Two Hundred Years of *Marbury v. Madison*: The Struggle for Judicial Review of Constitutional Questions in the United States and Europe

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A. Two Different Approaches

I. The Velvet Revolution: John Marshall's Stroke of Genius in the U.S. Supreme Court

This year we celebrate a United States Supreme Court decision that marks the beginning of modern jurisdiction over constitutional questions: *Marbury v. Madison*.[1] This is all the more remarkable since, when it was decided two hundred years ago in 1803, it was controversial and many still maintain it was wrongly decided. Chief Justice Marshall ruled on a dispute which he had earlier had a hand in causing, since the alleged legal error – the untimely delivery of a commission to Justice of the Peace Marbury – fell within his area of responsibility as Secretary of State. He dismissed the petition because the incorrect legal procedure had been chosen. However, he did not examine this question at the outset but – contrary to the accepted procedural rules of his time – at the end. This left room for a wide-ranging discussion of the right of judicial review, which was not required by law, and was, therefore, *obiter dicta*. Thomas Jefferson later referred to this discussion as the Chief Justice's "*obiter dissertation*." Of course, Adams himself contended that the case turned on the judicial right of review, since this was a component of his argument that the petition should be dismissed.

Since then, generations of jurists have used their acumen to find additional legal defects in the decision, or to add new, workable justifications.[2] Neither effort has diminished the epoch-making significance of the decision. In sum: even if the decision was wrong, it brought about the right result since the times were ripe to see it as correct.

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[1] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[2] *Cf.* Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J 1; NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW (2000).

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While one can only speculate about Marshall's true motives, a plausible case can still be made about them. The decision in *Marbury v. Madison* was issued at an important political turning point. President Adams, a Federalist, had been replaced by the Republican, Thomas Jefferson. Shortly before this Adams had hastily appointed his political ally, Marshall, to be Chief Justice of the Supreme Court. The appointed-but-not-yet-commissioned justice of the peace, Marbury, also owed his new job to this political calculus: Adams had in a great hurry named 42 District of Columbia justices of the peace of his own political hue to assure, with undemocratic intent, that legal precedent could serve as a bulwark for his own political convictions against the new political majority.

It would have served the logic of erecting a bastion of Federalists in the judiciary to let Marbury win before the Supreme Court. However, this would have been an open declaration of war against the new administration, which was already so outraged it refused to take part in the proceedings. Many observers believe Marshall would have had to reckon with impeachment proceedings if he had dared to find in favor of Marbury.[3] If this had happened his illustrious career as Chief Justice of the U.S. Supreme Court[4] would not have gotten off the ground. Above all, Marshall would not have been able to fulfill the political mandate of his patron, President Adams, to act as standard bearer for the Federalists's political and legal ideals.

Marshall, an astute politician and excellent lawyer, found an intelligent and, in hindsight, brilliant way out, which included several steps. Step 1: Marbury lost the case. The political setback for Jefferson was avoided or held within bounds. The rationale was face-saving: the petition was improperly brought. The Chief Justice's other statements, however, many of which were *obiter dicta* in many critics' opinions, were the "meat" of the decision. The least of it was Step 2: the finding that Marbury would have had to be appointed, i.e., that the petition would have been granted, if the procedural hurdle had been overcome. However, Step 3 was political dynamite: Marshall's general statements on judicial review of legislation. This is the reason we celebrate the decision as the start of modern court jurisdiction over constitutional issues. These teleological and systemic arguments were masterfully formulated and had a rhetorically persuasive elegance.

I cannot see into Marshall's inner thoughts, but I doubt he was aware of the impact his deductions would have on world history. However, it is plausible to assume that Marshall sought and found a vehicle that would give him the ability to fulfill his mission as the Federalist adversary of the Republicans, namely, review of the

[3] S. Van Alstyne, 1969 Duke L.J. 2.

[4] Concerning his carreer *see* J. E. SMITH, JOHN MARSHALL (1996).

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new administration's legislation. The Supreme Court, which was led by him during his lifetime, occupied by persons predestined for it, and whose decisions were not subject to any higher review, suited his purposes. Marshall forged a weapon for the medium and long term, but refrained from using it right away in the case before him so that its potency would not be revealed.

If this interpretation is correct, Marshall was doubly biased; not only in the specific case before him, where he seemingly "cured" the bias by dismissing the case, but principally in a political respect. To be sure, he was not acting on Adams' specific instructions, but in his spirit. An ambivalence was immediately apparent at the birth of judicial review. Such review dared, in the name of the constitution, to oppose compliance with the democratically enacted decisions of the congressional majority.[5]

The Supreme Court followed Marshall unanimously. No one objected to the weak legal rationale. No judge took exception to the political hautgout. No public storm of indignation materialized, and the political dynamite of the decision remained submerged for decades. The Supreme Court's power of review was established and remained as a sword of Damocles, warning the Jefferson Administration to be cautious. Not until 1857. 54 years later, did the Supreme Court declare a law unconstitutional for the first time.[6] At that time, however, the former political combatants were no more, and the Supreme Court could rely on a precedent that had become long-established.

Marbury v. Madison was a legal revolution sheltered by the lack of far-reaching consequences in the specific case. *Marbury v. Madison* was a velvet revolution, which did not claim its first victim for several decades. Even then, it did not erupt and cause political upheaval, but spread quietly to almost all parts of the world.

II. The German Supreme Court's Threat of Judicial Review

Not only did Marshall's new approach arguably make a successful career for him, but his strategy of gradualism found imitators as well. Let's jump ahead a good 120 years to the German Weimar Republic of 1925.[7] In that year, the *Reichsgericht* (Ger-

[5] This is an ongoing discussion, *cf.* Troper, *The Logic of Justification of Judicial Review*, 99 Int'l J. of Constitutional L. 2003.

[6] Dred Scott v. Sandford, 60 U.S. (19 How) 393 (1856).

[7] *Cf.* WENDENBURG, DIE DEBATTE UM DIE VERFASSUNGSGERICHTSBARKEIT UND DER METHODENSTREIT DER STAATSRECHTSLEHRE IN DER WEIMARER REPUBLIK 51 (1984); *See also* 3 STOLLEIS, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND 117 (1999).

man Supreme Court) issued its famous decision on revaluation legislation,[8] in which it established the judicial review of laws in theory with the matter-of-fact words: "Since the Reich's Constitution itself contains no provisions depriving the courts of jurisdiction over the constitutionality of Reich laws and transferring it to some other entity, the right and duty of the judiciary to review the constitutionality of Reich laws must be recognized."[9] Here too the strengthening of the judicial right of review was sheltered by the dismissal of the case. The latter dominated the public's perception of the decision. Shortly before the *Richterverein beim Reichsgericht* (Association of Supreme Court Judges), in a spectacular statement on the revaluation legislation,[10] threatened to deny enforcement of laws that were in breach of good faith. In this specific case, the German Supreme Court did not endorse this position, but ruled the revaluation legislation was constitutional. However, it used the decision to claim the right of substantive review. In so doing, it used a not uncommon ploy. It relied on the principle of *stare decisis* by citing earlier decisions. However, if these decisions dealt with judicial review of laws at all, it was highly doubtful they approved a right of judicial review for the German Supreme Court. Walter Jellinek called the reliance on this line of cases "the fairy-tale of Supreme Court review of the constitutionality of Reich laws."[11]

Since the German Supreme Court followed the Judges' Association's highly controversial policy in principle, but not in the specific case before it, the political dynamite of the decision was tempered by the specific result. Moreover, the Court let time pass – until 1929 – before it first declared a law unconstitutional.[12] During the Nazi period that followed, when the right of judicial review should have displayed its political clout, the weapon was put into moth balls.[13] Not until the post-war period could there be a new beginning.

III. Redesigning Legislative Reality through a Change in Paradigm

Marshall and the U.S. Supreme Court only set a new direction. Although judicial review was not applied in specific cases for a long time, it sat on the bench as a

[8] *RGZ* 111, 320 (1925).

[9] *RGZ* 111, 320, 323 (1925).

[10] Statement of January 8, 1924, JURISTISCHE WOCHENSCHRIFT 1924, 90.

[11] W. Jellinek, *Das Märchen von der Überprüfung Verfassungswidriger Reichssätze durch das Reichsgericht*, JURISTISCHE WOCHENSCHRIFT 1925, 454.

[12] *RGZ* 124, 173 (1929).

[13] *See Wendenburg*, *supra* note7, at 92.

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substitute player, ready to get into the game, if, in the judge's opinion, Congress made a foul. The German Supreme Court as well largely placed the right of judicial review on the back bench as a warning to the German parliament, which was disliked by large segments of the judiciary, and in reaction to the unsettled state of jurisprudence.[14]

However, a review of the specific political context still does not explain why the idea of judicial review of laws – and I restrict myself, in what follows, to the review of legal norms – was historically so significant. It is my thesis that the main reason for this was not any specific application, but rather that Marshall and the U.S. Supreme Court – and, as a result, the German Supreme Court – had formulated an idea for which the time was politically ripe. The development of the law occurred in tandem with the vicissitudes of political reality.

Historical conditions enabled a change in paradigm; a new design of legislative reality. The recognition of the judicial review of laws was the outward manifestation of this change in thinking, the roots of which reached much deeper and were richly fertilized by the spirit of the times.

B. The Three Steps to Establishing a Judicial Right of Review

Arguably, the right to judicial review of laws presupposes two to three steps, which have wide-reaching political and socio-political premises. Step 1: the recognition of a higher ranking law as a standard against which other legal norms are measured. Step 2: allocation of the right of review to a court. Step 1 poses the question of standards: against what principles shall laws be measured? Step 2 is a question of allocating the powers of the state. Step 3 is a more detailed explication of Step 2: either the right of review is transferred to an existing court or a special constitutional court is established. At Step 3, the United States placed its trust in an existing court. The Federal Republic of Germany created a special constitutional court.

I. Step 1: Recognition of Higher-ranking (Constitutional) Law

In Step 1, Marshall could rely on an impressive line of theoretical and political proponents of Natural Law and Enlightenment, even if he did not explicitly do so. These were representatives of the intellectual elite of Europe, drawn from many nationalities and similar in their diversity to the UN: The Englishman Locke, the Frenchmen Montesquieu and Sieyès, the Germans von Pufendorf and Christian Wolff, and the Dutchman Grotius. The thoughts of these men resonated in their

[14] *Id.*

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times because they provided a theoretical superstructure for the structural political change that occurred in the transition to a new era. This was significantly easier in the United States than in Europe, for, although the Americans had to overcome the hated English colonial power, they did not have to uproot firmly established feudal structures.

As history teaches, good arguments alone are not sufficient to effect a political change of paradigm. It must also make sense to follow them. The political need was lacking when the Englishman, Sir Edward Coke, asserted in Bonham's Case in 1610[15] that the Common Law, with its principles of reason and justice, took precedence over legislation enacted by parliament. That could have been Step 1.

Coke's idea had only limited success in English law and had become outdated there when it became an argument in the New World to support the American colonies' struggle against English power. Ideas were needed to justify resistance to the British colonial masters. The rhetorically gifted lawyer, James Otis, made use of this argument to oppose a bill before the English parliament. This bill sought to authorize British customs authorities to search for smuggled goods. In reliance on Coke, Otis concluded that an unjust law was invalid – here Step 2 comes into play – and should not be enforced by the courts.

The basic principles of unwritten Common Law were raised by the Americans to a higher standard before which the written law (enacted by Congress) had to give way. Ultimately this was the Natural Law and Common Law idea that there are *leges fundamentales* (fundamental laws), which are higher than written laws and before which written laws must give way.[16] Reliance on unchanging principles was used as a means to change political relationships. Later, when the Natural Law foundations of government theory and social philosophy loosened and constitutionalism triumphed, the concept of a higher law carried over to written (positive) constitutional law. The previously unwritten Common Law principles of reason and justice became written constitutional principles, which were the "fundamental law of the land." The rights that had previously been conferred only by "Nature," were now also conferred by constitutional law. Constitutional law in this sense does not mean a value-neutral constitutionalism, but a substantive constitutionalism based on basic human rights. The mere fact that a state was constitutional was

[15] 8 Coke Rep. 118 a (1610).

[16] *See* GROSSMANN, DIE STAATS- UND RECHTSIDEOLOGISCHEN GRUNDLAGEN DER VERFASSUNGSGERICHTSBARKEIT IN DEN VEREINIGTEN STAATEN VON AMERIKA UND IN DER SCHWEIZ 62 (1948).

less important than the substantive content of that constitution in the tradition of the *leges fundamentals*.[17]

II. Step 2: The Judicial Right of Review

Thus, the first hurdle toward judicial review of legislation, the development of a standard and the supremacy of the constitution, was overcome. However, what institution would implement it was still an open question.

1. The Choice Between A Right of Petition, A Right to Resist, or Judicial Review

In England, the concept of the sovereignty of parliament has remained paramount. The House of Lords is still the highest court in the land. There is no constitutional court and no constitutional, that is, supreme, law. There were alternatives to judicial oversight, including the right of petition and, above all, the right to resist illegitimately exercised government power.[18] However, in the end, both proved to be inadequate. The right of petition was inadequate because it again led to parliament. The right to resist was likewise not suitable because it appeared to be practicable only in extreme cases, since broad application of the right to resist would endanger the rule of law and ultimately threaten a return to feuding and the rule of force. Reliance on judicial authority promised progress, that is, a solution that recognized the political and economic interest in legal certainty and political stability.

A right to resist[19] may be good in isolated instances – and for historically spectacular resistance, such as the Boston Tea Party – but it was not much use as a basis for a new national government, which was dependent on recognition by all. Moreover, a society that has liberated itself from the chains of colonialism and dared to make a new political and economic departure is dependent on political and legal stability. It was no accident that the upheaval in the sciences engendered by the Enlightenment and the simultaneous expansion of the economy produced a need for a stable legal order. Unlike Europe, the United States did not have the burden and the task of overcoming the old feudal power. Europe was preoccupied with this throughout the 19th century. The United States could create a political order that was based on its own ideas and that embodied democratic decision-making processes. The memory of the colonial government's abuses of power and a con-

[17] Art. 79(3) of the German Basic Law enshrines this idea in positive German constitutional law.

[18] *Cf.* STOURZH, VOM WIDERSTANDSRECHT ZUR VERFASSUNGSGERICHTSBARKEIT: ZUM PROBLEM DER VERFASSUNGSGERICHTSBARKEIT IM 18. JAHRHUNDERT 23 (1974).

[19] *See* STOURZH, *supra* note 18, at 10, 19, and 23.

cern with abuse of power by *any* government, including their own, characterized the "United States" that were in the process of forming. The United States put the idea of popular sovereignty into practice and adopted the principle of separation of powers, and its citizens absorbed the concepts of individual freedom and recorded them in written basic laws (such as the Bill of Rights that amended the Constitution).

2. The Idea of the Separation of Powers

The idea of the separation of powers was particularly important for the development of the judicial right of review. In the United States, it was understood as not only the division of powers, but, going beyond Montesquieu, also as a model for mutual checks and balances on power.[20] The written constitution provided for Federal jurisdiction, but did not expressly transfer to the courts the task of reviewing the actions of the other branches of government. The U.S. Supreme Court created this jurisdiction for itself through Marshall's interpretation of the Constitution in *Marbury v. Madison*. He rejected the alternative, that every branch of government should be responsible for the constitutionality of its own acts, which is still recognized in France[21] (with the exception of the preventative review of laws) and Great Britain.[22] Marshall could rely on Hamilton's preliminary work in the Federalist Papers.[23] However, that would never have sufficed standing alone. Marshall experienced a resounding success primarily because he provided a solution that satisfied political needs and was in tune with the emerging spirit of the times. At the same time, Marshall relied on the continuity of old ideas and could have numbered the Natural Law theoreticians among the forbears of his approach.

If the political driving force for President Adams, and possibly for Chief Justice Marshall, was a mistrust of the political power of the new Republican administration, this flaw was compensated for in the course of time by another driving force, the mistrust of *any* government on the part of the rising political class in North America. Due to this basic mistrust, a democratically elected Congress and a democratically elected president were not an adequate guarantee of freedom and order. There had to be a third power to keep the first two branches in line if neces-

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[20] *See* Madison *in* THE FEDERALIST NO. 51, 26 (Garry Wills ed., 1982). *See* further Alton, *From Marbury v. Madison to Bush v. Gore: 200 Years of Judicial Review in the United States*, 7 Wesleyan L. Rev. 2001.

[21] *Cf.* NOLL, INTERNATIONALE VERFASSUNGSGERICHTSBARKEIT 53 (1992).

[22] See *Noll*, *supra* note 21, at 17.

[23] The Federalist No. 78, 395.

sary, thereby assuring that there would be room for the political and economic development of the dominant elites.

Marshall's new approach could come in silently because he made use of an existing structure – the Supreme Court – and merely expanded its jurisdiction. Therefore, the intrusion on the power structure appeared to be slight.

As a result, Marshall was more successful than the Frenchman Abbé Sieyès.[24] The latter, at the end of the 18th century, was not satisfied with granting existing courts jurisdiction to substantively review legislation. He wanted to see an independent constitutional court, even while the French Revolution was in progress. The *jury constitutionnaire,* he proposed, would have acted as an appellate court (among other things) to ensure the constitution was observed. The plan was rejected in no small part because the question of how to guarantee that the *jury* did not misuse its jurisdiction remained unanswered. The power to attack the might of the democratically elected parliament was not acceptable.

III. A Digression: Political Adjustments to Prevailing Case Law

The tension between independent review under enduring legal principles and democratic policy-making based on majority rule has always accompanied the solution chosen by Marshall and has, at times, caused the Supreme Court to change its precedent. This has manifested itself in many ways, including the handling of the "political question" doctrine and the practice of judicial self-restraint. Certain precedents have also been watersheds, such as the *Lochner*[25] line of cases, their reversal in the New Deal period, and the Supreme Court's active intervention in the segregation problem, as demonstrated by *Brown v. Board of Education*.[26]

IV. A Difficult Reception in Europe

The milestone in the development of the constitutional state achieved by Marshall in 1803 gradually began to be discussed in Europe as well. Alexis de Tocqueville made Europe aware of the American concept of a constitution and of the connection of laws to the constitution.[27] C. Welcker affirmed the supremacy of the consti-

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[24] *See* ROBBERS, EMMANUEL JOSEPH SIEYÈS – DIE IDEE EINER VERFASSUNGSGERICHTSBARKEIT IN DER FRANZÖSISCHEN REVOLUTION, IN: FESTSCHRIFT FÜR W. ZEIDLER 247 (1987).

[25] Lochner v. New York, 198 U.S. 45 (1905); *See also* 2 TRIBE, AMERICAN CONSTITUTIONAL LAW 567 (1988).

[26] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[27] DE TOQUEVILLE, DE LA DEMOCRATIE EN AMERIQUE (Part 1, 1836).

tution in the development of America.[28] Robert von Mohl wrote his book, "The Federal Law of the United States" in 1924 at the age of 25, but did not support the idea of the supremacy of the constitution until a later writing in 1852,[29] where he discussed the jurisdiction of the courts to review the constitutionality of laws.

The idea of a judicial check on sovereign power was not completely novel in Germany. The beginnings of this could be seen in the *Reichskammergericht* (Reich Court of Appeal), the *Reichshofrat* (Reich Court Counselor), and in many medieval constitutional documents that could be considered *leges fundamentales*. However, this line of development in the German legal system was not an adequate starting point for implementing the new ideas of the Enlightenment and for binding all sovereign power to the rule of law. The first large impetus in this direction came from the St. Paul's Church Assembly (1848), which, in its draft constitution,[30] expressly granted jurisdiction on constitutional questions to the *Reichsgericht*. This debate was expressly influenced by references to American Constitutionalism.[31] Although this proposed court was heavily oriented toward federal constitutional disputes, it was also to encompass review of the constitutionality of laws. The failure of the Paul's Church Constitution meant the failure of judicial review of constitutional questions as well.

The subject did not go away. A majority of the 1863 meeting of Germany's Lawyers' Association approved a judicial right of review to ensure that "laws and regulations had been adopted in a constitutional manner." This was a procedural, not a substantive right of review. The discussion, to the extent there was one, remained academic and the late doctrine of constitutional law, which was ossified in Positivism, was largely inclined to reject the concept. The influential Paul Laband can serve as a key witness to this.[32] He declared that the German Kaiser was the true protector of the constitution, based on his right to review proposed laws. The prevailing jurisprudence had no faith in the supremacy of a constitution though the debate had started.

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[28] *Welcker*, Art. "Gesetz", Das Staatslexikon, vol. 5, 1847, 695, 702, 704.

[29] R. von Mohl, Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes, vol. XXIV, 1852, revised in: Staatsrecht, Völkerrecht und Politik, vol. 1, 1860, 66.

[30] *See* THE DEMOCRATIC TRADITION: FOUR GERMAN CONSTITUTIONS (E. M. Hucko ed., 1987).

[31] *See* Hartmann, *How American Ideas Travelled*, 24 TUL. EUR. & CIV. L. F 40, (2002).

[32] LABAND, DAS STAATSRECHT DES DEUTSCHEN REICHES 43, 46 (vol. II, 1878).

The search for an explanation of why the idea of judicial review or even jurisdiction over constitutional questions did not arouse enthusiasm in 19th century Germany is illuminating. The reason may be found in the constitutional dualism between monarchical sovereignty and popular sovereignty, which excluded the recognition of a neutral and higher ranking institution. Instead, the lawmaking process was the place where conflicts between the two sovereigns were settled through political decision-making and compromise.[33] The result could not be subject to intervention by a third institution. Otherwise, the undecided question of ultimate sovereignty would have had to be answered by recognizing one authority as supreme.

One further thing should be added. The idea that individual citizens have fundamental rights they can exercise had not yet gained acceptance. To be sure, the constitutions of several German states contained fundamental rights although the Reich's did not. However, in many state constitutions they were only statutory instructions to lawmakers, who were acting with a dualistic responsibility, to recognize and embody fundamental rights in their legislation.[34] These fundamental rights had not been won by the citizenry, but had been "granted" by the monarchial powers that be. The review of whether laws adequately implemented the statutory instructions to embody fundamental rights in legislation would have given courts the political power to reshape the legal system. This would have been explosive in the political order of the latter days of the constitutional monarchy. The readiness for political change that had characterized the period leading up to the March 1848 revolution and the St. Paul's Church period was long past. The positivistic attitude of constitutional law doctrine in the latter days of the constitutional monarchy rang like an echo in a society politically frozen in the past. The parliament mistrusted itself. The rebellion of the new political class was suppressed. The example of the socialist laws demonstrated a quasi-absolutist will to power, which was not silenced until Germany's defeat in the First World War. However, the basic substance of this thinking lived on in the minds of many, including a large number of academic experts and the judiciary, and prevented jurisprudence from becoming a guiding intellectual force, to say nothing of a trailblazer or a driving force behind the democratic constitutional state. It was also inadequate to assist in forming a new political culture.

In post Word War I Germany there was not even a glimmering of the readiness to change, which the successful struggle against British colonial might had engendered in the United States – drawing its strength from the ideas of popular sover-

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[33] WAHL, DER VORRANG DER VERFASSUNG, DER STAAT 485, 493 (1981).

[34] *Cf.* DREIER, DIMENSIONEN DER GRUNDRECHTE 27 (1993); 2 GRIMM, DIE ZUKUNFT DER VERFASSUNG 226 (1994).

eignty, the immutable right to liberty, and the separation of powers. When, in the 1920s, the Supreme Court of the German Reich claimed the right to review legislation, this was like taking out judicial insurance against lawmakers who were largely mistrusted. This was, at least in part, because the lawmakers were influenced by forces that wanted to see a new political order. The Court's action resembled the political posture of President Adams. The difference was that the Republicans he opposed were the conservative element, and he was in agreement with the developmental processes at work in his society and with a current in American politics, which ultimately won out.

V. Step 3: Opting for a Special Constitutional Court

So how do things stand with respect to the third step, the decision in favor of a special constitutional court? My own thesis is that a constitutional court is a particularly good vehicle for safeguarding, accelerating, and institutionally insulating the process of constitutionalization. To put it more bluntly, a special constitutional court is a reasonable solution for systems where the political culture is not yet so highly developed that protection of the supremacy of the constitution can be entrusted to existing institutions. There is also a positive conclusion. Jurisdiction over constitutional questions has the potential to result in dogmatism with respect to constitutional and fundamental rights, which the regular courts are not likely to fall into.

1. England's Special Path

England provides an example of a country going in the opposite direction. England never even reached Step 1. It was able to establish the democratic rule of law without recognizing a hierarchy of basic (constitutional) laws and other laws, and without judicial oversight of the laws enacted by parliament. Historically, the notion of the sovereignty of parliament was ennobled by successes in the struggle against the monarchy, which established the right to individual freedom. The English king was forced to recognize certain rights and freedoms in the Petition of Rights in 1627. These rights and freedoms were strengthened by the Bill of Rights after the Glorious Revolution of 1689. A political culture established in this manner was clearly fertile soil for the development of the rule of law, which provided a standard for the protection of rights, which other nations could obtain only through special institutional guarantees.

2. Promoting the Establishment of the Rule of Law Through Special Jurisdiction Over Constitutional Questions: The German Example

These other nations include the Federal Republic of Germany. German history has been marked by unsuccessful or even failing attempts to establish the rule of law, which reached a low point in the totalitarian dictatorship of the Nazi era. In 1949, there was a totalitarian regime in East Germany, and West Germany was under military rule. It seemed appropriate to ratify the long overdue change of political paradigm with a new constitution.

Step 1: Articles 1(3) and 20(3) of West Germany's Basic Law[35] established the supremacy of the constitution over other laws. Step 2: All courts could review laws for constitutionality. However, only the Federal Constitutional Court had jurisdiction to reject laws as unconstitutional (Art. 100 of the Basic Law). This Court is a special authority entrusted with ensuring that sovereign power was exercised in accordance with the constitution (Art. 93 et seq. of the Basic Law). This is Step 3.

Apparently in response to previous failed attempts to establish the rule of law, the jurisdiction of this court is particularly wide-ranging. Not only is there a separate constitutional court, but it was given an abundance of responsibilities not possessed by any other constitutional court of the time. For one thing, it has considerably greater review jurisdiction than the U.S. Supreme Court. This includes the legal power to review of laws (in the absence of a specific controversy) and to institute a constitutional complaint, even against laws (arg. Art. 93(3) of the Federal Constitutional Court Act, BVerfGG). Finally, unconstitutional laws are void, and not, as in the United States, only not longer applicable.

Supported by this institutional framework, impelled by its experience with totalitarian injustice, and spurred on by the public's growing recognition of its role, the Federal Constitutional Court has been proactive in realizing the idea of the constitutional state and the inalienability of fundamental rights. It did not bend when it came under sharp criticism in the 1990s and was confronted with proposals for institutional change – in the spirit of President Roosevelt's court-packing plan[36] – which were never carried out.
Moreover, the Federal Constitutional Court has continually expanded its identity as the protector of the constitution and has enforced constitutional rights more vigorously than other courts, including the higher federal courts. It has overturned many of their decisions as unconstitutional.[37] The constitutional court has always been

[35] The German Basic Law is translated by D. P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (1994).

[36] See TRIBE, *supra* note 25, at 580.

[37] *See Bundesverfassungsgericht*, Jahresstatistik 2002, 17.

subject to criticism.[38] This includes the thesis, formulated by Carl Schmitt, that the power to review laws for constitutionality juridifies politics and politicizes the judiciary, resulting in a situation where neither win and both lose.[39] Setting aside Schmitt's conclusion, it can, nevertheless, not be denied that a constitutional court with such strong jurisdiction is a political factor to be reckoned with. The Federal Constitutional Court has never denied this. The judicial right to review laws has been a political issue since its inception in 1803. The refusal to reject an unconstitutional law can also be a political issue. If the constitutional legal system leaves leeway for application of the law, which is indisputably the case, this becomes a political issue. The legal power to make the final binding decision is coupled with the highest responsibility.

A look at the history of jurisdiction over constitutional issues in the Federal Republic of Germany shows that the political culture in Germany was initially not strong enough to assure that the legal system would conform to the constitution without a special institution for that purpose. With this oversight, however, a high standard of constitutional review and of constitutional law has been developed.

3. Accelerating Change to the Rule of Law Through a Special Jurisdiction Over Constitutional Issues: The Eastern European Example

The Eastern European states have treaded a path similar to that of the Federal Republic of Germany. They have been able to free themselves from decades of political oppression, though not by their own strength, as the American colonies did. Nevertheless, they utilized the end of the Cold War and the collapse of the Soviet Union as an opportunity to build new political orders. They are now endeavoring to achieve the rule-of-law law standards of the Western democracies. The time now seems to be ripe for recognizing the supremacy of the constitution and judicial review of the constitutionality of laws. However, this has been accompanied by the difficult endeavor of overcoming the totalitarianism of Communist rule in all spheres of life.

Along with the Austrian Constitutional Court – established in 1920, much earlier than the German one – the German Federal Constitutional Court has been a model to many Eastern European states.[40] It has successfully played a role in compensat-

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[38] LAMPRECHT, ZUR DEMONTAGE DES BUNDESVERFASSUNGSGERICHTS (1996); Schulze-Fielitz, *Das Bundesverfassungsgericht in der Krise des Zeitgeistes*, AöR 122 (1997), 6.

[39] C. SCHMITT, VERFASSUNGSLEHRE (4. ed. 1969).

[40] *Cf.* Brunner, *Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum*, *in* JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 191 (2002); SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL

ing for the weaknesses of the emerging political culture with its special institutional strengths and, on this basis, in putting democracy and the rule of law rapidly into practice, often more rapidly than the new rulers might have wished. The constitutional review of laws has played an outstanding role in this, as a potential threat and often as a swinging sword. In Germany, the constitutional complaint has played an even greater role.

With the exception of Estonia, the Eastern European states have chosen the Austro-German model of a separate constitutional court and have equipped this court with jurisdictions that, at times, go even beyond those of the German Federal Constitutional Court. At times, the substantive review of laws is broader than in Germany as is the authority to file a petition. In many Eastern European countries, there are collective lawsuits, or individual judicial reviews of laws, or procedures by which citizens can propose that laws be reviewed.[41] The picture is so diverse that the overall view would be lost if were drawn here in all its facets. It is impressive, in any event, to see the effort poured into laws intended to put the constitutional state into practice and, in so doing, to build on concepts that have withstood the test of time for over 200 years. For the time being, this is only an opportunity in Eastern Europe. The extent to which laws on the books will be put into practice depends on whether the political order is ripe for the rule of law and if the judges are independent enough from the political rulers. Although there is often reason to doubt, one can rely upon the dynamics of an idea that has already passed many tests, particularly when the process of Europeanization also supports its acceptance.

C. Internationalization and Europeanization of Constitutional Law

I. The European Unification

Law plays a prominent role in the Europeanization of political orders in Europe. From a functional standpoint, the European Human Rights Convention and the EU agreements are *leges fundamentales* and, with the Charter of Basic Rights and the planned European Constitution, the European Union is currently creating additional legal foundations with a special rank. The European courts, particularly the European Court of Human Rights in Strassbourg and the European Court in Lux-

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JUSTICE IN POST-COMMUNIST EUROPE (2000); DE VERGOTTINI, GUISTIZIA COSTITUZIONALE E SVILUPPO DEMOCRATICO NEI PAESI DELL'EUROPA CENTRO-ORIENTALE (2002).

[41] *See* Arnold, *Das Prinzip der Kontrolle des Gesetzgebers in der Verfassungsgerichtsbarkeit Mittel- und Osteuropas als Ausdruck gemeineuropäischen Verfassungsrechts*, 17 JAHRBUCH FÜR OSTRECHT 24, 26 (2002); *Brunner*, *supra* note 40, at 230.

embourg, are functionally, if not formally, constitutional courts. In Europe, law is being used as a means of building unity, and jurisprudence as an instrument of enforcement.

II. The International Legal System

At the same time, the international community of nations is taking cautious steps to materialize and institutionalize international law, including the establishment of jurisdiction to assist the *leges fundamentales* of a civilized community of nations – the modern successors of the Enlightenment's reason and justice – in becoming generally accepted. There can still be no talk of legal supremacy for these *leges fundamentals*, safeguarded worldwide by international law. For this reason, it is certainly vain to hope for a 21st century John Marshall to set the course, so measures can be introduced to develop a constitution for the international community, namely, an effective legal commitment and a comprehensive judicial right of review based on it, including the review legal acts that have significant international consequences. The process of institutionalizing and constitutionalizing international law presumably cannot be done by analogy to the development of modern states.

Nevertheless, the materialization and institutionalization of international law is moving forward. A kind of irony of history is that the main resistance is presently being offered by the United States, even though subjecting *its* sovereign acts to independent judicial control is not even under discussion. Thus, at the present time, there is no proposal for a World Court to provide comprehensive review of the commitment of nations and their citizens to international *leges fundamentales* on the political agenda anywhere. However, there are isolated, tentative steps. And, in some cases, the United States is opposing even these. It claims for its citizens – at least for its soldiers – a partial exemption from enforceable commitments to fundamental principles of human rights. In its war on terrorism, the United States sees itself as justified in denying legal protections to some foreign citizens. And, to some extent, it is blocking the establishment of international jurisdiction, such as the International Criminal Court, which is intended to protect internationally accepted standards. In its role as World Power No. 1, for which it can thank its early acceptance of the modern constitutional state, it is comparable to the former world power, the English colonialists. Whoever has power wants to maintain it and will not accept restrictions from third parties without necessity. Judicial oversight is, of necessity, a limitation on power.

But comparisons are flawed. There is no need to think of *leges fundamentales* that are internationally binding and their judicial enforcement only in connection with colonial history. Moreover, one brilliant "great judge," even if well-versed in politics, would not be sufficient to effectuate a change of paradigm in the international legal

system, as Marshall did in 1803 at the national level. However, we may hope that there will, nevertheless, be a breakthrough to increased judicial control over the exercise of power in the international sphere. We can hope it will be a velvet revolution, or at least an evolutionary process with respect for human dignity and freedom – concepts that have belonged to the social capital of modern societies since the Enlightenment.

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