Models of Constitutional Review

Draft Version 1.0

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For Handbook in comparative judicial Behavior
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1. Introduction

Constitutional review is the power of a body, usually a court, to assess whether law or government action complies with the constitution. Originating in the American constitutional order, it has spread all over the world and is now a ubiquitous feature of government: nearly three-quarters of constitutions in force provide for it, a number which includes many non-democracies (Ginsburg and Versteeg 2014; 590). There is no doubt that the phenomenon is important, as it has made judges the final arbiters over issues that used to be exclusively political in nature (Tate and Vallinder 1995: 5; Stone-Sweet 2000; Angell et al. 2005; Hirschl 2004).

Yet, the sweeping diffusion of the institution of judicial review belies substantial variation in how judicial review is structured and exercise. For the most part, the literature approaches the comparisons of judicial review through the lens of three canonical models, associated with the (i) United States, (ii) Germany and, (iii) France respectively. These were the models on offer during the Third Wave of democracy, when many countries rewrote constitutions to include the institution. They remain the classical starting point for a comparative account of judicial review.

Relying on models is a useful way to conduct a comparative inquiry. In the constitutional context, we think of a model as any configuration of institutional features that tend to co-occur, either by convention or by internal logic, and that may provide a basis on which other jurisdictions develop institutional designs. But models are also in part a construction of researchers, who need to decide which feature(s) to emphasize. The canonical models rely heavily on two features; specialization and whether review is abstract and concrete.

In this Chapter, we argue that there are alternative dimensions of variation in judicial review: (i) access, (ii) finality, and (iii) concentration. Relying on these features produces different classifications that cut across the three canonical models. What is more, we argue that some of these features may be more relevant to the practice of judicial review than concentration. We do not ultimately argue that one or the other approach is better: our goal is to show that multiple classifications are possible. We further reflect on the increasing importance of supranational review and how it affects each of the dimensions of access, finality and concentration.

The remainder of this Chapter is organized as follows. We will start by discussing the classical triad; the models of judicial review associated with the United States, Germany and French respectively. We then then propose alternative classifications. We next describe how supranational review can influence those dimensions. We conclude by reflecting upon the relative importance of each of these dimensions.

2. The Classical Triad

A. The American Model

Constitutional review originates in the American colonies for distinctive historical reasons (Shapiro 1993; Prakash and Yoo 2003). The former colonies had relied on British courts to adjudicate disputes with government; sovereignty lay back with the motherland, and so there were no aesthetic or conceptual barriers to individuals suing the charter governments, which were themselves derivative of imperial power. With the American Revolution of 1776, state governments found themselves subjected to decisions of their own courts for violations of rights. Thus, when the founding fathers gathered at Philadelphia in 1787, judicial review was in the air. Indeed, many have found evidence in the federalist papers that the founders expected courts to assess legislation for constitutionality, as they had in the colonies. Alexander Hamilton assumes it in Federalist No. 78, and sees no risk from judicial power that inheres in "the least dangerous branch" (Hamilton 1789).

Whatever their understanding of judicial review as a latent power, the founders made a somewhat fateful decision to omit from the constitutional text any mention of the power of courts to assess legislation for constitutionality. The 1803 case of *Marbury v. Madison* became the canonical origin of the power of judges to "say what the law is" at the federal level, but the textual omission has given rise to what is sometimes called the "counter-majoritarian difficulty," the uneasy relationship of an unelected court setting aside legislation produced by a democratic majority (Bickel 1962). Still, it was clearly understood, and confirmed by Alexis Tocqueville in the 19th century, that judicial review was a distinct feature of the American constitution that place the judges at the center of governance:

> "Whenever a law which the judge holds to be unconstitutional is argued in a tribunal of the United States he may refuse to admit it as a rule; this power is the only one which is peculiar to the American magistrate….The political power which the Americans have intrusted to their courts of justice is therefore immense, but the evils of this power are considerably diminished by the obligation which has been imposed of attacking the laws through the courts of justice alone…. Within these limits the power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies."[1]

We see in this brief passage some core features of what would become known as the American model: decentralization, legalization, and judicialization. The power to "refuse to admit" a law was seen as inherent in the power of judging, and so extended to any judge in the land—hence, decentralization. This power was moderated somewhat by the institutional passivity of judges, dependent as they were on bringing a *legal* case by a litigant—so legalization was a feature of the model. But it was nevertheless an immense power, giving rise to concerns of judicialization that remain a feature of American political discourse.

Tocqueville's comment that the power was "peculiar to the American magistrate," was mostly true for much of the 19th century. Some early constitutions in Latin America mention the

[1] Democracy in America, Ch VI.

power, as well as those of some European outliers the Netherlands in 1802; Norway in 1914; and Portugal in 1911. But increasingly complex government in the 20th century, with deeper penetration into the lives of citizens, motivated the idea of a check on government authority. One way to think about this is that it is the expansion of legislation itself necessitated more judging, and judicial review spread in popularity.

B. The German Model

The spread of legislative power, driven by modernity, encountered a very different legal theory among the civil law nations of Europe. These countries, in either the French or German tradition, tended to see law as formalistic and judges as exercising subordinate power (Merryman and Perez-Perdomo 2007). Their legal theory sat uneasily with the idea of decentralization or judicialization, and so required its own model.

Hans Kelsen was the great innovator, and his idea came from a conceptual jurisprudence confronting a practical problem. The practical problem, for Kelsen, was federalism, which meant the constitutional order had multiple sovereigns each creating its own law, and this necessitated some sort of institution to resolve conflicts. Kelsen thought that an ordinary court, whose job was to implement law passed by a legislature, could not as a matter of legal hierarchy be put in the position of judging that legislation. This led him to propose the creation, in the Constitution of the Austrian First Republic of 1920, of designated body called a "Constitutional Court" which would have a discrete task insulated from ordinary judging. That task was constitutional review. That was born the so-called centralized model of constitutional review, with a designated body dedicated to the task.

The key features of this model are concentration, specialization and a combination of abstract and concrete review. First, the power was limited to a single small group of judges. Second, those judges were dedicated solely to the task—hence, concentration. A strict Montesqueiuan reading of the separation of powers meant that the constitutional court sat outside of the legal hierarchy and so was characterized by specialization. Third, constitutional review was generally "abstract": the constitutional court did not resolve concrete legal disputes between private parties. Instead, in the original Kelsenian formulation, it answered questions referred to it by a designated set of government officials, either before or after the adoption of a law.

To be sure, abstraction was not complete, and the centralized model as it developed was compatible with resolving constitutional questions that arose in concrete disputes. But the manner in which these were resolved illustrates the distinct theoretical position of the constitutional court as slightly outside of the normal legal hierarchy. When an ordinary judge confronts a question of constitutional interpretation in the course of ordinary litigation, it certifies a question to the constitutional court. Ordinary proceedings are suspended until the constitutional court has ruled on the constitutionality of the question. Once rendered, the constitutional court's judgement is sent back to the referring court, which decided the case on the basis of the ruling.[2] Although arising in the context of actual litigation, the decision-making by the constitutional court had a somewhat abstract quality, relative to the American model. The entire emphasis was on maintaining the conceptual integrity of the legal system, in processes that were really internal to government rather than directly deciding disputes between citizen and state. The Kelsenian model of constitutional

[2] Austria Const. art. 89 (1920)

review was soon adopted in other countries, including Czechoslovakia (Const. art. 54.13 (1920)), Liechtenstein (Const. art. 104 (1921)), and Iraq (Const. art. 83 (1925)).

It is really with the *Grundgesetz* of Germany 1948 that the centralized model reaches its fullest expression. Whereas the Austrian constitutional court had focused on disputes related to federalism, in which states in the center needed a boundary adjudicator to protect the respective jurisdictions, the German constitutional court combined constitutional review of legislation with a vigorous and robust set of constitutional rights, articulated in aversion to the immediate Nazi past. These could be protected through the ordinary courts, using the Kelsenian device of asking ordinary judges to send the question to the Constitutional Court. But the Basic Law introduced the device of the constitutional complaint, through which any individual could challenge the constitutionality of a statute or government action, even without a specific case or controversy. This new mechanism played an important role in democratizing access to the constitutional court, and associating the institution with the protection of rights. It meant that access to constitutional review was even broader than that of the American model. In addition, the Constitutional Court was given many ancillary powers (Ginsburg 2004), including the ability to decide whether to ban a political party and review a state of emergency. But the concentrated power of final review of legislation in a specialized court is the core definitional attribute of this model.

Constitutional courts of the Kelsenian type were adopted throughout Europe after the World War II (for example in Portugal 1976, Spain 1978, and Belgium 1985) and in the former Soviet bloc after the cold war in the so-called third wave of constitutional review (Elster 1995).

C. The French Model

A third canonical model originates in the French Fifth Republic, embodied in the constitution of 1958. This document is associated with Charles de Gaulle and his solution to the crisis of French politics. The constitution of the Fourth Republic had been parliamentary, but a fragmented party system meant that there was no real coherence to the political system. DeGaulle wanted to correct for this weakness with a strong executive in the so-called semi presidential model. This constitutional design featured a divided executive, with directly elected president who had independent decree making, alongside a parliament which would generate a Prime Minister. Because the scheme featured two kinds of legislators, there is a need for a boundary adjudicator (Shapiro and Stone Sweet 2002). The body with this role was the *Conseil Constitutionnel*, a concentrated body that shared with Kelsen's design the features of specialization and abstraction. But unlike the German model, the French constitutional council was restricted to engaging in review of legislation only *ex-ante* and had no concrete jurisdiction whatsoever. Its distinct feature was its limitation to ex ante abstract review, performed before a law was promulgated. It could be initiated by a small number of political actors, including the president senate the president of the house, and the president of the country. It was squarely oriented towards protecting the integrity of the boundaries of law making within the constitutional system, rather than protecting the rights of citizens. We can thus define the key features as concentration, pure abstraction (rather than the mixed review which the German-style courts exercised) and discrete jurisdiction. Because the *Conseil* was not superior over other courts, as in the Kelsenian model: it was one of three top courts, along with the *Cour d'Cassation* and the *Conseil d'Etat.* Further, because the members of the *Conseil* included former presidents of the Republic, it was less specialized in the hands of judges. Finally,

The constitutional council acted with perhaps more independence than had been anticipated, especially after the grand figure of De Gaulle himself faded from the scene. The system changed quite significantly in 1974 when President Valerie Giscard d'Estaing decided to expand standing to include minority groups of legislators. As Stone Sweet (1992) tells it, this meant that political parties could attack legislation before promulgation, even when they had lost in legislative debates. The constitutional council became, in his telling, a third house of the legislature, a function that assumed very great importance when the Socialist party took over in 1981. The Constitutional council became a mechanism of constraining the socialists from their more radical plans, leading to what Stone Sweet calls the birth of judicial politics in France.

The French model was adopted in many former French colonies in Africa, including the rule that legislative minorities could bring cases to the constitutional accounts. Because many of these countries were one party states, however, there was not a lot of judicial politics. But in recent years, a vigorous judicial politics seems to be emerging on the African continent, including in some countries utilizing the French model. The Constitutional courts and councils are sites of occasional constraint of strong executives.

In France itself, the system changed again in 2008. In this year, perhaps responding to convergence pressures, the system was transformed yet again with the addition of ex post review. Citizens now have the ability to bring claims to the constitutional council in ways that were similar to those found in other European countries with designated constitutional courts. While this change represented a shift toward the German model, the presence of the other two high courts, means that the shift is incomplete. The French model lacks the supremacy associated with the German model.

D. Non-Judicial Variants

Not all countries have embraced judicial review. Several countries have a long tradition of parliamentary sovereignty. Parliamentary sovereignty implies that the people's representatives sitting in the legislature should have primacy over any other authority, and so be unconstrained by judicial control.

This theory is classically associated with Dicey in the United Kingdom, but it has resonated also outside of the British context. Notably, the idea has long been convenient for communist countries, whose constitutions typically involved no form of constitutional review. And in an age of democratic backsliding, the "political constitutionalism" (Bellamy 2011) associated with the British tradition has been an attractive theoretical device for those wanting to reduce the power of courts (Halmai 2019).

Another approach resembling parliamentary sovereignty in its pure form is taken by authoritarian communist countries. In 1982, the Peoples Republic of China adopted a Constitution as part of Deng Xiaoping's effort to provide a found a stronger institutional foundation for the rule of the Chinese communist party. This document centered the role of interpreting Constitution in the Standing Committee of the National People's Congress (Kellogg and Hand 2008). Under Chinese constitutional theory, the National People's Congress is the highest organ of state power, and its Standing Committee can thus engage in the authoritative interpretation of the constitution. It engages in ex ante review upon request from certain state organs, and also has a role in delivering authoritative interpretations to courts upon request. This form of review within the legislature does not utilize an adjudicative process, but it was a locus increasingly for debates on the constitutionality of major Chinese legislation during the early 2000s (Lin and Ginsburg 2015; Zhu

2010). During the same period, attempts by some lower courts to claim a power of constitutional review over administrative actions were shut down (Zhu 2010). This means that China has no genuine system of constitution review outside of the legislative process.

One final variant worth mentioning is that found in the constitution of Ethiopia, which features a relatively complex tribal and ethnic structure within a federal system. Constitutional review is performed by the House of Federations, the upper house of the legislature. This body does not have a major role in the ordinary legislative process, but can be seen as a device to protect the interests of the states from encroachment by the central government (Abebe 2010). As a design matter this certainly warrants some attention for its novelty, although less so from a judicial behavior perspective: there has not been much activity nor impact on the outputs of government.

3. The Rise of Supra-national Review

One major development, intensifying in recent decades, has been the development of supranational review, in which national-level decisions about constitutionality are subject to review on the basis of higher law by a court outside the state. Typically, this involves a regional trade or human rights regime.

Any system of supranational review complicates the traditional models on the issue of finality. Whereas in many systems, the constitutional review body is considered to have the final judicial word, once an international court is in the picture, this is no longer the case. A constitutional court decision might itself be a source of violation of the international norms, and thus generate obligations that individuals can enforce supra-nationally. We thus see how the presence of supranational review, even as a theoretical matter, complicates the traditional models.

One must be careful in delineating which supranational regimes have the power of final *constitutional* review. Under the European Convention of Human Rights, a supranational court interprets a regional treaty and issues judgments against member states on the international plane: the European Court of Human Rights decisions do not have domestic legal effect and so would not count as constitutional review under our definition. The decisions are addressed to member states, and a national constitutional court would still have the final word in interpreting national law. Similarly, the African Court of Human and People's Rights has reviewed constitutional provisions and asked member states to change them, but its decisions do not have direct effect. The picture is murkier in the European Court of Justice, whose decisions have direct effect in the constitutional order (Huneeus and Madsen 2018; Dulitsky 2015). If the European Court of Justice finds that a constitutional provision of a member state is in violation of the European treaties, the direct legal effect of the decision should trump any contrary domestic interpretation. For many years, the German Constitutional Court and the European Court of Justice have engaged in a back and forth about who has the final word in interpreting national constitutional law, with a kind of *détente* in place at this writing.

Direct effect is also in place in the Carribean and Latin American systems. The Caribbean system emerged from an early version of supra-national review that was found in the British

empire, in which the Judicial Committee of the House of Lords, the Privy Council, served as a court of last result for those members of the British commonwealth that retained its jurisdiction. But in part because of the backlash against a number of Privy Council decisions, Caribbean states created the Caribbean Court of Justice in the CARICOM trade area (Helfer 2002). This body has taken over as a collective court for the member states as a court of last resort, including with constitutional jurisdiction, and so can be considered a form of constitutional review.

The Inter-American Human Rights regime has transformed itself from a system of international law, in which the legal commands operate only among states as such, to one of supranational constitutional review. The crucial steps began with the 2006 case of *Almonacid-Arellano v. Chile*, which announced a doctrine of "conventionality control" (Dulitsky 2015).[3] Conventionality control means that the norms of the American Convention and American Declaration, as interpreted by the Inter-American Court, are binding on all the member states and their national courts. This includes not only statutes but national constitutional norms. As when natonal constitutional courts first had to coordinate with national supreme courts, the doctrine has created some tensions between national courts and the Inter-American Court (Huneeus 2011).

A final development, still only theoretical, is a proposal for an International Court of Constitutional Law (Albert 2023). This idea was pushed by Moncef Marzouki , the first President of Tunisia to serve after the Revolution of 2011. He introduced the idea at the United Nations General Assembly, and created a committee which developed a statute for the Court. But there was little uptake. Recently Richard Albert has called for a revival of the idea, as a way of counteracting democratic backsliding. Albert's view is that such a court should be limited to resolving abstract questions, which would simplify adoption of the proposal as a legal matter. At its most expansive, an international court of constitutional law would transform constitutional review in any state that signed up to the regime.

4. An Alternative Framing

The conventional way of organizing these models is by legal tradition, with the primary dimension of variation being whether a separate constitutional review body is involved as in many civil law countries, as opposed to the decentralized model of common law jurisdictions (Capelletti 1989). To a lesser extent, these models also revolve around whether judicial review is abstract or concrete. Specialization and abstraction, then, are the central analytic axes for constructing the classical models.

In this section, we de-center specialization to focus on different institutional features as the basis for categorization. We propose three lenses: breadth of accessibility; finality; and degree of concentration. These lenses produce different classifications that cut across the classical triad. In what follows, we will discuss various examples, but focus especially on Germany, South Korea, Mexico, India, South Africa and the United States.

[3] Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 124 (Sept. 26, 2006).

What is more, the possibility of supranational review changes all of these dimensions, generally by expanding accessibility, shifting the locus of final review, and expanding the number of judges and institutions with the possibility of final review.

A. Access

A first dimension along with judicial review varies, which cuts across the three canonical models, is access. We can see this, for example, within the German model. The Italian variant of constitutional review (Ferejohn and Pasquino 2012) had a slightly different system of access from the German. Whereas in Germany, citizens had a direct channel to the constitutional court through the mechanism of a constitutional complaint, in Italy all constitutional claims had to be processed through the court system. A citizen who felt the legislation was unconstitutional had to raise the issue in an ordinary court of law, at which point the judge would toll the case and certified question to the constitutional court for resolution. The constitutional court would resolve the legal question of interpretation and send the decision back to the ordinary court, which would in turn implement it in the case of hand. This mechanism focused on concrete cases and preserved the legal character of constitutional review, as well as the concentration of interpretation in a designated constitutional court. It resembles the operation of judicial review in the European Union, where the European Court of Justice hears claims certified from national courts about the status of EU law.

Judicial review in Latin America centered around the procedural device of the *amparo* (Brewer-Carrias 2014). This device originated in Mexico, and was created after De Tocqueville's description of judicial review was translated into Spanish. Jurists first introduced the idea at the state level, and it was adopted in the national Constitution of 1847, eventually spreading throughout the continent. A writ of amparo was a procedural device for rights protection, whereby a litigant could ask for protection in a particular case. The key feature, traditionally, was that the remedy was limited to the particular case, and a positive decision did not result in setting aside of legislation. But over time, the Mexican Supreme Court developed the practice that five writs granted on the same issue would lead to a decision of general effect. As the 20th century has progressed, new devices for rights protection such as the *tutela* in Colombia or the constitutional complaint in Brazil provided for broad access and powerful remedies. In this sense, there has been a great expansion of access to the point that judicial review has become more decentralized because ordinary judges also hear constitutional cases.

In similar vein, in several South Asian jurisdictions, including India and Pakistan, courts have been greatly expanding access, even allowing themselves to take cases at their own initiative (Galanter 2014; Quazi 2015). Such *suo moto* actions are becoming more prevalent.

As these examples show, there is substantial variation in how to access judicial review. In terms of accessibility, one can array systems on a spectrum from most closed to most open. Figure 1 depicts this graphically. Most closed are the systems where only certain governmental institutions can bring claims. The original French design, like that of Kelsen's in Austria, limited access to certain governmental actors, such as the President and Prime Minister. In this conception, review is focused on maintaining the internal integrity of the constitutional order in terms of the allocation of governmental power. When France expanded its jurisdiction to include a minority of legislators, review remained within the governmental sphere but increased the political importance, as legislative politics now could play out through judicial review. This mode of legislative access to review is now found in 35% of all constitutional systems. It is a somewhat

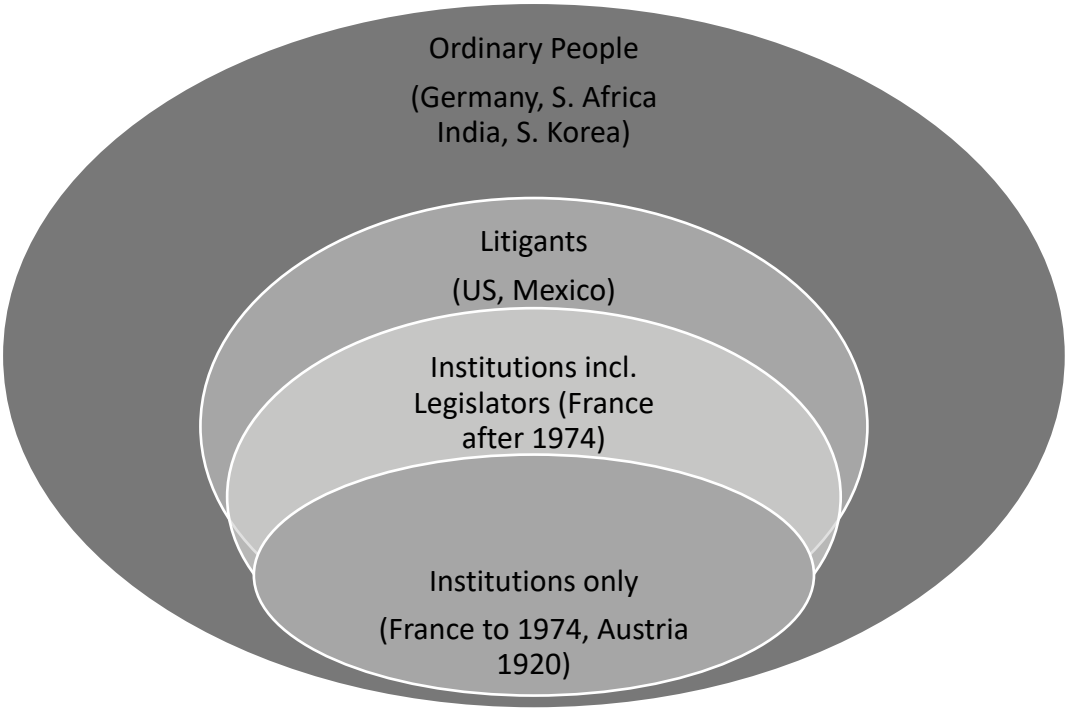
more open form of judicial review than one where only designated governmental actors can bring claim.

Next on the spectrum lie systems where cases can come up through the ordinary court system. According to data from the Comparative Constitutions Project, 25% of all constitutions in force mention the courts as a mode of accessing review. Most countries in the Americas have a broader system of access, since the legal process can be used to bring claims. This can be done through the ordinary legal process (as in the United States and Caribbean common law jurisdictions) or through special procedural devices like amparo and tutela (as in the Latin American countries). On the dimension of access, Mexico and the United States are similar.

Systems with constitutional petitions have the broadest access. These include about 30% of constitutional systems today. The German Constitutional Complaint has some procedural requirements, but a complaint does not need to be formulated as a legal claim. Similarly, section 167 of the South African Constitution allows a person, "when it is in the interests of justice and with leave of the Constitutional Court", to bring a matter directly to the Constitutional Court, as well as to appeal directly from another court. The Hungarian Constitution in place until 2011 provided access to "everyone," not even limiting access to citizens. An even broader form of standing is the Indian Supreme Court's adoption of the Public Interest Litigation model, under the leadership of Justice P.N. Bhagwati, in which anyone in the country can bring a complaint with minimal procedural requirements. Under the *suo moto* jurisdiction adopted in India and several other South Asian jurisdictions, even a formal complaint is not required for the courts to take up an issue for resolution and issue orders (Kureshi 2022).

In short, the lens of access produces different groupings than one might think of using the specialization lens. Concentrated systems are at both ends of the spectrum of access.

Figure 1: Classification Based on Access



B. Finality

Another dimension of variation that cuts across the three models is finality. Some might say that the definitional quality of constitutional review is that judges at the national level have the final decision on constitutionality, as a matter of law or practice.

But this is not the case in every country. We can imagine a spectrum ranging from systems where judicial review is not final to those where it is. On the far end of the spectrum are countries that have a tradition of parliamentary sovereignty and that continue to resist giving courts the final word in constitutional disputes, even as they have empowered courts. Specifically, recent decades have seen the emergence of what Gardbaum (2015) calls "the new constitutional commonwealth model of constitutional review". The central defining features of this model, according to Gardbaum, are (i) a catalogue of fundamental rights; (ii) entrenched either legally in a constitution or by a statute with political weight; (iii) enforced by courts with the power of constitutional review, that, (iv) do not necessarily have the last word in interpretation. It is this last feature, the lack of finality, that really marks the distinctive characteristic of this model, and it has the virtue of putting courts into dialogue with other constitutional actors. The model provided an intellectually satisfying synthesis between traditions of parliamentary sovereignty and demands for rights protection, and received acclaim in the literature. Mark Tushnet (2008) celebrates this as a form of "weak form review" which avoids the problems of legitimacy that arise from judicial finality. The central feature of these models is that they are dialogic, featuring a back-and-forth between multiple constitutional branches that each bring their own perspectives unconstitutional

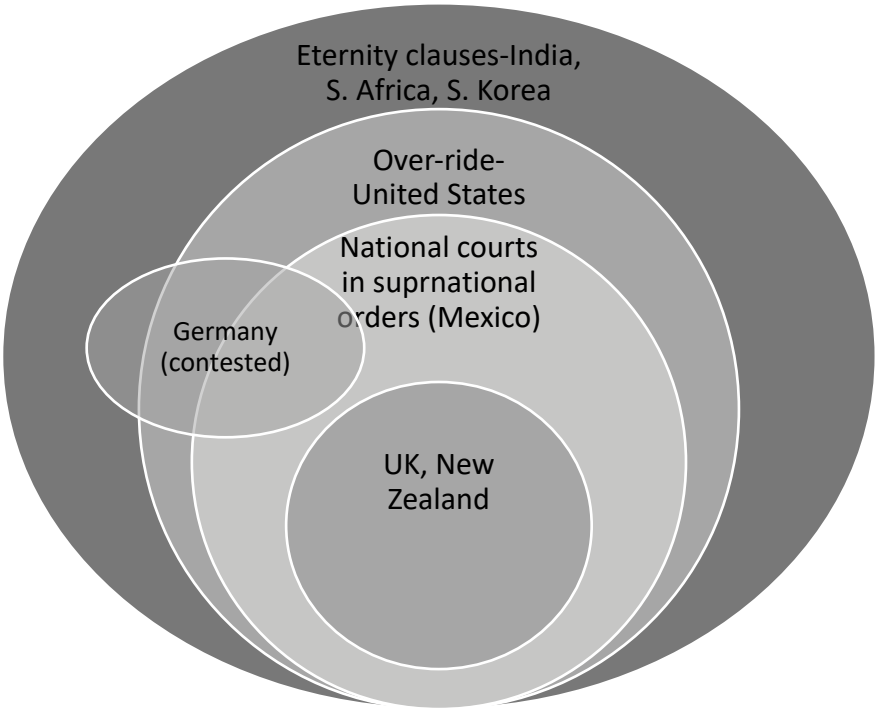
interpretation, and allowing for the overcoming of the counter majoritarian objection to constitutional review.

Next on the spectrum are national courts in supranational orders. The key insight here is that the expansion of supranational review undermines the finality of national constitutional review. This is somewhat counterintuitive, since supranational review is usually justified on the basis of enhancing rights protection, which is also a justification for national judicial empowerment. Yet as an analytic matter, there is no doubt that supranational review reduces the finality of national judges. National high courts can be overturned by supranational courts. At the same time, it is not always obvious that these decisions are final: domestic judges at times resist the supranational legal order (Lustig and Weiler 2018). A notable example is Germany. The German Constitutional Court is, of course, embedded in a broader supranational order, but it has asserted final authority to interpret the constitution. What is more, the German constitution makes certain parts of the constitution unamendable; hence one can imagine a theoretical case where the Court resists supranational interpretations; the legislature amending the constitution to bring it in line with the supranational legal order, and the Constitutional Court striking down these amendment based on the eternity clause. For this reason, we note Germany as a contested category on Figure 2.

Next on the spectrum are the systems where judicial review is final, but where judicial decisions can be overturned through constitutional amendments. The United States falls in this category, and a number of constitutional amendments have over-ruled contrary judicial decisions. Indeed some have suggested that the practice of amending the constitution to overturn certain judicial interpretations is quite common (Versteeg and Zackin 2016).

Furthest on the spectrum are the systems where courts have the power to overturn constitutional amendments. According to the doctrine of unconstitutional amendments, even procedurally valid amendments are subject to judicial review for determination as to whether they comply with some deeper standard, called "basic structure" (India), "constitutional custom" (South Korea), or other such norm (Roznai 2016). For systems with a robust doctrine of unconstitutional amendments, the judiciary is indeed final as a legal matter.

Figure 2: Classification Based on Finality



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C. Concentration

Another dimension of variation within these models is concentration. The classic lens focusing on legal tradition distinguishes those countries with concentrated review, in a specialized constitutional court, from those without such a court, which are presumed to be decentralized. Indeed, it is the isolation of the discrete function of constitutional adjudication that is definitional of constitutional courts (Ginsburg and Versteeg 2013).

But the crude distinction between constitutional courts and non-specialized high courts does not truly capture whether judicial review is centralized or decentralized. First, we observe there are some systems which have specicialization without a specialized constitutional court. In Costa Rica, there is only one Supreme Court, but it has a special chamber, Sala IV, which exercises constitutional review (Wilson 2009). This is a form of concentration within a generalized Supreme Court, a kind of hybrid model. Also, in Estonia, which alone among former Soviet Republics did not create a separate constitutional court, questions of constitutionality can go to a special constitutional chamber in the Supreme Court, or be heard *en banc*. Thus, whether there is an institution called "constitutional court" alone is not enough to establish that there is centralization.

But perhaps more importantly, in many systems with a constitutional court, judicial review can still be decentralized. This is especially the case in systems with broad access. For example, in Colombia, any judge can hear a *tutela* proceeding, meaning that review becomes more decentralized. Likewise, in South Africa, the 1996 Constitution provides for a Constitutional

Court, with wide access, which has become a major voice in the global conversation of how to protect rights (Böckenforde 2023). At the same time, ordinary courts also have the duty to protect constitutional rights. So this is a system with a designated constitutional court, that nevertheless deconcentrates constitutional review, in keeping with a desire of post-apartheid South Africa to maximally protect rights in the wake of apartheid. Open access, with a generalized duty to uphold the constitution among all courts, helps to do so. Because of this practice, systems like South Africa and Colombia become similar to the United States: in all these, it is the entire judiciary that can hear constitutional claims.

At the same time, there may also be an important difference between decentralization with a Supreme Court and decentralization with a Constitutional Court, in that the latter model is prone to conflicts between courts. A broad duty for all courts to protect rights sounds good in theory. But whenever there are two top courts in a system of concentrated review means that there are sometimes uneasy relations between the two bodies. These often take the form of jurisdictional battles over who has the final word on various legal questions (Garlicki 2003). While a "pure theory" would suggest that the Constitutional Court should have the final say on constitutional matters, this has not always played out in practice. Thus, the clean lines implied by models can sometimes break down in messy ways when put into practice.

Figure 3: Classification Based on Concentration

5. Advantages and disadvantages

The traditional literature on comparative judicial review that has emerged around the three classical models has not been particularly normative in character. Our framing allows a bit more nuance in terms of institutional design, though as always one can only speak of tradeoffs and optimization rather than a universal best.

As a start, which of the three dimensions is most important depends on normative considerations. If rights protection is a priority, then broad access is particularly important. There is no doubt that broad access to the institution of judicial review can help bring more rights claims. By contrast, if legal certainty is important, then finality is the key dimension. Finality is also important in settings where it is important to express the primacy of nation-state vis-à-vis supranational actors.

It is worth reflecting on the importance of concentration; the main feature that distinguishes the traditional models. Concentration of any function in government allows the development of expertise and consistency. But it has potential downsides as well. In our context, all models of constitution review must grapple with the fact that the institution is embedded in the broader system of politics. This is starkly illustrated by our current era of democratic backsliding. Traditionally constitutional courts were established to protect the integrity and coherence of constitutional review as well as the normative hierarchy within a legal system. However, that very concentration means having a good deal of power in a single body, which creates some risk. Perhaps the paradigm case illustrating the risk is the constitutional court of Hungary. Scheppele (2003; 2005) once celebrated the constitutional court of Hungary, in a series of articles demonstrating how it assumed a central role in the political system, served as an instrument of Europeanization, and generally helped with Hungary's transformation from communist rule in the 1990s and early 2000s. But this optimistic vision came crashing down with the election of Viktor Orbán in 2010. With a majority in parliament sufficient to pass constitutional amendments, his party replaced the Constitution, voided the entire prior jurisprudence of the constitutional court in one swoop, and appointed justices friendly to him. The very centrality of constitutional review meant that this linchpin reform gave him massive leverage over all other bodies in the political system, and the court was transformed into an instrument a political power rather than a constraint on it.

These stories have been repeated in other places. A major confrontation involving the Polish Constitutional Tribunal played out in 2018, as the Law and Justice Party was able to pack the court, as part of its broader attempt to take over the entire judicial system. The conflict led to direct confrontation between the government of Poland and the European Union, which has sued the country and is penalizing it with fines for violations of the rule of law principle. For our

purpose, the interesting point is that the constitutional tribunal, once a guarantor of rights, has become a locus of politicization and back sliding.

Still it does not seem to be the case that, as a general matter the concentrated model is more or less likely to produce a vigorous defense of democracy. In Africa, the Supreme Court of Kenya played the major role and protecting the integrity of the countries elections, while constitutional courts in the Central African Republic and Malawi have at times stood up against aggrandizing leaders.

We may be entering an era of dissatisfaction with constitutional courts. Some countries are beginning to consider shifting away from the model of a designated constitutional court toward one of supreme court review. Georgia and Armenia have both had discussions to this effect though neither has yet done away with the constitutional court. Our account has showed that this shift need not entail decentralization of the review function either.

6. Conclusion

A model is a configuration of co-occurring institutional features that are adopted and emulated. Early models of constitutional review included that of the United States, a model developed by Hans Kelsen that received its fullest expression in postwar Germany, and a model of pre-promulgation review developed in Fifth Republic France. As constitutional review has rapidly spread in the last four decades, these models have been adapted and complicated by various constitutional designers and judicial leaders.

Our approach to categorizing systems of review has focused on particular institutional features rather than the traditional three models. Once one looks at features like access, finality and concentration, it become apparent that the traditional approach has little explanatory power.

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