included in: WOMEN OF THE WALL: CLAIMING SACRED GROUND AT JUDAISM’S HOLY SITE (Phyllis Chesler and Rivka Haut, 2003) [hereinafter WOMEN OF THE WALL].

⁴²Bonna Haberman, *Drama in Jerusalem*, in WOMEN OF THE WALL, *supra* note 41, at 3, 9; Rivka Haut, *Orthodox Women’s Spirituality*, in WOMEN OF THE WALL, *supra* note 41, at 263, 267-74.

pray in a way compatible with the most halachically conservative among their members.⁴³ While some members of WOW and the support group, International Women of the Wall, have viewed their goal as opening up a more pluralistic and egalitarian vision of Jewish practice, others have understood their goal as bringing about incremental change within Orthodoxy.⁴⁴

Second, the dispute was not simply an internal religious dispute. It raised the question of women's equal access to and use of a public space and an important national and religious symbol, one maintained and paid for by the state. As WOW attorney Frances Raday argues, "the prohibition of women's public recital of prayers from the Torah, which is so central to Jewish culture and community, is a further manifestation of the exclusion of women from the public sphere and public functions."⁴⁵ Hirschl also does not comment on the level of violence to which WOW was subjected by the ultra-Orthodox Jewish men and women who opposed their practices, including cursing, spitting, and hurling chairs and tables on them, while police often did not provide protection.⁴⁶ Such violence ensued even though WOW "accepted the tenet of orthodox Judaism which separates men from women in the public sphere," but simply sought – within the women's section at the Wall – to pray in accordance with the group's custom.⁴⁷ Raday interprets this violent opposition as attempts

⁴³Bonna Haberman, *Drama in Jerusalem*, in WOMEN OF THE WALL, *supra* note 41, at 3, 26; Long, *supra* note 41.

⁴⁴A variety of perspectives appears in WOMEN OF THE WALL, *supra* note 41.

⁴⁵Frances Raday, *The Fight Against Silencing*, in WOMEN OF THE WALL, *supra* note 41.

⁴⁶Haberman, *supra* note 43, at 5-8; Long, *supra* note 41.

⁴⁷Pnina Lahav, *UP Against The Wall: Women's Legal Struggle to Pray at the Western Wall in Jerusalem*, ISRAEL STUDIES BULLETIN, 19, 21 (2000).

by “fundamentalist religious activists to preserve their patriarchal hegemony.”⁴⁸

Third, Hirschl treats the subsequent court rulings as a victory for women’s equality over religious beliefs, but members of the Women of the Wall and their lawyers took a different view. They deemed the court’s remedy of relegating them to a different area, away from the Wall, as “separate and unequal” and treating the women as “second class citizens.”⁴⁹ Further, Raday critiqued the tension between the court’s rhetoric of liberalism and human rights and its acceptance of “the most narrow, exclusionary interpretations of Jewish law.”⁵⁰ Thus, although the Court determined that the women had a right to pray in accordance with their custom, its ultimate remedy of ordering that the prayer take place elsewhere stemmed from concern over the women’s prayer giving offense to the feelings of other worshipers and inciting violence, thus being a danger to public safety.⁵¹ As Sherry Colb observes, this seems to draw a troubling analogy between women’s prayer and the sort of “fighting words” that may be regulated or prohibited because they may disrupt public order.⁵²

In view of these different aspects of the Women of the Wall controversy, it seems inapt to view it as illustrating how judicial rulings entrench “elite” or secular preferences or resolve Israel’s

⁴⁸Raday, *supra* note 45.

⁴⁹Eetta Prince-Gibson, *High-Pitched Controversy*, THE JERUSALEM POST, April 11, 2003, at 7B.

⁵⁰Raday, *supra* note 45.

⁵¹Prince-Gibson, *supra* note 49. An official English translation of the Court’s various decisions is not available, but the analysis in text draws on an unofficial translation of the Court’s 2003 ruling, prepared by members of WOW and IWOW, Rivka Haut and Susan Aranoff. [Editors: we are in the process of obtaining permission to use this translation.]

⁵²Sherry F. Colb, *The Israeli Supreme Court Denies Women the Right to Pray at the Western Wall: A Misguided Decision Parallels the U.S. “Fighting Words” Doctrine*, FINDLAW’S WRIT, writ.findlaw.com/colb/20030423.html (visited Feb. 15, 2005).

“secular-religious cleavage.” Notably, WOW’s struggles garnered little understanding or support by secular Israelis, including feminists.⁵³ It seems more apt to view the controversy as the sort of challenge that faces courts when dissenters within cultural or religious groups seek to invoke constitutional principles to support their interpretive claims. Thus, Amy Gutmann argues that the Women of the Wall illustrated courageous dissent by risking their safety to publicly oppose “state-sanctioned discrimination” and seek civic equality.⁵⁴ So viewed, is their challenge – and the court’s resolution – progressive? Perhaps so, since the court affirms the group’s right to prayer at an important public space, thus advancing the goal of redistributive justice between women and men. Perhaps not, since the resolution favors the status quo by requiring the dissenters to go elsewhere rather than empowering them to share that public space with their opponents. Perhaps the controversy illustrates the difficult challenges posed when government must address “internal” religious disputes; but it may also highlight the difficulty of reconciling competing religious freedoms – freedom of access to “holy sites” and freedom from offense to the feelings of religious persons toward those sites.⁵⁵

Finally, the Women of the Wall controversy seems an odd target of Hirschl’s critique of the “troubling” trend in Israel (and the other countries he studies) of shifting “foundational nation-building questions to the judiciary,” thus denying “We the People” the chance to resolve contentious political questions through “informed public deliberation and citizen participation.” (186-87) Hirschl

⁵³Susan Aranoff, *The Politics of Women of the Wall*, in *WOMEN OF THE WALL*, *supra* note 41, at 180, 190-91.

⁵⁴AMY GUTMANN, *IDENTITY IN DEMOCRACY* 62 (2003).

⁵⁵The Law of Preservation of Holy Sites (1967) includes provisions protecting against desecration and from anything impairing access or feelings toward the sites.

himself notes more than one protracted stage of deliberative impasse during the controversy (which started in 1988). This long history includes the Minister of Religion adopting a regulation barring religious ceremonies against the “custom” of the site and which offend worshipers’ sensitivities and a legislative proposal in the Knesset to impose seven-year jail sentences on women who, in the women’s section at the Wall, engaged in religious ceremonies of the sort embraced by WOW.⁵⁶ Such history counsels skepticism about whether a more progressive resolution would have emerged through the deliberative process alone.

The Canadian Charter of Rights and Freedoms

When Canadian feminists and female jurists assess the impact of the Charter of Rights and Freedoms upon women’s equality, they stress women’s constitutional agency as lobbyists, advocating for inclusion of equality rights in the Charter, and as litigators, seeking to shape constitutional interpretation of such equality rights in terms of substantive equality.⁵⁷ As lobbyists, women’s organizations played a significant role in shaping the language of the Charter’s equality provisions, seeking to ensure not simply formal equality, but substantive equality. Here, Canadian feminists learned from the limitations of U.S. equality jurisprudence. And, subsequent to the adoption of the Charter, Canadian women “understood that they would need to follow up with a multifaceted ‘Charter-watching’ strategy” that has included bringing test cases, engaging in public

⁵⁶ *A Chronology of Women of the Wall*, in *WOMEN OF THE WALL*, *supra* note 41, at 363, 390 (quoting 1989 regulation and proposed bill); Halperin-Kaddari, *supra* note 36, at 359 (describing bill passed in the Knesset shortly after 2000 ruling by the court that government must make appropriate arrangements for women to pray at the Wall).

⁵⁷ Beverly Baines, *Using the Canadian Charter of Rights and Freedoms to Constitute Women*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE*, *supra* note 34, at 48, 49.

education campaigns, and generating academic writing about equality.⁵⁸ Illustrative of this strategy is the formation of the Women's Legal Education and Action Fund ("LEAF").

As judges have applied the Charter, they have adopted a substantive definition of equality, which looks not only at formal equality, or the question of similar treatment for those who are similarly situated, but also makes a contextual analysis of such issues as historical patterns of discrimination and "whether the challenged legislative provisions perpetuate negative stereotypes and discrimination, either intentionally or by adverse effect."⁵⁹ This contextual approach, Justice L'Heureux-Dube (a former justice on the Canadian Supreme Court) argues, "has begun to inject the experience of historically marginalized groups into the notoriously disembodied and acontextual world of law."⁶⁰ Other assessments of the Charter affirm that a more complex, substantive equality approach has become the operative model at work in Canadian constitutional law.⁶¹ As feminist scholar Diane Majury characterizes this approach: "Substantive equality recognizes that in order to further equality, policies and practices need to respond to historically and socially based differences. Substantive equality looks to the effects of a practice or policy to determine its equality impact, recognizing that in order to be treated equally, dominant and subordinated groups may need to be treated differently."⁶² Human rights jurisprudence was an important factor both in shaping the

⁵⁸The Honorable Claire L'Heureux-Dube, *It Takes A Vision: The Constitutionalization of Equality in Canada*, 14 YALE J. L. & FEMINISM 363 (2002).

⁵⁹*Id.* at 368-69.

⁶⁰*Id.* at 370.

⁶¹Susan B. Boyd, *The Impact of the Charter of Rights and Freedoms on Canadian Family Law*, 17 CANADIAN JOURNAL OF FAMILY LAW 293, 318 (2000).

⁶²Majury, *supra* note 9, at 305-06.

Charter and in shaping judges' interpretation of it. Such jurisprudence stresses not only the importance of freedom from an intrusive state, but also freedom from discrimination and a conception of human dignity that recognizes that human beings need the means necessary for full and equal participation in society.⁶³ This emergence of substantive equality seems to counter Hirschl's claim that high courts exalt formal equality and an unregulated private sphere and shun governmental efforts to foster substantive equality. In this respect, a surprising omission from Hirschl's discussion of speech cases decided under the Charter is *R. v. Butler*, in which the Supreme Court of Canada upheld criminal prohibition on materials containing an "undue exploitation of sex" on a rationale of deterring violence against women and fostering true equality between women and men.⁶⁴

Assessments of the impact of the Charter on women's equality also point to the risks of conflating constitutionalization and judicial review. To be sure, one impact of the Charter has been direct constitutional challenges brought in courts, contending that various legislative provisions violate Charter guarantees. But there have been other impacts as well. One is that "some governments have reviewed and amended their legislation in order to ensure that statutory provisions comply with the Charter." In this respect, Susan Boyd argues, governments have focused on formal equality, making sure, for example, that family law statutes are facially neutral and that men and women have reciprocal obligations.⁶⁵

Another impact is on judicial discretion more generally: "the Charter has been invoked

⁶³*Id.* at 316; L'Heureux-Dube, *supra* note 58, at 366.

⁶⁴*R. v. Butler*, [1992] 1 S.C.R. 452 (1992).

⁶⁵Boyd, *supra* note 61, at 294, 313-14.

indirectly to argue that, even in the absence of the required element of government or state action, judges must nevertheless in this situation take into account the fundamental values (such as equality) that are enshrined in the Charter.”⁶⁶ Even though the Charter applies to the legislature and to government, some Supreme Court decisions suggest that courts should develop the law in all fields in a way consistent with charter values.⁶⁷ Boyd offers the example of judicial interpretation of spousal support laws, pointing out how, in *Moge v. Moge* (perhaps influenced by LEAF’s arguments), the Court took judicial notice of women’s impoverishment at divorce, and of how men’s earning capacity benefits in part from their female partners’ work in the home.⁶⁸ As Justice L’Heureux-Dube explains her majority opinion in that case: “Canvassing socio-economic research,” she “engaged in statutory interpretation without direct application of the Charter, but with equality values at the forefront nonetheless.” The Court rejected Mr. Moge’s argument that a support model should be based pre-eminently on self-sufficiency, pointing to other criteria included in the Divorce Act, such as economic disadvantage, financial consequences arising from child care, and economic hardship.⁶⁹ *Moge*’s emphasis upon the feminization of poverty and on the economic consequences flowing from marriage or marriage-like relationships has influenced subsequent Supreme Court of Canada cases involving aspects of family law.⁷⁰ However, recognizing how the gendered dynamics

⁶⁶*Id.* at 294-95.

⁶⁷*Id.* at 317-18 (discussing the Dolphin Delivery case).

⁶⁸*Id.* at 320-21 (discussing *Moge v. Moge*).

⁶⁹The Honorable Claire L’Heureux-Dube, *What A Difference a Decade Makes: The Canadian Constitution and the Family Since 1991*, 27 QUEEN’S L. J. 361, 368 (2001).

⁷⁰Boyd, *supra* note 61, at 321.

of family life have shaped family law did not prevent the Court from concluding, in *M v. H*, that a lesbian partner in an intimate same-sex relationship should be entitled – under the Charter’s equality guarantees – the same as married partners or unmarried opposite-sex cohabitants, to claim spousal support.⁷¹ There, the Court affirmed the law’s gender-neutral approach in protecting vulnerable persons in light of the interdependencies that arise in intimate relationships.

To be sure, an approach to family law stressing substantive equality has not been consistently adopted, and “formal equality still retains significant influence.”⁷² Nonetheless, if tenets of a progressive approach to rights include attending to problems of unequal power and resources in the private sphere, then Canadian jurisprudence seems to suggest a more progressive approach to rights than Hirschl’s grim assessment would acknowledge. Consider, for example, former justice Bertha Wilson’s observation, after the first decade of the Charter:

The process of constitutional analysis in Canada has revealed startling socio-political facts of which account has had to be taken. The lessons learned have not been easy ones. We have learned, for example, that serious inequalities of power and resources exist within the family such that we can no longer regard the preservation of the family in its present state as an unqualified good. We have come to appreciate that . . . framing constitutional questions and answers within existing doctrinal categories may not be adequate to the task of protecting the disadvantaged and underprivileged in our society.⁷³

⁷¹*M. v. H*, [1999] 2 S.C.R. 3.

⁷²Boyd, *supra* note 61, at 322-23.

⁷³L’Heureux-Dube, *supra* note 58, at 372 (quoting Wilson).

Referring back to this observation, Justice L'Heureux-Dube observes that in seeking to fulfill the Charter's mandate, the Canadian Supreme Court has "pierced the veil of the family when public values are at stake, but at the same time . . . respected the family's private sphere and . . . ensured that it is a haven for all sorts of interpersonal combinations."⁷⁴ The latter part of this observation refers, in part, to the Court's evolving protection of the intimate and family lives of gay men and lesbians. This is evident in such cases as *M v. H.*, which also led to statutory reforms extending benefits to same-sex partners, as well as in a number of provincial courts ruling that, under the Charter's equality provisions, same-sex marriage must be permitted. Curiously, Hirschl describes such protection as simply that of negative liberty (122-23), though many of the courts' decisions involve making various forms of benefits and protections available to parties in a same-sex relationship.

Is this account of the Charter and the role of courts too optimistic? Describing herself as a "charter pragmatist," Majury stresses the significance of the Charter as affording a forum, not simply for bringing specific cases, but also for bringing important matters to the foreground and offering opportunity for education about such matters.⁷⁵ At least with respect to women's equality, she concludes that both "celebration and equivocation" are in order.

Finally, to return to Hirschl's focus on distributive justice, feminist assessments of the Charter would concur that courts have not generally recognized positive socio-economic rights.

⁷⁴*Id.*

⁷⁵Majury, *supra* note 9, at 302-03; for an earlier reminder that "the struggle for social transformation must be carried on in a number of arenas simultaneously," see Judy Fudge, *The Public /Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles*, 25 OSGOODE HALL L.J. 485, 554 (1987).

Majury observes that “drastic government cutbacks and draconian revisions to social programs” have led groups to go to courts to seek redress. But, even though “poverty is one of the most glaring inequalities of Canadian contemporary society and is intimately related with the other section 15 [equality] grounds,” courts have not, for the most part, found economic inequality to trigger the Charter’s equality provisions.⁷⁶ The task, in her view, for equality and social justice advocates is to find ways to challenge not only the restraints of the Charter itself but also the restraints of society’s prevailing social values concerning social justice and inequality. Charter pragmatists recognize that litigation, even if it triggers progressive decisions, does not eliminate the need for broader social action to remedy social injustice and systemic economic disadvantage.⁷⁷

South Africa and the Constitutional Revolution: The Constitution’s Transformative Project

In including the South African constitutional revolution among his four examples, Hirschl admits that he faces a “most difficult case” in questioning conventional views concerning the role of progressivism both in the origins and consequences of the move to constitutionalism. (10) For the South African Constitution is regarded as one of the most progressive and far-reaching in explicitly including not only negative liberties but also positive rights.⁷⁸ And Hirschl’s review of bill of rights

⁷⁶Majury, *supra* note 9, at 330.

⁷⁷Lisa Phillips and Margot Young, *Sex, Tax and the Charter*, 2 REVIEW OF CONST. STUDIES 221, 304 (1995). Thus, family law decisions that may be progressive in imposing financial obligations in intimate relationships may also shift responsibility for poverty and economic dependency away from the state. *Id.*; see also Mary Jane Mossman, *Conversations About Families in Canadian Courts and Legislatures: Are There “Lessons” for the United States?*, 32 HOFSTRA L. REV. 171 (2003).

⁷⁸Frank Michelman, a thoughtful proponent of the idea that the American Constitution protects welfare rights, has thoughtfully examined the South African Constitution’s “social rights” provisions. See Frank Michelman, *The Constitution, Social Rights, and Reason: A Tribute to Etienne Mureinik*, 14 S. AFRICAN J. HUM. RIGHTS 499 (1998).

claims finds a higher success rate on positive rights claims in South Africa than in those brought in the other three countries. (Indeed, the success rate is higher than *negative* rights claims in the other three countries!) (106-07) He acknowledges that the Constitution not only declares a number of positive rights but also imposes upon the state the obligation to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”⁷⁹ Hirschl discusses the Court’s mixed record in addressing claims that the legislature has not fulfilled its obligations. But, to recall our argument above about the missing discourse of constitutions outside the courts, he does not address other dimensions of constitutionalization, such as the enactment of legislation and formation of various commissions to advance constitutional rights. Here again, in questioning whether a broader conception of progressive social change might challenge Hirschl’s conclusions, we will focus on the impact of constitutionalism on gender equality and family law.

As in the case of Canada’s Charter of Rights and Freedoms, so too in South Africa women’s groups played a role in the constitution-making process. As the drafting process began, Justice Yvonne Mokgoro observes, “a strong and formidable women’s movement ensured that gender equality was placed firmly on the agenda.”⁸⁰ Women’s organizations had, historically, directed their attention toward the eradication of apartheid, but as constitutional negotiations ensued, the Women’s National Coalition lobbied for the new constitution to affirm a principle of gender equality and

⁷⁹Constitution, Article 27 (2) (discussed in Hirschl, 130-34).

⁸⁰Justice Yvonne Mokgoro, *Constitutional Claims for Gender Equality in South Africa: A Judicial Response*, 67 ALBANY L. REV. 565, 566 (2003).

address women's issues.⁸¹ President Nelson Mandela declared that “freedom cannot be achieved unless women have been emancipated from all forms of oppression.”⁸² Notably, the Constitution, enacted in 1996, describes South Africa as “one sovereign state founded on the . . . values [of] human dignity, the achievement of equality and the advancement of human rights and freedoms, *non-racialism and non-sexism*.”⁸³ It protects a “right to equality,” and also bars “unfair discrimination” – whether direct or indirect, on such bases as race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, culture, belief, language, disability, and birth. As Justice Mokgoro points out, the concern for the rights of women goes beyond this equality provision, for the Bill of Rights also includes a right to freedom from all forms of violence, “from either public or private sources,” and protects rights to “make decisions concerning reproduction.”⁸⁴

Of particular relevance to feminist assessments of constitutionalism's capacity to address inequality in the private sphere is that the Constitution affirms that “everyone has the right to . . . participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights” – for example, with its protection of sex equality.⁸⁵ So, too, in contrast to the apartheid regime, it recognizes marriages under any

⁸¹Saras Jagwanth and Christina Murray, “*No Nation Can Be Free When One Half of It is Enslaved*,” in THE GENDER OF CONSTITUTIONAL JURISPRUDENCE, *supra* note 34, at 230-31; Penelope Andrews, *From Gender Apartheid to Non-Sexism: The Pursuit of Women's Rights in South Africa*, 26 N. CAROLINA J. INT'L L. & COM. REG. 693, 717-18 (2001).

⁸²Jagwanth and Murray, *supra* note 81, at 230 (quoting “State of the Nation Address,” Parliament, 24 May 1994, available at www.polity.org.za).

⁸³Constitution of the Republic of South Africa (1996), §1 (emphasis added).

⁸⁴Mokgoro, *supra* note 80, at 567.

⁸⁵The Constitution, §16 (2)(c)).

traditional, religious, personal, or family law system, but such marriages must be consistent with the provisions of the Constitution. In short, as Mokgoro concludes, the Constitution, in embracing both a right to culture and a right to sex equality, and in recognizing customary marriage subject to the requirements of sex equality, attempts a “process of harmonization” that accords respect to “cultural normative systems that conflict with equality,” such as customary marriage, but also disposes of their “oppressive effect, particularly on women.”⁸⁶

Why frame these commitments as in tension with each other and as requiring harmonization? Hirschl’s account focuses on the ANC’s compromise on positive rights and its firm protection of property in order to reassure domestic and foreign capital about the stability of the new regime. But a focus on sex equality and family law would direct attention, on the one hand, to the efforts by traditional leaders to exempt customary law from the reach of the Constitution – lest the Bill of Rights harm “entrenched cultural values” – and, on the other, to rural women’s demands for an end to various forms of sex inequality associated with the South African apartheid legal system and customary law.⁸⁷ Attempts to characterize customary law and culture are controversial, in part because such attempts often privilege the voice of patriarchal leaders at the expense of dissenting views in ways that, during apartheid, reinforced African women’s inequality.⁸⁸ But relevant legal

⁸⁶Mokgoro, *supra* note 80, at 578-68.

⁸⁷Jill Zimmerman, *The Reconstitution of Customary Law in South Africa: Method and Discourse*, 17 HARV. BLACKLETTER L.J. 197, 206-07 (2001).

⁸⁸*Id.*; Kim L. Robinson, *The Minority and Subordinate Status of African Women Under Customary Law*, 11 S. AFRICAN J. HUM. RIGHTS 457 (1995); Wayne Van Der Meide, *Gender Equality v. Right to Culture: Debunking the Perceived Conflicts Preventing the Reform of the Marital Property Regime of the “Official Version” of Customary Law*, 116 SOUTH AFRICAN LAW JOURNAL 100 (1999).

codes ostensibly based on customary law assign married women the legal status of a minor and/or allocate marital authority to husbands, limiting women's capacity to contract or own property; customary law also follows a rule of primogeniture and a model of patriarchal social relations.⁸⁹ The disadvantages faced by black women under African customary law, in combination with the poverty and inequality linked to colonialism and apartheid rule, "has led to a particularly detrimental effect on the socio-economic power and well-being of rural women."⁹⁰ Moreover, when decision making is patriarchal, it excludes women "from becoming engaged in activities at the local government level and making decisions that will have a profound effect, not only on their own lives, but on their communities as a whole."⁹¹ Thus, women's demands included calls for an end to primogeniture, equal representation on local government and development councils, the abolition of polygamy, joint registration of all marital property, and an independent right to land.⁹²

How has the constitutionalization process in South Africa addressed the problem of women's inequality? How has it dealt with the tension between women's equality and respect for culture and customary law? More generally, what has been the impact of constitutionalization on forms of inequality in the private sphere, including in the family?

South Africa's constitutional jurisprudence (at times drawing on Charter jurisprudence) stresses a commitment to substantive equality, not simply formal equality, and to examining patterns

⁸⁹Zimmerman, *supra* note 87; Robinson, *supra* note 88, at 459-65.

⁹⁰Mokgoro, *supra* note 80, at 565.

⁹¹Penelope E. Andrews, *Striking the Rock: Confronting Gender Equality in South Africa*, 3 MICH. J. RACE & L. 307, 326-27 (1998).

⁹²*Id.*

of disadvantage and specific social and economic conditions.⁹³ Indeed, South African legal scholars speak of the South African Constitution as committed to “a transformative project” and of the Constitutional Court as developing “an indigenous jurisprudence of transformation.”⁹⁴ Such a transformation involves, they contend, “the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality.”⁹⁵ The Preamble, for example, speaks of healing “the divisions of the past” and “establishing a society based on democratic values, social justice, and fundamental human rights.”⁹⁶

But responsibility for the Constitution’s transformative project does not rest only with the courts. Illustrating the importance of constitutions outside the courts, for example, the Constitution establishes six state institutions to “support constitutional democracy.”⁹⁷ One is the Commission on Gender Equality, which, according to its mandate, is to “promote respect for gender equality and the

⁹³Mokgoro, *supra* note 80, at 569; Justice Albie Sachs, *Equality Jurisprudence: The Origin of Doctrine in the South African Constitutional Court*, 5 REVIEW OF CONSTITUTIONAL STUDIES 76 (1999) (noting impact of Canadian jurisprudence on South African constitutional equality doctrine); Julia Sloth-Nielsen and Belinda Van Heerden, *The Constitutional Family: Developments in South African Family Law Jurisprudence Under the 1996 Constitution*, 17 INTL’L J.L. & POL’Y & FAM. 121, 127 (2003). A key case is *President of the Republic of South Africa v. Hugo*, 1997 (6) B.C.L.R. 708, in which the Constitutional Court upheld President Mandela’s pardon of female prisoners with children under 12 against a constitutional challenge by a male prisoner with a child, taking note of social facts concerning women’s disproportionate responsibility for children.

⁹⁴Cathi Albertyn and Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of An Indigenous Jurisprudence of Equality*, 14 S. AFRICAN J. HUM. RIGHTS 248, 248-50 (1998); *see also* Susie Cowen, *Can “Dignity” Guide South Africa’s Equality Jurisprudence?*, 17 S. AFRICAN J. HUM. RIGHTS 34, 35 (2001) (referring to the Constitution as an “instrument of transformation”).

⁹⁵Albertyn and Goldblatt, *supra* note 94, at 249.

⁹⁶Preamble, Constitution of the Republic of South Africa.

⁹⁷The Constitution, Chapter 9.

protection, development and attainment of gender equality.”⁹⁸ The Commission declares its values include equality, defined as “adherence to principles and practices that promote substantive equality,” and empathy, defined as “awareness of power relations and respect for human dignity.”⁹⁹ If progressive social change includes, as we suggest, addressing forms of systemic inequality in private life, then the Commission’s stated aims certainly appear progressive: they include assessing and monitoring the promotion of gender equality by “civil society” and “the public and private sectors” and “reaching out to the community” to seek to alter attitudes about gender equality.¹⁰⁰ But, as feminist scholars observe, a lack of resources has limited the effectiveness of the Commission’s educational and litigation missions, driving home the point that even the most progressive constitutional ideals are not self-implementing.¹⁰¹

How has a commitment to substantive equality, along with a principle of protecting vulnerable groups, reshaped South African family law? Consider the problem of domestic violence – a clear example of how oppression and domination in the “private” sphere hinder a person’s freedom to live a decent life. Surely, constitutional and legislative commitments to address this problem would be progressive. The new Constitution protects freedom of the person against violence, whether from a public or private source. In enacting laws to implement this constitutional guarantee, such as the Prevention of Family Violence Act, the legislature included a very expansive

⁹⁸*Id.*, §187.

⁹⁹Commission on Gender Equality, www.cge.org.za (visited February 18, 2005).

¹⁰⁰*Id.* (describing aims of “Provincial Conference on Gender and Governance” and “Workshops and Gender Dialogues”).

¹⁰¹Jagwanth and Murray, *supra* note 81, at 254.

definition of “domestic relationships,” leading to protecting persons “in a wide range of de facto relationships that go far beyond conventional civil marriages.”¹⁰² Legislation also imposes new duties and responsibilities on the South African Police Services to assist complainants who seek help after an act of domestic violence. As some commentators observe: “These provisions illustrate the interventionist character of the statute. In the tug of war between the dignity and the bodily integrity of the complainant and the traditional privacy of the family home, the former values clearly hold sway.”¹⁰³ Similarly, in upholding a provision of earlier legislation, the high court observed that “despite the high value set on the privacy of the home and the centrality attributed to intimate relations, all too often the privacy and intimacy end up providing both the opportunity for violence and the justification for noninterference.” The court also observed that, “to the extent that it is systemic, pervasive, and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form.”¹⁰⁴ The South African Law Commission articulated the public’s interest in the pervasive problem of domestic (private) violence, noting that it “violates our communities’ health, welfare, and economies by draining billions annually in social costs such as medical expenses, psychological problems, lost productivity, and intergenerational violence.”¹⁰⁵ In sum, on Hirschl’s own view, this willingness to intervene in

¹⁰²Sloth-Nielsen and Van Heerden, *supra* note 93, at 123-24.

¹⁰³*Id.* at 124.

¹⁰⁴*Id.* at 125 (quoting J. Sachs in *S. v. Baloyi*).

¹⁰⁵*Id.* (quoting South African Law Commission Discussion Paper 70 Project 100 Domestic Violence (1997), at 2).

the private sphere – rather than to defer to power relations there – appears to be progressive.¹⁰⁶

A second example of the impact of constitutional commitments upon family law in South Africa is the growing protection of persons on the basis of sexual orientation and marital status. Hirschl discusses this development, claiming that although formal equality based on “sexual preference” is thought to be a hallmark of progressive constitutional rights jurisprudence, it really reflects the triumph of negative liberty and of protection of a private sphere free from governmental regulation. (102) This argument may be apt with respect to decriminalizing sodomy, that is, freedom from prosecution, but it is less apt for some of his other examples in which rights seem to entail freedom to, not just freedom from. For example, Hirschl reports a series of decisions by the South African Constitutional Court invalidating laws that: provide benefits to spouses of heterosexual public employees but not same-sex life partners of judges; restrict joint adoption to married couples; and afford a different status to a child born to a married couple through artificial insemination than to one born to same-sex partners through such insemination. (124-25) These are not simply negative liberties; they are entitlements to equal treatment by the state with respect to affirmative benefits that flow from relationship status. Moreover, the rationale for some of these decisions has been not simply leaving people alone, but respecting the constitutional right to dignity, and in cases involving children, fostering the best interests of the children involved.¹⁰⁷

As Hirschl notes, a series of decisions under the Canadian Charter of Rights and Freedoms

¹⁰⁶However, feminist scholars critique the Court’s lack of a substantive equality analysis – and attention to social context – in its decision in *Jordan*, (2002), 11 BCLR 1117 (CC), in which it upheld a criminal law penalizing the conduct of sex workers but not clients. *See Jagwanth and Murray, supra* note 81, at 246-48.

¹⁰⁷Sloth-Nielsen and Van Heerden, *supra* note 93, at 130-34.

has also recognized the rights of same-sex partners to equal treatment under various statutory laws regulating family rights and responsibilities (e.g., spousal support). Just beyond the time period covered by Hirschl's book, we can now add decisions by the various constitutional courts concluding that the Charter of Rights and Freedoms's guarantees require allowing same-sex couples to marry. Surely marriage involves "freedom to," not simply "freedom from."¹⁰⁸ For example, the Court of Appeals for Ontario concluded that exclusion from marriage "perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships" and "offends the dignity of persons in same-sex relationships."¹⁰⁹ True, as Hirschl writes, such cases affirm a "sameness" principle, but it is a right to equal benefit, not simply an equal right to be let alone. Only a quite narrow conception of progressive change would conclude that these Canadian and South African decisions are not within its ambit.¹¹⁰

A third example of the impact of constitutionalism on sex equality and family life in South Africa is efforts to address the evident tension, within the Constitution, of the twin commitments to women's equality and to customary forms of marriage. The Recognition of Customary Marriages Act of 1998, which took effect in 2000, repealed laws from the apartheid era concerning African women in customary marriages and declared that a wife in a customary marriage, "on the basis of equality with her husband," has "full status and capacity" with respect to acquiring assets, disposing

¹⁰⁸See *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 959 (2003).

¹⁰⁹*Halpern v. Toronto*, 172 O.A.C. 276 (2003).

¹¹⁰It is possible to argue that these South African decisions are conservative, rather than progressive, because by analogizing to marriage in determining what sorts of features a same-sex intimate relationship must have to deserve analogous benefits, they implicitly shore up traditional family structures. Sloth-Nielsen and Van Heerden, *supra* note 93, at 131.

of them, entering into contracts, and litigating.¹¹¹ The Act itself evidences progressive social change altering inequality in the realm of family life. In addition, the process leading to the Act usefully challenges Hirschl's argument that constitutionalism wrongly removes from the deliberative process important issues of self-definition and nation-building. To propose reforms to bring the status of women under customary law into harmony with the constitutional equality provision, the South African Law Commission sponsored consultations and hearings on the issue of customary marriage.¹¹² It included consultation with traditional authorities, who invoked "culture" to argue against according women greater decision-making roles in society. And it included "women's equality and legal reform advocates," who "voiced their opposition to women's status as minors under customary law and to the system of primogeniture more generally."¹¹³

Out of this process came a political compromise. Significant steps toward affirming women's equality included recognizing women's contractual and proprietary capacity and deeming both spouses to hold property as community property, and giving women equal rights to initiate divorce proceedings, and equal guardianship and custody rights to married parents. At the same time, the practice of *lobolo*, or bride price, was retained, as was polygny, in part because of expressed concern

¹¹¹Recognition of Customary Marriages Act No. 120 of 1998, Butterworth Statutes of South Africa.

¹¹²The constitutional provisions seem to provide that equality should prevail in the case of a conflict with customary law. Yet the controversial *Mthembu v. Letsela* decision, relying heavily on anthropological accounts of customary law, ruled against a women claiming that customary rules of intestate succession should be declared invalid under the Constitution. It treated patriarchal aspects of customary law, because of their protective function, as not "unfair" discrimination. Zimmerman, *supra* note 87, at 215-18.

¹¹³Monique Deveaux, *A Deliberative Approach to Conflicts of Culture*, 31 POLITICAL THEORY 780, 797-78 (2003).

that abolishing it would leave women in polygynous marriages unprotected. But certain measures were approved to afford an existing wife protection before her husband can marry another wife.¹¹⁴

This example suggests that constitutionalism need not shut down deliberation about important, contentious matters. Indeed, political theorist Monique Deveaux offers this process as an important example of the potential of “a deliberative approach to resolving disputes about contested cultural practices,” one that emphasizes inclusive debate and uses negotiation and compromise to produce “fair and equitable” – even if illiberal – outcomes.¹¹⁵ However, commenting on Deveaux’s account, Susan Moller Okin questioned whether the process – by giving a role to tribal leaders *as* leaders or representatives of leaders – gave leaders far more than equal power, thus failing to meet Deveaux’s proposed criteria of “non-domination and political equality.”¹¹⁶ Other feminist scholars contend that the Law Commission’s process heavily privileged “the voices of traditional leaders and legal anthropologists” and tended to treat the views of women’s groups (for example, their opposition to polygyny) as reflecting “western norms and values,” rather than an attempt to offer an alternative definition of and challenge to African culture.¹¹⁷ This feminist debate suggests the importance of an approach to deliberative process – and to the development of customary law itself under the new Constitution – that finds ways to support voices offering dissenting and dynamic

¹¹⁴*Id.* at 799.

¹¹⁵*Id.* at 799-800.

¹¹⁶Susan Moller Okin, *Multiculturalism and Feminism: No Simple Questions, No Simple Answers*, in *MINORITIES WITHIN MINORITIES* (Avigail Eisenberg and Jeff Spinner-Halev eds., forthcoming).

¹¹⁷Zimmerman, *supra* note 87, at 221.

interpretations of culture.¹¹⁸

In sum, these examples suggest that constitutionalization has been an impetus to at least some progressive change in South Africa in the areas of women's equality and family law. To be sure, Hirschl correctly argues that there is a sizeable gap between the many positive rights included in the South African Constitution and the economic conditions in which black South Africans continue to live. A scarcity of economic resources, Justice Makguro suggests, has been a major factor hindering the implementation of the Constitution's reforms.¹¹⁹ Moreover, "the privatized nature of the South African economy and the imperatives of a market driven agenda may undermine the transformative possibilities of the Constitution" in overturning structural inequality.¹²⁰ But Hirschl himself notes that it is too soon to rule out such transformation. Thus, in 2002, the high court issued a "potentially revolutionary judgment" invoking the constitutional right to health care to require the distribution to pregnant women with HIV/AIDS of a drug to reduce the risk of transmission. (132-33).¹²¹ Similar to the Charter pragmatists, Justice Mokgoro also cautions to look not only to courts but also to legislatures for progressive social change: because litigation "tends to be the privilege of the economically empowered," a "vigilant civil society" should "agitate for change and monitor

¹¹⁸For example, feminist scholars praise the Supreme Court of Appeal's description, in *Mabena v. Lesoalo*, (1998), 2 S.A. 1068 (T.), of customary law as not just existing in the "official version," but as "living law," experienced in African communities and subject to ongoing development. In that case, the Court found that mothers, as well as fathers, could negotiate the terms of and consent to customary marriages of their daughters. Jagawanth and Murray, *supra* note 81, at 252-53 (discussing *Mabena*).

¹¹⁹Mokgoro, *supra* note 80, at 573.

¹²⁰Andrews, *supra* note 91, at 835.

¹²¹The case is: *Minister of Health v. Treatment Action Campaign*, 2002, (10) BCLR 1033 (CC).

implementation” through “more accessible and direct strategies,” such as legislation and policy development.¹²²

VI. Conclusion

Hirschl’s *Towards Juristocracy* is one of the most ambitious books ever written in the field of comparative constitutional law. It makes important and sobering arguments concerning the origins and consequences of the new constitutionalism. These arguments no doubt will spark and shape further inquiry for years to come. In offering these criticisms, we aim to help clarify and narrow his arguments and to suggest fruitful lines of inquiry.

¹²²Mokgoro, *supra* note 80, at 573.