THE NEW CONSTITUTIONAL POLITICS OF EUROPE

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Long considered a North American anomaly, constitutional judicial review is today a global phenomenon. Since 1945, Japan, India, the Philippines, Turkey, and more than a dozen politics in Western Europe and Latin America have established or reestablished constitutional courts with review powers, that is, the power to declare legislative enactments and administrative rules invalid on the grounds that they violate constitutional norms. The postcommunist regimes in the Czech Republic, Hungary, Poland, Slovakia, and Russia provide for the same.

This special issue of Comparative Political Studies focuses on the politics of constitutional review in Western Europe. The topic presses upon comparativists because constitutional politics have been increasingly at the heart of national politics in many places. European courts are striking down laws and administrative actions. European governments, parliaments, and administrators interact differently as a result of this judicial activity. The language, the style, and the outcomes of European policy processes are now different from what they would have been in the absence of constitutional review.

When this project was initially conceived, the editors were struck by the extent to which contemporary comparative political scientists had ignored these developments. No article even remotely touching on the topics of courts, judges, or constitutions, for example, had ever appeared in the leading forums of the field, Comparative Politics and Comparative Political Studies. Indeed, comparativists rarely know anything about law and courts. Contemporary, advanced research of the kind we see on the executive, legislatures, political parties, interest groups, and so on, is scarce for two main reasons. First, there is a strong commitment in Western liberal-democratic political
ideology to the separation of law and politics and to a vision of judges as independent, neutral law appliers rather than political policymakers. To study law and courts as part of politics can appear iconoclastic and subversive. Second, the study of law and courts is, for political scientists, necessarily interdisciplinary. Courts conduct themselves in a specialized, professional-technical discourse that is relatively distinct from normal political discourse. Political scientists have been inhibited by the cost of learning this second discourse. Even political scientists who specialized in law and courts did not do much comparative research. The American Supreme Court, with its enormous and almost unique power of judicial review, quickly became the focus of public law political scientists. Precisely because public law political scientists had invested so much in learning a second language, their work tended to focus on the Court’s case law. Thus they have tended to live alone in a public law ghetto, very divorced from comparative politics and even from American politics. Comparative studies of judicial behavior and constitutional jurisprudence were produced in the past three decades, but the impact of such work was largely restricted to public law. The field of comparative politics seemingly took little or no interest.

Since 1990, a comparative literature addressed to non-public-law political scientists has begun to appear (Brunello & Lehrman, 1991; Jackson & Tate, 1990; Volcansek, 1992b). In fact, developments now suggest that comparative politics might enjoy a closer connection to law and courts. First, students of public law have piled up an enormous number of studies indicating that, at the very least, courts are political in the sense of being significant governmental actors in policy-making and that their behavior can be examined and explained by employing the same research strategies as those used in the study of other governmental actors. More important for comparative politics, judicial review has diffused. There are now many powerful constitutional courts outside of the United States. Most important, political scientists are finding that they keep bumping into law and courts while doing research in (ostensibly) non-public-law areas. As comparativists become increasingly involved in policy studies, to cite just one example, they very quickly discover that certain policy areas are so full of law and courts that one has no choice but to confront them.

It becomes obvious that a comparative politics that leaves out law and courts is incomplete. What remains is the substantial cost of learning a second discourse and, because legal discourses are different in different countries, the cost of learning a number of such discourses. We must begin by asking: What can people who have paid that cost offer to those who have not? To what degree need comparative politics scholars interest themselves in this work? The place to begin is with the most developed area: supreme court
constitutional law studies. Such a focus directs attention to that crucial point where party politics, executive and legislative institutions, judicial power, and constitutional texts intersect in the concrete world of policy-making. Simply put, to the degree that it is demonstrated that courts are major participants in policy-making processes and imprint on those processes qualities that they otherwise would not possess, comparativists have no choice but to be interested.

Aside from this bluntly stated "obligation," we might ask more generally whether the study of law and courts will further the various theory projects that concern comparativists. We have already mentioned the now burgeoning interest in policy studies. In addition, both American and comparative politics are experiencing "the new institutionalism," as well as a related redirection of interest in "political culture" toward long-term "institutionally embedded" values, as a counterweight to the somewhat ephemeral findings of survey research. In much policy-oriented institutional analysis, research is structured by an empirical focus on the interaction of institutions and embedded policy-making "styles" within the relatively closed, state-bounded context of policy-making (e.g., Hall, 1986; Katzenstein, 1987). As has been shown in France (Stone, 1992a) and Germany (Landfried, 1985), European constitutional courts can and ought to be treated in the same way, and legal discourse, which generates a kind of policy-making style itself, can and ought to be treated as one of the relatively coherent, long-term repertoires of thought and behavior that help to produce political outcomes (Stone, 1992a). Indeed, law may be the paradigmatic example of institutionally embedded values (Smith, 1988). Law is, among other things, a special discourse, courts are a privileged arena of this discourse, and jurisprudential language has tended to seep into and, in many cases, overwhelm other political discourse. Whether we assess the impact of courts in terms of policy-making, state building, national integration, or legitimation processes, courts have been as, or more persistent than, other political institutions.

With this issue of Comparative Political Studies, we seek to contribute to a general rediscovery of courts by comparative politics. Our objective is to engage the concerns of comparativists who do not usually study law and courts, and to sharpen the analytical and conceptual tools needed for future research. Contributors were asked to assess the impact of European courts on their institutional and policy-making environments. Donald Kammers and Mary Volcansek provide broad-gauge overviews of the role and function of the German and Italian constitutional courts, respectively, two of the oldest and most active of such courts. Alec Stone's article is a comparative case study of the influence of the French and German constitutional courts on left-wing legislative agendas. Susan Sterett's contribution assesses the im-
portance of judicial review of administrative acts in Great Britain, a polity that otherwise remains hostile to review. The final two articles assess the impact of the European Court of Justice on European integration processes. Joseph Weiler begins with a survey of the Court’s most important “constitutionalizing” doctrines, and then examines how these doctrines have been received by politicians, national courts, and the scholarly community. Karen Alter and Sophie Meunier-Aitsahalia focus on the impact of one leading decision, Cassis de Dijon, on larger discussions about how best to achieve economic integration. We situate this special issue in wider, comparative context in the discussion that follows.

THE RISE OF CONSTITUTIONAL REVIEW

Since the Renaissance reception of the Roman law, continental Europe has shared a Roman or civil law tradition (Merryman, 1985). The civil law judges of France had been a central and inextricable part of the ancien régime. The French revolution perforce retained the civil law while subjugating judicial to political authority. The result was the Napoleonic code system, which revolutionary influence imposed on all of the continent in the 19th century. These codes were conceived of as positive legal commands that judges were strictly obligated to obey. European judges were thus made faithful servants of the will of legislatures as enshrined in the codes, and judicial review was formally prohibited. Even where written constitutions were introduced, judges were typically denied powers to interpret constitutional provisions on the grounds that courts would use them to install a “government of judges.”

In the late 19th and early 20th centuries, a form of constitutional review—what can now be called the “European model” of review—first developed in the federal states of Germany and Austria. In the American model of review, any judge of any court, in any case, at any time, at the behest of any litigating party, has the power to declare a law unconstitutional. This power is what Americans always think of when they see judicial review. According to the central tenets of the European model, however, only separate, specialized jurisdictions—constitutional courts—can exercise review powers, often at the behest of a governmental entity rather than a private litigant, and only in the course of proceedings distinct from regular litigation (Kommers, 1989; Stone, 1990). After 1945, with the writing of new constitutions, this form of review spread throughout Europe. Its popularity is both a result of ideological change—a new and urgent concern for limited government after an era of authoritarianism—and structural inertia. Concentrating review powers in a
special court provides a means of defending constitutional law, and thus human rights provisions, while retaining advantages associated with the prohibition against general judicial review by ordinary or administrative judges. Viewed from this perspective, European constitutional courts, without exception, resemble each other more than they resemble the American Supreme Court.

As the contributors to this issue point out, no one expected these courts to develop into powerful institutional actors or policymakers. Instead, they were expected to function in obscurity, docile in the face of newly democratic governments and legislatures still deeply hostile to judges and judging. Constitutional review, however, developed in unexpected ways. First, because the German constitution enshrined a lengthy and detailed bill of rights, and because German, like Austrian, federalism involved a complex division of powers between central and state governments, a great deal of review occurred there. Second, the European Communities (EC) came into existence. It had a high court, the Court of Justice (ECJ), and that court too—confronted by a complex kind of something like federalism, under a written something like a constitution, which specified something like constitutional judicial review—began doing quite a lot of review. Third, almost absent-mindedly, the French created a situation in which nearly every piece of important legislation would end up before the Constitutional Council, and so that body began doing a lot of review. Last, in the 1970s and 1980s, authoritarian regimes fell in Greece, Portugal, Spain, and in the former communist states of Eastern Europe. As a means of anchoring new liberal constitutions, these countries too established constitutional courts on the Austro-German, European model.

The great surge in European constitutional review simply may be the sum of a number of peculiar circumstances. Viewed comparatively, however, there is something more profound and mysterious about it. To understand the mystery, a brief digression is necessary, but one that will aid us later in considering other matters. Now constitutional review is the power of a court to declare a statute, an act of the executive, an administrative regulation, or another court’s decision legally null and void because it conflicts with a statute or other law. This kind of review, the power to declare something not unconstitutional but unlawful, is to be found in all the European states and in most countries that proclaim the rule of law. By the late 1940s and early 1950s, both constitutional judicial review and statutory review were at a low ebb in the United States, and statutory review, which is the only kind the British had, was at a low ebb in Great Britain. Everywhere in the English-speaking world, judicial self-restraint and deference to the political branches (executive and legislature) was the dominant doctrine of lawyers, legal
scholars, and judges themselves. In the United States, *Brown v. Board of Education* (1954) announced a new wave of judicial activism in constitutional judicial review. Far less known was the huge new wave of judicial activism in statutory review of administrative decision making that began in the 1960s and constantly escalated into the 1980s. Although laymen and most politicians have not been particularly conscious of this second wave, it was well known to judges throughout the world. In the 1960s and 1970s, British courts too began to appear more active in reviewing administrative decisions.

If we lump constitutional and statutory review together and take an Atlantic perspective, what we see is a significant rise in the level of judicial participation in both North American and European government since the mid-1950s. That change is partly due to the diffusion of constitutional review. It is also due to a general secular expansion of the opportunities afforded judges to exercise wide-ranging political authority. We still know very little about the causes of this expansion in Europe, but they certainly include:

- a general proliferation in levels of government and administration, both vertical and horizontal, as formerly unitary countries federalized (Belgium), as others have decentralized or added “autonomous” regions (France, Italy, Spain), as the EC has added another layer of rule making and enforcement above the national level, and as governments have spun off effective governing power to a huge variety of independent administrative and regulatory agencies;
- the general waning in confidence in technocratic government and planning, and a consequent desire to restrict discretionary powers of the state;
- the liberalization and democratization of formerly authoritarian polities—Germany, Greece, Italy, Portugal, Spain—and the consequent establishment of an explicitly private sphere of social life, guaranteed by a judicially enforceable bill of rights;
- a related expansion in the number of pressure groups and the quality of citizen participation in the making of public policy.

What is clear is that political authority has everywhere given judicial authority the responsibility, expressly or by default, to protect the rights of citizens, police separation of power schemes, and check bureaucratic discretion. Elected officials, lobbyists, and citizens’ action groups have in turn been provided with new arenas (law and courts) for pressing their political claims. These developments reflect, or translate into, a very widespread increase in the prestige and self-confidence of the judiciary.

If the expansion of the role and impact of courts is today a worldwide phenomenon, it would be foolish to assume that these changes have been generated entirely from within the law, ignoring the far broader arena of party
competition and legislative-executive-judicial politics. One central message of this volume, that constitutional judicial review has significantly altered politics in Western Europe, is in part a message about constitutional politics per se, and in part a message about the new prominence of judges as political actors.

THIRD CHAMBERS AND JUDICIALIZED LEGISLATIVE DELIBERATION

The increase in constitutional review in Europe is not only a matter of quantity but of a particular quality. The extreme case is France. The Constitutional Council may only review proposed legislation in the time period immediately after passage and before promulgation. Once promulgated, a law is immune to judicial control. When the French modified their constitutional practice to allow any 60 members of the assembly or the senate to bring a constitutional challenge (1974), the result was that nearly every major piece of legislation almost routinely passes to the council for review. French opposition parties always have more than 60 votes and have not been shy about using the council for partisan ends. Thus when the government drafts legislation, and when parliament debates and amends it, lawmakers are aware that the legislative words will pass directly from its mouth to the council’s ear. Other European constitutional courts exercise not only this immediate, direct review, but also the review of constitutional controversies that come from the judicial system or individuals.

European constitutional judges not only have ears, but as described in the contributions to this volume, remarkably big mouths. It is not entirely unknown for American judges to suggest what changes in the provisions of a statute they are in the process of striking down might render it constitutional. But American judges tend to concentrate very heavily on giving reasons to support their invalidation of a law rather than suggestions for fixing it. Because their judgments are rendered in the course of ordinary litigation between two contending parties, American judges tend (or pretend) to visualize the audience for their opinions as those two parties. The parties care whether the law is unconstitutional because the resolution of that issue may well determine which party wins. The litigants may not much care about how the law might be rewritten in the future so that a reenacted version would survive judicial scrutiny in some other case between some other litigants. American judges write accordingly.

In many cases, the putative audience for European judges is the legislature itself, which awaits judicial evaluation of its product. That audience is
directly and immediately interested in how to improve the product if the judges find fault with it. European constitutional courts frequently offer direct and specific instructions on how an unconstitutional statute can be redrafted into constitutionality. Sometimes the opinions actually provide the draft statutory language that the judges say they would find constitutional. In this context, talk of a third legislative chamber is inevitable, with the third chamber exercising a specialized constitutional expertise and sending its constitutionally improved versions of bills back to the first two chambers for further consideration.

As important, members of the first (and second) chambers find their own behavior changing in response to the review activities of the third chamber. Legislators begin to debate not only what is good or bad policy, but precisely what has the best chance of surviving the scrutiny—or reading—of the third chamber. The language of the floor and of the committees begins to show constitutionalization, with technical constitutional arguments made, debated, and countered by other constitutional arguments. Constitutional lawyers and former constitutional judges are brought in to testify in committees and to advise parliamentarians on the best way to attack or defend a bill’s constitutionality. In this way, the vocabulary of constitutional law comes to infect the vocabulary of policy-making, and the language of the constitutional lawyer becomes the language of the policymaker.

**HOW BIG?**

In this volume, the three national constitutional courts examined, the French, German, and Italian, are at times conceptualized as third chambers, not least as a means of situating constitutional courts, constitutional judges, and constitutional law where they belong—at the heart of national politics, in interaction with governments and legislatures. The lawmaking process as a whole provides the setting for this interaction, and legislative outcomes provide the means for assessment of the legislative behavior and impact of each institution.

The strong version of the third-chamber argument, most explicitly formulated in work on France and Germany (Landfried, 1984, 1992; Stone, 1992a, 1992b), flows from two sources. The first is structural (jurisdictional). Legislators and constitutional judges, within certain legislative processes, are in nearly constant and intimate contact. The extensive nature of this contact should not surprise because the framers of both the French and the German constitutions sought quite consciously to give their respective constitutional courts at least partially legislative, third-chamber powers. The second is
based on the empirically verifiable fact that the legislative impact of constitutional courts on whole policy sectors is often greater than the impact of either chamber of parliament. This outcome also should not surprise because legislatures all over Europe hardly ever engage in effective lawmaking anymore. This part of the argument is worth examining more closely.

The literature on the decline of the legislature in parliamentary systems is a familiar one to comparativists. The rise of prime ministerial and/or cabinet government, reinforced by relatively strict party discipline within parliament, and anchored by relatively stable party systems outside it, has come at the expense of the legislature (Blondel, 1973; Olson, 1980). European legislatures do not so much make laws today as assent to them. On this point there is broad consensus, as demonstrated by the location of European parliaments on established typologies that seek to categorize legislatures according to their capacity to generate policy in a meaningfully autonomous (from the executive) manner. Mezey’s (1979) three-step continuum, for example, describes legislative capacities as strong where capable of amending and rejecting executive proposals, modest where capable of amending but not rejecting proposals, or weak where they can neither amend nor reject. European legislatures have only modest capacities with relatively slight variation within that category (Norton, 1990). Polsby’s (1975) transformative-arena dichotomy organizes the problem in a similar way. Transformative legislatures are those that “possess the independent capacity, frequently exercised, to mold and transform proposals from whatever source [including itself] into laws.” The U.S. Congress is the prototype of the transformative legislature. So-called arena legislatures rarely make policy, but are instead formal “settings” for the ratification and legitimation of policy made elsewhere (pp. 277-297). The British and French cases—where the executive controls the legislative timetable, where parliaments are not allowed to independently raise or spend money, and where only those laws or amendments that the government supports may be adopted—constitute prototypes of the arena legislature. The German and Italian parliaments possess more lawmaking autonomy than do their French or British counterparts, and because of fragmented executives, exercise it more; but no one would describe either as transformative.

In this context, that is the context of executive-dominated legislative processes, the impact of constitutional courts may at times overshadow that of parliaments. Put differently, constitutional courts conceived as third legislative chambers at times blend strong and modest legislative capacities. In France, a government with a secure majority in the assembly can ignore the senate’s (merely suspensive) veto, but the governing majority, as in Germany, has no power to oppose a referral of its legislation to the constitutional court,
and it cannot ignore or substantially reverse the court’s rulings. In Germany as well, the opposition can use the court to obstruct or revise disputed legislation. But the court is less central as an instrument of opposition if the opposition controls the upper chamber, the Bundesrat, which possesses an absolute veto over certain legislative matters. But even in this latter case, the opposition is able to use rulings of unconstitutionality to bolster the bargaining position of the Bundesrat. These points are elaborated on at length in Alec Stone’s comparison of French and German constitutional politics in this volume. In Italy, where legislative “immobilism” has been the consequence of a kaleidoscopic party system, the court’s role has at times, Mary Volcansek tells us, been to force or cajole legislative activity in areas where debilitating inertia had reigned (see also de Francisis & Zannini, 1992, pp. 77-78). Thus constitutional courts have the capacity, which parliaments often do not, to restructure legislative environments and to generate legislative processes and outcomes.

The issue of the democratic legitimacy of these courts is inevitably raised by their participation in legislative processes. Some have decried the rise of constitutionalization, calling it “dangerous for democracy” because effective power has been transferred from representative to nonrepresentative institutions (Landfried, 1985). Others see the development in a positive light. As Kommers argues forcefully here, regime legitimacy and democracy itself are strengthened to the extent that national politics is conducted within a framework generated by constitutional law and legal materials and administered by constitutional courts (see also Favoreu, 1986; Gusy, 1985). If we can take any lesson from the case of American judicial review, it is that such arguments are probably both permanent and irresolvable. In any event, it would be simplistic to assume that constitutional review can be effectively exercised without provoking such controversies. At the same time, it is also simplistic to view the effective exercise of review as necessarily or always coming at the expense of the first two chambers. On the contrary, to the extent that constitutional courts serve to redress serious imbalances that govern relations between the legislature and the executive, and between the majority and the opposition, one can argue that they serve to reinvigorate parliamentary life.

Put in these third-chamber ways, European constitutional review seems very big indeed. Whether European review is very big or not, relative to other national policy-making bodies, is still a mysterious question requiring a great deal more empirical investigation. Any global assessment of the real legislative and macropolitical impact of most European constitutional courts is difficult. The relative dearth of major judicial-political confrontations, set aside the stream of cases in which the judiciary requests technical changes in statutory language that the legislature then ratifies, is susceptible to one of several characterizations. The constitutional judiciary may be sufficiently
powerful that the legislature has, in response to established constitutional jurisprudence, so perfected its anticipatory reaction to potential judicial objections that it almost entirely avoids passing constitutionally vulnerable statutes. Or alternatively, the constitutional courts may have become minor, technical drafting committees of the polity, designated to perfect statutes so as to avoid conflicts with the constitution but, like the parliamentary chambers, with relatively little influence over the broad outlines of policy. We suspect that these seemingly opposed representations of impact may well coexist, at least with respect to most normal, incremental lawmaking. By disaggregating judicial impact along sectoral lines, we would be able to determine which characterization best describes the situation governing any given policy area.

We suspect, also, that high levels of judicial activism, or the outbreak of judicial-political confrontation, far from normal, will occur only under certain conditions—when governments engage in nonincremental, “radical” reform, for example, and/or when legislative majorities no longer correspond to the party affiliation or sympathies of those serving on constitutional courts. Such reform periods are the focus of Alec Stone’s article. In any event, questions about the relevance of constitutional politics are never easily separated from the legislative environment. If governments are not pushing parliament to enact complex and far-reaching legislation, then constitutional judges will not be confronted with much controversial legislation. And in such situations, we would not expect to see high levels of constitutional innovation or judicial lawmaking on the part of constitutional courts.

This problem of assessment is even more serious in Great Britain. The British, of course, have no constitutional judicial review. The British do, however, have statutory judicial review, and as Sue Sterett indicates in her contribution, something that adds up to some degree of judicial authority to thwart arbitrary action by the government. Yet even during the 30 years in which the level of this activity is widely thought to have been rising, there have been only a handful of big cases. Sterett is largely reduced to surrogate measures of judicial influence, such as the investment by government in training programs to sharpen civil servants’ skills at anticipating potential judicial objections and the emergence of a special interest in administrative law among the barristers (see also Drewry, 1992).

To this point, we have focused on the hugely salient but relatively narrow issue of judicial-political interaction in legislative processes. Blurring the boundaries of organic separation of power notions, which commonly distinguish what legislatures do from what courts do, has the advantage of making the important point that European constitutional courts are policymakers, at least minimally comparable to legislatures within a common context and
framework. But just as legislatures do more than adopt statutes, courts do more than simply help or hinder lawmaker. Constitutional courts, for example, have a special responsibility of ensuring the integrity of the constitutional order writ large, and this duty requires assessment along a number of different dimensions.

FEDERALISM

It may be that constitutional courts are most politically influential when they operate in federal or quasi-federal political systems. Their potential usefulness to the central government in holding the member states in line is a political resource of such magnitude that it can be employed to extract from the central government obedience to its decisions, even on questions unrelated to federalism, and on decisions on federalism that run against the central government. Indeed, again writing the American experience large, each of the member states of a federalism may typically be sufficiently concerned about the potential misconduct of its fellow members that each will welcome federal judicial discipline directed against the others and even accept that discipline when directed against itself as a small price to pay for insuring the discipline of the others.

Clearly the two most politically influential constitutional courts in Europe are those of Germany and the Community. Both of those courts exercise the vital function of refereeing jurisdictional boundaries between central and member-state governments in federal systems, as do the Supreme Courts of the United States, Canada, and Australia. As Donald Kromers tells us here and elsewhere (Kromers, 1989), German federalism, in many respects more vital than American federalism, has been guided and even reshaped by the impact of constitutional review. What is undeniable is that "the German federal system would not be what it is today without the umpiring role of the Constitutional Court" (Blair, 1991; see also Kisker, 1989). Constitutional courts in Italy and Spain are also key actors in the evolution of regional politics in those countries, and when Belgium recently decided to establish federalism, its leaders also felt obliged to establish a constitutional court for federal matters (Verougstraete, 1992, p. 95).

The ECJ, for its part, offers the clearest case of a court that not only yields a substantial policy-making power, but has been a major political player in the state-building enterprise. There are few instances as observable and as important as the ECJ case of a court building itself as a political institution, and building the whole set of institutions of which it is a part. As the work of Joseph Weiler in this volume and elsewhere (1981, 1991) attests, if no
other constitutional review existed at all in Europe, the political success of
the ECJ alone would justify a new and major interest in European law on the
part of political scientists. For long periods of time, the court represented the
leading political force in building the Community. In a tour de force often
compared to that of John Marshall in Marbury v. Madison (1803), the court
successfully claimed for itself a sweeping power of judicial review. In the
course of doing so, however, the court did far more than Marshall ever needed
to do. In a series of now legendary decisions, the court converted the
agreements founding the communities from treaties—which under conven-
tional international law are only binding on the signatories, that is, the states,
and only indirectly binding on their citizens—into a federal constitution
enforceable on the members through judicial proceedings in the federation’s
own court and directly binding on all the citizens of those states. Such
proceedings, as Karen Alter and Sophie Meunier-Aitsahalia show in their
contribution on the now-famous Cassis de Dijon decision, can have wide-
ranging, if sometimes unintended, impact. In the case of Cassis, the
judicially-constructed doctrine of “mutual recognition,” modified by a com-
plex process of interaction among a wide range of political actors, ultimately
became a cornerstone of the 1992 agreement, moving the EC to a new stage
of economic integration. And with some false starts and hiatuses, which may
still not be over, the court has succeeded in getting compliance from the
government organs of the members states and the EC itself and, crucially,
from the courts of the member states (Shapiro, 1992).

The answer then to how big is constitutional review in Europe is, at least
in its most important federal and quasi-federal systems, very big indeed.

HUMAN RIGHTS

In Europe, a political jurisprudence of rights is today endemic and
occasionally epidemic. And we choose the word endemic with some care.
For the judicial politics of rights, the use of rights discourse to expand judicial
power, is both very widespread and barely visible, or visible in occasional
outbreaks. Here we can present only a cursory sketch designed to warn
European comparativists that they ought to take rights seriously.

The postwar wave of constitutionalizing rights in Europe condemned a
deeply entrenched dogma of continental state theory, namely that the prerog-
atives of the state necessarily come before civil liberties, and that liberties
that did exist came into being as a result of an act of self-limitation on the
part of leviathan itself. The codification of rights repudiated the notion that
the existence of the state presupposes the existence of rights. In an act infused
with symbolic importance, the Germans placed their bill of rights in the first 18 articles of the Basic Law, that is, before the structure of the German state is laid out. Other democracies emerging from fascism, such as Italy and Spain, also enshrined charter of rights which, like the German are, at least on paper, much more extensive than the American. In each of these polities, constitutional courts were given a privileged role to defend and interpret constitutional rights. In France, the conventional view that the constitution contained no charter of rights binding on parliament was overcome by a series of creative constitutional council decisions in the 1970s. The effect of these decisions was to incorporate the preamble to the 1958 constitution, which indirectly mentions a number of rights texts, including the 1789 Declaration of the Rights of Man (Stone, 1992a, pp. 45-50, 66-78). These texts are now routinely invoked in constitutional review processes.

 Much can and has been made about the presumed function of European constitutional courts to protect human rights and thus to enhance regime legitimacy (Cappelletti, 1989, pp. 204-211; Favoreu, 1982, 1987). Two points about the politics of constitutional rights seem to us to be crucial. First, the constitutional review activity of virtually all national European constitutional courts is dominated by rights issues. In the most striking examples, referrals of constitutional controversies by individuals complaining of violations of their constitutional rights account for over 90% of the German and Spanish constitutional courts’ caseloads and a huge majority of decisions rendered (Stone, 1990, pp. 86-87). But even in France, where neither individuals nor the judicial system has access to the Constitutional Council, nearly every important legislative invalidation by the council has been enabled by its reading of rights provisions. Second, as Kammers suggests in his article on the German court, rights jurisdiction bolsters arguments in favor of the democratic nature of these otherwise nonrepresentative institutions and enhances their public standing. Put somewhat differently, the central position of constitutional courts in an ongoing (even constitutionally required) discourse on rights provides these courts with the materials of political autonomy and legitimacy. One of the reasons that public judicial-legislative confrontations have been so rare in Europe is that the idea that both human rights and constitutional review are constituent components of modern democracy has been successfully propagated and manipulated by constitutional courts and their supporters. It is potentially extremely dangerous for a governing political party to attack constitutional courts on rights issues; at the same time, adjudicating rights issues is what most of these courts do most of the time.

 In addition, a curious story about the judicial protection of fundamental liberties in European polities that do not have constitutionally enshrined and
enforceable rights is still unfolding. In the Netherlands, statutory judicial review is expressly prohibited by one constitutional provision whereas another provision proclaims the legal superiority of international over domestic law (van Koppen, 1992, p. 83). In practice, this has meant that treaty obligations entered into by the Netherlands become directly judicially enforceable parts of Dutch domestic law, without the need for domestic legislation from parliament. The Dutch courts have thus discovered that the European Convention on Human Rights is now a judicially enforceable domestic bill of rights which, along with the EC treaties, provides the jurisdictional basis for constitutional review. A similar story can be told in Belgium (Verougstraete, 1992, pp. 101-102), where the judiciary has invalidated a number of laws on the grounds that they conflict with European agreements. In Great Britain, the courts have said that they can hardly imagine that any British legal rule would not be in accord with the principles of the European Convention and will interpret British legal rules accordingly (Drewry, 1992, p. 13; Drzemczewski, 1983, pp. 177-178). Thus four Western European nations with a strong antipathy to American-style bill of rights and judicial review have discovered some sort of nascent charter of rights, and courts have announced that they will proceed to enforce it.

Finally, there has been a stealthy, almost invisible, growth of constitutional rights and judicial claims of authority to enforce them on the supranational level. Most obviously, the Court of Human Rights (ECHR), operating under the European Convention of Human Rights, is a visible presence that has succeeded in getting some substantial policy changes from the governments of the member states and in providing access to individual citizens complaining against their own governments (Frowein, Schuhlofer, & Shapiro, 1986; Stack, 1992). It remains, however, an international—not a constitutional—court. The legal differences between the two would be burdensome to explain here, but the bottom line is that international courts exercise considerably less authority over governments than do constitutional courts. There is no bill of rights in the EC treaties. Yet the ECJ has announced that a kind of European common-law bill of rights inheres in the treaties and will be enforced by the court (Volcansek, 1992a, pp. 115-117).

TRANSPARENCY, PARTICIPATION, AND ADMINISTRATIVE LAW

This issue of Comparative Political Studies is primarily about constitutional review in Europe. Sue Sterett’s contribution is about English statutory or administrative law review because the review of the lawfulness of admin-
istrative actions is the closest thing to constitutional review that the British have. In many judicial controversies concerning EC law, in many different national and jurisdictional settings, constitutional review and statutory review are intertwined, the question often being whether a member state's government's administrative action violates EC legislation. In such cases, the constitutional question of whether a member state has violated the constitutional of the EC (which proclaims the supremacy of EC law) and the question of whether an administrative act violates a statute are the same question.

In examining the ECJ, we are nearly always seeing a mix of constitutional and statutory or administrative review. The review of EC Commission decisions, for example, is typically both constitutional and administrative. Because the commission is both legislator and maker of administrative rules, because it makes its laws by procedures that are essentially administrative, and because many of the standards of administrative procedure that the ECJ imposes on the commission and its subordinate bodies are, at least nominally, derived directly from the EC treaties rather than from any sort of administrative procedures statute, the distinction between constitutional and nonconstitutional, statutory or administrative law review is often inappropriate to ECJ review of commission acts.

Yet many European countries have special constitutional courts limited to, and with exclusive jurisdiction over, constitutional questions, and special administrative courts limited to, and with at least semiexclusive jurisdiction over, administrative law questions. So the distinction between constitutional and administrative review, that is, review of whether administrative agencies have obeyed statutory law, is often essential in those countries. Moreover, as noted earlier, constitutional review is the most dramatic and obviously political form of review because it often involves a judicial veto of a whole statute passed by the legislature. So this issue is about constitutional review plus.

It would be a shame, however, for comparativists who interest themselves in law in the future to make the mistake that most American public law political scientists have made—to be so preoccupied with matters constitutional that they neglect politically important developments in nonconstitutional law. Today, one of the most important developments in European politics revolves around administrative rather than constitutional politics.

The locus of some of the most politically sensitive and important lawmaking has now moved from national parliaments to the EC Commission which, given the peculiar constitution of the community, is a body that makes laws by essentially administrative not parliamentary procedures, or if you like, whose lawmaking is actually administrative rulemaking. The commission is also a body that makes a lot of administrative rules designed to implement laws it has made itself rather than laws that have been made by a separate
lawmaking body. The community treaties have only a few and general provisions about what procedures the commission shall employ, and these have not until now been codified. Thus administrative law and administrative review is underdeveloped.

Even before the 1992 referenda on the Maastricht treaty revealed popular disquiet with the European integration project, considerable unease about the commission Eurocrats had developed among political, legal, and business elites. Now a great many powerful people in Europe’s national capitals are suddenly concerned with rendering regulatory decisions in Brussels more transparent and participatory. In spite of all of its evident failures, the Europeans are interested in American-style administrative institutions, procedures, and judicial review because they know that Americans have achieved the most transparent, most participatory regulatory regime in the world. Europeans may not want all of this regime, but they are certainly looking to import some of it.

American experience has taught us that as elites, and citizens more generally, become distrustful of technocratic, regulatory bureaucracies, but remain enamored of regulation, new things begin to happen. Among those new things is a move to increased judicial review of administrative action, in part to make regulatory processes more open and participatory, in part to provide another arena in which to challenge technocratic self-interest, narrow perspective, and substantive error, and in part to set up nontechnocratic judges as a makeweight against technocratic judges. Or put another way, judicial discretion is set to watch bureaucratic discretion. The result is heightened judicial activity in the regulatory process and a certain level of substitution of judicial policy-making for administrative and legislative policy-making (Shapiro, 1988). Today, American courts, not through their constitutional review powers but through administrative review powers, have become major players in environmental, health and safety, and other regulatory politics—that is, exactly those areas that are currently undergoing expansion in the post-Single European Act EC.

Could the same thing happen in Europe? Maybe. Maybe not. Community lawyers, community law scholars, the ECJ, and the legal staff of the commission are now in the midst of working out the law of administrative procedure for the community. It would be foolish indeed for political scientists to ignore all of this activity as somehow technical, nonconstitutional, and thus politically irrelevant lawyers’ stuff. In Europe today, much of the political action in law is in community law, and it may well be that the area of community law that is about to become the most politically relevant is the body of procedure law that is conventionally assigned to administrative law, not constitutional law.
THE POLITICAL ACTORS:
LEGAL POLITICAL ELITES, JUDGES, AND LAWYERS

To this point, we have concentrated heavily on certain structural factors that generate and shape constitutional politics, such as parliaments, courts, constitutional texts, and differences among legal systems. We have argued here what the articles that follow will demonstrate more concretely, that constitutional politics regularly come into play in national political processes, and at times, overwhelm them. Constitutional politics are one of several forms or styles of politics that impinge on national policy-making. We do not mean by this that courts behave just like all other policy institutions. They do not. The behavior of any given institution is enabled or constrained by particular resources granted or accrued, and by internal rules and procedures specific to that institution. Institutions differ among themselves as well by the repertoire of symbols, rituals, and discursive structures that they manipulate to rationalize or justify their exercise of power.

Courts can be said to meaningfully differ from the so-called political institutions (the legislature and the executive) in two basic ways. First, they perform a judicial function, that of resolving legal conflicts within specified legal procedures. Courts do so in written decisions, the record of which inevitably comes to constitute or form the basis of a jurisprudence, itself a very specialized form of discursive structure. Second, because courts are commonly understood to suffer, in comparison to executives and legislatures, from a democratic deficit, the legitimacy of the judiciary in democratic societies must be constructed according to criteria that differ from those used to assess the political branches. We have already mentioned two criteria commonly invoked to offset the deficit: to the extent that courts are engaged in policing the horizontal and vertical divisions of powers and to the extent that they protect fundamental rights and liberties, one can argue that courts function to preserve conditions essential to the existence and well being of constitutional democracy.

Put in terms of a comparative constitutional politics, these differences lead comparativists to observe certain politically significant actors, whom we had not noticed before. Courts talk not only to governments and legislatures, but also to judges on other courts, to lawyers, and to law professors. Taken together, these actors constitute a kind of policy community, relatively autonomous from, but in constant interaction with, other policy communities. What they say to each other and how they say it matters to constitutional politics at least as much as how nuclear physicists’ talk matters to nuclear regulatory policy, or how marine biologists’ talk matters to environmental
protection. In the parlance of some public lawyers, this legal discourse clearly constitutes a kind of "cognitive structure" (Smith, 1988); in the parlance of some recent international relations theorizing, the legal community is an "epistemic community" (Haas, 1992).

Constitutional law professors have done more work to encourage and then legitimize the growth of constitutional review than any other elite group in European society. Much more research is needed to assess their impact (but see the discussions of Kommers, Volcansek, and Weiler in this volume, and Stone, 1992a, pp. 93-116). Some of this work is direct, as when they serve on constitutional courts or when they testify in parliamentary proceedings or otherwise advise political parties as to the meaningfulness of existing constitutional jurisprudence to policy matters at hand. Less direct and less visible, but perhaps ultimately even more politically significant, is doctrinal activity, the synthesis or deconstruction of jurisprudence as a means of systematizing the law. Much of this activity seeks consciously to raise policy relevant issues and to reinforce or destabilize existing solutions to policy problems. Doctrinal work is to be found in specialized law journals, text books, and treatises. Judges, and increasingly the staffs of government ministries and legislatures, are immersed in such materials, and it is no coincidence that developments within the doctrine have an uncanny knack of finding their way into legislative provisions and administrative regulations. Doctrinal activity is, in essence, a highly specialized form of lobbying within the specialized discursive structure that underpins much of constitutional politics. It is aimed at judges, but is not therefore less meaningful than the lobbying targeted at other policymakers. Thus because their activity can heavily condition both process and outcome, law professors ought to be conceptualized as important political actors in constitutional politics.

Lawyers, too, are active participants in the particular game of elite politics that judges play. They require more attention from us (Shapiro, 1990). They function as a necessary conduit for many judicial policy-making processes, transmitting policy-relevant issues to judges, but also helping to disseminate judicial policies by, for example, incorporating jurisprudential innovations taking place in one judicial setting into their advocacy in another. Activist lawyers may even push courts into activist policy-making. Accounting for variation in activism among lawyers (as with judges) is virtually impossible at present, due to the paucity of research and the plethora of potential explanatory variables, such as recruitment, training, or practice experience, or the impact of developments within the legal system. Litigation of British origin is disproportionate in the caseload of the European Court of Human Rights (ECHR). The explanation may be that the British government, because of Northern Ireland or something else, violates human rights more
systematically than most. But it may also be more mundane. Because the ECHR, not the litigating party, pays the lawyers fees and pays very well, and because taking litigation to Luxembourg entails an escape from English cuisine to seemingly superior ones, British barristers yearn for human rights litigation as a meal ticket in the most literal sense. It is, of course, also possible that what is going on is that a set of activist, civil rights oriented barristers faced with a national legal system with no bill of rights and a low level of judicial activism are attempting to shift to a political arena more favorable to their cause.

Our point is that the activities of law professors and lawyers are of interest both as elite agents and symptoms of political change. If we see more lawyers doing more of something, something important is probably happening. Sue Sterett’s contribution to this volume is full of lawyer symptoms. Lawyers and law professors are revealing symptoms because they are skilled observers with far higher incentives and far greater resources to observe politics than those possessed by political scientists. If the legal community is spending new time and resources on something new, it is because they think they have found something new that matters. It may be difficult for an outside political scientist to assess the significance of potential changes in judicial proclivities, but lawyer activity is often a marvelous and unobtrusive measure of judicial change.

CONCLUSION

In assessing this issue of *Comparative Political Studies*, the reader should continuously ask: How important to European politics in general is the European constitutional politics I am reading about? There is one instance, that of the ECJ, in which a calculated course of decisions over a considerable period of time has been a major force in state building, in constituting a new political entity, the EC. The German, Italian, and Spanish constitutional courts have also done some very useful work in purging legal systems of fascist legacies, and thus in facilitating regime transition and democratization. As a matter of national policy-making impact, there are instances in which a constitutional court has exercised a clear and effective veto of legislative objectives that has had a crucial, long-lasting impact on a major area of policy-making. The German Federal Constitutional Court’s decisions on university reform and abortion during the 1970s are the clearest examples. But there are not many like these. There are, however, a substantial number of instances where clear, one-time constitutional vetoes of legislation closed off the development of what could have become new and important policy
areas, and a number of instances when courts have encouraged or required other policymakers to act. Finally, in each of the polities examined here, we find a great number of clear vetoes that had major short-term effects on substantial policy initiatives, or one-time effects on legislation less central to the government’s legislative agenda.

Less dramatic, but perhaps of greater, long-run systemic significance than big judicial vetoes, is the emergence of a politics of constitutional dialogue. European constitutional courts have created situations in which legislators feel obliged to enter into constitutional discourse, both an internal discourse and a discourse with the court, to make and to take seriously constitutional arguments, and to cast and to recast statutory language in the light of potential constitutional objections. In the most dramatic instances, this discourse is structured by constitutional courts actually dictating the language of statutes to legislators. But far more important may be the change in the discourse that legislators employ in their own internal drafting and debate in anticipation of subsequent constitutional review. The penetration and absorption of constitutional discourse into day-to-day political discourse has had the effect of enhancing the legitimacy of both the constitution, and thus the regime, and of the constitutional court, and thus constitutional review.

The question of the legitimacy of constitutional lawmaking is also increasingly bound up in constitutional rights discourse. Clearly Europe is experiencing an explosion of rights claims meant to constrain government. Constitutional judges know that their constitutional responsibility to protect constitutional rights is perhaps their greatest defense against charges of legislative usurpation. That is, one relatively secure means of justifying their intervention in politics is to rely on constitutional provisions that enshrine rights. This is one reason why they do so more and more. The rapidly expanding constitutional politics of rights easily comes to infect the entire political system because opposition political parties, lawyers, citizen groups, and others can see that rights claims are an effective avenue of social change. These actors have become, in essence, the political constituencies of the judges and of constitutional review.

Far less visible, and largely neglected in this volume, are the ranges of influence on policy and politics that European courts exercise thorough their powers of statutory interpretation and administrative judicial review, areas that remain a mystery to most political scientists because of their preoccupation with constitutional law (but see Volcansek, 1986). It is perhaps easiest to see this area of judicial politics in Britain. Even there, however, changes in levels of judicial intervention in policy matters are easier to see in such surrogate measures as changes in the behavior of lawyers, both in and out of government, than in the statutes and case decisions themselves.
It may well be that the United States remains over on one far end of the spectrum of judicial participation in legislative and administrative policymaking. What is increasingly clear, however, and most easily identifiable in the work of constitutional courts, is that judicial participation in and influence on the politics of policy-making is not uniquely an American phenomenon. Indeed, this issue offers convincing evidence that since World War II, the style and content of legislative and administrative politics in Europe have changed as a result of increasing judicial participation in political decision making.

REFERENCES


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