

## The Global Spread of Constitutional Review

Tom Ginsburg, University of Chicago Law School  
*Draft* for OXFORD HANDBOOK OF LAW AND POLITICS  
(Keith Whittington and Daniel Keleman, eds., 2008).

Constitutional review, the power of courts to strike down incompatible legislation and administrative action, is an innovation of the American constitutional order that has become a norm of democratic constitution-writing. Whereas before World War II, only a small handful of constitutions contained provisions for constitutional review, as of this writing, 158 out of 191 constitutional systems include some formal provision for constitutional review.<sup>1</sup> Some political systems, such as the United States, have developed vigorous constitutional review even without an explicit textual mandate. How did this institution, whose democratic foundations are so often questioned in its birthplace, become a norm of democratic constitution writing?

The spread of constitutional review has both ideational and institutional underpinnings. Constitutional review is closely associated in the popular mind with what has been characterized as the most important idea of the twentieth century, the notion of human rights (Henkin 1990). But political scientists looking at constitutional review have emphasized its origin in a functional need for dispute resolution. This essay traces the spread of constitutional review and evaluates the various political explanations for the establishment, development and spread of the institution, emphasizing the mutually reinforcing roles of ideas and institutions. The essay also suggests lines for future inquiry in the burgeoning field of comparative constitutional studies.

### Three Waves

#### *The Founding*

Although conventionally traced back to John Marshall's famous decision in *Marbury v. Madison* (1803), the practice of judicial review was well known to the earlier colonial governments (Snowiss 1990; Marcus 1995; Rakove 1997; Treanor 2005). Underpinning the practice were a number of distinct ideas that came together around the time of the American Revolution. One crucial background idea drew on Judeo-Christian notions of higher law (Cappelletti 1989). If a normative system divides rules into higher law and lower law, then there is an inherent need to limit lower laws that conflict with higher principles. Another crucial idea was the Lockean notion of government as social contract, so that citizens conceived of government as a bearer of duties and themselves as bearers of rights. If government was in a contract with its citizens, then citizens ought to be able to enforce the contract. This seemed even more natural when the contract was embodied in a written constitution, one of the innovations of the American founding. These three

---

<sup>1</sup>Seventy-nine written constitutions had designated bodies called constitutional courts or councils. Another sixty had explicit provisions for judicial review by ordinary courts or the supreme court. Finally, a small number of constitutions (China, Vietnam, and Burma) provide for review of constitutionality by the legislature itself. This data comes from the *University of Illinois Comparative Constitutions Project*, available at [netfiles.uiuc.edu/zelkins/constitutions](http://netfiles.uiuc.edu/zelkins/constitutions)

ideas of higher law, the social contract and the written constitution all contributed to the notion of constitutional supremacy in the early American milieu.

Simply accepting that the constitution is supreme, however, does not itself dictate a precise institutional mechanism for ensuring supremacy in practice. Here judges drew on an institutional legacy distinct to the Anglo-American legal tradition, for common law judges had established a long tradition of institutional autonomy in England. Autonomy is not itself supremacy. Indeed, Lord Coke's opinion in *Bonham's Case*,<sup>2</sup> calling on judges to overturn laws that were contrary to common law and reason, had not been followed during the ascendancy of Parliament in seventeenth century Britain. But the natural law notions embodied in Coke's opinion were embraced by young American lawyers, who naturally had less respect for the notion of *British* parliamentary supremacy. The long tradition of institutional autonomy and the natural law overtones of common law adjudication gave the judges a resource to become the guardians of higher legality in the newly independent United States.

Judicial review thus originates as an expression of Anglo-American natural law tradition in an age of positive legislation; it could not or at least did not emerge in the same manner in the Islamic, Chinese or Romanist political-legal traditions. The Islamic tradition had a strong emphasis on religiously-rooted natural law constraints on temporal rulers, but lacked a general theory of legislation (Shapiro 1981) and so avoided the problem of lower law in conflict with divine law. The Chinese tradition, on the other hand, had a theory of legislation but no notion of institutional constraint on the Emperor, who stood at the center of the cosmological system (Ginsburg 2003).

The above account explains the necessary ideological underpinnings of constitutional review, but not the particular details of its emergence in the late eighteenth century. One set of political accounts of the origin of judicial review emphasizes game theory and the particular strategic constraints on Marshall and Jefferson in the context of *Marbury* (Clinton 1989, 31-42; 1994; Epstein and Knight 1998, 151- 153; Knight and Epstein 1996). Marshall, in deciding whether to order Jefferson to deliver a commission he did not want to deliver, faced uncertainty about the prospects of compliance. Jefferson too faced uncertainty with regard to reactions of other political actors to his various possible responses to Marshall. This set up a game theoretic situation in which alternative outcomes might easily have resulted. Marshall could have declined to claim the power of judicial review, or deliver it stillborn by ordering an action that would generate presidential defiance. Instead, Marshall's decision, to decline to order the delivery of *Marbury's* ill-fated commission but to establish judicial review, fit the strategic logic of the situation and established a new institutional equilibrium.

This view of *Marbury* as central is challenged somewhat by Graber (1999) who takes a more gradualist political approach to constitutional review, arguing that it was not until the election of the more moderate Madison that Marshall could truly issue the key decisions empowering the Court. Graber's account emphasizes context and long-term historical interactions among various branches in establishing the practice of review, rather than a single great case.

Another series of accounts emphasizes the federal logic of judicial review in the early United States (Shapiro 1992; 1999; Rakove 1997; Ackerman 1997). There are two basic rationales or complementarities between federalism and judicial review. First of all,

---

<sup>2</sup> 8 Coke Reports 114 (1609-1610).

whenever there are two lawmaking bodies or levels with different lawmaking jurisdictions, there is the potential for conflicts over jurisdiction. A neutral third body can serve both levels of government in resolving these disputes as they arise (Shapiro 1981). Indeed, federal systems would seem to require some sort of mechanism for resolving jurisdictional disputes, and the affinity of judicial review with federalism is illustrated by the large number of federal systems with some form of judicial review. This branch of federalist logic is structural and functionalist in character, emphasizing the need to deal with inevitable disputes in countries with complex political structures and multiple lawmakers.

The second complementarity between federalism and judicial review is related to free trade. In a free trade system with multiple lawmakers, states face a collective action problem with regard to their own legislative powers. There is the threat that each state will put up protectionist barriers. If every state does so, then trade will not be free at all. States thus have a problem committing to a free trade system on their own. A written constitution with a neutral body in the form of a court that can evaluate state legislation serves can help make states' commitments to free trade federalism more credible (Qian and Weingast 1997). Indeed, the early history of the United States Supreme Court illustrates this logic, focusing as it did on consolidating national power.

These functionalist accounts (game theory, federalism) could be used to develop a theory of the spread of constitutional review. Presumably the logic in the founding case might have something to do with later cases. Outside the United States, constitutional review was rarely provided for and even more rarely utilized before World War II. Norway's Supreme Court had the power but refrained from exercising it. (Slagstad 1995; Smith 2000). Portugal introduced judicial review in 1909 (Vanberg 2005:10). The initial polities with active judicial review were indeed all common law federal polities, namely the United States, Canada and Australia.<sup>3</sup> Mexico developed a form of constitutional review, the *amparo* suit, which restricted the remedy for unconstitutionality to individual cases; at times in its early history, *amparo* cases focused on federal-state

Affinities between constitutional review and federalism, as well as free trade, may have some power in explaining dynamics of constitutional review outside the founding case (especially in the second wave case of the European Union). The federalist account suggests that one reason constitutional review was relatively limited before the twentieth century was that there were relatively few federalist systems. However, the adoption of constitutional review after World War II in so many countries without federalism or internal problems of committing to free trade suggests that these dynamics may be at best sufficient but not necessary conditions for its establishment.

### *The Second Wave*

The second wave of judicial review began in earnest with the development of Hans Kelsen's model of constitutional review, originally embodied in the Austrian constitution of 1920. This model rested on a strong theoretical orientation of judges as subordinate to the parliament. Therefore, constitutional interpretation needed to be done by a designated body outside of the ordinary judicial power. This led to the creation of a special Constitutional Court to safeguard the constitutional order. The Austrian case seems to fit

---

<sup>3</sup> In the Canadian example, much of the early judicial review was exercised by the Privy Council in London. See Bednar et al, 2001: 246-49.

the federalism logic of constitutional review, for in its original formulation it only had jurisdiction to resolve jurisdictional disputes among different levels of government.

This model of a designated constitutional court became the basis of the post-World War II constitutional courts in Europe. Though many mistakenly assert that most European countries have designated constitutional courts, in fact there were only five of the Kelsen model in Western Europe: Austria, Germany, Italy, Portugal and Spain. It is no accident that these are the post-fascist countries: the conventional account traces these developments to a new post-war awareness of rights and natural law limitations on the power of legislatures (Cappelletti 1989). The courts were adopted along with constitutions that had extensive rights provisions, and constitutional review became associated with protection of rights.

Designated constitutional courts make a good deal of sense in new democracies where the ordinary judiciary has low status or capacity, as in post-fascist and later in post-communist contexts. This contrasts with the founding case of the early nineteenth century United States, when John Marshall was able to draw on the stock of legitimacy in the ordinary courts of the common law tradition to explain how it was only natural that the courts possessed a power to disregard statutes that contradicted constitutional requirements (Shapiro 1999, 211).

Outside Europe, the wave of decolonization and constitutional reconstruction led other countries to adopt constitutional review. India's new democracy adopted a model of judicial review in which the Supreme Court had a carefully circumscribed power of review. Japan's American-drafted constitution also contained provision for judicial review on the American model. In these and other cases, constitutional review spread to new democracies where rights traditions were relatively underdeveloped.

These second wave institutions varied in their levels of activity, but several courts emerged as major forces in their societies. Over time, the Indian Supreme Court transformed the original constitutional scheme to greatly expand its power (Baxi 1980). Volcansek (1994; 1995; 2000) has emphasized the role of the Italian Court in striking down pieces of fascist legislation one at a time, maintaining the legitimating fiction that the Italians had won the War. Germany proved to be exceptionally fruitful soil for constitutional review, combining as it did a federal system with a post-fascist yearning for rights. Germany's Constitutional Court is arguably the most influential court outside the US in terms of its institutional structure and jurisprudence (Ackerman 1992, 101-04; Kommers 2001; Vanberg 2005).

Separately, Charles deGaulle in France was developing a distinct model of constitutional review. Frustrated by the ineffectual parliament in the Fourth Republic, De Gaulle's prerogative was to set up a separate realm of executive lawmaking. De Gaulle's constitution created a new body, the *Conseil Constitutionnel*, which was empowered to conduct only pre-promulgation, abstract review (Stone 1992). Fearing encroachment by the legislature on the executive, DeGaulle allowed the *Conseil* to hear challenges to unconstitutional legislation before it took effect. The orientation was less toward the protection of rights than toward the maintenance of divided and separated powers. Access to constitutional review was limited to the executive branch, leaders of the legislature, and certain other designated officials, and the institution was designed to constrain the legislature on behalf of the executive rather than on behalf of citizens directly. As in the earlier federalist cases, constitutional review was a functionalist

response to a division of powers, but it was a horizontal division of powers rather than a vertical one. Both horizontal and vertical divisions of powers were at play in the establishment and expansion of supranational review in the European Union (Hirschl 2005; Kelemen 2004; Stone Sweet 2004; Conant 2002; see Alter in this volume).

Even in polities without explicit constitutional authorization for constitutional review, courts were in some instances able to repeat Marshall's trick in *Marbury* and claim the power for themselves. Israel was the paradigmatic example here; its assertions were ultimately blessed by the passage of Basic Laws that explicitly authorized judicial review (Jacobsohn 1993, Hirschl 2000). The French *Conseil* read the Declaration of the Rights of Man, incorporated into the preamble of the French constitution, into a judicially enforceable set of rights, greatly expanding its bases of review (Stone 1992).

These were the second wave cases of constitutional review that were by and large successful, and they generally involved countries that were democratic and industrialized (with India a notable exception from the latter condition). In more unstable or authoritarian political environments, courts were more constrained. One pattern saw courts falling on their swords, in what Helmke (2002, 2005) has called the logic of "strategic defection" against political elites. Strategic defection is motivated by the desire of judicial actors to maintain institutional capital when they think regime change may occur. By openly challenging elites in the endgame of authoritarianism, courts and judges risk the imposition of short-term costs in exchange for mid-term legitimacy. A similar dynamic has been observed in Pakistan (Newberg 1995), Indonesia (Bouchier 1999), and might explain recent moves in Egypt (Moustafa, forthcoming). This move preserves the institutional capital of the judiciary after the eventual return to democracy. It may also itself play a role in hastening democracy, as judges can signal to other actors that the end of the regime is nigh, provide institutional resources for regime opponents through supportive decisions, and make judicial independence a political issue around which to organize.

These various institutional dynamics are important for understanding and evaluating the overall success of constitutional review. The postwar spread of the international human rights movement, with its normative attachment to judicial forms of protection, meant that constitutional review was seen as an important bulwark against arbitrary government, and courts were able to draw on this legitimacy in constraining the state. No doubt the actual performance of review varied, depending on local political circumstances, but the successful courts were emulated and became an ideal to which others aspired.

### *The Third Wave*

The third wave of democratization (Huntington, 1991), and particularly the fall of the Berlin Wall, corresponded with a new wave of constitution-writing. This led to the creation of a whole new set of constitutional courts. Indeed, every post-Soviet constitution has some provision for a designated constitutional court, save Estonia which adopted the American model (Ishiyama Smithey and Ishiyama 2000, 2002; Schwartz 2000). Elsewhere, countries in Africa and Asia, from Mali to Korea, also created new courts or reinvigorated old ones (Ginsburg 2003). The result is the current situation in which the vast majority of constitutions have some provision for judicial review, either by a designated constitutional court or the ordinary court.

Clearly the rights story was an important part of the spread of the institution in the post-Soviet bloc countries. Judges were closely identified with constraining government and protecting rights. Indeed, the inherent legitimacy of the constitutional judiciary was such that in post-apartheid South Africa, the Constitutional Court was entrusted with authority to approve the draft Final Constitution, and its initial rejection of the draft did not provoke significant negative reaction. Constitutional review was seen as an inherent and valuable constraint on democracy, and the so-called counter-majoritarian difficulty was hardly raised.

A final point worth noting is the spread of quasi-constitutional review to the international system, a topic to be covered by other chapters in this Handbook. When a NAFTA Tribunal reviews national legislative or administrative measures for conformity with Chapter 11, or when an ad-hoc arbitration tribunal does the same acting under a Bilateral Investment Treaty, they are evaluating government action and legislation for conformity with higher law. They do so upon direct application from a private party, unlike the traditional state-to-state mechanisms of public international law. These tribunals are subject to pressure from interest groups that seek to file *amicus* briefs. When the tribunals find treaty violations, they typically produce an order to modify the legislation or administrative action, or threaten externally imposed costs. While they do not have the authority to strike the legislation, neither as a formal matter do certain supreme courts exercising constitutional review. These developments might herald a fourth wave, though it is too early to say how robust these practices will be in the face of legitimacy concerns.

In summary, constitutional review has evolved from an institution primarily directed at enforcing structural provisions of constitutions, such as federalism, to a close identification with rights and democracy. It has served to help spread liberal and democratic values to new constitutional cultures. This remarkable institutional success begs for explanation. We now consider various political accounts of the proliferation of constitutional review.

## **Explaining Institutional Proliferation**

### *Federalism and Rights*

We can characterize the traditional theories for the spread of constitutional review as institutional-functional or ideational in character. Of course, the various theories are hardly mutually exclusive. In some cases, they clearly reinforce one another, such as the iconic German case that involved both federalism and rights rationales. It is likely that the ultimate political account explaining constitutional review has both ideational and institutional elements (see also Ferejohn 2002: 55-61).

Ideational accounts of the early development of judicial review have to grapple with the fact that the founding case did not much emphasize rights in its first century of existence. Shapiro (1999) discusses what he calls the “rule of law” theory, suggesting that judicial review will flourish in countries with stronger allegiances to judicial neutrality. Judicial review is more likely in cultures where judges are associated with the liberal ideal of limited government. Because the English common law tradition emphasized this idea, English colonies were particularly receptive environments for judicial review.

While the federalism and rule of law hypotheses look quite powerful in the founding case of the United States and its common law relatives such as Australia, neither of these accounts seems to be wholly adequate given the adoption of constitutional review as a norm in other countries after World War II. We then turn to a second ideational account, the “rights hypothesis” (Shapiro 1999:200), which focuses on the growing national and international concern with individual rights. A rights ideology, evident in advanced industrial economies since World War II and embodied in international human rights instruments, has spread globally. The spread of a rights culture and rights ideology, accompanied by support structures (Epp 1998) leads to greater demand for constitutionalization. The long association of courts with protecting individual rights has made judicial review the institution of choice to protect these crucial interests. Constitutional review in this account is a dependent variable with demand for rights as the key independent variable.

An early and formalistic version of this hypothesis suggested that the written constitution was dispositive. That is, judicial review would be greater in countries that had written rights provisions in the constitution (such as India and the United States) than in countries with unwritten constitutions (such as England). Smithey and Ishiyama (2002), in a study of Eastern Europe, did not find a positive relationship between formal rights and judicial review, suggesting that a rights culture is a more informal and ideological phenomenon.

Shapiro (1996; 1999) roots the growth of rights ideology in increasing complexity of governmental processes. Demand for judicial review stems from common conditions in advanced industrial societies, namely distrust of the ubiquitous and essential technical bureaucracies. Citizens demand protection from all kinds of harms, but this entails delegation of immense power to unelected government experts. Citizens naturally fear unchecked governmental power. Judges, in Shapiro’s view, become the generalist guardians of the public interest, by demanding reasons for administrative and legislative action, by enforcing participatory rights, and by ensuring transparency. Sometimes these judicially-imposed constraints are framed in constitutional terms.

Shapiro sees this as a strong, if not inevitable, trend that triggers a dialectic. If courts succeed they generate greater demands for constraining government, leading them to become, inevitably, deeply involved in policymaking. Shapiro is deeply skeptical about the possibility of courts limiting themselves to the “proper” level of constitutional review. Courts making policy in turn may generate a backlash from legislative and executive actors who charge unelected judges with overstepping their mandates. There is a kind of grammar to constitutional contestation, but also dynamics of limitation and constraint that operate over time (Vanberg 2003). The driving factors, however, are cultural and ideological.

#### *Beyond Rights: The Domestic Logics of Constitutional Review*

However powerful the role of rights may be in creating demands for judicial review, rights ideology alone simply cannot explain the patterns of institutional diffusion that we observe. The rights hypothesis is a demand-side theory that posits judicial review as an institutional response to social forces. There are, however, evidentiary problems with this account. The level of demand for “rights” is difficult to assess across countries.

Furthermore, courts play an important role in *generating* demand for rights through their decisions. Disentangling demand from judicial supply of rights is difficult.

Demand side theories also tend to be underspecified. They neither account for variation in institutional design of constitutional review, nor for the different levels of activism that various courts engage in. They have trouble dealing with forms of constitutional review, such as the French, in which individuals do not have access to make claims about rights-protections. And they cannot explain the particular timing of the adoption of constitutional review (Hirschl 2000, 99-100).

To examine variation in form and substance, an institutionalist approach is more helpful. Institutionalism assumes that institutions “matter” and that the variety of institutional structures is not random (March and Olsen 1984; Clayton and Gillman 1999). Both the existence and operation of constitutional review are to be explained and not assumed by political analysis. A recent set of theories roots constitutional review in *domestic* political logics, which in turn suggests more theoretical payoff in terms of explanatory power to account for variation.

The basic institutional story begins with political fragmentation (Ferejohn 2002). As the discussion of waves of judicial review illustrated, several accounts of the emergence of judicial review are built on the fragmentation of power vertically (as in federalist polities) or horizontally (as in presidential systems like the United States and France). Political fragmentation creates the potential for conflict among different institutions and therefore demand for a third party to resolve disputes (Shapiro 1981.) Since this is what courts do, they are a logical place to turn when disputes concern constitutional allocation of policymaking power.

Fragmentation also creates the potential for political gridlock as institutional veto players make it difficult to shift policies from the status quo. In turn, this expands the space for judicial policymaking. When the political system cannot deliver policies because of gridlock, those who seek to advance particular interests will turn to the courts to obtain those policies. Constitutional review is a particularly entrenched form of judicial policymaking that may be utilized in such instances.

This basic institutional story has been supplemented in recent years. Drawing on a theory of judicial independence put forward by Ramseyer (1994), Ginsburg (2003) argues that the spread of democracy is a factor in the spread of constitutional review. Judicial review, he argues, is a solution to the problem of political uncertainty at the time of constitutional design. Parties that believe they will be out of power in the future are likely to prefer constitutional review by an independent court, because the court provides an alternative forum for challenging government action. Constitutional review is a form of political *insurance* that mitigates the risk of electoral loss. On the other hand, stronger political parties will have less of a desire for independent judicial review, since they believe they will be able to advance their interests in the post-constitutional legislature. Ginsburg provides some large-n and case study evidence for this proposition that the design and functioning of courts reflects political insurance and is related to features in the party system (see also Stephenson 2003; Chavez 2004).

Hirschl (2004) offers a complementary political account of judicialization that he calls *hegemonic preservation*. His view is that judicialization, including establishment of constitutional review, is a strategy adopted by elites that foresee themselves losing power. In the final stages of their rule, it makes sense to set up courts to preserve the bargains



embodied in legislation and constitutionalized rights. This account has the great strength of shedding light on the *timing* of the adoption of review. It fits the classic understanding of the American experience establishing judicial review, in which the Federalists spent the months after losing the 1800 election putting their supporters into the courts. Hirschl extends the account to judicialization in other common law jurisdictions, including Canada, Israel, New Zealand and South Africa. More recently, the last parliamentary session of the Palestinian Authority before the takeover of Hamas passed a law establishing a constitutional court empowered to strike legislation, a conspicuous case of hegemonic preservation (though the immediate response of the new parliament was to supersede this law. Mexico's empowerment of its Supreme Court in the waning years of PRI rule may also make sense as a case of hegemonic preservation, and certainly fits the insurance model (Finkel 2001; Magaloni 2004).

Hirschl and Ginsburg's theories both rely on intertemporal electoral uncertainty as the primary theoretical driver for the adoption of constitutional review. Hirschl's hegemonic preservation seems to make strong assumptions about the information available to elites; but it has the virtue of accounting for situations where a declining power adopts the institution that then ends up hastening the party's demise. Ginsburg's insurance model is broader, as it can account for the support for the establishment of constitutional review by new, non-hegemonic, political parties (as in Eastern Europe) when they think they may not win the post-constitutional election. Both, however, are political theories that are not purely functional in character, but consider the party system and the "political vectors" (Hirschl 2000, 91-95) of establishing review.

These political theories also link, with the literature on democratization. Declining hegemony and electoral uncertainty are the core of the democratization dynamic. While the focus of the new political accounts of judicial review is on domestic politics, they suggest that a primary cause for the spread of the institution is the spread of democracy.

Both insurance and hegemonic preservation theses, then, are rooted in exogenously specified domestic political incentives. Institutions are the dependent variable. One area in which further work is needed concerns the feedback effects of these institutional choices. When adopted by a declining authoritarian regime, for example, an independent constitutional court can hasten the regime's demise through strategic decision-making and diffusing political power. Ginsburg (2003) makes the point that, as political insurance, constitutional review lowers the potential costs of losing for the electoral losers, making it more likely that they will respect the constitutional order even when out of power. Constitutional review is not only reinforced by democracy, but it reinforces democracy.

In general, the dominant counter-majoritarian paradigm has been supplemented in recent years through work elucidating the majoritarian political functions of courts (Whittington 2005; Hofnung and Dotan 2005). Whittington (2005) discusses judicial activism by a relatively friendly court and notes that courts can help overcome obstacles to direct political action. The entrenchment function emphasized by Ginsburg and Hirschl, in other words, is not the only role for courts. This suggestion has not been adequately assimilated in comparative work (but see Hofnung and Dotan 2005).

*New Directions*

The comparative study of constitutional review is just beginning. This section considers issues that deserve greater attention as the field goes forward. One set of cases that has not adequately been theorized or studied concerns the establishment of constitutional review in authoritarian contexts. These authoritarian cases, in which review serves functional needs in the political system, clearly have little to do with the rights hypothesis, and are better accounted for by the political theories of judicial empowerment. For example, Iran's Council of Guardians exercises review for Islamicity and has served to constrain the democratically-elected political institutions in the Islamic Republic. This draws on long religious traditions of Islamic constraint on the state, but with the twist that it now serves to preserve a particular faction and is used by the illiberal elements of the regime to maintain control (Shambayati 2004). The basic idea of using the courts to limit a competing faction because of political uncertainty seems to fit this case.

Barros (2003) develops a fascinating account of the role a constitutional court can play in an authoritarian regime, with examples from Chile under the Pinochet dictatorship (1973-1990). Barros notes that the junta was not a unitary actor, and faced a need for internal coordination among the different branches of the military. This coordination role was effectively played by the new constitutional court set up under Pinochet. This account resonates with much of the division of powers argument, illustrated by the federal cases and Fifth Republic France, but suggests an interesting extension: even informal divisions of power in an oligarchy can generate a role for constitutional review.

Another area for future work is to further examine the underexplored ideological reasons for the adoption of legal forms of political restraint. That is, the political theories of constitutional review explain why it is that temporally insecure political agents may wish to constrain future political institutions, but they do not provide a complete explanation for why *courts* are the institution that is chosen. Other minoritarian institutions, such as bicameralism and supermajority requirements, might be able to play the same role. We as yet have no thorough account of the institutional tradeoffs in the process of constitutional design. No doubt there is a kind of economy of possible constraining devices, but we have little awareness of the tradeoffs that constitutional designers engage in, or how various institutions supplement and complement each other.

To answer the question of why courts have become the focal institutions for constitutional designers, ideational elements are likely important. One prominent theory of institutional change tracks the diffusion of ideas and institutions to countries that have similar characteristics such as language, geographic region, legal tradition, and ethnic connections (Elkins and Simmons 2005). Diffusion emphasizes transnational and ideational elements rather than the domestic political logics of the new accounts of constitutional review.

While no general diffusion-based study has yet been undertaken to examine the spread of constitutional review, casual empiricism suggests there is a good deal of diffusion or institutional isomorphism with regard to structures of constitutional review. For example, nearly every country with a "constitutional council" exercising only abstract pre-promulgation review is a former French colony. After a wave of new constitutions in Eastern Europe, the German model of a designated constitutional court appears to be the dominant form of constitutional review, although the scope of powers vary with local political conditions (e.g. Solyom and Brunner 2000). An account that combines institutional considerations with some of the recent diffusion-based approaches

may be a more fruitful direction than either approach alone. Isolating the factors that push towards adoption or retardation of particular elements of institutional design would advance our understanding a good deal.

Even diffusion studies do not always account for the particular pathways or processes by which institutions are adopted. Casual observers attribute a good deal of weight to the role of foreign governments and advisors in the process of constitutional design (Boulanger 2003, 13). We have very few micro-studies of constitutional design processes, and so the association of constitutional review with particular foreign influence or advice remains speculative. We do, however, observe a good deal of constitutional borrowing among courts when deciding particular cases, suggesting that the operation if not the adoption of constitutional review is increasingly a transnational process.

### **Measuring Performance**

To the extent that constitutional review spreads because of its perceived success, the operation of constitutional courts must be part of our inquiry. Why is it that some constitutional courts fail and others succeed?

Comparative work on variations in performance is hampered by lack of a common metric of judicial power. While courts may look alike, each is embedded in a particular institutional environment. Evaluating failure is relatively easy, for there is typically evidence of a conflict between courts and other branches of government; but examining success is harder conceptually. All in all, the variables of number and importance of cases and compliance with decisions do seem to be indicia of judicial power. But a very powerful court may decide relatively few cases because legislators already accommodate its preferences. Furthermore, a court with very broad standing rules might have a large volume of cases, but a relatively small number of valid claims, so it may have a lower rate of striking legislation. One cannot therefore rely on simple strike rates as a metric of success or power (cf. Herron and Randazzo 2003).

While in the American context, many scholars utilize the attitudinal model to study the supreme court, the strategic model has been most successful in explaining the success of courts abroad. Attitudinalism is a particularly problematic method for comparative work because it depends on coding separate opinions of individual judges and linking them to their appointing authorities. Because of variations in procedures for appointing judges to constitutional courts and the fact that many courts issue single 'consensus' opinions, rather than signed majority opinions and dissents, the attitudinal model is unlikely to work as a basis for comparative research.

We are left with the strategic approach. Any political account of courts assumes that they operate within political constraints, and that these constraints can vary across time and space. Much recent work draws on this insight to elucidate the conditions under which courts can succeed or fail. Whether explicitly or implicitly utilized, the strategic model (Knight, Epstein, and Shvetsova, 2001; Ginsburg 2003; Vanberg 2005) underpins these accounts.

Further research is also needed into the interactions between constitutional courts, legislatures and governments, along with further theoretical refinement of effective strategies by courts. The strategic perspective implies some constraints on constitutional decision-making, as the other political actors retain means of punishing courts, reducing

jurisdiction, budget and powers. Consistent with this framework, Herron and Randazzo (2003: 434) find that presidential power is negatively associated with judicial review for the intuitive reason that concentrated executive power facilitates punishment of wayward courts. Iaeyczower and Spiller show that in Argentina, antigovernment decisions rise during periods of divided government in part because leaders have less ability to sanction courts. (Iaeyczower, Spiller and Tommasi 2002; Rosenberg 1992).

Vanberg's (2005) account of Germany emphasizes the importance of public support and transparency as crucial factors in a game of executive-judicial relations. Public support can insulate the constitutional court from criticism and counter-attack. Public support for constitutional review depends not just on structural factors such as access to the court but on a substantive ideology of rights. A public that demands rights protection will avail itself of a constitutional court more than a public that does not care about rights. Thus a rights framework, while it cannot explain the adoption of constitutional review on its own, does have some power to account for the operation of a particular court and its acceptance by the public.

Much work remains to be done in the comparative examination of constitutional review. The vast majority of studies to date have been country-specific, which is understandable given the particularities of each institutional context. But truly comparative work should become increasingly possible as national studies accumulate. Possible dimensions of comparison include the different functioning of courts in presidential and parliamentary systems; comparisons of situations wherein the court is the embodiment of a clear founding moment (Ackerman 1997) with more gradualist political transitions; and situations wherein the court itself takes the power of constitutional review or significantly expands it versus situations where the power is clearly granted in a constitutional text (Hofnung 1996). The connection of constitutional review to particular political cultures, or what might be called national styles of constitutional review (Ginsburg 2002) may also become apparent as more studies are concluded.

## **Conclusion**

From its origins in colonial America, constitutional review has become a global institutional norm. It has spread to nearly every democracy as well as a number of authoritarian regimes, and, increasingly, transnational contexts as well. Traditional political accounts of the spread of the practice, focusing on federalism and rights, no doubt identified some of the important dynamics, but have been refined by a richer set of theories that emphasize the interests of political actors in adopting constitutional review. These institutional explanations have advanced our understanding significantly and provided useful frameworks for understanding constitutional review in particular national contexts. But ideational factors which are often casually linked to the spread of constitutional review remain poorly understood and not adequately tested.

No doubt the future of constitutional review will be determined by the strategic dynamics of judicial power that have been observed in many national contexts. Judges will continue to decide central questions of social, political and economic life as matters of constitutional law. They will do so subject to constraints by external political forces. Judicial skill and daring will determine whether the judges are subjected to the various forms of punishment that politicians have at their disposal, and whether judicial review

can maintain its institutional reputation as a device of choice for constitution-drafters in the twenty-first century.

## REFERENCES

- Ackerman, B. 1992. *The Future of Liberal Revolution*. New Haven: Yale University Press.
- Ackerman, B. 1997. The Rise of World Constitutionalism. *Virginia Law Review*, 83: 771-97.
- Baker, R. 1971. *Judicial Review in Mexico: A Study of the Amparo Suit*. Austin: University of Texas Press.
- Barros, R. 2003. Pp. \_\_\_-\_\_\_ in J. Maravall and A. Przeworski, eds. *Democracy and the Rule of Law*. New York: Cambridge University Press.
- Baxi, U. 1980. *The Indian Supreme Court and Politics*. Lucknow: Eastern Book Company.
- Bednar, J., W. Eskridge, Jr., and J. Ferejohn. 2001. A Political Theory of Federalism. pp. 223-270 in J. Ferejohn, J. Rakove, and J. Riley, eds. *Constitutional Culture and Democratic Rule*. New York: Cambridge University Press,
- Boulanger, C. 2003. Beyond Significant Relationships, Tolerance Intervals and Triadic Dispute Resolution: Constructing a Comparative Theory of Judicial Review in Post-Communist Societies. Paper presented at Law and Society Association Meeting June 5-8 2003, Pittsburgh.
- Boulanger, C. 2003. Beyond Significant Relationships, Tolerance Intervals and Triadic Dispute resolution: Constructing a Comparative Theory of Judicial Review in Post-Communist Societies. Paper presented at Law and Society Association Annual Meetings, Pittsburgh, June 5-8.
- Bourchier, D. Magic Memos, Collusion and Judges with Attitude: Notes on the Politics of Law in Contemporary Indonesia. Pp. 233-52 in K. Jayasuriya, ed., *Law, Capitalism, and Power in Asia: The Rule of Law and Legal Institutions*. New York: Routledge, 1999.
- Burley, A.M. and W. Mattli. 1993. Europe Before the Court: A Political Theory of Legal Integration. *International Organization* 47: 41-76.
- Cappelletti, Mauro. 1989. *The Judicial Process in Comparative Perspective*. Oxford: Clarendon Press.
- \_\_\_\_\_. 1971. *Judicial Review in the Contemporary World*. New York: Bobbs-Merrill.

- Chavez, R. 2004. *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina*. Stanford: Stanford University Press.
- Clinton, R. L., 1994. Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of *Marbury v. Madison*. *American Journal of Political Science*. 38: 285-302.
- \_\_\_\_\_. 1989. *Marbury v. Madison and Judicial Review*. Lawrence: University of Kansas Press.
- Conant, L. 2002. *Justice Contained: Law and Politics in the European Union*. Ithaca: Cornell University Press.
- Elkins, Z. and Simmons, B. 2005. On Waves, Clusters and Diffusion: A Conceptual Framework. *Annals of the American Academy of Political Science* 598: 33-51.
- Epstein, L. & J. Knight. 1998. *The Choices Justices Make*. Washington, DC: CQ Press.
- Epstein, L., J. Knight, and O. Shvetsova. 2001. The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government. *Law and Society Review*. 35: 117-63.
- Ferejohn, J. 2002. Judicializing Politics, Politicizing Law. *Law and Contemporary Problems* 65: 41-68.
- Finkel, J. 2003. Supreme Court Decisions on Electoral Rules after Mexico's 1994 Judicial Reform: An Empowered Court. *Journal of Latin American Studies* 35: 777-799;
- Finkel, J. 2001. *Judicial Reform in Latin America: Market Economies, Self-Interested Politicians, and Judicial Independence*. Ph.D. Dissertation, University of California, Los Angeles.
- Ginsburg, T. 2002. Confucian Constitutionalism? Globalization and Judicial Review in Korea and Taiwan. *Law and Social Inquiry* 27(4):763-800.
- Ginsburg, T. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York: Cambridge University Press.
- Graber, M. 1999. The Problematic Establishment Of Judicial Review, Pp. 28-42 In H. Gillman & C. Clayton, eds. *The Supreme Court in American Politics*. Norman: University of Oklahoma Press.

- Halmi, G., editor. 2000 .The Constitution Found?: The First Nine Years Of The Hungarian Constitutional Review Of Fundamental Human Rights. Budapest: Indok-Human Rights and Information Documentation Center.
- Helmke, G. 2002. The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy. *American Political Science Review* 96: 291-303.
- Helmke, G. 2005. *Courts under Constraints: Judges, Generals, and Presidents in Argentina*. Cambridge: Cambridge University Press.
- Henkin, L. 1990. *The Age of Rights*. New York: Columbia University Press.
- Herron, E.S. and K.A. Randazzo. 2003. The Relationship Between Independence and Judicial Review in Post-Communist Courts. *Journal of Politics* 65: 422-38.
- Hilbink, E. 2002. An Exception to Chilean Exceptionalism? The Historical Role of Chile's Judiciary and Prospects for Change, in S. E. Eckstein and T. Wickham-Crowley, eds., *The Politics of Injustice in Latin America*. Berkeley: University of California Press.
- Hirschl, R. 2000. The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions. *Law and Social Inquiry*, 25: 95-139.
- Hirschl, R. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge: Harvard University Press.
- Hirschl, R. 2005. Preserving Hegemony? The Political Origins of the European Constitution. *International Journal of Constitutional Law*, 3: 269-91.
- Hofnung, M. 1996. The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel. *American Journal of Comparative Law* 44: 585-604.
- Hofnung, M. and Y. Dotan. 2005. Legal Defeats-Political Wins: Why Elected Representatives Go to Court. *Comparative Political Studies* 38: 75-103.
- Huntington, S.I. 1991. *The Third Wave*. Norman: University of Oklahoma Press.
- Iaeyczower, M., P. Spiller and M. Tommasi 2002. Judicial independence in Unstable Regimes: Argentina 1935-1995. *American Journal of Political Science* 46: 699-716.
- Ishiyama Smithey, S. and J. Ishiyama. 2000. Judicious Choices: Designing Courts in Post-Communist Politics. *Communist and Post-Communist Studies*. 33: 166-82.



- Ishiyama Smithey, S. and J. Ishiyama. 2002. Judicial Activism in Post-Communist Politics. *Law and Society Review* 36: 719-41.
- Jacobsohn, G. 1993. *Apple of Gold: Constitutionalism in Israel and the United States*. Princeton: Princeton University Press.
- Kelemen, R. D. 2004. *The Rules of Federalism*. Cambridge: Harvard University Press.
- Kommers, D. *The Constitutional Jurisprudence of the Federal Republic of Germany*. 2nd. Ed. Durham: Duke University Press.
- Knight, Epstein, and Shvetsova, 2001
- March, J. and J. Olsen. 1984. The New Institutionalism and Organizational Factors in Public Life. *American Political Science Review* 78: 734-49.
- Moustafa, T. forthcoming.
- Newberg, P. 1995. *Judging the State: Courts and Constitutional Politics in Pakistan*. New York: Oxford University Press.
- Qian, Y. and B. Weingast. 1997. Federalism As a Commitment to Market Incentives. *Journal of Economic Perspectives*. 11(4): 83-92.
- Rakove, J. 1997. *Original Meanings*. New York: Vintage.
- Ramseyer, J. M. 1994. The Puzzling (In)Dependence Of Courts: A Comparative Approach. *Journal of Legal Studies*. 23: 721-47.
- Rosenberg, G. 1992. 1992. Judicial Independence and the Reality of Political Power. *The Review of Politics*. Summer: 369-98
- Schwartz, H. 2000. *The Struggle for Constitutional Justice in Post-Communist Europe*. Chicago: University of Chicago Press.
- Shambayati, H. 2004. A Tale of Two Mayors: Courts and Politics in Turkey and Iran. *International Journal of Middle East Studies*.
- Snowiss, S. 1990. *Judicial Review and the Law of the Constitution*. New Haven: Yale University Press.
- Shapiro, M. 1981. *Courts*. Chicago: University of Chicago Press.
- Shapiro, M. 1992. Federalism, the Race to the Bottom and the Regulation-Averse Entrepreneur. In H. Scheiber, ed., *North American and Comparative Federalism*. Berkeley: Institute of Governmental Studies Press.

- Shapiro, M. 1996. *The Globalization of Judicial Review*. In H. Scheiber and L. Friedman, eds. *Legal Culture and the Legal Profession*. Boulder: Westview Press.
- Shapiro, M. 1999. *The Success of Judicial Review*. In S. Kenney, W. Reisinger & J. Reitz, eds., *Constitutional Dialogues in Comparative Perspective*. London: Macmillan, pp. 193-219.
- Slagstad, R. 1995. *The Breakthrough of Judicial Review in the Norwegian System*. In R. Slagstad and E. Smith, eds. *Constitutional Justice Under Old Constitutions*. The Hague: Kluwer Law International.
- Smith, C. 2000. *Judicial Review of Parliamentary Legislation: Norway as a European Pioneer*. Public Law
- Solyom, L. and Brunner, G. *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*. Ann Arbor: University of Michigan Press.
- Stephenson, M. 2003. "When the Devil Turns . . .": The Political Foundations of Independent Judicial Review. *Journal of Legal Studies* 32: 59-81.
- Stone, A. 1992. *The Birth of Judicial Politics in France*. New York: Oxford University Press.
- Stone Sweet, A. 2004. *The Judicial Construction of Europe*. New York: Oxford University Press.
- Treanor, W. M. 2005. *Judicial Review Before Marbury*. *Stanford Law Review* 58: 455-562.
- Vanberg, G. 2005. *The Politics of Constitutional Review in Germany*. New York: Cambridge University Press.
- Volcansek, M. 1999. *Political Power and Judicial Review in Italy*. *Comparative Political Studies*. 26: 492-509.
- Whittington, K. 2005. "Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court. *American Political Science Review* 99: 583-96.