

# A Theory of Judicial Power and Judicial Review

**J**UDICIAL REVIEW HAS LONG BEEN CHARACTERIZED by constitutional scholars as countermajoritarian and anti-democratic. This article employs insights from political science and game theory to argue that the opposite is true: 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 government acts as the agent of the people and is supposed to exercise power consistent with the terms and conditions imposed by the people in the form of a constitution. 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 thus face the challenge of asserting effective control over a potentially treacherous government, and they cannot meet this challenge without first overcoming two potentially serious obstacles.

One is an information problem: the people cannot respond to bad behavior by the government if they remain unaware of that behavior. Another 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.

**COURTS THAT ENGAGE** in judicial review perform monitoring and coordinating functions that help the people to solve both of these problems. First, a court engaged in judicial review serves the function of a whistleblower or fire alarm: it provides the people with reliable, low-cost information about 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. They are, therefore, in need of a highly public signal that creates such beliefs on a large scale.

A court can provide such a signal by ruling publicly against the government. The fact that constitutional courts perform monitoring and coordinating functions helps, in turn, to solve the puzzle of why governments obey them, notwithstanding the fact that they lack the power of either the purse or the sword. The ability of a court to mobilize the people against the government means that government disobedience of the court's decisions carries potentially severe consequences.



CYLINDA MARQUART

This account has important empirical implications that directly contradict the conventional wisdom about the purported relationship between judicial legitimacy and judicial power. In particular, it is often thought that courts jeopardize their legitimacy, and thus their power, by rendering unpopular decisions. The theory proposed here suggests, however, 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.

Thus, the successful exercise of judicial power in the face of opposition or criticism merely begets even more judicial power. The theory also helps to explain both judicial independence and public support for the courts in the face of decisions that may sometimes defy the wishes of a majority: because constitutional courts perform a watchdog function, the people have reason to support their independence even if specific judicial decisions happen to be unpopular.

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**PART I OF THIS ARTICLE** sets forth the principal-agent problem that lies at the heart of any government premised upon the notion of popular sovereignty. It illustrates the problem by positing a hypothetical state of nature in which people have much reason to institute a government, but also have reason

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to fear that any government to which they delegate power may betray them. In this scenario, the introduction of a judicial body reduces the risk of such betrayal and reinforces popular control over the government. Parts II and III argue that constitutional courts with the power of judicial review perform monitoring and coordinating functions that both ameliorate the principal-agent problem and create incentives for the government to comply with judicial decisions. ...

Part IV of this article discusses a counterintuitive implication of a coordination-based account of judicial power. Conventional wisdom suggests that courts secure compliance with their decisions by drawing upon their store of legitimacy, which is undermined by decisions that are unpopular, controversial, or lack intellectual integrity. [In fact,] precisely the opposite is true: an unpopular or unpersuasive decision can, in fact, enhance a court's power in future cases, as long as it is obeyed. Widespread compliance with a decision that is controversial, unpopular, or unpersuasive serves only to strengthen the widely held expectation that others comply with judicial decisions. This expectation, in turn, is self-fulfilling: those who expect others to comply with a court's decisions will find it strategically prudent to comply themselves, and the aggregate result will, in fact, be widespread compliance. ...

**PART V EXPLORES** the practical implications of the theory for judicial independence and the extent of popular support for the courts. It does so by modeling judicial review by an independent court as a game of strategy played by the government, the court, and the people. This analysis yields three predictions. First, if the theory is correct that constitutional courts facilitate popular control over the government by performing monitoring and coordinating functions, would-be tyrants have an incentive to undermine their independence for the same reasons that a would-be arsonist might seek to disable a fire alarm.

Second, because people know that would-be tyrants have an incentive to undermine judicial independence, they will support the independence of the courts from the government, and they will further construe an attack upon the courts as a warning sign of potential usurpation. Third, to the extent that judicial review performs monitoring and coordinating functions that bolster popular control of the government, the people have a rational incentive to support judicial independence, even if the courts do not always adopt policies that are preferred by the majority.

The article closes by urging a new research agenda for constitutional scholarship—one that moves beyond the countermajoritarian dilemma to questions deserving of greater attention. ... Why do people obey courts? What functions do courts perform, and to whose benefit? Why do government actors comply with the decisions of constitutional courts? What, if anything, can such courts do to augment their power? For what reasons might citizens and governments alike not merely tolerate, but even encourage, the growth of judicial power? Under what conditions can constitutional courts and judicial review actually succeed at setting limits upon the state, or at protecting rights from infringement? To what extent, if any, does constitutional adjudication facilitate the expression and resolution of social and political conflict?

There is no good reason why constitutional scholarship should give short shrift to such fundamental questions of “who gets what, how, and why.” Perhaps it is optimistic to imagine how the field of constitutional theory might look if it were to outgrow its preoccupation with the supposedly countermajoritarian character of judicial review. But it is time for the wheel to turn. ||||

*David S. Law, professor of law and professor of political science, writes and teaches in the areas of law and political science, comparative public law, judicial politics, constitutional politics, and constitutional theory.*

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