

## 8.

# **Beyond Judicial Review: Ancillary Powers of Constitutional Courts**

Tom Ginsburg

### **Introduction**

Much of the literature on the global judicialization of politics consists of documenting the spread of constitutional review around the globe, first in Europe and increasingly in Asia, Africa and Latin America. The paradigm power of these courts is constitutional review, in which a court evaluates legislation, administrative action, or an international treaty for compatibility with the written constitution. It is natural that writers on the new constitutional courts have concentrated attention on judicial review, for it is here that the court's lawmaking power is at its apex. Relatively free of the threat of correction from other political actors, courts exercising judicial review are rather obviously policymaking bodies.<sup>1</sup> But in their understandable eagerness to assess new systems of review, scholars have paid little attention to the other functions of constitutional courts.

This chapter is concerned with what I will call the ancillary powers of constitutional courts, those powers that fall outside the prototypical constitutional review function described above.<sup>2</sup> Perhaps because of the very success of constitutional review as an institution, constitution-drafters have given new courts a wide range of other tasks. Just as Martin Shapiro (1991) has argued that scholars of American law and courts have paid too much attention to judicial review, so scholars of the new constitutional courts risk an incomplete understanding of courts as political institutions if they ignore these other powers of constitutional courts, which often place the courts in the midst of politically charged controversies. This chapter is a first attempt to call attention to these powers.

I will argue that many of these functions are in fact closer to the triadic social logic of courts as identified by Shapiro (1981a) than the prototypical function of constitutional review. This is because the essential function of courts in many of these cases is that of dispute resolution, pure and simple.

As we will see, the ancillary powers vary in the extent to which they require the court to refer to a constitutional text, and some of them do not involve the constitution even nominally. By moving away from the core task of constitutional courts, we actually highlight the basic social logic of courtness in their institutional design.

The chapter is organized as follows: I begin with a review of the recent literature on constitutional review as a lawmaking process. I then describe some of the ancillary powers of constitutional courts around the world, both as provided by constitutional text and as exercised in practice. I conclude by speculating on the tension that emerges between lawmaking and dispute resolution in the exercise of these ancillary powers.

### **Constitutional Review and Judicial Lawmaking**

Constitutional review can be divided into two different kinds of tasks with very different political logics: dispute resolution among multiple lawmakers and protection of individual rights. Both of these involve constraint of present day political authorities on the basis of fundamental principles in the constitutional text. First, consider the logic of dispute resolution among multiple lawmakers. Here, we can include the classic federalist rationale for judicial review so apparent in the early history of the United States Supreme Court and in Hans Kelsen's model for the Austrian Constitutional Court. With two levels of lawmaking authority, each with its own area of competence, a neutral third party is needed to ensure that neither lawmaker steps over the boundary into the other jurisdictional domain. The oft-noted affinity between federalism and judicial review reflects this.<sup>3</sup>

We can also include horizontal separation of powers schemes as drawing on the logic of dispute resolution. Where two parallel bodies have different zones of lawmaking authority, a neutral third is needed to police the boundary. The scheme of divided lawmaking between the executive and legislature in the Constitution of Fifth Republic France is the paradigm example here (Stone Sweet 1992). The French system allows the Executive to make law by decree, and established a *Conseil Constitutionnel* in large part to keep parliamentary legislation from impinging on the Executive's zone of authority. In the United States, one can think of constitutional disputes over executive competence, such as the proper scope of the commander-in-chief power, or issues related to judicial control of administration in situations of congressional delegation to agencies. Each of these problems involves defining the boundary between multiple lawmakers,

and enforcing the founding bargain that set up the institutions in the first place.

The second major function of judicial review is individual rights protection. The image here is of the judge as hero and policymaker. Rather than triadic dispute resolution among governmental bodies, the judge is siding with the individual against the mighty apparatus of the state to advance particular substantive goals of liberal democracy. The policymaking role of courts is more apparent here because the logic of dispute resolution does not really mask it. When the court substitutes its own judgment for that of the government or legislature, it cannot be doing anything other than policymaking.

Much work, by Shapiro and others, has shown how courts created to play the basic dispute resolving function can transform their role into one that involves much more explicit policymaking. Again, French experience provides a paradigm example. Some years after its creation, the *Conseil* discovered that of the 1789 French Declaration of the Rights of Man formed a part of the French Constitution (Stone Sweet 1992). This gave it a human rights mandate that it had not previously exercised. The similar transformation of the American Supreme Court from its early focus on centralizing federalism into a rights-guardian began before *Lochner*<sup>4</sup> and has expanded with fits and starts since then. Again, a court shifted from dispute resolver to rights protector over time.

Regardless of whether the court is conducting boundary-guarding dispute resolution or rights-enforcing constraint of government, a common thread in both forms of constitutional review is judicial lawmaking. This feature of lawmaking is inherent in the judicial and administrative process (Shapiro 1968, 1981a, 1986). In lieu of the Montesquieuan conception of rule-making as practiced solely by the legislature, we must accept judicial lawmaking if we are to characterize adjudication as applying general principles to particular cases. And if judges simply lie about what they are doing, that is part of the game, for their power is drawn from the image of applying pre-existing rules (Shapiro 1994).

The lawmaking function of constitutional review has been highlighted in two literatures bridging political science and law. The first is comparative work, by Stone Sweet and others, that focused initially on the *Conseil Constitutionnel* (Stone Sweet 1990, 1992, 1995). The French system of pre-promulgation abstract review highlights the lawmaking function, since the *Conseil's* declarations of unconstitutionality almost always lead to revision and resubmission of the legislation to conform with the constitutional dictates of the *Conseil*. Stone Sweet observed that this type of review turns

the *Conseil* into a specialized third chamber of the legislature (Shapiro 1999, 197). Stone Sweet used this insight to develop a broader “legislative” approach to abstract review, in which judicial lawmaking is not the particular and retrospective type identified by Shapiro, but rather shares with the legislative process the elaboration of general norms for prospective application.

The lawmaking function of constitutional courts is emphasized in a second literature that is emerging as the central paradigm in public law studies of law and courts, namely strategic accounts of judicial power. The core insight of the strategic model is that courts can make law, but are constrained by other actors in the political system. This work originated in the context of “dynamic” statutory interpretation in the United States (Eskridge 1994; Ferejohn and Weingast 1992). The court can adopt its preferred interpretation of a particular piece of legislation. Whether this judicial interpretation is stable depends on the preferences of other actors, conceived of in spatial terms as distance from their ideal policy preferences. If both Houses of Congress and the president disagree with the court and can agree on a more preferred interpretation, they will cooperate to pass new legislation overturning the court. The process then starts all over again. Over time, the court and Congress continue to develop the law together; the law is simply the equilibrium outcome of their games of power. Much empirical work has documented the back and forth of Congress and the Court engaging in “constitutional dialogues” in particular policy areas (Fisher 1988; Devins 1996; Epstein and Knight 1998).

This work has positive and normative implications. The positive implication is that judicial “activism” is a continuous variable reflecting the zone of space where other actors cannot agree on overturning judicially enacted policy. This means that the ability of courts to deviate from the desired preferences of politicians will vary as those preferences themselves diverge from each other. For example, judicial lawmaking power should expand in periods of divided government, since politicians will find it more difficult to agree (Whittington 2003). The constitutional structure will also play a key role in determining the extent of judicial power: In the proverbial state of other things being equal, more actors involved in the legislative process should lead to more policy space for the court to work in because of the difficulty of passing new legislation. It is thus, not surprising that courts in the United Kingdom, with its single house of parliament controlled by a legislative majority, are less active than courts in the United States, with weak parties and three separate institutions that must collaborate to make new law (Cooter and Ginsburg 1996). Nor is it surprising that the European

Court of Justice has a great deal of strategic space to operate in, with many diverse states involved in the formal lawmaking process (Stone Sweet, this volume; Cooter and Ginsburg 1998).

The key distinction between statutory and constitutional interpretation in this view is the greater difficulty of overruling the court in the constitutional context. Constitutional amendments are more difficult to obtain than ordinary legislation. A judicial decision to treat a policy area as a constitutional matter will render the court much more powerful, both because of the normative significance attached to the constitution, but also because overruling constitutional interpretation requires constitutional amendment.

This work on judicial lawmaking also has a normative implication. A judicial interpretation that deviates from the statutory or constitutional text may in fact be legitimate if it is within the tolerance zones of other sitting political actors. William Eskridge has argued forcefully for just this kind of “dynamic” approach to statutory interpretation (Eskridge 1994). The court’s creativity plays a role in keeping the system up to date and saves the legislature the trouble of having to continually amend legislation. The positive observation of judicial lawmaking now has normative significance.

These two literatures, the comparative constitutional literature and the strategic model focused on the United States, are now coming together in comparative work on constitutional courts, describing how the extent of the “policy space” limits lawmaking in comparative terms (Epstein and Knight 2001). Weiler’s work on the role of the European Court in “transforming” Europe implicitly supports this point of view (Weiler 1991). The story goes like this. In the early years of the European Communities, integration proceeded at a modest pace, but with the adoption of the Luxembourg compromise allowing any state to veto new law, the political organs of Europe became paralyzed. As the difficulty of passing legislation increased, the space of judicial discretion increased accordingly, and the Court became the primary vehicle for integration. Shapiro has suggested how this led to a backlash from the Member States who feared a judicially sanctioned “race to the bottom” in regulatory standards, so that the States eventually came together to develop and control a new program of integration (Shapiro 1992a, 51–52; Cooter and Ginsburg 1998). The Court’s power was thus constrained, but it had played the key role in jump-starting European integration.

All this work on constitutional review and constitutional courts has developed the basic insight, that courts make law, into a sophisticated framework for understanding judicial power in particular political contexts. But the very success of the research program has obscured other questions.

Judicial power becomes equivalent to the extent of lawmaking discretion in any particular context. As we shall see, however, a complete survey of powers allocated to constitutional courts goes beyond lawmaking.

### **Ancillary Powers**

Besides the core task of constitutional review of legislation and administrative action, constitutional courts have been granted other powers, including such duties as proposing legislation<sup>5</sup>; determining whether political parties are unconstitutional<sup>6</sup>; impeaching senior governmental officials<sup>7</sup>; and adjudicating election violations.<sup>8</sup> United States federal courts have some of these and other powers, including rulemaking,<sup>9</sup> and until recently a role in appointing special prosecutors.<sup>10</sup> Constitutional courts have been given a wide range of other powers that move even more far afield from the paradigm role of judicial review. The Constitutional Court of Belarus has the power to “submit proposals to the Supreme Council on the need for amendments and addenda to the Constitution and on the adoption and amendment of laws.”<sup>11</sup> The Azerbaijani draft Constitution gave the constitutional court power to “dissolve parliament if it repeatedly passes laws that violate the Constitution,”<sup>12</sup> though this, thankfully, did not survive into the final draft. The South African constitutional court must certify the constitutions of provinces for conformity with the Constitution.<sup>13</sup> Armenia’s constitutional court can supervise decisions on states of emergency.<sup>14</sup>

The Constitutional Court of Thailand, set up as part of an effort to clamp down on corruption, exercises a wide array of ancillary powers. It can confirm findings of and evaluate disclosures submitted to the new National Counter-Corruption Commission (NCCC), review whether any appropriations bill would lead to involvement of an elected official in the expenditure of funds,<sup>15</sup> determine whether an Emergency Decree is made in a real emergency,<sup>16</sup> determine whether Election Commissioners should be disqualified,<sup>17</sup> and decide whether political party regulations violate the Constitution or fundamental principles of Thai governance.<sup>18</sup> Because of the overarching concern with corruption that animated the 1997 Constitution, the Court has the power to demand documents or evidence to carry out its duties. In this sense, it is a kind of inquisitorial Constitutional Court exercising a wide gamut of ancillary powers.

The following table lists some of the functions given to constitutional courts in new democracies, drawn from the post-socialist context as a convenient source of comparative data.

**Table 1: Ancillary Powers of Post-Socialist Courts**

Country	Supervise elections or referenda	Impeachment	Constitutionality of political parties	Other
Albania	X	X		enforce provision preventing parliamentary deputies from making money with state property
Armenia	X	X	X	
Belarus		X		
Bosnia				resolve disputes over House of Peoples' vetoes of lower house legislation
Bulgaria	X	X	X	
Croatia	X	X	X	establish if President cannot perform duties
Czech Republic	X	X	X	
Estonia				establish if President cannot perform duties
Hungary		X		Approve dissolution of local government bodies
Lithuania	X			establish if President cannot perform duties
Macedonia	X	X	X	establish if President cannot perform duties
Mongolia	X	X		
Poland				determine if temporary impediment to exercise of presidential power
Rumania	X	X	X	
Russia		X	Not after 1993	propose legislation in areas of competence
Slovakia	X	X		
Slovenia	X	X	X	
Ukraine	X	X		Supervise amendments

We will now consider some of these powers in terms of the basic functions of courts. Recall that the basic paradigm of constitutional review relies on the image of the court as interpreting the fundamental text. Some of the powers described above, such as evaluating the constitutionality of political parties or states of emergency, fit this scheme. Others, such as deciding disputes that arise in the context of elections, are more akin to pure ad-hoc dispute resolution such as found in Weber's image of kadi justice.

One can array these ancillary powers on a spectrum, from those that rather clearly involve judicial lawmaking (such as proposing legislation and articulating the standards which make a political party unconstitutional) to those that involve relatively pure forms of dispute resolution (such as impeachment and electoral disputes) where lawmaking is at a minimum. The function of judicial review itself lies strongly toward the lawmaking end of the spectrum; at the other end of the spectrum are cases in which the court is resolving ad-hoc disputes without even referring to the constitutional text. We will take the powers in this order.

### **Proposing Legislation**

The first power grows rather directly out of the lawmaking functions of review described above. Courts engaged in constitutional dialogues are sometimes characterized as acting as a kind of negative legislator, constraining the legislature and bounding its actions rather than positively making rules. (This formulation goes back directly to Kelsen, who explicitly designed the Austrian Constitutional Court with this conception in mind.) The distinction between negative legislation and positive is really rather formal, and turns only on who has the power of initial proposal. For once a proposal is made, a decision restricting that proposal has as much substantive impact as the initial proposal. Indeed, this very aspect of negative legislation is highlighted in scholarly accounts of separation of power games, where the key term is whether or not an institution provides a "veto gate" on new legislation. The power of the veto gate is really a negative lawmaking power.

The slight distinction between negative and positive legislation breaks down completely when the court has the power to hold legislative *omissions* unconstitutional. In this type of review, well-developed in Germany and copied by constitutional courts in countries as diverse as Hungary, Slovakia, Slovenia, South Korea and Taiwan, the court can set a deadline by which the legislature must act to correct an omission. The court can even suggest specific language that would pass constitutional muster. Statutes then passed



in response to court proposals become the basis for another round of review.<sup>19</sup>

It is not much of a jump from this type of review to explicitly allowing the constitutional court to propose legislation, either within a designated area of competence or more generally. Yet it is quite rare that constitutional courts are explicitly given the power to propose legislation: Russia is the only new democracy considered that provides this power. Some state courts in the United States have the power to promulgate the rules of evidence, but proposing norms outside the narrow confines of the judicial function is nearly unheard of. In part, this may result from the separation of powers formalism that sees courts as passive interpreters rather than lawmakers. Where courts have *explicit* norm-proposing power, they can no longer draw on the imagery, identified by Shapiro, of being neutral appliers of pre-existing norms. Their very “court-ness” would be called into question were they allowed to propose general law directly, rather than indirectly as they already do. As a normative matter, it is interesting to speculate whether expanding explicit lawmaking power would really be so deleterious, but that consideration is beyond the scope of this paper.

### **Supervising Political Parties**

It is not infrequent that constitutional courts are given the task of supervising political parties alleged to have unconstitutional programs in polities that take an aggressive stance toward safeguarding democracy (Fox and Nolte 1995). The fountainhead of this kind of supervision is that required by Article 21(2) of the German Basic Law, banning parties that oppose the “free democratic basic order” (Kommers 1997, 200). This gave rise to two famous cases familiar to comparativists wherein the German constitutional court banned unconstitutional parties.<sup>20</sup>

The power to regulate political parties has been widely copied in the post-socialist context and given rise to some of the most dramatic decisions there, including the famous decision of the first Russian court to ban the communist party (Epstein and Knight 2001; Ahdieh 1997; Sharlet 1993), and a prominent decision in Bulgaria to ban a Macedonian-nationalist party.<sup>21</sup> The actual scope of the court’s power varies from evaluating party programs to actual behavior. For example, in Macedonia, the court’s action is limited to evaluating the statute and programs of political parties to ensure that they are not directed against the constitutional order, designed to encourage ethnic

hatred, or inviting military aggression. The German Basic Law regulates both programs and activities of political parties.

The power has also been copied in East Asia. During the democratic transition on Taiwan, the power of declaring political parties unconstitutional was transferred to the Council of Grand Justices (the *de facto* constitutional court of the Republic of China), away from the executive branch that had used the power to threaten advocates of Taiwan independence during the period of one-party rule. Interestingly, although the Council exercises abstract constitutional review power generally, it is only called a constitutional court when it sits to evaluate the programs of political parties.

Giving this power to constitutional courts highlights the small-c constitutional nature of electoral and political party law. Though political party and electoral law are not elaborated in detail in most constitutions, in a very real sense these rules *constitute* the polity. Because of this quasi-constitutional nature, it is logical that the supreme guardian of constitutionality would also have a supervisory role over them. The constitutional court can also draw on the image of neutrality to make what is in fact a major policy decision defining the outer limits of political discourse. Constitutional courts evaluating political parties are really meta-policymakers; they determine the policy about who can make policy.

Indeed, this ancillary power deviates only very slightly from the ordinary functions of judicial review of legislation and administrative action, and simply moves the evaluation forward in the political process. Abstract pre-promulgation review examines proposed laws for their potential impact; policing the programs of political parties can be seen as another form of abstract review that prevents some policies from even being proposed in the first place. This function draws on the recognition that political parties are indeed important elements of a democratic political system, and can be agents of violating constitutional rights just as government can.

Furthermore, as in judicial review, the court is basing its decision on a reading of the foundational text, though in practice it is often up to the court to provide substance to such concepts as the “free democratic basic order.” Although this exercise in interpretation may be less textually grounded than the conventional exercise of constitutional review, it is still ultimately an exercise in interpretation.

### **Impeachment**

Another important power of constitutional courts is to adjudicate impeachment hearings of a chief executive or other high official, typically as

part of a process involving indictment by a legislative body.<sup>22</sup> This was the most common ancillary power in our survey of post-socialist courts. In terms of the political functions of courts, the obvious immediate analogue to impeachment is social control. A political figure has committed a criminal act or a willful violation of the constitution (the actual formulation of the predicate act varies). The court must determine whether or not a violation has occurred or if it warrants removal from office, sometimes by reference to the constitutional text. In the quasi-criminal context of presidential impeachment, the legislature becomes the prosecutor, and the president the defendant. The constitution becomes the criminal statute to which the court refers.

In fact the analogy is incomplete. The character of impeachment in most constitutional schemes is better understood as a variant of the conflict resolution function that is at the heart of judicial review. This is because impeachment hearings are unlikely to occur unless there is an institutional and political conflict between parliament and the executive. To illustrate, contrast the probabilities of a successful indictment of a chief executive when a single disciplined political party controls the legislature and presidency as compared with a situation of divided government. The president in the former scheme may be able to get away with crimes and misdemeanors that would be impeachable in the latter situation.

Impeachment cases thus presuppose political conflict, and the court becomes a neutral triadic figure to adjudicate between the two antagonists. Recall that the fundamental problem of this type of dispute resolution is to convince the loser to comply. There is no higher authority over the president and legislature that can enforce decisions; enforcement depends on the voluntary performance of the parties. The legislature wants the president out; the president wants to stay. The decision of the court must be self-fulfilling, in the sense that no centralized enforcement is typically needed.

In these circumstances, the primary role of the court is not actually to determine facts or evaluate a standard, but simply to provide an answer to help the parties resolve their dispute. Its role does not depend on the image of court-ness so much as its presence as a neutral party on the same constitutional plane. The criminal analogy is crucial for designating the constitutional court as the relevant third party among all possible third parties, but in fact the criminal analogy is misleading in terms of the political function at work.

When two parties are in a dispute and no external enforcer can impose sanctions on them, the parties are in one variant of a situation game theorists describe as a coordination problem. Coordination problems occur when two

parties must decide what course of action to take based on their expectation of what action the other will take, and two potential equilibria exist. The paradigm illustration is two cars in a state of nature that must decide which side of the street to drive on. If both choose the same side of the street (“right” or “left”), they will pass each other on the road safely, but if they choose alternate sides, the two will find themselves in a head-on collision. The parties here need to coordinate their actions, and the key will be what they expect the other party to do. Even if the two parties cannot communicate directly, one way to coordinate actions is for a third party to signal to the players to drive on the appropriate side. Thus, if one driver observes a third party say to the other driver to drive on the left, the first driver may believe that the second driver is likely to follow the instruction, and the third-party’s signal can become self-enforcing even if they have no power to sanction the driver.

Many situations in dispute resolution involve similar coordination problems. We will return to this kind of problem further in the next section, which concerns ad-hoc election disputes. For now, it is worth pointing out that the natural instinct to give the impeachment power to the constitutional court ensures that it may be called on to resolve monumental political crises.

### **Electoral Disputes**

Another role for constitutional courts is supervising elections or elections authorities.<sup>23</sup> Referenda are supervised by constitutional courts in Italy, Portugal, Armenia, and many other countries. The *Conseil Constitutionnel* can supervise the legality of elections for the president or legislature, and referenda, as do many of the constitutional courts listed on Table 1. This ancillary power differs from all the previous ones in that there is frequently not even a formal link between the dispute and the text of the constitution. Rather, this jurisdiction is basically one of ad-hoc dispute resolution on a case-by-case basis.

I want to illustrate this point by discussing recent prominent electoral decisions by two very different constitutional courts, the Constitutional Court of Thailand and the United States Supreme Court.<sup>24</sup> The Constitutional Court of Thailand, set up after the return to civilian rule after five years of military control, was given the power of supervising the decisions of the new NCCC. Corruption has been an endemic issue in Thailand, and the 1997 Constitution was designed to ensure clean politics. The NCCC collects reports on assets from politicians and senior bureaucrats to ensure that there are no mysterious

increases during the time they are in public service. Those who fail to report assets can be barred from office, subject to approval from the new Constitutional Court.

The most prominent cases that have come before the Thai Constitutional Court to date are those involving scrutiny of politicians. In one case, the Minister of Interior was found to have deliberately submitted a false statement of his assets to the NCCC. The Constitutional Court unanimously confirmed the report of the NCCC, leading to a five-year ban from office for the prominent politician.<sup>25</sup> A higher profile case arose in January 2001, when Thaksin Shinawatra, the billionaire-turned-politician who was the leading candidate for Prime Minister in the upcoming election, was found by the NCCC to have filed a false asset report, the Constitutional Court was put in a difficult position. Thaksin's Thai Rak Thai party subsequently won the elections. In a divided decision that has been described as confused, the Court found that the false report had not been filed deliberately, and thereby allowed Thaksin to take the post of Prime Minister.

Criticism of the rationales of courts in these cases is common precisely because there is a conflict between the image of the court as neutral body basing a decision on pre-existing norms and the social logic of the coordination problem at hand. *Bush v. Gore*<sup>26</sup> is perhaps the paradigm here. In facts recounted extensively elsewhere, the court intervened in a partisan election that had produced a statistical tie. The dispute involved a constitutional scheme described previously described as a train wreck waiting to happen (Levinson 2002; Amar 1998). The court's decision has been widely criticized as poorly reasoned, legally flawed, and unnecessary (Dershowitz 2001; Gillman 2001; cf. Posner 2001).

*Bush v. Gore* is widely viewed as the most political of political decisions. As suggested by the double entendre of the title of Howard Gillman's *The Votes that Counted* (2001), the Court's closely divided vote substituted for the votes of the electorate. The chief difference between an electorate of 100 million and an electorate of nine is that in the latter there are no ties. What could be more activist or political?

From the functional point of view, however, the decision looks quite different. For *Bush v. Gore* is a paradigm case of pure dispute resolution. Two parties come before the court. Both prefer a resolution of some kind to continuing uncertainty. Like Weber's kadi under the tree, the court was certainly not engaged in lawmaking of a real kind, as its own limiting assertions on the implications of its equal protection analysis made clear.<sup>28</sup> Nor was the court carrying out regime policies to exercise social control. There was no regime to serve—and that was of course the issue in the case.

Rather the court was a neutral third resolving a coordination problem among the parties. Here we see the basic social logic of dispute resolution at its apex.

I want to illustrate this with a further detour into game theory because I think it will help illuminate the function of the court in these kinds of disputes. The above description of coordination problems concerned “pure” coordination: Neither driver really cares which side of the road he or she drives on as long as he avoids the accident. The game in election disputes like *Bush v. Gore* is more akin to that of “chicken,” famous from the scene in the James Dean movie where two cars drive headfirst at each other to see who will be the first to swerve. Each party would prefer to play the aggressive strategy and refuse to swerve, but if both follow this first best strategy, they will wind up in the collectively worst outcome of a head-on collision. The task for each party is to convincingly demonstrate that he will not swerve, thereby inducing the other party to swerve. To analogize to *Bush v. Gore*, there is only one Presidency with two claimants. Each party prefers that he be the one to occupy the office. However, the most important thing is that some sort of resolution occur. The costs to the constitutional order of continuing to fight exceed the costs of being the “loser.” The trick is to figure out who will play the role of “loser” and back down from the confrontation. Left to their own devices, the parties will not be able to coordinate their roles. Each will try to express resolve to induce the other party to back down (Ginsburg and McAdams 2004).

The role of a constitutional court here is to point to one or the other contender and identify him as the “winner.” Once a court identifies one party as a winner, the decision may become a self-enforcing focal point. Gore’s perception of the likelihood of Bush’s backing down changed as soon as the Supreme Court announced its decision. Whereas before the decision, Gore seemed to have a legitimate claim on the Presidency and might have expected Bush to accede, after the decision Bush was unlikely to do so. Gore could have stayed on—but the chances of Bush ever adopting the “swerve” strategy were greatly reduced.

Note that this interpretation of electoral disputes as a game of chicken suggests that the Supreme Court can play a function independent of the quality of any particular justification that it offers. The Supreme Court could have simply flipped a coin to decide *Bush v. Gore* to play this crucial function: Had the court simply pointed to Bush as the random winner, Gore would still have had to readjust his views as to the likelihood of Bush backing down. The particular reasoning offered, flawed as it was, was not the

point. Regardless of its rationale, the court decision became focal for the two parties in seeking to coordinate their strategies.<sup>29</sup>

Because any external source can provide a focal point in these kind of disputes, there is no reason that a *constitutional* court must inherently exercise this ancillary power. In many constitutional schemes, the role of the constitutional court is limited to certain types of electoral disputes. For example, in Albania, disputes over local government elections go to the ordinary courts while disputes over parliamentary elections go to the constitutional court. Nevertheless, the constitutional court can be a convenient third party to turn to in constitutional design, in part because it, like other courts, draws on the imagery of a neutral dispute resolver.

### **Tensions Between Lawmaking and Dispute Resolution**

So far we have moved on a spectrum all the way from the high-profile function of lawmaking in constitutional review toward simple dispute resolution in ad-hoc impeachment cases and electoral disputes. We have thus come a long way from the conventional emphasis on the lawmaking function of courts. The image we are left with is of a court that is an ad-hoc decision-maker, akin to Weber's *kadi* under the tree or Shapiro's Papuan with many pigs. The constitutional court helps powerful actors resolve coordination problems, and the particular justifications offered are of little import.

Of course, one important feature of constitutional schemes is that everyone is a repeat player. If we adopt as a hypothesis that courts seek to enhance their power and influence over time, then we must assume the court acts strategically not only in particular cases, as emphasized by Epstein and Knight (1998; 2001), but across different policy areas and cases calling on the exercise of different types of powers. The court is a strategic actor over time, and hence will encounter a sequence of cases of various types.

Here we see a tension emerge between the simple dispute resolution role and the lawmaking function of an actor with policy preferences. For the dispute resolver's neutrality with regard to a particular outcome may be compromised when the court needs to take long-term institutional considerations into account. The Court may not care, as an ideal matter, whether Bush or Gore wins the election, but in fact each justice has real preferences about the ultimate direction of the court in the next presidential term, and may thus have preferences about which candidate should be, for example, appointing new justices. More importantly, the Court must be mindful of its own institutional position. Creating an angry loser, one which

by definition has sufficient power to be a force in national politics, may mean creating a permanent enemy.

This may lead courts in such circumstances to act rather more cautiously than they appear to. In the Thai example, the Court may have sought to avoid a fight with an incoming political majority with strong support. In a dispute unfolding as this volume went to press, the Ukrainian Supreme Court required a new election in a disputed presidential contest—but at least some analysts believed that it did so only after the major political forces had reached a consensus that a new election was the appropriate course.

Constitutional designers have quite consciously given courts the wide array of powers described in this chapter. They have done so in part because the global success of judicial review has given constitutional courts a reputation as effective institutions. Constitutional review creates a kind of stock of capital that designers seek to draw on to help resolve impasses in the political system, such as occur in impeachment and election disputes. The risk is that as they are drawn into *explicitly* political conflicts, courts risk drawing down this stock of capital. This risk is no doubt particularly acute in new democracies.

In the context of ordinary dispute resolution, we have long been told that much of the structure and image of adjudication are designed to deal with the problem of the appearance of bias toward the winner of the dispute (Shapiro 1981a). Appeals play this function, as do judges' reliance on the image of applying pre-existing neutral principles. Many of these techniques are unavailable to constitutional courts. There is no higher court to appeal to; and oftentimes the very rationale for designating a special constitutional court is a recognition of the fact that the function is in part political in nature, rather than technical and legal. All constitutional courts have, in the end, is the constitutional text and the notion that founding principles are dictating decisions. In the end, then, the image of judicial review is central to their political success, even when in practice constitutional courts are exercising a wider array of powers.

The dangers and tradeoffs are illustrated in the well-known story of the first Russian Constitutional Court in the Communist Party Case of 1992. The Russian Court, created in the late Gorbachev period, was seen to be a central embodiment of the rule of law and the “new” Russia. Its primary role emerged as mediating disputes between the parliament and president. When Boris Yeltsin, in a series of decrees after the 1991 coup attempt, disbanded the Communist party and seized its property and assets,<sup>30</sup> the communists challenged the decrees as exceeding presidential power. This prompted a cross-petition by opponents of the Communist Party who invoked the



Court's ancillary power to determine the party's legality and constitutional status. The two petitions were joined by the chairman of the Court, Valery Zorkin, bringing together genuinely legal issues with deeply political ones.<sup>31</sup>

The Court was faced with a difficult situation. It could uphold the president's actions, even though he did not follow the relevant legal procedures for banning political associations; or it could strike them and side with the anti-constitutional Communists who had supported the coup. Neither option appeared particularly attractive. Thus caught, the Court attempted to split the difference by finding a mediate solution. In a decision published on November 30, 1992, the Court upheld Yeltsin's decrees against the organs of the national Communist Party of the Soviet Union, but not against its local bodies. This decision provoked disappointment on all sides, and failed to resolve the governmental crisis. Court Chairman Zorkin then sought to negotiate a compromise document between Yeltsin and the parliament. This constitutional compromise marked the deep involvement of the Court, and Zorkin in particular, in the realm of pure politics as opposed to law. The image of the court as a neutral, technical body devoted to the law was dashed. When Yeltsin dispensed with the compromise and announced a decree granting himself emergency powers in March 1993, the Court issued an opinion declaring the actions unconstitutional, even before the decree was issued.<sup>32</sup> Within months, Yeltsin dissolved the parliament and suspended the Court's operation.<sup>33</sup> It was not reconvened until February 1995, with reduced powers.<sup>34</sup> In particular, it lost the ancillary powers to declare parties unconstitutional and issue an advisory opinion on the impeachment of the president.

The Russian story illustrates the dilemma of courts exercising ancillary powers. Oddly, it was ancillary powers and the extension of the court's chairman into an explicitly political role, rather than lawmaking, that led to the demise of the first Russian Constitutional Court. To the extent that they rely on the dispute resolution logic of all triadic third parties, ancillary powers can facilitate resolution of major political conflicts and coordination problems. But the further the court gets away from its paradigm task of review based on interpretation of a fundamental text, it may find itself acting in a fashion that undermines its own legitimacy. Furthermore, the need to act strategically over a long series of cases that call on various powers of the court means that sometimes "pure" dispute resolution will be compromised by political expediency. Ancillary powers, then, are some, but only some, of the tools the court must use to build up its political role over time.

### Conclusion

The recent weight of comparative constitutional scholarship has focused nearly exclusively on the power of constitutional review. As a result, the dominant image of courts is that of lawmaker, creating rules through dialogues with political branches. When one examines the full array of powers explicitly granted and utilized by constitutional courts, however, a somewhat different picture emerges. The ancillary functions highlight how constitutional courts operate as triadic figures, drawing on the basic social logic of courts identified by Shapiro.

This mix of “court-like” features and quasi-legislative features is neither surprising nor inherently problematic. Like other features of modern mixed government, the notion of “pure” governmental functions implicit in separation of powers formalism remains a fantasy. “Executive” administrative agencies adjudicate cases and write rules; legislatures hold hearings and pass private bills; and courts both make law and resolve disputes.

Nevertheless, it is worth sounding a note of caution. The urge to transfer new functions to successful institutions is an understandable one for constitutional designers. The prestige of constitutional courts in general, their reputation for neutrality, and their reliance on political legitimacy as the primary mechanism for enforcement of their decisions, creates an incentive to give them complex political problems to resolve. There is, however, a risk that constitutional courts will be drawn into inherently unwinnable zero-sum conflicts, which require deft maneuvering and skillful action. In new democracies, at least, it is not obvious that the courts themselves will always be up to the task.

## Notes

- <sup>1</sup> On correction as a key determinant of discretion see Cooter and Ginsburg (1996).
- <sup>2</sup> I recognize that these powers are only “ancillary” if one considers judicial review to be the central function of constitutional courts.
- <sup>3</sup> Luis Lopez Guerra, *Conflict Resolution in Federal and Regional Systems*, Venice Commission paper CDL-JU 24, 21 February 2002, available at [Hwww.venice.coe.int/docs/2002H](http://www.venice.coe.int/docs/2002H). The distinct nature of conflict resolution is evident in constitutions that have special procedures for resolving conflicts of competence. See, e.g., Constitution of Austria, art. 138c; Basic Law of Germany, arts. 93.3 and 93.4; Constitution of Spain, arts. 161.1 and 161.2. Occasionally, provisions for multiple lawmakers are utilized in constitutional text with regard to specific territories as a means of ensuring their acquiescence to central authority. In Finland, for example, the Supreme Court can determine conflicts between the central state and the Aland Islands. The Bosnia-Herzegovina constitutional text similarly gives the Court competence to resolve disputes between the two geographic entities. Some constitutions have special procedures for resolving conflicts of competence. Austrian Constitution, art 138c, German Basic Law, arts 93.3 and 93.4, Constitution of Spain, arts. 161.1 and 161.2.
- <sup>4</sup> 198 U.S. 45 (1905).
- <sup>5</sup> See e.g., Constitution of Bosnia/Herzegovina (1995), Constitution of the Chechen Republic (1992) art. 65; Constitutional Court Act of Russia, art. 9.
- <sup>6</sup> See, e.g., Constitution of the Republic of China, as amended (1997); Basic Law of Germany (1949), art. 21(2); Constitution of Bulgaria (1991), article 149(5).
- <sup>7</sup> See, e.g., Constitution of Bulgaria (1991), art. 149(8); Constitution of Hungary (1949), art. 31(a); Constitution of Mongolia (1992), art. 35(1); Basic Law of Germany (1949), art. 61.
- <sup>8</sup> See, e.g., Constitution of France (1958), art. 58-60, Basic Law of Germany (1949), art. 41(2); Constitution of Lithuania (1992), art 105(3)(1).
- <sup>9</sup> See Rules Enabling Act, 28 U.S.C. § 2072 (1994); Pfander (2001).
- <sup>10</sup> 28 U.S.C. § 591.
- <sup>11</sup> art. 93.
- <sup>12</sup> Ludwikowski (1993). The Constitution was passed in 1995 without these provisions.
- <sup>13</sup> Constitution of South Africa (1997), art. 144.
- <sup>14</sup> Constitution of Armenia (1999), art. 83.
- <sup>15</sup> Constitution of Thailand (1997), § 180.
- <sup>16</sup> Constitution of Thailand (1997), § 219.
- <sup>17</sup> Constitution of Thailand (1997), § 142 (referring to §§ 137 and 139).
- <sup>18</sup> Constitution of Thailand (1997), § 47 para. 3.
- <sup>19</sup> The use of deadlines in this type of review is slightly at odds with the rule of law imagery underlying constitutional court power. The court finds that legislation violates the constitution, but lets it stand for a designated period. Those affected by the legislation will be treated as constitutionally bound one day, and not bound a day later after the deadline. Clearly this type of system is a pragmatic recognition of the dialogue phenomenon.

- <sup>20</sup> Kommers 1997 at 217–24. These were the *Socialist Reich Party Case*, 2 BverfGE 1 (1952), concerning a neo-nazi party and the *Communist Party Case*, 5 BverfGE 85 (1956).
- <sup>21</sup> BBC Monitoring Service, 29 Feb., 2000.
- <sup>22</sup> A related role is to determine disqualification of legislators. See, e.g., Constitution of Bulgaria (1991), art. 72.
- <sup>23</sup> Sometimes this is an appeals jurisdiction, as in Hungary where the court rules on appeals from the National Electoral Commission on the legality of particular questions subject to referenda.
- <sup>24</sup> As this chapter was going to press a high profile dispute was unfolding in the Ukraine in which the country's supreme court over-turned a disputed election.
- <sup>25</sup> Constitutional Court Decision 31/2543 (2000).
- <sup>26</sup> 531 U.S. 98 (2000).
- <sup>27</sup> 531 U.S. 98 (2000).
- <sup>28</sup> *Bush v. Gore*, 121 U.S. at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).
- <sup>29</sup> I should state that I am not offering a defense of *Bush v. Gore* (cf. Posner 2001). I am not at all convinced, as Richard Posner seems to be, that the consequences of continued indecision would necessarily be grave. The Court was not the only source of a focal point. Indeed, one of the important features of self-enforcing focal points is that they can come from *many* external sources—anything that can change expectations about what the other party will do can become a focal point. My argument is not a normative one, but rather a functional attempt to understand why the decision worked as a positive matter. Viewing *Bush v. Gore* as a coordination problem may in part explain why it is that the court's legitimacy as an institution was affected only very slightly by the decision (Kritzer 2001; Clayton 2002, 80).
- <sup>30</sup> Decree No. 79 of 23 August 1991; Decree No. 90 of 24 August 1991; and Decree No. 169 of 6 November 1991.
- <sup>31</sup> The legal grounds of the case were complicated, and better elaborated elsewhere. Suffice it to say that the case featured some bizarre arguments, such as when Yeltsin's team argued that the decree to ban a political association was legal under a 1932 Stalinist decree that permitted the executive to undertake such action. See generally AHDIEH 1997.
- <sup>32</sup> In fact, the decree never materialized. The Court thus issued an advisory opinion.
- <sup>33</sup> Decree No. 1400 of 21 September 1993 and No. 1612 of 7 October 1993.
- <sup>34</sup> Ahdieh, 1997, 149; Pashin 1994.