

# Constitutional Courts and Parliamentary Democracy

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Constitutional judges possess broad powers to govern, in conjunction with other state officials, by virtue of an explicit act of delegation. In the terminology of delegation theory, constitutional courts are *agents*. These courts, when considered as functional solutions to the mixed dilemmas of contracting and commitment, appear to conform, paradigmatically as it were, to the delegation theorist's preferred logic of institutional design. This article explores this formulation critically, in light of the themes laid out in the introduction,<sup>1</sup> and in light of the deep transformations of parliamentary governance now taking place in Europe as a result of the diffusion of constitutional review.<sup>2</sup>

The discussion proceeds in three parts. The first examines the organisational logic of conferring constitutional review authority on a specialised court, rather than on the judiciary as a whole. By constitutional review, is meant the authority to evaluate the constitutionality of public acts, including legislation, and to annul those acts as unlawful when found to be in conflict with the constitutional law. I then turn to constitutional politics, the sources and consequences of conferring review powers on a state organ. The second part focuses on formal elements of the delegation of powers to constitutional courts. Following Majone,<sup>3</sup> I argue that the *agency* metaphor that animates standard Principal-Agent (P-A) research on the politics of delegation is less appropriate than a metaphor of *trusteeship*, given that relevant 'political property rights' have, for all practical purposes, been transferred to constitutional judges. The third part summarises the major outcomes of constitutional politics, providing an explanation of the most important similarities and differences among my four cases. This explanation does not rely on concepts provided by delegation theory, *per se*.

## THE CONSTITUTION AND SEPARATION OF POWERS

One can always interpret the emergence of a new institution in purely functionalist terms. Doing so will displace the (potentially crucial) question of if and how pre-existing cognitive maps, ideologies, and institutional

forms constrained the choices available to those who would delegate. If functional logics are always present in episodes of conscious institutional design, focus on them is unlikely to tell us much about the (analytically prior) process of how menus of options were constituted in the first place. This latter process deserves our attention further, to the extent that it conditions expectations about the likely consequences of delegating review powers, and conditions how the legitimacy of new institutions will be understood and debated (see also McNamara, this volume).

A functional logic for the establishment of constitutional courts is laid out in the second part. The organisational logic of these courts, however, must be considered in light of inherited structures, in that certain deeply embedded ideas and organisational forms – models of governance – radically narrowed the possibilities for review in Europe. These structures gave advantages to the Kelsenian court, as a particular institutional solution to a particular institutional problem: how does a polity guarantee the normative superiority of the constitution, and of human rights provisions, without empowering the judiciary? The alternative, the American model of *judicial review*, was hardly considered. The successful diffusion of the Kelsenian court across Europe depended heavily on the belief that it could be attached to the existing architecture of the state with minimal disruption to the established order of things.

#### *The Old Constitutionalism: Legislative Supremacy and Separation of Powers*

In Europe, where a deep political hostility toward judges has reigned over most of the last two centuries, the delegation of power to judiciaries has been viewed as a necessary evil. Since statutes do not interpret, apply, or enforce themselves, political rulers needed courts; and judicial authority was made more palatable through separation of powers doctrines. These doctrines sought to distinguish the political function (legislating and administering) from the judicial function (the resolution of legal disputes by a judge through application of the legislator's law). Constitutions commonly expressed these doctrines in three, linked, ways: (1) they prohibited judicial review of legislation; (2) they denied courts jurisdiction over fundamental rights; and (3) they formally subjugated judicial to legislative authority. Put simply, these doctrines assert, and then seek to sustain, the supremacy of parliamentary statute within the legal order. Even today, with legislative sovereignty fatally weakened, these ideas retain a hold on the imaginations of legislators and other political elites.

Prior to the appearance of the Kelsenian constitutional court, it was widely assumed that constitutional review was incompatible with parliamentary governance and the unitary state. The parliamentary model

owes its popularity to its capacity to combine centralised political authority with responsible, representative democracy. The system privileges an ideology, that of majority rule, which is realised through legislative supremacy and its corollaries. American-style judicial review, by contrast, was thought to 'fit' only in polities where legislative sovereignty had been rejected – such as where 'separation' of powers meant 'checks and balances' among co-equal branches of government – or where a judicial 'umpire' of federalism was needed. Generally, forms of non-judicial, constitutional review, took root only in the German federations, Switzerland, and Austria.<sup>4</sup>

### *The New Constitutionalism*

Successive waves of democratisation in this century (for example, Germany and Italy after World War II, Southern Europe in the 1970s, the whole of Central and Eastern Europe after 1989) have transformed the juridical basis of the European state. New constitutions typically proclaim a long list of human rights; they establish a mechanism of defending the normative supremacy of the constitution; and they stipulate (non-legislative) procedures for how the constitutional law is to be amended.<sup>5</sup> The framers of these new constitutions, almost always the leaders of political parties acting in constituent assemblies,<sup>6</sup> rejected American-style judicial review.<sup>7</sup> Suspicious of judicial power, political parties sought to maintain, as far as possible, the viability of traditional separation of powers. The 'ordinary judges' – by which is meant all non-constitutional judges, including those who sit on the various specialised courts – remain precluded from reviewing the constitutionality of statute and other public acts. Instead, constituent assemblies conferred review authority on a constitutional court.

### *Kelsen's Court*

The modern European constitutional court is the invention of the Austrian legal theorist, Hans Kelsen. Kelsen developed the European model of constitutional review, first in his role as the drafter of the constitution of the Austrian Second Republic (1920–34), and then as a legal theorist. His followers and close collaborators were present at the founding of the Federal Republic of Germany, and they proposed a variant of the Austrian system as an alternative to American judicial review. Kelsen's legacy was secured when constitutional reformers in Spain, Portugal, and most of Central and Eastern Europe rejected the American, but adopted the European, 'model' of constitutional review.

We can break down this model into four constituent components. First, constitutional courts enjoy exclusive and final constitutional jurisdiction. Formally, constitutional judges possess a monopoly on the exercise of constitutional review, while the judiciary remains prohibited from engaging

in review. Second, terms of jurisdiction restrict constitutional courts to the settling of constitutional disputes. Constitutional judges do not preside over judicial disputes or litigation, which remain the function of judges sitting on the ordinary courts. Instead, specifically designated authorities or individuals ask questions of constitutional courts, challenging the constitutionality of specific legal acts; constitutional judges are then required to answer these questions, and to give reasons for their answers. Their decisions are final. Third, constitutional courts have links with, but are formally detached from, the judiciary and legislature. They occupy their own 'constitutional' space, which is neither clearly 'judicial' nor 'political'. Fourth, unlike the situation in the US,<sup>8</sup> constitutional courts may review legislation before it has been enforced, as a means of eliminating unconstitutionality prior to harm being done. Thus, in the European model, the ordinary judges remain bound by the supremacy of statute in the legal order, while constitutional judges are charged with preserving the supremacy of the constitution.

#### *The Constitution and Normative Hierarchies*

Kelsen's constitutional theory remains a standard, scholarly reference point for contemporary debates about the legitimacy of review, and thus deserves brief discussion.<sup>9</sup> Kelsen focused on the problem of determining legal validity, that is, on the issue of how legal rules and public acts are to be invested with normativity, their formal authority as binding law, enforceable through sanctioned state power. Simplifying, Kelsen viewed a system based on legislative sovereignty as logically incomplete, and indeed unstable, and sought to ground the legality of state action more formally in a supra-legislative body of rules, a *Grundnorm*. He argued that any given act could only be considered valid, or normative, if it is enabled by, and does not conflict with, a specific – and formally superior – legal rule. Furthermore, all legal rules, in order to confer validity on lower order rules, must be capable of being enforced by a judge or 'jurisdiction'.

The move to higher law constitutionalism and constitutional review established closed, self-referential, hierarchically ordered, systems of norms. The validity of every legal rule depends upon the validity of another, higher order, legal rule; and the hierarchy of norms itself depends, for its own systemic validity, on the constitution, as *Grundnorm*. A ministerial decree or a police action taken in pursuance of a statute must respect the terms of that statute or be invalid, as controlled by legally designated judicial authority; and the statute itself must conform to constitutional dictates or be invalid, as controlled by constitutional judges. The legality of any norm (which reduces to constitutional legality), and the legitimacy of the legal system, are virtually one and the same thing. That is, the

constitutional law, as validated by the sovereign people, comprises both a source of law, in and of itself, and the ultimate source of legitimacy for all other legal norms.

Kelsen's model of the juridical state can easily be translated into the language of delegation theory. The distinguishing feature of P-A models is that they link, as in a chain, authoritative acts of delegation from one constitutionally recognised authority to another. In Europe and North America, these acts typically take a highly legalistic form. The sovereign people (first-order principals) ratify a constitution, which delegates power to governmental bodies, like legislatures and courts.<sup>10</sup> The statute is the normative instrument through which governments and legislatures (agents of the electorate, but second-order principals vis-à-vis ordinary judges and administrators) delegate certain specific responsibilities and powers to the courts and the administration. Principals can therefore be identified by virtue of the constitutional authority they possess to delegate powers through a specific type of normative instrument. Agents are constituted, and their activities mandated or circumscribed, through these acts of law making. In this system, the ultimate source of authority (and of the legitimacy of all delegated powers), is the constitution, which is assumed to express the will of the sovereign people. And the normativity of the constitution is guaranteed through the delegation of constitutional review powers to constitutional judges.

#### *The Positive and Negative Legislator*

Kelsen understood that any jurisdiction that exercised the constitutional review of statute would inevitably participate in the legislative function, hence the insistence on concentrating review in a specialised court (rather than diffusing powers of review throughout the judiciary). He nonetheless distinguished what parliaments and constitutional courts do when they legislate. Parliaments, he argued, are 'positive legislators', since they made law freely, subject only to the constraints of the constitution (for example, rules of procedure). Constitutional judges, on the other hand, are 'negative legislators', whose legislative authority is restricted to the annulment of statute when it conflicts with the law of the constitution.

Kelsen's distinction between the positive and the negative legislator relies almost entirely on the absence, within the constitutional law, of enforceable human rights. Although this fact is ignored by his modern-day followers, Kelsen explicitly warned of the 'dangers' of bestowing constitutional status to human rights, which he equated with natural law, because a rights jurisprudence would inevitably lead to the obliteration of the distinction between the 'negative' and the 'positive' legislator. Through their quest to discover the content and scope of the natural law,

constitutional judges would, in effect, become super-legislators.<sup>11</sup> Although Kelsen's constitutional theory is today orthodoxy, contemporary Kelsenians claim that constitutional courts function to protect constitutional rights, and that this function is basic to the legitimacy of review.<sup>12</sup> Nonetheless, Kelsenians ritually rehearse the negative versus positive legislator distinction as a means of bolstering these courts' legitimacy.<sup>13</sup>

#### CONTRACTING AND DELEGATION

In the introduction to this volume, it was proposed that some of the variation in the scope of delegation to non-majoritarian institutions might be explained by the nature of the functional problem that principals seek to resolve. We hypothesised, in particular, that the greater the commitment problem, the more likely the principals will grant relatively more discretion to an agent, and the more likely *ex post* controls will be relatively weak. This formulation possesses an obvious attractiveness for explaining crucial aspects of the move to constitutional review in Europe. I have argued here that constitutional-relational contracting generated a massive functional demand for an institution whose purpose would be to monitor and enforce compliance with the constitution, and especially the respect for human rights.

In the first part I characterised the new constitutionalism in terms of a new hierarchy of norms, or a new state theory, but constitutions may also be seen as contracts – a set of nested bargains – among those who negotiate them. Most post-World War II European constitutions were in fact produced by intense, often conflictual, negotiations among the main, national political parties. Each party, or group of parties, arrayed or clustered on the left, right, or in the centre of the ideological spectrum, brought to the bargaining table their own constitutional preferences, ideas about how the new polity was to be constructed. Each party or grouping fought to enshrine these ideas as constitutional provisions. Negotiations proceeded in light of the relative power of the participants in the constituent assembly convention, and the extent to which constitutional preferences either converged or diverged.

#### *Constitutional Bargains*

Parties contract with each other in order to achieve joint purposes, that is, in order to provide benefits they could not expect to realise on their own. In the case of political elites negotiating the rules of a democratic regime, such benefits include the potential to rule, to direct the polity with political legitimacy. Of course, in establishing parliamentary democracy, each political party knows that its capacity to determine events will ebb and flow depending upon relative electoral fortunes. Each party hopes to see its policy preferences substantiated as law, through legislation. Yet the parties

also know that the construction of stable rules for competition among them is a necessary first step to governing. Constitutional contracting – the choice of rules governing the interplay of policy makers and policy bodies – is often easier than choosing among those policy alternatives that are possible within the rules.<sup>14</sup> Given the consensus in favour of parliamentarianism, the parties were able to come to agreement on the basic rules, not least, since each could see itself, over time, benefiting from them.

In Germany, Italy, and Spain, negotiations produced four main outcomes. First, the contracting parties established parliamentary systems of government, using relatively familiar institutional templates. The other three outcomes ran counter to political centralisation. Constitutions provided for federalism (Germany) or strong regionalism (Italy and Spain), but only after long and contentious debate. The third outcome, the codification of an enforceable body of fundamental rights and liberties, proved to be even more difficult to achieve.

Elster has argued that ‘norm-free bargaining’ – where ‘the only thing at stake is self-interest’ – is most likely to result in a settlement, whereas ‘norm conflicts’ frequently lead to ‘bargaining impasse’ since the parties interact with one another from the standpoint of radically opposed social values.<sup>15</sup> Arguments about rights are inherently arguments about social values. Indeed, the general problem of determining the catalogue and content of rights provisions intermittently paralysed constituent assemblies. Simplifying what were enormously complex politics, stalemates were typically broken by giving partial victories to everyone. Major parties enshrined their own preferred set of rights, albeit watered down by the horsetrading.

Despite these disagreements, new European constitutions bestow a privileged status on rights provisions. In Germany, Italy, and Spain, constitutions announce rights before state institutions are established and governmental functions distributed. Partly in consequence, academic lawyers and some judges consider rights to possess a kind of ‘supraconstitutional’ status. As discussed below, this privileged status is reinforced by rules governing constitutional amendment, which tend to treat non-rights provisions as more flexible, and rights provisions as more rigid and immutable. Thus, although the constitutional law is viewed as positive law in these countries, parts of that law – rights – can be interpreted as expressing (or codifying) natural law.

The scope of constitutional rights contained in the German, Italian, and Spanish constitutions, and in texts incorporated into the French constitution by the French constitutional court, is far more extensive than the American bill of rights. European charters typically include the traditional ‘liberal’, or ‘negative’, rights and freedoms, for example of speech, assembly, religion,

equality before the law, and due process. And they enshrine newer, more 'collective', or 'positive', rights, for example, to education, employment, trade union activity, health care, the development of 'personality', and leisure. Further, most new European constitutions list the duties of citizens (for example, to military service, to pay taxes, to educate their children), but also of the state (for example, to provide public health care, free education, or unemployment insurance).

The structure of these provisions constitute implicit delegations of enormous law making discretion to constitutional judges. Although a few rights are declared in absolutist terms – the most important being 'equality before the law' provisions, found in all four countries, and 'human dignity' in Germany – the great majority of rights are expressly limited. To illustrate, here are a handful of expressly 'limited' rights:

- In Spain, art. 20.1 proclaims the right to free expression, which art. 20.4 then 'delimits' with reference to 'other rights, including personal honor and privacy'. Art. 33.1 declares the right to private property, while art. 33.3 provides for the restriction of property rights for 'public benefit', as determined by statute;
- In Italy, art. 21.1 announces that 'the press shall not be subjected to any authority of censorship', while art. 21.6 provides that 'printed publications ... contrary to morality are forbidden', and art. 21.7 states that parliament possesses the responsibility to 'prevent and repress all [such] violations';
- In Germany, art. 2.1 states that 'everyone shall have the right to the free development of her personality in so far as she does not violate the rights of others or offend the constitutional order or moral code'. Art. 10.1 proclaims that the 'privacy of posts and telecommunications shall be inviolable', while art. 10.2 states that 'this right may be restricted [by] statute'.
- In France, art. 11 of the 1789 Declaration of the Rights of Man declares that 'every citizen may ... speak, write, and print freely, but is responsible for the abuse of this liberty in circumstances determined by statute'. The 1946 social and economic principles of the 1946 include the proclamation that 'the right to strike is exercised according to the laws that regulate it'.

It should come as no surprise that, today, the crucial task of the constitutional judges is to determine the proper scope and limit of any rights provision in relation to another provision announcing a right, or to one that defines the duties or powers of government.

The fourth outcome was the adoption of the Kelsenian court.

*Constitutional Courts*

The normative logic of a constitutionalism that limits legislative sovereignty by recognising the rights of individuals and the prerogatives of subnational government all but necessitates the establishment of a means of enforcing these rules. Further, in occupied Germany and Italy, the Americans insisted that new constitutions include rights and a means of protecting them. American-style judicial review was nonetheless rejected in these states, and across Europe thereafter, for diverse reasons. Most important, a majority of political elites remained hostile to sharing policy making authority with judiciaries; left-wing parties, especially, fiercely opposed judicial review, seeing in it the spectre of the dreaded 'government of judges'. As discussed, Kelsenian constitutional review provided a means of defending constitutional law as higher law, while retaining the general prohibition on judicial review. The Spanish Constituent Assembly, which modelled that country's system on the German, never seriously considered *not* establishing a Kelsenian court. In the debates, only the Spanish Communists opposed moving to constitutional review.

France has been left out of the discussion so far because the new constitutionalism emerged there by a different, far more circuitous, route. Unlike Germany and Italy, the Americans did not occupy France. Other logics favouring constitutional review are weak or non-existent. The state is unitary not federal, with a tradition of weak regional and local government. The two post-war constitutions (1946, 1958) did not establish enforceable rights; indeed, statutory supremacy remained unquestioned dogma. The constitution of the Fifth Republic was not so much the product of inter-party bargaining, but rather the choice of one political force, the entourage of General de Gaulle, acting almost unchecked. And the Left voted against the new constitution in parliament, but the Right majority prevailed.

The Gaullists replaced France's traditional, British-style, parliamentary system with a 'mixed presidential-parliamentary' one, strengthening the executive. The constitution established a Constitutional Council, but its purpose was to guarantee the dominance of the executive (the government) over a weakened parliament. Beginning in 1971, however, the Council began to assert its independence. In that year, for the first time, it declared a government-sponsored law unconstitutional on the grounds that the law violated constitutional rights. This decision paved the way for the incorporation of a charter of rights into the 1958 constitution, a charter that the Council has taken upon itself to expand and enforce creatively.<sup>16</sup> Thus, for the first time, and against the wishes of the Gaullists and all of the other political parties in 1958, France has both a bill of rights and an effective constitutional court.

*Constitutional Courts, Relational Contracting, and Commitment*

Constitutional contracting itself produces a demand for the establishment of something like a constitutional court. Generally, contracts can be said to be 'incomplete' to the extent that there exists meaningful uncertainty as to the precise nature of the commitments made. Due to the insurmountable difficulties associated with negotiating rules for all possible contingencies, and given that, as time passes, conditions will change and the interests of the parties to the agreement will evolve, all contracts are incomplete in some significant way.<sup>17</sup> Most agreements of any complexity are generated by what organisational economists call 'relational contracting'. The parties to an agreement seek to broadly 'frame' their relationship by agreeing on a set of basic 'goals and objectives', fixing outer limits on acceptable behaviour, and establishing procedures for 'completing' the contract over time.<sup>18</sup>

Modern European constitutions – complex instruments of governance designed to last indefinitely, if not forever – are paradigmatic examples of relational contracts. Much is left general, even ill-defined and vague, as in the case of rights. Generalities and vagueness may facilitate agreement at the *ex ante*, constitutional moment. But vagueness, by definition, is normative uncertainty, and normative uncertainty threatens to undermine rationales for contracting in the first place. The establishment of constitutional review can be understood as an institutional response to the incomplete contract, the linked problems of uncertainty and enforcement. Each party to it has an interest in seeing that other parties obey their obligations, and will be reprimanded when failing to do so. Review functions to clarify, over time, the meaning of the contract, and to monitor compliance.

The constitution itself, through rules of jurisdiction, delegates authority to constitutional judges, determining how they are to exercise review.<sup>19</sup>

*Jurisdiction*

Simplifying, there are three basic types of review jurisdiction: abstract review, concrete review, and the individual complaint procedure. Abstract review is 'abstract' because the review of legislation takes place in the absence of litigation (in the absence of what Americans call 'a concrete case or controversy'). Concrete review is 'concrete' because the review of legislation, or other public act, constitutes a separate stage in an ongoing judicial process (that is, litigation in the ordinary courts). In individual complaints, a private individual alleges the violation of a constitutional right by a public act or governmental official, and seeks redress from the court for this violation through direct petition. These modes of (and other important variations in) constitutional review jurisdiction were earlier elaborated by Kelsen.<sup>20</sup>

## CONSTITUTIONAL COURTS AND PARLIAMENTARY DEMOCRACY 87

Abstract review processes result in decisions on the constitutionality of legislation that has been adopted by parliament but has not yet entered into force (France), or that has been adopted and promulgated, but not yet applied (Germany, Italy, Spain). It is initiated by specifically designated, elected politicians. Executives and legislators (France, Germany, Spain), federated member states or regional governments (Germany, Italy, Spain), or an ombudsman (the Defender of the People in Spain) may, within prescribed time limits, attack legislation as unconstitutional before the constitutional court. These attacks are made in writing, in documents here called referrals. In practice, nearly all referrals are made by members of opposition parties, against legislation proposed by the majority, or governing, party or parties. Referrals usually suspend the legal force of the referred law (France, Germany, Italy) pending a ruling, but in Spain the law may be applied notwithstanding a referral.

Concrete review is initiated by the judiciary (Germany, Italy, Spain) in the course of litigation in the courts. Judicial officials are authorised to refer constitutional questions – is a given law, legal rule, judicial decision, or administrative act constitutional? – to constitutional judges. The general rule is that a presiding judge must go to the constitutional court if two conditions are met: (1) that the constitutional question is material to litigation at bar, that is, who wins and who loses depends on the answer to the question; and (2) there is reasonable doubt in the judge's mind about the constitutionality of the act or rule in question. Referrals suspend proceedings pending a review by the constitutional court. Once rendered, the constitutional court's judgment is sent back to the referring judge, who then decides the case with the help of the ruling. Constitutional decisions are binding on the judiciary. Ordinary judges are not permitted, at least in theory, to determine the constitutionality of public acts on their own (but see the section below on Constitutional Adjudication).

Individual complaints (a *Verfassungsbeschwerde* in German, an *amparo* in Spanish) bring private actors into the mix. Once judicial remedies have been exhausted, individuals (Germany, Spain), and an ombudsman (Spain) have the right to go to directly to constitutional judges. In Spain, individuals may attack the act of any public official that they think has violated their constitutional rights, with one important exception. Technically, the *amparo* may not be used to attack a statute, although this occurs under certain conditions. In Germany, persons who believe that they have suffered as a result of a specific infringement of the constitutional law, by a public official, may file a complaint.<sup>21</sup> A statute may be targeted, as long as the complainant's rights have been abridged in some 'personal' and 'direct' way. In both countries, appeals of judicial decisions (on the grounds that due process has been denied) comprise, by far, the largest class of complaints.

*Composition*

Two modes of appointment exist, nomination and election. Where nomination procedures are used, the appointing authority simply names a judge or a slate of judges; no countervailing confirmation or veto procedures exist. Such is the case of France, where all constitutional judges are named by political authorities (the Presidents of the Republic, the Assembly, and the Senate). Italy and Spain have mixed nomination and election systems. Where election systems are used, a qualified majority (a 2/3 or 3/5 vote) within a parliamentary body is necessary for appointment. Because in Germany, Italy, and Spain no single party has ever possessed a super-majority on its own, the qualified majority requirement effectively forces the parties to negotiate with each other in order to achieve consensus on a slate of candidates. This bargaining process occurs in intense, behind-closed-doors negotiations. In practice, these negotiations determine which party will fill vacancies on the court, with allocations usually roughly proportionate to relative parliamentary strength. Compared with the US, where federal judges serve life terms, members of European constitutional courts serve either nine or 12 year, non-renewable, terms.

*Agency and Trusteeship*

When those who possess or manage political authority effectively transfer, through an act of delegation, their political property rights to a new institution, the P-A framework loses much of its relevance (see the introduction to this volume). In Majone's terms, 'standard agency theory does not provide satisfactory models', either for analysing relations between those who have delegated and the new institution, or for 'understanding the governance structure in which such relations are embedded'.<sup>22</sup> Instead, Majone proposes a model of trusteeship in which 'relational contracting' and 'imperfect commitment' lead political rulers to delegate broad 'fiduciary' powers to a particular kind of agent – a trustee – and then to guarantee that trustee's independence. As I have argued here and with respect to the Treaty of Rome and the European Court of Justice:<sup>23</sup> new European constitutions are relational contracts, *par excellence*; constitutional courts have been delegated broad powers to govern by those who, at the same time, have largely relinquished the powers usually held by principals; and mechanisms of control that do remain to control the court are relatively weak. Put differently, the move from the old to the new constitutionalism replaced a system of legislative sovereignty, in which governments and parliamentarians (that is, political parties) governed, with a system of trusteeship in which governments and parliaments are being governed by rules and processes largely outside of their control.

## CONSTITUTIONAL COURTS AND PARLIAMENTARY DEMOCRACY 89

To illustrate, consider this stylised account of the ordinary judge as agent. The judge's principal is the parliament, and the normative instrument parliament controls – statute – fixes, substantively, the terms of the judge's policy mandate. According to separation of powers dogma, the judge is a 'slave to the codes', whose purpose it is to enforce parliament's will, as that will is expressed in legislation. In reality, we know that European judiciaries engage in such extensive interpretation of the various legal codes that these statutes often mean only what the courts say they mean. Nevertheless, the principal remains in charge. If ministers or parliamentarians notice that a judge has applied a statutory provision in a way that they did not intend and do not like, the law can be changed. Thus, to the extent that an agency problem can be identified, it can be corrected: the principals overturn judicial decisions by reworking the normative instrument that they themselves directly control, thus precluding the offending judicial interpretation. Other things being equal, the decision rule governing the P–A relationship – a majority vote of the parliament – favours control by the principals, and this rule is constitutionally frozen into place. (Further, judicial officials are typically employed and managed by ministries of justice which, we know empirically, gives political elites some leverage over judicial outcomes.)

If for ordinary adjudication, the relationship between principals and agents appears straightforward, the situation becomes rather confused for constitutional adjudication – that is, if one insists on describing the situation in P–A, rather than fiduciary, terms. One basic service that constitutional judges render is to regulate the actions of the government and parliament themselves. Constitutional judges have the duty to control the exercise of legislative authority and all of those acts pursuant to the adoption of statute. Depending upon the relevant constitutional rules in place, the political parties may be able to overturn constitutional decisions, or restrict the constitutional court's powers, but only if they can reconstitute themselves as a jurisdiction capable of amending the constitutional law. This last point deserves emphasis: legislators or ministers are never principals in their relationship to constitutional judges. Further, the decision rules governing constitutional revision processes are more restrictive than those governing the revision of legislation. These decision rules, as will be demonstrated, heavily favour the continuous dominance of constitutional judges over the interpretation of the constitutional law.

In practice, some members of political parties who exercise executive or legislative powers participate in some of the functions usually associated with principals, since they appoint members of the courts, and they can sometimes initiate revision of the constitution in order to avoid the consequences of constitutional rulemaking on the part of the judges. Nonetheless, by establishing (1) the normative superiority of the

constitution, (2) a review organ, and (3) specific procedures for constitutional revision, they have radically reduced their own influence over the development of the constitution. If they may sometimes act as principals, they are more often merely 'players' within the rule structures provided by the constitution. They compete with each other in order to be in the position to govern, and, once in power, they legislate, among other things.

Constitutional adjudication is implicated in the exercise of legislative power. If in exercising review authority, the judges simply controlled the integrity of parliamentary procedures, and not the substance of legislation, the judges would be relatively minor policy makers, akin to Kelsen's 'negative legislator'. But the judges possess jurisdiction over rights that are, by definition, substantive constraints on law making powers. The political parties thus transferred their own entirely unresolved problems – what is the nature and purpose of any given rights provision? and what is the normative relationship of that provision to the rest of the constitutional text? – to judges. This transfer constitutes a massive, virtually open-ended, delegation of policy making authority. Similarly, review jurisdiction organises the elaboration of higher law rules governing federalism and regional autonomy in Germany, Italy, and Spain.

To the extent that it is costly to activate constitutional review of legislation, the importance of the review within policy processes, and the authority of judges over outcomes, would be mitigated. But initiating abstract review is virtually costless for oppositions; concrete review procedures entail delays for the litigants, but other costs are essentially borne by the state; and individual complaints can be scribbled by anyone on a crumpled piece of notebook paper. To the extent that those authorised to refer constitutional questions to constitutional judges find it difficult to translate their (policy) interests into a constitutional claim, constitutional adjudication would be less likely to be central to the work of legislators and the ordinary judges. But the huge, expansive array of rights provisions available for instrumental use on the part of the majority's opponents in fact invites such use. Even so, if it were relatively easy for the governing majority to overturn the case law of the court, or to curb the judges' powers, the court's authority over the legislature and the courts might be fleeting.

What kinds of control mechanisms are available to the political parties is therefore relevant to much policy autonomy judges will presumably wield.

### *Mechanisms of Control*

We can sort control mechanisms into two broad categories: direct and indirect. Direct controls are formal (they are established by explicit rules) and negative (they annul or authoritatively revise the court's decisions, or

## CONSTITUTIONAL COURTS AND PARLIAMENTARY DEMOCRACY 91

curb the court's powers). For the purposes of this discussion, let us assume that the principal is that entity (or entities) which has the authority to revise the constitution in order to overturn a decision of the agent, the constitutional court. To exercise control by direct means, the principal must succeed in amending the constitution.

The rules governing constitutional amendment are relatively permissive of agent autonomy, through restricting the principal's control. Most of the German constitution can be revised by a two-thirds majority vote of the Bundestag and the Bundesrat; however, the Basic Law (art. 19.2, art. 79) explicitly precludes any restriction on 'the essential content of a basic right'; content, of course, is to be determined by the Court. Many interpret these clauses as meaning that constitutional rulings interpreting rights provisions could not be overturned by the constituent power. In Spain, constitutional revision is normally accomplished by a three-fifths vote of the Cortes and the Senate, upon initiation by either chamber or the government. But when a proposed amendment concerns a rights provision, a two-thirds majority in each chamber is required; and if this majority is achieved, then parliament is dissolved, and the proposed amendment is submitted to the people for ratification by referendum. The Italian constitution can be amended by majority vote of the lower and upper houses, deliberating separately; but unless a two-thirds majority vote of both is secured, a ratification referendum is required if one-fifth of either house, or five regional councils, or 500,000 voters, so request. In Spain and Italy, core rights provisions are considered by many legal scholars to be immune to revision. As in Germany, such provisions are considered to be possessed of 'supraconstitutional' status (a natural law position). In fact, no rights provision has been changed in Spain or Italy, despite recurrent calls to do so.

In France, where rights were not meant by the founders to be included in the constitution of the Fifth Republic, the revision process is the most permissive. Political parties can transform themselves into a constitutional assembly on their own: once both parliamentary chambers have adopted the text of a constitutional amendment, a constitutional congress is organised, wherein deputies and senators, sitting together, revise the constitution by a three-fifths vote. Further, the French court is the only one of the four constitutional courts to have determined that rights provisions are not privileged constitutional norms; every part of the constitution is apparently open to revision as long as prescribed procedures are followed.

Indirect controls are informal and indirect. These mechanisms are effective in as much as the agent internalises the principal's interests, or takes cues from the revealed preferences of the latter, and acts accordingly. It is generally assumed that the extent to which the agent does so is commensurate to the credibility of the threat that its principal will activate

direct controls. Indirect controls operate according to the logic of deterrence: the more credible the threat of punishment, the more the agent will constrain itself by behaving as if the principal's interests were its own. This control is registered as an anticipatory reaction operating as a constraint on the court's behaviour. If this assumption holds, we have no good reason to think that constitutional courts (or for that matter the ECJ, when it interprets the treaties) are systematically constraining themselves for fear of being punished.

#### CONSTITUTIONAL ADJUDICATION AND PARLIAMENTARY GOVERNANCE

The introduction to this volume defined governance generically, as the mechanisms, or processes, through which the rule systems in any social system are adapted on an ongoing basis to the needs and purposes of those who live under them.<sup>24</sup> In parliamentary systems, the government and legislature govern by building or refining the various codes and other legal regimes. Administrators govern when they apply rules to situations and to people. When a court resolves a legal dispute by interpreting (an exercise akin to legislating) and applying (an exercise akin to administering) statutory provisions, the judge, too, governs.<sup>25</sup> The constitutional law comprises a body of rules that authoritatively conditions each of these activities. Thus, because constitutional judges possess broad powers to interpret authoritatively, and thereby (re)construct, the constitutional law (the normative context for all other public decision making), constitutional judges govern to the extent that they actually exercise these powers.

There now exists a substantial social science literature on the impact of constitutional courts on West European politics.<sup>26</sup> Rather than rehearse the empirical findings of this literature, the argument will focus summarily on how and to what extent constitutional adjudication has transformed the nature of parliamentary governance. This transformation can be observed and to some degree measured by examining the impact of constitutional decision making on the work of legislators and judiciaries. Delegation theory can tell us something, but only relatively little, about the pace, content, or depth of these changes.

#### *Discretion and Autonomy*

The introduction to this volume raised a classic issue of delegation theory, namely how to conceptualise and account for the gaps that inevitably develop once new institutions actually begin to perform their assigned tasks. Such gaps, this volume asserts, ought to be conceived in terms of a

theoretical 'zone of discretion', which is 'constituted by (a) the sum of delegated powers (policy discretion) granted by the principal to the agent, minus (b) the sum of control instruments available for use by the principal to shape (constrain) or annul (reverse) outcomes that emerge as the result of the agent's performance of tasks. A situation of trusteeship, wherein the agent exercises fiduciary responsibilities, the zone of discretion is, by definition, unusually large. In some places and in some domains, the discretionary powers enjoyed by constitutional courts are close to unlimited.

Nothing in delegation theory can tell us what constitutional courts will actually do with their discretion, no functional theory of institutional design, *per se*, could. The best one can do is to generate predictions about outcomes in light of two variables: the distribution and intensity of the principals' preferences for outcomes (assuming multiple principals), and the presumed effectiveness of control mechanisms (as built into the design of the delegation). We can, of course, assume that the framers of constitutions wished to see certain outcomes produced and others avoided. But, given the 'zone of discretion' enjoyed by constitutional judges, we should not expect the *ex ante* policy preferences of principals to be decisive. In fact, the outcomes to which we now turn were neither intended nor anticipated at the *ex ante* moment of institutional design.

#### *Constitutional Adjudication and the Legislator*

The impact of constitutional adjudication on the polity proceeds through constitutional decision making, which results in law making. By constitutional decision making is meant the process of determining the meaning of a given constitutional provision (or set of provisions) in order to resolve a dispute about the constitutionality of a public act, including statutes and the exercise of public authority (for example, administering and judging) pursuant to statute. In deciding, the constitutional court simultaneously resolves a legislative dispute *and* enacts the constitution. This enactment, or constitutional rule making, clarifies or revises the constitutional law, by authoritatively interpreting it.

The effects, or impact, of constitutional rule making on the work of the legislator can be both direct and indirect. When a court declares a bill or statute unconstitutional, it vetoes the bill. The court has intervened directly in the legislative process, in Kelsen's phrase, as a 'negative legislator'. Such annulments are rare, but often spectacular, political events. Important legislation vetoed by constitutional courts include the liberalisation of abortion in Germany (1975, 1992) and Spain (1985), the nationalisation of industry and financial institutions in France (1981), the reform of German university governance (1973), the bid to introduce affirmative action in France (1982), and, in all countries, important revisions of the penal codes,

and legislative moves to privatise industry and to establish anti-trust regimes for the press and television sectors.

Yet constitutional judges have also come to exercise substantial, 'indirect' authority over legislating, to the extent that case law, in any given policy domain, meaningfully guides the decision making of legislators in that domain. There are two archetypal forms of indirect impact, both of which result when legislators anticipate the policy preferences of the constitutional court, as these preferences are revealed through constitutional decision making. The first, 'autolimitation', refers to the exercise of self-restraint on the part of the government and its parliamentary majority in anticipation of an annulment by the constitutional court.<sup>27</sup> We observe autolimitation when the government and its parliamentary majority take decisions, during the legislative process, that (1) sacrifice initially held policy objectives in order to (2) reduce the probability that a bill will either be referred to the court, or be judged unconstitutional. Hundreds of bills have been altered, even gutted by such decisions including the French decentralisation (1982) and press (1984) laws, and the industrial co-determination bill in Germany (1976).

The second form of anticipatory reaction, 'corrective revision', takes place after a bill has been annulled. Corrective revision refers to the re-elaboration of a censured text in conformity with the court's decision in order to secure promulgation. These legislative processes are highly structured by case law, to the extent that the judges have already made their legislative choices explicit, and that oppositions work to monitor the majority's compliance with the ruling.

The logic of corrective revision is straightforward. Once a constitutional court has annulled a bill and then gone on to state in precise detail what a constitutional version of the bill would look like, the legislative majority is faced with a choice. In theory, it has four options. First, it can engage in a corrective revision process, securing constitutionality by deferring to the policy preferences of the constitutional court. This option is almost always the one selected. The majority knows that the surest way to secure promulgation of beleaguered legislation is to concede part of their law making authority to constitutional judges. Second, it can forego the legislation entirely. This is rarely a viable option for important pieces of legislation, since it is usually better for the majority to get some part, rather than nothing, of what it wanted. Third, it could seek to circumvent the court's ruling, for example, by creatively reformulating the legislation. In such cases, law makers are, in effect, playing 'chicken' with the court, daring the judges to annul the bill a second time. Although they often interpret a court's ruling as narrowly as possible, to allow for maximum legislative discretion over the precise terms of the correction, it seems there

is no important case where legislators have revised a censured bill but blatantly ignored the court's dictates.<sup>28</sup> A final option exists: the majority can revise the constitution in order to make constitutional those acts that had been censored, repudiating the court in the process.<sup>29</sup> The feasibility of this option depends on how difficult it is to revise the constitution.<sup>30</sup>

Corrective revision leads to the dominance of constitutional courts over policy outcomes. One finds relatively high levels of such dominance over, among others, penal competition and electoral law, and over legal regimes governing expropriation and privatisation, abortion, education, and industrial relations.

The extent to which constitutional courts intervene in legislative processes and shape outcomes varies cross-nationally, as a function of three factors.<sup>31</sup> The first is the existence of abstract review jurisdiction. Where abstract review does not exist (for example, Italy), the court's capacity to shape outcomes is reduced, other things being equal. The second is the number of veto points in the legislative process (the extent of centralised, executive control over the policy process as a whole). Where there are relatively more veto points, oppositions will make use opportunities to block or water-down the majority's bills before turning to the court, and the parliament will adopt fewer 'radical' reforms. The case of France lies at one end of the spectrum (the court is the usually the only veto point available to the political minority), the cases of Germany and Italy lie at the other.

A third factor, the relative development of the constitutional law through constitutional rule making, is endogenous to the politics described here, to the extent that constitutional case law 'feeds back' onto the legislature, reproducing the same behaviours and reinforcing the same logics that provoked constitutional review in the first place. Oppositions go to the court in order to win what they would otherwise lose in the 'normal' processes (they would be outvoted). Abstract review petitions enable constitutional courts to construct the constitutional law, to extend techniques of control over law making activities, and (the same thing) to make policy. As the constitutional law expands to more and more policy areas, and as it becomes 'thicker' in each domain (more dense, technical, and differentiated), so do the grounds for constitutional debate. The process tends to reproduce itself, and in so doing, the court's authority over the legislator grows, and the legislator's discretion reduces.

#### *Constitutional Adjudication and the Judiciary*

Although traditional separation of powers doctrines preclude judicial review of legislative acts, the new constitutionalism enables review by Kelsenian courts, and organises a set of interactions between the judiciary and constitutional judges. Concrete review processes require ordinary

judges to participate in the scrutiny of legislation, weakening (at least potentially) the domination of the codes over judicial decision making. But judicial officials also have an interest in activating constitutional review to the extent that they wish (1) to participate in the construction of the constitutional law, and (2) to remove unconstitutional (and perhaps unwanted) laws. Both are new powers for them. The constitutional court also benefits from the system. Concrete review enlists potential litigants and the judiciary in a general, relatively decentralised effort to detect violations of the constitution; judicial officials provide the constitutional court with a case load; and the rules governing the process generally favour the constitutional court's control over outcomes. Given this mix of formal rules and corporate interests, we can only expect that concrete review will undermine the dogma of the juridical supremacy of legislative acts even further, subverting traditional separation of powers schemes.

In fact, the development of constitutional review has transformed the role and function of the law courts, a development known as 'the constitutionalisation of the legal order'. By constitutionalisation I mean the process through which:

- constitutional norms come to constitute a source of law, capable of being invoked by litigators and applied by ordinary judges to resolve legal disputes, including in the domain of private law;
- the constitutional court, through its jurisdiction over concrete review referrals and individual complaints, comes to behave as a kind of super-court of appeal for the judiciary, involving itself in the latter's tasks of fact finding and rule application; and
- the techniques of constitutional decision-making become an important mode of argumentation and decision-making in the ordinary courts.

Constitutionalisation is partly the logical, normative consequence of the direct effect of rights provisions, and in part the product of complex dialogues between constitutional judges and the judiciary. There is space here only to mention the most important outcomes of this process, and to discuss variation among cases.<sup>32</sup>

Constitutionalisation has subverted three very powerful, deeply entrenched dogmas about the character and functioning of Continental legal systems. First, the traditional notion that the various legal codes in each country constituted more or less autonomous realms, governed by different sources of law and different principles of adjudication, is gradually being replaced by a new view, Kelsenian in inspiration, that the constitutional law unifies these domains into a more or less coherent legal order. Second, the quasi-official myth of judges as slaves of the codes, prohibited from

creatively interpreting and rewriting the laws, has been shattered. The very existence of constitutional review subverted the 'sacred' nature of statute within the legal order; and the practice of constitutional review, by processing concrete review referrals, for example, socialised judges into a new role, that of protecting the legal order from those acts contaminated by unconstitutionality. Third, orthodox accounts of the division of powers between constitutional judges and the ordinary judges have been rendered obsolete (see below). The fact that these dogmas persist has much to do with the inability of judges, legal scholars, and political elites, faced with constitutionalisation, to reconstitute the legitimacy of the juridical order differently than they have in the past.

These commonalities mentioned, there is also significant cross-national variation in the pace and scope of constitutionalisation. Generally, the greater the level of interaction between the constitutional court and any given court system (civil, administrative, labour, tax, and so on), the more the distinction between constitutional jurisdiction and ordinary jurisdiction collapses. That is, as constitutionalisation deepens, ordinary judges necessarily behave as constitutional judges – they engage in principled constitutional reasoning and resolve disputes by applying constitutional norms. And, as constitutionalisation deepens, constitutional judges become more deeply involved in what is, theoretically, in the purview of the judiciary: they interpret the facts in a given dispute, and they review the relationship between these facts and the legality of infraconstitutional norms. Ordinary judges begin to treat the codes, more overtly and explicitly than they had previously, less as a set of sacred commands issuing from the sovereign, and more as a system of rules that must be co-ordinated with other systems of rules in light of changing conditions.

Cross-national differences in the scope, pace, and intensity of constitutionalisation appear to be closely tied to the existence, or non-existence, of particular modes of review. In Germany and Spain, where abstract review, concrete review, and individual complaint procedures coexist, extensive constitutionalisation has proceeded rapidly. Indeed, well over 90 per cent of all individual complaints allege that a judicial decision has failed to take into account the constitutional law or the constitutional court's decision making. For the court to decide on the merits of such claims, it must delve deeply into the workings of the judiciary, and it has the power to impose its own preferred outcome on any recalcitrant judge. In Italy, the absence of an individual complaint mechanism has reduced the capacity of the constitutional court to control judicial outcomes (as the absence of abstract review mechanisms has reduced the court's capacity to control legislative outcomes). In consequence, constitutionalisation has been more gradual and piecemeal, and the high civil court, Cassazione, has

retained substantial interpretive autonomy. In France, where promulgated statute retain their formal, sovereign character, and no formal links between ordinary and constitutional jurisdictions exist, a primitive form of constitutionalisation can nevertheless be observed.

Last, there is increasingly compelling evidence that the ordinary judges are moulding, by creatively interpreting, the various codes, without first referring questions to the constitutional court.<sup>33</sup> Judges read constitutional principles into the codes, through statutory interpretation (principled, constitutional construction of statutes), and sometimes they have gone beyond, or even contradicted, more restrictive interpretations of rights issued by the constitutional court. By foregoing constitutional referrals, ordinary judges enhance their own autonomy. In this way, both legislative intent and the alleged monopoly of the constitutional court on constitutional interpretation are subverted.

#### CONCLUSION

In summary, both discrete organisational and more general functional logics underpin the diffusion of the Kelsenian constitutional court across Europe. These logics are easily synthesised. Historical legacies, notably in the form of existing models of governance and rigid separation of powers doctrines, reduced the options available to those who sought to resolve their own social dilemmas through delegating to a non-majoritarian institution. Little in delegation theory, however, can explain the major outcomes produced by constitutional politics. Indeed, the ongoing exercise of review by constitutional judges has served to (re)construct the constitutional law in ways that subvert the schema initially assumed to legitimise the role and function of review itself. Kelsen was right. The delegation of rights jurisdiction to a constitutional organ, effectively insulated from political controls, has engendered the gradual but inevitable collapse of separation of powers doctrines. Today, ministers and parliamentarians govern with constitutional judges. And the judiciary, partly in interactions with constitutional judges, has radically expanded its capacity to control policy outcomes.

#### NOTES

1. M. Thatcher and A. Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions', *West European Politics*, this issue.
2. This article is based partly on themes developed in A. Stone Sweet, *Governing with Judges: Constitutional Politics in Western Europe* (Oxford: Oxford University Press 2000).
3. G. Majone, 'Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance', *European Union Politics* 2/1 (2001), pp.103–22. See also T. Moe, 'Political Institutions: The

## CONSTITUTIONAL COURTS AND PARLIAMENTARY DEMOCRACY 99

- Neglected Side of the Story', *Journal of Law, Economics, and Organisation* 6 (1990), pp.213–53.
4. K. von Beyme, 'The Genesis of Constitutional Review in Parliamentary Systems', in C. Lanfried (ed.), *Constitutional Review and Legislation: An International Comparison* (Baden-Baden: Nomos 1989); A. Stone, *The Birth of Judicial Politics in France* (Oxford: Oxford University Press 1992), chs. 2, 9.
  5. In the old constitutionalism (for example, in the French Third Republic), constitutional rules could be revised or otherwise recast through statutory instruments.
  6. The exception is France, see Stone, *The Birth of Judicial Politics in France*, ch. 3.
  7. Only the example of Greece might comfort proponents of American judicial review, although there are a few curious mixed systems (for example, that of Estonia). Some older systems, for example, Sweden, possess systems of constitutional judicial review.
  8. But see A. Stone, 'Qu'y a-t-il de concret dans le contrôle abstrait aux États-unis?', *Revue française de droit constitutionnel* 34 (1998), pp.227–50.
  9. H. Kelsen, 'La Garantie Juridictionnelle de la Constitution', *Revue du Droit Public* 44 (1928), pp.197–257.
  10. Germany (art. 20.2): 'All governmental authority emanates from the People. It shall be exercised by the People by means of elections and voting, and by specific legislative, executive, and judicial organs'. France (art. 3): 'Sovereignty resides in the Nation. No body, no individual, may exercise authority which has not been expressly granted'. Italy (art. 1): 'Sovereignty belongs to the People, who exercise it in the manner and within the limits laid down by the Constitution'. Spain (art. 1.2): 'National sovereignty belongs to the Spanish People, from whom all powers of state emanate'.
  11. Kelsen, 'La Garantie Juridictionnelle de la Constitution', pp.221–41.
  12. Although this point will not be explored further here, the orthodox position of modern Kelsenians, and many judges, is that rights possess a kind of 'supraconstitutional' status (their contents can not be altered by constitutional revision). This is akin to a natural law, not a Kelsenian or positivist, position.
  13. See Stone Sweet, *Governing with Judges*, ch. 5.
  14. G. Brennan and J. Buchanan, *The Reason of Rules: Constitutional Political Economy* (Cambridge: Cambridge University Press 1985).
  15. J. Elster, *The Cement of Society: A Study of Social Order* (Cambridge: Cambridge University Press 1989), pp.215, 244–47.
  16. This charter is composed of rights texts mentioned or contained in the preamble to the 1946 constitution, which itself is mentioned in the preamble to the 1958 constitution.
  17. A 'complete' contract 'would specify precisely what each party is to do in every possible circumstance and arrange the distribution of realised costs and benefits in each contingency so that each party individually finds it optimal to abide by the contract's terms', P. Milgrom and J.R. Roberts, *Economics, Organization and Management* (Englewood Cliffs, NJ: Prentice-Hall International 1992), p.127.
  18. *Ibid.*, pp.127–33.
  19. Although most important rules of jurisdiction are constitutional in nature, some jurisdictional details are regulated by statutes called organic laws.
  20. Kelsen, 'La Garantie Juridictionnelle de la Constitution'.
  21. In Germany, local officials can also file complaints if they believe that the constitutional prerogatives of local government have been abridged by the public actions of another level of government.
  22. Majone, 'Two Logics of Delegation', p.104.
  23. Stone Sweet, *Governing with Judges*; and A. Stone Sweet and J. Caporaso, 'From Free Trade to Supranational Polity: The European Court and Integration', in W. Sandholtz and A. Stone Sweet (eds.), *European Integration and Supranational Governance* (Oxford: Oxford University Press 1998), pp.92–133.
  24. A. Stone Sweet, 'Judicialisation and the Construction of Governance', *Comparative Political Studies* 31 (1999), pp.147–84.
  25. See the contribution of M. Shapiro to this volume.
  26. For example, S. Kenney, W. Reisinger and J. Reitz (eds.), *New Approaches to Law and*

- Politics in Europe* (New York: MacMillan 1999); D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press 1997); C. Landfried, *Bundesverfassungsgericht und Gesetzgeber* (Baden-Baden: Nomos 1984); C. Landfried (ed.), *Constitutional Review and Legislation: An International Comparison*; M. Shapiro and A. Stone (eds.), special issue of *Comparative Political Studies* 26 (1994); 'The New Constitutional Politics of Europe'; Stone, *The Birth of Judicial Politics in France*; Stone Sweet, *Governing with Judges*; M.L. Volcansek (ed.), special issue on Judicial Politics in Western Europe, *West European Politics*, 15 (1992); M.L. Volcansek, *Constitutional Politics in Italy* (London: Macmillan 2000).
27. The term was first coined by L. Favoreu, 'Décentralisation et Constitution', *Revue du Droit Public* 98 (1982), pp.1259–95. In Germany, the phenomenon has been studied extensively by Landfried, *Bundesverfassungsgericht und Gesetzgeber*. Game theoretic models of autolimitation are currently being developed, see Georg Vanberg, 'Abstract Judicial Review, Legislative Bargaining, and Policy Compromise', *Journal of Theoretical Politics* 10 (1998), pp.299–326; and A Stone Sweet, 'Rules, Dispute Resolution, and Strategic Behavior: Reply to Vanberg', *Journal of Theoretical Politics* 10 (1998), pp.327–38.
  28. The German government was urged to do so by its parliamentary supporters after the 1975 abortion ruling, and the French government considered doing so in reaction to the nationalisations decisions (1981–82).
  29. The legislature still must re-adopt the law subsequent to the entry into force of the constitutional revision.
  30. I know of only one important instance: in 1993, the French constitution was revised to enable the adoption of a law, previously annulled in important respects, on immigration and asylum.
  31. For a fuller discussion see Stone Sweet, *Governing with Judges*, ch. 2.
  32. For a summary and comparative perspective, see Stone Sweet, *Governing with Judges*, pp.114–25. For Spain, see P. Bon, 'La Constitutionnalisation du Droit Espagnol', *Revue Française de Droit Constitutionnel* 5 (1991), pp.35–54. For France, see L. Favoreu, 'Le Droit Constitutionnel, Droit de la Constitution et Constitution du Droit', *Revue Française de Droit Constitutionnel* 1 (1990), pp.71–89; For Italy, see A. Pizzorusso, 'The Italian Constitution: Implementation and Reform', *Jahrbuch des Öffentlichen Rechts der Gegenwart* 34 (1985), pp.105–21. For Germany, see P.E. Quint, 'Free Speech and Private Law in German Constitutional Theory', *Maryland Law Review* 48 (1989), pp.247–347.
  33. There is no systematic literature on the phenomenon, but see G. Bognetti, 'Direct Application and Indirect Impact of the Constitution in the Italian Legal System', in *Italian National Reports to the XIth International Congress of Comparative Law*, Carcas (Milano, Giuffrè Editore 1982); R. Errera, 'Recent Decisions of the French Conseil d'Etat', *Public Law* 2 (1998), pp.152–4; S.D.-R. Guanter, 'Employee Privacy in Spanish Labor Relations', *Comparative Labor Law Journal* 17 (1995), pp.122–38; and Quint, 'Free Speech and Private Law in German Constitutional Theory'.