

ABSTRACT:
A THEORY OF JUDICIAL POWER AND JUDICIAL REVIEW

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Judicial review has long been characterized by constitutional scholars as countermajoritarian and antidemocratic. This Article employs insights from political science and game theory to argue that precisely the opposite is true: the relationship between judicial power and popular rule is not antagonistic, but symbiotic. Constitutional courts with the power of judicial review perform monitoring and coordination functions that are crucial to the maintenance of popular sovereignty. By conveying relevant information about government misconduct in a highly public fashion, constitutional courts enable the people to exercise control over the government in an informed and coordinated manner. The fact that constitutional courts perform monitoring and coordinating functions helps, in turn, to solve the puzzle of why governments obey them. Their ability to mobilize the people against the government means that government disobedience of the courts carries potentially severe consequences.

Judicial review supports popular sovereignty by mitigating the principal-agent problem that lies at the heart of democratic government. In a system of constitutional government premised upon popular sovereignty, the people institute and delegate power to a government and may impose terms and conditions in the form of a constitution. The government, as the agent of the people, is supposed to exercise its power consistent with those terms and conditions. But the interests of principal and agent may diverge: those entrusted with public power may seek to seize more power than has been given them, or to turn the power they have been given against the people themselves. The people, as collective principal, thus face the challenge of asserting effective control over a potentially treacherous government. A constitution ordinarily sets forth mechanisms by which they may exercise such control peacefully, but these are not immune to sabotage and failure. In extreme cases of constitutional failure, the people may band together to overthrow a government that has blocked the ordinary mechanisms of popular control. There are, however, significant potential obstacles to any effective exercise of popular power over the government. First is an information problem: the people cannot respond to bad behavior by the government if they remain unaware of that behavior. Second is a coordination problem: even if the people acting together are capable of replacing the government, such action may require widespread coordination that can be difficult to achieve.

Constitutional courts facilitate the exercise of popular control over the government in two ways. First, they provide reliable, low-cost information about the constitutionality of government conduct. A court engaged in judicial review performs the function of a whistleblower or fire alarm: it warns the people whether their government has overstepped the bounds of its delegated power. Second, courts can coordinate popular action against usurping governments. People are unlikely to act openly against a tyrannical government unless they believe that others will act as well. What they need, therefore, is a signal that it is time to act. A court can provide such a signal by ruling publicly against the government.

This theoretical account has important empirical implications that directly contradict the conventional wisdom about the purported relationship between judicial

legitimacy and judicial power. It is commonly thought that courts jeopardize their legitimacy, and thus their power, by rendering unpopular decisions. This Article argues that the opposite may be true. When a court renders an unpopular decision that nevertheless receives widespread compliance, it generates and reinforces strategic expectations about its efficacy in future cases. These expectations are self-fulfilling and increase in strength over time: to the extent that one expects others to comply with the court's decisions, one will conclude that it is in one's own best to comply as well, and the result of such strategic calculations, multiplied over the entire populace, is an equilibrium of mass compliance. Thus, the successful exercise of judicial power in the face of opposition or criticism merely begets even more judicial power. The overall theory also helps to explain both judicial independence and public support for the courts. Because constitutional courts perform a watchdog function, the people have reason to support their independence even if particular decisions happen to strike an unpopular note. This prediction is consistent with the fact that popular support for the Supreme Court has remained high in the face of discontent with particular decisions.

The Article concludes by offering a range of practical advice for those in the world of government, together with a call for reform of the scholarly agenda. For those on the bench, the Article offers suggestions as to how courts can best protect and expand their own power. For those who dream of becoming despots, it offers advice on how best to design a toothless judiciary without being too obvious about it. For those faced with the task of framing working constitutional arrangements for a liberal democracy, it makes a modest case for popular participation in the selection of judges. And for those who produce (or publish) legal scholarship, it argues for the reinvention of constitutional theory along post-counter-majoritarian lines and attempts to envisage what questions might more fruitfully occupy the attention of constitutional scholars in this reimagined world.