

Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review

ANDRÉ BZDERA *University of Montreal*

Most modern theories of judicial review of federalism disputes attempt to reconcile judicial review of legislation with democratic ideals.¹ The federal high court is considered to be the necessary neutral arbiter of jurisdictional conflicts that periodically arise between the democratically elected central and regional parliaments, as well as between national majorities and regional minorities.² The high court judges are thus the guardians of the proper application of general principles of the federal constitution that divide state power between the two levels of government. However, these normative theories of judicial review rarely take into account the history of judicial review of federalism disputes in the older federations, such as the United States or Canada, nor are they compatible with the comparative political study of federal high courts. Their links to empirical reality are tenuous at best.

Consider for instance the case of Canadian theories of judicial review of federalism disputes. It is commonly asserted in Canadian political science that the Supreme Court demonstrates neither federalist nor provincialist bias in cases concerning the division of powers established

1 The most recent Canadian example of this literature is Katherine E. Swinton, *The Supreme Court and Canadian Federalism* (Toronto: Carswell, 1990), 8. Most general theories of judicial review are not without serious problems. See Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge: Harvard University Press, 1988); or Joel Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought," *Osgoode Hall Law Journal* 27 (1989), 123-93.

2 Kenneth C. Wheare, *Federal Government* (4th ed.; New York: Oxford University Press, 1964), 60-61. He writes that federal high courts "have exhibited a considerable impartiality in the exercise of their function as interpreters of the division of powers." See also Ivo D. Duchacek, *Comparative Federalism* (New York: Holt, Rinehart and Winston, 1970), 258.

André Bzderá, Department of Political Science, University of Montreal, P.O. Box 6128, Station A, Montreal, Quebec H3C 3J7

Courts A Comparative And Political Analysis

Howard Gillman,Cornell W. Clayton

Courts A Comparative And Political Analysis:

Courts Martin Shapiro,2013-11-15 In this provocative work Martin Shapiro proposes an original model for the study of courts one that emphasizes the different modes of decision making and the multiple political roles that characterize the functioning of courts in different political systems Globalizing Human Rights Charles Anthony Smith,2016-04-08 This collection presents a comprehensive engagement of issues of human rights in an increasingly globalized world As the role of the rule of law has moved beyond the confines of the state and beyond the interactions of states how and when law protects human rights has become a central issue of concern These essays shed light on both the immediate and the long term future of a variety of issues located at the intersection of globalized law and the protection of the rights of individuals Here both top down mechanisms and bottom up mechanisms for the fulfilment of human rights are artfully explained This volume presents frontiers of research in human rights in both substance and approach using a variety of methodologies to engage issues ranging from national court compliance norm diffusion and the role of the judiciary in fulfilling human rights to human trafficking same sex marriage and judicial institution building through non governmental organizations This book was published as a special issue of the Journal of Human Rights **The Supreme Court in American Politics** Howard Gillman,Cornell W. Clayton,1999 For decades political scientists studying the Court have adopted behavioral approaches and focused on the relatively narrow question of how the justices policy preferences influence their voting behavior This emphasis has illuminated important aspects of Supreme Court politics but it has also left unaddressed many other important questions about this unique and fascinating institution Drawing on the new institutionalism in the social sciences the distinguished contributors to this volume attempt to fill this gap by exploring a variety of topics including the Court s institutional development and its relationship to broader political contexts such as party regimes electoral systems social movements social change legal precedents political identities and historically evolving economic structures The book s initial chapters examine the nature of the Court s distinctive norms as well as the development of its institutional powers and practice A second section relates the development of Supreme Court politics to the historical development of other political institutions and social movements Concluding chapters explore how its decision making in particular areas of law or periods of time is influenced by and influences its socio political milieu These contributions offer provocative insights regarding the Court s role in maintaining or disrupting political and economic structures as well as social structures and identities tied to ideology class race gender and sexual orientation The Supreme Court in American Politics shows how we can develop an enriched understanding of this institution and open up exciting new areas of research by placing it in the broader context of politics in the United States **Halduskultuur-Administrative Culture 12 (1)** , *Arizona Journal of International and Comparative Law* ,1989 **God and Man in the Law** Robert Lowry Clinton,1997 In a wide ranging study based on legal history political theory and philosophical ideas going all the way back to Plato and Roman law Robert Clinton challenges

current faith in an activist judiciary Claiming that a human centered Constitution leads to government by reductive moral theory and illegitimate judicial review he advocates a return to traditional jurisprudence and a God centered Constitution grounded in English common law and its precedents **Freedom of Speech: The Supreme Court and Judicial Review** Martin Shapiro,2011-02-11 One of the great continuing disputes of U S politics is about the role of the Supreme Court Another is about the First Amendment This book is about both A classic defense of the openly political role of the Court this book belies the notion reasserted recently by Chief Justice Roberts that judges are just neutral umpires Especially in the area of speech judges make policy they create law Appellate Courts Daniel John Meador,Thomas E. Baker,Joan E. Steinman,2006 This edition promises to redefine the canon of the study of appellate courts continuing the comprehensiveness and increasing the depth of the First Edition This edition of Appellate Courts provides teachers with choices that are suitable for a two or three unit course or a seminar The book permits emphasis on either appellate jurisdiction and practice or on the structural and policy aspects of appellate court organization and administration All the chapters have been revamped and updated with coverage of appellate jurisdiction substantially expanded Using both classic and new cases the book examines theoretical and practical issues arising from the appellate courts dual roles to correct trial court error and to generate common law Its coverage of the dramatic rise in the volume of appeals and the resultant institutional reforms far surpasses that of any other law school course book Fresh materials present new perspectives on appellate structures personnel and procedures preparing students to practice in the contemporary state and federal appellate courts This provocative book considers such issues as the delegation of responsibility to law clerks and staff attorneys the threats to judicial collegiality the selection of state and federal judges including the regulation of judicial candidates speech and the role and ethics of the appellate lawyer It devotes a separate chapter to the U S Supreme Court's discretionary jurisdiction while another chapter draws upon Professor Meador's unique understanding of the English and German appellate systems to contrast those systems with our own In short this book is unique in not only exploring appellate jurisdiction and procedure but also in taking the measure of the appellate courts in all their dimensions as important institutions in the American legal order The Teacher's Manual also has been updated and greatly expanded to assist both experienced and less experienced teachers It includes discussion of the principal cases and secondary materials as well as expert suggestions concerning answers to questions posed in the Notes It also provides a wealth of supplemental material to bolster any professor's expertise and make it easy for an instructor new to the subject to teach from the book effectively and confidently **Judging in Black & White** Stacia L. Haynie,2003 Despite the increasing recognition of judges as political actors few studies have empirically explored the role and function of courts in repressive regimes Based on individual case studies as well as empirical analyses of all the reported decisions of the highest appellate court in South Africa Judging in Black and White Decision Making in the South African Appellate Division 1950-1990 creates a portrait of the individuals who

staffed the bench during the rise and fall of apartheid This book explores the dilemma of judging in a system that juxtaposes the formal law and the repressive law Regardless of their adherence to a formal law approach to judging the adjudicative function cannot be fully separated from the larger moral questions embedded in these systems This text evaluates the response of judges to this dilemma through institutional individual and longitudinal analyses of judicial decision making

Judges and the Language of Law Matthew Williams,2022-01-17 This book looks at how the language of the law has changed over time and how this has empowered judges In particular it looks at how this has empowered judges to rule against governments **The View from the Bench and Chambers** Jennifer Barnes Bowie,Donald R. Songer,John Szmer,2014-10-30 For most of their history the U S courts of appeals have toiled in obscurity well out of the limelight of political controversy But as the number of appeals has increased dramatically while the number of cases heard by the Supreme Court has remained the same the courts of appeals have become the court of last resort for the vast majority of litigants This enhanced status has been recognized by important political actors and as a result appointments to the courts of appeals have become more and more contentious since the 1990s This combination of increasing political salience and increasing political controversy has led to the rise of serious empirical studies of the role of the courts of appeals in our legal and political system At once building on and contributing to this wave of scholarship The View from the Bench and Chambers melds a series of quantitative analyses of judicial decisions with the perspectives gained from in depth interviews with the judges and their law clerks This multifaceted approach yields a level of insight beyond that provided by any previous work on appellate courts in the United States making The View from the Bench and Chambers the most comprehensive and rich account of the operation of these courts to date

Judicialization and the Construction of Governance Alec Stone

Sweet,1996 **Legalism Against Democracy** Elisabeth C. Hilbink,1999 Courts ,1981 Value Change in the Supreme Court of Canada Matthew E. Wetstein,C.L. Ostberg,2017-01-01 Value Change in the Supreme Court of Canada is a groundbreaking analysis of the degree to which Supreme Court decisions reflect the changing values of society over the past four decades Focusing on three key areas of law environmental disputes free speech and discrimination cases Wetstein and Ostberg provide a revealing analysis of the language used by Supreme Court justices in landmark rulings in order to document the way that value changes are transmitted into the legal and political landscape Bolstered by a comprehensive and nuanced blend of research methods Value Change in the Supreme Court of Canada offers a sweeping analysis of pre and post Charter influences one that will be of significant interest to political scientists lawyers journalists and anyone interested in the increasingly powerful role of the Supreme Court Representative Government in Modern Europe Michael Gallagher,Michael Laver,Peter Mair,2001 Uniting theory and application the third edition of Representative Government in Modern Europe continues the tradition of previous editions by first examining the themes debates developments and structures driving European politics and then investigating the way in which the theories behind them are manifested

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