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The Politics of Constitutional Review

Constitutional review – defined as the power of judicial bodies to set aside ordinary legislative or administrative acts if judges conclude that they conflict with the constitution – has emerged as an almost universal feature of Western-style democracy. The commitment to this institution has become so pervasive that it is now virtually unthinkable to draft a democratic constitution without providing for its inclusion. Whether in postfascist Spain, postapartheid South Africa, or postcommunist Eastern Europe, recent transitions to democracy have been transitions to *constitutional* democracy, including judicial oversight of the political process. As Mauro Cappelletti has observed, in much of the Western world, constitutional review has come to be understood as “the necessary ‘crowning’ of the rule of law” (1989:205).

The experiences of totalitarianism provided a natural impetus for this development. In writing his monumental survey of American democracy in the 1830s, Alexis de Tocqueville praised the role of the judiciary in the new political system, arguing that “the power granted to American courts to pronounce on the constitutionality of laws is yet one of the most powerful barriers ever erected against the tyranny of political assemblies” (1835/1988:103f.). Similarly, constitution writers following World War II, and again in the wake of the peaceful revolutions of 1989 in Eastern Europe, turned to courts armed with the power of constitutional review in the hope of creating effective limitations on the power of legislative majorities.¹

¹ See, for example, Konrad Adenauer’s remarks during the West German Constitutional Convention: “Dictatorship is not necessarily dictatorship by a single person. There is also dictatorship by a parliamentary majority. And we want protection against such dictatorship in the form of a constitutional court” (Verhandlungen des Parlamentarischen Rates, 2nd session, p. 25).

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And yet, Tocqueville's seemingly uncontroversial observation raises a critical question: *How can courts, and the judges who serve on them, constrain governing majorities in practice?* For governing majorities, constitutional courts often pose an unwelcome constraint on power and a potential threat to a majority's legislative program. Moreover, it is widely accepted that courts constitute, in Alexander Hamilton's well-known phrase, the "least dangerous" branch of government. In contrast to legislatures, which control the "purse," and executives, which control the "sword," courts enjoy few formal powers to enforce their rulings. Given their apparent weakness, how can courts manage (and have managed) to predominate in interactions with the more powerful branches? Under what circumstances will they fail to do so? And what are the broader implications for the nature of constitutionally constrained government? This book provides one answer to these puzzles and considers the implications of this answer for our broader understanding of constitutional review. Before outlining the argument in greater detail, we will consider several examples that highlight the difficult position courts occupy.

EXAMPLES

Example 1: The Crucifix Decision in Germany

In August 1995, the German Federal Constitutional Court (FCC) issued a decision on the constitutionality of a Bavarian school ordinance that required the display of a crucifix in public elementary school classrooms.² The requirement had been challenged by adherents of the nature philosophy of Rudolf Steiner, who argued that forcing their children "to learn beneath the cross" constituted a violation of the children's constitutional right to religious freedom, guaranteed under Article 4, Section 1 of the Basic Law: "Freedom of creed, of conscience, and freedom to profess a religious or non-religious faith are inviolable." In characteristically dry German legal language, the first two sentences of the court's ruling read:

1. The display of a cross or crucifix in classrooms of a public school, which has no denominational affiliation, constitutes a violation of Article 4, Section 1 of the Basic Law.

² Decisions of the FCC are published in serial format and are referenced by the volume and page number on which the decision appears. The *Crucifix* decision is BVerfGE 93, 1, indicating that it can be found in volume 93, page 1, of the court's decisions. All references to decisions by the FCC follow this convention.

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2. Article 13, Section 1, Sentence 3 of the School Ordinance for Elementary Schools in Bavaria is incompatible with Article 4, Section 1 of the Basic Law and void.

Within days, a storm of public protest against the decision erupted. Church leaders condemned the ruling as an attack on Germany's Christian heritage. Politicians, mostly affiliated with the ruling Christian Democrats, joined the chorus. Even the chancellor, Helmut Kohl, weighed in, calling the decision "incomprehensible." In a hastily arranged press release, the court made an attempt to defuse the situation by claiming that the decision's first sentence had been "misformulated." The clarification seemed to imply that the ruling only precluded the state-mandated display of a cross. But the concession did little to assuage the protests. The Bavarian premier, Edmund Stoiber, vowed that crucifixes would remain in elementary schools. A genuine constitutional crisis appeared at hand. One of the court's judges (a member of the majority) became so concerned over calls for defiance that he wrote an editorial entitled "Why a Judicial Ruling Deserves Respect," published in one of the major national newspapers (*Frankfurter Allgemeine Zeitung*, August 18, 1995).

Naturally, opposition to the verdict was not unanimous. Some commentators and politicians, while often critical of the ruling, argued against open defiance of the court. But the conflict lingered. As the school year began, crucifixes remained in Bavarian schoolrooms. A mass demonstration organized by the Catholic Church in opposition to the decision brought more than 30,000 protesters to Munich's Odeonplatz. By the end of the year, a campaign in Bavaria had collected more than 700,000 signatures against the verdict. In late December, the Bavarian parliament finally passed a revision of the school ordinance to implement the court's decision. The new ordinance reads:

Article 7, Section 3: In light of Bavaria's historical and cultural traditions, a cross is displayed in every classroom. This act symbolizes the desire to realize the highest educational goals of the constitution on the basis of Christian and occidental values while respecting religious freedom. If parents challenge the installation of the cross for genuine and acceptable reasons of faith or secular belief, the school principal shall attempt a compromise solution. If it is not possible to find a solution, the principal shall notify the school authorities and then devise an individual solution that respects the religious freedom of the person who has objected and which balances the religious and secular beliefs of all persons in a class appropriately. In doing so, the will of the majority must be considered as much as possible.

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Obviously, the extent to which this new regulation is consistent with the court's decision is open to question. Crosses are still required in schoolrooms. Even if a student or a parent objects, the new regulation does not require the removal of the cross. The nature of the prescribed "compromise solution" is left open. In a year-end article on the crisis, the *Neue Zürcher Zeitung*, one of the most influential European newspapers, concluded that "except for a few extremely rare cases, nothing has changed in everyday school life in Bavaria" (December 16, 1995). As a judge of the FCC quipped during a lecture at the University of Freiburg: "There are more crucifixes hanging in Bavarian schoolrooms now than before the decision."

Example 2: German Party Finance

As in many European countries, established political parties in Germany are provided public subsidies for their political activities. The precise form of these subsidies, and the terms on which they are granted, have been subject to a continuous tug of war between parliament and the constitutional court ever since public party finance was first established in 1959.³ The party finance law in effect during the late 1980s and early 1990s included a so-called base amount as part of the funding scheme. This base amount provided a fixed amount of money to each party that had received at least 2 percent of the vote in a given federal election. In a 1992 decision, the FCC declared this provision unconstitutional. The practical consequence of the base amount, the court concluded, was to divorce (at least in part) a party's public financial support from its ability to gather votes, donations, and membership dues from citizens (by paying a "premium" on the first votes a party secured). Such a provision, the court argued, violates the constitutionally guaranteed independence of political parties from the state (BVerfGE 85,264:294).

In 1994, the federal parliament (Bundestag) passed a revision of the party finance law in response to the FCC's decision. Under the new law, a party receives 1 deutsche mark (DM 1) for every vote it captures in a federal, state, or European Union election. For the first 5 million votes captured, however, parties receive an additional DM 0.30 above the regular amount.⁴ Naturally, this "bonus payment" constitutes, in practice,

³ West Germany was the first industrialized Western democracy to introduce such public financing for political parties, although other countries quickly followed suit.

⁴ In the latest revision of the party finance law, this bonus payment was modified to Euro 0.70 with a Euro 0.15 bonus payment for the first 4 million votes captured.

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little more than the base amount that was declared unconstitutional by the court, as several prominent constitutional lawyers have pointed out (Rudzio 1994; von Arnim 1996:107). In fact, the constitutionality of this provision was so questionable in light of the 1992 decision that fifteen Social Democratic members of the Bundestag publicly stated their constitutional objections and refused to vote for the new law (BTD 12:16448f.). Federal President Richard von Weizsäcker also voiced his constitutional concerns and signed the new law only after considerable delay – an unprecedented step by a German president, who ordinarily has only ceremonial functions.

Example 3: The Legislative Veto in the United States

A final example comes from the United States. In *INS v. Chadha* (462 U.S. 919), a landmark separation-of-powers decision issued in 1983, the U.S. Supreme Court invalidated congressional use of the “one-house legislative veto.” This device allows Congress to delegate authority to executive agencies, but Congress retains the right to veto decisions that executive agencies subsequently take by a resolution of one house of Congress, that is, without having to pass a new law. In declaring this procedure unconstitutional, the Court held that the separation-of-powers principle inherent in the U.S. Constitution requires that whenever Congress acts to change the legal environment, it must do so by passing a statute, including (1) passage of the same bill in both houses and (2) the opportunity for the president to sign or veto the bill. Congress cannot reserve the right to change executive agency decisions without following these procedures.

The congressional reaction to the *Chadha* decision is particularly interesting. On the one hand, Congress removed legislative vetoes from a number of statutes, generally replacing them with a requirement for joint resolutions of approval. On the other hand, Congress simply continued to employ the legislative veto *even after* the decision was handed down. As Louis Fisher has documented, in the ten-year period between 1983 and 1992 alone, Congress passed more than 200 new statutes containing a legislative veto, usually subjecting the actions of executive agencies to approval by particular congressional committees (Fisher 1993:288). These vetoes appear to be in clear conflict with the Court’s holding in the *Chadha* decision. As Fisher has concluded, “the meaning of constitutional law in this area is evidently determined more by pragmatic agreements hammered out between the elected branches than by doctrines announced by the Supreme Court” (1993:273).

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These examples are suggestive because they underscore the crucial distinction between *announcing* and *implementing* a legal decision. Courts do not act in a vacuum. While they often enjoy broad powers of review, few possess direct means to oversee the implementation of their rulings. Instead, implementation usually requires the cooperation of other actors – on many occasions, even the cooperation of the very institutions whose acts the court has just struck down. As Canon and Johnson put it in their influential treatment of judicial implementation, “in virtually all instances, courts that formulate policies must rely on other courts or on nonjudicial actors to translate those policies into action” (1999:1).⁵

This is true in several senses. Implementation of a ruling may require another institution to refrain from engaging in certain behavior (as in *Chadha*). A decision may require a person or an institution to take a certain action (e.g., the order to President Richard Nixon to turn over White House tapes upheld in *United States v. Nixon*, 418 U.S. 683). More commonly, a decision that attacks the constitutionality of a statute or administrative action, like the German *Crucifix* and *Party Finance* decisions, may require a legislative majority or an agency to revise an existing statute or regulation in light of the court’s ruling. Even where no action is formally required to implement a decision, a ruling may evoke a legislative response as governing majorities attempt to adjust policy in light of the judicial action (e.g., if a court strikes down a particular income tax provision, a government usually does not stop collecting income tax; instead, a new tax statute is passed). In other words, judicial decisions ordinarily require or induce a response by other policy makers. As our examples show, this fact calls attention to the relationship between judicial decision and response. To what extent does a legislative or executive reaction correspond to the court’s ruling?

Putting the same point slightly differently, a judicial ruling is typically *not* the last act in the adjudication of many constitutional disputes. To be sure, the traditional account of the role and purpose of constitutional review does not deny the formal need for implementation. Rather, it is often assumed implicitly that the response to a decision is a straightforward technical matter that does not afford legislators or bureaucrats much

⁵ More than 200 years ago, Alexander Hamilton made essentially the same observation in *Federalist* 78: “The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments” (1961:465).

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discretion.⁶ Putting it loosely, nonjudicial governmental actors are assumed to translate judicial rulings faithfully into law. Our examples suggest that the reality is more complex. The need for courts to rely on other institutions to implement decisions provides legislators and bureaucrats with opportunities to attempt to evade judicial decisions they oppose.

The possibility is not simply academic. Evasion of constitutional decisions in Germany, for example, is sufficiently frequent that an article published in one of the nation's preeminent newspapers, the *Süddeutsche Zeitung*, recently concluded that legislative majorities in Germany routinely evade or circumvent FCC decisions that are politically costly or have significant budgetary implications.⁷ In post-World War II Italy, the first president of the Italian Constitutional Court resigned in protest after the government repeatedly failed to enforce judicial decisions (Volcansek 1991:120). Nor has resistance to implementation disappeared since the court's early years. For example, Mary Volcansek, a prominent scholar of the Italian court, concluded in a survey of decisions on media pluralism issued in the 1980s and 1990s that the court's

influence in directing the legislative process was minimal. Twice the Court enumerated what would be necessary in constitutionally accepted laws, and both times Parliament passed laws that did not conform. The Mammi Law served only to replicate by law the situation that the Court had earlier deemed unacceptable. (2000:139)

The Russian Constitutional Court, similarly, has had to contend with "persistent noncompliance with and frequent delays in the implementation of its decisions by federal and regional authorities" (Trochev 2002:96; see also Schwartz 2000). In the Russian case, the Constitutional Court's difficulties in securing compliance led to a particularly interesting episode. Since the demise of the Soviet Union, there has been a persistent struggle between Moscow and several regions intent on asserting their autonomy. In this struggle, the Constitutional Court soon proved to be a valuable ally of the central government, quashing regional claims of sovereignty in several cases. Regional governments, however, were little bothered by these decisions and routinely ignored them, in one case even refusing to publish the court's rulings (Trochev 2002:96). In response, President

⁶ I focus on legislative and administrative responses, not on responses by lower courts. However, judicial responses raise similar issues and can be analyzed within the framework provided here.

⁷ See "Was nicht paßt, wird ignoriert" ("If it does not sit well, it is ignored"), *Süddeutsche Zeitung*, January 10, 1998, page 2.

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Vladimir Putin in late 2001 proposed and pushed through the Duma a new statute establishing strict deadlines for compliance with Constitutional Court decisions. However, Putin may have been less motivated by a genuine concern for compliance with judicial decisions than by an interest in using the court to bring recalcitrant regional governments to heel. The law provides sanctions only for *regional* governments that fail to comply in a timely manner. Federal institutions are exempted from penalties for noncompliance (Trochev 2002: 101).

All of these episodes powerfully underscore a central point: Because judicial decisions often require or induce a response from other governmental actors, constitutional courts face a potential *implementation problem*. While judges may possess the formal power to declare legislative and administrative actions unconstitutional, the substantive effect of such a declaration in specific cases will often turn on the manner in which other political actors implement the decision. The actual, as opposed to formal, influence judges can exercise over the use of political power will therefore be determined, in part, by the strategic interactions between constitutional courts and parliaments.⁸ All of this raises questions that go to the heart of our understanding of constitutional democracy:

- What factors determine how legislative majorities respond to judicial rulings?
- Does the potential for evasion shape judicial deliberations and perhaps even decisions?
- Under what circumstances can courts successfully constrain legislative majorities, and when will they not do so?
- What are the deeper implications for the possibility of democratic yet constitutionally constrained government?

An answer to these questions requires a theory of judicial–legislative relations. Over the past decade, a growing literature has tried to construct such a theory from a strategic, game-theoretic perspective, mostly with application to the U.S. Supreme Court (e.g., Epstein and Knight 1998; Ferejohn and Shipan 1990; Ferejohn and Weingast 1992) but also in comparative politics (Epstein, Knight, and Shvetsova 2001; Helmke 2002; Vanberg 1998a, 2000, 2001). Building on these efforts, I investigate the strategic interactions between courts and legislatures and the

⁸ Although I will focus on legislative–judicial relations in the remainder of the analysis, a similar argument applies to administrative–judicial relations.

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role of public support in shaping these interactions. I then test the theoretical argument in a detailed study of the relations between the German Bundesverfassungsgericht and Bundestag. Before I sketch the outlines of the theory and the plan for this book, a brief detour to consider the historical origins of constitutional review is useful.

CONSTITUTIONAL REVIEW IN COMPARATIVE PERSPECTIVE

Perhaps surprisingly, the pervasive popularity of constitutional review is of relatively recent vintage. While the ideal of constitutionally constrained government has a long tradition in Western political thought (see Gordon 1999), the notion that judges can (and should) act as guardians of the constitutional order emerged as a significant practical political force only after the founding of the United States. Although the U.S. Constitution does not mention constitutional review explicitly, it was widely understood and expected during the founding era that judges would exercise such power. Thus, Alexander Hamilton famously commented in *Federalist* 78:

By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority. . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. (Hamilton 1961:466)⁹

By the early nineteenth century, judicial review of state laws had become common in the American political system, and the U.S. Supreme Court's historic decision in *Marbury v. Madison* (5 U.S. 137) set a precedent for the invalidation of a federal statute on constitutional grounds.

In continental Europe, on the other hand, constitution writers as well as legal and constitutional scholars initially resisted the idea of judicial oversight precisely because it places limits on the authority of representative assemblies. An explicit adoption of constitutional review, it was feared, might lead to the establishment of a "government of judges,"

⁹ Similarly, in arguing against ratification of the U.S. Constitution, "Brutus" warned against the power that judges would be able to exercise under the new constitution: "If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature" (Ketcham 1986:307).

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who would lack the popular legitimacy enjoyed by an elected assembly.¹⁰ Nonetheless, against the backdrop of the American experience, the idea gained increasing intellectual support over the course of the nineteenth century.¹¹ Thus, the draft constitution for a unified German state produced by the national assembly convened in Frankfurt's Paulskirche during the unsuccessful 1848 revolution already included a provision creating a Reichsgericht with wide-ranging powers of constitutional review. With the adoption of a republican constitution in Portugal in 1911, constitutional review was introduced into European political practice. Under the constitution, ordinary courts were authorized to review the constitutionality of legislation as part of their proceedings, much as American courts had been doing for more than a century (Magalhaes 2003:31).

It was with the Austrian Constitution of 1920, drafted by the well-known legal scholar Hans Kelsen, that constitutional review finally gained a secure foothold on the European continent. Significantly, Kelsen developed an alternative institutional structure that differs in important respects from the decentralized form of review exercised by American courts. While the American model provides for a decentralized system in which any court can exercise constitutional review,¹² the European model concentrates the power of review in a constitutional court that acts outside of the ordinary judicial hierarchy and has exclusive jurisdiction over constitutional questions. Moreover, unlike American courts, which are constrained to decide only "cases and controversies" that arise out of disputes between litigants with provable injuries, European constitutional courts usually have broad jurisdiction and open rules of access that allow (and often require) them to decide abstract constitutional questions in the absence of a concrete dispute.

In the face of the rise of totalitarianism in the 1930s, the initial experiment with constitutional review in Europe turned out to be short-lived. But in the aftermath of the horrific suffering and destruction wrought by Nazi Germany, Kelsen's model quickly gained acceptance in other European countries. Constitution writers across Europe tried to secure the limitation of legislative powers that Tocqueville had identified as one

¹⁰ For example, in France, an explicit prohibition of constitutional review was adopted in August 1790, which is still valid for the ordinary French judiciary: "Courts cannot interfere with the exercising of legislative powers or suspend the application of the laws" (see Stone Sweet 2000:33).

¹¹ For an excellent review, see Stone (1992, chapter 9) and Cappelletti (1989, chapters 3–5).

¹² Subject, of course, to the opportunity for appeal and the principle of *stare decisis*.