

Testing Hegemonic Preservation Beyond Judicial Review:  
A New Theory of Political Insurance Through Rights Implementation

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## A New Theory of Political Insurance

The right to counsel is often considered one of the key elements in a fair trial around the world (Antoine 1992), and the origin of it and other rights is a focus of an immense amount of scholarship (Falk 1981; Huntington 1991). The origin of rights is especially confused among those considered fundamental to liberal democratic order. I present the framework for a causal mechanism of rights emergence based on the socio-economic and power position of threatened elites. Using the general framework of Ran Hirschl's hegemonic preservation and Tom Ginsburg's insurance thesis (Hirschl 2000; Ginsburg 2003), I suggest that when faced with the potential of future persecution, elites will entrench rights within an institutional setting in order to ensure their continued survival within the future order. The Ginsburg and Hirschl approaches to constitutionalization center around the phenomenon of judicial review as an outcome of political, economic, and legal elites attempting to entrench counter-majoritarian influences in the face of a significant threat to their hegemony. Using case studies in England, Canada, and South Africa, I argue instead that by using rights themselves as units of analysis it is possible to employ the framework developed in hegemonic preservation and insurance literature to explain constitutional and statutory outcomes during periods of political instability. Rights exist within an institutional setting. Looking at how elites attempt to entrench rights within social, legal, and economic institutions in order to preserve their hegemonic position constitutes a process of 'insurance' against future losses. As byproducts of threatened elite interests, this thesis then challenges the dominant paradigm in human rights literature that sees entrenched rights as fundamental to a liberal democracy.<sup>1</sup>

### I. Hegemonic Preservation and Insurance

Following Ran Hirschl, I argue that the struggle for hegemony by politicians representing cultural and economic elites determine the 'timing, extent, and nature' of constitutional reform (Hirschl 2004). Political actors attempt to shape a legal system to suit their interests; however, working in a rule-of-law society, they must secure the cooperation of a legal elite.

In the face of challenges from 'peripheral' majoritarian forces, threatened elites may attempt to limit the policy-making power of those actors by transferring authority to insulated institutions. Popular decision-making mechanisms are still kept

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<sup>1</sup> Ginsburg (2003) does argue, however, that Hirschl's process does indeed smooth over the transition to a legitimate democracy, regardless of its basis in elite politics. Alternately, human rights literature does emphasize the importance of institutions, but does not approach the question of their formation, concentration only on their procedural potential for rights 'implementation.' See Buergethal (1988); Kennedy (2002).

at the center of the democratic process, yet the power to promulgate certain policies are effectively shifted to bodies that minimize a threat to elite hegemony. When the hegemony of political elites is challenged in the context of rule-of-law, majoritarian, or otherwise democratic settings, powerful elites may move to support constitutionalizing rights in order to transfer power to secondary bodies, such as courts, where they assume that their policy preferences will become embedded (Hirschl 2000, 99).

Broadly conceived, Hirschl suggests that in the post-war reconstruction era of constitution-making, governing elites are increasingly predisposed to delegate power to the judiciary in order to increase their own hegemonic position and mitigate destabilizing political forces. He identifies constitutionalization as the primary mechanism by which rights enter into an institutional arrangement with the political and legal arena. The prototypical conception of constitutional politics approaches particular rights as either a foundational element of the rule of law in a polity, or an outcome of a political effort by interest groups designed to limit majoritarian impulses (Lijphart et. al. 1996; Abdo et. al. 1997).

Hirschl observes that the process of judicial empowerment through constitutions is ongoing, but becomes accelerated when 'peripheral' actors threaten hegemonic elites. When the threat increases, elites with access to a legal setting can try to entrench rights in some way. While this may take place by power transfer to courts, elites may also reach out to a larger array of actors.

I compare this approach to Ginsburg's insurance thesis (Ginsburg 2003), which outlines a similar mechanism through which judicial review and Constitutional Courts come about as a way to reduce uncertainty. Looking at instances of democratization, Ginsburg observes that judicial review offers a solution to the uncertainty of changing regimes, where providing insurance to the losers of the incumbent government makes the possibility of a transition to democracy a feasible option. When dominant actors face the expectation of loss of control, judicial review through constitutional design then offers a nonviolent and relatively stable way of protecting their interests. I find the primary difference, and the reason for my partial departure with Hirschl's work, in the observation that it is fully possible that the insurance mechanism of judicial review to not only bring about a democratic transition, but actually function as a force of progressive change in the right context (Michelman 2001). For Hirschl, the very basis of a Constitutional Court in hegemonic preservation delineates its future actions. This may very well be true. When the selection of Constitutional Court justices is drawn from the same class of elites that designed the structure, it is unlikely that majoritarian forces will infiltrate the Court. Yet that is not to say that justices must always vote along socio-economic lines. Although this rests outside of the scope of this paper, I believe that this points to the fact that Hirschl's rigid adherence to a social conflict

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perspective is ultimately self-constraining, in that it does not admit that Courts may be agents of social change (Shapiro 1981).

Clearly, the hegemonic preservation thesis then varies from some of the dominant ideas regarding comparative constitutionalism. Hirschl proposes that conventional arguments explaining constitutionalization fail to take into account the conflictual basis of political action (Coser 1956; Knight 1992). By developing access to the constitution, judicial review is often seen as a check on majoritarian parties. Courts facilitate the political voice of minorities who cannot generally participate in the political process. (Weaver and Rockman 1993, 266). Other scholars propose that legal development is inherently connected to a socio-economic transition, where courts evolve along a timeline of modernization (Stein 1980). A democratic proliferation thesis observes that along with an international, widespread move to democracy in the developing world, new democracies tend to provide for judicial review as an intrinsic element of democratization. This position similarly does not account for the variation among various nations in terms of constitutional composition. A utilitarian approach advanced by scholars such as Martin Shapiro alternately proposes that autonomous courts in the UK were initially developed to restrain the monarchy, and later the parliament (Shapiro 1986, 65-125).

This assumes that there is some inherent need for legal change that increases the efficiency of some political or economic system, such as recent work on tort law (Calabresi and Hirschhoff 1972). An institutionalist approach of judicial empowerment—Hirschl's proposed end result in the elite conflict process—suggests that constitutions and an independent judiciary address a credible commitment problem. What these theories share is the presupposition that there is some structural need for rights embeddedness.

Rather, Hirschl builds off of what he terms the 'electoral market' model of judicial empowerment (Ramseyer 1994). A ruling party with the expectation to win elections consistently will most likely not transfer power to a judiciary. Long-term bargains with constituents mean that politicians will not want to support an autonomous judiciary when they have a high prospect of remaining in power. However, when that stability is threatened, it may support an independent judiciary to ensure that the next ruling regime cannot successfully achieve its policies or prosecute former regime members.

The electoral market model sees judicialization as a byproduct of a strategic interplay between political elites, economic elites who wish to advance a neoliberal agenda through institutionalizing economic liberties, and legal elites who wish to expand their political power. He terms this triumvirate *strategic legal innovators*—elites who determine the 'timing, extent, and nature' of constitutionalization.

The self-enforcing nature of judicial review requires some explanation. Political actors who establish this institution and the other hegemonic elites who support it assume that the transfer costs under this novel structure will be lower than the limits imposed on their competition. In other words, hegemonic elites will attempt to impose universal constraints that nonetheless constrain their opponents in a more significant way. There is thus some risk to judicialization, but it is outweighed by the benefits of insuring against future threats from the periphery. Judicial review serves the interests of elites in a number of ways. Hegemonic elites promote their interests by changing the venue of political disputes from a majoritarian forum to a setting with more objective rules. Politicians can divert responsibility to a judiciary not beholden to voters, and thus cover up their own errors. Economic elites can forward a neoliberal agenda through market deregulation masked in the language of increased human rights. Finally, delegating power to courts enhances the symbolic of the legal elite.

In a setting such as a high court already populated by legal elites, this assumption may be reasonable. Intentional judicial empowerment may, however, create a less than desirable set of institutional rules. Periphery actors may learn to employ the rules and language of the elite and employ a Constitutional framework for advancing their own policies. This indicates that there may be more to the psychology and impetus of elites faced with persecution.

In order for constitutionalization to occur in the face of a significant political threat, there must be some level of certainty that those initiating that transition will be better served. I have outlined the ways in which counsel may benefit hegemonic elites. However, a second condition that Hirschl believes must be met is the existence of public trust in the 'political impartiality' of the judiciary (Epstein et. al. 1997). This points to an important element in Hirschl's argument that is left relatively undeveloped in his and others' scholarship. The relationship between elites must appear negligible or non-existent—the appearance of any political dependence within the judiciary would shatter the liberal basis of embedding insurance rights (Gibson et al. 1998).

Yet Constitutionalization is only one part of the puzzle. Rights were articulated and enforced before constitutions took a central role in political life. I suggest that Constitutions play an important but by no means singular role in guiding political and social actors. Looking at a constellation of informal actors instead reveals a more complex set of motivations that guide elites to favor the promulgation of rights outside of Constitutional Courts (Brinks 2003).

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### II. The Role of Institutions in Hegemonic Preservation

I argue that a severely underplayed element in Hirschl's thesis is the particular mechanism that places an abstract concept such as judicial review within a constitutional setting in order to 'fortify' that concept. What does the fortifying? I suggest that it is not the Constitution itself, but its place within a dense network of institutional relations that creates the rules and norms of political life (North 1990). This relates to the rights insurance thesis in one important way: rights work in the same way, moving from an abstract concept to a lived, substantive process. This is what makes a right—or rather, the institutional embedding of a right—a sensible end-goal for threatened hegemonic elites. Ronald Dworkin classifies rights in terms of the moral and utilitarian basis of their claim to legitimacy (Dworkin 1977). In his conception rights can have both a moral and positive basis. They are a 'trump' over background justifications for politically-motivated decisions (Dworkin 1985, 154). Rights state a goal for a whole community. They ultimately represent a state of affairs, in which the constitutive elements of that state demand some resource for a particular individual or group (Michelman 2000; Michelman 2008, 667). He contrasts a right with a goal, which is a state of affairs whose specific elements does not demand some resource, such as increasing economic output as desirable but not applicable to the specifics of individual needs. As such, the right to counsel has a specific application as a method of preserving hegemonic judicial integrity, as well as serving an underlying societal moral basis that a defendant in criminal trials should be treated fairly.<sup>2</sup>

I believe this can fit in with the rights insurance thesis in that hegemonic elites *are* bounded in some ways. They cannot, for example, attempt to create legislation calling for genocide and hope to see it enforced. Individuals in the majoritarian sector must recognize some claim to legitimacy of the right being called for. I believe that this is the reason that the language of rights discussions tends towards the notion of fundamental principles. It is an appeal to majoritarian sentiments.

At the same time, Dworkin's point also indicates that elites may attempt to appeal to the moral or universal basis of rights. This was a position unsurprisingly advanced by Marxian thinkers during the Cold War (Kolakowski 1983), as Western liberal democracies began employing a human rights critique of the USSR as a political tool.<sup>3</sup> I think it is unduly cynical to believe that all state or official appeals to human rights originate in efforts of hegemonic preservation; however, outside of Marxian

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<sup>2</sup> This directly contradicts the Bentham critique of moral rights as 'nonsense,' because moral rights do not have social recognition (Bentham 1987).

<sup>3</sup> Kolawoski (1983, 85) states that, "[To Marx], human rights, in other words, are simply the facade of the capitalist system."

critiques it seems that too little attention is paid to the practical foundation of human rights in general. Recent work on the institutional formation of rights does, however, begin to address the question of that foundation.

Institutions do, in fact, play a large role in Hirschl's thinking. Clearly, constitutional reform that creates judicial review, as well as other self-constraining institutions such as autonomous central banks, limits the flexibility of political actors (Hirschl 2000, 120). Hirschl's analysis is strikingly similar to theories regarding the formation of central banks and other semi-autonomous institutions (Hirschl 2004, 203). Rights themselves only exist in a substantive way within an institutional arrangement. Courts must enforce them, and networks of individuals must act in accordance to their dictates. Yet this structure is obviously far less ordered than a Constitutional Court or other formal body. Instead, the right to counsel may act as a coordinating principle around which informal and quasi-formal institutions may organize. The structure I am proposing does bear resemblance to Hirschl's transaction cost-limiting basis of new institutional structures, yet instead of a single court becoming increasingly powerful, elites may attempt to strengthen the relationships built around a right as a protective mechanism, thereby similarly creating political insurance.

As such, I want to emphasize the role of institutions simply because they 'entrench' or 'embed' rights. What this means is that rights provide a core that is upheld by a framework of procedures, rules, and norms. Cass Sunstein uses the term 'entrenched rights' in contrast to those which are simply protected from constitutional amendment (Sunstein 1991). Others suggest that rights are institutionalized by bringing power actors to recognize the potency or legitimacy of those rights (Michelman 2003a, Michelman 2003b). For example, the right to counsel exists within a judicial system with its own set of rules that dictates the boundaries and sets the terms of legal actors.

Microeconomic institutional theory provides some explanation as to how institutions work. They most often do not have the power of the sword nor purse. Actors, conceived as self-interested rational decision makers, would establish economic, legal, or political institutions to protect their autonomy and abide by their created limits. North and Weingast (1989, 820) explain this process. The ruler's arbitrary authority to confiscate wealth and maintain power was constrained over time. This process was the vital political factor underlying economic growth and the development of early markets in Europe. This took place through the ruler making credible commitments to periphery power actors, which took the form of self-enforcing institutions, such as private property rights enforceable by the Parliament. Credibility could only come about through submitting to the rules of these institutions. This in part explains early British developments in creating an

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independent judiciary. The legal security created credible expectations—and it was these expectations that allowed rulers to borrow capital from lenders, who were then protected by the new legal-institutional rules. This self-constraining act limited rulers, but also ensured long-term economic growth (North 1989; La Porta et. al. 1997; Acemoglu et al. 2001; Djankov et. al. 2003).

As institutions embody both the 'rules of the game' as well as the constellation of agents acting within that setting, it is useful to elites as both rule-setters as well as agents constrained by those rules. Because rights implicate not just procedural rules but also substantive features like budgets, policies, and organizational doctrines or ideology, elites may not simply focus on judicial review because it only addresses one half of this equation. The substantive features of rights provide an entry point for elites to consider novel ways of ensuring their survival as well.

### III. Rights Insurance

Hirschl presents a mechanism in which constitutional fortification of rights is the means towards the end of judicial empowerment (Hirschl 2000, 96), suggesting that this is an efficient way for hegemonic social and political forces to preserve their position in the face of inconvenient majoritarian decision-making processes.

What if, however, the fortification of rights could itself be the ends of hegemonic elites? My theoretical framework supposes that instead of constitutionalizing judicial review, elites may attempt to institutionalize—that is, embed in an institutional setting—certain rights that may be in their interest to be able to employ at a later date. This is why I term it 'insurance': elites have long-term and short-term future survival strategies. Similarly to Hirschl and Ginsburg, I am focusing on political moments where some instability—economic, political, or military—has caused the local elite to become concerned for their continued position of hegemony.

That insurance can either be *short-term* or *long-term*. *Short-term* insurance appears when elites have to interact with a majoritarian political sphere, but do not believe that their hegemony is threatened. An example would be South Africa's apartheid regime in the 1980's: although political violence was on the rise, there was little indication that the white elite would cede power (Ogletree 1995; Meadows 1995). As such, leaders presented various reforms that were aimed at placating the Parliament and international community. *Long-term* insurance is more similar to Hirschl's hegemonic preservation: at a moment when the elite believe that their loss of hegemony is imminent, political, legal, and economic elite tend to support common projects that ensure their continued survival within a more hostile environment. To continue using South Africa, when the apartheid regime was on the verge of collapse

in 1993, de Kleerk proposed a new institutional order that allowed for the right to counsel as a security from a political show trial where leaders could be tried in secret or without the benefit of assistance.

In fact, a number of Hirschl's proposed benefits for elite preservation through judicial review are mirrored in my conception of rights insurance. Insisting on the use of counsel promotes the legal profession as a necessary element in a liberal regime, for example, thereby solidifying the use of lawyers in a manner dictated by the profession internally. My case studies outline a number of examples where rights entrenchment has benefited threatened elites. However, for the moment, I want to use Hirschl's broader structure as a way to explain the appearance of certain rights at moments of elite insecurity. What follows are a number of case studies that attempt to shed light on that phenomenon.

#### IV. Case Study: England

Rights enter into a constitutional system after a destabilizing event to protect elite's short-term or long-term interests. England exemplifies the long-term protection that the right to counsel afforded a threatened group. Some history may be helpful here. England unquestionably has a long history of the use of counsel at trial (Johnson 1986). Despite the existence of counsel, however, it is not as clear how attorneys were used, under what circumstances, and if there was any uniformity in the employment of counsel among various courts. England's development of the right to counsel depends on the particular blend of the monarchical institutions of a trial-judiciary and the common law (Plucknett 1956).

Elite power actors were the key to creating a right to counsel in early trials. Until the mid-twentieth century, the right to counsel in England, as well as most other countries with an operational judicial system existed only within the context of the criminal trial (Taylor 2004). As Stephen (1883) notes, "criminal trials...[were] not unlike a race between the King and the prisoner, in which the King had a long start and the prisoner was heavily weighted." The setting was shaped by the theatrical nature of the proceedings.<sup>4</sup> Although trials were brief and often quite informal, a number of authors have pointed out that they served the dual purpose of justice and a demonstration of monarchical power. During the period of absolute monarchy, the defendant could have been executed without any process whatsoever, and yet the King nonetheless invested some significant energy into the criminal trial.

During the late seventeenth, and in to the eighteenth century, individuals

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<sup>4</sup> Physical punishment was connected to the concept of truth. Torture and the spectacle of the trial had at its objective that , "the body has produced and reproduced the truth of the crime" (Foucault 1977).

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charged with a felony were faced with one very serious challenge to their ability to mount a defense: an individual accused of any generally serious offense was prohibited from retaining counsel.<sup>5</sup> Accusation of felonies, such as murder or robbery, and treason at various times warranted capital punishment, putting a defendant in the extremely difficult position of having the most to lose without assistance from third parties.

The common law rule against counsel was eradicated during a period of intense elite competition for political power.<sup>6</sup> The timing here is critical. As I noted, because counsel could potentially disrupt successful convictions representation was only allowed in minor cases. The simplest explanation of this was that the government was more willing to take chances and offer liberal concessions when it had less at stake (Taylor 2004). The rule fell apart in the 17<sup>th</sup> century when the Whig party began their ascent into political power after decades of competition against the Tories.

The Treason Act came to being through Whig responses to nearly three decades of false treason accusations levied by opposition elements (Beattie 1986, 357). When the Whigs gained control of Parliament, they immediately turned to the common law rule to change the balance of power, recognizing that their position of power was quite precarious. Party politics in early modern England seesawed between various interest groups rapidly and without warning, and because the rule

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<sup>5</sup> This common law rule should be seen as an outgrowth of the exigencies of retaining monarchical power. By far the most compelling explanation of the usefulness and longevity the common law rule against counsel stems from the social conflict hypothesis of institutional formation proposed by Jack Knight (1992) and Lewis Coser (1956). Institutions are products of vying social forces, and this power dynamic leaves its print on the rules of the game endemic to institutions. In this sense, the justice institution was inimically shaped by the necessity by the state to maintain peace and order in the absence of other mechanisms of social control. As Holdsworth notes, “[t]he government had no standing army and no force of police. It was exposed to intrigues from without and sedition from within” (Holdsworth 1956). The state, in a precarious position of navigating internal court politics as well as foreign wars, was under constant threat, and serious crimes constituted a prominent danger to the monarchy. In this sense, the assistance of counsel was an impediment to the institutional use of the justice system, which was to prosecute and punish threatening elements to the state publicly and quickly. The rules of evidence provide a good example: there were particularly thin evidentiary standards not only because there were simply no police to collect evidence, but because the trial was structured towards systemic stability.

<sup>6</sup> Its origins are similarly rooted in institutional embeddedness. As the power of the monarchy grew, treason and misprision of treason became direct assaults on the state itself (Tomkovicz 2002, 4), which led to the formation of the Privy and Star Chambers as methods of state control. Yet that institution quickly became a battleground in a conflict among elite Party interests. Acting as a court of equity, chancellors had great flexibility in determining moral wrong. In attempting to secure power, certain political elites saw the political benefits of a secret trial without the ability to use counsel. These actors had the same motives as a monarchy who wished to secure power by the denial of counsel in treason trials. As such, nobles such as Thomas Cranmer (the Archbishop of Canterbury, 1515-1529) then attached themselves to an institution that would propagate the norms they desired, thereby embedding the common law rule disabling counsel within an institutional setting (For an examination of Star Chamber records, see Cheyney (1913).

against counsel represented a major legislative encroachment on common law supremacy the Whigs did away with it in the most viable way possible. Through the Act of 1695, the Whigs passed a statute allowing for counsel in all cases, stating that:

[n]othing is more just and reasonable, than that persons prosecuted for high treason and misprision of treason, whereby their liberties, lives, honour, estates, blood, and posterity of the subjects, may be lost and destroyed, should be justly and equally tried, and...should not be debarred of al just and equal means for defence of their innocencies in such cases.<sup>7</sup>

The Act went on to provide for the admission of counsel for defense in serious cases. What is critical in this context was that at a time when the threat of counterrevolution was so immediate, the effect of the new law actually assisted government opponents with a more fair trial. It is understandable that the Whigs possible believed that one day they would stand in the same place.

The historical record supports this point. Although Parliamentary records for this period are scarce, there is some indication that Crown and Country battles intensified during the period surrounding the Act of 1695, culminating in the succession crisis involving King William in that year (Holdsworth 1956). As parties solidified from the nebulous Crown/Country division, the stakes at Parliamentary control grew. Single-party power over the sword and purse became a distinct possibility—along with the ability to ruthlessly pursue ones' enemies freed from the balance of opposing factions.

A key historical point runs against the judicial review argument. Hirschl and others suggest that Constitutions are the primary sources of rights and fundamental principles, whatever the motivation was in its creation. However, England lacks a formal codified constitution, and recognizes only those rights that exist through common law rules and statutes. Although some suggest that those together make up a constitution (Pollock and Maitland 1923, 1-217, 312), this is clearly not what Hirschl has in mind. The fact that the right to counsel then continued as a part of legal life long after the 17<sup>th</sup> century supports my rights-insurance thesis. Threatened elites saw it as in their long-term interest to ensure that they were not persecuted when they lost power. They passed a single law that then challenged at least a century of common-law practice. Yet it stuck. The reason lies in a mechanism that works on both statutes and constitutions: institutional embeddedness. As I argued, when rights are

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<sup>7</sup> 7 Will. 3, ch. 3 (Eng.)

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practiced, they become a part of the 'rules and norms' that guide institutional actors. The right to counsel was convenient for persecuted elites, and because of the rapid turnover of power in early modern England, many found it convenient to keep the right in practice. It thus gradually became part of normalized legal practice.

### V. Case Study: Canada

Beginning with the Constitution Act of 1867, the era of Canadian Constitutionalism was marked by few formal restrictions on legislative power. However, there was a great deal of political pressure to entrench individual rights within Constitutional bounds since at least 1930, with the first modern efforts at Canadian independence. Despite these pressures, all of the pre-1982 attempts to entrench rights had failed, in part due to the political elites at the federal level who did not wish to grant power to the judiciary so long as their political hegemony was not threatened. The policymaking apparatus at the federal level remained unchanged through such a large part of the 20th century that Parliamentary elites felt secure in their ability to dominate legislation.

Prior to the 1982 Constitutional period, there were few restrictions on Canadian Parliamentary authority, modeled after the British structure of colonial rule. Federal political power holders defied numerous attempts through the mid 20<sup>th</sup> century to reform the Constitutional structure and entrench various rights in a bill or rights-type text. The rise of Québécois nationalism in the 1960's precipitated a significant change in the Canadian political structure.

These destabilizing events threatened a hegemonic political monopoly in Parliament. The victory of the separatist Parti Québécois in the mid 1960's and the rise of Québécois nationalism movements under the leadership of René Lévesque in 1976, led to the so-called 'Quebec Referendum' in 1980. The incentive structure of policymaking changed rapidly. Following at least a decade of Prime Minister Trudeau's efforts to revise the Constitution, in 1982 the Act passed in Parliament.

Hirschl points out that the conventional argument explaining Canadian jurisprudence is that despite general adherence to British traditions of judicial restraint, judicial review became prominent in Canada for mainly symbolic reasons, upholding the Charter and supporting individual rights (Hogg 1977; Hovius and Martin 1983; Hirschl 200, 92). However, more recent scholarship suggests that the Charter of Rights and Freedoms was actually brought about by elite interests, who began to see the majoritarian politics that produced the Québécois movement as threatening (Mandel 1994). They saw the Protestant, business-oriented culture of Anglophone Canada as threatened by separatist movements, and thus calls for

adopting the American model of Constitutional protections were strongly supported by industrial factions and the coalitions of neo-liberal economic powers that had rallied in the 1970's against a Québécois separation. Because of this, they viewed constitutionalization of rights as a tool to create economic deregulation and fight the 'large government' of a welfare state (Vaugh 1999).

The general formula of the preservation thesis is further bolstered by *who* pushed the 1982 Constitution Act. In the 1970's, Prime Minister Trudeau began a decade-long program attempting to create a bill of rights document. Interestingly, it was only when the separatist movement undertook the 'Quiet Revolution' and actually threatened the stability of the state that an entrenched Charter appeared. The Parti Québécois under Rene Levesque, who took power in 1976, pushed the Quebec referendum in 1980, triggering a radical response by elite interests. Hirschl explains Trudeau's change of heart from the 1960's, when he publicly went on record to criticize reform movements (Hirschl 2000, 128) to his 1980 and '81 speeches in favor of Constitutionalization. Records indicate that while the right to counsel was considered as fundamental, there was some debate as to whether it should be available free of charge to indigent defendants. Since this would put a substantial burden on the state, it was left for judicial interpretation, which has been halting and piecemeal in its response.

So how does my rights-insurance thesis differ from Hirschl's model? Consider the position of the Canadian Supreme Court. The Charter of Rights and Freedoms does not expressly guarantee government-funded legal representation at trial, and the Canadian Supreme Court has not issued a decisive opinion as to the operation of the right to counsel.<sup>8</sup> This is not surprising. An elite competition perspective focuses on the structural position of the Court (Landes et. al. 1975). I want to move the focus to regarding specific rights—and I think in this way it is revealing that the Charter specifically delineates the extent of protection provided by rights and allows for little movement beyond it. The rights that entered into the Canadian constitutional arrangement were there for a reason. As I have argued, either the elite believed it necessary to placate majoritarian forces with the right, or it believed that it could use it for their own protection. I believe the Canadian example indicates the former: the right to counsel defined in section 10(b) as the right to “retain and instruct counsel” has no implication on substantive government duty to actually provide any services.<sup>9</sup>

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<sup>8</sup> Several provincial courts, particularly in Ontario, have held that despite the lack of an explicit provision of the right to counsel in the Charter, it may be inferred using sections 10(b), and 11(d) of the Charter.

<sup>9</sup> The Ontario Court of Appeals case of *Rowbotham v. Regina* [1988] O.A.C. 321; [1988] C.C.C.3d 1 (Ont. C.A.) involved a defendant charged with drug trafficking who was denied legal aid. The Court of Appeals examined the Charter and found that although it does not explicitly provide a right to counsel funded by the state for indigent defendants, the terms are constitutionalized through Sections 7 and 11(d) of the Charter, which require

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Hogg (1982, 398) observes that, “the legislative history clearly discloses an intention on the part of the framers to avoid substantive judicial review.” The right to counsel then has meaning in this context only inasmuch as its interpretation has expanded its use in lower courts. It is structured to be useful only inasmuch as elite interests believed it would be necessary to advance their other neoliberal goals through constitutionalization.

### VI. Case Study: South Africa

South Africa offers a quintessential example of long-term rights insurance. However, the actions of the ruling elite in the 1980's also point to a short-term viewpoint in their attempts to placate an increasingly powerful anti-apartheid black population with promises of better rights enforcement.

The South African case study is indelibly marked by the system of apartheid, out of which a new constitutional system emerged in 1994. Yet South Africa initially seems to present a paradox in the elite preservation thesis. The state guaranteed the right to counsel statutorily, codified in § 218 of the Criminal Procedure Act, No. 31 of 1917, and § 73(2) of the Criminal Procedure Act No. 51 of 1977. It certainly exemplified the 'dichotomous structure' of apartheid (Meadows 1995, 455), where fundamental rights seemed to exist in the context of fair statutes, but were applied in such a way that they did not exist for most South Africans. Statutory language guaranteeing fair trials was employed for numerous laws that served to directly suppress political opposition to apartheid. However, we must look to the moment when the apartheid regime actually faced a legitimate threat to its existence to test Hirschl's thesis.

The National Party gained control of the legislature in the 1950's, and controlled the regime until the end of apartheid. Within an English tradition of Parliamentary Supremacy, the Party quickly took control of political life. As Ogletree (1995, 25) notes, Blackstone described Parliamentary Supremacy as a regime in which the legislature, “could do everything that is not naturally impossible' with powers “absolute and without control,” and in the context of South Africa, this was proven true. The Afrikaaner National Party began the implementation of apartheid in 1950, quickly turning to criminal law as a main tool through which to enforce racial segregation. Especially during the early years from 1950 to the mid 1960's, the Party pushed through numerous criminal reforms aimed at segregating and oppressing the black population.

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funded counsel to be provided if representation is essential to a “fair trial.” The Court argued that, “The right to retain counsel, constitutionally secured by s. 10(b) of the Charter, and the right to have counsel provided at the expense of the state are not the same thing.”

This almost uniformly took place through the language of terrorism and thus the exigencies of imminent state collapse. In 1950, the regime passed the Suppression of Communism Act, which made the Communist Party unlawful and allowed the President to suppress Communist organizations, making it criminal to engage in nearly activities even loosely related to oppositional political organization.<sup>10</sup> In the 1970's and 80's this focus on criminal law intensified: just as the early English treason trial of the seventeenth century prohibited counsel, and had as its goal the demonstration of state power, criminal trials in this period of South African history employed the language of the 'imminent threat' in order to effectively deny counsel to political opponents (Matthews 1972).

The regime continued to promulgate laws aimed at both limiting the number of reliefs available to black defendants and political opponents and investing the courts with increased ability to prosecute without procedural standards in place under common law rules. The Public Safety Act of 1953 allowed the government to declare a state of emergency, which was first invoked in 1960.<sup>11</sup> The General Law Amendment Act in 1956<sup>12</sup> allowed for arrest without warrant, also limiting the ability for habeas corpus review.

Up to the mid-1960's, discriminatory practices within judicial procedure were rampant, but not codified. The Terrorism Act of 1967<sup>13</sup> was the first of many attempts to proceduralize discrimination. A large body of legislation as well as case law was promulgated in the years leading up to the fall of apartheid that had the effect of severely limiting the procedural right to counsel, as well as the substantive ability for most individuals to attain counsel in criminal trials.

The 1967 Terrorism Act most likely came about because of a series of highly publicized failures of prosecution in treason trials in the late 1950's and early 1960's (Ogletree 1995). At the same time, a number of high-profile incidents of political violence seemed to catalyze the state to pressure Parliament into passing the Act. In March of 1960, police fired on a crowd of blacks protesting the pass laws (Matthews 1972), killing sixty-nine and injuring nearly two hundred. Shortly after in November of 1962 in Paarl, a town near Cape Town, a black mob killed two whites, sparking racially-motivated killings in the region. The Act was not the first attempt to facilitate the prosecution of alleged political dissidents, but it was the first piece of legislation that created a new form of statutory treason, under the title 'terroristic activities'

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<sup>10</sup> Suppression of Communism Act, Act 44 of 1950 (S. Afr.).

<sup>11</sup> Act 3 of 1953 (S. Afr.)

<sup>12</sup> General Law Amendment Act, Act 37 of 1963 (S. Afr.).

<sup>13</sup> Terrorism Act, No. 83 of 1967 (S. Afr.).

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(Dugard 1978).<sup>14</sup> The Act significantly extended the definition of treason from the Roman-Dutch origins of overthrowing the state by violent act. With the explicit transfer of the burden of proof to the accused, a variety of offenses, some relatively minor, became punishable as treason.

Emblematic of the legal perversions of an apartheid regime struggling to maintain political control over a large, subjugated majority, the Act furthermore became law on the 12th of June 1967, but all its other provisions were asserted to have come into effect in June of 1962. This retroactive application of law is also symbolic of the manner in which the regime attempted to implement radically new policies of political control through the appropriation of the language and procedure of common law rules.

Generally, laws affecting the right to counsel were motivated by the same type of political exigencies that guided the criminal trial of seventeenth century England: in the context of a weak state rife with political disturbances, the treason trial serves the purpose of demonstrating the power of the state. Sydney Kentridge (1980, 612), a South African Barrister, wrote that as the number of political disturbances and the severity of dissent grew, the trial reverted from its procedural role into that same mechanism of state control. He notes that this reversion symbolized a social pathology: in English history, “in a trial for treason an acquittal must always be considered a defeat of the government.”

In sum, the Afrikaans political establishment was secure in its position of power during much of the postwar period. But it became increasingly clear in the 1980's that the regime could not sustain itself through increasingly repressive policies, the incentives for the white minority changed suddenly and radically. Virtually overnight, the late 1980's saw a conversion to the support of an entrenched bill of rights. Like Canada in the 1980's and England with the Whig's Treason Act of 1695, the political elite recognized that it may soon be in a weakened position where entrenched rights would protect their interests while their own institutional power waned. The moment where Hirschl and others identify as the most emblematic point of change as the 1989 investigation initiated by the minister of justice, H. J. Coetsee (Hirschl 2004, 96). A vigorous supporter of apartheid, in that year he opened an investigation into the subject of human rights. Only two years earlier in 1987 he had famously denounced the very notion of black rights. His investigation yielded the 1989 publication of a working paper that actually recommended the adoption of an entrenched bill of rights (S.A. Law Commission 1989). President F. W. de Klerk then informed Parliament that a constitution would have to provide for a bill of rights as outlined in the Law Commission's working paper (Cockrell 1997). The apartheid

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<sup>14</sup> Terrorism Act, No. 83 of 1967 (S. Afr.)

National Party went on to advocate and publish a new “Charter of Fundamental Rights” in 1993.

This must be seen in the context of previous attempts in the country to secure the place of the white elite in the face of opposition. British colonial rulers believed that the countries of Africa would protect the interests of white settlers and foreign investors after decolonization. At this time, they were quite willing to establish what appeared to be a series of autonomous institutions, such as judicial systems and land registration bodies, as well as enumerate individual rights within a constitutional-like text just prior to the completion of decolonization (Hart 1999).

One of de Klerk and Coetsee's major areas of focus was expanding the right to counsel. Of course, the authors emphasized that this was simply a question of degrees of enforcement, as the right existed in some form since the colonial period. As a matter of long-term insurance, the report clearly indicates that the elite was concerned that eventual collapse of the apartheid regime would place the prime architects and leaders into the inextricable position of being held accountable for their actions. The truth commission largely exonerated many of those individuals associated with apartheid. Yet the concern over future prosecution certainly guided the 1980's efforts at including the right to counsel in the national debate. As Hirschl notes, as the white regime's repressive tactics failed, their incentive structure changed (Hirschl 2000, 135), and the regime panicked.

Yet South Africa also demonstrates the short-term thinking behind rights-insurance. The National Party published its own Charter of Fundamental Rights in February of 1993 shortly before the 1994 regime collapse. As de Klerk faced an ANC-dominated Parliament, he endorsed the right to counsel, along with numerous other provisions, as 'necessary to avoid dictatorship.' In Hirschl's conception, this follows the triumvirate of legal, political, and economic elites coming together to endorse a set of policies clearly meant to maintain, rather than avoid, tyranny. This type of bargaining appears typical in the face of immanent collapse—the short-term rights insurance is simply a tool employed by elites to temporarily avoid a threat. In the South African example, this tactic was clearly bound to fail—the system had been repressive for far too long, with far too much structural integrity—but indicates a desire on the part of elites to use rights as a way of avoiding persecution all together. It should offer an interesting starting point for examinations of elite preservation in new democracies, where scholarship has approached the issue of rights implementation as critical to the formation of a stable state apparatus.

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### VII. Areas of Further Study and Conclusions

The rights insurance thesis may be very applicable to new democracies. In a weakly institutionalized setting, elite interests are particularly transparent (Dalton 1990). Furthermore, looking at rights as political insurance can bring in a more robust examination of the motivations behind elite actors, as a smaller unit of analysis provides more focused records and historiographies (Diamond 1989).

Post-Soviet countries offer a good starting point for approaching how the state re-conceptualized itself following a period of political transition (Grzymala-Busse and Luong 2002). Uzbekistan gained its independence in 1992 rather incidentally to the breakdown of the Soviet Union. Prior to that event, local elites had been gradually weakening ties with the USSR in order to exclude party power holders and bring in individuals close to the regime. Islam Karimov took control of Uzbek politics in the 1980's, and became President in 1992. When the breakdown of the USSR appeared immanent, Karimov's regime sprung into action to ensure that their own economic and political hegemony would not be threatened. Under the Commonwealth of Independent States, the government would not receive any subsidies, so economic leaders turned to neoliberal economic reforms to maintain viability. It quickly became apparent that a new constitution was necessary. Karimov's government entered into short-term insurance building and advanced a set of liberal rights—including the right to counsel—into the Constitution, while simultaneously systematically denying journalists and dissidents from the Birlik opposition party counsel or even a fair trial through the mid 1990's. Other former Soviet states may offer a similarly rich analysis as case studies both recent and relatively well-documented (Clarke 1995).

Former military regimes may also provide fertile territory for testing the rights insurance thesis. Military regimes often enter into transitional power arrangements (Dalton 1997; Tullock 1987), thus placing the regime's power on a stopwatch. While it does not appear that this has effectively deterred many military regimes from forming repressive and violent dictatorships (Hadenius 1997), it may place into perspective the limited time military leaders and legal power holders associated with the regime may have. It changes the long-term incentive structure (Wintrobe 1998). One effect of this change is that it seems to induce a resource extraction mentality and rentier state behavior (Warner 1997). However, it may also make leaders think about their future prospects in a civilian regime. A growing body of literature points to the importance of Truth Commissions or other post-transition bodies that seek to investigate, and sometimes prosecute, members of the old regime (Grandin 2005; Hayner 1994, 2001; Kritz 1995; Minow 1998).

After the collapse of Jean-Claude Duvalier's (Baby Doc) kleptocratic regime by

an army takeover in February of 1986, it was unclear what the intentions of the army were in terms of redistributing power. A two year period of provisional military rule followed, characterized by bursts of extreme violence and political uncertainty under General Namphy. Nonetheless, with increasing discontent at the ineffectual and violent regime, in 1987 the army allowed for a new constitution to be ratified, including the right to counsel as a provision in §25.1. The November 1987 election was canceled when the army massacred some 300 voters on election day. Subsequent violent outbursts indicated a regime quite uneasy with its position of power. It is somewhat speculative to imagine what the thought process was of the regime at this time, but their actions belie a deep fear of internal threats. When threatened in this way, leaders reacted by providing certain rights that would benefit them in the eventual case of regime turnover (Lawson 1980). The regime reaction was not only to address the structure of the Constitution, as the prototypical elite preservation thesis considers, but to look to the actual content of the laws and see what could possibly be used to harm elite interests in the future. One can also image this situation in Nigeria between 1993-1999, Ecuador from 1972-1979, or Sierra Leone in 1997-1998 (Mainwaring et. al. 1995). The recent political in Tunisia, Egypt, Yemen, and in the Islamic world more generally may provide fertile ground for examining in real-time the development of rights insurance as a regime policy, especially in the face of a military takeover or possible transitional government. Some, like Yemen's elite, seem to be engaging in short-term placation of majoritarian interests in the hopes of overcoming opposition, while others such as Mubarak's ousted regime members in Egypt are engaging in serious preservation efforts through ensuring a fair legal process so as to protect against punishment under the new regime. Whatever the cause, the advent of widespread internet media reporting will make gathering empirical information on the promulgation and promotion of rights as insurance easier and ultimately more robust in comparative analysis.

I believe this is particularly important because the rights insurance thesis is particularly susceptible to certain methodological shortcomings. Rights insurance analysis has been problematic where public records around constitutional or statutory debates are inaccessible or nonexistent. As opposed to the constitutional-level of analysis, looking at the origins of particular rights is both content-based and historical in nature, and thus requires some documentation of the actors and motivations surrounding its appearance in a text. Content Analysis of news sources and the growth of text analytics more generally may ease this concern. More research and focused documentation is generally needed, however, to form more than a speculative opinion as to why the right to counsel entered into the discussion of the future of a military regime.

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Furthermore, important outliers exist among instances of rights codification during a regime change. The United States stands as a prominent example of a Constitutional revolution where there was no clear instance of hegemonic preservation by the British government.<sup>15</sup> It may require a more creative reading of the 'second revolution' of 1812 to envision rights insurance as a mechanism employed by the American Federalists, and even then this process would need to take into account the wide variation in laws and practices among the various states. At the same time, the right to counsel in particular had existed in a more robust form than England<sup>16</sup> since as early as 1660,<sup>17</sup> making any assertion that it was implemented simply as a method to secure regime rule problematic.

Yet other rights deeply ingrained in fundamental conceptions of liberal democracy may be approached in terms of reactionary impulses by elites against democratizing, or otherwise threatening, non-elite forces. This approach is certainly troublesome from a qualitative perspective due simply to the overwhelming and deeply ingrained assumption that certain rights are inextricable from notions of democracy. Ginsburg (2003) certainly makes strides in demonstrating how hegemonic preservation can actually assist in the transition to democracy. Yet it is unclear how institutions other than Constitutional Courts work to foster democracy, and how the interplay of Hirschl's three power actors actually works in this situation. It is evident that they do engage in insurance-building outside of Constitutions; it simply remains to be empirically constructed as to *where* and *how*. The dichotomy between long- and short-term insurance assists conceptually in approaching this question. It is a well-documented phenomenon that majoritarian and elite conflict produces institutions. I suggest that by examining the basis of this conflict through the elite

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<sup>15</sup> Although it may be inferred from early court records that domestic colonial elite interests did employ the right to counsel as a way to make a trial seem 'fair' or 'lawful' in order to ensure that an angry mob did not threaten overall social stability. During the 1770 Boston Massacre trials, Massachusetts Solicitor General Samuel Quincy and Robert Treat Paine, the prosecutors, argued that British soldiers had unlawfully killed five civilians, while John Adams, Josiah Quincy II, and Robert Auchmuty, advocating as the defense counsel for British soldiers. It seems that because the crown wanted to reduce the chance of retaliation and unrest, they called for a fair trial and allowed for the courts to employ counsel.

<sup>16</sup> Beattie's study of the Old Bailey, London's central criminal court, indicates that prosecutors were represented by counsel in only about 3% of cases during the period from the New Jersey study. In contrast, in American trial courts counsel represented the prosecution 88% of the time, and defense lawyers appeared in 54 percent of American trials as opposed to about 5% in the Old Bailey (Beattie 1986, 227).

<sup>17</sup> The Rhode Island General Assembly passed a statute that allowed defendants charged with any crime to employ counsel in 1660 (Tomkovich 2002, 11). Massachusetts in 1780 and New Hampshire in 1784 similarly provided a right to criminal counsel. The New York Constitution of 1777, however, went on to grant that counsel would be allowed in criminal and civil actions (N.Y. Const. Of 1777, para XXXIV). The Delaware Constitution of 1776 provided the right to counsel as a fundamental element of a fair trial, as it upheld the 1776 Declaration of Rights and Fundamental Rules (Del. Const. Of 1776, art. 25). Even earlier, the 1701 Pennsylvania Charter of Privileges gave defendants the same privileges as Prosecutors (Pen. Charter of Priv. §V).

actors involved, we can take a first step in understanding the legal spaces created by that conflict. As such, the rights insurance thesis challenges notions of the universality of rights. The political origin of the institutions that define rights makes it clear that their international variation and relative complexity are not byproducts of 'partial' rights implementation. It is my hope then that introducing the notion of rights as practical, utilitarian mechanisms of elite insurance may provoke a reframing of the legal discourse surrounding rights-implementation in the direction of a more policy-based approach recognizing the necessity of involving power actors in nation-building and democratization.

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