

Ancillary Powers of Constitutional Courts

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I. Introduction

Observers of the global judicialization of politics have noted the spread of constitutional courts around the world, which made their appearance in early twentieth-century Europe¹ and became seemingly required practice thereafter in Asia, Africa, and Latin America.² The paradigmatic power of these courts is constitutional review, in which a court evaluates legislation, administrative action, or an international treaty for compatibility with the written constitution. It is natural that writers on the new constitutional courts have concentrated attention on judicial review, for it is here that the courts' lawmaking power is at its apex. Relatively free of the threat of correction from other political actors, courts exercising judicial review are rather obviously policy-making bodies. But in their understandable eagerness to assess new systems of review, scholars have paid little attention to the other functions of constitutional courts—functions that potentially alter the status and effectiveness of the bodies.

This Article is concerned with what we call the ancillary powers of constitutional courts—those powers that fall outside the prototypical constitutional-review function described above. Perhaps because of the prominence of constitutional courts and their function of reviewing legislation and government action, constitution drafters have given new courts a wide range of other tasks ranging from impeachment to certifying states of emergency. Just as Martin Shapiro has argued that scholars of American law and courts have paid too much attention to judicial review,³ scholars of the

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1. See Torbjörn Vallinder, *When the Courts Go Marching In*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 13, 23 (C. Neal Tate & Torbjörn Vallinder eds., 1995) (describing Austria's adoption of Hans Kelsen's BV-G constitutional text in 1920, which established a national court equipped with the power of judicial review).

2. See, e.g., Ran Hirschl, *The Judicialization of Politics*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 119, 126–27 (Keith E. Whittington et al. eds., 2008) (describing how judicial bodies in countries throughout Asia, Africa, and Latin America have played an increasingly crucial role in electoral processes and political accountability movements, and identifying specific countries that have adopted constitutional courts).

3. See Martin Shapiro, *Public Law and Judicial Politics*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE II* 365, 365–66 (Ada W. Finifter ed., 1993) (lamenting that public-law scholarship

new constitutional courts also risk an incomplete understanding of courts as political institutions if they ignore these other powers of constitutional courts, which often place the courts in the midst of politically charged controversies. This Article is a first attempt to call attention to these powers as a set. It describes the powers, documents trends over time, and speculates as to the political consequences of assigning courts tasks beyond judicial review.

We do not mean anything pejorative by labeling these powers ancillary. As a historical matter, the earliest constitutional power of courts was that of judicial review.⁴ The powers considered here arise later as a historical matter, and hence can be labeled ancillary in this sense. Furthermore, none of the powers considered here is seen as essential to the definition of a court as a constitutional adjudicator. The defining function of a constitutional court is constitutional review, and other powers may be bundled with that function, but need not be. As we will see, the ancillary powers vary in the extent to which they require the court to refer to a constitutional text, and some of them do not involve the constitution even nominally. But paradoxically, the involvement of courts in ancillary tasks has the potential to undermine their ability to conduct effective constitutional review, precisely because it pulls them into political conflicts.

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

II. Constitutional Review and Judicial Lawmaking

A. *The Spread of Constitutional Review*

Constitutional interpretation is arguably an essential function of written constitutions, but for much of the history of written constitutions the task was primarily assigned (if at all) to the legislature in accordance with the doctrine of parliamentary sovereignty.⁵ The American experience with *Marbury v. Madison*⁶ was, however, emulated in several Latin American constitutions in

focuses largely on the Supreme Court's constitutional law opinions and votes, a topic too broad and sporadic to have any meaningful impact on everyday American politics).

4. See Tom Ginsburg, *The Global Spread of Constitutional Review*, in THE OXFORD HANDBOOK OF LAW AND POLITICS, *supra* note 2, at 81, 83–84 (discussing possible causes for the emergence of judicial review under the U.S. Constitution).

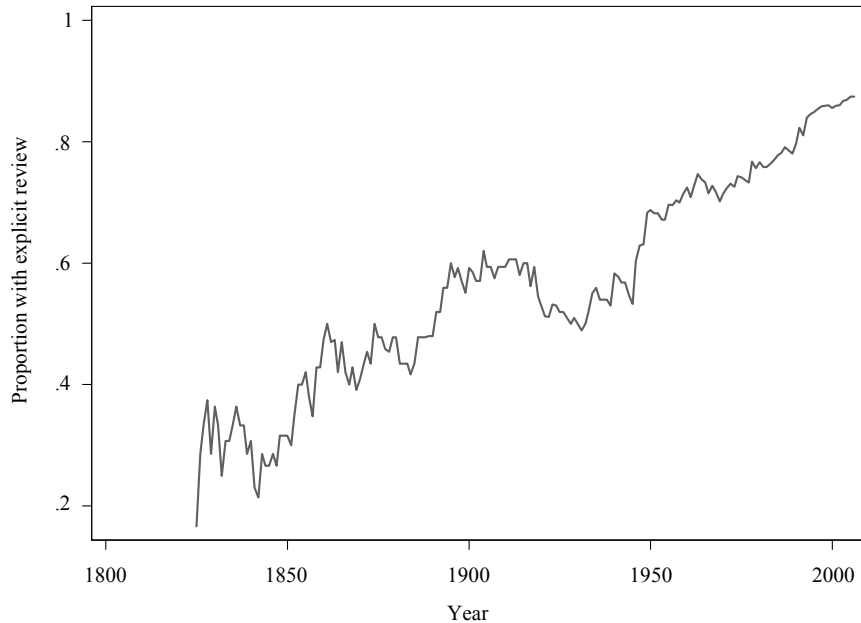
5. See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 1–4 (2003) (illustrating how judicial review has largely replaced notions of parliamentary sovereignty as the primary vehicle of constitutional interpretation in modern Europe).

6. 5 U.S. (1 Cranch) 137 (1803).

the nineteenth century⁷ and in other countries, such as Norway, where courts announced the power to review legislation for constitutionality.⁸ Figure 1 documents the spread of the norm of designating a particular body with authority to interpret the constitution, suggesting that the norm was well established by the turn of the twentieth century.⁹

Figure 1: Proportion of Constitutions in Force That Provide Explicitly for Constitutional Interpretation

Universe: All Independent States Since 1789 ($N = 562$ Constitutions)



In the mid-twentieth century, the rise of designated constitutional courts associated with Hans Kelsen's Austrian model shifted the institutional locus of constitutional review.¹⁰ Within the universe of constitutions providing for explicit interpretation, there has been a distinct trend away from legislative

7. See M.C. MIROW, *LATIN AMERICAN LAW* 107–08, 111 (2004) (detailing the transformative impact the introduction of judicial review had on Mexican and Argentine governmental structures in the nineteenth century).

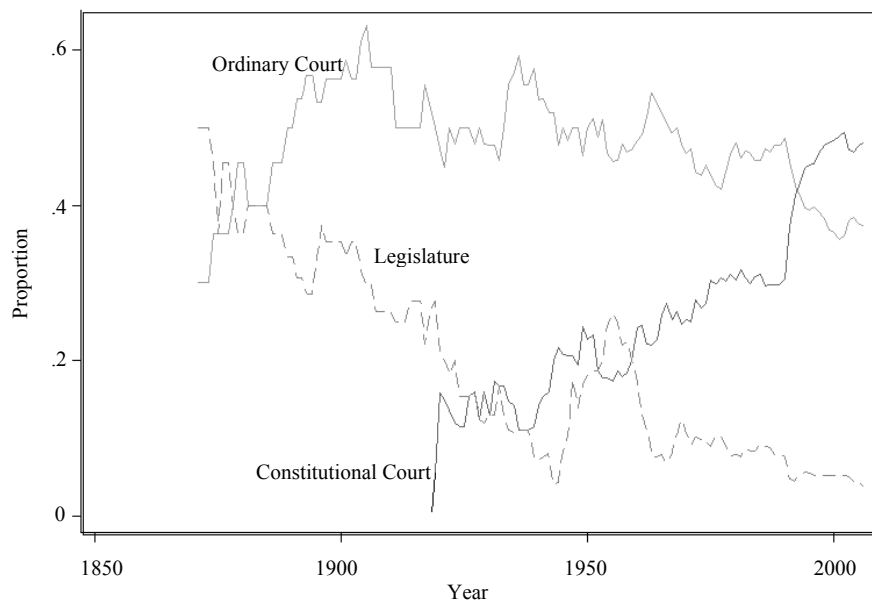
8. Rune Slagstad, *The Breakthrough of Judicial Review in the Norwegian System*, in *CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS* 81, 81 (Eivind Smith ed., 1995).

9. All data in this Article is drawn from the authors' Comparative Constitutions Project, which collects information about the formal characteristics of contemporary and historical written constitutions. For a description of the project and its methodology, see Tom Ginsburg & Zachary Elkins, *Comparative Constitutions Project*, <http://www.comparativeconstitutionsproject.org/> (specific data is on file with the authors).

10. Ginsburg, *supra* note 4, at 85 (explaining that the constitutional-court model used in Europe post-World War II emanated from Kelsen's Austrian initiative, which subjugated legislative acts to judicial review).

interpretation and toward interpretation by courts, particularly toward a designated constitutional court. For example, virtually every Eastern European country that drafted constitutions after the fall of communism in 1989 adopted a specialized constitutional court.¹¹ Other constitution makers in new democracies have also preferred the Kelsenian model. Figure 2 provides a graphic illustration of some of these striking trends. The data suggest a secular increase in the interpretive role of constitutional courts at the expense of ordinary courts and, in particular, legislatures.

Figure 2: Proportion of Constitutions That Provide Primary Review Power to Select Bodies
Universe: Constitutions with Explicit Constitutional Review ($N = 404$)



B. *The Political Logics of Constitutional Review*

Constitutional review can be divided into two different kinds of tasks with very different political logics: the resolution of disputes among multiple lawmakers and the protection of individual rights.¹² Both of these involve

11. *Id.* The exception being Estonia, where the Supreme Court functions as both an ordinary high court and a court of constitutional review. EESTI VABARIIGI PÕHISEADUS [PÕHISEADUS] [Constitution] art. 149 (Est.), translated in 6 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Rüdiger Wolfrum & Rainer Grote eds., 2009).

12. See Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia*, 16 IND. J. GLOBAL LEGAL STUD. (forthcoming 2008) (manuscript at 4, on file at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134183) (distinguishing the constitutional powers of the Mexican Supreme Court, which “police[s] vertical and horizontal

the constraint of present-day political authorities on the basis of fundamental principles in the constitutional text. First, consider the logic of dispute resolution among multiple lawmakers. Here we can include the classic federalist rationale for judicial review so apparent in the early history of the U.S. Supreme Court and in Hans Kelsen's model for the Austrian Constitutional Court. With two levels of lawmaking authority, each with its own area of competence, a neutral third party is needed to ensure that neither lawmaker steps over the boundary into the other's jurisdictional domain. The oft-noted affinity between federalism and judicial review reflects this need.¹³

We can also include horizontal separation-of-powers schemes as drawing on the logic of dispute resolution. Where two parallel bodies have different zones of lawmaking authority, a neutral third is needed to police the boundary. The scheme of divided lawmaking between the executive and legislature in the Constitution of Fifth Republic France is the quintessential example here. The French system allows the executive to make law by decree,¹⁴ and established a *Conseil Constitutionnel* in large part to keep parliamentary legislation from impinging on the executive's zone of

separation of powers," from those of the Colombian Constitutional Court, which acts to "deepen the social bases of democracy by constructing rights").

13. See LUIS LOPEZ GUERRA, EUR. COMM'N FOR DEMOCRACY THROUGH LAW, CONFLICT RESOLUTION IN FEDERAL AND REGIONAL SYSTEMS 3 (2002), [http://www.venice.coe.int/docs/2002/CDL-JU\(2002\)024-e.pdf](http://www.venice.coe.int/docs/2002/CDL-JU(2002)024-e.pdf) ("The truth is that with only a few exceptions, in Europe the task of judicially resolving conflicts between central and regional or federal authorities is usually assigned to Constitutional Courts or equivalent judicial bodies."). The distinct nature of conflict resolution is evident in constitutions that have special procedures for resolving conflicts of competence. See, e.g., BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] BGBl No.1/1930, as last amended by Bundesgesetz [BG] BGBl I No. 100/2003, art.138, § 1(c), (Austria), translated in 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (granting the Constitutional Court the power to pronounce on conflicts of competence between a state and the Federation); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution] art. 93, §§ 1, 3–4 (F.R.G.), translated in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (granting the Federal Constitutional Court authority to rule on "disputes" or "disagreements" between the Federation and the Länder); CONSTITUCIÓN [C.E.] art. 161, §§ 1(c), 2 (Spain), translated in 17 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (granting the Constitutional Court the power to resolve jurisdictional and statutory disputes between "the State and the Autonomous Communities"). Occasionally, provisions for multiple lawmakers are utilized in a constitutional text with regard to specific territories as a means of ensuring their acquiescence to central authority. In Finland, for example, the Supreme Court can determine conflicts between the central state and the Åland Islands. See SUOMEN PERUSTUSLAKI [PERUSTUSLAKI] [Constitution] § 120 (Fin.), translated in 17 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (granting the Åland Islands self-governance as a matter of constitutional right and incorporating the Act on the Autonomy of Åland (1991), which gives the Supreme Court authority to decide conflicts of authority under § 60). The Bosnia–Herzegovina constitutional text (which was part of the 1995 Dayton Agreement) similarly gives the Court competence to resolve disputes between the two geographic entities. CONST. BOSN. & HERZ. art. VI, § 3(a).

14. See John D. Huber, *Executive Decree Authority in France*, in EXECUTIVE DECREE AUTHORITY 233, 233 (John M. Carey & Matthew Soberg Shugart eds., 1998) (remarking that "the French Constitution of 1958 creates two executives, a president and a prime minister" and that "[f]or both of these executives, decree authority is an important ingredient").

authority.¹⁵ In the United States, one can think of constitutional disputes over executive competence, such as the proper scope of the Commander-in-Chief power or issues related to judicial control of administration in situations of congressional delegation to agencies. Each of these problems involves defining the boundary between multiple lawmakers and enforcing the founding bargain that set up the institutions in the first place.

The second major function of judicial review is individual-rights protection. The image here is of the judge as hero and policy maker. Rather than triadic dispute resolution among governmental bodies, the judge defends the individual from the mighty apparatus of the state in the interest of particular substantive goals of liberal democracy. The policy-making role of courts is more apparent here because the logic of seemingly neutral dispute resolution does not really mask it. When the court substitutes its own judgment for that of the government or legislature, it cannot be doing anything other than policy making.

Much work has shown how courts created to play the basic dispute-resolving function can transform their role into one that involves much more explicit policy making. Again, French experience provides a paradigmatic example. Some years after its creation as a body to police the boundary between the executive and legislature, the *Conseil* “discover[ed]” that the 1789 French Declaration of the Rights of Man formed a part of the French Constitution.¹⁶ This gave the Court a human-rights mandate that it had not previously exercised.¹⁷ With constitutional amendments in summer 2008 granting the *Conseil* powers of prospective review for the first time, the transformation is complete. The similar transformation of the U.S. Supreme Court from its early focus on centralizing federalism into, in part, a rights guardian began before *Lochner v. New York*¹⁸ and has expanded with fits and starts since then.¹⁹ Again, a court shifted from dispute resolver to rights protector over time.

15. ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* 47 (1992) (“The function of the Council was made explicit: to facilitate the centralization of executive authority, and to ensure that the system would not somehow revert to traditional parliamentary orthodoxy.”).

16. *See id.* at 37, 41–45 (describing how the Preamble to the French Fourth Republic Constitution gradually became accepted as an authoritative constitutional document despite the creators’ apparent contrary intentions).

17. *See id.* at 45 (“Courts . . . began to catalog, and quite explicitly, a vast array of constitutional and extra-constitutional principles[,] . . . includ[ing] such discoverable notions as ‘individual liberty,’ ‘equality before the law,’ ‘freedom of conscience,’ and ‘nonretroactivity’ . . .”).

18. 198 U.S. 45 (1905).

19. *See, e.g., Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (holding that a Colorado state constitutional amendment seeking to preclude legal protection of gay rights was unconstitutional); *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) (holding that a state denies defendants equal protection when members of the community who share a common ethnicity with the defendant are purposely excluded from being on the jury); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (granting indigent criminal defendants the right to legal counsel); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 (1954) (prohibiting racial segregation of public schools).

Regardless of whether the court is functioning as a boundary-guarding dispute resolver or as a rights-enforcing constraint on government, a common thread in both forms of constitutional review is judicial lawmaking. This feature of lawmaking is inherent in the judicial and administrative process.²⁰ In lieu of the Montesquieuan conception of rule making as practiced solely by the legislature,²¹ we must accept judicial lawmaking if we are to characterize adjudication as applying general principles to particular cases. This is so even if judges are adept at characterizing their role as merely applying preexisting rules; that sort of justification is simply part of the game.²²

The lawmaking function of constitutional review has been highlighted in two literatures bridging political science and law. The first is comparative work, by Alec Stone Sweet and others, that focused initially on the *Conseil Constitutionnel*.²³ The French system of prepromulgation abstract review highlights the lawmaking function because the *Conseil*'s declarations of unconstitutionality almost always lead to revision and resubmission of the legislation to conform with the constitutional dictates of the *Conseil*.²⁴ Stone Sweet observed that this type of review turns the *Conseil* into a specialized third chamber of the legislature.²⁵ Stone Sweet used this insight to develop a broader "legislative" approach to abstract review,²⁶ in which judicial lawmaking is not the particular and retrospective type identified by Shapiro²⁷ but rather shares with the legislative process the elaboration of general norms for prospective application.

20. MARTIN SHAPIRO, COURTS 28 (1981) [hereinafter SHAPIRO, COURTS] ("Nearly all contemporary students of courts agree that courts do engage in at least supplementary and interstitial lawmaking, filling in the details of statutory or customary law. In several major systems courts go far beyond interstitial lawmaking.") (endnote omitted); MARTIN SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 21–22, 93–95 (1968) [hereinafter SHAPIRO, SUPREME COURT] (noting that both courts and agencies play major policy-making roles on constitutional issues in the United States).

21. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 6 (Anne M. Cohler et al. trans. and eds., Cambridge University Press, 1989) (1750).

22. See Martin Shapiro, *Judges As Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 155–56 (1994) ("[Courts] must always deny their authority to make law, even when they are making law.")

23. E.g., STONE, *supra* note 15; Alec Stone, *The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe*, 19 POL'Y STUD. J. 81 (1990) [hereinafter Stone, *The Birth and Development of Abstract Review*]; Alec Stone, *Complex Coordinate Construction in France and Germany*, in THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 1, at 205 [hereinafter Stone, *Complex Coordinate Construction*].

24. See Stone, *The Birth and Development of Abstract Review*, *supra* note 23, at 84 (explaining that in the French system of *a priori* review, laws are referred to the court by politicians after adoption but before promulgation, effectively extending what would otherwise be a concluded legislative process).

25. STONE, *supra* note 15, at 8–9.

26. *Id.*

27. See SHAPIRO, SUPREME COURT, *supra* note 20, at 9–11 (describing how the Supreme Court functions as a dispute-resolution body that settles disagreements over the validity and interpretation of statutes and regulations).

The lawmaking function of constitutional courts is emphasized in a second literature that has become a central paradigm in public-law studies of law and courts—namely, strategic accounts of judicial power. The core insight of the strategic model is that courts can make law but are constrained by other actors in the political system.²⁸ This work originated in the context of “dynamic” statutory interpretation in the United States.²⁹ The Supreme Court can adopt its preferred interpretation of a particular piece of legislation. Whether this judicial interpretation is stable depends, in spatial terms, on the distance between the interpretation and the ideal policy preferences of other actors.³⁰ If both houses of Congress and the President disagree with the Court and can agree on a more preferred interpretation, they can cooperate to pass new legislation overturning the Court. The process then starts all over again. Over time, the Court and Congress continue to develop the law together; the law is simply the equilibrium outcome of their games of power. Much empirical work has documented the back and forth of Congress and the Court engaging in “constitutional dialogues” in particular policy areas.³¹

This work has positive and normative implications. The positive implication is that judicial “activism” is a continuous variable reflecting the zone of space where other actors cannot sufficiently agree to overturn judicially enacted policy. This means that the ability of courts to deviate from the desired preferences of politicians will vary as those preferences themselves diverge from each other. For example, judicial lawmaking power should expand in periods of divided government because politicians will find it more difficult to agree.

The constitutional structure will also play a key role in determining the extent of judicial power: in the proverbial state of other things being equal, more actors involved in the legislative process should lead to more policy space in which the court can work because of the difficulty of passing new legislation. It is thus not surprising that courts in the United Kingdom, facing

28. See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 69 (1994) (claiming that legislative and executive forces act as political constraints on the Supreme Court’s decision-making function).

29. See, e.g., *id.* (demonstrating that an interpreter’s statutory interpretations are “constrained both by the way the issue is framed for her from below and by the prospect that her interpretation will be overridden from above”); John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT’L REV. L. & ECON. 263, 263 (1992) (“If a court’s decision fails to reflect external political reality, it cannot stand for long.”).

30. See Ferejohn & Weingast, *supra* note 29, at 267–69 (building a one-dimensional model of the Court’s authority to enact its policy preferences vis-à-vis previously enacted legislation).

31. See, e.g., LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 138–57 (1998) (delineating the ways in which the Court is constrained by separation of powers and using the parties’ briefs in a random sampling of cases to show that the Court is often informed of the preferences of other political actors); see also LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 233–47 (1988) (outlining the means by which constitutional interpretation is a shared enterprise calling on the best efforts of both Congress and the Judiciary).

only one majoritarian legislative body in the House of Commons, are less active than are courts in the United States, which contend with weaker parties and three separate institutions that must collaborate to make new law.³² Nor is it surprising that the European Court of Justice has a great deal of strategic space in which to operate, with many diverse states involved in the formal lawmaking process.³³

The key distinction between statutory and constitutional interpretation in this view hinges on the greater difficulty of overruling the court in the constitutional context. Constitutional amendments are more difficult to obtain than are ordinary legislative acts. A judicial decision to treat a policy area as a constitutional matter will render the court much more powerful, not only because of the normative significance attached to the constitution but also because overruling a constitutional interpretation requires a constitutional amendment.

This work on judicial lawmaking also has a normative implication. A judicial interpretation that deviates from the statutory or constitutional text may in fact be legitimate if it is within the tolerance zones of other sitting political actors. William Eskridge has argued forcefully for just this kind of “dynamic” approach to statutory interpretation.³⁴ The court’s creativity plays a role in keeping the system up to date and saves the legislature the trouble of having to continually amend legislation.³⁵ The positive observation of judicial lawmaking now has normative significance.

One of us has argued that the basic political rationale behind the adoption of constitutional review is one of political insurance.³⁶ When parties are uncertain about their position in the future constitutional order, they have a need for a neutral body to provide a forum to challenge majority rule, to fill gaps in the text, and to articulate the bargain in accordance with

32. See Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT’L REV. L. & ECON. 295, 296 (1996) (arguing that the American system fosters more “judicial creativity” than the British system because the presence of a bicameral Congress and a President provides three independent vetoes on new legislation, thereby “allow[ing] the court[s] to diverge further before provoking a legislative correction”).

33. See *id.* at 308–09 (postulating that the development of the European Union, with an increasingly powerful European Parliament, has increased legislative resistance and in turn expanded the judicial discretion of the European Court of Justice).

34. See ESKRIDGE, *supra* note 28, at 131, 130–32 (“[T]he traditional rule has been that patterns of statutory interpretations by agencies and courts adapting a statute to changed circumstances are presumptively valid so long as they have been brought to Congress’s attention and Congress has not changed them.”).

35. See *id.* at 132 (arguing that one reason to separate the legislative and judicial powers is to leave the legislative agenda uncluttered by issues of statutory fine-tuning).

36. See GINSBURG, *supra* note 5, at 18 (viewing judicial review as a form of political insurance for elected constitutional drafters that guarantees them a forum to challenge the legislature if they lose their postconstitutional elections).

the wishes of the founders.³⁷ This insures electoral losers from being dominated by the winners.

All this work on constitutional review and constitutional courts has developed the basic insight that courts make law into a sophisticated framework for understanding judicial power in particular political contexts. But the very success of the research program has obscured other questions. Judicial power becomes equivalent to the extent of lawmaking discretion in any particular context. As we shall see, however, a complete survey of powers allocated to constitutional courts goes beyond lawmaking.

III. Ancillary Powers

A. *Types and Trends*

Besides the core task of constitutional review of legislation and administrative action, constitutional courts have been granted other powers, including such duties as proposing legislation;³⁸ determining whether political parties are unconstitutional;³⁹ certifying states of emergency;⁴⁰ impeaching senior governmental officials;⁴¹ and adjudicating election

37. *See id.* at 19 (“Political uncertainty leads to the adoption of judicial review as a form of insurance to protect the constitutional bargain.”).

38. *See, e.g.*, KONSTITUCIA CHECHENSKOJ RESPUBLIKI [KONST. CHECH. ICH.] [Constitution], 1992, art. 65 (Chechen Republic of Ichkeria), *translated in* 4 CONSTITUTIONS OF DEPENDENCIES AND TERRITORIES (Philip Raworth ed., 2005) (including the courts with Parliament and the President in the group that has the right of legislative initiative); Federal’nyi Konstitutsionnyi Zakon [FKZ] [Federal Constitutional Law], O Konstitutsionnyi Sud Rossiiskoi Federatsii [Konst. Sud RF] [On the Constitutional Court of the Russian Federation], Sobranie Zakonodatel’stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1994, No. 13, Item 1447, art. 3, § 6, *translated in* 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (“[The Constitutional Court] shall take legislative initiative on matters within its jurisdiction.”).

39. *See, e.g.*, KONSTITUCIYA NA BALGARIYA [KONST. BULG.] [Constitution] art. 149, § 1(5), *translated in* 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (declaring that the Constitutional Court will rule on disputes concerning the constitutionality of political parties); GG art. 21, § 2 (F.R.G.) (declaring parties that seek to impair or abolish the free democratic basic order unconstitutional); ZHONGHUA MINGUA XIANFA ZENG XIU DIAO WEN [XIANFA ZENG XIU DIAO WEN] [Additional Articles to the Constitution] art. 5 (Taiwan), *translated in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (“[The] Constitutional Court [shall] adjudicate matters relating to . . . the dissolution of unconstitutional political parties.”).

40. *See, e.g.*, HAYASTANI HANRAPETOWT’YAN SAHMANADROWT’YOWNY, 1995 [SAHMANADROWT’YOWNY] [Constitution], art. 100, § 6 (amended 2005) (Arm.), *available at* <http://www.president.am/files/output.php?fid=111> (establishing the Constitutional Court’s ability to certify whether or not the President has grounds to invoke a state of emergency).

41. *See, e.g.*, KONST. BULG. art. 149, § 1(8) (directing the Court to rule on impeachment of the President or Vice President once it is initiated by the National Assembly); GG art. 61, § 1 (F.R.G.) (empowering the Federal Constitutional Court with the ability to declare that the President forfeited his or her office by willfully violating the Basic Law); A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [ALKOTMÁNYA] [Constitution] art. 31/A, § 6 (Hung.), *translated in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (allowing the Court to remove the President after an impeachment proceeding if it finds that he has violated the law); MONGOL ULSYN ÜNДСЕН KHUULI [ÜNДСЕН KHUULI] [Constitution] art. 35, § 2 (Mong.), *translated in* 12 CONSTITUTIONS OF THE

violations.⁴² U.S. federal courts have some of these and other powers, including rule making⁴³ and, until recently, a role in appointing special prosecutors.⁴⁴ Constitutional courts have been given a wide range of other powers that move even further afield from the defining role of judicial review. From 1994 to 1996, the Constitutional Court of Belarus had the power to “submit proposals to the Supreme Council on the need for amendments and addenda to the Constitution and on the adoption and amendment of laws.”⁴⁵ The Azerbaijani draft constitution gave the constitutional court power to “dissolve parliament if it repeatedly passes laws that violate the Constitution,”⁴⁶ though this, perhaps thankfully, did not survive into the final draft.⁴⁷ The South African Constitutional Court must certify the constitutions of provinces for conformity with the Constitution.⁴⁸ Portugal’s Constitutional Court must certify the death or incapacity of the President.⁴⁹

The Constitutional Court of Thailand, first set up in 1997 as part of an effort to clamp down on corruption,⁵⁰ exercised a wide array of ancillary powers, and it continues to do so under the 2007 Constitution. It can

COUNTRIES OF THE WORLD, *supra* note 11 (allowing for removal of the President on the basis of findings from the Constitutional Court of an abuse of power).

42. *See, e.g.*, GG art. 41, § 2 (F.R.G.) (allowing for complaints concerning electoral legitimacy and oversight to be lodged with the Federal Constitutional Court); LA CONSTITUTION [1958 CONST.] arts. 58–60 (Fr.), *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (granting the Constitutional Council the power to examine electoral disputes); LIETUVOS RESPUBLIKOS KONSTITUCIJA [LITH. KONST.] [Constitution] art. 105, § 3(1) (Lith.), *translated in* 11 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (requiring the Constitutional Court to present conclusions about violations of election laws in presidential or parliamentary elections).

43. *See* Rules Enabling Act, 28 U.S.C. § 2072(a) (2000) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence . . .”); James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1518 (2001) (observing that the Supreme Court’s power “to exercise wide ranging, freestanding supervisory powers over inferior courts and ministerial officers” is rooted in Anglo-American jurisprudential precedent).

44. *See* 28 U.S.C. § 593(b)(1) (2000) (“Upon receipt of an application . . . the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel’s prosecutorial jurisdiction.”).

45. KANSTYTUCYJA RĚSPUBLIKI BELARUS’ [KANST. BELR.] [Constitution], art. 130 (repealed 1996).

46. Rett R. Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance: Current Development*, 23 GA. J. INT’L & COMP. L. 155, 190 (1993).

47. AZĚRBAYCAN KONSTITUSIYA [AZER. KONST.] [Constitution] art. 130, § 3 (Azer.), *translated in* 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (enumerating the current powers of the Constitutional Court of Azerbaijan, which do not include the ability to dissolve Parliament).

48. S. AFR. CONST. 1996 § 144.

49. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONST. PORT.] art. 223, § 2(a), *translated in* 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11.

50. Tom Ginsburg, *Constitutional Afterlife: The Continuing Impact of Thailand’s Post-political Constitution*, 7 INT’L J. CONST. L. 83, 94 (2009).

introduce organic laws;⁵¹ determine whether an Emergency Decree is made in a real emergency;⁵² determine whether members of the House of Representatives and Election Commissioners should be disqualified;⁵³ and decide whether political-party regulations violate the Constitution or fundamental principles of Thai governance.⁵⁴ Its President is a member of the selection committees for the appointed seats in the Senate and for most independent agencies charged with monitoring government.⁵⁵ In 1997, the Constitutional Court also had the duty to confirm findings of and evaluate disclosures submitted to the new National Counter-Corruption Commission (NCCC).⁵⁶

How common are these ancillary powers? Figure 3 provides an indicator of the trends. In the Comparative Constitutions Project survey, which covers the 800 or so constitutions since 1789, we ask whether constitutional courts are given any powers besides the power of judicial review. Following the appearance of the Kelsenian model in 1920, we begin to see constitutional courts' formal powers accumulate. Figure 3 provides the mean number of ancillary powers provided to constitutional courts in formal constitutional texts, over time. The typical constitutional court in existence today has three ancillary powers—a three-fold increase from the Kelsen era when these bodies took on an average of one other function.

51. RÁTTÁTAMMÁNOON HÄENG RÁËTCHÁANA AJÁK TAI [RÁTTÁTAMMÁNOON] [Constitution] art. 139 (Thail.), *translated in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11.

52. *See id.* § 185 (stipulating that the Constitutional Court presides over complaints by legislators that a potential Emergency Decree is unconstitutional and determines whether the complaints are valid).

53. *Id.* §§ 91, 233.

54. *Id.* §§ 65, 68.

55. *Id.* §§ 113, 231, 243, 246.

56. RÁTTÁTAMMÁNOON, 1997, § 295 (Thail.) (repealed 2007). For further discussion of this role of the Constitutional Court of Thailand, see *infra* notes 101–14 and accompanying text.

Figure 3: The Average Number of Ancillary Functions Assigned to Constitutional Courts, by Year
 Universe: Constitutions with Constitutional Courts ($N = 121$)

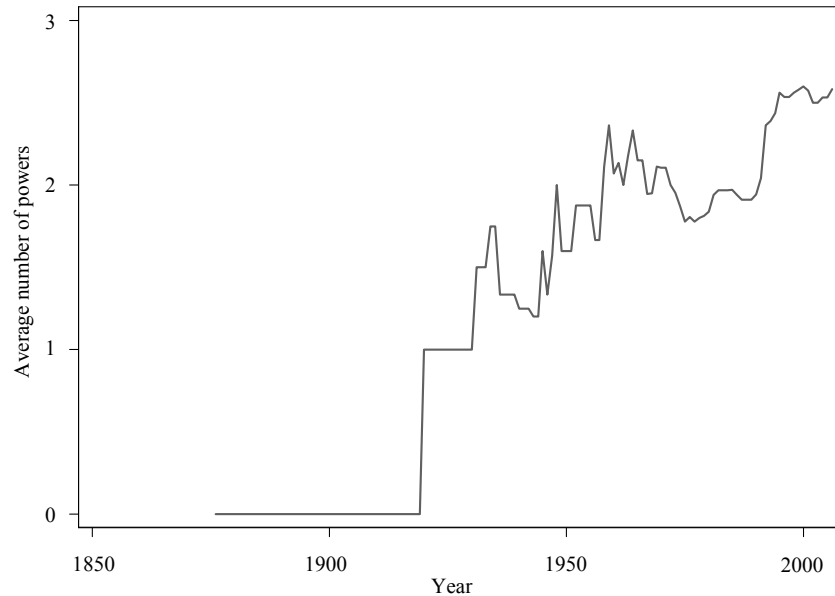


Table 1 shows the principal ancillary functions provided to constitutional courts and the proportion of contemporary constitutions (as of 2006) that provide each power.

Table 1: Some Frequent Ancillary Powers of Constitutional Courts
 Universe: Constitutions with Constitutional Courts in Force in 2006
 ($N = 77$)

Function	Percent with Function
Adjudicate or Supervise Elections	55
Review Treaties	39
Adjudicate Charges Against the Executive	30
Adjudicate Charges of Illegal Political Parties	29
Review States of Emergency	7

One can array these ancillary powers on a spectrum, from those that rather clearly involve judicial lawmaking (such as proposing legislation and articulating the standards that make a political party unconstitutional), to those that involve relatively pure forms of dispute resolution (such as impeachment and electoral disputes) in which decisions may be highly political,

but lawmaking is at a minimum. The function of judicial review itself lies strongly toward the lawmaking end of the spectrum; at the other end of the spectrum are cases in which the court is resolving ad hoc disputes without even referring to the constitutional text. We will take the powers in this order.

B. Proposing Legislation

The first power grows rather directly out of the lawmaking functions of review described above. Courts engaged in constitutional dialogues are sometimes characterized as acting as a kind of negative legislator, constraining the legislature and bounding its actions rather than positively making rules.⁵⁷ This formulation goes back directly to Kelsen, who explicitly designed the Austrian Constitutional Court with this conception in mind.⁵⁸ It finds echoes in Stone Sweet's characterization of the French *Conseil*, which exercised review of legislation before promulgation as a third legislative chamber.⁵⁹

The distinction between negative and positive legislation is really rather formal, and it turns only on who has the power of initial proposal. For once a proposal is made, a decision restricting that proposal has as much substantive impact as the initial proposal. Indeed, this very aspect of negative legislation is highlighted in scholarly accounts of separation-of-powers games, where the key term is whether or not an institution provides a "veto gate" on new legislation.⁶⁰ The power of the veto gate is really a negative lawmaking power.

This is not to say, however, that the stage of the legislative process at which courts pass judgment is inconsequential. Indeed, constitutional review

57. See, e.g., Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, in *EUROPEAN AND US CONSTITUTIONALISM* 197, 200 (Georg Nolte ed., 2005) ("The constitutional judge as negative legislator may invalidate laws only to the extent that they contravene formal constitutional requirements . . . and, therefore, may remain largely apolitical.").

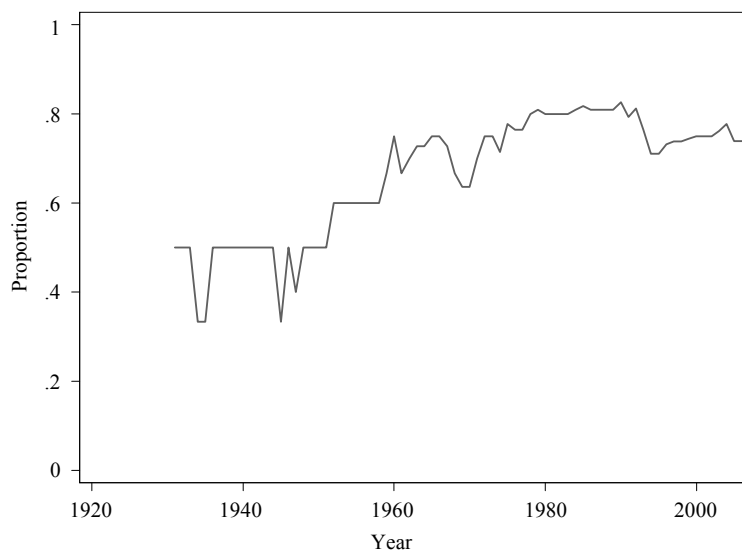
58. See HANS KELSEN, *GENERAL THEORY OF LAW & STATE* 268 (Transaction Publishers 2006) (1949) ("The annulment of a law is a legislative function, an act—so to speak—of negative legislation. A court which is competent to abolish laws—individually or generally—functions as a negative legislator."); Clemens Jabloner, *Introduction to Reprinted Works of Hans Kelsen*, in *WEIMAR: A JURISPRUDENCE OF CRISIS* 67, 71 (Arthur J. Jacobson & Bernhard Schlink eds., Belinda Cooper et al. trans., 2002) (remarking that during Kelsen's service on the Austrian Constitutional Court, "establishing the court's theoretical and constitutional basis remained at the center of Kelsen's commitment").

59. See STONE, *supra* note 15, at 108 (stressing that "every Council decision objectively constitutes the final stage of one legislative process," and therefore "the Council can be fruitfully conceptualized as a kind of third legislative chamber").

60. See, e.g., GEORGE TSEBELIS, *VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK* 19 (2002) (elaborating a concept whereby the "constitution of a country can assign the status of veto player to different individual or collective actors," who are then institutional veto players in that constitutional system); Mathew D. McCubbins, *Legislative Process*, in *THE ENCYCLOPEDIA OF DEMOCRATIC THOUGHT* 403, 408 (Barry Clarke & Joe Foweraker eds., 2001) (describing the veto gate as a "negative agenda control").

is arguably at its most potent when it can be exercised *prior* to the promulgation of legislation, rather than after, when inertial forces can render judicial action more difficult. As Figure 4 shows, since the Kelsenian innovation, constitutional courts have tended increasingly to wield pre- as opposed to post-promulgation power. While only a minority of constitutional courts held pre-promulgation review power prior to World War II, a majority (81% in 2006) now do. Thus, the negative power of these courts tends to be especially strong, as negative powers go.

Figure 4: Proportion of Constitutional Courts That Have Explicit Pre-Promulgation Judicial Review
Universe: Constitutions with Constitutional Courts ($N = 121$)



Even then, the slight distinction between negative and positive legislation breaks down completely when the court has the power to hold legislative *omissions* unconstitutional. In this type of review, well-developed in Germany and copied by constitutional courts in countries as diverse as Hungary, Slovakia, Slovenia, South Korea, and Taiwan, the court can set a deadline by which the legislature must act to correct an omission.⁶¹ The

61. See ÚSTAVA SLOVENSKEJ REPUBLIKY [ÚSTAVA] [Constitution] art. 127, § 2 (Slovk.), translated in 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (“If the violation of rights or freedoms . . . has arisen due to the inactivity of the other party, the Constitutional Court may order it to act on the issue.”); The Constitutional Court Act art. 68, § 1 (1988) (Kor.), translated in 10 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (“Any person who claims that one or more of his or her basic rights . . . have been violated by an exercise or non-exercise of governmental power may file a constitutional complaint with the Constitutional Court”); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 53 (2nd ed., rev. & expanded 1997) (indicating the effectiveness

court can even suggest specific language that would pass constitutional muster.⁶² Statutes then passed in response to court proposals become the bases for additional rounds of review.⁶³

It is not much of a jump from this type of review to one that explicitly allows the constitutional court to propose legislation, either within a designated area of competence or more generally. Yet it is quite rare that constitutional courts are explicitly given the power to propose legislation; the Russian Constitutional Court is a prominent example of one with such power.⁶⁴ Some state courts in the United States have the power to promulgate rules of evidence,⁶⁵ but proposing norms outside the narrow confines of the judicial function is nearly unheard of. In part, this may result from ardent fidelity to the separation-of-powers formalism that sees courts as passive interpreters rather than lawmakers. Where courts have *explicit* norm-proposing power, they can no longer draw on the imagery, contested by Shapiro, of being neutral appliers of preexisting norms.⁶⁶ Their very “courtiness” would be called into question were they allowed to propose general law directly, rather than indirectly as they already do. As a normative matter, it is interesting to speculate whether expanding explicit lawmaking power would really be so deleterious, but that consideration is beyond the scope of this Article.

C. *Supervising Political Parties*

It is not infrequent that constitutional courts are given the task of supervising political parties alleged to have unconstitutional programs in

in Germany of using “admonitory decisions” to declare legislative omissions inconsistent with the constitution); GINSBURG, *supra* note 5, at 143–44 (describing the imposition of deadlines for compliance on the legislature by the Judicial Yuan of Taiwan); HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 79–80 (2000) (asserting that “omissions jurisdiction” imparts upon the Hungarian Constitutional Court essentially the ability to mandate specific legislation); CONST. COURT OF THE REPUBLIC OF SLOVN., *PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE* 3 (2007), <http://www.lrkt.lt/conference/Pranesimai/Euroconference%20Vilnius-anglesko%20besedilo.doc> (“[C]ertain omissions of the legislature can entail unconstitutional gaps in the law.”).

62. *See, e.g.*, CONST. COURT OF THE REPUBLIC OF SLOVN., *supra* note 61, at 5 (indicating that Article 40 of the Slovenia Constitutional Court Act empowers the Court to operate as a “positive legislator,” suggesting and imposing laws of its own creation).

63. The use of deadlines in this type of review is slightly at odds with the rule-of-law imagery underlying constitutional court power. The court finds that legislation violates the constitution, but lets it stand for a designated period. SCHWARTZ, *supra* note 61, at 80. Those affected by the legislation will be treated as constitutionally bound one day, and not bound a day later after the deadline. Clearly this type of system is a pragmatic recognition of the dialogue phenomenon.

64. KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [Constitution] art. 104 (Russ.), *translated in* 15 *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, *supra* note 11; *see also* SCHWARTZ, *supra* note 61, at 256 n.32.

65. DAVID M. HEDGE, *GOVERNANCE AND THE CHANGING AMERICAN STATES* 160 (1998).

66. SHAPIRO, *SUPREME COURT*, *supra* note 20, at 18.

polities that take an aggressive stance toward safeguarding democracy.⁶⁷ The fountainhead of this kind of supervision is that required by Article 21, Section 2 of the German Basic Law, banning parties that oppose the “free democratic basic order.”⁶⁸ This gave rise to two famous cases familiar to comparativists wherein the German Constitutional Court banned unconstitutional parties.⁶⁹ We should also emphasize that the banning of certain parties is not at all uncommon in post-World War II constitutions. Prior to World War II, our data show that only three constitutions had ever included provisions proscribing political parties (the constitutions of Colombia 1886, Cuba 1940, and Guatemala 1945).⁷⁰ By 1955, however, 16% of constitutions in force banned certain parties or certain types of parties.⁷¹ This proportion has grown over the years and has even increased since the Cold War.⁷² Among contemporary constitutions, 28% contain party proscription provisions.⁷³

The power of constitutional courts to regulate political parties has been widely copied in the postsocialist context and given rise to dramatic decisions in this area, including the famous decision of the first Russian Court to ban the Communist Party⁷⁴ and a prominent decision in Bulgaria to ban a Macedonian-nationalist party.⁷⁵ The actual scope of the court’s power varies from evaluating party programs to actual behavior. For example, in Macedonia, the Court’s action is limited to evaluating the statute and programs of political parties to ensure that they are not directed against the constitutional order, designed to encourage ethnic hatred, or inviting military

67. See, e.g., Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1, 52 (1995) (discussing, among other examples, the Turkish Constitutional Court’s prohibition of moderate Kurdish-oriented parties, which the Court believed were “destroying the . . . indivisible integrity of the territory and the people and the existence of the Turkish state”) (internal citations omitted).

68. GG art. 21, § 2; see also KOMMERS, *supra* note 61, at 13 (labeling art. 21, § 2 as the “most vivid expression” of the German Federal Constitutional Court’s role as guardian of the constitutional order).

69. KOMMERS, *supra* note 61, at 217–24. These were the *Communist Party Case*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 17, 1956, 5 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 85, and the *Socialist Reich Party Case*, BVerfG Oct. 23, 1952, 2 BVerfGE 1, translated in part in KOMMERS, *supra* note 61, at 218–22.

70. Specifically, Article 47 of the 1886 Colombian Constitution, Article 102 of the 1940 Cuban Constitution, and Article 32 of the 1945 Guatemalan Constitution. Ginsburg & Elkins, *supra* note 9.

71. *Id.*

72. *Id.*

73. *Id.*

74. See ROBERT B. AHDIEH, *RUSSIA’S CONSTITUTIONAL REVOLUTION: LEGAL CONSCIOUSNESS AND THE TRANSITION TO DEMOCRACY 1985–1996*, at 80–83 (1997) (describing the Russian Constitutional Court’s decision to uphold Yeltsin’s decrees banning the Communist Party’s national body).

75. See KRASSIMIR KANEV & METO JOVANOVSKI, *INT’L HELSINKI FEDERATION FOR HUMAN RIGHTS, MACEDONIANS OF BULGARIA IN UNCERTAINTY 1* (2000), http://www.ihf-hr.org/viewbinary/viewdocument.php?doc_id=5080 (“On February 28, 2000 the Constitutional Court of Bulgaria declared unconstitutional ŌMO Ilinden-PIRIN, the political party of the Macedonians of Bulgaria . . .”).

aggression.⁷⁶ The German Basic Law regulates both programs and activities of political parties.⁷⁷

This power has also been copied in East Asia. During the democratic transition in Taiwan, the power of declaring political parties unconstitutional was transferred to the Council of Grand Justices (the de facto constitutional court of the Republic of China), away from the executive branch that had used the power to threaten advocates of Taiwanese independence during the period of one-party rule.⁷⁸ Interestingly, although the Council exercises abstract constitutional review power generally, it is only called a constitutional court when it sits to evaluate the programs of political parties.⁷⁹

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

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

76. See USTAV NA REPUBLIKA MAKEDONIJA [USTAV MACED.] [Constitution] art. 110 (Maced.), translated in 11 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11 (establishing human rights, civil liberties, peace, and coexistence as values underlying the Macedonian Constitution and nation, and granting to the Constitutional Court the authority to decide whether the “programmes and statutes” of political parties are conforming to the Constitution).

77. See GG art. 21 (requiring that political parties’ internal organization conform to democratic principles and banning as unconstitutional parties that by their aims or even the behavior of their supporters seek to overthrow German democracy).

78. See XIANFA ZENG XIU DIAO WEN art. 5 (“The Grand Justices of the Judicial Yuan shall . . . form a Constitutional Court to adjudicate matters relating to . . . the dissolution of unconstitutional political parties.”).

79. See *id.* (explaining that in addition to interpreting the Constitution and unifying the interpretation of laws and ordinances, the Judicial Yuan shall form a Constitutional Court to adjudicate matters regarding the impeachment of the President and Vice President and the dissolution of unconstitutional political parties).

Furthermore, as in judicial review, the court is basing its decision on a reading of the foundational text, though in practice it is often up to the court to provide substance to such concepts as the “free democratic basic order.”⁸⁰ Although this exercise in interpretation may be less textually grounded than the conventional exercise of constitutional review, it is still ultimately an exercise in interpretation.

D. Removing Leaders

Another important power of constitutional courts is to adjudicate impeachment or other removal hearings of a chief executive or other high official, typically as part of a process involving indictment by a legislative body. Roughly a third of contemporary constitutional courts have this power.⁸¹ In terms of the political functions of courts, the obvious immediate analogue to impeachment is social control. A political figure has committed a criminal act or a willful violation of the constitution (the actual formulation of the predicate act varies). The court must determine whether or not a violation has occurred or if it warrants removal from office, sometimes by reference to the constitutional text. In the quasi-criminal context of presidential impeachment, the legislature becomes the prosecutor, and the president the defendant.⁸² The constitution becomes the criminal statute to which the court refers.

In fact the analogy is incomplete. The character of impeachment in most constitutional schemes is better understood as a variant of the conflict-resolution function that is at the heart of judicial review. This is because impeachment hearings are unlikely to occur unless there is an institutional and political conflict between parliament and the executive.⁸³ To illustrate, contrast the probabilities of a successful indictment of a chief executive when a single, disciplined political party controls the legislature and presidency as compared with a situation of divided government. The president in the former scheme may be able to get away with crimes and misdemeanors that would be impeachable in the latter situation.

Impeachment cases thus presuppose political conflict, and the court becomes a neutral triadic figure to adjudicate between the two antagonists.

80. KOMMERS, *supra* note 61, at 1.

81. *See supra* Table 1.

82. *See, e.g.*, KONST. BULG. art. 149, § 1(8) (providing that the Constitutional Court “[r]ules on the impeachment initiated by the National Assembly against the President”); GG art. 61, § 1 (F.R.G.) (“The Bundestag or the Bundesrat may impeach the Federal President before the Federal Constitutional Court for willful violation of this Basic Law or any other federal law.”). A related role is to determine disqualification of legislators. *See, e.g.*, KONST. BULG. art. 72, §§ 1–2 (granting the Constitutional Court the role of terminating the powers of national representatives upon “the establishment of ineligibility or incompatibility”).

83. *See* Julie R. O’Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2236–37 (1998) (explaining the use of impeachment as a device to remedy institutional conflicts).

Recall that the fundamental problem of this type of dispute resolution is to convince the loser to comply.⁸⁴ There is no higher authority over the president and legislature that can enforce decisions; enforcement depends on the voluntary performance of the parties. The legislature wants the president out; the president wants to stay. The decision of the court must be self-fulfilling in the sense that no centralized enforcement is typically needed.

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

When two parties are in a dispute and no external enforcer can impose sanctions on them, the parties are in one variant of a situation game theorists describe as a coordination problem.⁸⁵ Coordination problems occur when two parties must decide what course of action to take based on each's expectation of what action the other will take, and two potential equilibria exist.⁸⁶ The paradigm illustration is two cars in a state of nature that must decide which side of the street to drive on. If both choose the same side of the street ("right" or "left"), they will pass each other on the road safely, but if they choose alternate sides, the two will find themselves in a head-on collision. The parties here need to coordinate their actions, and the key will be what they expect the other party to do. Even if the two parties cannot communicate directly, one way to coordinate actions is for a third party to signal to the players to drive on the appropriate side. Thus, if one driver observes a third party say to the other driver to drive on the left, the first driver may believe that the second driver is likely to follow the instruction, and the third party's signal can become self-enforcing even if they have no power to sanction the driver.

Many situations in dispute resolution involve similar coordination problems. We will return to this kind of problem further in the next subpart, which concerns ad hoc election disputes. For now, it is worth pointing out

84. See David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 725 (2009) ("[C]ourts lack any obvious means of enforcing their decisions against other government actors.").

85. See *id.* at 758–61 (2008) (describing "mixed-motive games" and how various circumstances can affect the likelihood adversarial parties will work cooperatively when their dispute is mediated by a judicial body).

86. See Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1235 (2004) ("Coordination games describe situations where parties have fully or partially common interests that can be achieved only if they coordinate their strategies among multiple possible equilibria.").

that the natural instinct to give the impeachment power to the constitutional court ensures that it may be called on to resolve monumental political crises.

An example of impeachment arose in South Korea in 2003.⁸⁷ That year saw major generational change in the political arena with the rise of left-wing lawyer Roh Moo-hyun, who won the presidential election in late December 2002.⁸⁸ Roh's ability to pursue his ambitious agenda, however, was complicated by the fact that his Millennium Democratic Party did not win a majority in the National Assembly.⁸⁹ His position became even less tenable when the party split as a result of generational tensions in September 2003 and a corruption scandal related to campaign contributions erupted that October.⁹⁰ Roh then staked his future on a mid-term legislative election to be held in April 2004, but—in violation of South Korean law—appeared to campaign for his new Uri Party by urging voters to support it.⁹¹ The majority in the National Assembly responded with a motion for impeachment, which easily passed by the necessary two-thirds vote.⁹² The impeachment was sent to the Constitutional Court for confirmation, as required under the Constitution.⁹³

Surprisingly, Roh's approval rating skyrocketed in the wake of the impeachment, and his party received overwhelming support at the April 2004 polls, winning an absolute majority in the National Assembly with 152 out of 299 votes.⁹⁴ Though speculative, it is generally believed that this indicator of the public's preferences influenced the Court in its decision.⁹⁵ On May 14, the Court rejected the impeachment motion, resolving the conflict and allowing the political process to proceed.⁹⁶ Alas, Roh's approval ratings subsequently tanked, but this was hardly the fault of the Court.⁹⁷

87. See Youngjae Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, 53 AM. J. COMP. L. 403, 406–07 (2005) (comparing the U.S. and Korean impeachment processes, and elucidating the increasing judicialization of megapolitical systems).

88. *Id.* at 408.

89. *Id.* at 409.

90. *Id.*

91. *Id.* at 410–11.

92. *Id.* at 411–12.

93. *Id.* at 412.

94. *Id.*

95. See *id.* at 411 (commenting that polls indicated seven out of ten Korean citizens opposed the impeachment).

96. *Id.* at 404.

97. See Norimitsu Onishi, *South Korea's President Sags in Opinion Polls*, N.Y. TIMES, Nov. 27, 2006, at A6 (describing President Roh as being “battered mercilessly in the polls”).

E. Electoral Disputes

The most common ancillary role for constitutional courts is supervising or adjudicating elections or election authorities.⁹⁸ As Table 1 shows, a majority of constitutional courts now have such powers. Referenda are supervised by constitutional courts in Portugal, Armenia, and many other countries.⁹⁹ The *Conseil Constitutionnel* can supervise the legality of elections for the president or legislature, and referenda,¹⁰⁰ as do many of the constitutional courts today. This ancillary power differs from all the previous ones in that there is frequently not even a formal link between the dispute and the text of the constitution. Rather, this jurisdiction is basically one of ad hoc dispute resolution on a case-by-case basis.

Why is there a trend toward involving constitutional courts in electoral oversight? The logic of coordination seems to have something to do with it. We want to illustrate this point by discussing recent prominent electoral decisions by two very different courts with constitutional review powers, the Constitutional Court of Thailand and the U.S. Supreme Court.¹⁰¹ The Constitutional Court of Thailand, set up in 1997 when Thailand returned to civilian rule after five years of being under military control, was given the power of supervising the decisions of the new NCCC.¹⁰² Corruption has been an endemic issue in Thailand, and the 1997 Constitution was designed to ensure clean politics.¹⁰³ The NCCC collected reports on assets from politicians and senior bureaucrats to ensure that there were no mysterious increases during the time they were in public service.¹⁰⁴ Those who failed to report assets could be barred from office, subject to approval from the new Constitutional Court.¹⁰⁵ The Court could also remove politicians for violations of the law and did so on occasion, which led to some politicians being banned from office.¹⁰⁶

98. See *supra* Table 1. Sometimes this is an appellate jurisdiction, as in Hungary, where the Court rules on appeals from the National Electoral Commission on the legality of particular questions subject to referenda. EUR. COMM'N FOR DEMOCRACY THROUGH LAW, DECISIONS OF CONSTITUTIONAL COURTS AND EQUIVALENT BODIES AND THEIR EXECUTION (2001), [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)009-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)009-e.asp). The following discussion of Thailand borrows heavily from Tom Ginsburg, *Ancillary Powers of Constitutional Courts*, in INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES 225 (Tom Ginsburg & Robert A. Kagan eds., 2004).

99. EUR. COMM'N FOR DEMOCRACY THROUGH LAW, *supra* note 98.

100. 1958 CONST. arts. 58–60 (Fr.).

101. On Thailand, see Tom Ginsburg, *Constitutional Afterlife: The Continuing Impact of Thailand's Post-political Constitution*, 7 INT'L J. CONST. L. 83, 93 (2009), for a discussion of how constitutional mechanisms implemented by the 1997 Constitution that aimed to limit the authority of elected representatives remain evident despite the recent military coup.

102. *Id.* at 93–94.

103. *Id.* at 93.

104. *Id.*

105. *Id.*

106. *Id.* at 96.

A high-profile case arose in January 2001 when Thaksin Shinawatra, the billionaire-turned-politician who was the leading candidate for Prime Minister in the upcoming election, was found by the NCCC to have filed a false asset report.¹⁰⁷ The Constitutional Court was put in a difficult position when Thaksin's Thai Rak Thai Party subsequently won the elections.¹⁰⁸ In a divided decision that has been described as confused, the Court found that the false report had not been filed deliberately, and thereby allowed Thaksin to take the post of Prime Minister.¹⁰⁹ Thaksin subsequently expanded his authority considerably, buying off members of the Court and other oversight institutions of the Constitution.¹¹⁰ Opposition to his rule led eventually to large-scale protests and a political stalemate culminating in a controversial election in 2006 that was boycotted by the opposition.¹¹¹ Shortly thereafter, the highly respected King charged the country's courts with resolving the dispute.¹¹² The Court then turned, belatedly, against Thaksin and found that his reelection was invalid.¹¹³ In the fall of 2006, a military coup ousted Thaksin from power, and the new rulers disbanded the Constitutional Court, which was seen as insufficiently independent.¹¹⁴ This story illustrates the dangers for courts of involvement in electoral disputes: should they fail to pick the side that eventually prevails, they are likely to be blamed as ineffectual at best and partisan at worst.

F. Summary and Implications

Many of the ancillary powers we have discussed have involved policing the political process in some form or another. Figure 5 illustrates the trends.

107. *Id.*

108. *Id.*

109. *Id.*; see also Peter Leyland, *Thailand's Constitutional Watchdogs: Dobermans, Bloodhounds or Lapdogs?*, J. COMP. L., 2007 (Issue 2), at 151, 169 n.127 (discussing the Court's "unusual" vote-counting system used in the case to reach a majority).

110. *Id.* at 96–97.

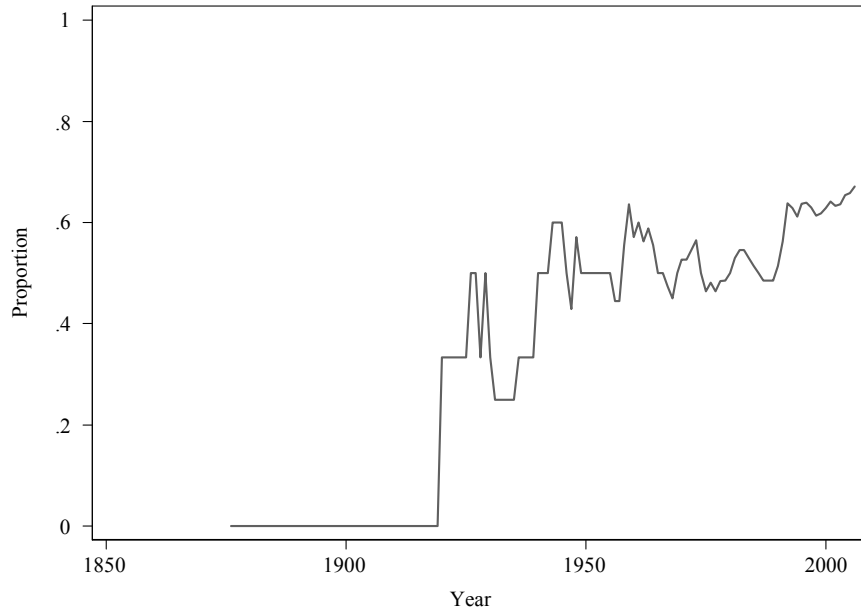
111. *Id.* at 97–98.

112. *Id.* at 98.

113. *Id.*

114. Seth Mydans & Thomas Fuller, *With Premier at U.N., Thai Military Stages Coup*, INT'L HERALD TRIB., Sept. 20, 2006, at 1.

Figure 5: Proportion of Constitutional Courts with Powers to Police the Political Process¹¹⁵
 Universe: Constitutions with Constitutional Courts ($N = 121$)



Why are ancillary powers given to constitutional courts? Perhaps it reflects a similar logic to the spread of judicial review itself: the need for political insurance in the face of uncertainty. Constitutional designers know there will be political conflict down the road, but they cannot anticipate who will be on what side of the issues and may anticipate that they are not in the majority. This will, *ceteris paribus*, lead them to empower a downstream actor who can fill gaps in the constitution and resolve disputes so as to maintain the system.

Alternatively, the assignment of ancillary powers may simply reflect the willingness of constitutional designers to bundle functions in a single body as an economizing tactic. An institution with a reputation for success is given further tasks. Just as an ace pitcher is called on to pitch more innings than a middle reliever, one gives more tasks to an important and successful institution. Of course, there are risks: using a good pitcher as both your ace and closer is tempting, but it can overburden the pitcher and ruin his arm.

What are the implications of a ballooning job description for constitutional court justices? On the practical level, does the expansion overextend the court's resources and thus compromise more-central

115. These powers include adjudication of (1) electoral disputes, (2) allegations of political party illegality, and (3) charges of impeachment for the executive(s) or members of the legislature.

functions? If the U.S. Supreme Court has its hands full with a docket of 100 cases a year, it seems fair to ask whether analogous courts in other countries can be burdened with that responsibility *plus* an additional five or six ancillary tasks, as are some constitutional courts today. This question requires inspection at closer range in particular countries, but it seems possible that the added functions—while certainly important—come into play only infrequently. Just as *Bush v. Gore*¹¹⁶ was a singular case that shifted the U.S. Court's agenda briefly, so too the ancillary tasks assigned constitutional courts may have only short-term consequences on workload. However, *Bush v. Gore* reminds us that such cases can have important implications for the character and reputation of a court. Recall that the basic paradigm of constitutional review relies on the image of the court as interpreting the foundational text. Some of the powers described above, such as evaluating the constitutionality of political parties, fit this scheme. Others, such as certifying states of emergency, involve factual determinations, while some, particularly disputes that arise in the context of elections, are more akin to pure ad hoc dispute resolution.

Criticism of the rationales of courts in these cases is common precisely because there is a conflict between the image of the court as a neutral body basing a decision on preexisting norms and the social logic of the coordination problem at hand. *Bush v. Gore* is perhaps the paradigm here. Widely viewed as the most political of political decisions,¹¹⁷ the Court's closely divided vote substituted for the votes of the electorate. The chief difference between an electorate of 100 million and an electorate of nine is that in the latter there are no ties. What could be more activist or political?

From the functional point of view, however, the decision looks quite different. For *Bush v. Gore* is a prototypical case of pure dispute resolution. Two parties come before the Court. Both prefer a resolution of some kind to continuing uncertainty. Like Weber's *kadi* under the tree,¹¹⁸ the Court was certainly not engaged in lawmaking of a real kind, as its own limiting

116. 531 U.S. 98 (2000).

117. See, e.g., Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408 (2001) ("*Bush v. Gore* was troubling because it suggested that the Court was motivated by a particular kind of partisanship, one much more narrow than the promotion of broad political principles through the development of constitutional doctrine. The distinction is between the 'high' politics of political principle and the 'low' politics of partisan advantage."); Erwin Chemerinsky, *How Should We Think About Bush v. Gore?*, 34 LOY. U. CHI. L.J. 1, 3 (2002) (observing people's acceptance of the fact "that the Court made political choices" in *Bush v. Gore*).

118. See *Terminiello v. City of Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting) ("We do not sit like a *kadi* under a tree dispensing justice according to considerations of individual expediency."); MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 213 n.48 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954) (describing *kadi* as "a term of art to describe the administration of justice which is oriented not at fixed rules of a formally rational law but at the ethical, religious, political, or otherwise expediential postulates of a substantively rational law").

assertions on the implications of its equal protection analysis made clear.¹¹⁹ Nor was the Court carrying out regime policies to exercise social control. There was no regime to serve—and that was of course the issue in the case. Rather, the Court was a neutral third resolving a coordination problem among the parties. Here we see the basic social logic of dispute resolution at its apex.

We illustrate this with a further detour into game theory to help illuminate the function of a court in these kinds of disputes. The above description of coordination problems concerned “pure” coordination: Neither driver really cares which side of the road he or she drives on as long as he avoids the accident.¹²⁰ The game in election disputes like *Bush v. Gore* is more akin to that of “chicken,” famous from the scene in the James Dean movie where two cars drive headfirst at each other to see who will be the first to swerve.¹²¹ Each party would prefer to play the aggressive strategy and refuse to swerve, but if both follow this first-best strategy, they will wind up in the collectively worst outcome of a head-on collision. The task for each party is to convincingly demonstrate that he will not swerve, thereby inducing the other party to swerve. To analogize to *Bush v. Gore*, there is only one presidency with two claimants. Each party prefers that he be the one to occupy the office. However, the most important thing is that some sort of resolution occur. The costs to the constitutional order of continuing to fight exceed the costs of being the “loser.” The trick is to figure out who will play the role of “loser” and back down from the confrontation. Left to their own devices, the parties will not be able to coordinate their roles. Each will try to express resolve to induce the other party to back down.¹²² The role of a constitutional court here is to point to one or the other contender and identify him as the “winner.” Once a court identifies one party as a winner, the decision may become a self-enforcing focal point. Gore’s perception of the likelihood of Bush’s backing down changed as soon as the Supreme Court announced its decision. Whereas before the decision, Gore seemed to have a legitimate claim on the presidency and might have expected Bush to accede, after the decision Bush was unlikely to do so. Gore could have stayed on, but the chances of Bush ever adopting the “swerve” strategy were greatly reduced.

Note that this interpretation of electoral disputes as a game of chicken suggests that the Supreme Court can play a function independent of the quality of any particular justification that it offers. The Supreme Court could have simply flipped a coin to decide *Bush v. Gore* to play this crucial

119. See *Bush*, 538 U.S. at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

120. See *supra* notes 85–87 and accompanying text.

121. *REBEL WITHOUT A CAUSE* (Warner Bros. 1955).

122. Cf. Ginsburg & McAdams, *supra* note 86, at 1235 (analogizing that when, for instance, two nations take adversarial positions, “each nation prefers to gain the territory by having the other side defer to its claim”).

function; had the Court simply pointed to Bush as the random winner, Gore would still have had to readjust his views as to the likelihood of Bush backing down. The particular reasoning offered, flawed as it was, was not the point. Regardless of its rationale, the Court decision became focal for the two parties in seeking to coordinate their strategies.¹²³

Because any external source can provide a focal point in these kinds of disputes, there is no reason that a *constitutional* court must inherently exercise this ancillary power. In many constitutional schemes, the role of the constitutional court is limited to certain types of electoral disputes. For example, in Albania, disputes over local government elections go to the ordinary courts, while disputes over parliamentary elections go to the constitutional court.¹²⁴ Nevertheless, the constitutional court can be a convenient third party to turn to in constitutional design, in part because it, like other courts, draws on the imagery of a neutral dispute resolver.

IV. Tensions Between Lawmaking and Dispute Resolution

So far we have moved on a spectrum all the way from the high-profile function of lawmaking in constitutional review toward simple dispute resolution in ad hoc impeachment cases and electoral disputes. We have thus come a long way from the conventional emphasis on the lawmaking function of courts. The image we are left with is of a court that is an ad hoc decision maker, akin to Weber's *kadi* under the tree or Shapiro's Papuan with many pigs.¹²⁵ The constitutional court helps powerful actors resolve coordination problems, and the particular justifications offered are of little import.

Of course, one important feature of constitutional schemes is that everyone is a repeat player. If we adopt as a hypothesis that courts seek to enhance their power and influence over time, then we must assume the court acts strategically not only in particular cases, as emphasized by Epstein and

123. Interestingly, despite much criticism of the decision, the Court's legitimacy as an institution was affected only very slightly by the decision. See Cornell W. Clayton, *The Supply and Demand Sides of Judicial Policy-Making (Or, Why Be So Positive About the Judicialization of Politics?)*, 65 LAW & CONTEMP. PROBS. 69, 80 (2002) (positing that the Court's decision was justified); Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 33 (2001) ("The Court's action in *Bush v. Gore* was dramatic, subject to intense media coverage, and controversial, but the effects on public perceptions and knowledge of the Court were modest.").

124. Albanian electoral law provides for the judicial appeal of election results to the Electoral College of the Court of Appeals in Tirana, an eight person panel made up of specially selected appellate judges. Electoral Code, Law No. 9087, §§ 162–163 (Alb.). For elections involving members of the national assembly, however, the Albanian Constitution grants exclusive jurisdiction to the Constitutional Court. KUSHTETUTA E REPUBLIKËS SË SHQIPËRISË [KUSH. ALB.] [Constitution] art. 131(g), translated in 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 11.

125. See *supra* note 118 (discussing the term *kadi*); SHAPIRO, COURTS, *supra* note 20, at 6 ("In most societies, however, there seem to be instances in which it pays to choose a big man to do the tasks, whether a government official like the urban praetor or, as among the Papuans, the owner of many pigs.").

Knight,¹²⁶ but across different policy areas and cases calling on the exercise of different types of powers. The court is a strategic actor over time, and hence will encounter a sequence of cases of various types.

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

This may lead courts in such circumstances to act rather more cautiously than they appear to. In the Thai example, the Court may have sought to avoid a fight with an incoming political majority with strong support, but this ultimately cost the Court when the opposition staged a coup.¹²⁷ In the Orange Revolution, the Ukrainian Supreme Court required a new election in a disputed presidential contest, but at least some analysts believed that it did so only after the major political forces had reached a consensus that a new election was the appropriate course.¹²⁸

Constitutional designers have quite consciously given courts the wide array of powers described in this Article. They have done so in part because the global success of judicial review has given constitutional courts a reputation as effective institutions.¹²⁹ Constitutional review creates a kind of stock of capital that designers seek to draw on to help resolve impasses in the political system, such as those that occur in impeachment and election disputes. The risk is that, as they are drawn into *explicitly* political conflicts, courts risk drawing down this stock of capital. This risk is no doubt particularly acute in new democracies.

In the context of ordinary dispute resolution, we have long been told that much of the structure and image of adjudication are designed to deal with the problem of the appearance of bias toward the winner of the

126. EPSTEIN & KNIGHT, *supra* note 31, at 12–13.

127. *See supra* notes 107–14 and accompanying text.

128. *See, e.g.,* Adrian Karatnycky, *Ukraine's Orange Revolution*, FOREIGN AFFAIRS, Mar.–Apr. 2005, at 35, 45–46 (documenting the Ukraine Supreme Court's decision while acknowledging that, before the Court did so, the Parliament had already met and declared the prior poll invalid).

129. *See* GINSBURG, *supra* note 5, at 26 (“[J]udicial review has a reputation for effective minoritarianism that makes designers particularly likely to adopt it.”).

dispute.¹³⁰ Appeals play this function, as do judges' reliance on the image of applying preexisting neutral principles. Many of these techniques are unavailable to constitutional courts. There is no higher court to appeal to; and oftentimes the very rationale for designating a special constitutional court is a recognition of the fact that the function is in part political in nature rather than technical and legal.¹³¹ All constitutional courts have, in the end, is the constitutional text and the notion that founding principles are dictating decisions. In the end, then, the image of judicial review is central to their political success, even when in practice constitutional courts are exercising a wider array of powers.

The dangers and tradeoffs are illustrated in the well-known story of the first Russian Constitutional Court in the Communist Party Case of 1992. The Russian Court, created in the late Gorbachev period, was seen to be a central embodiment of the rule of law and the "new" Russia.¹³² Its primary role emerged as mediating disputes between the parliament and President.¹³³ When Boris Yeltsin, in a series of decrees after the 1991 coup attempt, disbanded the Communist Party and seized its property and assets,¹³⁴ the Communists challenged the decrees as exceeding presidential power.¹³⁵ This prompted a cross-petition by opponents of the Communist Party, who invoked the Court's ancillary power to determine the party's legality and constitutional status.¹³⁶ The two petitions were joined by the Chairman of the Court, Valery Zorkin.¹³⁷

The Court was faced with a difficult situation. It could uphold the President's actions, even though he did not follow the relevant legal procedures for banning political associations, or it could strike them and side with the anticonstitutional Communists who had supported the coup. Neither

130. See SHAPIRO, *COURTS*, *supra* note 20, at 2 (describing a "triad" in which two conflicting persons call upon a third for assistance in reaching a resolution and noting that "[a] substantial portion of the total behavior of courts in all societies can be analyzed in terms of attempts to prevent the triad from breaking down into two against one").

131. See KOMMERS, *supra* note 61, at 4, 8 (differentiating judicial review, which involves the review of the constitutionality of legislation, from constitutional review, which resolves political disputes between branches and levels of government); *see also id.* at 28, 27–29 (discussing the German Constitutional Court's caseload and noting the "thin line between law and politics trod by the court" in cases of abstract judicial review, which are "almost always initiated by a political party on the short end of a legislative vote in the federal parliament or by the national or a state government challenging an action of another level of government controlled by an opposing political party or coalition of parties").

132. AHDIEH, *supra* note 74, at 78.

133. *Id.* at 50.

134. *Id.* at 41–42.

135. *Id.* at 80–81.

136. *Id.* at 81.

137. *Id.* The legal grounds of the case were complicated and better elaborated elsewhere. Suffice it to say that the case featured some bizarre arguments, such as when Yeltsin's team argued that the decree to ban a political association was legal under a 1932 Stalinist decree that permitted the Executive to undertake such action. *Id.*

option appeared particularly attractive. Thus caught, the Court attempted to split the difference by finding a mediate solution. In a decision published on November 30, 1992, the Court upheld Yeltsin's decrees against the organs of the national Communist Party of the Soviet Union, but not against its local bodies.¹³⁸ This decision provoked disappointment on all sides and failed to resolve the governmental crisis.¹³⁹ Court Chairman Zorkin then sought to negotiate a compromise document between Yeltsin and the parliament.¹⁴⁰ This constitutional compromise marked the deep involvement of the Court, and Zorkin in particular, in the realm of pure politics as opposed to law. The image of the Court as a neutral, technical body devoted to the law was dashed. When Yeltsin dispensed with the compromise and announced a decree granting himself emergency powers in March 1993, the Court issued an opinion declaring the actions unconstitutional, even before the decree was issued.¹⁴¹ Within months, Yeltsin dissolved the parliament and suspended the Court's operation.¹⁴² It was not reconvened until February 1995, with reduced powers.¹⁴³ In particular, it lost the ancillary power to declare parties unconstitutional—the very power that had sparked the crisis in the first place.¹⁴⁴

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

138. *Id.* at 82.

139. *See id.* (recounting the political exploits initiated by both parties and the seemingly tenuous position the Court attempted but failed to defend).

140. *Id.* at 86.

141. *Id.* at 87. In fact, the decree never materialized and the opinion was only an advisory opinion. *Id.* at 87–88.

142. Sergey Pashin, *A Second Edition of the Constitutional Court*, 3 E. EUR. CONST. REV., Summer–Fall 1994, at 82, 82.

143. AHDIEH, *supra* note 74, at 149; Pashin, *supra* note 142, at 83.

144. *See* AHDIEH, *supra* note 74, at 149 (discussing the passage in 1994 of Article 125 of the Russian Constitution, which reestablished the Court); KONST. RF art. 125 (enumerating the current powers of the Constitutional Court, which no longer include the ability to declare parties unconstitutional).

V. Conclusion

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

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

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