The Politics of Judicial Review in Inter-War Europe

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Thesis submitted in partial fulfilment

of the requirements for the degree of DPhil in Politics

in the Department of Politics and International Relations

at the University of Oxford

April 2021

Word count: 99,842

Abstract

Why do some politicians choose to tie their own hands by empowering courts to review the constitutionality of legislation? This is a persistent question in judicial politics. According to a popular rational choice theory, politicians accept judicial constraints on their power because they seek "insurance" against costs they might incur during future periods in opposition. Hence, the key variable favouring support for judicial review is electoral alternation.

This theory fails to explain some cases where politicians oppose judicial review despite a competitive, democratic political system. I argue that some of these cases are explained by the expectation of a slant of judicial review against the policy agenda of a part of the political spectrum. Such a slant is more likely where judicial review primarily safeguards *policy-interactive* legal provisions, such as rights, rather than *policy-indifferent* provisions, such as the provisions demarcating the powers of different levels of government in federations. Hence, judicial review is more likely to find broad political support where it is expected to safeguard primarily the boundaries between state and federal powers, rather than rights.

Using secondary and primary sources, I test this argument in case studies of three inter-war democracies – Norway, Weimar Germany, and the First Austrian Republic. In the first two countries, left-wing politicians, especially socialists, opposed judicial review for at least some time, whereas Austrian Social Democrats supported judicial review throughout the First Republic. My argument partly explains these differences: In Norway and Germany, judicial review emphasised safeguarding rights, raising concerns that the courts would obstruct progressive social policies. In Austria, judicial review hardly protected rights against the legislature; its purpose was primarily the adjudication of federalism-related conflicts. Hence, Austrian Social Democrats did not expect it to obstruct their policy agenda. Instead, they benefited from judicial safeguards of their control over the state of Vienna.

Acknowledgments

Many individuals and institutions have supported my work on this thesis. Above all, I wish to thank my supervisors, Ezequiel González-Ocantos and David Rueda. They have patiently seen this project through from beginning to end and helped it evolve from a vague idea into a finished thesis with their comments, questions and encouragement. Naturally, all errors are mine alone.

I am also grateful to my college advisor, Anne Deighton, who has helped me navigate through the DPhil.

Wolfson College has been a wonderful place for writing this thesis. I am particularly grateful for the financial support provided jointly by the College and the University through the Oxford-Wolfson Marriott Scholarship. Most importantly, I thank the staff of Wolfson College, who have gone out of their way to keep the College running despite the pandemic. Thanks are also due to Mansfield College, where I have very much felt at home for two years, and to the Department of Politics and International Relations.

Participants at the ECPR Joint Sessions in Mons, the ECPR General Conference in Wrocław, and the CES Workshop in Madrid have given valuable feedback on draft chapters of the thesis. Horst Dreier and Thomas Olechowski kindly provided comments on Chapters 4 and 5, respectively.

The staff of several archives have immensely facilitated my fieldwork. Particular thanks to the staff of the German Federal Archives, the Norwegian National Archives and the Austrian National Archives.

I am also indebted to my friends for the countless contributions they have made to this project – from hosting me on a trip to the archive to proofreading a chapter – and for their companionship. Finally, I wish to thank my parents for their continuous support and encouragement throughout my studies and the doctorate.

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List of Abbreviations

AdR	*Archiv der Republik*	Archives of the Republic (Austria)
BArch	*Bundesarchiv*	Federal Archives (Germany)
BGBl.	*Bundesgesetzblatt*	Federal Law Gazette (Austria)
BVerfGE	*Entscheidungen des Bundesverfassungsgerichts*	Federal Constitutional Court case reporter (Germany)
DDP	*Deutsche Demokratische Partei*	German Democratic Party
DNVP	*Deutschnationale Volkspartei*	German National People's Party
Indst. S., Innst. S.	*Innstilling til Stortinget*	Storting committee report
Lt. forh.	*Forhandlinger i Lagtinget*	Proceedings of the Lagting
L-S	*Lammers/Simons, Die Rechtsprechung des Staatsgerichtshofs für das Deutsche Reich*	Lammers/Simons State Court case reporter (Germany)
Ot. forh.	*Forhandlinger i Odelstinget*	Proceedings of the Odelsting
Ot. prp.	*Proposisjon til Odelstinget*	Government bill (Norway)
ÖStA	*Österreichisches Staatsarchiv*	Austrian National Archives
RA	*Riksarkivet*	National Archives (Norway)
RFHE	*Sammlung der Entscheidungen und Gutachten des Reichsfinanzhofs*	Supreme Fiscal Court case reporter (Germany)
RGBl.	*Reichsgesetzblatt*	Law Gazette (Germany)
RGZ	*Entscheidungen des Reichsgerichts in Zivilsachen*	Supreme Court case reporter (private law only, Germany)
Rt.	*Retstidende*	Supreme Court case reporter (Norway)
RVG	*Reichsversorgungsgericht; Entscheidungen des Reichsversorgungsgericht*	Reichsversorgungsgericht; Reichsversorgungsgericht case reporter (Germany)
SPD	*Sozialdemokratische Partei Deutschlands*	Social Democratic Party of Germany
St. forh.	*Forhandlinger i Stortinget*	Proceedings of the Storting
VfSlg	*Sammlung der Erkenntnisse des Verfassungsgerichtshofes*	Constitutional Court case reporter (Austria)

Chapter One. Introduction

Until recently, political scientists have mainly studied the political role of courts outside the U.S. from a judicialization perspective.[1] Broadly speaking, the judicialization narrative contends that the influence of courts on political decisions is growing, in particular thanks to the proliferating power to review the constitutionality of legislation.[2] In the past few years, the dominance of the judicialization paradigm has given way to an increasing interest in a "backlash" of political challenges to judicial authority and judicial independence.[3] Yet, even before this "backlash," partly a by-product of authoritarian challenges to democracy more broadly, the judicialization story had some gaps. In particular, in a substantial number of countries, such as Switzerland, the Nordic countries or the Netherlands, the political influence of (domestic) courts has remained low. The courts in these countries do not dispose of the power to review (federal) statutes or hardly exercise these powers.[4] This variation in the extent of judicial powers across democracies is difficult to explain with the most prominent theory of demand for judicial review – insurance theory. Insurance theory argues that demand for judicial review is brought about by electoral competition, since policy-makers seek judicial review as "insurance" against the costs of being in opposition.[5]

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1. Christoph Hönnige, "Beyond Judicialization: Why We Need More Comparative Research About Constitutional Courts," *European Political Science* 10, no. 3 (2011): 346–58.

2. See, f. ex., Torbjörn Vallinder, "When the Courts Go Marching In," in *The Global Expansion of Judicial Power*, ed. C. Neal Tate and Torbjörn Vallinder (New York, 1997), 13–26; Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford, 2000); Ran Hirschl, "The Judicialization of Politics," in *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (Oxford, 2008), 119–37.

3. For example, see Erik Voeten, "Populism and Backlashes against International Courts," *Perspectives on Politics* 18, no. 2 (2020): 407–22; David Kosař and Katarína Šipulová, "How to Fight Court-Packing?," *Constitutional Studies* 6 (2020): 133–64.

4. Christine Rothmayr, "Towards the Judicialisation of Swiss Politics?," *West European Politics* 24, no. 2 (2001): 77–94; Ran Hirschl, "The Nordic Counternarrative: Democracy, Human Development, and Judicial Review," *International Journal of Constitutional Law* 9, no. 2 (2011): 449–69; Andreas Føllesdal and Marlene Wind, "Nordic Reluctance towards Judicial Review under Siege," *Nordisk Tidsskrift for Menneskerettigheter* 27, no. 2 (2009): 131–41; Nick Huls, "The Dutch Hoge Raad: Judicial Roles Played, Lost, and Not Played," in *Consequential Courts: Judicial Roles in Global Perspective*, ed. Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (Cambridge, UK, 2013), 181–98.

5. Matthew C. Stephenson, "'When the Devil Turns … ': The Political Foundations of Independent Judicial Review," *The Journal of Legal Studies* 32, no. 1 (2003): 59–89; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge, UK, 2003).

In this thesis, I provide a more specific answer to the question of under what conditions policy-makers support judicial review.[6] My argument is not entirely different from insurance theory; instead, it builds on it. For insurance theory, the key variable that makes policy-makers more likely to support judicial review is electoral competition. The more competitive a political system, the more likely it is that competitors across the political spectrum will expect to find themselves on the opposition bench in the future. Therefore, they seek the opportunity to challenge policies of their opponents in court and accept constraints on their own power.[7] This argument implies that policy-makers see the courts as neutral arbiters of their conflicts and that the demand for judicial review is independent of policy-makers' policy preferences.

In contrast, I suggest a more complex model – what I call a legal norms theory of support for judicial review: policy-makers do not only consider their electoral prospects, but also how their own and their opponents' policy preferences interact with the constitutional provisions safeguarded by judicial review. Some provisions, which I call policy-indifferent provisions, constrain political actors across the spectrum in equal measure: Imagine, for example, constitutional norms specifying legislative procedure. Where judicial review mainly safeguards such provisions, the view of the courts as arbiters of political conflict is likely to gain traction, and judicial review is likely to be supported. However, some provisions, which I call policy-interactive provisions, constrain the agenda of some political actors more than others. Where judicial review primarily safeguards such provisions, a part of the political spectrum will easily see judicial review as a spoke in the wheels of their policy agenda, making widespread support for judicial review less likely.[8]

More specifically, I argue that it makes a difference for the political sustainability of judicial review whether it primarily safeguards rights – the most important kind of policy-interactive provisions – or the rules stipulating the legislative

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6. By judicial review, I mean the power of judges not to apply or to annul statutory provisions because they are in conflict with a higher legal norm, typically a constitution or a norm of international law.

7. Ginsburg, *Judicial Review in New Democracies*; Stephenson, "'When the Devil Turns … .'"

8. The "spoke in the wheels" metaphor is borrowed from Jens Arup Seip, "Jus og politikk: teorien om domstolenes 'prøvingsrett', politisk tolket," in *Tanke og handling i norsk historie: artikler og avhandlinger* (Oslo, 1968), 120.

powers of different levels of government in federations – the most important kind of policy-indifferent provisions. This is not a normative case against rights or in favour of federalism, but a prediction about how the interaction of different types of judicial review with given policy preferences affects support for judicial review. As value-laden legal norms, rights disallow the implementation of certain policy preferences. Political actors whose preferences are in conflict with these rights are likely to reject judicial review even under conditions of electoral competition, since judicial review is bound to be of little value to them during times of opposition, and a constraint on them during times of government.

In contrast, federalism-related constitutional norms are typically value-neutral. They do not disallow the implementation of certain policy preferences, but allow actors controlling a given level of government to legislate on some policy fields, but not on others. Unless policy-makers at the federal level have no interest in legislating on a matter altogether, they will seek to extend their powers as far as possible, whereas their opponents – as long as they have a perspective of controlling at least one state government – will have an interest in judicial review to push against such an expansion of federal power. Where federal elections are competitive, policy-makers will seek an opportunity to constrain an expansion of federal power in the future, and hence support judicial review – the electoral alternation logic of insurance theory plays out. Unless policy-makers systematically prefer the opportunity to expand their policy-making powers at the federal level over the opportunity to protect their policy-making power at the state level, they will rarely come to the conclusion that the judicial review of federalism-related constitutional norms puts them at a systematic disadvantage. Thus, federalism-centred judicial review is more likely to find broad political support than rights-based judicial review.

Empirically, I test this argument in qualitative case studies of three European inter-war democracies – Norway, Weimar Germany and the First Austrian Republic. The case studies focus on the stance of the political left towards judicial review, as left-wing support for judicial review was generally more precarious than right-wing support. In Norway, where judicial review had been practised since the 19th century, Labour and, to a lesser extent, Liberals, made efforts to ban or weaken judicial review from 1917 until the mid-1930s. In Germany, the courts began to review the constitutionality of federal statutes in the 1920s. Plans to centralize judicial review were under discussion, but strong opposition against them emerged within the Social Democratic Party in the late 1920s. In contrast, Austrian Social Democrats supported the adoption and exercise of judicial review throughout the First Republic; indeed, it was conservatives who eventually attacked the independence of the Constitutional Court. The differences in left-wing support for judicial review are at least partly explained by my argument. In Germany and Norway, judicial review was largely rights-based and left-wing politicians therefore feared that it would obstruct interventionist economic policies. In Austria, rights hardly played a role in the judicial review practice of the Constitutional Court; instead, it was almost entirely focused on deciding conflicts between the states and the federal government over the extent of their respective powers. Hence, judicial review in Austria was in the interest of both right- and left-wing politicians until democracy itself became unstable.

1.1 Why Inter-War Europe

The choice of cases from the inter-war period may surprise. The European judicial politics literature has been based almost entirely on post-World War II cases so far.[9] The end of the War is widely seen as a watershed moment for the proliferation of judicial review. According to what Lustig and Weiler call the "catastrophe thesis," the widespread adoption of judicial review after World War II was the result of learning from the experience of democratic breakdown and the atrocities of fascism.[10] Judicial review became the centrepiece of a post-war constitutionalism that stressed the importance of safeguards against the excesses of majority rule.[11] In contrast, the role of

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9. With a similar observation on the sociology of courts and judicial review Thomas Olechowski, "The Beginnings of Constitutional Justice in Europe," in *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law*, ed. Mikael Rask Madsen and Chris Thornhill (Cambridge, UK, 2014), 79; a notable exception is the study of the evolution of French judicial review in Alec Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford, 1992).

10. Doreen Lustig and J. H. H. Weiler, "Judicial Review in the Contemporary World—Retrospective and Prospective," *International Journal of Constitutional Law* 16, no. 2 (2018): 329.

judicial review in inter-war Europe has been rather neglected, seen at best as a matter of theoretical debate rather than an institution of practical relevance.[12]

In fact, the history of inter-war Europe is a rich tapestry of efforts both to establish and to rein in judicial review. Czechoslovakia and Austria were the world's first countries to vest the power of judicial review into constitutional courts in 1920, followed by Liechtenstein in 1921, and Spain in 1931.[13] Ireland provided for judicial review both in the 1922 and the 1937 constitutions.[14] Romania vested the power of judicial review into the Court of Cassation with the 1923 Constitution.[15] The Greek constitution of 1927 provided for diffuse judicial review, a power the Greek courts had already claimed in the 19th century.[16] In other countries, judicial review was more contentious, or debates on its merits did not make it past scholarly circles: At the making of the Weimar constitution in 1919, the adoption of centralized judicial review of federal statutes was rejected. However, the German courts claimed diffuse review powers in the 1920s, and further efforts to centralize judicial review became the subject of fierce contestation.[17] France saw efforts, mainly by legal scholars, to promote judicial

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11. Ibid., 322; Alec Stone Sweet, "Why Europe Rejected American Judicial Review: And Why It May Not Matter," *Michigan Law Review* 101, no. 8 (2003): 2769.

12. See Lustig and Weiler, "Judicial Review in the Contemporary World," 321.

13. See, a. o., Georg Schmitz, "The Constitutional Court of the Republic of Austria 1918–1920," *Ratio Juris* 16, no. 2 (2003): 240–65; Olechowski, "The Beginnings of Constitutional Justice in Europe"; Jana Osterkamp, *Verfassungsgerichtsbarkeit in der Tschechoslowakei (1920-1939): Verfassungsidee – Demokratieverständnis – Nationalitätenproblem* (Frankfurt/Main, 2009); Wilhelm Boucsein, *Verfassungssicherung und Verfassungsgerichtsbarkeit in der zweiten spanischen Republik (1931-1936)* (Frankfurt/Main, 1977); Tom Ginsburg and Mila Versteeg, "Why Do Countries Adopt Constitutional Review?," *The Journal of Law, Economics, and Organization* 30, no. 3 (2014): 521.

14. Bill Kissane, "Eamon de Valera and the Survival of Democracy in Inter-War Ireland," *Journal of Contemporary History* 42, no. 2 (2007): 214; Seamus O'Tuama, "Judicial Review under the Irish Constitution: More American than Commonwealth," *Electronic Journal of Comparative Law* 12.2 (October 2008): 2.

15. Cristina E. Parau, "Romania's Transnational Constitution. A Tradition of Elite Learning and Self-Empowerment," in *Social and Political Foundations of Constitutions*, ed. Denis J. Galligan and Mila Versteeg (Cambridge, UK, 2013), 514.

16. Stylianos-Ioannis G. Koutnatzis, "The Proportionality Principle in Greek Judicial Practice," *Diritto & Questioni Pubbliche: Rivista Di Filosofia Del Diritto e Cultura Giuridica* 16, no. 2 (2016): 207. Before the inter-war period, the Portuguese constitution of 1911 also provided for judicial review, although the provision largely remained without practical relevance, see Gonçalo de Almeida Ribeiro, "Judicial Review of Legislation in Portugal: Genealogy and Critique," in *Comparative Constitutional History*, ed. Francesco Biagi, Justin Orlando Frosini, and Jason Mazzone, vol. 1: *Principles, Developments, Challenges* (Leiden, 2020), 213f.

17. See Chapter 4 and Michael Stolleis, "Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic," *Ratio Juris* 16, no. 2 (2003): 266–80.

review in the 1920s and 1930s.[18] Denmark and Norway, and to a lesser extent Sweden, saw political criticism of judicial review.[19] Switzerland held a referendum on the introduction of judicial review of federal legislation in 1939, which was won by its opponents.[20]

At least on paper, more European democracies adopted judicial review before World War II than during the decade following it, with Italy establishing a constitutional court in 1947, followed by West Germany in 1949. In 1945, Austria merely re-adopted its 1920 Constitution, which had already included judicial review. In contrast, the introduction of judicial review was rejected by the drafters of the French Constitution of 1946,[21] and during the Danish constitutional reform in 1953.[22] In the same year, a reform of the Dutch constitution empowered courts to review the conformity of domestic legislation with international law, but a ban on reviewing the constitutionality of laws remained.[23] Other West European democracies did not even engage in constitutional reform during this period.

The politics of judicial review in the inter-war period deserve our attention because limiting the empirical scope of the European judicial politics literature to the post-World War II period might lead to wrong conclusions. While there is little doubt that the political weight of judicial review in some European countries has grown since 1945, the focus on this period in the literature is problematic precisely because it draws conclusions from a set of cases that, at least until recently, included hardly any episodes of contestation of judicial empowerment. This can lead to theories that fail to take into

18. See Eric Maulin, "Réforme de l'état et contrôle de constitutionalité des lois sous la IIIe république: Charles Benoist et Jacques Bardoux," in *Aux origines du contrôle de constitutionnalité, XVIIIe-XXe siècle*, ed. Dominique Chagnollaud (Paris, 2003), 58–60, 80–81; Marc Milet, "La controverse de 1925 sur l'exception d'inconstitutionnalité. Genèse d'un débat : l'affaire Ratier," *Revue française de science politique* 49, no. 6 (1999): 783–802.

19. Ragnhildur Helgadóttir, *The Influence of American Theories of Judicial Review on Nordic Constitutional Law* (Leiden, 2006), 106; Jens Peter Christensen, *Domstolene – den tredje statsmagt* (Århus, 2004), 14f.; Anine Kierulf, *Judicial Review in Norway: A Bicentennial Debate* (Cambridge, UK, 2018), 77–108.

20. Stefan Oeter, "Die Beschränkung der Normenkontrolle in der schweizerischen Verfassungsgerichtsbarkeit," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 50 (1990): 591; Rafael Küffer, *Eine liberale Kritik am Notrecht: Zaccaria Giacometti als Protagonist der Schweizer Notrechtsdebatte* (Tübingen, 2014), 120.

21. Stone Sweet, "Why Europe Rejected American Judicial Review," 2761.

22. Christensen, *Domstolene – den tredje statsmagt*, 16.

23. Huls, "The Dutch Hoge Raad," 182.

account important conditions underpinning the post-war rise of judicial power. By extending the temporal scope of the literature to the inter-war period, these conditions come into view. The fact that judicial review made it onto the political agenda, but was rejected in some countries, whereas it was adopted in others, is of great use. This variation within a relatively clearly bounded period helps us identify the conditions that made the adoption of judicial review possible.

1.2 Case Selection

Among the inter-war cases, how is the choice of Austria, Germany and Norway justified? First, it is only possible to study political actors' preferences regarding judicial review where the question of judicial review made it on the political agenda in the first place. There is nothing we can learn about political actors' preferences regarding judicial review if they have no reason to form such preferences or reveal them. This excludes some countries where judicial review was not discussed to any relevant extent, such as the UK or the Netherlands. Since judicial review was not on the agenda in these cases, they also fail the "possibility principle," that is, a positive outcome was hardly possible in the first place.[24] Additionally, there are countries such as Czechoslovakia, where judicial review existed on paper, but was hardly exercised. It is intriguing why judicial review remains such a "parchment institution" in some countries, and the argument advanced here may explain this to some extent, but there is a risk that these cases hardly yield any observations that help to answer this question.

The three cases chosen here themselves are suitable for qualitative case studies precisely because judicial review was a fairly salient issue in these countries during the inter-war period. Judicial review was also discussed in countries such as France, Ireland or Denmark, but the lower salience of the issue in these countries has generated few observations that could be used for process-tracing. Moreover, a qualitative historical case study requires some knowledge of the language of the country in question. These

24. See James Mahoney and Gary Goertz, "The Possibility Principle: Choosing Negative Cases in Comparative Research," *American Political Science Review* 98, no. 4 (2004): 653–69.

two criteria – salience and language – essentially leave me with the choice among Austria, Germany, Norway, and Switzerland.

Weimar Germany is a valuable case because it contradicts both the expectation of insurance theory and the expectation that federalism leads to the adoption of judicial review. Weimar Germany was both a competitive political system and a federation, making it a most likely case for the establishment of judicial review of federal, and not only of state laws. Yet, this never happened. At the same time, Weimar Germany has the advantage that it represents a "near miss"[25] – plans to establish centralized judicial review were pursued over a relatively long time and only narrowly failed. This makes it possible to observe the causal process unfold over time and get a better idea of the factors militating in favour of and against the adoption of judicial review. I argue that the expectation that rights-based judicial review would obstruct progressive social policy was a necessary cause of the opposition against centralized judicial review that arose among Social Democrats in the late 1920s; however, it is difficult to say whether this opposition was decisive for the failure of plans to adopt centralized judicial review.

The negative German case is juxtaposed with the positive case of Austria, where centralized judicial review was adopted in 1920 and sustained until 1929. In Austria, support for judicial review across the political spectrum was possible because judicial review, in the mind of policy-makers and in practice, was focused on the adjudication of federalism-related conflicts, and hardly imposed constraints on the legislature on the basis of rights. Taken together, Germany and Austria are 'most similar' cases – i. e., "the chosen pair of cases is similar on all the measured independent variables, except the independent variable of interest."[26] Both inter-war Germany and Austria were competitive, federal political systems. They share a similar legal culture, and the academic debate on judicial review among German-speaking scholars crossed the border; hence, the same ideas were available in both countries at the same time. While these commonalities do not allow to rule out the influence of these variables in the sense

25. On the notion of the "near miss," see Giovanni Capoccia and Daniel Ziblatt, "The Historical Turn in Democratization Studies: A New Research Agenda for Europe and Beyond," *Comparative Political Studies* 43, no. 8–9 (2010): 943.

26. Jason Seawright and John Gerring, "Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options," *Political Research Quarterly* 61, no. 2 (2008): 304.

of applying Mill's "method of difference," the parallels between Austria and Germany strengthen the confidence in counterfactual claims.

Finally, since my theory seeks to explain not only whether judicial review is adopted, but also whether it is sustained, it is important to include a case where judicial review had already been practised before it became contentious during the inter-war period. Such a case has the potential to demonstrate that political support for judicial review can become tenuous not only in cases where it might be viewed with suspicion because of its status as an institutional innovation. For this purpose, Norway comes with the unique advantage that judicial review has been practised there since the 19th century. As I argue, Labour and socially progressive Liberals demanded a ban, or a restriction, of this practice from 1917 onwards at least partly because judicial review put them at a disadvantage due to its narrow focus on socio-economic rights. As Norway's legal system is rooted in Scandinavian legal culture, this case can also suggest whether my argument is applicable beyond the more similar legal cultures of Austria and Germany.

1.3 Alternative Explanations

In addition to the classic insurance model, the case studies consider three alternative explanations for the support or rejection of judicial review by the political left. First, one might argue that court decisions in judicial review cases are primarily a product of judges' political attitudes; knowing this, policy-makers will not care about the constitutional norms judicial review safeguards, but merely about judicial appointments. In contrast, the argument made here is essentially a legal model of support for judicial review: Policy-makers form their expectations about the utility of judicial review by considering whether their policies and those of their opponents are in conflict with the legal norms that judicial review, as practised or theorized in the legal community at a particular historical moment, will likely safeguard. I do not doubt that an attitudinal model explains judicial decision-making to some extent, and that this also influences policy-makers' calculations about judicial review. Yet, my model requires that neither actual judicial decision-making nor policy-makers' model thereof are purely based on judges' political attitudes. Rather, judges are expected to follow established doctrine, convention or legal templates for action to some extent.

Second, one might argue that policy-makers base their support or rejection merely on their ideological preconceptions, regardless of whether they expect judicial review to foster or hamper the implementation of their policy agenda. Especially in the historical context of my case studies, it is plausible that the political left was committed to ideals of popular sovereignty or was deeply convinced that the courts are necessarily an instrument of bourgeois domination, making it reject judicial review as a matter of principle. Of course, I do not deny that ideological priors may bias policy-makers in favour of or against judicial review. What I seek to rule out is the sufficiency of such beliefs, that is, they dictate policy-makers' stance towards judicial review, no matter whether they expect judicial review to be beneficial or costly to them in day-to-day politics.

Third, in the inter-war context, a plausible influence on left-wing attitudes towards judicial review is knowledge of the U.S. Supreme Court's *Lochner* jurisprudence and its conflict with president Roosevelt over the New Deal. The U.S. example may have decisively shaped expectations about the effects of judicial review on progressive policies in Europe. This alternative explanation is a story of exogenous learning rather than endogenous political calculations.[27]

With respect to all these alternative explanations, I do not seek to rule out that they had some influence in the cases studied. Instead, the question is whether judicial attitudes and beliefs about them, policy-makers' ideological priors or knowledge of the U.S. experience were sufficient causes of the rejection or acceptance of judicial review. I show they were not.

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27. Where they are challenging this alternative account, my analytic narratives should not be read as claiming that Norway and Germany experienced a sort of *Lochner* period that gave rise to those calculations. The courts in these countries never obstructed social policy to the extent that they did in the U.S.; yet, my argument does not require large-scale obstruction, but only the reasonable expectation that judicial review would be costly, even if these costs were expected to be modest.

1.4 Method, Observable Implications and Data

The method used in the case studies is primarily process-tracing. The task is to show a causal relationship between the independent variable – the extent to which judicial review is based, or is expected to be based on rights or on federalism-related constitutional norms – and the dependant variable – policy-makers' support for or opposition against judicial review. This causal relationship passes through the expectation of the costs and benefits of judicial review due to the constraints it is expected to impose on policy-makers' own agenda and the policy agenda of their opponents. Hence, this requires, first, the observation of an expected unequal cost-benefit distribution in the case of rights-based review, of an expected equal cost-benefit distribution in the case of federalism-centred review, as well as an idea of which of those two functions will be the emphasis of judicial review. Second, the observation of policy-makers' attitudes towards judicial review. Third, the inference of a causal linkage between these two phenomena. As discussed above, the Austrian and German case studies allow, due to their parallels, comparisons that further strengthen the confidence in the causal linkages.

In the hypothetical best data scenario, we would observe a practice of judicial review that is confined to adjudicating federalism-related conflicts and produces decisions that can unambiguously be characterized as costly for actors across the political spectrum. We would also observe expectations about the future costs of judicial review that reflect this current political balance of judicial review and the explicit motivation of support for judicial review with the expectation that its political costs will remain balanced in the future. Ideally, political actors would express their support for judicial review conditional on its political costs. We would then observe a turn of judicial review to safeguarding rights against the legislature, entailing political costs that disproportionately fall on one side of the political spectrum. This turn in the practice of judicial review should be followed by the expectation, shared across the political spectrum, that these disproportionate costs will accrue in rights-based cases in the future. Those political actors disadvantaged by the changed practice of judicial review should then oppose judicial review and motivate this opposition with the expectation of disproportionate costs. Again, this opposition should ideally be expressed conditional on the future costs of judicial review. Calculations about the future costs of judicial review should be motivated entirely on the basis of legal reasoning, and without regard to judges' political background and in the absence of knowledge about the experiences in other countries.

In practice, the key methodological challenge lies in disentangling the expectations about the costs and benefits of judicial review and the influence these have on the attitudes towards judicial review from the factors I seek to rule out as alternative explanations. Put differently, there has to be a part of the expectations about the costs and benefits of judicial review and the attitudes towards judicial review that can be shown not to be the product of an ideological commitment regarding the desirability of judicial review, the U.S. example, or beliefs about judges' political attitudes. Even the appreciation of the costs and benefits of an existing judicial review practice can already be influenced heavily by ideological priors. The problem is aggravated where expectations are not grounded in an existing judicial review practice, but, for example, formed in an academic debate. There are two main strategies that I employ as often as possible to deal with this problem: First, I look at whether people with different political views evaluate the consequences of judicial review or scholarly arguments similarly and express similar expectations about their future effects. Second, I look at changes in the attitudes towards judicial review over time. Such changes are difficult to explain with ideological beliefs – which we would expect to be more constant.

The case studies rely both on primary and secondary sources. For all three cases, there is a literature on the history of judicial review (also) during the inter-war period, written mainly by legal scholars and scholars of legal history. The case studies are indebted to this literature for setting the empirical scope of the investigation, structuring the narrative, providing background information and explaining sometimes complex legal questions. Moreover, for the observations underpinning my causal chain, I also use primary sources, including published material, such as court decisions, parliamentary records, newspaper articles or scholarly works from the inter-war period, but also unpublished material collected in various archives, such as government files and minutes of court deliberations. Again, the historical literature has pointed me to many of these sources. They are discussed in detail in the introductions to the individual case studies.

1.5 Plan Ahead

The following chapter elaborates the theoretical argument and situates it in the existing literature. The empirical part of the thesis begins with the case study of inter-war Norway – the case where the argument plays out in the most straightforward fashion. This is followed by the more complicated German case. These two cases of left-wing opposition to judicial review are then contrasted with the case of Austria, where Social Democrats consistently supported judicial review. In the conclusion, I summarize the findings across the three cases, discuss the generalizability of my argument, present some additional theoretical insights from the case studies and discuss avenues for further research.

Chapter Two. A Legal Norms Theory of Support for Judicial Review

The global mosaic of judicial power is more diverse than ever. It is a mosaic of courts that are both politically influential and independent, of courts that are one, but not the other, and of some that are neither. Since independent courts are institutions that constrain political power, this empirical variation raises the classical question of the conditions under which politicians choose to tie their own hands. The argument advanced here is concerned with this question only in one specific regard, namely the conditions under which politicians accept judicial constraints on their *policy-making* powers. More precisely, I ask under what conditions politicians support what is arguably the strictest judicial constraint on policy-making power, namely the power of judicial review of statutes.

I argue that widespread support for, and hence an equilibrium of independent judicial review is more likely where it safeguards primarily formal, "policy-indifferent" provisions such as those distributing powers in a federation than where it primarily safeguards value-laden, "policy-interactive" provisions such as rights.[1] It is the entanglement of judicial review with a structure of value-laden legal norms that allows politicians to update their beliefs about the effects of judicial review on their policy agenda and possibly infer that the courts will not be neutral arbiters, but structurally biased means of obstruction. In analogy to the legal model of judicial behaviour (as opposed to the attitudinal and strategic models), I call this a legal norms theory of support for judicial review: Legal norms – and not only beliefs about judges' political attitudes, or about their willingness to give in to political pressure – influence politicians' support for judicial review.

In the following, I first give a brief overview of existing explanations for the adoption and maintenance of judicial review. I then discuss in detail the theory my argument builds on – insurance theory – and explain how I modify it by distinguishing

1. This is not a normative case against rights or rights-based judicial review. Instead, my argument highlights that rights-based judicial review is at a higher risk of political contestation – an implication that should be of interest to both sceptics and advocates of rights-centred constitutionalism.

between judicial review on the basis of policy-interactive provisions and judicial review on the basis of policy-indifferent provisions. Subsequently, I discuss how the political sustainability of judicial review varies depending on whether it primarily safeguards rights – the most important kind of policy-interactive provisions – or the boundaries between levels of government in federations – the most important kind of policy-indifferent provisions. The final section summarizes the argument and deals with a possible objection.

2.1 The Literature

The literature on judicial authority has seen a marked shift in recent years. Much of the early work on judicial politics outside the U.S. described and explained an alleged expansion of judicial influence to the detriment of executives and legislatures – a key aspect of the "judicialization" concept central to this literature.[2] The underlying normative concern of many authors in this vein was whether policy made by judges enjoyed the same democratic legitimacy as policy made by elected politicians. Constitutional courts and the power of judicial review were the institutions on whose rise and functioning the judicialization literature focussed. This older literature, interested above all in judicial encroachments on the political domain, has now partly given way to a newer literature, interested primarily in political encroachments on the judicial domain.[3] This newer literature, inspired by recent developments across the globe and motivated by concerns about the demise of the rule of law, primarily seeks to explain political attacks on judicial independence.

A decline in judicial independence is not the same as a reversal of judicialization; hence, the more recent literature is not the flip side of the older

2. See, f. ex., C. Neal Tate and Torbjörn Vallinder, eds., *The Global Expansion of Judicial Power* (New York, 1997); Stone Sweet, *Governing with Judges*; Ginsburg, *Judicial Review in New Democracies*.

3. For example, Maria Popova, "Political Competition as an Obstacle to Judicial Independence: Evidence From Russia and Ukraine," *Comparative Political Studies* 43, no. 10 (2010): 1202–29; Aylin Aydın, "Judicial Independence across Democratic Regimes: Understanding the Varying Impact of Political Competition," *Law & Society Review* 47, no. 1 (2013): 105–34; Brad Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy* (Oxford, 2019); Voeten, "Populism and Backlashes against International Courts"; Kosař and Šipulová, "How to Fight Court-Packing?"

literature. Yet, some arguments developed to explain primarily under what conditions politicians accept judicial influence over policy-making can also be used to explain under what conditions politicians reject independent courts altogether. Nevertheless, the argument made here speaks primarily to the older literature on the judicial policy-making role, rather than to the newer literature. My argument is not concerned with explaining cases where politicians attack judicial independence – this will often be endogenous to a decline in democracy. Instead, I am interested in explaining variation among cases where politicians by and large respect judicial independence, but that differ as to whether they also accept the judicial policy-making influence of courts that comes with judicial review.

Three types of explanations for the adoption of judicial review can be distinguished: functionalist, rational-choice, and ideational approaches. Functionalist accounts explain judicial review with the function it fulfils in a political system, without necessarily specifying who benefits and who loses from its existence. Rational-choice accounts explain judicial review with its benefits for individual political actors. Ideational accounts stress the influence of ideas about the role of law and courts in politics.[4]

I will discuss the most important functionalist and rational-choice arguments – the federalism approach to judicial review, the insurance theory,[5] and the hegemonic preservation[6] approach in more detail below. Put simply, a functionalist version of the federalism approach holds that federations are more likely to adopt judicial review than unitary states, since the former require an umpire for boundary conflicts among different levels of government.[7] Rational-choice approaches see judicial review as a device that governing elites either adopt to credibly commit themselves to the respect of

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4. Lustig and Weiler, "Judicial Review in the Contemporary World," 331, distinguish further between ideational, hegemonic, functionalist and strategic explanations.

5. Ginsburg, *Judicial Review in New Democracies*; Stephenson, "'When the Devil Turns … .'"

6. Ran Hirschl, Towards Juristocracy: *The Origins and Consequences of the New Constitutionalism (*Cambridge, Mass., 2009); Ran Hirschl, "The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions," *Law & Social Inquiry* 25, no. 1 (2000): 91–149.

7. Barry Friedman and Erin Delaney, "Becoming Supreme: The Federal Foundation of Judicial Supremacy," *Columbia Law Review* 100, no. 2 (2011): 110ff.; Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford, 2002), 149ff.

legal, especially constitutional, boundaries,[8] a device that they adopt to constrain future governing majorities,[9] or one that enables actors alternating in government to make a mutual commitment to respect constitutional boundaries.[10] Common to all these rational-choice approaches is the expectation that political actors support judicial review as long as they expect to be better off with courts putting limits on political discretion in the future.

In ideational accounts, the adoption of judicial review is the result of a shift from ideas of unconstrained parliamentary power to the idea that the exercise of legislative power has to respect constitutional boundaries, and that the respect of these boundaries can and has to be policed by courts. In particular, a role of courts in policing constitutional boundaries is favoured by the rise of ideas about human rights as giving individuals a claim to challenge a violation of these rules to their disadvantage. To a large extent, "diffusion" accounts that explain the adoption of judicial review in one country as influenced by the adoption of judicial review in other countries, are also ideational accounts, since it is not necessarily, but often, the spread of norms regarding what are good institutions that lies at their heart.

The ideas typically associated with an aversion against judicial oversight of the legislature are the Rousseauian conception of popular sovereignty, as well as legal positivism. Where the legislature's decisions embody an infallible general will, any correction by a body other than parliament can only be a deviation from this supreme will. The classic case for the negative influence of Rousseauian ideas on judicial power has for a long time been France, at least until the Constitutional Council evolved into a constitutional court regularly exercising judicial review from the 1970s onwards.[11] Frequently going hand in hand with conceptions of unfettered popular sovereignty is the

8. Tamir Moustafa, "Law and Courts in Authoritarian Regimes," *Annual Review of Law and Social Science* 10, no. 1 (2014): 281–99.

9. Hirschl, *Towards Juristocracy*; Hirschl, "Political Origins."

10. J. Mark Ramseyer, "The Puzzling (In)Dependence of Courts: A Comparative Approach," *The Journal of Legal Studies* 23, no. 2 (1994): 721–47; Stephenson, "'When the Devil Turns … '"; Ginsburg, *Judicial Review in New Democracies*.

11. Mauro Cappelletti and John Clarke Adams, "Judicial Review of Legislation: European Antecedents and Adaptations," *Harvard Law Review* 79, no. 6 (1966): 1212; Stone Sweet, *Birth of Judicial Politics in France*; David Deener, "Judicial Review in Modern Constitutional Systems," *American Political Science Review* 46, no. 4 (1952): 1082; Stone Sweet, "Why Europe Rejected American Judicial Review," 2748.

prevalence of legal positivism, the view that “the existence of a law is one thing: its merits or demerits are another thing.”[12] This view is said to favour reluctance towards assessing the conformity of legislation with any external yardstick, and consequently towards judicial review.[13]

Vice versa, ideational accounts ascribe the adoption of judicial review to the displacement of theories of parliamentary sovereignty by conceptions of constrained democracy and the demise of legal positivism in favour of natural law ideas.[14] The idea that majority rule should be constrained by institutions that can enforce the constitution against transgressions by the majority enjoys particular currency since the end of World War II. According to this view, the purpose of policing constitutional constraints is to safeguard democracy as such, as well as individual positions that have been legally recognized as fundamental rights. In particular with regard to the aftermath of World War II, the adoption of rights catalogues, and incidentally of judicial review, has been linked to the popularity of Christian natural law, broadly speaking the idea that a god-given natural order exists and that judges should assess the conformity of man-made law with this natural order.[15] Yet, natural law ideas have also been said to be influential in the common law countries,[16] with the adoption of judicial review in the U.S. as the outcome of a “long tradition of institutional autonomy and the natural law overtones of common law adjudication.”[17]

A strength of ideational explanations is their ability to account for cases that are left unexplained by rational-choice theory.[18] Political actors in countries such as the UK face similar commitment and coordination problems as those in France or Italy, but they

12. John Austin, *The Province of Jurisprudence Determined* (London, 1832), 278.

13. Ezequiel A. González-Ocantos, *Shifting Legal Visions: Judicial Change and Human Rights Trials in Latin America* (Cambridge, UK, 2016), 51ff.

14. Cappelletti and Adams, “Judicial Review of Legislation,” 1208.

15. Gottfried Dietze, “Judicial Review in Europe,” *Michigan Law Review* 55, no. 4 (1957): 539.

16. Cappelletti and Adams, “Judicial Review of Legislation,” 1210–11.

17. Tom Ginsburg, “The Global Spread of Constitutional Review,” in *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (Oxford, 2008), 82.

18. With misgivings about such a narrow role for ideational explanations, Mark Blyth, “Ideas, Uncertainty, and Evolution,” in *Ideas and Politics in Social Science Research*, ed. Daniel Beland and Robert Henry Cox (Oxford, 2010), 84.

have so far not adopted a strong form of judicial review. For these cases, the persistence of traditions of parliamentary supremacy and weak separation of powers conceptions can help to explain why judicial review has been rejected.[19] In other words, changes in or the persistence of ideas are particularly suited to explain why judicial review makes it on the institutional agenda in some countries or at some historical moments. Moreover, ideas about the proper role of judicial review will be particularly important in constitutional moments when the actors involved have no clear sense of the consequences of judicial review in day-to-day politics.

However, ideational accounts raise the question whether the rise and demise of certain ideas is endogenous to the interests of the actors advocating these ideas. Ideational explanations often assign unduly monolithic ideational traditions to countries, for example the tradition of parliamentary supremacy to the United Kingdom, or the tradition of legal positivism to France. Yet, detailed investigations often show that traditions have rarely ever been unchallenged, that an idea may have been dominant at a given time, but that counter-currents existed, too. For example, Stone Sweet's work on the emergence of judicial review in the French Fifth Republic shows that there has always been a counter-current to legal positivism in France.[20] However, where different ideas co-exist at the same time in the same place, the crucial question is why the decisive actors embrace one idea, and not another.

The empirical evidence for the theories discussed here is mixed. Case studies are the dominant form of evidence, whereas large-n evidence is rare. Since most countries established judicial review from the 1970s onwards, these countries make up a large share of the case studies. Many case studies present ideational accounts whereby judicial review was adopted as part of a wider shift towards rights-centred constitutionalism among legal elites or policy-makers, for example Israel and France since the 1970s.[21] According to Erdos, a wider shift of attitudes towards post-materialism and concomitant sympathies for rights protection, in combination with

19. With the opposite view on the role of the separation of powers, see Cappelletti and Adams, "Judicial Review of Legislation," 1211.

20. Stone Sweet, *Birth of Judicial Politics in France*.

21. Patricia J. Woods, "The Ideational Foundations of Israel's 'Constitutional Revolution,'" *Political Research Quarterly* 62, no. 4 (2009): 811–24; Stone Sweet, *Birth of Judicial Politics in France*.

political "trigger experiences" such as the exposure to periods of relatively unrestrained government power or centrifugal tendencies, explain the adoption of bills of rights and judicial safeguards thereof in Canada (1960), New Zealand (1990) and the UK (1998).[22]

In contrast, other case studies broadly support the idea that politicians support judicial review out of "insurance concerns," that is, to cut the costs they expect to incur during times of opposition. In the case studies of Ginsburg's book on insurance theory, the author finds support for his argument in the cases of Taiwan 1947, Mongolia 1992 and South Korea 1987, but he also acknowledges the influence of diffusion in some of these cases.[23] This combination of an ideational, especially a diffusion logic, and insurance concerns, is also reflected in other case studies. Stroh and Heyl find that the French model of judicial review diffused to former French colonies in Africa, but that some of these countries went beyond the weak French "baseline model" out of insurance concerns.[24] Volcansek sees both insurance considerations among the political centre-right, as well as an ideological aversion against judicial review on the political left, at play in the establishment of a constitutional court in Italy 1947.[25]

Hirschl finds support for his argument that hegemonic incumbents promote judicial review to entrench their policy preferences, primarily characterized by economic neo-liberalism, against rising challengers in the cases of Israel 1992, New Zealand 1990 and South Africa 1993.[26] In a rare case of multiple studies of the same country, his account of the adoption of judicial review in Israel stands in direct contrast to Woods' ideational account.[27] Verdugo's account of the establishment of a Constitutional Tribunal in Chile 1970 echoes Hirschl in that he argues that the Tribunal was set up by politicians eager to preserve their own power base in the country's

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22. David Oliver Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford, 2010).

23. Ginsburg, *Judicial Review in New Democracies*.

24. Alexander Stroh and Charlotte Heyl, "Diffusion versus Strategic Action? The Creation of West African Constitutional Courts Revisited," Giga Working Papers (German Institute of Global and Area Studies, November 2013).

25. Mary L. Volcansek, "Bargaining Constitutional Design in Italy: Judicial Review as Political Insurance," *West European Politics* 33, no. 2 (2010): 280–96.

26. Hirschl, *Towards Juristocracy*; Hirschl, "Political Origins."

27. Woods, "The Ideational Foundations of Israel's 'Constitutional Revolution.'"

presidency.[28] Also resembling Hirschl's logic, Harvey's quantitative study of 49 former European colonies finds that higher economic inequality increases the likelihood of adopting entrenched judicial review, i. e., judicial review that can only be abolished by a constitutional amendment requiring a super-majority. This evidence is consistent with the argument that economic elites favour judicial review to protect themselves against the redistributive threat of majority rule.[29]

In the most extensive quantitative study of the adoption of judicial review in a set of 204 countries, including both democracies and autocracies, between 1781 and 2011, Ginsburg and Versteeg find that increased electoral competition increases the probability of adopting judicial review.[30] In contrast, they find no evidence for an influence of ideational factors, federalism, and norm diffusion. However, the paper deals only with the adoption of judicial review, not with its maintenance; the coding for the existence of judicial review is based merely on the text of constitutions, not on whether a practice of judicial review actually exists, and, in federations, does not distinguish between judicial review of federal and state laws. For example, this means that the U.S. is coded as having no constitutional review (because the constitution does not explicitly provide for it), whereas Switzerland, with its 1848 constitution, contributes 164 country-years with "American-style" constitutional review to the dataset, although the Swiss Federal Court can only review the constitutionality of cantonal, not federal legislation.[31]

A general weakness of existing case studies is the relative absence of negative cases, that is, a lack of variation in the dependant variable. This comes with a risk of overlooking causal factors that do not vary among cases with a positive outcome, and hence with a risk of wrong or oversimplified theories. For example, students of the establishment of constitutional courts in Italy and Germany after World War II might explain the absence of such an institution in Switzerland with the absence of the

28. Sergio Verdugo, "Birth and Decay of the Chilean Constitutional Tribunal (1970–1973)," *International Journal of Constitutional Law* 15, no. 2 (2017): 469–94.

29. Anna Harvey, "The Economic Origins of Entrenched Judicial Review," *Studies in American Political Development* 29, no. 1 (2015): 1–22.

30. Ginsburg and Versteeg, "Why Do Countries Adopt Constitutional Review?"

31. See the replication data: "Download CCP Data," Comparative Constitutions Project, accessed April 18, 2021, https://comparativeconstitutionsproject.org/download-data/.

experience of dictatorship. Such an explanation would arguably neglect a host of important background conditions – conditions that might come into view once the rejection of judicial review of federal statutes in Weimar Germany and inter-war Switzerland are studied. While some studies look at variation in the specific institutional design of judicial review, cases in which politicians decided not to adopt, to ban, or to abolish judicial review are basically absent from the literature. In contrast, the related literature on judicial independence is very concerned with cases where judicial independence is not respected.[32] Yet, the outcome of interest in this literature is a different one. While the number of cases where judicial review is rejected or abolished, but judicial independence as such is maintained, is probably quite low – at least in the recent past – omitting these cases can nevertheless lead to wrong theoretical conclusions.

2.2 Insurance Theory and the Distinction Between Policy-Indifferent and Policy-Interactive Provisions

The dependant variable of my theory is politicians' support for independent judicial review. By judicial review, I mean the power of judges not to apply or to annul statutory provisions because they are in conflict with a higher legal norm, typically a constitution or a norm of international law. Support for judicial review means that politicians are in favour of its adoption, and once adopted, of its meaningful exercise – that is, they are willing to accept a not entirely negligible risk that their policies will be curtailed by the courts. In contrast, judicial review that is expected to exist merely on paper does not count. I define judicial review as independent as long as politicians abstain from efforts to reduce the risk judicial review poses to their policy agenda through measures that were not previously part of the accepted repertoire of political interactions with the

32. In an important quantitative study, Aydın argues that electoral competition has a positive effect on judicial independence in consolidated democracies, whereas it has a negative effect in developing democracies. However, Epperly fails to replicate these findings with slightly different codings for what counts as a democracy, and instead finds a positive effect of electoral competition on judicial independence in autocracies. See Aydın, "Judicial Independence"; Brad Epperly, "(Re)Examining the Insurance Model of Judicial Independence across Democracies," *Journal of Law and Courts* 6, no. 2 (2018): 405–19; Brad Epperly, "Political Competition and de Facto Judicial Independence in Non-Democracies," *European Journal of Political Research* 56, no. 2 (2017): 279–300.

courts. Thus, usual efforts to make the courts more sympathetic towards one's own policy agenda, such as the nomination of judges with partisan affiliations, do not imply a breakdown of independent judicial review, whereas packing a court to bring about a strong reduction of the risk to one's policy agenda would imply such a break-down (although regular court-packing by successive governments could be a new equilibrium).

It may surprise that the argument advanced here does not distinguish between support for adopting judicial review and support for maintaining judicial review. Vanberg argues that explaining the adoption of an independent judiciary, typically at a "constitutional moment," is not the same as explaining the continued maintenance of judicial review.[33] This difference is also emphasized by Blass and Brinks' distinction between the "originating coalition" that sets up the initial system of judicial checks and balances, and the "constitutional governance coalition," that is, the set of actors that can later influence this system and in whose shadow the courts hence operate.[34] I agree that constitutional deliberations often occur behind a "veil of uncertainty"; more abstract considerations will therefore loom larger than in day-to-day politics.[35] Yet, this does not mean that different explanations for the support of judicial review during the making of a constitution and its later maintenance are needed. The argument advanced here relies on the ability of political actors to form expectations about the effects of judicial review in day-to-day politics. This ability will be lower at the "zeroth hour" than later on, but since institutions are rarely established on a clean slate, this will be a difference of degree, not of kind. Importantly, policy-makers do not only form expectations about the effects of judicial review on the basis of an already existing judicial practice. Policy-makers themselves can interpret the law, too, and they can observe what legal interpretations prevail or are gaining currency among legal elites.

The theory put forward here explains preferences about judicial review, more precisely, the degree to which a preference in favour of judicial review prevails in the

33. Georg Vanberg, "Constitutional Courts in Comparative Perspective: A Theoretical Assessment," *Annual Review of Political Science* 18, no. 1 (2015): 169–70.

34. Daniel M. Brinks and Abby Blass, *The DNA of Constitutional Justice in Latin America: Politics, Governance, and Judicial Design* (Cambridge, UK, 2018), 50, 57.

35. Vanberg, "Constitutional Courts in Comparative Perspective," 169.

political system. As this is an equilibrium explanation, knowing whether all relevant political actors prefer judicial review also tells us, theoretically, whether judicial review is sustained. In practice, institutional outcomes can obviously diverge from political actors' preferences. There will often be idiosyncratic historical circumstances, such as institutional traditions, that keep judicial review from ever making it on the constitutional agenda in the first place, or a degree of institutional inertia that sustains judicial review although crucial political actors reject it.

The scope of my argument is confined to democracies. First, because this argument assumes a degree of autonomy of the legal sphere that will be hard to find beyond democracies, second, because it is difficult to apply an insurance logic of inter-temporal commitment beyond democracies – a difficulty highlighted by Popova and Aydın and discussed further below. Moreover, this is not an argument about judicial independence. I am only interested in judicial independence insofar as it is a necessary prerequisite for the meaningful exercise of judicial review. Yet, as insurance theory has also been used to explain judicial independence, and as this strand of the literature has given rise to an important theoretical debate, I discuss some contributions from this literature below.

Apart from some federalism approaches, there are currently two major competing rational-choice explanations for the adoption of judicial review: Hirschl's hegemonic preservation theory,[36] and Ginsburg's and Stephenson's insurance theory.[37] Put simply, Hirschl argues that judicial review is adopted by "hegemonic" political actors who anticipate their fall from power and seek to entrench their policy preferences against rising political challengers. My argument contests this line of reasoning. As others have pointed out, Hirschl's assumption that hegemons can entrench judicial review against political challengers is unrealistic.[38] Instead, coalitions far smaller than those required, say, for formal constitutional amendments, can effectively hamper the exercise of judicial review. There is no lack of examples that formal constitutional or

36. Hirschl, *Towards Juristocracy*; Hirschl, "Political Origins."

37. Stephenson, "'When the Devil Turns … '"; Ginsburg, *Judicial Review in New Democracies*.

38. Brinks and Blass, *DNA of Constitutional Justice*, 54.

legal safeguards of judicial powers are no insurmountable barrier to court-curbing. To use Blass and Brinks' terminology, the "Constitutional Governance Coalition" – "the coalition of actors whose agreement is required to exercise the mechanisms of judicial control"[39] – is typically far smaller than the coalition required for a formal constitutional amendment. As they put it, "through appointments, the manipulation of judicial incentives, lawmaking, non-compliance and the need for popular support, courts remain tethered to a greater or lesser degree to contemporary, rather than foundational, politics."[40] Since rising political challengers will be aware of efforts to employ the courts for "hegemonic preservation," they will try to thwart the effective exercise of judicial review once Hirschl's hegemons are no longer a necessary member of the "Constitutional Governance Coalition."

Considering these difficulties to entrench judicial review against the current rulers, equilibrium explanations – that is, explanations demonstrating how the maintenance of judicial review is in the interest of all actors whose support is necessary – are preferable. The theory I build on here, insurance theory, is such an equilibrium explanation. It argues that judicial review is adopted and sustained by a cross-party coalition, of which all members seek to employ judicial review to protect them against the political costs they might incur while in opposition. The key variable driving support for judicial review is the electoral competitiveness of the political system – a hegemonic political actor that expects to remain in government for the foreseeable future will have no reason to let the courts tie its own hands without an "insurance" benefit in return.

A general critique of insurance theory is the long time horizon required for incumbents to value the safeguards judicial review might offer them in the future as highly as to respect independent judicial review in the present. Moreover, the probability of losing power itself will often be influenced by the ability to engage in the transgressions that judicial review is meant to be a safeguard against,[41] such as the persecution of opposition candidates. This problem has been highlighted particularly in the debate about whether insurance theory can explain variation in judicial

39. Ibid., 57.

40. Ibid., 53.

41. Ibid., 54.

independence beyond advanced democracies. On the one hand, primarily Popova and Aydın argue that political competitiveness in hybrid regimes (Popova) and developing democracies (Aydın) has the opposite effect on judicial independence as in consolidated democracies, since incumbents instrumentalize the courts to lower the risk of an opposition victory. Such instrumentalization tends to have low costs, since the media in hybrid regimes are often weak; at the same time, its benefits tend to be high, since weakly organized, personalistic parties make the judicial persecution of high-profile individuals a particularly potent tool to attack the opposition.[42] On the other hand, Epperly argues that the logic of electoral competition exerts an even greater positive effect on the provision of independent courts in electoral autocracies, since autocrats who expect to lose their power do not only face the risk of policy reversal, as democratic rulers do, but also of physical persecution.[43]

While my argument builds on insurance theory, its scope of applicability is explicitly confined to democracies with such a degree of consolidation that free and fair democratic elections are widely expected to continue. In other words, even in the absence of judicial review, political actors should be unwilling or unable to rig the game so strongly in their favour that they are immune from being voted out of power. The debate over insurance theory's scope of application highlights the important distinction between uncertainty about the winner of the next round of electoral competition – entailing a positive effect on the provision of independent judicial review – and uncertainty as to whether the democratic game is to continue at all – entailing a negative effect on the provision of independent judicial review. Two of my empirical cases – the First Austrian Republic and Weimar Germany – suffered increasingly from the second kind of uncertainty as they moved towards the break-down of democracy in 1933. It is thus important to consider when they reached the point where "the trade-off between current and future policy control may be a moot point."[44]

In contrast to this critique regarding the scope of application of insurance theory across different regime types, my argument questions whether the logic of insurance

42. Popova, "Political Competition," 1206–8; Aydın, "Judicial Independence," 112.

43. Epperly, *Political Foundations*.

44. Popova, "Political Competition," 1209.

theory works equally well even among electorally competitive democracies. There is a significant number of countries, such as the Netherlands or Denmark, that have never introduced (domestic) judicial review, and even democracies have experienced efforts to rein it in – the U.S. during the New Deal is a prominent example. Yet, insurance theory predicts that these competitive democracies should have adopted and sustained judicial review. I argue that one reason why insurance theory predicts such cases wrongly is that it does not take into account how differences in the type of constitutional rules safeguarded by judicial review can influence the expectations of political actors about its costs and benefits. Insurance theory assumes too easily that political actors will expect courts with judicial review powers to be neutral arbiters, instead of seeing judicial review as a spoke about to be thrown into the wheels of their own policy agenda, rather than into those of their opponents. This expectation, I argue, is not only the product of the observation of judges' political attitudes or their willingness to give in to political pressure, but also of what legal norms play a role in the practice of judicial review and how they are interpreted in legal discourse more broadly.

The basis of my argument is the distinction between *policy-indifferent* and *policy-interactive* legal provisions. In the case of judicial review on the basis of policy-indifferent provisions, the probability that judicial review will impose constraints on a given political actor's government depends only on the chances that this political actor controls the government; it does not change with the actor's policy agenda. In other words, knowing the policy preferences of a political actor – whether it is left, right, etc... – does not tell us, and importantly, does not tell this actor, anything about whether the opposition will be able to challenge its government agenda in court. As an example of a policy-indifferent provision, suppose a constitutional rule requiring a minimum number of parliamentary readings before a bill can be passed into law. Whatever the policy preferences of a political actor, this provision will be a constraint on them while in government, but equally, during times of opposition, an opportunity to challenge the policies of political opponents in the case of a violation of this rule.

In contrast, in the case of judicial review on the basis of policy-interactive provisions, the probability that a political actor's government will be constrained by judicial review does not only depend on the probability of them controlling the government, but also on their policy agenda. In other words, if we want to know how likely it is that the courts will strike down a policy of a given political actor, it helps to know what the policy preferences of this actor actually are, and not only how likely it is that this actor will be in government. A policy-interactive provision can also be thought of as a boundary towards one or both ends of a policy spectrum. As a straightforward example, suppose a constitutional rule outlawing the death penalty: This provision sets a boundary on the "higher punitiveness" end of a criminal justice policy spectrum, spanning from more lenient to harsher punishment of crimes. Obviously, the probability that a political actor will run afoul of this provision depends not only on their probability of being in government, but also on their substantive preferences on the death penalty, in other words, on whether their preferences are situated left or right of the constitutional boundary.

As a consequence of this distinction, judicial review on the basis of policy-interactive instead of policy-indifferent provisions will more easily come with a slant in favour of or against a specific policy agenda and will therefore less likely find the necessary support across the political spectrum. In the case of "formalist" judicial review on the basis of policy-indifferent provisions, the electoral alternation logic of insurance theory fully plays out: The mere prospect of being out of government sustains support for judicial review across the political spectrum. None of the actors alternating in government will have reason to believe that their own policy agenda, but not their opponents' agenda, will be more vulnerable to judicial challenges. In contrast, this is not necessarily the case for judicial review on the basis of policy-interactive provisions: Despite the expectation of being in opposition in the future, a political actor might expect that the costs of judicial review incurred through frequent obstruction of its own policy agenda will exceed the benefits from the rare opportunities to obstruct the policy agenda of their opponents.[45]

45. The slant theorized here should not be conflated with the status quo bias arising from the veto player nature of courts exercising judicial review. In the historical context studied here, this status quo bias may have been an additional reason for left-wing scepticism towards judicial review. However, it is questionable whether judicial review nowadays does, in fact, still have a status quo bias – if, for example, a ban on same-sex marriage dating back to the 19th century is struck down, the status quo is, of course, changed.

Obviously, judicial review is hardly ever based on one single provision only. Constitutions are often a compromise, and will therefore contain some provisions that are cumbersome to one part of the political spectrum, and others that are cumbersome to another part of the political spectrum. Yet, in abstract terms, judicial review based on a set of policy-indifferent provisions can necessarily not exhibit a slant towards one or another side of the political spectrum. In contrast, while a set of policy-interactive provisions, could, overall, also be balanced in its effects across the political spectrum, a slant cannot be ruled out. In particular, historical legacies, the structure of the legal field or "hegemonic preservation" efforts can imply that policy-interactive provisions do not impose equal constraints on all political actors. For example, the bill of rights of the 1919 Weimar constitution contained both classic liberal and progressive socio-economic rights. Hence, one might expect that judicial review on the basis of such a bill of rights would have been an attractive instrument for conservative and progressive interest groups alike. But many progressive provisions of the Weimar constitution were not considered justiciable. In practice, the set of rights that judicial review actually safeguarded was only a small sample of the entire bill of rights; the beneficiaries of the judicial safeguarding of these provisions were primarily civil servants, property owners, the churches and fringe parties (see Chapter 4).

The conditions under which such a slant is likely to occur have hardly been theorized so far. In his formalized version of insurance theory, Stephenson includes a parameter of "judicial slant" into the model and demonstrates that too strong a slant undermines the sustainability of judicial review. However, he does not explain where such a slant might come from and considers it possible that courts self-correct their slant in order to uphold the judicial review equilibrium.[46] This latter possibility requires judges to behave strategically – which they may well do to some extent.

Yet, there are several reasons why judges may not correct a slant. First, even if judges act strategically, they may prefer to stand their ground against a political threat. Under the conditions of political competition required by insurance theory, there is a chance that judges may get away with decisions that disadvantage some political

46. Stephenson, "'When the Devil Turns … ,'" 66.

competitors. Judges may well choose to gamble. Second, self-restraint may effectively reduce judicial power almost as much as an externally imposed curtailing of their powers. Hence, judges may as well wait for political sanctions instead of sanctioning themselves. Third, given the widespread expectation that judges behave in an apolitical way, observable strategic behaviour may come with the risk of reputational damage and hence a decline in exogenous support for judicial independence. For judges, the best strategy may be to stick their principles.[47] Fourth, judges may not be able to act strategically since their decisions need to be justified with legal reasons, and judges may not know acceptable reasons to justify a politically expedient decision.[48] Fifth, as all strategic actors, judges have limited information about the preferences of other actors, entailing the risk of miscalculations. Finally, judges may not want to act strategically, since this would be incompatible with their role conception – a role conception that may stem from social norms internalized through legal education or their work in institutions promoting these norms.[49]

2.3 Rights-Based Judicial Review

Two important kinds of legal norms fall, not perfectly, but rather neatly, into these categories of policy-indifferent and policy-interactive provisions: The constitutional norms demarcating the distribution of powers in federations are usually policy-indifferent, whereas rights are usually policy-interactive. With regard to the latter, I exclude procedural rights from the discussion, for example, the right to vote or freedom of speech. While these rights, too, can be the object of political conflict, it would stretch the concept to see them as boundaries on policy dimensions. Moreover, a minimum of these rights is by definition given in democracies, and therefore part of my scope conditions. Instead, I am interested in rights that embody values beyond those

47. Howard Gillman, “The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making,” in *Supreme Court Decision-Making: New Institutionalist Approaches*, ed. Cornell W. Clayton and Howard Gillman (Chicago, 1999), 71f.

48. See González-Ocantos, *Shifting Legal Visions*, 34–36.

49. See Gillman, “The Court as an Idea, Not a Building (or a Game),” 74; González-Ocantos, *Shifting Legal Visions*, 36–38.

underlying procedural democracy, for example property rights, rights that demand that different social groups be treated equally, that underlie claims to the access to certain resources or that demarcate a zone of autonomous decisions for groups or individuals. These questions are at the heart of policy conflict, that is, conflict that is not about the basic rules of the political game as such.[50]

Whether a political actor will be constrained by these rights depends on their policy preferences – they are policy-interactive. We can think of rights as limits towards one end of a policy dimension: For example, the right to property sets a limit on the more-redistribution end of the redistributive policy dimension and religious freedom sets a limit on the more-state-intervention end of the more/less-state-control-over-religion policy dimension. Importantly, since rights often have their origin in demands by specific social groups for the protection of their interests, rights tend to map onto a policy dimension in an asymmetric way – they set a limit towards one end of the policy dimension, but not towards the other end. For example, the right to property sets a maximum limit on redistribution, but does not prescribe a minimum of redistribution: Leaving the differences of expropriation law across countries aside, the right to property at least prohibits to take all assets from one group and transfer them to another group without justification or compensation. Only some jurisdictions have relatively recently seen the creation – be it by lawmakers or by judges – of *justiciable* social rights that establish a complementary constitutional limit on the other side of the redistributive policy dimension.

As a stylized example for the imbalance of rights-based judicial review, suppose a political system with a left and a right party. Both parties alternate in government, and disagree over one matter only, the degree of redistribution. The left party favours more, the right party less redistribution. The country's constitution has only one provision – the right to property, mapping asymmetrically on the redistributive policy dimension. Consequently, the leftist party – favouring more redistribution – is more likely to have an ideal point beyond the limit set by the right to property than the rightist party. In

50. I am not offering a definition of "rights" here. Such a definition would not be helpful, since I am not claiming that rights are intrinsically policy-interactive. Instead, the policy-interactive character of rights follows from the empirical phenomenon that the provisions commonly defined as "rights" in constitutions tend to safeguard specific political interests.

practice, judicial review can therefore be expected to be a useful instrument for the right, once in opposition, to obstruct the left's redistributive policies, but to be useless for the left, which has no reason to invoke the right to property against redistribution. In short, judicial review in this scenario has no insurance value whatsoever for a left opposition, but will be a constraint on a leftist government. The left has therefore no reason to support it. Note that this is not the same as the question whether the left is in favour of respecting property rights in general or of having the right to property included into a constitution. The leftist party may well accept that political constraints, such as public opinion, make important and obvious violations of property rights very costly, but may not want judicial review to police the constitutional grey zone where violations of rights can remain unnoticed or are a matter of debate.

To be clear, judicial review may very well be practised on the basis of rights without exhibiting a slant towards either side of the political spectrum. But if we think of rights-based judicial review as judicial protection for a limited set of policy objectives, we can see several ways how this set can become an unbalanced subset of all the policy objectives pursued in a political system. To maintain balance in a changing political environment, the courts either have to give up protecting certain causes or take up new causes. But since the views of legal elites necessarily exhibit a certain inertia, neither will happen quickly. In one of the empirical cases, inter-war Norway, the scope of judicial review is essentially limited to safeguarding property rights, entailing a slant against the interventionist economic policies of the left. Left-wing opposition against judicial review rises fast, whereas the Supreme Court only slowly reduces its protection for property rights. The alternative way of balancing – developing a legal opportunity structure for left-wing causes – is not pursued. Hence, the sphere of constitutionalism in inter-war Norway shrinks rather than expands. The opposite happens in Weimar Germany, a hotbed of innovative constitutional thinking, where legal scholars and the courts advance new interpretations of constitutional rights. In this case, it is not the inertia of the legal field, but the under-representation of the political left among scholars and judges that favours the development of an opportunity structure slanted against the left.

Beyond the abstract logic of policy-interactiveness theorized here, there are other reasons to expect that rights-based review will less easily find or maintain broad political support. Individual rights maximize the counter-majoritarian leverage of judicial review: A single individual can challenge policies supported by an entire parliamentary majority on the grounds that they violate the individual's rights. Unless the legal system knows a sort of *actio popularis*, that is, the possibility for individuals to initiate legal action although they are not concerned in their *own* rights, groups demanding the respect of merely procedural constitutional rules will usually be larger, since these rules tend to protect the participation of groups in the political process or protect the prerogatives of other collectively organized political actors, such as the member states of a federation. Thus, the operation of judicial review in a rights-centred context can lead to a situation where courts will be compelled to do what advocates of a strategic perspective expect them to do but rarely – to "serve the interests of true outsiders."[51] Moreover, since conflict over values is typically more intense than procedural conflict, rights-based review will often involve higher stakes, and there will often be many defensible interpretations of one and the same right, making rights-based decisions more prone to contestation than decisions based on procedural legal norms.

2.4 Federalism-Based Judicial Review

In contrast to rights-based review, judicial review is more likely to find broad political support if it primarily safeguards the boundaries of state and federal powers in federations – empirically, the other important function of judicial review besides safeguarding rights – since this entails judicial review primarily on the basis of policy-indifferent provisions.[52] If we let the logic of insurance theory play out under conditions

51. Brinks and Blass, *DNA of Constitutional Justice*, 65.

52. The claim that the safeguarding of rights and federalist structures are empirically the main functions of judicial review is difficult to substantiate at a global scale, but will hopefully appear plausible to most readers. As an illustration, about 82 per cent of 487 laws held unconstitutional in whole or in part by the U.S. Supreme Court between 1958 and 2019 were, by my own count, found to violate constitutional rights, about 11 per cent violated the distribution of powers between the state governments and the federal government, and the rest concerned other issues or could not easily be classified. List of cases: Library of Congress, "Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court," accessed April 16, 2021, https://constitution.congress.gov/resources/unconstitutional-laws/.

of federalism, judicial review remains attractive to political actors alternating in government regardless of their respective policy agenda, since they will always be interested in claiming an excess of the powers granted to the federal government if there is a risk that it could be controlled by their opponents. Note that the comparison here is between support for judicial review of laws in a unitary state to support for judicial review of *federal* laws, not of state laws, in a federation – that is, I am comparing support for judicial review at the highest level of government (of which there is only one in the unitary setting).

So far, the logic of electoral alternation in insurance theory and the federalism approach have not been combined. In general, federalism has largely disappeared from theorizing about judicial review.[53] Federalism is seen as a historical factor that used to give rise to judicial review in the past, but has now largely lost its importance for driving its adoption,[54] as its adoption in countless unitary states after World War II demonstrates. Yet, the declining importance of federalism for the adoption of judicial review does not mean it cannot enhance its political stability – although federalism alone will often not be sufficient to maintain judicial review in equilibrium. Instead, it is when federalism and high political competitiveness are combined that judicial review is most stable.

The standard explanation for the pervasiveness of judicial review in federations is, broadly speaking, that courts are effective devices to safeguard the boundaries between state and federal powers.[55] Often, it is simply asserted that federations cannot do without an arbiter, and therefore adopt judicial review – "for federal theorists judicial supremacy exists because it must."[56] This essentially seems to be a transaction costs argument: Resolving conflicts in court is considered more efficient than through negotiations. However, it is not difficult to imagine that a state government or the federal government would rather not have judicial review, so as to get away with

53. For example, see Brinks and Blass, *DNA of Constitutional Justice*.

54. Ginsburg and Versteeg, "Why Do Countries Adopt Constitutional Review?," 608.

55. Mikhail Filippov, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge, UK, 2004), 152; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge, UK, 2009), 278.

56. Friedman and Delaney, "Becoming Supreme," 110; sceptical in this regard Shapiro and Stone Sweet, *On Law, Politics, and Judicialization*, 149ff.

exceeding its powers in some cases, even if this comes with higher transaction costs of conflict resolution in other cases. It is equally questionable to explain judicial review of federal laws as a concession in return against judicial review of state laws (or vice versa), that is, the federal government accepts judicial review of federal laws in return against the function judicial review of state laws fulfils in suppressing “outlier conduct” of state governments.[57] How one follows from the other is unclear; in any case, state governments do not necessarily have the power to extract this concession from the federal government. For example, in Switzerland, parties in favour of more centralization adopted judicial review of state, but not of federal laws, in 1848.[58]

Instead, it is necessary to distinguish clearly between judicial review of state laws and judicial review of federal laws. Judicial review of state laws helps to deal with the first of the “two fundamental dilemmas of federalism”[59] – how to keep the member states of a federation from reneging on the obligations of the federal compact and from free-riding on the other states. In contrast, judicial review of federal laws deals with the second dilemma – how to prevent the federal government from “overawing”[60] the member states.

More specifically, judicial review of state laws can be modelled in the same way as courts in international law. These courts serve as triggering devices that identify a state’s defection from its obligations under international law and coordinate a punishment response of all other states.[61] It is every single state’s awareness that it may require the help of all other states to enforce the covenant in the future that makes them participate in the enforcement of court decisions today. In the same vein, judicial review of state laws can be seen as a device that a federation’s member states use to prevent other member states from defecting from their covenant, especially by erecting trade

57. Friedman and Delaney, “Becoming Supreme.”

58. Oeter, “Die Beschränkung,” 555.

59. Rui J. P. de Figueiredo and Barry R. Weingast, “Self-Enforcing Federalism,” *The Journal of Law, Economics, and Organization* 21, no. 1 (2005): 104.

60. Ibid.

61. Leslie Johns, “Courts as Coordinators: Endogenous Enforcement and Jurisdiction in International Adjudication,” *Journal of Conflict Resolution* 56, no. 2 (2012): 257–89.

barriers.[62] Admittedly, one may wonder whether this is still the main function of judicial review of state laws nowadays, or whether it now mainly serves to protect the interests of the political opposition within a member state, rather than the interests of other member states. In any case, there may be actors both in- and outside a member state interested in making sure it fulfils its obligations under a federal compact.

Yet, my theoretical interest is in explaining support for judicial review of statutes enacted at the highest level of government, that is, in federations, at the federal level. In the same way as judicial review of state laws, judicial review of federal laws can be seen as a triggering device coordinating a joint enforcement response of the member states – yet, in this case, not against another member state, but against the federal government exceeding its powers. This follows from the classic argument about the coordination function of constitutions: A sovereign, or a federal government, can transgress against citizens (or member states) with impunity, unless a constitution creates the necessary consensus among citizens (or member states) on what exactly constitutes a transgression.[63] Citizens, or in the federal case, member states, "must react in concert"[64] in order to mount effective resistance against sovereign transgressions. However, since a constitution by itself is usually too ambiguous to serve as a trigger device, it takes an authoritative judicial interpretation to resolve this ambiguity and send a clear signal to citizens or member states as to whether they must join forces against the sovereign.[65]

The coordination approach provides a logic sustaining judicial review of federal laws even in the absence of electoral alternation at the federal level: Ruling elites in all member states will support it in order to fend off transgressions by the group controlling the federal level, whether or not this group ever changes. Yet, the coordination model

62. Additionally, judicial review of state laws can be sustained by a domestic public that seeks to prevent its government from erecting trade barriers against the interests of the public, see Clifford James Carrubba, "A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems," *The Journal of Politics* 71, no. 1 (2009): 55–69.

63. Barry R. Weingast, "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development," *Journal of Law, Economics, & Organization* 11, no. 1 (1995): 1–31; de Figueiredo and Weingast, "Self-Enforcing Federalism," 120ff.

64. Weingast, "The Economic Role of Political Institutions," 10.

65. Georg Vanberg, "Substance vs. Procedure: Constitutional Enforcement and Constitutional Choice," *Journal of Economic Behavior & Organization* 80, no. 2 (2011): 309–18; Filippov, *Designing Federalism*, 153.

hinges on the assumption that "state governments" and "federal government" are actually distinct actors, and that there is a conflict of interests between a substantial number of member states and the federal government. This assumption seems at odds with the functioning of federalism in many democracies, in which a national party system may dominate and the elites controlling state governments may essentially be the same as those controlling the federal government.[66]

While the party system is not necessarily the only factor that can reduce the antagonism between the state and the federal level, the positive impact of "integrated parties" – "in which politicians at one level of government bear an organizational relationship to politicians at other levels"[67] – on the cohesion across levels of government has been emphasized.[68] Not only a congruence of policy positions within parties, but also career and electoral incentives reduce the attractiveness of conflict over the vertical distribution of powers among politicians of the same party.[69] This might lead to an effective collapse of the salience of the federal-state cleavage. While this might be considered positive, since it reduces the degree of conflict between the federal and state levels, it might also remove the rationale for the existence of a federation in the long run. Yet, in the absence of electoral alternation, the collapse of the federal-state cleavage will first affect the institution that polices transgressions of the federal-state boundaries, that is, judicial review.

Consider the example of a federation with two parties, say, a left and a right party. Suppose that within these parties, politicians have essentially identical policy preferences regardless of whether they are involved in state or federal politics. Since the policy preferences of state and federal politicians within the same party are identical, they do not care on what level of government policies are implemented, as long as their party controls this level of government. In this situation, a state government controlled

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66. This may apply in particular to old federations, since these tend to feature a higher degree of party system nationalization than younger ones, see Grigorii V. Golosov, "Factors of Party System Nationalization," *International Political Science Review* 37, no. 2 (2016): 246–60.

67. Filippov, *Designing Federalism*, 190.

68. Ibid.; Bednar, *The Robust Federation*, 278–79; Jenna Bednar and William N. Eskridge, "Steadying the Court's 'Unsteady Path': A Theory of Judicial Enforcement of Federalism," *Southern California Law Review* 68 (1995): 1479.

69. See Filippov, *Designing Federalism*, 195.

by the left party has no interest in judicial constraints on a federal government controlled by the same party. Only state governments controlled by the right party have an interest in judicial review of federal laws. If the right party has the political power to enforce the respect of judicial review, it is maintained. But if the left party is hegemonic, judicial review will have a hard time surviving. Thus, in federations with a dominant and non-competitive national party system, judicial review will be as unstable as in unitary states that are electorally non-competitive: The remaining states who have an interest in constraining the federal government will, ceteris paribus, be less likely to muster the power to sustain judicial review; given their smaller number and the similarity of their preferences due to their control by the same party, they will also be less likely to require a co-ordination device to resist federal transgressions.

The prospects for the institutional stability of judicial review look brighter if the logic of electoral alternation is introduced into the federal setting. We can now give up the requirement that the member states have distinct policy preferences in and of themselves. Suppose a federation in which two parties, A and B, alternate in federal government and both of them also control at least one state government. A and B disagree over some issues. Within both parties A and B, policy-makers at the state and federal level have exactly the same policy preferences. At the moment, B controls the federal government.

If A and B disagree fiercely enough over a policy falling within state powers, B will try to wrest some policy influence from A. B could do this by passing a federal law that falls within a constitutional grey area – an area where it would take a court to resolve the ambiguity on whether the law falls within federal or state powers. Crucially, this temptation to violate the rules of federalism does not depend on B's substantive policy preferences – it merely depends on A and B disagreeing and the risks involved with such a transgression.

If the temptation to transgress such a rule does not depend on B's policy preferences, the interest in having a judicial safeguard for this rule does not depend on A's policy preferences either: the rule is policy-indifferent. If A and B alternate in federal government, they will therefore both be interested in a means to assess whether the federal government legislates outside its powers, that is, they will support judicial review of federal legislation.

To clarify the differences between federalism-related rules and rights: If we look, side by side, at a bill of rights and the manifestos of the major political parties, we will be able to make a good guess about which party will be more prone to violate the bill of rights, at least in the near future. The same exercise, with party manifestos side by side with a constitution's provisions demarcating state and federal powers, will not improve our guess (under the conditions specified above), since it is the trivial condition that parties disagree with each other that will tempt them to violate these boundaries.

Admittedly, there are situations in which some political actors systematically favour a stronger expansion of one level of government relative to another, because their policy preferences can only be implemented at a specific level of government. For example, a strong expansion of redistribution may only be feasible at the federal level. A party in favour of such an expansion of redistribution will therefore have a relatively lower interest in constraints on the federal government, whereas a party opposing an expansion of redistribution will have a stronger interest in constraints on the federal government. The obvious example for this constellation is the New Deal.

However, expectations about the distribution of the political costs of judicial review are still less clear-cut in this situation than in the rights-centred situation. Even a party opposing the expansion of federal power in the long run will still be tempted to engage in small-scale transgressions of federal power during the periods when it controls the federal government. Consequently, even a party favouring an expansion of federal power in the long run will find itself exposed to federal transgressions in the short run. This leads to ambivalent interests in means to keep federal power in check. Such an ambivalence of short- and long-run interests is more difficult to imagine in the case of rights: For example, it is implausible that a party that seeks to curtail the influence of the church in the long run would suddenly invoke constitutional safeguards of religious freedom against transgressions by their generally more church-friendly opponents.

Beyond the logic of a continuous tug-of-war over the scope of federal powers regardless of policy preferences, there are further reasons why judicial review on the basis of federalism-related constitutional norms will be more stable. One reason is that the adjudication of a conflict on the basis of federalism-related provisions allows courts to avoid taking a stance on value-laden questions. Conflict on a heavily contested policy dimension can be transposed onto the typically less contentious federal-state dimension.[70] Moreover, because value questions hardly play an overt role in the interpretation of federalism-related constitutional norms, court decisions on their basis will also support a perception of courts as technical, apolitical umpires.

2.5 Summary of the Argument

Table 2.1 summarizes the implications of the interaction between the degree of political competitiveness and the rights-based or federalism-based character of judicial review of laws enacted at the highest level of government. In situations of low political competitiveness, the general expectation derived from insurance theory is that the stability of judicial review is low. Federalism will have a stabilizing effect in this situation, but only as long as an antagonism between the state and the federal governments exists and judicial review of federal laws can therefore be modelled as a coordination device for the member states. In situations of low political competitiveness, rights-based judicial review will be even more precarious, since the policy-interactive character of rights can imply a slant of judicial review against the ruling party that it will seek to counteract. This problem of a possible slant of policy-interactive provisions, and hence rights-based review, is not resolved as we move from a situation of low political competitiveness to a situation of high political competitiveness. However, the logic of electoral alternation now provides higher stability for judicial review both in the case of rights- and in the case of federalism-based judicial review. Stability is highest in the latter case. Here, the policy-indifferent character of federalism-related constitutional norms sustains the expectation of judicial

70. Bednar, The Robust Federation, 121.

review as a neutral arbiter across the political spectrum, and we no longer need to rely on the function of judicial review as coordination device for the member states to keep it in equilibrium.

Table 2.1. Probability that Judicial Review of Laws Promulgated at the Highest Level of Government (in Federations: the Federal Level) is Sustained, by Type of Review and Competitiveness of the Political System

	low political competitiveness	**high political competitiveness**
federalism-based judicial review	medium	high
rights-based judicial review	low	medium

Since the increase in the sustainability of judicial review as we move from low to high political competitiveness is already the main implication of insurance theory, the main difference of interest here is between federalism-based and rights-based judicial review. Thus, the key hypothesis stemming from the legal norms theory of support for judicial review is:

H1: Judicial review is more likely to find broad political support where it is expected to safeguard primarily the boundaries between state and federal powers, rather than rights.

2.6 Possible Objections

A possible objection to this argument is that it explains institutions with institutions – in other words, that whether judicial review is based on federalism and/or rights is not exogenous to political support for it. I accept that political actors who are dissatisfied with judicial review might try to change the constitutional norms it safeguards – in the empirical part, the Norwegian case study will show that this can be a strategy to reduce the costs of judicial review. However, changing the yardstick of judicial review may be more difficult than refusing to adopt, curtailing or abolishing it. First, because many constitutions fulfil a function as political constitutions, regardless of whether they are safeguarded through judicial review. As Vanberg points out, the value of judicial review lies in signalling transgressions of constitutional boundaries in a grey zone, where they are not, so to speak, visible with the bare eye.[71] In contrast, it hardly requires judicial review to raise the alarm about crass, unambiguous transgressions of constitutional boundaries. Political actors may still want constitutions to function as such loose boundaries, policed through the political process, rather than by judicial review. And even if political actors preferred to abolish some constitutional boundaries entirely, they might still refrain from it because this might send an undesirable signal. For example, it might appear more threatening if a radical-left party abolishes the right to property than if it abolishes the judicial safeguards of this right.

Finally, even where political actors have calibrated a constitutional framework so as to make it a balanced set of constraints, their control over what later happens to these boundaries – which of them become, in practice, strict boundaries on the legislature, and which of them don't – is out of their hands to some extent. The interpretation of constitutional norms will be a matter for legal elites, above all, for judges, but also for legal scholars. How these elites develop constitutional norms does not follow a logic of sustaining an equilibrium. Some constitutional provisions may eventually be regarded as justiciable and as entailing important obligations for the legislature; others may be considered merely programmatic provisions. The uneven development of some constitutional provisions into hard constraints, and others into merely programmatic provisions, is conceivable not least because the legal field may not be representative of the interests present in the political system. Some political causes may enjoy broader support by legal elites than others, and their efforts to make constitutional norms relevant to these causes will differ correspondingly.

Hirschl's "hegemonic preservation" efforts are the starkest example of such uneven efforts to turn some, but not other legal norms into hard boundaries. These disproportionate efforts can accumulate over time. It is unrealistic to assume that courts

71. Vanberg, "Substance vs. Procedure."

enforce the will of the drafters of a constitutional compact even long after they have left power.[72] However, in pluralist societies, it is also difficult for the current rulers to correct the stock of legal interpretations that has developed over a long time at will. Not only constitutional courts, as Stone Sweet and Brunell argue,[73] but also the wider legal field in which they are embedded, function as trustees to some extent, that is, at least sometimes, they themselves define their own zone of discretion. This relative lack of political control over the development of constitutional constraints also cannot be completely remedied through judicial appointments. Although partisan effects on judicial behaviour will be present in most countries, I assume that the normative structure of legal text, doctrine, accepted methods of interpretation and precedent influences judicial decision-making sufficiently so as to make appointments a highly imperfect means to to avoid adverse outcomes.

2.7 The Legal Norms Theory in the Inter-War Context

As such, this argument does not make a prediction about what specific political actors support or oppose judicial review at a given historical moment. But if we form some tentative expectations about inter-war Europe, the most plausible expectation is that if rights-based judicial review disadvantaged a part of the political spectrum, it disadvantaged the left, especially socialists. Courts will largely operate on the basis of the institutional and ideational legacy of the past. In many continental European countries, this will have been – to use a broad brush – the legacy of liberal constitutionalism. The adoption of judicial review already constituted a departure from this legacy in one important respect: The period of liberal constitutionalism was the period of the "legislative state"; rights could largely be curtailed by statute, and the courts could typically not review the constitutionality of statutes.[74] Ambitions to

72. Brinks and Blass, *DNA of Constitutional Justice*, 50.

73. Alec Stone Sweet and Thomas L. Brunell, "Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization," *Journal of Law and Courts* 1, no. 1 (2013): 61–88.

74. Andrea Buratti, *Western Constitutionalism: History, Institutions, Comparative Law* (Cham, 2019), 85–86.

constrain state power through the courts mostly targeted the executive, not the legislature.[75] In the inter-war period, it would have required an even greater leap to change not only the object of judicial review, but also to apply radically new yardsticks of review. Thus, I would expect inter-war judicial review to focus on safeguarding the rights familiar from the period of liberal constitutionalism. This included civil liberties such as press freedom and freedom of religion, but also economic rights such as the right to property.[76]

Of course, inter-war socialists did not oppose all these rights. As long as they were rising political challengers, they certainly had great interest in judicial safeguards of their civil liberties. But by and large, these liberties should have been given as long as a country fell within the scope conditions of my argument, i. e., was democratic. This leaves the economic rights of liberal constitutionalism as the potential main constraints on the legislature – rights that should disproportionately constrain the parties favouring more state intervention into the economy, hence, the left. To be clear, the inter-war period also saw socialist demands incorporated into constitutions in the form of social rights, for example in Weimar Germany. But even if legal elites were sympathetic to socialists, they should have found it difficult to provide an opportunity structure for socialist causes on the basis of social rights. In inter-war Europe, the justiciability of social rights was hardly a conceivable idea. Even in post-World War II constitutionalism, the judicial enforcement of social rights was regarded with scepticism for a long time.[77] Hence, if rights-based judicial review exhibited a slant against a part of the political spectrum during the inter-war period, I would expect a slant against the left.

In the following, three case studies will show that the theory discussed here partly explains why judicial review found cross-party political support in inter-war Austria (until 1929), but was opposed by left-wing parties in Norway and Weimar

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75. See Bernardo Sordi, "Révolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence and Development of Administrative Law," in *Comparative Administrative Law*, ed. Susan Rose-Ackerman and Peter L. Lindseth (Cheltenham, 2010), 23–37.

76. See Buratti, *Western Constitutionalism*, 75.

77. See Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory," in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (Cambridge, UK, 2008), 8f.

Germany. All three countries were competitive political systems, with Austria even exhibiting a lower degree of political competition at the highest level of government than the other two cases. However, only in Austria was judicial review almost entirely confined to deciding conflicts between the Austrian states and the federation. In Norway, a unitary state, but also in federal Germany, judicial review mainly safeguarded constitutional rights. The case outcomes match the theoretical expectations summarized in Table 2.1: In Austria, both conservatives and Social Democrats supported judicial review – at least until 1929, when conservatives, already on the path towards Austro-Fascism, curbed the Constitutional Court. In Norway, the Labour Party and to a lesser extent socially progressive Liberals advocated abolishing judicial review, whereas conservatives supported it. In Germany, strong opposition towards centralized judicial review arose within the Social Democratic Party in the late 1920s, whereas the parties further to the right supported it.

Chapter Three. Norway

3.1 Introduction

In contrast to Weimar Germany and the First Austrian Republic, which will be the focus of the following chapters, inter-war Norway did not debate the adoption of judicial review, but abolishing it. When Labour and socially reformist Liberals began a campaign against judicial review in 1917, they attacked an institution that had already been established in the 19th century – a uniquely early time for a European country.[1] Until 1936, left-wing politicians repeatedly put forward constitutional amendments to ban or weaken judicial review, but lacked the necessary majorities to pass them. Liberals stopped efforts to ban or weaken judicial review at the latest in 1929, and Labour in 1937. Formally speaking, judicial review therefore survived the inter-war period. Yet, empirically, it became marginal in the 1930s, in the sense that it became very unlikely that judicial review would interfere with an important policy.

In this chapter, I argue that my theoretical argument partly explains why Labour and Liberals began their campaigns against judicial review, whereas the causes of the end of their campaigns are more uncertain. In Norway, judicial review was almost entirely confined to safeguarding a right and a rights-like provision, namely the right to property and the ban on retroactive legislation. This narrow function of judicial review disadvantaged the parties most favourable towards state intervention into the economy – Liberals and Labour. The anti-left slant of judicial review was a necessary cause of their efforts to abolish it. The key condition insurance theory posits for the political sustainability of judicial review – a competitive political system – was not sufficient to sustain left-wing support for it, since it was difficult to invoke judicial review against more right-wing policies.

In contrast, I cannot definitely answer what caused the end of the Liberal campaign against judicial review by 1929. However, it could plausibly be explained, in

1. See Eirik Holmøyvik, "Årsaker til utviklinga av prøvingsretten i Noreg og Danmark," *Tidsskrift for Rettsvitenskap* 120, no. 5 (2008): 721.

line with my argument, with Labour's electoral rise. This pushed Liberals into the political centre, creating an interest in safeguards against a political challenger further to the left that, as it seemed, also harboured authoritarian intentions. The later end of Labour's campaign against judicial review in the 1930s coincided with a more deferential exercise of judicial review. The decline of the expected political costs of judicial review was necessary for Labour to make peace with it. Yet, since the risk that judicial review would interfere with Labour's policy agenda had not disappeared entirely, another factor, possibly concerns that voters might perceive its anti-judicial review campaign as authoritarian, had to contribute to the end of this campaign.

Inter-war Norway is a valuable addition to the set of cases in this study for several reasons: It provides the opportunity to test whether my argument also applies to a case with an already established practice of judicial review. Additionally, Norway provides variation due to its distinct legal tradition, the continuity of its regime after World War I, and the trajectory of its political system during the inter-war period. In contrast to Austria and Germany, Norwegian democracy did not collapse and give way to fascism, but, in Luebbert's classification, established a social democratic regime.[2] This suggests that the factors driving conflict over judicial review were not necessarily identical with the factors leading to the break-down of democracy. Finally, Norway is an interesting case because it is nowadays said to be part of the "Nordic counter-narrative" of liberal democracies that have been largely exempt from the global trend towards constitutionalism.[3] This case study supports the argument that this Nordic exceptionalism came about partly as the judicial safeguarding of constitutional boundaries became politically suspect during an early stage of welfare state expansion.[4]

The literature on the development of judicial review in Norway has extensively discussed the question at what point in the 19th century judicial review was actually first introduced, and why. This question arises because until 2014/2015, an explicit

2. Gregory M. Luebbert, *Liberalism, Fascism, or Social Democracy: Social Classes and the Political Origins of Regimes in Interwar Europe* (Oxford, 1991), 2.

3. Hirschl, "Nordic Counternarrative."

4. For an overview of explanations, see Føllesdal and Wind, "Nordic Reluctance towards Judicial Review under Siege," 136–40.

constitutional mandate for the exercise of judicial review did not exist.[5] As in the U.S., the Supreme Court began to exercise judicial review in the 19th century in an act of self-empowerment.[6] Most prominently the historian Jens A. Seip argued that this self-empowerment occurred in response to the introduction of parliamentarism in 1884 – in Seip's words, judicial review was a "spanner deliberately thrown in the works of democracy, behind the back of Parliament, by the dethroned high state officials."[7] This view has been rejected by authors who argue that judicial review had already been introduced earlier, at the latest by the 1860s.[8]

The less extensive literature on the history of judicial review in the first half of the 20th century has largely focused on explaining its growing incidence due to the increase in legislative activity and state intervention in the economy during the course of economic modernization, World War I and economic crisis.[9] Less weight has been given to the emergence of a stricter interpretation of economic rights by the Supreme Court and efforts to compensate for the disappearance of the royal veto at the turn of the century,[10] as well as to the influence of the U.S. Supreme Court on the jurisprudence of the Norwegian Supreme Court.[11] The ensuing efforts to abolish or rein in judicial review have been attributed to the dissatisfaction of Liberals and Labour with the risks to reformist policies posed by the protection of economic rights through judicial review,[12]

5. Kierulf, *Judicial Review*, 36.

6. See ibid., 63–69.

7. Jens Arup Seip, "Den norske Høyesterett som politisk organ," *Lov og rett*, 1965, 2; as quoted and translated in Kierulf, *Judicial Review*, 120; see also Torstein Eckhoff, "Høyesterett som grunnlovens vokter," in *Makt og motiv: Et festskrift til Jens Arup Seip*, ed. Ottar Dahl et al. (Oslo, 1975), 182–207.

8. Johs. Andenæs, "Høyesterett som politisk organ," *Lov og rett*, 1965, 22–43; Rune Slagstad, "Prøvingsretten i det norske system," *Nytt Norsk Tidsskrift* 6, no. 4 (1989): 333–56; Eivind Smith, *Høyesterett og folkestyret: prøvingsretten overfor lover* (Oslo, 1993), 117–59; Holmøyvik, "Årsaker," 738–40; Rune Slagstad, *Rettens ironi*, 3rd ed. (Oslo, 2015), 358–61.

9. Erling Sandmo, *Siste ord: Høgsterett i norsk historie* 1814–1965, vol. 2, *1905–1965* (Oslo, 2005), 114, 165; Smith, *Høyesterett og folkestyret*, 187–88; Finn Hiorthøy, "Domstolene og Forfatningsutviklingen," in *Den dømmende makt: domstolene og rettsutviklingen 1814-1964*, by Gunnar Brun Nissen, Finn Hiorthøy, and Karsten Gaarder, ed. Den Norske dommerforening (Oslo, 1967), 127; Benedikte Moltumyr Høgberg, "Hvordan samfunnet har påvirket tolkningen av Grunnloven §§ 97 og 105," in *Tolkingar av Grunnlova: om forfatningsutviklinga 1814–2014*, ed. Eirik Holmøyvik (Oslo, 2013), 379.

10. Eckhoff, "Høyesterett," 194–95, 203.

11. Moltumyr Høgberg, "Hvordan samfunnet har påvirket tolkningen," 378.

12. Kierulf, *Judicial Review*, 14, 106; Jens Arup Seip, "Den norske høyesterett som politisk organ," in *Tanke og handling i norsk historie: artikler og avhandlinger* (Oslo, 1968), 101; Hiorthøy, "Domstolene og Forfatningsutviklingen," 154.

as well as to long-running Liberal efforts to democratize the judiciary and an attachment to ideas of popular sovereignty on the left.[13] The end of the conflict over judicial review has been explained with reference to the rise of Labour as a political challenger to the parties further to the right,[14] but also to a more moderate exercise of judicial review,[15] itself considered the product of various factors, including ideational shifts within the judiciary,[16] changes to the Supreme Court's procedure,[17] and the appointment of progressive justices.[18]

The following account is based on this secondary literature,[19] as well as on several primary sources. Press articles on judicial review cases, collected in an extensive search of digitized newspapers,[20] provide observations about the salience of these cases and on political actors' expectations towards and reactions to them. Many newspapers of the period had strong ties to specific political parties. The stance these newspapers took can therefore be assumed to correlate not perfectly, but strongly with the stance of the parties they were close to. The second major source are parliamentary documents – both committee reports and plenary minutes – primarily concerning the proposals to abolish judicial review and related constitutional provisions, but also general policy debates in which the issue of judicial review came up. The Supreme Court's judgments are an important source, too. Apart from the newspaper articles, most of these sources have already been used in the secondary literature. Additionally, I use a few archival documents, mainly from the Ministry of Justice, preserved in the Norwegian National Archives. These allow me primarily to provide observations on the perceived political risks of judicial review as expressed in private.

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13. Seip, "Jus og politikk," 134.

14. Seip, "Den norske høyesterett," 104.

15. Sandmo, *Siste ord*, 2:22; Seip, "Jus og politikk," 135–36.

16. Smith, *Høyesterett og folkestyret*, 190; Seip, "Den norske høyesterett," 101.

17. Sandmo, *Siste ord*, 2:52; Seip, "Den norske høyesterett," 101.

18. Seip, "Den norske høyesterett," 101; Eckhoff, "Høyesterett," 205.

19. In particular, Kierulf, *Judicial Review*; Sandmo, *Siste ord*; Eckhoff, "Høyesterett"; Seip, "Den norske høyesterett"; Seip, "Jus og politikk"; Smith, *Høyesterett og folkestyret*.

20. Primarily a search for articles including the terms Høiester*, Høyester* and Høgster* in the newspaper collection of the National Library for the 1909–1940 period, as well as other search terms for specific periods.

Since Norway was neutral during World War I and did not experience a break with its past regime afterwards, the beginning of the inter-war period is not as clearly marked as in Austria and Germany. While direct efforts to abolish or weaken judicial review were only made from 1917 onwards, the conflict over judicial review already began in the first decade of the 20th century. The following account therefore includes some developments prior to the inter-war period.

The chapter is structured as follows: I discuss the extent of judicial review during the inter-war period, provide some context on the Supreme Court and consider whether its judicial review practice can entirely be explained with partisan effects – an alternative explanation to my argument, for which the constitutional norms safeguarded by judicial review should matter (2.). Subsequently, I give an overview of Liberals' and Labour's efforts to abolish judicial review and show that insurance theory's logic of political competition cannot explain these efforts (3.). These efforts are traced back to the Supreme Court's practice of judicial review and the risks that its exclusive focus on economic rights posed to left-wing policies (4.). I discuss why Liberals ended their campaign against judicial review in the late 1920s (5.), but Labour continued to oppose judicial review until the mid-1930s and only then stopped its efforts (6.). As for further alternative explanations, I discuss the influence of Labour's and Liberals' ideological beliefs and the deterrent effect of the U.S. experience of judicial review (7.), before concluding (8.).

3.2 The Norwegian Supreme Court and Inter-War Judicial Review

The Norwegian courts, above all the Supreme Court, exercised judicial review without an explicit constitutional mandate to do so during the period studied here. The text of the constitution therefore cannot tell us when judicial review was actually part of the political system (which, of course, it never indicates precisely anyway). This section therefore assesses when and to what extent the Supreme Court actually exercised judicial review during the inter-war period in a politically relevant way. I also show that this practice was confined to safeguarding economic rights. Additionally, I provide some background information on the Court and discuss whether its decisions – and hence the political costs it created – were entirely due to partisan effects. This would be an alternative explanation to the account presented here, which relies on the idea that the legal norms safeguarded by judicial review, and not only a partisan slant of the judicial bench, make a difference to the political costs it generates.

Judicial review in Norway has been exercised in a diffuse way, that is, by all courts.[21] Nevertheless, the inter-war conflict over judicial review essentially concerned only the decisions of the Norwegian Supreme Court (*Norges Høyesterett*). While the Supreme Court, as all other courts, cannot annul a statute, but can only decide not to apply a provision it found unconstitutional in the case at hand (i. e., *inter partes*), the precedential effect of its decisions makes a statutory provision it found unconstitutional difficult to enforce.[22] During the period under study, cases before the Court were heard by one of two divisions, each seven justices strong, until the number was reduced to a minimum of five justices per division in 1938.[23] In principle, justices were randomly allocated to cases.[24] The appointment of justices was controlled by the executive, especially due to the practice of appointing "extraordinary justices" with a limited

21. Kierulf, *Judicial Review*, 36.

22. Ibid., 37.

23. Sandmo, *Siste ord*, 2:23, 34.

24. See Kierulf, *Judicial Review*, 30; Anine Kierulf and Rune Slagstad, "Høyesteretts dommere," in *Lov, sannhet, rett: Norges Høyesterett 200 år*, ed. Tore Schei, Jens Edvin A. Skoghøy, and Toril M. Øie (Oslo, 2015), 73; Anders Bøhn, *Domstolloven: kommentarutgave* (Oslo, 2000), 32–33.

period of tenure.[25] In April 1938, the Court counted 20 justices, including the chief justice, 18 permanent justices, as well as one extraordinary justice.[26]

The period between ca. 1909 and the early 1930s was the heyday of judicial review in Norway.[27] Yet, absent a dedicated procedure of judicial review, there is no official list of judicial review cases decided by the Supreme Court. Case lists can be found in several works by legal scholars and historians, but the inclusion criteria vary. Moreover, even among cases that arguably count as judicial review cases, the intensity of review varies widely. In some judgments, the constitutionality of a statutory provision was the most important issue, discussed over several pages; in others, it was a peripheral question, dealt with in a single sentence. For a legal history of judicial review, all these cases may matter; for a study of political conflict over judicial review, only politically salient cases are relevant.

To establish the extent of politically salient judicial review, I have checked for all cases mentioned in at least one of several scholarly works on the topic[28] whether they were reported on in either *Aftenposten*, the Conservative newspaper of record, or *Arbeiderbladet*, the most important Labour-affiliated paper (called *Social-Demokraten* until 1923) within four days after the judgment. The period for which these data were collected extends from January 1, 1917, to April 9, 1940, the beginning of the German occupation. Importantly, cases were only included if the press report at least mentioned that the constitutionality of a statutory provision was an aspect of the decision, since cases that were not identified as judicial review cases could hardly matter to the political debate.

As shown in Table 3.1 below, this approach yields 17 decisions, with the first in March 1918 and the last in February 1938. In six of these decisions statutory provisions were set aside. In 1931, a statutory provision was set aside in a politically salient case – as defined above – for the last time during the inter-war period. In essence, judicial

25. See Sandmo, *Siste ord*, 2:34–36; on the “extraordinary justices,” see also Kierulf, *Judicial Review*, 83–84.

26. “Innst. S. nr. 193. Instilling fra utenriks- og konstitusjonskomiteen angående forslag til forandring av grunnlovens §§ 88,” 1938, 533.

27. Kierulf, *Judicial Review*, 77; Sandmo, *Siste ord*, 2:114–15.

28. Hiorthøy, “Domstolene og Forfatningsutviklingen”; Eckhoff, “Høyesterett”; Smith, *Høyesterett og folkestyret*; Kierulf, *Judicial Review*.

review occurred regularly in politically salient cases – at a rate of about one case every 16 months in the entire period – and the Supreme Court also regularly set aside statutory provisions. However, eight of the judgments were rendered in the period between 1918 and 1923 alone. As the table also shows, and as will be discussed in further detail below, two provisions – the ban on retroactive legislation (section 97 of the constitution) and the right to property (section 105) – were the constitutional yardsticks applied in almost all these cases.

An important preliminary question is whether there were strong partisan effects on the Court, and whether the costs of judicial review therefore were, at the point when a decision was taken, entirely the product of the justices' individual political attitudes and were unrelated to the prevailing interpretations of constitutional law in scholarship and the Court's case law. As the Labour politician Ole Colbjørnsen claimed in parliament in 1937, what determined the political ramifications of judicial review were not so much constitutional provisions, but "to what degree it is modern, socially and radically oriented people who sit on the country's Supreme Court."[29] Colbjørnsen can hardly have believed this entirely himself, since he said it in a debate on a Labour motion to abolish the constitutional ban on retroactive legislation – hence, Labour must have believed that legal norms mattered.

29. Stortinget, February 12, 1937, St. forh. 1937, 58.

Table 3.1. Cases of Judicial Review by the Supreme Court Covered in Aftenposten or Social-Demokraten/Arbeiderbladet, January 1, 1917 – April 9, 1940, in Which the Problem of Constitutionality was Mentioned in the Press Reports

Date/Decision	**Policy Field**	**Statute Provisions of Which Were Reviewed**	**Yardstick of Review**	**Result**	**Votes**
March 12, 1918 – Rt. 1918 I s. 403 *Waterfall Case/Great Concession Case*	Industrial policy	Act of September 18, 1909 (Concession Act)	Section 105 (right to property)	upheld	4:3
April 30, 1918 – Rt. 1918 I s. 497	Rent regulation	Act of May 10, 1916	Section 97 (ban on retroactive legislation)	upheld	5:2
September 28, 1918 – Rt. 1918 II s. 47 *Opstad*	Agriculture / land policy	Act of July 16, 1907	Section 97	set aside	4:3
February 26, 1919 – Rt. 1919 s. 462	Alcohol regulation	Act of August 18, 1914	Sections 97, 105	upheld	4:3
May 28, 1919 – Rt. 1919, s. 742	Rent regulation	Act of May 10, 1916	Section 97	upheld	4:3
July 21, 1922 – Rt. 1922 s. 624 *Vauvert*	Alcohol regulation	Act of June 7, 1917	Sections 97, 105	upheld	8:0
May 8, 1923 – Rt. 1924 s. 12 *Stavanger*	Tax	Act Nr. 2 of May 3, 1918	Section 97	set aside	4:3
November 21, 1923 – Rt. 1924 s. 18	Tax	Act Nr. 2 of May 3, 1918	Section 97	upheld	4:3
June 30, 1925 – Rt. 1925 s. 588	Tax	Act Nr. 1 of May 3, 1918	Section 97	upheld	13:7
October 14, 1925 – Rt. 1925 s. 1014	Wartime measures / price controls	Act of August 18, 1914	Section 105	set aside	4:3
November 15, 1927 – Rt. 1927 s. 1057	Agriculture	Act of July 23, 1920	Section 97	set aside	17:4
December 11, 1930 – Rt. 1930 s. 1408	Agriculture	Act of July 23, 1920	Section 97	set aside	12:9
September 18, 1931 – Rt. 1931 s. 865 *Moe (Odelsrett)*	Agriculture / land policy	Act of June 26, 1929	Sections 97, 105	set aside	19:2
November 10, 1933 – Rt. 1933 s. 1041 *Milk Case*	Agriculture	Act of June 6, 1930 with amendments of June 24, 1931	Sections 105, 75a	upheld	7:0
November 3, 1934 – Rt. 1934 s. 997	Urban development	Act of February 22, 1924	Section 105	upheld	21:0
November 19, 1935 – Rt. 1935 s. 958	Tax	Storting decision of June 29, 1932[30]	Section 75a	upheld	19:0
February 1, 1938 – Rt. 1938 s. 72	Criminal law	Penal Code in the version of February 22, 1929	Section 97	upheld	7:0

30. Strictly speaking, this is not a case in which a statute is reviewed, but an annual resolution of parliament setting taxes.

Partisan effects surely existed to some extent, but the patterns of behaviour on the bench suggest that the Court's decisions cannot entirely be explained with attitudinal factors. While the Court split in many cases and more or less deferential justices can be identified, the justices sometimes defied expectations one might form based on their political leanings.[31] For example, justice Karl F. Dahl, an active Labour Party member and a critic of judicial review off the bench, sometimes voted to set aside statutory provisions, in one case explicitly with the justification that he considered himself bound by precedent.[32] This kind of behaviour suggests some degree of autonomy of judicial decision-making.

If there were pronounced partisan effects on judicial decision-making – and assuming that politicians knew this – then we should also see partisan effects on judicial appointments. Such effects probably existed to some extent.[33] Yet, they do not seem strong. Strikingly, many justices had obvious party-political affiliations and had held political office at some point. A prominent example is the Liberal Paal Berg, chief justice between 1929 and 1946, who had also served as minister of social affairs and justice.[34] Despite such often overt political ties, judicial appointments were hardly contentious. Admittedly, appointments to the Supreme Court were sometimes met with criticism. In 1909, when Karenus Thinn was appointed chief justice, conservative newspapers complained that Thinn had been preferred over more qualified candidates thanks to his liberal political views and that he was too lenient a judge – "he hates

31. Different views on attitudinal effects on the Supreme Court can be found in the legal history literature. More sceptical are Kierulf and Slagstad, "Høyesteretts dommere," 74; also, with the exception of the 1918 Waterfall Case, Kierulf, *Judicial Review*, 83. Cautious Smith, *Høyesterett og folkestyret*, 185. Less sceptical is Eckhoff, "Høyesterett," 205. The quantitative evidence for judge effects at the time is limited. On the basis of merely three non-unanimous plenary decisions pitting a private party against the state between 1926 and 1934, only an age effect is found by Gunnar Grendstad, William R. Shaffer, and Eric N. Waltenburg, *Policy Making in an Independent Judiciary: The Norwegian Supreme Court* (Colchester, 2015), 180.

32. Judgment of December 11, 1930 – Rt. 1930 s. 1408. See also judgment of September 18, 1931 – Rt. 1931 s. 865. On Dahl, see "Karl Frimann Dahl," in *Store norske leksikon*, 2020, http://snl.no/Karl_Frimann_Dahl.

33. Appointments to the Supreme Court were "very rarely" politically motivated in the view of Sandmo, *Siste ord*, 2:37. With the claim that Liberals in the early 20th century engaged in "appointment politics," Seip, "Den norske høyesterett," 101. Deeming this possible also Sandmo, *Siste ord*, 2:37. More cautiously Andenæs, "Høyesterett," 26–27; Anine Kierulf and Rune Slagstad, "Historikeres Fortellinger Om Juss (Historians' Tales of Law)," 2012, 12f., https://papers.ssrn.com/abstract=2182746.

34. Peter Lødrup, "Paal Berg," in *Norsk biografisk leksikon*, 2009, http://nbl.snl.no/Paal_Berg.

crime, but loves criminals," the conservative newspaper *Morgenbladet* wrote.[35] The appointment of Johan Castberg, a prominent Liberal social reformer and a fierce critic of judicial review, as a "permanent extraordinary" justice in 1924 raised eyebrows in the conservative press, too.[36] But overall, appointments to the Court were a non-issue. Had they been an important instrument of influencing the Court's jurisprudence, they should have attracted more controversy.

35. "Den overste Dommer," *Morgenbladet*, January 19, 1909, evening edition, 1; see also "Justitiarius i Høiesteret," *Aftenposten*, January 19, 1909, evening edition, 1.

36. "Storting og høiesteret," *Morgenbladet*, November 6, 1925, 4.

3.3 Opposition to Judicial Review Despite Political Competition

The insurance theory of judicial review holds that the probability of adopting and sustaining judicial review increases with the electoral competitiveness of the political system. From this perspective, inter-war Norway should have provided favourable circumstances to sustain judicial review. Yet, as this section shows, the conflict over judicial review in inter-war Norway presents a puzzle that insurance theory alone cannot resolve. The political system was highly competitive, but, contrary to the expectation of insurance theory, political competition failed to sustain political support for judicial review. In the following, I provide some background information on the political system, before giving an overview of Liberals' and Labour's long-running anti-judicial review campaigns, including no less than nine – unsuccessful – motions to amend the constitution, with the first motion put forward in December 1917 and the last parliamentary vote on a motion in February 1937.

Among the countries with an early practice of judicial review, Norway is rather unique since it has always been a unitary state. Since the establishment of parliamentarism in the late 19th century, the horizontal fragmentation of government powers has been low, too. Although technically bicameral, seat shares in both chambers of parliament (the *Odelsting* and the *Lagting*) were identical.[37] Since 1921, parliament has been elected under proportional representation rules.[38] However, the (inter-war) political system came with two features that are considered favourable to the existence of judicial review. First, the high degree of entrenchment of the constitution: In order to amend the constitution, an amendment introduced in a given electoral period has to be passed by a 2/3-majority of parliament *after* the following general elections.[39] Second, the high competitiveness of the political system: Eleven different minority governments came and went between June 1920 and March 1935. Four of these were formed by the Liberal Party (*Venstre*), four by a coalition of the Conservative Party (*Høyre*) and the more business-friendly Free-Minded Liberals (*Frisinnede Venstre*), two by the Farmers'

37. James A. Storing, "Unique Features of the Norwegian Storting," *The Western Political Quarterly* 16, no. 1 (1963): 161.

38. Ole T. Berg, "forholdstallsvalg," in *Store norske leksikon*, February 21, 2019, http://snl.no/forholdstallsvalg.

39. Kierulf, *Judicial Review*, 77–78.

Party (*Bondepartiet*) and one, for a period of 18 days in 1928, by Labour (*Arbeiderpartiet*).[40]

The conflict over judicial review follows the opposite trajectory of what insurance theory predicts. Between January 1913 and June 1920, Liberals, led by Prime Minister Gunnar Knudsen, were in government without interruption. Until 1918, Knudsen led a majority government. It was only after the Liberal seven-year reign had ended that a Liberal MP first put forward an amendment to ban judicial review in December 1920 (see Table 3.2 for an overview of all proposed amendments). Insurance theory (as well as Hirschl's hegemonic preservation theory) would predict Liberal opposition to judicial review during their hegemonic period, and increasing support for judicial review as their power began to fade.

The trajectory of Labour's anti-judicial review campaign, with the first amendment put forward in December 1917, and the last amendment in January 1936, is counter-intuitive, too. Labour MPs proposed seven of eight amendments to abolish judicial review or the constitutional provisions it safeguarded while Labour was in opposition. Once Labour had formed a lasting government in March 1935, Labour introduced only one further amendment that can be considered aimed at weakening judicial review, namely an amendment to repeal the ban on retroactive legislation in January 1936. Neither before the end of the Norwegian inter-war period brought about by the German occupation in April 1940, nor at any other point during the three decades of Labour's hegemonic rule did Labour attempt to abolish judicial review again. Again, insurance theory predicts the opposite trajectory, namely Labour support for judicial review during its opposition period, and rejection as it established its hegemony.

40. It may seem unusual to subsume the Liberals under the label "left," as I do in this chapter. The Liberals were, since their foundation in 1884, a broad coalition of different groups that suffered several splits, especially along the urban-rural cleavage. See Stein Rokkan, "Geography, Religion, and Social Class: Crosscutting Cleavages in Norwegian Politics," in *Party Systems and Voter Alignments: Cross-National Perspectives*, ed. Seymour M. Lipset and Stein Rokkan (New York, 1967), 367–444; Jørn Y. Leiphart and Lars Svåsand, "The Norwegian Liberal Party: From Political Pioneer to Political Footnote," in *Liberal Parties in Western Europe*, ed. Emil J. Kirchner (Cambridge, UK, 1988), 304–25. In this study, I use the term "Liberals" so as to include their socially most progressive offshoot, the Labour Democrats. In any case, during the period under study, only Labour was overall more favourable towards state intervention, esp. redistribution, than the Liberals. Since I use the left-right label as a shorthand for the redistributive dimension, this places the Liberals to the left of Conservatives, the Free-Minded Liberals and the Farmers' Party.

Two types of amendments can be distinguished: amendments to include an explicit ban of judicial review into the constitution, and amendments to remove or modify the constitutional right to property (section 105 of the constitution) or the ban on retroactive legislation (section 97), i. e., to neutralize the constitutional yardsticks of most judicial review cases.[41] All in all, nine amendments were put forward. Socialists put forward amendments both of the first and second type between December 1917 and January 1936, whereas Liberals introduced an anti-judicial review amendment for the first time in December 1920, and for the last time already in July 1926. As Table 3.2 shows, the amendments were put forward by – usually several – individual MPs. Yet, this does not mean that support for these motions was limited to only those members who had introduced them.

Table 3.2. Constitutional Amendments to Remove or Curtail the Scope of Judicial Review, 1917–1940

Amendment	**Proposed by**	**Introduced**	**Plenary Vote**
Abolish ban on retroactive legislation	Haakon Finstad (Ap), Christopher Hornsrud (Ap), Magnus Nilssen (Ap)	Dec 1917[42]	Nov 1920[43]
Ban judicial review of statutes and constitutional amendments, restrict scope of ban on retroactive legislation, abolish right to property or increase legislative discretion on compensation for expropriation	Fridtjov Hegge (V), Ludvig Enge (Ap)	Dec 1920[44]	Oct 1923[45]
Abolish ban on retroactive legislation	Christopher Hornsrud (Ap)	Dec 1920[46]	Oct 1923[47]

41. At the same time, there was also a related discussion on the constitutional amendment clause – section 112 of the constitution – which bans amendments contradicting its principles and spirit. This discussion is left aside here. See Kierulf, *Judicial Review*, 77f.

42. “Dokument nr. 57. Grundlovsforslag, fremsat paa fem og sekstiende og seks og sekstiende ordentlige Storting,” 1917, 13.

43. Stortinget, November 23, 1920, St. forh. 1920, 3740.

44. “Dokument nr. 35. Grunnlovforslag, fremsatt på ni og sekstiende ordentlige Storting,” 1920, 77f.

45. Stortinget, October 17, 1923, St. forh. 1923, 3228f.

46. “Dokument nr. 35 (1920),” 78.

47. Stortinget, October 17, 1923, St. forh. 1923, 3229.

Ban judicial review of the constitutionality of constitutional amendments, statutes and other decisions of parliament	Nils Skaar (V), Hans Aarstad (V), Ole Mjelde (V), Gunnuf Eiesland (V), Johs. Okkenhaug (V)	Dec 1923[48]	Jun 1926[49]
Abolish ban on retroactive legislation	Christopher Hornsrud (Ap)	Dec 1923[50]	Jul 1925[51]
Ban judicial review of the constitutionality of constitutional amendments, statutes and other decisions of parliament	Johan Castberg (Ad), Hans Aarstad (V), Ole Mjelde (V), Anders Vassbotn (V), Gunnuf Eiesland (V), Arne Magnussen (SD), Nils Kverneland (B), Alfred Madsen (Ap), Torgeir Anderssen-Rysst (V), Sverre Støstad (K)	Jul 1926[52]	Jun 1929[53]
Ban judicial review of statutes, abolish ban on retroactive legislation, make question of compensation for expropriation subject to legislative discretion	Christopher Hornsrud (Ap), Alfred Madsen (Ap)	Jun 1929[54]	Jan 1932,[55] Jun 1932[56]
Ban judicial review of statutes, restrict the scope of the ban on retroactive legislation, make question of compensation for expropriation subject to legislative discretion	Torvald Haavardstad (Ap), Kornelius Bergsvik (Ap), Børge Olsen-Hagen (Ap)	Jun 1932[57]	Jun 1934[58]
Abolish ban on retroactive legislation	Christopher Hornsrud (Ap), Sverre Støstad (Ap), Anton Alvestad (Ap), Børge Olsen-Hagen (Ap)	Jan 1936[59]	Feb 1937[60]
Ad = Arbeiderdemokratene (Labour Democrats); Ap = Arbeiderpartiet (Labour); B = Bondepartiet (Farmers' Party); K = Norges Kommunistiske Parti (Communists); SD = Norges Socialdemokratiske Arbeiderparti (Social Democratic Labour Party); V = Venstre (Liberals)			

48. "Dokument nr. 19. Grunnlovforslag, fremsatt på to og syttiende ordentlige Storting," 1923, 32f.

49. Stortinget, June 30, 1926, St. forh. 1926, 2530.

50. "Dokument nr. 19 (1923)," 33.

51. Stortinget, July 16, 1925, St. forh. 1925, 2802.

52. "Dokument nr. 20. Grunnlovsforslag, fremsatt på fem og syttiende ordentlige Storting," 1926, 18.

53. Stortinget, June 7, 1929, St. forh. 1929, 1940.

54. "Dokument nr. 14. Grunnlovsforslag, fremsatt på otte og syttiende ordentlige Storting," 1929, 8. Labour MPs had made an identical suggestion also in a parliamentary committee in 1927, see the attachment to "Innst. S. nr. 1. Innstilling fra utenriks- og konstitusjonskomiteen angående spesialkomiteens (av 1927) innstilling om endringer i grunnlov, ansvarlighetslov og riksrettsreglement," 1932, 66.

55. Stortinget, January 15, 1932, St. forh. 1932, 45f. (right to property).

56. Stortinget, June 25, 1932, St. forh. 1932, 2362ff. (judicial review, ban on retroactive legislation).

57. "Dokument nr. 12. Grunnlovsforslag, fremsatt på enogåttiende ordentlige Storting," 1932, 5f.

58. Stortinget, June 5, 1934, St. forh. 1934, 1934ff.

59. "Dokument nr. 23. Grunnlovforslag, fremsatt på fireogåttiende ordentlige Storting," 1935, 46.

60. Stortinget, February 12, 1937, St. forh. 1937, 63.

After the amendments were discussed in parliament's Constitutional Committee, they were put to a vote in plenary. In these plenary votes, Liberals almost never voted for the amendments in question, even if they had been put forward by Liberal MPs.[61] In contrast, Labour usually voted loyally for the amendments put forward by its MPs, although in several years the amendments were unanimously rejected. Yet, unanimous rejection did not mean that all MPs supported judicial review. For instance, in some years, another amendment to the same effect was introduced shortly after the previous one had been unanimously rejected. Instead, unanimous rejection probably avoided the hassle of counting votes on a motion for which there was no majority anyway.

Table 3.3. Number of Seats in Parliament by Party Group and Election Year, 1918–1936[62]

	1918	**1921**	**1924**	**1927**	**1930**	**1933**	**1936**
Arbeiderpartiet (Labour)	18	29	24	59	47	69	70
Norges kommunist. Parti (Communists)	-	-	6	3	-	-	-
Arbeiderdemokratene (Labour Democrats)	3	2	2	1	1	1	-
Norges Socialdem. Arbeiderp. (Social Dem. Labour)	-	8	8	-	-	-	-
Venstre (Liberals)	51	37	34	30	33	24	23
Total left (both socialist and non-socialist)	**72**	**76**	**74**	**93**	**81**	**94**	**93**
Høyre (Conservatives)	40	42	43	29	41	30	36
Senterpartiet (Farmers' Party)	3	17	22	26	25	23	18
Det Frisinnede Venstre (Conservative-Liberals)	10	15	11	2	3	1	-
Kristelig Folkeparti (Christian Democrats)	-	-	-	-	-	1	2
Samfundspartiet (Society Party)	-	-	-	-	-	1	1
Independent	1	-	-	-	-	-	-
Two thirds	**84**	**100**	**100**	**100**	**100**	**100**	**100**
Total	**126**	**150**	**150**	**150**	**150**	**150**	**150**

61. With the exception of the Labour Democrats Johan Castberg and Olav Moe voting for Hornsrud's motion to abolish section 97 in 1925; see Stortinget, July 16, 1925, St. forh. 1925, 2803.

62. Data source: Norsk senter for forskningsdata, "Stortingets sammensetning 1903-1945," accessed April 1, 2019, https://nsd.no/polsys/index.cfm?urlname=storting&lan=&UttakNr=105&MenuItem=N1_1&ChildItem=&State=collapse.

A crucial question is whether the amendments to abolish judicial review and modify or abolish the constitution's contested rights provisions ever had a realistic chance of passing with the required two-thirds majority. It is safe to say that the Liberals, their reformist, but non-socialist "Labour Democrats" offshoot, as well as the Labour Party and its various fragments were the only parliamentary groups who would have ever voted for the amendments. Since the amendment procedure stipulated that amendments could only be voted on in the electoral period *after* their introduction, the question is whether the parties on the left could realistically expect to command two thirds of parliamentary seats in the following electoral period. If this was never a realistic expectation in the first place, one might argue that the anti-judicial review amendments did not reflect a preference for abolishing judicial review, but merely had the purpose of signalling its political costs to the Supreme Court, so as to maintain judicial review, but contain its costs – put differently, if the amendments actually had a chance of succeeding, they would not have been put forward.

As shown in Table 3.3 above, the left parties combined never reached the two-thirds threshold.[63] But since elections were volatile, it was not unrealistic that they would. Especially before the 1921 election – with the uncertainty added by the introduction of proportional representation, as well as after 1933 – a left-wing two-thirds majority did not seem out of reach. Thus, as I argue in the following, the constitutional amendments introduced by Liberals and Labour can be seen as efforts to abolish an institution that was politically costly to these two parties.

63. Emphasizing this Eckhoff, "Høyesterett," 206.

3.4 The Onset of Left-Wing Opposition to Judicial Review

Labour's and Liberal efforts to abolish judicial review or the underlying constitutional provisions ran in parallel during roughly the first decade of the inter-war period.[64] They began at roughly the same time: In December 1917, Labour MPs first introduced a constitutional amendment to abolish the ban on retroactive legislation, the main yardstick of judicial review. At this time, the Liberal government was defending important legislation before the Supreme Court. In this case, the government's attorney argued in vain that the courts did not have the power of judicial review. In December 1920, a Liberal MP first introduced an amendment to abolish judicial review. In this section, I discuss why Liberals and Labour both began efforts to abolish judicial review. In line with my theory, I argue that judicial review was so strongly tied to the protection of a small set of economic rights that it was structurally biased against left parties. The stronger a party favoured state intervention into the economy, the higher was the risk that judicial review would impede the implementation of its policy preferences.

The judgment in the "Waterfall Case" (also called "Great Concession Case") of March 1918 – a case in which the Supreme Court ruled on the constitutionality of a key provision in legislation regulating hydro-electric installations – is widely considered the most important judicial review case before World War II and a crucial moment in the conflict over judicial review.[65] It was with this case that the conflict over judicial review fully erupted. Yet, the Court had already intensified its practice of judicial review from 1909 on and misgivings about it had been widespread on the left already before the Waterfall Case.[66] Some judicial review cases attracted little political controversy – for example, neither *Aftenposten* nor *Social-Demokraten* reported on a 1909 judgment on the power of the legislature to curtail existing logging rights, although the case quickly became seminal in legal debates.[67] Instead, judicial review became contested insofar as it concerned politically contentious issues, such as regulations on the sale of alcohol and rent regulation.

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64. Seip, "Den norske høyesterett," 103.

65. Ibid., 100; Kierulf, *Judicial Review*, 79; Eckhoff, "Høyesterett," 196.

66. See Sandmo, *Siste ord*, 2:117ff.

67. Judgment of May 22, 1909 – Rt. 1909 s. 417 (*Thams*). See Sandmo, *Siste ord*, 2:118–21.

In the decade before 1918, the Supreme Court's most contested decisions concerned alcohol regulation.[68] In some cases, the Court ruled that merchants holding pre-existing vested rights to sell alcohol were exempt from new, stricter legislation on its sale. For example, the Court ruled in 1909 that a beer trader with an old trading privilege was not obliged to observe more limited opening hours – 5 p.m. instead of 10 p.m. – mandated by a municipality.[69] This could make a big difference in the fight against alcoholism, since it meant that beer halls could still stay open after working hours.[70] The Court's case law implied that new legislation on alcohol regulation could not simply void the vested rights; if it did, it would be an expropriation, possibly requiring compensation. The precise extent of these rights was decisive for the costs of a possible expropriation – as the Liberal trade minister Lars Abrahamsen put it in parliament in 1909 with regard to the "Borregaardsrett," a privilege held in the industrial city of Sarpsborg,[71] expropriating this right would only "create incalculable expenses for the state, and this can hardly serve any public interest."[72]

Until the 1920s, alcohol regulation was an important political issue. Since the 19th century, a growing temperance movement called for restrictions or even a ban on the sale of alcohol. In 1905, the movement counted about a tenth of the population among its adherents.[73] The Liberals, but also Labour, were sympathetic to the temperance movement, whereas Conservatives, under the influence of commercial interests, were more critical towards stricter regulation.[74] Hence, the Supreme Court's protection for the vested rights to sell alcohol was unpopular with the left. In 1909, the

68. The following discussion of the alcohol issue is largely based on Eckhoff, "Høyesterett," 188–99; see also Helgadóttir, *American Theories*, 64ff. The Supreme Court decided cases on the alcohol issue as early as 1890, see Eckhoff, "Høyesterett," 189; Smith, *Høyesterett og folkestyret*, 168–69.

69. Judgment of January 30, 1909 – Rt. 1909 s. 156. It has been contested whether this judgment actually implied that the underlying statute was unconstitutional. E. g., see Bredo Morgenstierne, "Høiesterets Adgang til at tilsidesætte Lovbestemmelser som grundlovstridige," *Norsk Retstidende*, 1913, 455; Eckhoff, "Høyesterett," 193; Sandmo, *Siste ord*, 2:117.

70. *Aalesund Socialdemokrat*, as cited in "Høiesteretsdom," *Tidens Krav*, February 5, 1909, 1.

71. Kristian Fredrik Brøgger and Wilhelm Keilhau, *Lov og rett: norsk juridisk og rettsøkonomisk oppslagsbok utgitt i ajour-ført form* (Oslo, 1951), 122.

72. Stortinget, April 24, 1909, St. forh. 1909, 1188.

73. Per Fuglum, *Brennevinsforbudet i Norge* (Trondheim, 1995), 30.

74. See ibid., 51–54, 58–59, 83–88.

newspaper of a temperance organisation saw first, the Supreme Court, and only second, poverty, as the greatest obstacles to stricter alcohol regulation:

> *"It looks as if the Supreme Court, with the powers that have been vested into it in our country, will be a serious danger to all far-reaching social reforms. The question is whether one should not make changes in this regard; otherwise it looks as if the Norwegian Supreme Court will be a sort of miniature upper chamber here at home. It is absurd that the Supreme Court should be able to overturn with its juridical interpretations what parliament has decided."*[75]

The conflict over the vested rights to trade alcohol eventually fizzled out. In 1914, the Court did not do away with the "Borregaardsrett," but curtailed its scope further than its owner would have preferred.[76] As the temperance movement-affiliated newspaper *Vort Arbeide* put it, the judgment was the "biggest victory our cause has achieved since 1895."[77] The matter of the vested rights was finally settled in July 1922, when the Supreme Court unanimously ruled that the owners of an important type of vested rights could not claim compensation for the removal of their rights under a 1917 Act on alcohol regulation.[78]

After parliament had passed this act in 1917, a judgment of the Oslo City Court on a 1916 Act on rent control caught the attention of lawmakers. On October 30, 1917, the City Court ruled that it violated the constitutional ban on retroactive legislation (section 97) if the Act was applied to tenancy agreements entered into before the passage of the Act, forcing landlords to reduce the rent.[79] A month later, the Labour MP Magnus Nilssen asked in parliament what the government made of this judgment. The judgment, Nilssen argued, made it far more difficult to fight the extortionate rents

75. "Aaret 1909," *Vort Arbeide*, December 29, 1909, 1.

76. Judgment of December 9, 1914 – Rt. 1915 s. 209.

77. "Dammen sprængt," *Vort Arbeide*, December 12, 1914, 1.

78. Judgment of July 21, 1922 (*Vauvert*) – Rt. 1922 s. 624. See also Eckhoff, "Høyesterett," 199; Sandmo, *Siste ord*, 2:147–49.

79. See the City Court's judgment included in the later Supreme Court judgment, Rt. 1918 I s. 497.

charged by many landlords and made the "common man" ask: "Can a court in this way defy the legally enacted decisions of the representation of the people?"[80] In his reply, the Liberal Lars Abrahamsen, now Minister of Social Affairs, remarked that judicial review had become a "highly unfortunate" practice.[81] Yet, he did not entirely oppose it. In Abrahamsen's view, the courts should not set aside an unconstitutional statutory provision, but merely grant compensation for the rights violation suffered by the plaintiff.[82] Eventually, the Supreme Court overturned the judgment of the City Court and, in effect, upheld the statutory provision in question with five to two votes in April 1918.[83]

The rent control case was typical for the large majority of judicial review cases of the time. In almost all cases, the plaintiffs – including landlords, merchants, a bank, the owner of a waterfall, but also farmers – went to court to defend their economic interests against state intervention. Some farmers possibly left aside, the plaintiffs were from the upper-middle or middle classes. As Table 3.1 shows, the statutory provisions they challenged mostly concerned market regulation, tax and expropriation measures. Their case against the constitutionality of a statutory provision was usually based on the ban on retroactive legislation, more rarely on the right to property.[84] With regard to the former, the plaintiffs typically argued that their economic interest was rooted in an action undertaken before the statute in question was passed, that they would not have undertaken this action with knowledge of the statute in question, and that the statute could therefore not rightfully touch the economic interest in question.

Invoking the ban on retroactive legislation was particularly attractive because this provision was very versatile. Any tax, ban or regulation necessarily has a temporal

80. Stortinget, November 27, 1917, St. forh. 1917, 2610.

81. Ibid., 2611–2612.

82. Ibid., 2612.

83. Judgment of April 30, 1918 – Rt. 1918 I s. 497.

84. Section 97, the ban on retroactive legislation, stipulates that "No law must be given retroactive effect." Section 105 guarantees the right to property: "If the welfare of the state requires that any person shall surrender their movable or immovable property for the public use, they shall receive full compensation from the Treasury." These are translations of the current version of the Norwegian constitution: "The Constitution, as Laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and Subsequently Amended, Most Recently in May 2018," accessed April 8, 2021, https://stortinget.no/globalassets/pdf/english/constitutionenglish.pdf. Sections 97 and 105 have only undergone minor changes since 1814.

scope. Claiming that a statute had unconstitutional retroactive effect gave the plaintiffs a shot at having the economic burden of a state intervention at least somewhat mitigated, whatever that state intervention was. Moreover, the ban on retroactive legislation was attractive to invoke in court because the boundaries of unconstitutional retroactivity remained unclear, despite efforts to clarify its precise meaning.[85] As the legal scholar Ragnar Knoph wrote in the 1930s, "many judges find themselves on unsafe ground when they approach section 97 of the constitution … even Supreme Court justices can be puzzled about what the provision actually entails."[86] Since nobody invoked the ban on retroactive legislation against, say, a retroactive tax cut, section 97 was in practice a policy-interactive provision, the more costly to policy-makers the more they favoured state interventions into the economy – that is, the further they were to the left.

Besides the ban on retroactive legislation, only one other constitutional provision – the right to property (section 105) – played a significant role as yardstick of judicial review. In quantitative terms, it was less important than the ban on retroactive legislation, with section 105 as the yardstick of review in only seven of the politically salient cases collected in Table 3.1 above. However, the right to property was at the heart of the most important of all inter-war cases, the Waterfall Case of March 1918.[87]

At stake in this case was the concessions policy for the construction of hydro-electric plants at Norway's many waterfalls, a crucial resource for the country's industrialization. What conditions to stipulate for the necessary investments, in particular for foreign capital, was one of the most controversial issues of the time.[88] Conservatives favoured more of a free market approach, whereas Liberals and Labour demanded a stronger role for the state.[89] The 1909 Concession Act stipulated that some – especially foreign – investors required the government's concession in order to

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85. See Smith, *Høyesterett og folkestyret*, 185.

86. Ragnar Knoph, *Rettslige Standarder* (Oslo, 1939), 64.

87. Judgment of March 12, 1918 – Rt. 1918 I s. 403. The Waterfall case has been extensively discussed. For example, see Kierulf, *Judicial Review*, 79–85; Helgadóttir, *American Theories*, 56ff.; Sandmo, *Siste ord*, 2:131–38; in a wider context Smith, *Høyesterett og folkestyret*, 185–87; Seip, "Den norske høyesterett," 100–102; Eckhoff, "Høyesterett," 196–97; Slagstad, *Rettens ironi*, 362–64.

88. Seip, "Den norske høyesterett," 100.

89. Francis Sejersted, *The Age of Social Democracy: Norway and Sweden in the Twentieth Century* (Princeton, 2011), 27–30.

acquire a waterfall.[90] Additionally, the Liberal government under Prime Minister Gunnar Knudsen included a so-called "right of reversion" into the 1909 Concessions Act:[91] The waterfalls and the hydroelectric plants would become state property, without compensation for the owner, 60 to 80 years after the concession to exploit the resource had been granted.[92]

For almost a decade, the constitutionality of the right to reversion was the subject of a fierce debate. Conservatives usually claimed that it was an unconstitutional expropriation, whereas Liberals denied this.[93] Eventually, the owner of a waterfall who wanted to sell it to an investor went to court. Since investors would lose their investment to the state at some point, the right of reversion had ruined the price he could achieve and was hence an unconstitutional expropriation, the plaintiff argued.[94] He lost the case before the lower court in 1913; almost four years later, his appeal was heard by the Supreme Court. Its ruling was eagerly anticipated. The possibility that a judicial challenge might upend their "signature policy"[95] alarmed Liberals. "It should be difficult," the Liberal newspaper *Dagbladet* wrote on the eve of the judgment, "to find anything more important for our country among the many cases that the Supreme Court has dealt with in the more than 100 years since it has been established."[96]

The Court had to decide two questions: Whether the right of reversion was unconstitutional, but also, more fundamentally, whether the courts had the power of judicial review at all. The government's attorney, Annæus Schjødt, argued that judicial review did not have any constitutional basis.[97] This made the Waterfall Case the first Liberal attempt to abolish judicial review – not through a constitutional amendment, but in the same way that it had been introduced into Norwegian constitutional law in the first place, that is, via the jurisprudence of the Supreme Court.

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90. Act of 18 September 1909 (Nr. 4), §2. See also Kierulf, *Judicial Review*, 80.

91. Kierulf, *Judicial Review*, 80.

92. Act of 18 September 1909 (Nr. 4), §2, Nr. 10. See also Kierulf, *Judicial Review*, 80.

93. See Kierulf, *Judicial Review*, 82.

94. Rt. 1918 I s. 403 (403–405).

95. Eckhoff, "Høyesterett," 197.

96. "Koncessionssaken i høiesteret," *Dagbladet*, March 11, 1918, 4.

97. Kierulf, *Judicial Review*, 80.

Yet, the Court was unwilling to curb its own powers. The justices unanimously affirmed that the courts had the power of judicial review.[98] However, some justices emphasized that judicial review had to be exercised with caution.[99] For example, the Liberal Paal Berg, later the Court's chief justice, argued that the courts should only set aside statutes that "obviously or undoubtedly" violated the constitution.[100] The Liberal Chief Justice Thinn even qualified his support for judicial review by adding that he personally preferred it if the courts did not dispose of this power.[101] Other justices, mostly those who had considered the right of reversion unconstitutional, endorsed the power of judicial review without reservation. Putting the role of judicial review into the contemporary political context, Justice Mejdell wrote that "the danger of transgressions of the public powers against private citizens is not much smaller in a society where democracy rules under the symbol of popular sovereignty than in a society where, as in our case in the period before 1814, bureaucracy governs under the symbol of absolutism."[102]

Although the right of reversion had passed the Court's scrutiny, the prevailing perception in the Liberal press was not one of victory, but of shock over a narrow escape. "With apprehension the public thinks about how close the victory was, how easily it can happen in our legal order that things go differently next time, how this question can come up again at any time both in this and other fields, and how the work of social reform can be hampered by the Supreme Court," the Liberal *Dagbladet* commented.[103] Given these risks, some authors in the press therefore called for judicial

98. Ibid.

99. For a detailed discussion of the different positions on judicial review expressed in this case, see ibid., 80–82.

100. Rt. 1918 I s. 403 (424). Quotation translated in Kierulf, *Judicial Review*, 81. In an interesting parallel, it was also discussed during the drafting of the Austrian constitution in 1920 whether the Constitutional Court should only assess if a statute was "obviously" unconstitutional, see Theo Öhlinger, "The Genesis of the Austrian Model of Constitutional Review of Legislation," *Ratio Juris* 16, no. 2 (2003): 218.

101. Rt. 1918 I s. 403 (426). See also Kierulf, *Judicial Review*, 80.

102. Rt 1918 I s. 403 (410).

103. "Høiesteret og folk," *Dagbladet*, March 13, 1918, 4. The Waterfall Case's creation of a "feeling of insecurity" among Liberals is later also emphasized by the liberal legal scholar Jon Skeie, *Den Norske Civilproces*, vol. 1 (Oslo, 1929), 114.

review to be abolished.[104] Others suggested to wait and see whether the Court would insist on the power of judicial review in future decisions.[105]

Was the Liberal anxiety, as it has later been argued, much ado about nothing? After all, not the entire concession legislation, but only the right of reversion was at stake and the claim for compensation could be considered modest.[106] Yet, Liberals tied immense hopes to the right of reversion. “Once the hydropower, and hence also the generated electricity with power, heat and light, finally becomes the people’s collective property through the right of reversion, the Norwegian people will enjoy conditions of material fortune as hardly any other people on earth,”[107] the Liberal *Dagbladet* would write in an obituary for Prime Minister Knudsen more than ten years later.

Thus, while the outcome of the case had been in favour of the Liberal policy position and the decision can be read in hindsight as a “definitive indication by the Supreme Court that the era of economic liberalism had come to an end,”[108] Liberals rather saw the Waterfall Case as an indication of the future risks of judicial review. This risk perception must have been even stronger if, as it has been alleged, the Liberal Chief Justice Thinn had manipulated the supposedly random selection of justices deciding the case in order to save the right to reversion.[109] Yet, whether Thinn really tampered with the composition of the bench remains an open question.[110]

As the Waterfall Case illustrates, judicial review on the basis of the right to property was generally as disadvantageous to the left as judicial review on the basis of the ban on retroactive legislation. The potential of the right to property to be a nuisance to policy-makers increased the more they sought to interfere with the existing

104. “Høiesteret og folk,” 4; “Amerikansk og europæisk forfatningsret,” *Norske Intelligenssedler*, March 16, 1918, 3.

105. Ole Solnørdal, “Høiesteret Og Lovgivningsmagten,” *Dagbladet*, March 16, 1918, 4.

106. Eckhoff, “Høyesterett,” 197.

107. “Ved Gunnar Knudsens død,” *Dagbladet*, December 3, 1928, 7.

108. Rune Slagstad, *De nasjonale strateger* (Oslo, 1998), 138; similarly Slagstad, *Rettens ironi*, 363–64; Eckhoff, “Høyesterett,” 197; Malcolm Langford, “The Norwegian Welfare State and Social Rights,” in *Social Rights in the Welfare State: Origins and Transformations, ed. Toomas Kotkas and Kenneth Veitch* (London, 2017), 39.

109. See Kierulf, *Judicial Review*, 83–85.

110. Andenæs, “Høyesterett,” 31–32 rejects the allegation; Kierulf, *Judicial Review*, 85, leaves the question open.

distribution of assets, thus, again, the further to the left they were situated. However, judicial review cases on the basis of the right to property were much rarer than cases on the basis of the ban on retroactive legislation.[111] It was harder to claim successfully that a policy constituted an expropriation and therefore required compensation than to claim that it had retroactive effect in some regard. Moreover, all that plaintiffs could generally achieve with a challenge on the basis of the right to property was compensation, but they could not have the statutory provision in question set aside as such. Yet, judicial review on the basis of the ban on retroactive legislation sometimes also only resulted in an obligation for the state to compensate for the costs caused by the application of an unconstitutional provision.[112]

While the proceedings in the Waterfall Case were still ongoing, the three Labour MPs Magnus Nilssen, Haakon Finstad and Christopher Hornsrud introduced a constitutional amendment to abolish the ban on retroactive legislation on December 12, 1917.[113] This was the first amendment aimed at curtailing the exercise of judicial review. As discussed above, Nilssen had criticized the Oslo City Court's judgment on rent control in parliament in late November 1917 and had claimed that rent control "is made ineffective on the basis of section 97 of the constitution."[114] It is therefore likely that the row over the rent control issue triggered the Labour proposal. However, in 1917, the debate on alcohol regulation and the judicial protection of the vested rights was also particularly intense, since an act meant to do away with the vested rights to trade alcohol for good was passed in May 1917.[115] As parliament's Constitutional Committee saw it when it dealt with the Labour proposal in 1920,

> "*The essential reason why the question has not been raised earlier, and at the same time the reason why it had to come up in recent times, is obviously the*

111. See Table 3.1 above.

112. See Frede Castberg, *Norges statsforfatning*, vol. 2 (Oslo, 1935), 217–19.

113. "Dokument nr. 57 (1917)," 13.

114. Stortinget, November 27, 1917, St. forh. 1917, 2608.

115. Act of June 7, 1917.

changing view on what pertains to the role of the state on the economic and business fields …

Once one has taken the stance expressed for example in our concession and alcohol legislation, to give some obvious examples, a conflict necessarily has to arise between the interests of the state and the supposedly existing older private rights, and thereby the question how far the legislature can go without an infringement of the rule in section 97 of the constitution."[116]

The Labour proposal was unanimously rejected by the Constitutional Committee and in plenary. However, the proposal did not fail because of a lack of sympathy for it among the Committee's members, in particular the Liberals. Instead, the Committee suggested that the matter should be assessed by legal experts first, since some legal implications of the proposal remained unclear.[117] The Ministry of Justice took up this suggestion and asked two legal scholars to prepare expert opinions on the implications of abolishing the ban on retroactive legislation.[118]

In November 1920, the question of judicial review also came up in a debate on yet another element of concession legislation, this time, concerning the acquisition of farmland. When the MP Wollert Konow, representing the Farmers' Association, referred approvingly to the minority opinion in the Waterfall Case, he prompted the Liberal Gunnar Knudsen, who had stepped down as Prime Minister a few months earlier, to suggest that the question of judicial review be taken "into consideration."[119] Supporting Knudsen, the Labour Democrat Johan Castberg – the mastermind behind the concession legislation – questioned whether "royally appointed civil servants should sit as an über-parliament over the democratically elected national assembly."[120] In December 1920, a

116. "Indst. S. nr. 346. Indstilling fra konstitutionskomiteen angaaende forslag til ophævelse av grundlovens § 97," 1920, 523.

117. Ibid., 524.

118. "Innst. S. LXXIV. Instilling fra konstitusjonskomiteen angående forslag til ophevelse eller forandring av grunnlovens §§ 81, 97, 105 og 112," 1923, 2; on these opinions, see Kierulf, *Judicial Review*, 88–94; Sandmo, *Siste ord*, 2:143–46.

119. Odelstinget, November 10, 1920, Ot. forh. 1920, 811.

120. Ot. forh. 1920, 813.

few weeks after this exchange, and after the Labour amendment of 1917 had been rejected, the Liberal MP and chair of the Constitutional Committee Fridtjov Hegge, as well as the Labour MP Ludvig Enge suggested a comprehensive amendment to ban the judicial review of statutes and constitutional amendments, restrict the scope of the ban on retroactive legislation and abolish the right to property or at least increase legislative discretion on compensation for expropriation.[121] In a separate motion, the Labour MP Christopher Hornsrud proposed, now for the second time, to abolish the ban on retroactive legislation entirely.[122]

It is remarkable that Liberals only supported amendments to abolish judicial review or the underlying rights provisions from late 1920 on, three years later than Labour. But this delay was less important than it seems. According to the procedure for constitutional amendments, these had to be put forward in the first or second parliament after a general election. Thus, in the 1915–1919 electoral period, at the latest in 1917, and then at the earliest in 1919 again. Probably Liberals did not see an urgent need for an anti-judicial review amendment in 1917 for two reasons. First, they were not yet under the impression of the narrow survival of the right of reversion in the Supreme Court in March 1918. Second, they may still have hoped that the Court itself would reject the power of judicial review. In an important expert opinion on the vested rights to trade alcohol, the liberal law professor Jon Skeie had argued in 1916 that there was no constitutional basis to claim the power of judicial review.[123] If this was a defensible position in the first place, it was apparently reasonable to believe that the Supreme Court could follow this approach.[124] Only after the Court had dashed this hope in 1918, did Liberals resort to constitutional amendments to abolish judicial review.

The 1920 proposals were discussed in parliament's Constitutional Committee and in plenary in 1923.[125] After the Committee had elaborated an extensive report

121. "Dokument nr. 35 (1920)," 77.

122. Ibid., 78.

123. "Dokument nr. 1. Ang. ot. prp. nr. 43 for 1916: Ændringer i loven av 17de mai 1904 om salg og sjænkning av brændevin m. v.," 1917, 5; see also Kierulf, *Judicial Review*, 86–88; Sandmo, *Siste ord*, 2:124–26.

124. With a different view Sandmo, *Siste ord*, 2:133; Eckhoff, "Høyesterett," 197.

125. "Innst. S. LXXIV. Instilling Fa Konstitusjonskomiteen Angående Forslag Til Ophevelse Eller Forandring Av Grunnlovens §§ 81, 97, 105 Og 112"; Stortinget, October 17, 1923, St. forh. 1923,

(discussed further below), its majority, including the Conservative and Conservative-Liberal members, but also one of the Liberal members, Arnold Holmboe, voted in favour of retaining judicial review. A second Liberal member, Nils Skaar, as well as the member for the Farmers' Party, were only willing to support the majority's conclusion, but not its reasoning. Only the Labour MPs on the Committee voted both against the majority opinion and its conclusion in favour of judicial review.[126] In plenary, only Labour MPs voted for Hegge's and Enge's 1920 proposal, whereas all other MPs – including all the Liberals present – voted against it.[127] "The Supreme Court shall remain the guardian of Parliament," the Liberal *Dagbladet* sub-titled its report on the vote.[128]

The fact that no Liberal MP voted for the amendment in October 1923 does not mean that all Liberals had made their peace with judicial review. Instead, it can, at least partly, be explained with the futility of voting in favour of a motion that had no majority anyway. Nils Skaar, one of the two Liberal MPs who had only reluctantly supported the majority opinion in the Constitutional Committee, reiterated that he merely had done so because he disagreed with the motion's wording.[129] Two months later, Skaar and four other Liberal MPs (all of whom had voted against the 1920 motions in plenary) introduced another motion to abolish judicial review.[130] Thus, while some Liberals had made their peace with judicial review, others were still unwilling to tolerate it.

Yet, the meagre Liberal support for their own motion both in the Committee and in plenary raises the question how widespread opposition to judicial review actually was among Liberals. Even immediately after the Waterfall case, there were voices within Liberal circles who, although sceptical towards judicial review, opposed abolishing it. For example, the attorney Ole Solnørdal, a prominent member of the temperance movement and a collaborator of the Labour Democrat Johan Castberg,[131] disliked the

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3221–29.

126. "Innst. S. LXXIV (1923)," 7, 15. With regard to the right to property and the ban on retroactive legislation, only the Committee's Labour members were in favour of the proposed amendments, see ibid., 12f.

127. St. forh. 1923, 3221–29.

128. "Stortinget vil ikke forandre grunnloven," *Dagbladet*, October 17, 1923, evening edition, 1.

129. St. forh. 1923, 3228.

130. "Dokument nr. 19 (1923)," 32f.

131. Fuglum, *Brennevinsforbudet i Norge*, 284.

idea that the courts would have to apply a law they considered unconstitutional, but was open to modifying the constitutional rights the courts applied.[132] Kierulf argues that only individual Liberal MPs, but not the entire party supported the campaign against judicial review – "Apart from the proposing representatives and some of the dissenting minorities in the Committees … only representatives from the Labor Party did in fact support abolishment."[133] Unfortunately, there was never a vote on judicial review in which the motion to abolish it actually had a chance of winning, so that there never was a Liberal show of hands. It is therefore difficult to quantify the share of Liberals in favour of abolishing judicial review. However, there is no doubt that opposition to judicial review reached far into the Liberal leadership. As discussed above, Gunnar Knudsen, Prime Minister from 1908 to 1910 and from 1913 to 1920, as well as the prominent Labour Democrat Johan Castberg opposed or were at least highly sceptical of judicial review at some point.

As this section has shown, both Liberals and Labour began efforts to abolish judicial review from 1917 on because it interfered or threatened to interfere with their interventionist policy agendas – for example on issues such as alcohol and rent regulation, and most importantly, the concessions question. In all these cases, statutes were reviewed against the yardstick of the right to property or the ban on retroactive legislation and the closely related vested rights. Judicial review was inextricably linked to safeguarding these policy-interactive provisions and consequently was biased against the left. In contrast to what insurance theory predicts, political competition was therefore not sufficient to create support for judicial review across the entire political spectrum.

132. Ole Solnørdal, "Høiesteret og lovgivningsmagten," *Dagbladet*, March 19, 1918, 4–5.

133. Kierulf, *Judicial Review*, 103.

3.5 The End of the Liberal Campaign Against Judicial Review

While not a single Liberal MP voted for the – futile – motion to abolish judicial review in 1923, at least some Liberals continued their campaign against it. In December 1923, five Liberal MPs put forward a new proposal to ban judicial review.[134] In contrast to the 1920 proposal, the new one did not encompass amendments to the right to property and the ban on retroactive legislation; however, an amendment to the latter effect was proposed by the leading Labour politician Christopher Hornsrud.[135] Parliament unanimously rejected these proposals in July 1925 and June 1926.[136] Yet, this hardly implied consensus, since 10 MPs, including the Labour Democrat Johan Castberg, five Liberals, as well as Social Democrat, Labour, Communist and Farmers' Party MPs introduced another judicial review ban in July 1926.[137] After both the Constitutional Committee and parliament as a whole unanimously rejected this proposal in May and June 1929,[138] only Labour MPs continued to introduce anti-judicial review amendments. Thus, all Liberals had given up their campaign against judicial review by June 1929 at the latest.

Why did Liberals end their campaign against judicial review? From my theoretical perspective, this should have happened either because Liberals' expected costs of judicial review decreased, or because its expected benefits increased. A decrease of expected costs could have been due to a lower propensity of the Supreme Court to interfere with Liberal policies. An increase of expected benefits could have been due to rising fears of a radically interventionist, and possibly authoritarian Labour government. As the historian Jens A. Seip put it, "leaving the interpretation of the constitution to a parliament where the Liberal Party was, if not the majority, at least the centre of gravity, was one thing – another thing was to leave this to a parliament that was more and more packed with people who called themselves socialists."[139] Other

134. "Dokument nr. 19 (1923)," 32f.

135. Ibid., 33.

136. Stortinget, June 30, 1926, St. forh. 1926, 2527–2530.

137. "Dokument nr. 20 (1926)," 18.

138. "Innst. S. nr. 113. Innstilling fra utenriks- og konstitusjonskomiteen angående forslag fra J. Castberg, H. Aarstad m. fl. til forandring i grunnlovens §§ 88, 89, 90 og 91," 1929; Stortinget, June 7, 1929, St. forh. 1929, 1940.

139. Seip, "Høyesterett som politisk organ," 104.

possible explanations for the end of the Liberal anti-judicial review campaign include a sort of small-scale centralization of judicial review in 1926, the rise of a principled rule of law commitment among Liberals, or the desire to demarcate Liberal constitutional politics clearly from Labour's. Due to a lack of evidence, I give no definitive explanation for the end of the Liberal anti-judicial review campaign.

On the cost side of judicial review, Liberals did not suffer a shock of the magnitude of the Waterfall Case in the 1920s. Nevertheless, the Supreme Court continued to inflict costs on Liberals. In May 1923, the Court, with a four-to-three majority, set aside a provision in a 1918 tax act as a violation of the ban on retroactive legislation, since the provision encompassed certain transactions that had occurred before the act was passed.[140] "The Supreme Court stops the tendency of recent times to hollow out section 97 of the Constitution," the Conservative *Aftenposten* noted on its front page,[141] whereas the Liberal *Dagbladet* later complained that the decision was the product of "arch-conservative" legal views.[142] Half a year later, an entirely different set of Supreme Court justices found the provision in question constitutional, again with a four-to-three majority.[143] In June 1925, the Court eventually decided the question in plenary and upheld a similar statutory provision with thirteen to seven votes.[144]

In 1927 and 1930, the Court, sitting in plenary, set aside provisions in a 1920 law protecting tenant farmers against eviction. This law had been spearheaded by left-wing Liberals, in particular the Labour Democrat Johan Castberg.[145] In 1927, the Court ruled that the constitutional ban on retroactive legislation prohibited the application of this law to cases in which the lease had been terminated prior to the passage of the law.[146] On the basis of this precedent, the Court ruled in 1930 that existing fixed-term leases were also exempt from the law's scope of application.[147]

140. Judgment of May 8, 1923 – Rt. 1924 s. 12.

141. "En betydningsfuld høiesteretsdom," *Aftenposten*, May 9, 1923, evening edition, 1.

142. "Dommer og politiker," *Dagbladet*, July 14, 1923, 4.

143. Judgment of November 21, 1923 – Rt. 1924 s. 18.

144. Judgment of June 30, 1925 – Rt. 1925 s. 588. On these cases, see Sandmo, *Siste ord*, 2:149–52.

145. See "Ot. prp. nr. 63. (1920). Om utferdigelse av en midlertidig lov om forlengelse av leietiden for husmenn, bygselmenn og leilendinger," 1920.

146. Rt. 1927 s. 1057. See Sandmo, *Siste ord*, 2:155–56; Helgadóttir, *American Theories*, 76.

147. Rt. 1930 s. 1408.

Many Liberals could live with judicial review as long as it only played a marginal political role. This is highlighted by the majority opinion in the report the Constitutional Committee prepared in 1923 on the motions regarding judicial review and the constitution's sections 97 and 105 tabled in 1920.[148] This majority opinion was supported by the Conservative, the market-liberal "Free-minded Liberal" and one of the Liberal Committee members.[149] On the one hand, the majority opinion acknowledged that judicial review had the legitimate function of safeguarding individual rights: this was "one of the first conditions of a thriving society."[150] On the other, the report repeatedly emphasized that judicial review should rarely be relevant in day-to-day policy-making: Judicial review came "certainly not without concerns, as long as it is not exercised with the necessary moderation."[151] In the very first sentence, the Committee majority contrasted the Norwegian experience with what appeared to be a lack of moderation of judicial review in the U.S. "It is clear that the courts' exercise of the power in question here has not been as extensive as in the United States,"[152] the majority wrote. "While, from different sides and particularly in individual cases, doubts have been raised on the general legitimacy and the expediency of the principle [of judicial review], it can hardly be said that judicial practice has created extensive dissatisfaction."[153] In other words, as long as the extent of judicial review remained modest, it was acceptable.

The Committee majority also emphasized that judicial review was particularly valuable when it did not pit the legislature's and the courts' preferences on constitutional interpretation against each other, but rather a sort of constitutional negligence by the legislature against the diligent interpretation of the constitution by the courts. In the account of the Committee majority, judicial review had primarily been a safeguard against accidental violations of citizens' private rights during the rapid state

148. To be precise, this report also dealt with a motion to ban the courts from reviewing constitutional amendments.

149. "Innst. S. LXXIV (1923)"; on this report, see also Kierulf, *Judicial Review*, 94–97.

150. "Innst. S. LXXIV (1923)," 7.

151. Ibid.

152. Ibid., 6.

153. Ibid.

expansion of recent years – "during the great legislative work that has been executed here, often under circumstances that offered little time for thorough assessments and considerations."[154] Put differently, the primary function of judicial review was not to stand in the way when the legislature deliberately rode roughshod over individual rights, but to rectify minor injustices caused by a hasty legislative process.

The Liberal Committee chairman, Arnold Holmboe, later re-emphasized his commitment to judicial review in principle, but only under the condition of its cautious exercise in practice. "It is quite certainly the case that the system has its disadvantages, and it is quite necessary that the courts exercise their authority with much finesse and much caution," Holmboe said during the plenary debate on the Committee's report in October 1923. "If it should turn out as in the United States, that the courts appropriate themselves greater and greater powers, one will see to find means against this; but overall … this power is considered in the countries where it exists precisely as a safeguard of general legal certainty,"[155] Holmboe said. Abolishing judicial review would remove this valuable safeguard. "But I am entirely willing to concede that this system, as any system, has its faults," Holmboe reiterated, "and if the courts do not exercise this power with finesse and caution, then it can easily happen that one will say: We need to curtail the power of the courts; but I hold, as I said, the view, that our courts have so far exercised this power in a reasonable way."[156]

Liberals' acceptance of a limited role for judicial review in the political system should have been facilitated by a small-scale centralization of judicial review in 1926 that further lowered its costs: A provision in the Plenary Act of 1926 required all the Court's justices to decide in plenary, among others, if at least three justices on a panel of seven wanted to base their decision on the argument that statutes, other kinds of parliamentary decisions or provisional laws passed by the executive were unconstitutional.[157] To some degree, this provision was probably inspired by the back-

154. Ibid., 7; on this point, see also Kierulf, *Judicial Review*, 97.

155. Stortinget, October 17, 1923, St. forh. 1923, 3225.

156. St. forh. 1923, 3226. On this point, see also Kierulf, *Judicial Review*, 97.

157. Christofer Eriksen, *Prejudikat og prøvelsesrett: Politiske og juridiske faktorer bak plenumsloven av 1926* (Oslo, 2000), 1–2, 110; see also Kierulf, *Judicial Review*, 100–101.

and-forth in the 1923 tax cases mentioned above.[158] The Ministry of Justice justified it with the need to rule out that outcomes in judicial review cases could have an element of chance.[159] This two-stage judicial review procedure did not make it much more difficult for the Court to set aside provisions that a majority of its justices considered unconstitutional – in such a case, it was very likely that there would be at least three justices on a panel of seven who had the necessary doubts about its constitutionality to pass it into the plenary stage.[160] But the Plenary Act did away with the possibility that plaintiffs could bank on chance to provide them with a panel of seven justices that considered the provision in question unconstitutional.[161] This was a fairly realistic prospect for statutes that were "on the edge" of the constitution. Such statutes, but not uncontroversially unconstitutional statutes, were now better protected against challenges.[162]

Parliamentary documents later cited the Plenary Act as a factor that rectified a shortcoming in how judicial review was exercised.[163] But as discussed above, the Supreme Court nevertheless still took decisions that were costly to Liberals as late as 1930. From my theoretical vantage point, Liberals should not have supported an institution that was still overall costly to them, even if these costs were low. By itself,

158. See Eckhoff, "Høyesterett," 200–201.

159. "Ot. prp. nr. 28. (1926) Om forandring i lovgivningen om Høiesterett," 1926, 3–4.

160. As an example, consider how unlikely it is that a panel would not feature the necessary number of three justices with such doubts even if only a narrow majority of *all* justices – 11 of 20 – considered a statute unconstitutional: If x is the number of justices on a panel who deem a statute unconstitutional, then the probability of fewer than three justices with this view on a panel of 7 justices, selected from 20 justices with a majority of 11 justices with this view, is $p(x \leq 2) = \sum_{i=0}^{2} \frac{\binom{11}{i}\binom{9}{7-i}}{\binom{20}{7}} \approx 0.10$.

161. Plaintiffs' chances that only a minority of justices on a panel would vote to uphold a statute, although a narrow majority of all justices would do so in plenary were quite good. This is calculated in the same way as above: If x is the number of justices on a panel who deem a statute constitutional, then the probability of fewer than four justices with this view on a panel of 7 justices, selected from 20 justices with a majority of 11 justices with this view, is $p(x \leq 3) = \sum_{i=0}^{3} \frac{\binom{11}{i}\binom{9}{7-i}}{\binom{20}{7}} \approx 0.37$.

162. This qualifies the claim that the Plenary Act aimed at curtailing judicial review. With this view – cautiously – Eriksen, *Prejudikat og prøvelsesrett,* 44; Sandmo, *Siste ord,* 2:51; Eckhoff, "Høyesterett," 201; Hiorthøy, "Domstolene og Forfatningsutviklingen," 135; unclear Seip, "Den norske høyesterett," 102; against this view Seip, "Jus og politikk," 135.

163. "Innst. S. nr. 147. Indstilling fra utenriks- og konstitusjonskomiteen angaaende forslag til forandring i grundlovens §§ 89, 90, 91 og 97," 1932, 362.

the decline of the expected costs of judicial review is therefore not a sufficient explanation.

Hence, it makes sense to consider whether the expected benefits of judicial review explain the end of Liberal efforts to abolish it. As long as legislative majorities without the Liberals were going to be situated to their right on economic issues, Liberals could not expect to benefit from judicial review limited to safeguarding sections 97 and 105 of the constitution, since it could only pull economic policies further to the right. But with Labour's electoral rise, legislative majorities to the left of Liberals became conceivable, and hence a Liberal interest in maintaining judicial review: first, as an instrument to pull economic policies further towards the – now Liberal – centre, second, as protection against possible authoritarian plans of Labour.

The odds of a Labour(-led) majority increased dramatically with the general elections of October 1927, shortly after Liberals had suggested a ban on judicial review for the last time in July 1926. After overcoming internal divisions, Labour became the strongest party in parliament, with twice as many seats as Liberals, and more than twice its previous seat share (from 24 to 59 of a total 150 seats).[164] A few months later, Christopher Hornsrud, who had been among the sponsors of several anti-judicial review amendments, formed the first socialist government in Norwegian history – it fell already after 18 days. Despite its failure, Hornsrud's minority government marked a watershed moment. Labour was now a viable government party, and the main fault line in the political system ran no longer between Liberals and Conservatives, but between Labour and the non-socialist parties.[165]

Labour's surge in 1927 triggered a bourgeois panic. Capital left the country and the bourgeois parties began to close ranks against Labour.[166] The 1930 elections saw the hardest-fought electoral campaign of the century so far,[167] with joint electoral lists of Conservatives and Liberals in some places.[168] How serious the authoritarian threat of Labour really was, has been contested among historians. In any case, the bourgeois fears

164. Berge Furre, *Norsk historie 1905–1940*, 2nd ed. (Oslo, 1982), 206–7. See also Table 3.3.

165. Ibid., 189; Rolf Danielsen, *Borgerlig oppdemmingspolitikk 1918–1940* (Oslo, 1984), 165.

166. Danielsen, *Oppdemmingspolitikk*, 166f.

167. Furre, *Norsk historie*, 211.

168. Danielsen, *Oppdemmingspolitikk*, 170.

of Labour were real.[169] Judicial review was surely not the strongest safeguard against an authoritarian takeover, but it could reasonably be expected to throw not a spoke, but at least some sand in the gears of an incipient Labour dictatorship.

Yet, it is difficult to show a direct link between Liberals' growing fear of Labour and the end of their efforts to abolish judicial review. A change in the stance towards judicial review can be observed in the prominent liberal jurist Jon Skeie.[170] In 1916, as a key contributor to the debate on the constitutional implications of alcohol regulation, Skeie had been critical towards judicial review and had argued that it did not have a constitutional basis.[171] In his 1929 treatise on civil procedure, Skeie now was in favour of maintaining judicial review.[172] Skeie seemed to allude to the threat of authoritarianism as a reason to be cautious with attempts to weaken fundamental principles such as the ban on retroactive legislation and the right to property. These principles, Skeie wrote, "have been considered as the basis for our societal order." Politicians should be wary of eroding them through constitutionally questionable legislation, since the times were now such that "one has to reckon with the struggle against these principles as a political reality."[173]

More explicitly, the Supreme Court Justice Thomas Bonnevie – whose political views could be placed on the left wing of the Liberals[174] – suggested the introduction of an abstract form of judicial review as an immediate institutional safeguard against the revolutionary threat of Labour. Writing to the Liberal Prime Minister Johan Ludwig Mowinckel in May 1930, a few months before the highly contested 1930 election, Bonnevie warned that Labour's radical manifesto suggested a high risk that a Labour majority would attempt to establish a dictatorship. "This year, the Labour Party contests the elections on the basis of the programme that it is no longer the majority of the

169. See ibid., 165f.

170. Kierulf, *Judicial Review*, 88.

171. "Dokument nr. 1 (1917)," 10; see also Kierulf, *Judicial Review*, 86.

172. Skeie, *Den Norske Civilproces*, 1:114; see also Kierulf, *Judicial Review*, 88.

173. Skeie, *Den Norske Civilproces*, 1:115.

174. In a letter to *Aftenposten*, Bonnevie wrote that he had alternated between voting Liberal and Labour so far, did not consider himself a socialist, and would vote for the Conservative-Liberal Party in the next general elections: Thomas Bonnevie, "Dødsdommen," *Aftenposten*, October 20, 1930, morning edition, 3.

people that has the right to rule in this country," Bonnevie wrote. "And if it achieves a parliamentary majority this time, the Labour Party will, on the basis of this programme, not be afraid to reach for a dictatorship to protect itself against losing power again."[175]

In Bonnevie's imagination, a procedure of abstract review could offer some protection against the establishment of a Labour dictatorship. Under his proposal, a group of at least 50 MPs could request a Supreme Court opinion on the constitutionality of a parliamentary decision, such as a statute. Any MPs who were detained at the time of the vote and could therefore not take part, would count in favour of the request.[176] The Supreme Court's decision could then function as a trigger of resistance against an authoritarian take-over: "The first condition for the people reacting *in the right moment* to infractions of the constitution has to be that it can be established in a rather incontestable way that the constitution *is* violated,"[177] Bonnevie wrote (emphasis in the original). Of course, this proposal hardly had a chance of being realized – in any case, introducing it through constitutional amendment would have been difficult without Labour's support.

Further evidence that the reason why Liberals stopped to demand a ban on judicial review might be found on the benefit side of judicial review comes from the 1930s. In 1936 and 1939, Liberals introduced motions to simplify the constitutional amendment procedure. Under the status quo, passing an amendment required a 2/3-majority of parliament in the electoral period following the period when it had been put forward. Instead, the proponents of the motion suggested to make it possible to amend the constitution within three to twelve months on the basis of a 2/3-majority in parliament or a popular referendum with qualified majority.[178] The proposal was not uncontested within the Liberal Party, but enjoyed considerable support – in 1935, the Party's Programme Committee also called for a simplified constitutional amendment

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175. Thomas Bonnevie to Ludwig Mowinckel, May 16, 1930, RA/S-3212/D/Dc/L0009/00001 – Grunnlovsforandringer: IXb Skrivelser 1922-1934, 2.

176. Bonnevie to Mowinckel, 9.

177. Bonnevie to Mowinckel, 3.

178. "Dokument nr. 23 (1935)," 47–48; "Dokument nr. 15. Grunnlovsforslag, fremsatt på syvogåttiende ordentlige Storting," 1938, 48–49.

procedure.[179] Yet, both the 1936 amendment and the second amendment introduced in 1939 (which was voted on only in 1947, after the end of the German occupation) failed to pass in parliament.[180]

The quest for more flexible amendments was probably not only, but partly motivated by concerns that the cumbersome amendment procedure, together with judicial review, would make it difficult to pass bold economic reforms – reforms that might be necessary to solve problems threatening democracy itself. It is hardly accidental that one of the Liberals who put forward the proposal was Wilhelm Thagaard, a chief architect of trust and competition policy during the inter-war period and one of the foremost Liberal technocrats.[181] Explaining the proposal before party members in September 1935, the Liberal politician and journalist Christian A. R. Christensen said that “we need to have more flexible rules. When a law passed by parliament comes into conflict with the constitution, the final decision lies with the Supreme Court. A handful Supreme Court justices can block a unanimous decision of parliament.”[182] Possibly it was also Christensen who, citing Supreme Court decisions on war time price controls and tenancy protection, warned in *Dagbladet* a few days later that “the constitution can easily become a brake on development, and we can face the risk of a legal chaos that can lead to a violation of the constitution.”[183]

The jurisprudence of the U.S. Supreme Court, increasingly in conflict with the Roosevelt administration, illustrated the dangers of rigid constitutions and judicial review. In May 1935, the U.S. Supreme Court declared the National Industrial Recovery Act, a centrepiece of the New Deal, unconstitutional. “At the last elections Roosevelt gathered two thirds of the entire people behind his plans; nevertheless a reactionary Supreme Court can use a conservative provision of the constitution from the past to block the will of the entire people,” a *Dagbladet* article lamented – “It is this kind of

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179. “Venstres programforslag betyr en aktivisering av partiets politikk,” *Dagbladet*, September 11, 1935, 7.

180. Stortinget, June 17, 1938, St. forh. 1938, 1533; Stortinget, July 8, 1947, St. forh. 1947, 1448.

181. On Thaagard’s role as chief technocrat of the emerging regulatory state, see Slagstad, *De nasjonale strateger*, esp. 157ff., 233ff.

182. “Venstres programforslag betyr en aktivisering av partiets politikk,” 7.

183. “Låst fast,” *Dagbladet*, September 14, 1935, 3.

rigidity in the constitution that can cause revolutions." It would be "better if we could amend the constitution early enough, so that we do not, one day, suddenly face popular demand to circumvent or violate it."[184]

As this shows, concerns about the obstructive effects of judicial review still existed among Liberals in the 1930s. The fact that their ongoing perception of judicial review as problematic did not lead them to demand abolishing judicial review in the 1930s, but to demand easier constitutional amendments instead, supports the view that it was the rise of Labour that ended Liberal efforts to abolish judicial review. By keeping judicial review and making amendments more flexible, Liberals could have it all: insurance against the policies of a Labour-led majority, and at the same time the possibility to override judicial review decisions through constitutional amendments. The two-thirds majority required for the latter was hard to achieve without Liberal support. Abolishing judicial review instead would have brought more constitutional flexibility, but also less protection against Labour.

Overall, there is much to suggest that the rise of Labour changed the Liberal calculus about judicial review, turning it from a nuisance into a valuable safeguard of economic interests and democracy. Especially Skeie's and Bonnevie's statements suggest that the Labour threat influenced Liberal thinking about constitutional safeguards. But these two individuals were hardly representative of the Liberal Party. I could not find a statement by central Liberal figures that they came to consider judicial review a safeguard against Labour-led majorities. It is therefore difficult to rule out alternative explanations: Maybe Liberals developed a principled commitment to the rule of law, or to a constitutional tradition encompassing judicial review that made them tolerate its – not enormous – costs. Liberals may also have become wary of campaigning against an institution they could only abolish with Labour's help.[185] At a

184. "Kyllingdommen," *Dagbladet*, May 31, 1935, 3.

185. Specifically regarding the Constitutional Committee's *unanimous* rejection of the anti-judicial review motion in 1929, Kierulf, *Judicial Review*, 103, notes that the Committee claimed in 1932 that this was because a 1929 lawsuit on the wages of civil servants had highlighted the importance of judicial safeguards against parliamentary transgressions. On this case, see section 3.7 below. While the role of the case itself for the end of the Liberal anti-judicial review campaign seems questionable to me, the fact that it soon became part of the rationalization of support for judicial review is consistent with an increasing Liberal attachment to constitutional safeguards, both out of principled and instrumental motives.

time when the non-socialist parties made a point of portraying Labour as authoritarian, campaigning against judicial review together with Labour could hardly appeal to their voters. While the rise of Liberal opposition to judicial review can be attributed to its expected costs, its decline is therefore more difficult to explain.

3.6 Labour's Continuing Campaign Against Judicial Review and its End

While Liberal MPs put forward an amendment to abolish judicial review for the last time in July 1926, Labour's anti-judicial review campaign lasted about a decade longer. Labour MPs still introduced amendments to abolish judicial review as well as the ban on retroactive legislation and to curtail the right to property in 1929 and 1932, and put forward a final proposal to abolish the ban on retroactive legislation in January 1936, barely a year after Labour had come to power in March 1935. In this section, I discuss why Labour's efforts against judicial review continued for far longer than Liberals', but eventually also came to an end. I argue that judicial review continued to interfere with state intervention in the economy and that it was therefore still costly to Labour as the party furthest to the left. But after 1931, judicial review hardly was a constraint on economic policy any more. Labour expected very low costs of judicial review. This decrease in the expected costs was necessary for Labour to give up its campaign against judicial review. Yet, it cannot have been sufficient, given that judicial review never entirely disappeared from the political system. An additional factor explaining the end of Labour's campaign against judicial review may have been concerns that it could be perceived as authoritarian.

Between 1927 and 1931, the Supreme Court continued to set aside statutory provisions as violations of the ban on retroactive legislation in three cases that received considerable attention.[186] All these cases concerned measures to improve the situation in the farming sector, which still employed 26 per cent of the labour force in 1930.[187] During the inter-war period, many farmers suffered severe economic hardship due to overproduction and a heavy debt burden.[188] In 1920, their grievances gave rise to the establishment of the Farmers' Party.[189] The party formed minority governments from 1931 to 1933, and, in the "red-green coalition" of 1935, lent crucial support to the formation of a lasting Labour government.[190]

186. Judgments of November 15, 1927 – Rt. 1927 s. 1057; December 11, 1930 – Rt. 1930 s. 1408; September 18, 1931 – Rt. 1931 s. 865.

187. Fritz Hodne, *Norges økonomiske historie 1815–1970* (Oslo, 1981), 492.

188. Ibid.

189. Furre, *Norsk historie*, 166–67.

190. Ibid., 214–217, 238–40.

As mentioned above, the Court set aside provisions on the protection of tenant farmers as cases of unconstitutional retroactivity in 1927 and 1930. "The holy right to property is strongly protected," the socialist newspaper *Fremtiden* noted on the latter occasion.[191] As the newspaper omitted to mention, the majority opinion in the 1930 case had been written by the socialist Justice Karl F. Dahl, who strongly opposed judicial review, but considered himself bound by the 1927 precedent.[192] Among the politically salient judicial review cases listed in Table 3.1, the 1930 judgment marks the last time when a policy promoted primarily by Liberals and their most progressive "Labour Democrat" offshoot was curtailed by judicial review.

Hardly a year later, in September 1931, a provision for which primarily the Farmers' Party and Labour had been responsible was set aside for the first time in a politically salient case.[193] The 1929 statute in question allowed farmers holding an "Odelsrett" – a particular hereditary land title of great importance to small farmers – to have mortgages on their land reduced in some cases.[194] Excessive debt was a severe problem for farmers at the time; in 1932, the average ratio of debt to equity among farmers stood at 45 per cent.[195] A Liberal government had introduced the Act in 1929, but in parliament a coalition largely composed of the Farmers' Party and Labour passed amendments that were even less favourable to the farmers' creditors than the Liberal proposal.[196]

As Conservatives and Liberals had warned,[197] a challenge against the constitutionality of a provision in the 1929 Act – brought by a bank, and financially supported by the Association of Norwegian Banks[198] – was successful. With a majority

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191. "Husmannsloven var grunnlovstridig," *Fremtiden*, December 11, 1930, 1.

192. Rt. 1930 s. 1408 (1410).

193. Judgment of September 18, 1931 – Rt 1931 s. 865. On this case, see Sandmo, *Siste ord*, 2:103–8.

194. See Sandmo, *Siste ord*, 2:104.

195. Hodne, *Norges økonomiske historie 1815–1970*, 492.

196. See Odelstinget, June 18, 1929, Ot. forh. 1929, 686–707; Lagtinget, June 21, 1929, Lt. forh. 1929, 178–187, "Innst. O. XVIII. (1929) Instilling fra den forsterkede skog- og vassdragskomite om forandring i lovgivningen om odelsløsning," 1929.

197. Odelstinget, June 18, 1929, Ot. forh. 1929, 686ff.

198. Nicolai Rygg to E. G. Borch, December 12, 1930, RA/S-3161/D/L0613/0007 – Norges Bank, Direksjonsarkivet II, Saksarkiv. L-1-21 Lover, Odelsloven.

of 19 of the 21 justices – including the socialist Karl F. Dahl – the Supreme Court set the provision in question aside as a case of unconstitutional retroactivity. Only Justice Johan Herman Lie and the Liberal Paal Berg, by then the chief justice, dissented. As a Farmers' Party MP later claimed, the judgment caused "great disappointment" in rural Norway.[199] The Labour-affiliated newspaper *Arbeiderbladet* saw the decision as yet another confirmation that the Court served conservative interests. "Again, the Court has made a fuss about section 97 of the Constitution without taking into consideration the enormous change that our economic life has undergone," the newspaper commented. While Chief Justice Berg's dissent received praise, *Arbeiderbladet* saw the case for constitutional reform strengthened: "Again, this decision raises the question of limits to the courts' power to assess the constitutionality of statutes. Earlier [in the 1930 case discussed above] the Supreme Court has set aside the provisional acts on tenant farmers. The result is that parliament's legislative power is curtailed."[200]

After the judgment, the government, now led by the Farmers' Party, tried to salvage the debt relief measures without running afoul of the constitution again. Yet, it struggled to find a way to achieve both. Eventually, at the government's suggestion, parliament requested an expert opinion from the Supreme Court on whether a revised version of the provision in question was constitutional.[201] After one of the justices had personally helped to draft a new law,[202] Labour and the Farmers' Party eventually pushed through a new version of the debt relief measures in July 1933.[203]

The two-year delay in the full implementation of the debt relief measures caused by the judgment in the Odelsrett case demonstrates that judicial review could still interfere with interventionist economic policy. At the same time, there was nothing to outweigh these costs of judicial review from Labour's perspective. In 1928, Labour MPs had argued before the Supreme Court that a statute requiring mandatory arbitration

199. Lagtinget, June 29, 1933, Lt. forh. 1933, 140.

200. "Storting og høiesterett," *Arbeiderbladet*, September 19, 1931, 4.

201. "Innst. O. XXII. (1933) Innstilling fra Lovkomiteen om tillegg til odelslovgivningen," 1933, 1.

202. Lt. forh. 1933, 138.

203. "Odelsloven," *Finmarksposten*, July 3, 1933, 4.

of industrial conflict was an unconstitutional expropriation of workers' labour power.[204] Unsurprisingly, this far-fetched argument did not find any favour with the Court. Nor could the democracy-protecting function that judicial review had taken on in the mind of some Liberals appeal to Labour. It was Labour itself that was widely seen as the authoritarian threat. Although authoritarian tendencies also existed on the right, they hardly posed a credible threat to democracy.[205] Additionally, even when Labour considered itself the victim of state repression, it hardly expected the Court to defend its interests: In the early 1920s, Labour MPs complained that the Court had insufficiently protected the constitutional right to free speech.[206]

The amendments against judicial review and the constitution's economic rights Labour MPs put forward in 1929 and 1932 can be explained with this continued bias of judicial review against the political party furthest to the left. The amendments introduced in 1929 were rejected in 1932 both in the parliamentary Committee and in plenary without much further debate, since Labour fell short of the necessary majority anyway.[207] The amendments introduced in 1932 were, after a short parliamentary debate in 1934, also rejected.[208] In the debate, the Labour MP Olav Versto referred to the Odelsrett case. In his view, the Supreme Court's judgment had "partially hindered effective debt relief out in the countryside. Parliament has passed legislation that should lead to debt relief, but the courts have said that it was unconstitutional, and so it stranded."[209]

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204. "Bidragene til den ulovlige streik for høiesterett," *Dagbladet*, October 16, 1928, 1; on this case, see Sandmo, *Siste ord*, 2:234–236; Helgadóttir, *American Theories*, 82f.

205. See Furre, *Norsk historie*, 168–71.

206. Kierulf, *Judicial Review*, 95–96.

207. Stortinget, January 15, 1932, St. forh. 1932, 45f.; "Innst. S. nr. 9. Innstilling fra utenriks- og konstitusjonskomiteen angående representantene Alfred Madsen og Chr. Hornsruds forslag til forandring av grunnlovens § 105," 1932 (right to property); Stortinget, June 25, 1932, St. forh. 1932, 2362ff.; "Innst. S. nr. 147 (1932)" (judicial review and ban on retroactive legislation).

208. Stortinget, June 5, 1934, St. forh. 1934, 1934ff., "Innst. S. nr. 121. Innstilling fra utenriks- og konstitusjonskomiteen angående forslag fra T. Haavardstad, K. Bergsvik og B. Olsen-Hagen om ny §82 i grunnloven," 1934; "Innst. S. nr. 122. Indstilling fra utenriks- og konstitutionskomiteen angaaende forslag til forandring i grundlovens §97," 1934; "Innst. S. nr. 123. Innstilling fra utenriks- og konstitusjonskomiteen angående forslag til forandring av grunnlovens §105 fremsatt av Torvald Haavardstad, K. Bergsvik og B. Olsen-Hagen," 1934.

209. Stortinget, June 5, 1934, St. forh. 1934, 1933–34.

This debate marks the beginning of the end of Labour's campaign against judicial review. In January 1936, with Labour now in government, Labour MPs still introduced a final proposal to abolish the ban on retroactive legislation. Parliament rejected it, against Labour's votes, in February 1937.[210] After 1937, Labour never put forward any further such amendment.

Why did Labour end its campaign against judicial review? If anything, we would expect that a party, once in government, increases its efforts to loosen constitutional constraints, even more so if it sees itself on the ascent towards hegemony. But Labour did the opposite. It ceased its attacks on judicial review shortly after the formation of the red-green coalition in March 1935 had brought it into government – a moment marking, in hindsight, "a regime change, not only a change of government."[211] In the view of the historian Jens A. Seip, Labour gave up its attacks against the Supreme Court as the Court had already been almost entirely "neutralized" by the Liberals, and because a general trend towards the subordination of the judiciary under the other branches of government was under way.[212] This is essentially what my theory would expect: Labour gave up opposition to judicial review because its expected costs dropped to zero. But did they?

For this argument to hold, the Supreme Court should have become more deferential in its exercise of judicial review, and Labour should have observed this shift.

During the 1930s, the Court indeed became increasingly deferential in its exercise of judicial review.[213] This does not mean that the Court ceased to exercise judicial review altogether. Smith still counts 28 cases of judicial review in the period from 1931 to 1940, with four cases in which statutory provisions were, at least effectively, set aside.[214] Yet, in some of these cases, the Court did not formally set statutory provisions aside, but interpreted them in a way that kept them within constitutional limits, even though this required interpretations that went against

210. Stortinget, February 12, 1937, St. forh. 1937, 56ff., "Innst. S. nr. 18. Indstilling fra utenriks- og konstitutionskomiteen angaaende forslag til ophævelse av grundlovens § 97," 1937.

211. Edvard Bull, *Klassekamp og fellesskap 1920–1945* (Oslo, 1979), 296.

212. Seip, "Den norske høyesterett," 105ff.

213. Kierulf, *Judicial Review*, 105.

214. Smith, Høyesterett og folkestyret, 223.

legislative intent.[215] My list of politically salient judicial review cases only contains four further cases after the Odelsrett case of 1931. In all these cases, the Court unanimously upheld the statutory provision in question.[216] As the Supreme Court Justice Finn Hiorthøy put it in 1967, the Court of the 1930s was sometimes “bending over backwards”[217] to uphold constitutionally highly questionable legislation.

I am agnostic with regard to the causes of this change in the Supreme Court’s practice. Maybe the justices were impressed by the campaign against judicial review, and strategically moderated their decisions. Another explanation is that the Plenary Act of 1926 made it more difficult to set statutory provisions aside.[218] Finally, it is possible that the Court became increasingly deferential due to a shift in legal thinking towards a greater acceptance of legislative discretion, possibly brought to the Court by the arrival of new justices on the bench. There is widespread agreement in the legal and historical literature that such a shift towards a more realist, utilitarian legal thinking occurred in legal scholarship and the Court’s jurisprudence, although there seem to be different views with regard to the exact timing of this shift.[219]

The so-called Milk case of November 1933[220] was among the cases in which the Court was later found to have been “bending over backwards.”[221] The case concerned an important economic policy and its outcome was anticipated with apprehension; hence, when the Court upheld the statute in question, it was a clear signal of deference to the legislature.

As the Odelsrett case, the Milk case, too, concerned the struggling farming sector – more specifically, dairy farming, an activity providing 40 per cent of the overall income of farmers in the 1930s.[222] In 1930/1931, a compulsory organization of dairy farmers was set up, as well as a mandatory “equalizing contribution” levied from dairy

215. Ibid., 222f.

216. See Table 3.1 above.

217. Hiorthøy, “Domstolene og Forfatningsutviklingen,” 131–32.

218. Sandmo, *Siste ord*, 2:167.

219. See Kierulf, *Judicial Review*, 41f., 104; Seip, “Den norske høyesterett,” 113ff.; Francis Sejersted, *Demokratisk kapitalisme* (Oslo, 1993), 261; Sandmo, *Siste ord*, 2:167ff.

220. Judgment of November 10, 1933 – Rt. 1933 s. 1041.

221. Hiorthøy, “Domstolene og Forfatningsutviklingen,” 131–32.

222. Furre, *Norsk historie*, 224.

farmers. These measures were spearheaded by the Farmers' Party, whereas the other parties supported them only reluctantly.[223] Their aim was to tackle the ruinous competition on the dairy market, where the so-called "milk war" saw farmers in the countryside use improved means of transportation to push into the lucrative market for fresh milk delivery to the cities – a market hitherto exclusive to farmers in close proximity.[224] The "equalizing contribution" should even out the different prices that could be achieved for fresh milk and for milk for further processing. Many farmers supported the mandatory contribution, but a substantial number fiercely resisted it.[225] In 1933, about 1,000 cases were reported in which farmers' assets had been seized as they had been unwilling or unable to pay the contribution.[226]

One of these farmers went to court with the claim that the "equalizing contribution" was a violation of his right to property. The case raised several questions, including whether the contribution was covered by the state's taxation powers, since its revenue did not go into the state budget, but was immediately and exclusively used to subsidize the milk price. It was also questionable whether binding decisions on the contribution could be delegated to the farmers' co-operatives, that is, private entities.[227] How the Court would decide was uncertain. The seven justices on the panel initially considered whether the Court should deliberate in plenary, but finally rejected this idea[228] – as discussed above, the Plenary Act of 1926 only allowed the Court to set aside a statute if it decided in plenary. In a meeting of the body administering the equalizing contribution, one of its members raised the question what to do should the Court declare it unconstitutional – "If the case in the Supreme Court is lost … other means of maintaining the milk price would have to be found."[229]

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223. Bull, *Klassekamp*, 157–58.

224. Furre, *Norsk historie*, 224–25.

225. Bull, *Klassekamp*, 158.

226. "Den store melkesak for høiesterett," *Arbeiderbladet*, November 2, 1933, 2.

227. See Castberg, *Norges statsforfatning*, 2:344–45; Knoph, *Rettslige Standarder*, 134–36; Jon Skeie, *Organisasjon og lovgivning til hjelp i jordbrukskrisen* (Oslo, 1933), 75–94.

228. "Den store melkesak for høiesterett."

229. Minutes of the Omsetningsrådet executive committee, May 23, 1933, RA/S-6073/1/A/Aa/Aaa/L0001 – Omsetningsrådet/Arbeidsutvalget, Møtebok, vol. 1, 421.

This turned out to be unnecessary: The Court unanimously upheld the contribution.[230] Justice Lie, writing the lead opinion, argued that the economic circumstances justified the policy: It had to be considered "against the backdrop of the crisis in farming that has brought it about." Overall, the scheme was "a socially justified measure in the interest of the dairy industry under difficult economic circumstances."[231] The mandatory contribution was an insurance scheme for milk producers; its purpose could only be achieved if it was compulsory.[232] None of the other justices had much to add to this.

The farmers who had resisted the mandatory contribution were deeply disappointed. For some of them, it posed an existential economic threat. The Court had now paved the way to enforce the payment of the contribution – an "apocalyptic" scenario, as a farmers' representative put it.[233] Another farmers' representative claimed that the Court had been put "under pressure."[234] The Labour-affiliated *Arbeiderbladet* appeared more satisfied. "The bourgeois press has been markedly silent after the Supreme Court decision in the milk case. There is nothing to hear about forced organization, monopolies or the freedom of work, although the judgment touches on all these principles or terms," *Arbeiderbladet* wrote. While it was unfortunate that a measure perceived as unjust by many now had to be enforced, "everything that can contribute to creating more orderly and secure conditions in the farming sector … has our support."[235]

As *Arbeiderbladet's* cautious praise for the Court shows, its willingness to uphold such a transformative economic policy as the compulsory organization of dairy farmers had not gone unnoticed with Labour. The importance of the case went beyond the dairy market, since similar schemes for other markets were already in place or still

230. Rt. 1933 s. 1041. See also Sandmo, *Siste ord*, 2:157–58; Helgadóttir, *American Theories*, 80f.

231. Rt. 1933 s. 1041 (1042).

232. Ibid.

233. "De frie melkprodusenter fortsetter sin kamp," *Adresseavisen*, November 22, 1933, 2.

234. "Dommen i melkesaken avsagt under press, fremholder formannen i Melkeprodusentenes landsforening," *Aftenposten*, November 13, 1933, evening edition, 1.

235. "Efter dommen," *Arbeiderbladet*, November 13, 1933, 4.

to come.[236] While the fate of the farming sector was far higher on the Farmers' Party's agenda than on Labour's, the ability to shore up farming was critical to the emerging red-green coalition between Labour and the Farmers' Party.[237] If constitutional constraints had stood in the way of solving the farming crisis, sustaining the red-green coalition would have been less attractive to the Farmers' Party.

The Milk case was the last judicial review case of major political importance in the 1930s. After the Milk case, only three further judicial review cases were reported as such in *Aftenposten* or *Arbeiderbladet*. In all these cases, the Court unanimously upheld the constitutionality of the provision in question. These cases, politically hardly important, concerned the obligation of land owners to contribute to the costs of roadworks,[238] a tax increase,[239] and the challenge of a convicted criminal against the terms of his sentence.[240] In 1934, when parliament debated Labour's anti-judicial review amendment, introduced in 1932, the most recent case any Labour MP mentioned with disapproval in that debate was the by then three-years old Odelsrett case.[241]

In February 1935, barely a month before the red-green coalition with the Farmers' Party brought Labour into government, the party newspaper *Arbeiderbladet* had remarkable praise for the Supreme Court. The occasion for this praise was not a decision by the Norwegian Supreme Court, but the U.S. Supreme Court's judgment in the Gold Clause cases. In this judgment, the U.S. Supreme Court, with five to four votes, upheld the power of Congress to abrogate contractual clauses requiring payment in gold.[242] As discussed in more detail below, the unfolding conflict between the U.S. Supreme Court and the Roosevelt administration was covered extensively in the Norwegian press. *Arbeiderbladet* commented on the Gold Clause Cases:

236. See Bo Rothstein, "Explaining Swedish Corporatism: The Formative Moment," *Scandinavian Political Studies* 15, no. 3 (1992): 180 for a similar constitutional debate in Sweden in 1932.

237. See Bull, *Klassekamp*, 158.

238. Judgment of November 3, 1934 – Rt. 1934 s. 997.

239. Judgment of November 19, 1935 – Rt. 1935 s. 958.

240. Judgment of February 1, 1938 – Rt. 1938 s. 72.

241. Stortinget, June 5, 1934, St. forh. 1934, 1933–34.

242. James W. Ely, "Gold Clause Cases," Oxford Reference, accessed June 4, 2020, https://doi.org/10.1093/oi/authority.20110803095858155.

"This episode confirms once again that in any modern civilized country the legal system cannot resist progress and the clearly articulated popular will … The American founding fathers who passed the constitution in 1787 had, in the same way as our Eidsvoll men [i. e., the framers of the Norwegian constitution], a naive urge to regulate all of the country's matters for all future time. This view has now been entirely abandoned, even by the jurists. In Norway a man such as Professor Knoph [the legal scholar Ragnar Knoph] has emphasized again and again that the law must follow life, that formal laws have to be developed and reconstructed so as to correspond to a modern understanding of the law …

We had comparable cases in Norway. The concession laws of 1907 entailed a significant infringement upon the right to dispose freely of certain forms of physical capital. They were the subject of intense struggles. In 1918, the Supreme Court, with a narrow majority, ruled that they were not unconstitutional. In recent times we had the case of the dairy collectives. The Norwegian Supreme Court justices have generally shown the ability to go with the time and to let societal considerations prevail over an old, slavish adherence to the letter of the law. A factor contributing to this can obviously be, both here and in America, that the government has the power to renew the judiciary through the appointment of new judges."[243]

As this quote suggests, Labour noticed that the Supreme Court and legal scholars did not interpret the constitution in a way that conflicted strongly with the changing demands of legislative majorities. Yet, the fact that Labour noticed that the Court had become more permissive does not mean that it expected the risks of judicial review to be zero. In hindsight, it is visible that the Court abstained from confrontation with the legislature on politically important issues after the Odelsrett case. But for my argument,

243. "Dommen i gullklausul-saken," *Arbeiderbladet*, February 19, 1935, 4, 15.

the ex ante perception of the risk of judicial review matters. While Labour perceived this risk as very low, it was not entirely absent.

This risk stemmed at least in part from the ban on retroactive legislation, section 97 of the constitution. Section 97 was still the yardstick in 20 of 28 judicial review cases counted by Smith between 1931 and 1940,[244] and it was still the subject of debate among legal experts and during the preparation of legislation.[245] A particularly important issue where the new Labour government risked to run into constitutional obstacles – note the parallel to the U.S. Gold Clause case – was monetary policy. Different measures were considered in 1935/1936, including a reduction of the dividend of central bank shareholders – a proposal put forward by the Labour MP Christopher Hornsrud – as well as a reduction in the gold value of the Norwegian currency.

The constitutionality of these proposals was questionable.[246] The legislation unit in the Ministry of Justice found that the Hornsrud proposal was in conflict with section 97 and also gave rise to claims for compensation under section 105, the right to property.[247] The reduction in the gold value of the Norwegian Crown was also seen critically. In particular, the legislation unit argued that creditors under existing contracts could not be forced to accept merely nominal payment in devalued crowns without violating the ban on retroactive legislation.[248] As the assessment of the legislation unit was summarized in a note of the Ministry of Justice, "such a law could not be expected to be upheld by the courts."[249] To circumvent this problem, a constitutional amendment, stipulating an exception to sections 97 and 105 only for the scope of the devaluation was considered.[250] In order to have this amendment passed quickly, the Ministry pre-

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244. Smith, *Høyesterett og folkestyret*, 223.

245. For example, see Per Augdahl, "Ingen lov må gis tilbakevirkende kraft (Grunnlovens §97)," *Tidsskrift for Rettsvitenskap* 51 (1938): 379–407.

246. "Ot. prp. nr. 46. (1936) Forandringer i lov om Norges Bank av 23 april 1892 med senere tilleggslover," 1936, 5–7.

247. Ibid., 6.

248. Draft memo by the Legislation Unit, May 31, 1935, RA/S-3212/D/Dc/L0020 – Justisdepartementet, Lovavdelingen. Grunnlovens forståelse (1936). Ad jnr. 689-35E, 5.

249. Memo by the Legislation Unit, March 14, 1936, RA/S-3212/D/Dc/L0020 – Justisdepartementet, Lovavdelingen, Grunnlovens forståelse (1936), Ad jnr. 1523-35E, 3.

250. Memo by the Legislation Unit, November 9, 1935, RA/S-3212/D/Dc/L0020 – Justisdepartementet, Lovavdelingen, Grunnlovens forståelse (1936), Jnr. 1406-35E, P.M. Opskrivning av Norges Banks gullbeholdning. Nedskrivning av kronens gullinhold.

emptively suggested in 1936 to make the cumbersome constitutional amendment procedure easier.[251] However, parliament rejected this proposal in June 1938.[252]

In 1937, the Norwegian Supreme Court, too, had to decide a gold clause case.[253] The question at stake was whether the Norwegian government could pay back U.S. dollar-denominated bonds in paper money after the United States had left the gold standard in 1933. The Court largely had to apply U.S. law in this case, but also touched upon the question whether the ban on retroactive legislation in section 97 prohibited application of the U.S. legislation, and whether the creditors consequently still had to be paid back in gold dollars. The Court denied this question. Before the Court decided the case in December 1937, the legal scholar Ragnar Knoph had noted that the Court should be cautious to refuse the application of foreign legislation on invalidating gold clauses because it conflicted with section 97, "also considering what future Norwegian legislation could bring."[254] During the proceedings in the case, the government attorney, Kristen Johanssen, engaged in a more general critique of section 97. "A country's population can crudely be divided into two parts: Those who are sitting on the cake, and those who want to have a share of the cake the others are sitting on," Johanssen argued. "And section 97 of the constitution has over time become the palladium of the former."[255]

Earlier in the same year, in February 1937, parliament had debated a last proposal to repeal section 97, put forward in January 1936 by four Labour MPs, including Christopher Hornsrud, who had already introduced the first amendment to this effect in 1917. This was the very last amendment aimed at abolishing judicial review or its most important constitutional yardstick. Possibly government attorney Johanssen may have inspired the 1936 proposal, since a letter critical of section 97, allegedly written by Johanssen to an unnamed Labour politician, was quoted during the plenary

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251. See "St. prp. nr. 76. (1935) Om forandringer i grunnloven.," 1935, 6ff; "Ot. prp. nr. 46. (1936)," 7.

252. Stortinget, June 17, 1938, St. forh. 1938, 1533.

253. Judgment of December 8, 1937 – Rt 1937 s. 888.

254. Ragnar Knoph, "Ordre public-synspunktet i de amerikanske gulldollarsakene," *Tidsskrift for Rettsvidenskap* 50 (1937): 364.

255. Kristen Johanssen, *Gullklausulen* (Oslo, 1937), 61.

debate on the motion in 1937.[256] The speakers in the 1937 debate talked mostly about the ban on retroactive legislation as such, but also about judicial review.

The contributions to this debate by Labour MPs suggest that Labour was, on the one hand, not very concerned about judicial review and section 97, but on the other hand still would have preferred it if this section did not exist. Labour MPs repeated the by then well-rehearsed arguments about section 97 as, supposedly, "a barrier to societal development,"[257] providing alcohol regulation and the trade privileges of pharmacies as examples.[258] However, the Labour MP Olav Vegheim also said that discussions with legal experts suggested that section 97 was currently hardly relevant and rarely used.[259] In a similar vein, Labour's chief economic thinker, Ole Colbjørnsen deemed it "possible that the significance of this section 97 has been overemphasized quite a lot. These proposals are a little bit of a revenant from rather old times."[260] Nevertheless, Colbjørnsen insisted that the ban on retroactivity still represented a risk to Labour's policy agenda. "The development itself has made major inroads into this conservative guarantee, but as long as the section remains standing in its current bare form, difficulties with many new necessary legislative projects pertaining to economic assets can come up."[261]

Colbjørnsen also had some praise for the Norwegian Supreme Court. "What obviously ultimately matters," Colbjørnsen said, "is the Supreme Court's interpretation of this provision, and this will in turn be based on the composition of the Supreme Court and the degree to which it is people with modern, social and radical views who sit on the country's Supreme Court. In this regard, here in Norway we are luckily in a much better position than for example the U.S."[262] In the unlikely case that the Supreme Court would still turn out to be a barrier, President Roosevelt had shown the way. Packing the Supreme Court, Colbjørnsen maintained, would be hardly contentious in the Norwegian

256. Stortinget, February 12, 1937, St. forh. 1937, 63–64.

257. St. forh. 1937, 58.

258. Ibid., 56.

259. Ibid.

260. Ibid., 58

261. Ibid.

262. Ibid.

context, as the constitution set no upper limit on the maximal number of justices. However, Colbjørnsen concluded that "we will never run into these difficulties, and I for my part do not believe that this question has big practical significance."[263]

Labour MPs loyally voted for their own motion in 1937, but remained far from reaching the necessary 2/3-majority without the support of other parties. Thereafter, Labour introduced no further amendments to ban judicial review, or abolish the right to property or the ban on retroactive legislation. Labour also did not, as Colbjørnsen had mused, pack the Court with party loyalists. In fact, it was under Labour that the easiest way to exert political influence over the Court's composition – the possibility to appoint temporary "extraordinary justices" – was abolished.[264]

On the one hand, Labour's continued efforts to abolish judicial review in the 1930s, the end of these efforts as Labour observed the emergence of a more deferential jurisprudence and Colbjørnsen's speculations about court-packing in the hypothetical scenario that the Supreme Court obstructed an important economic policy suggest that the decline of the expected costs of judicial review was necessary for Labour to abandon its campaign against judicial review. It seems likely that Labour would have continued this campaign if the Court had interfered with economic policy in, for example, the Milk case or in hypothetical cases concerning similar schemes.

On the other hand, the decline in the expected costs of judicial review is not sufficient to explain the end of Labour's campaign against it. As the debate on section 97 and the implications of currency devaluation show, the political risks of judicial review were not zero. Who could guarantee that the Court would remain deferential, also considering that Labour's policy agenda could yet become more interventionist?

Hence, there had to be an additional factor that led Labour to accept a low, but nevertheless not absent risk of judicial review. One such factor might have been Labour's reluctance, considering the rise of dictatorship abroad, to continue a constitutional agenda that smacked of authoritarianism. At least this was how Conservatives framed the issue. During the 1936 electoral campaign, the Conservatives' parliamentary leader C. J. Hambro cast the election as a portentous choice between

263. Ibid., 59.

264. Kierulf and Slagstad, "Høyesteretts dommere," 68.

democracy and a (Labour) dictatorship and presented Labour’s campaign against judicial review and the proposed ban on retroactive legislation as evidence.[265] After the failure of Labour’s last proposal to abolish section 97, the conservative press celebrated that an “assault on the constitution” had been averted.[266] A Labour MP complained about this, in his view, unfair framing of their constitutional reform plans for the purpose of political agitation.[267] This suggests that Labour was nervous that the framing of their campaign against judicial review as authoritarian could cost votes.

More generally, after Labour formed the government in 1935, Labour largely abandoned its class war rhetoric and emphasized cross-class co-operation.[268] The noise created by Labour’s campaign against judicial review did not sit well with attempts to pacify social tensions. Given that the Supreme Court showed no ambitions to interfere with Labour’s agenda, entering a third decade of efforts to abolish judicial review was probably not worth the political cost.

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265. “Folkestyre eller diktatur og terror – det er det valget gjelder,” *Morgenbladet*, September 21, 1936, 1; in this vein also “Arbeiderpartiet og rettssikkerheten,” *Adresseavisen*, November 5, 1936, 3.

266. “Arbeiderpartiets attentat mot grunnloven slått tilbake med 72 mot 67 stemmer,” *Aftenposten*, February 13, 1937, evening edition, 5; “Arbeiderpartiets angrep på rettsbeskyttelsen blev avslått,” *Grimstad Adressetidende*, February 16, 1937, 1.

267. St. forh. 1937, 56.

268. Furre, *Norsk historie*, 269.

3.7 Alternative Explanations: Ideological Commitment and the U.S. Experience

The account in this chapter explains Liberals' and Labour's opposition to judicial review in terms of the political costs it imposed on them. Put differently, I argue that Liberals and Labour expected judicial review to impose constraints on their policy agenda, that this was a reasonable expectation to hold, and that Liberals and Labour would not have rejected judicial review in the absence of this expectation. In this argument, the expected consequences of judicial review are central to its political acceptance. Yet, as the legal scholar Torstein Eckhoff saw it, judicial review in inter-war Norway actually did not have important political consequences. "Altogether it can hardly be said that the cases where laws were set aside were of far-reaching social significance," Eckhoff wrote. "In many cases the decisions only led to a brief delay in the implementation of the measures the legislature had sought, and other cases concerned liability for compensation that hardly amounted to much in the state budget."[269] This claim, however, understates the importance of inter-war judicial review. Eckhoff considers the stakes of judicial review ex post, not ex ante. It is hard to see why, for example, thousands of over-indebted farmers, and hence their political representatives, should not have been deeply concerned about the possibility that the Supreme Court could hamper debt relief.

Yet, Eckhoff's point makes it all the more important to discuss two plausible alternative explanations for Liberals' and Labour's opposition to judicial review. First, it could merely have been due to an ideological commitment – what mattered to Liberals and Labour, one might argue, was not whether judicial review was politically useful or cumbersome, but its incompatibility with their ideological priors, such as views about the intrinsic value of popular sovereignty. Second, it is plausible that the example of the U.S. Supreme Court's *Lochner* jurisprudence was sufficient for shaping the expectation that judicial review would be costly to the left, overshadowing the domestic experience of judicial review.

Labour and also many Liberals undoubtedly held beliefs that predisposed them unfavourably towards judicial review. Opposition to judicial review was often expressed

269. Eckhoff, "Høyesterett," 206.

in terms of its alleged incompatibility with liberal and socialist ideals of popular rule. Judicial review, the socialist Supreme Court Justice Karl F. Dahl wrote in 1929, was "entirely incompatible with the idea of popular sovereignty."[270] The Norwegian Labour Party of the late 1910s and the 1920s was more radical than other socialist parties in Western and Northern Europe.[271] In 1919, Labour joined the Communist International, prompting the party's Social Democratic wing to go its separate way in 1921, but left the International again in 1923, now prompting the departure of its Communist wing.[272] In 1927, Labour reunited with the Social Democratic Party.[273] Nevertheless, Labour's 1925 manifesto described the party as a Communist party that sought the dictatorship of the working class.[274] Comparing Labour's manifestos from 1920 on, we find a version of Marx' committee thesis – the "executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie"[275] in all manifestos until 1933. Only the 1939 manifesto dropped the characterization of the state as an instrument of bourgeois domination.[276]

Liberals, too, carried an ideological heritage that did not fit easily with judicial review. The struggle against bureaucratic elites and the introduction of parliamentarism had been key Liberal projects during the 19th century. "Self-rule" (*selvstyre*) – both in the sense of Norwegian self-government independently of Sweden and in the sense of parliamentary government – had become a Liberal catchword during these struggles.[277] The dogma of unfettered parliamentarism – "all authority and power is gathered in this room," as its most prominent Liberal advocate Johan Sverdrup famously put it – surely

270. Karl Frimann Dahl, "Grunnloven," *Det 20de Århundrede*, 1929, 33.

271. Edvard Bull, *Arbeiderklassen i norsk historie*, 2nd ed. (Oslo, 1948), 216; Stefano Bartolini, *The Political Mobilization of the European Left, 1860–1980: The Class Cleavage* (Cambridge, UK, 2007), 28; see also David Redvaldsen, *The Labour Party in Britain and Norway: Elections and the Pursuit of Power between the World Wars* (London, 2011), 13.

272. Einhart Lorenz, *Arbeiderbevegelsens historie: en innføring: norsk sosialisme i internasjonalt perspektiv*, vol. 1, *1789–1930* (Oslo, 1972), 126ff., 150ff.

273. Furre, *Norsk historie*, 206.

274. "Det norske Arbeiderpartis program," 1925, https://nsd.no/polsys/data/filer/parti/10002.rtf.

275. Karl Marx and Friedrich Engels, "Manifesto of the Communist Party," 1848, 15, https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf.

276. "Det norske arbeiderpartis prinsipielle program 1939," 1939, https://nsd.no/polsys/data/filer/parti/10022.rtf.

277. Jens Arup Seip, *Utsikt over Norges historie*, 2nd ed., vol. 2, *Tidsrommet ca. 1850–1884* (Oslo, 1997), 161ff.

did not easily accommodate ceding a slice of this hard-won power to the courts.[278] In this vein, the Liberal MP Nils Skaar, among others, justified his opposition to judicial review. “We hold the old-fashioned view that there is only one legislative power here in the country, and this is parliament. It is sovereign on the field of legislation,” Skaar said in 1923.[279]

However, some aspects of the conflict over judicial review are difficult to explain with an ideological aversion alone. One aspect is the onset of the campaign: Most clearly Liberals, but also Labour, only made efforts to abolish judicial review once they directly faced the possibility that it would interfere with the implementation of their policy preferences. As the account in this chapter shows, Liberal efforts to abolish judicial review were triggered by the Waterfall Case in 1918, and the first Labour amendment to abolish the ban on retroactive legislative was probably triggered by the Oslo City Court’s 1917 judgment on rent regulation. Liberals had known that the waterfall concessions policy was constitutionally contentious already at its passage in 1909, but only tried to abolish judicial review when the Concessions Act came under judicial scrutiny. If Liberal and Labour opposition to judicial review had primarily been due to a deep-seated ideological aversion against it, they should have tried to abolish it even before the political stakes increased.

Second, a 1929 row over civil servant wages further highlights the importance of instrumental considerations, instead of an ideological commitment, for the stance towards judicial power. In this case, civil servants went to court to challenge a cut to their wages passed by parliament – against the votes of Labour.[280] In legal terms, this was not a case of judicial review, but it ultimately also concerned the question what boundaries on legislative power existed – it is somewhat reminiscent of the important role the vested rights of civil servants played for judicial review in Weimar Germany. In the Norwegian case, civil servants argued that parliament was bound by a 1920 wage

278. Sverdrup had also been critical towards judicial review in the mid-19th century, see Kierulf, *Judicial Review*, 72.

279. Stortinget, October 17, 1923, St. forh. 1923, 3227.

280. On this episode, see Kierulf, *Judicial Review*, 99–100; Asmund Arup Seip, *Rett til å forhandle: en studie i statstjenestemennenes forhandlingsrett i Norge og Sverige 1910–1965*, 243 (Oslo, 1997), 144; Furre, *Norsk historie*, 202–3.

scale that allowed cuts to their wages only if wages in the private sector had declined to such an extent that a disproportionate difference between public and private sector pay had arisen.[281] They succeeded in court, leaving the government with a bill of 27 million Norwegian Crowns,[282] about $162 million in today's prices. In a reversal of the usual positions on judicial power, Conservatives attacked the decision as an infringement of parliamentary prerogatives, whereas Labour, who wanted the government to engage in wage bargaining with civil servants,[283] celebrated the decision as a victory for public employees.[284]

The opportunism of this behaviour was not lost to the author of a letter to the Labour-affiliated newspaper *1ste Mai* who feared that Labour's sudden support for judicial oversight of parliament would come back to haunt the party in the future: Once in government, "Labour will obviously put forward measures that intervene into our military, the banking sector and probably also economic life,"[285] the letter writer predicted. "As far as I can understand, the state can then expect lawsuits by the Norwegian Banking Association and the Norwegian Trade Association. And those who know our jurists and our courts will not doubt that the state will lose the case. … Regardless whether the reduction of civil servants' wages is legitimate or not, the courts should not be able to cast aside a decision by Parliament."[286] Yet, in the conflict over civil servants' wages, short-term political gains trumped ideological commitment. As the legal scholar Anine Kierulf puts it, "Parliament's view of the relation between itself and the courts seems more opportunistic than principled."[287] Such opportunism is more consistent with an explanation on the basis of instrumental cost-benefit calculations than with an explanation based on ideology.

As discussed above, I do not take a stance on why Liberals gave up their opposition to judicial review after 1926; it is possible that they developed an intrinsic

281. Seip, *Rett til å forhandle*, 144.

282. Ibid., 164.

283. Ibid., 147.

284. Kierulf, *Judicial Review*, 100.

285. I. K., "Dommen," *1ste Mai*, February 11, 1929, 2.

286. Ibid.

287. Kierulf, *Judicial Review*, 99.

commitment to judicial review as part of the rule of law or constitutional tradition – although in the overall context, it is hard to disentangle this from instrumental considerations related to the rise of Labour. Regarding the end of Labour's campaign, its turn away from Marxist rhetoric hardly implied an ideological commitment to judicial review as part of constitutional democracy; as discussed above, Labour's chief economic strategist Ole Colbjørnsen still mused about court-packing in parliament in 1937. It is difficult to see a commitment to judicial review here that did not depend on its political costs.

Besides the ideological beliefs of Liberals and Labour, it merits discussion whether the U.S. Supreme Court's *Lochner* jurisprudence led to a sort of *Lochner* anxiety on the left, that is, a perception of the risks of judicial review that was detached from the Norwegian context. There is no doubt that the U.S. experience was very present in the Norwegian discussion and often served as evidence for the detrimental effects of judicial review on progressive policies.[288] Norwegian scholars were very aware of the discussion on judicial review in the U.S. For example, an expert opinion on behalf of parliament's Constitutional Committee cited much judicial review-sceptic U.S. literature, as well as Edouard Lambert's 1921 book on the "government of judges."[289] Already in 1913, the legal scholar Bredo Morgenstierne cited Theodore Roosevelt's proposal to give voters the power of a "decision recall," that is, to overturn, through a referendum, a judgment setting aside a statute.[290] In the mid-1930s, the conflict between Franklin D. Roosevelt and the Court over the New Deal was widely reported on and discussed.[291] The last parliamentary debate on repealing the ban on retroactive legislation on February 12, 1937, took place only a week after Roosevelt had announced his court-packing plan on February 5.

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288. See Sandmo, *Siste ord*, 2:115–17; more extensively Helgadóttir, *American Theories*.

289. Mikael H. Lie, "Dokument nr. 13 (1923). Betenkning angående grunnlovens §§97 og 105 og om domstolenes myndighet til å prøve loves indre gyldighet," 1923, 20; see also Helgadóttir, *American Theories*, 45ff.; Kierulf, *Judicial Review*, 89–90.

290. Morgenstierne, "Høiesterets Adgang til at tilsidesætte Lovbestemmelser som grundlovstridige," 453; see also Sandmo, *Siste ord*, 2:116.

291. For example, "Roosevelts kriselover rammes av et nytt alvorlig slag," *Aftenposten*, May 19, 1936, morning edition, 1.

In the Norwegian debate, the U.S. usually was cited as a negative example of judicial review obstructing social reform.[292] For example, the Constitutional Committee noted in its 1923 report that judicial review in the U.S. had "in recent times met strong objections claiming that the courts in reality exercise political power and oppose social progress."[293] During the 1937 plenary debate, the Labour MP Ole Colbjørnsen speculated on what a jurisprudence along the lines of the U.S. Supreme Court would have meant in the Norwegian context: "We have seen how the U.S. Supreme Court has set aside the acts concerning industry [the National Industrial Recovery Act] and agriculture [the Agricultural Adjustment Act]. Here in Norway everything that concerns the dairy collectives, and even the current trust legislation would be declared unconstitutional on the basis of the interpretation that the conservative U.S. Supreme Court has given [to the constitution]."[294]

It is plausible that the U.S. experience added a sense of urgency to the Norwegian debate. As discussed above, the U.S. Supreme Court's judgments in the Gold Clause cases and on the New Deal illustrated the dangers of rigid constitutions and possible judicial obstacles to monetary devaluation. But while the U.S. experience was often invoked as a cautionary tale of the judicial obstruction of social reform, there is little to suggest that the spectre of *Lochner* is sufficient to explain the rejection of judicial review in Norway. Hardly any comparison to the U.S. was made without pointing out that the experience of judicial review in Norway and the U.S. differed and that a simple extrapolation from the U.S. case was not warranted. For example, the 1923 majority opinion of the Constitutional Committee pointed out that "the judiciary's use of the power in question here has not been as extensive as in the United States,"[295] and Labour MP Ole Colbjørnsen acknowledged that "here in Norway we are luckily in a much better position than for example the U.S."[296] All in all, although the U.S.

292. Kierulf, *Judicial Review*, 106.

293. "Innst. S. LXXIV (1923)," 4.

294. Stortinget, February 12, 1937, St. forh. 1937, 62.

295. "Innst. S. LXXIV (1923)," 6.

296. St. forh. 1937, 58.

experience of judicial review served as an illustration of the risks of an activist exercise of judicial review, it was not naively transposed onto the Norwegian case.

Altogether, Labour's Marxism and Liberals' ideological heritage of strong parliamentarism, as well as the U.S. example, surely provided the Norwegian left with a set of normative and empirical beliefs about the effects of judicial review that helped to trigger their campaign against it. But the timing of their campaign, Labour's opportunism in the civil servants' case of 1929, and the nuanced comparison of the U.S. and Norwegian experience are at odds with an explanation in which these beliefs are sufficient for the left-wing opposition to judicial review. It is difficult to imagine Liberals' and Labour's anti-judicial review campaign absent its practice by the Supreme Court and the challenges this posed to their policy agenda.

3.8 Conclusion

In this chapter, I argued that Norwegian Liberals and Labour attempted to abolish judicial review because it exhibited a structural bias against their policy agenda. Based essentially on two policy-interactive provisions – the right to property and the ban on retroactive legislation – judicial review was an overall costly institution for those political actors with prospects of participating in governing majorities that were furthest to the left on the political spectrum. In contrast to what insurance theory assumes, judicial review did not provide a valuable safeguard for Labour, and for a long time also Liberal interests. Instead, its entanglement into a structure of constitutional rights only provided an opportunity for judicial challenges from the right, such as challenges against regulations on the sale of alcohol, rent regulation, the right to reversion on hydro-power installations or measures against debt relief for farmers. I also showed that the rise of left-wing opposition cannot be explained merely with Labour's and Liberals' ideological beliefs or a deterrent effect of the U.S. example.

Observing the Norwegian debate from Germany, where judicial review had become a similarly contentious issue, the legal scholar Ernst Wolgast seemed convinced that the efforts to abolish judicial review would not succeed. "Recent attacks against the legitimacy of the institution originate in socially reformist circles … that are close to the ideology of the fourth estate and consider judicial review an impediment to 'effective social reform efforts'. They have not been effective so far. The institution [of judicial review] is too deeply rooted in popular consciousness,"[297] Wolgast wrote in 1922. Formally speaking, this prediction was correct. Judicial review remained part of Norwegian constitutional law. However, as this chapter shows, judicial review became politically relatively marginal in the 1930s.

The increasingly marginal role of judicial review in the political system is a necessary cause of the end of Labour's anti-judicial review campaign after 1937. Labour noticed that the Supreme Court became increasingly deferential and was willing to uphold interventionist policies if they could be justified with economic imperatives. But Labour also did not develop a commitment to judicial review regardless of its costs,

297. Ernst Wolgast, "Das richterliche Prüfungsrecht in Norwegen," *Deutsche Juristenzeitung* 27, no. 23/24 (1922): col. 718.

as Ole Colbjørnsen's musing about court-packing in 1937 shows. Given that Labour still introduced a motion to abolish the ban on retroactive legislation in 1936, when the Court had last interfered with an important economic policy five years ago, it seems likely that Labour would have continued its campaign against judicial review had its intensity returned to previous levels. However, since the risk of judicial review had also not disappeared entirely, an additional factor must have contributed to the end of Labour's campaign against judicial review. This may have been concerns that attacks against the constitution and judicial review appeared divisive and authoritarian at a time when Labour tried to promote a more harmonious political vision.

Ironically, Labour may have contributed to the end of the Liberal campaign against judicial review after 1926. The shift of Norwegian politics from pitting Conservatives against Liberals, to pitting Conservatives and Liberals against Labour implied that Liberals now had an interest in safeguards against policies located further to their left, as well as against Labour's supposedly authoritarian tendencies. At the same time, memories of the shock of the 1918 Waterfall Case were fading and the Plenary Act made it more difficult to challenge marginally constitutional policies. Yet, it is possible that Liberals would also have stopped efforts to ban judicial review in the absence of "insurance" benefits against Labour and a decline in the costs of judicial review. Instead, Liberals may have developed an intrinsic commitment to judicial review or may have wanted to demarcate themselves more clearly from Labour.

The hibernation of judicial review that began in the 1930s lasted well beyond the end of World War II. According to the prevailing view in constitutional history, judicial review had its big return only with the *Kløfta* case of 1976, when the Court refused to apply, with ten against seven votes, provisions in an act that restricted the extent of compensation for expropriation.[298] Barely a year earlier, the legal scholar Torstein Eckhoff had declared judicial review dead when he expressed his doubts that "these powers will ever be used again in any way worth mentioning."[299] Eckhoff's scepticism appears justified given the very small extent of judicial review in the three decades after the end of World War II. This was the period of welfare state expansion and Labour

298. Judgment of January 27, 1976 – Rt 1976 s. 1. See Kierulf, *Judicial Review*, 123ff.

299. Eckhoff, "Høyesterett," 202. As translated in Kierulf, *Judicial Review*, 135.

hegemony, with a total of 23 years of Labour governments. On the basis of generous criteria for what counts as judicial review – including, importantly, also review of decrees – Smith finds 72 cases of judicial review between 1945 and 1974.[300] Yet, Smith counts only two cases in which provisions were set aside as unconstitutional.[301]

However, with stricter criteria, far fewer post-World War II judicial review cases are found. Grendstad, Shaffer and Waltenburg report 14 non-unanimous plenary decisions concerning sections 97 and 105 between 1945 and 1975.[302] As discussed, these provisions were the main yardstick of judicial review and plenary decisions were necessary if at least three (since 1939 two) Supreme Court justices sought to set aside a statute or decree as unconstitutional. Of these 14 cases, exactly one was lost by the government.[303] In this case, the Court set aside a wartime decree on the wages of police officers who had been members of the collaborationist *Nasjonal Samling* Party, insofar as the decree's retroactive scope of application was concerned.[304]

In the first decade after World War II, judicial review was strongly concerned with the sanctioning of crimes and collaborationism during the German occupation,[305] an issue unrelated to the main political cleavages of the time. The post-World War II expansion of state intervention into the economy remained unaffected by judicial review.[306] As Kierulf argues, it was not unthinkable that the government would lose judicial review cases during this period – "judicial review was indeed a functioning institution at the time."[307] Yet, it seems fair to say that the overall risk that the Supreme Court would find a statute concerning an important policy unconstitutional at this time was very low.[308]

300. Smith, *Høyesterett og folkestyret*, 204.

301. Rt 1952 s. 932, and Rt 1964 s. 1418. See Smith, *Høyesterett og folkestyret*, 224–26.

302. Grendstad, Shaffer, and Waltenburg, *Policy Making in an Independent Judiciary*, 178.

303. Ibid.

304. Judgment of September 13, 1952 – Rt 1952 s. 932. See also Smith, *Høyesterett og folkestyret*, 224.

305. See Kierulf, *Judicial Review*, 111f.

306. Ibid., 112.

307. Ibid., 117.

308. See Ibid., 116.

Chapter Four. Weimar Germany

4.1 Introduction

In Weimar Germany, the question of judicial review was under debate during almost the entire lifespan of the Republic. It was discussed during the drafting of the constitution in 1919, in parliament, among legal scholars, and among practitioners. From 1925 to 1929, a bill on the centralization of judicial review of federal laws was under preparation. This bill was never passed, leaving Weimar Germany with an incomplete, fragmented system of judicial review, comprising the – uncontested – review of state laws, as well as a controversial practice of review of federal laws in which the judiciary engaged in an act of self-empowerment. But in contrast to Austria, politicians in Weimar Germany never explicitly vested the power to review the constitutionality of federal laws into a court.

This outcome is difficult to explain with existing theories of judicial review. Like Austria, Weimar Germany was a federation. Its political system was highly competitive, and the Weimar Constitution contained the most comprehensive bill of rights in German history. The close ties between Austrian and German legal scholarship allowed the instant diffusion of the theory and practice of the Austrian Constitutional Court to Germany. Historical institutionalists might argue that the drafters of the Weimar Constitution could not build on the institutional legacy of the monarchy, as their Austrian counterparts did by transforming the Habsburg Imperial Court into the new Constitutional Court. However, such an explanation is difficult to reconcile with the fact that Weimar Germany came very close to adopting the centralized judicial review of federal laws: The Weimar Constitutional Committee rejected a motion to vest the power of review of federal laws into the State Court only in a tied vote. Later, a bill to centralize judicial review was pursued by five governments between 1925 and 1929. All major parties in the Reichstag except the Communists supported the bill in 1927, before other legislative business and early elections prevented its passage. Only in early 1930 was the project abandoned. Although many factors were favourable to the adoption of judicial review, Weimar Germany remained a "near miss"[1] of institutional reform. What stood in the way?

In this chapter, I argue that the chances for the adoption of centralized judicial review of federal laws in Weimar Germany deteriorated as legal experts in the Social Democratic Party (SPD) came to the conclusion that judicial review, by safeguarding a few specific constitutional rights, would entail a slant against interventionist economic policies, and therefore the SPD's policy agenda. Such an anti-left slant of judicial review was not yet expected when the constitution was drafted. The narrow rejection of centralized judicial review in 1919 can instead be explained with views about the rule of law inherited from the monarchy. In the following years, a practice of diffuse judicial review emerged that, to say the least, was hardly beneficial to Social Democratic interests. More importantly, the right to property and the constitution's equality clause were interpreted in an increasingly expansive fashion. When the federal government, concerned about diminishing legal certainty and legislative discretion, drew up plans to centralize the judicial review of federal laws, these efforts initially made good progress and won the support of all major political parties. Until 1928, it was not a possible anti-progressive slant of judicial review, but its potential to interfere with foreign policy that was the main concern among policy-makers and bureaucrats – a problem that did not appear insurmountable. But in 1929, jurists in the SPD voiced concerns that rights-based judicial review could obstruct progressive economic policies. However, these concerns did not extend to the role of judicial review in adjudicating federalism-related conflicts. Shortly after the opposition in the SPD had come to the fore, the SPD-led government shelved further work on the bill – a decision that may have been due to the concerns within the SPD, although there is no definitive evidence to prove this.

The literature on Weimar constitutional history, including the debate on judicial review and its practice, is vast.[2] Many contributions focus on the intellectual history of

1. Capoccia and Ziblatt, "The Historical Turn in Democratization Studies," 943.

2. As a starting point in English, see, among others, Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism* (Durham, N.C, 1997); Stolleis, "Judicial Review"; Michael Stolleis, *A History of Public Law in Germany 1914–1945* (Oxford, 2004); Gertrude Lübbe-Wolff, "Safeguards of Civil and Constitutional Rights – the Debate on the Role of the Reichsgericht," in *German and American Constitutional Thought: Contexts, Interaction, and Historical Realities*, ed. Hermann Wellenreuther, Claudia Schnurmann, and Thomas Krueger (New York, 1990), 353–72. For a comprehensive overview of the Weimar Constitution, see

Weimar constitutionalism, an aspect that remains in the background here. I rely more on the literature that deals with the practice of judicial review,[3] especially the emergence of diffuse judicial review of federal statutes and the judiciary's increasing assertiveness vis-a-vis the legislature, especially in the context of hyperinflation.[4] This literature informs the summary of the practice of judicial review and its political consequences in this section. Most important for the questions asked in this chapter – why did the adoption of centralized judicial review of federal laws fail, and why did opposition towards it arise in the SPD – are the works (also) dealing with the institutional plans and choices of policy-makers.[5]

Yet, these works hardly discuss why plans to centralize judicial review failed several times during the Weimar period. Wendenburg attributes the failure of the motion in the Constitutional Committee in 1919 to a coalition of strict opponents of judicial review and supporters of *diffuse* judicial review;[6] he also sees the latter group behind the failure of a similar motion in 1920.[7] A clear cause of the failure of further plans to centralize judicial review in the late 1920s is not identified. Some authors doubt that these plans would have found the support of a parliamentary majority.[8] Others put the decline in support for centralized judicial review in the context of increasing misgivings

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Christoph Gusy, *Die Weimarer Reichsverfassung* (Tübingen, 1997).

3. For example, Lübbe-Wolff, "Safeguards"; Alexandra Hornauer, *Das Reichsgericht zur Frage des richterlichen Prüfungsrechts (1919-1933)* (Frankfurt/Main, 2009); Horst Dreier, "Verfassungsgerichtsbarkeit in der Weimarer Republik," in *Schutz der Verfassung: Normen, Institutionen, Höchst- und Verfassungsgerichte: Tagung der Vereinigung für Verfassungsgeschichte in Hofgeismar vom 12. bis 14. März 2012*, ed. Thomas Simon and Johannes Kalwoda (Berlin, 2014), 317–72.

4. Friedrich Karl Kübler, "Der deutsche Richter und das demokratische Gesetz," *Archiv für die civilistische Praxis* N.F. 42, no. 1/2 (1963): 104–27; Helmut D. Fangmann, *Justiz gegen Demokratie: Entstehungs- und Funktionsbedingungen der Verfassungsjustiz in Deutschland* (Frankfurt/Main, 1979); Michael L. Hughes, "Private Equity, Social Inequity: German Judges React to Inflation, 1914–24," *Central European History* 16, no. 1 (1983): 76–94; Gerald D. Feldman, *The Great Disorder: Politics, Economics, and Society in the German Inflation, 1914–1924* (Oxford, 1993), esp. 515ff., 812ff.; Christiane Chlosta, *Nur dem Gesetz unterworfen? Eine rechtsgeschichtliche Untersuchung zu Idee und Wirklichkeit richterlicher Gesetzestreue unter besonderer Berücksichtigung der Aufwertungsrechtsprechung und des richterlichen Prüfungsrechts* (Frankfurt/Main, 2005).

5. Wolfgang Wehler, *Der Staatsgerichtshof für das Deutsche Reich*, PhD thesis (University of Bonn, 1979); Helge Wendenburg, *Die Debatte um die Verfassungsgerichtsbarkeit und der Methodenstreit der Staatsrechtslehre in der Weimarer Republik* (Göttingen, 1984); Fangmann, *Justiz gegen Demokratie*.

6. Wendenburg, *Die Debatte*, 50.

7. Ibid., 85.

8. Ibid., 41; Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789*, vol. 6, *Die Weimarer Reichsverfassung* (Stuttgart, 1981), 564.

in the SPD,[9] and of growing scepticism among scholars and within the government about judicial constraints on the legislature and the executive.[10] Yet other authors point to the disorder of the last Weimar years,[11] "the Reichstag's paralysis after 1929,"[12] growing tendencies of the president to assess the constitutionality of statutes before signing them, as well as the shift to govern through emergency decrees, instead of parliamentary legislation.[13] The authors who discuss the concerns about judicial review in the SPD emphasize various aspects, such as Social Democrats' worries about the obstruction of progressive policies, concerns about an "erosion of parliamentary authority,"[14] difficulties to staff the State Court with socialist judges,[15] a principled rejection of fundamental rights as undemocratic, and misgivings about increasing the discretion of conservative judges.[16]

This chapter draws on the secondary literature especially with regard to the discussions in the Weimar constitutional assembly, the practice of judicial review and trends in legal scholarship. However, to analyse political actors' preferences towards judicial review, I also use primary sources, including the minutes of the constitutional assembly, parliamentary records, newspaper and periodical articles and government files, mainly on the bill to centralize judicial review under preparation between 1925 and 1929.[17] These files, stored in the Federal Archives in Berlin, provide valuable inside information on the motivation of efforts to centralize judicial review, the concerns associated with it, and the failure of these plans. I also rely on a summary of a 1929

9. Wehler, *Staatsgerichtshof*, 114ff.

10. Ibid., 114ff.; Huber, *Verfassungsgeschichte*, 6:564.

11. Karl Zippelius, *Verfassungsrechtliche Stellung und Entwicklung der Rechtsprechung des Staatsgerichtshofs für das Deutsche Reich dargestellt mit Blick auf den Status des Bundesverfassungsgerichts der Bundesrepublik Deutschland* (PhD thesis, University of Freiburg, 1973), 69.

12. Caldwell, *Popular Sovereignty*, 155.

13. Fangmann, *Justiz gegen Demokratie*, 133; Stolleis, "Judicial Review," 279.

14. Wehler, *Staatsgerichtshof*, 119.

15. Ibid., 115ff.

16. See Wendenburg, *Die Debatte*, 83ff.

17. In systematic fashion, I consulted the files on the bill to centralize judicial review in the Interior Ministry (BArch, R 1501/125073 and R 1501/125074), the Ministry of Justice (BArch, R 3001/7120 and R 3001/7121) and the Foreign Office (R 901/28068). I also refer to a few documents from Chancellery files (BArch, R-43 I), selected mainly on the basis of leads in the secondary literature.

meeting of SPD jurists contained in the personal files of the SPD politician Carl Herz.[18] Some of these sources have, to my knowledge, not been used in the existing literature so far. In contrast to the other case studies, this chapter relies less on newspaper articles of court decisions. The coverage of judicial review cases in the SPD party newspaper *Vorwärts* or the liberal *Vossische Zeitung* was rather irregular, possibly because most cases only concerned state legislation and therefore hardly mattered to a national audience.

In what follows, I first explain why the drafters of the constitution narrowly rejected judicial review of federal statutes in 1919 (2.). I summarize how the courts nevertheless began to review the constitutionality of federal statutes, especially in the context of hyperinflation (3.), and discuss whether the overall practice of judicial review can plausibly be described as disadvantageous to the SPD (4.). Subsequently, I discuss the Supreme Court's expanding property rights jurisprudence and the constraints judicial review imposed in the conflict over the assets of the former royal families (5.), as well as the ground-breaking transformation of the equality clause spearheaded by legal scholars (6.). These developments are crucial to understanding later plans to centralize judicial review (7.), and the eventual opposition to these plans within the SPD (8.). In this section, I also deal with the question why opposition against judicial review was not only a matter of judicial attitudes and hence of control over judicial appointments. Two further alternative explanations for Social Democratic opposition to judicial review are discussed in more detail: the role of an ideological commitment (9.), as well as the influence of the U.S. example (10.). Finally, I discuss whether the shelving of plans to centralize judicial review in 1930 can be attributed to the opposition within the SPD (11.).

18. Carl Herz Papers, nr. 426, International Institute of Social History, Amsterdam.

4.2 Judicial Review at the Drafting of the Weimar Constitution

The 1919 Weimar Constitution vested considerable powers to adjudicate constitutional disputes in the courts. Among others, the Supreme Court was granted abstract review powers over the conformity of state legislation with federal law (including the constitution), and a State Court (*Staatsgerichtshof*) decided constitutional disputes within and among the German states, as well as between the states and the federation (*Reich*). Yet, the constitution remained silent on the crucial question of judicial review of *federal* statutes. At the same time, the Weimar Constitutional Committee could not have come closer to adopting this power – in an abstract, centralized form – since it rejected a motion to this effect with merely 11 to 11 votes. Most importantly, Social Democrats supported this motion. Thus, the adoption of judicial review was entirely within reach in 1919. As I argue, this was because the constitution's framers, including those on the left, still lacked an idea of the political causes judicial review would prove valuable for, and of the causes on which it would impose constraints. Instead, preferences for or against judicial review in 1919 largely resulted from the ideational legacy of the monarchy.

The Weimar Constitution established a semi-presidential system of government. The federal government depended on the confidence of parliament; however, parliamentary power was balanced by the directly elected president, who appointed the chancellor according to his own discretion and disposed of strong emergency powers, as well as the power to dissolve parliament.[19] As the old monarchy, the new republic was a federation, albeit a much more centralized one.[20] The 24 states (as of 1919) retained certain legislative powers, especially on education and policing, as well as their own administration, and, apart from the federal apex courts, the judiciary.[21] However, the federal government had gained important powers, especially the power to raise taxes.[22] A state chamber (*Reichsrat*) could veto legislation; parliament could overrule a veto only with a 2/3-majority.[23] Constitutional amendments required a 2/3-majority in

19. Gusy, *Weimarer Reichsverfassung*, 99ff., 113ff.

20. Ibid., 226.

21. Ibid., 236–42.

22. Ibid., 243–47.

23. Ibid., 157.

parliament (to be precise, 2/3 of the MPs present, with at least 2/3 of all MPs present), and a 2/3-majority of the votes cast in the state chamber; however, parliament could overrule a veto of the state chamber unless the state chamber demanded a referendum.[24] In practice, statutes were sometimes passed with the 2/3-majority required for a constitutional amendment; hence, they acquired constitutional status,[25] making them practically immune to judicial review.

The constitution inherited some judicial review powers from the monarchy; they were not explicitly banned by the constitution and could hence be presupposed. This included the diffuse review of the legality (and, specifically, the constitutionality) of decrees, as well as the conformity of state laws with federal law, but not of the constitutionality of federal statutes.[26] As most scholars saw it during the monarchy, the constitutionality of federal statutes could only be reviewed in a formal sense, that is, whether they had been properly promulgated.[27] Additionally, the constitution extended the judicial role in the resolution of constitutional conflicts. The first draft by liberal legal scholar Hugo Preuß already included a State Court whose function was primarily to decide "constitutional disputes" within member states and among them, as well as when government members or the president were impeached.[28] Further powers were added during consultations with the state governments. At the proposal of the Ministry of Justice, an apex court, later specified as the Supreme Court, was empowered to exercise abstract review over the conformity of state law with federal law.[29] As Prussia suggested, the State Court should not only decide in conflicts within or among the states, but also in conflicts between the states and the federation;[30] yet, this did not imply the power to review the constitutionality of statutes. In contrast to Austria, no German state government demanded this power when the constitution was drafted. It

24. Willibalt Apelt, *Geschichte der Weimarer Verfassung*, 2nd ed. (München, 1964), 246.

25. Gusy, *Weimarer Reichsverfassung*, 146f.

26. Dreier, "Verfassungsgerichtsbarkeit," 322–27.

27. Ibid., 325–26.

28. §§10, 13, 68 of Preuß' first draft (= §§10, 13, 73 of the second draft). Drafts reproduced in Heinrich Triepel, *Quellensammlung zum deutschen Staatsrecht*, 5th ed. (Tübingen, 1931), 6ff.; see also Wehler, *Staatsgerichtshof*, 42f.

29. Wehler, *Staatsgerichtshof*, 48.

30. Ibid., 49.

was probably not on their mind, especially since judicial review was not yet a "standard institution" of constitutionalism at the time.

Although the State Court did not explicitly have the power to review the constitutionality of statutes (a power it eventually claimed), it would decide important constitutional cases, most famously the dispute over the federal government's take-over of the Prussian government in 1932.[31] It was also the State Court in which proposals to establish centralized judicial review sought to vest this power. The Court was never an entirely separate entity, but a panel of judges attached to the Supreme Court. This panel was originally intended to migrate to a new Supreme Administrative Court (*Reichsverwaltungsgericht*), a court whose establishment was under preparation during almost the entire Weimar period, but remained unachieved for various reasons.[32]

The political parties could not control the State Court's composition as directly as Austrian politicians controlled the composition of the Constitutional Court. A short exception was the period between 1919 and 1921: At the urging of Social Democrats in the Constitutional Committee, four of the State Court's seven judges were chosen by the Reichstag, and the remaining three by the Supreme Court.[33] However, this was only supposed to be a preliminary arrangement; it was abolished in 1921 with the Act on the State Court's organisation. Regarding the Court's most important powers, this Act stipulated that its presiding judge and three of its seven judges would be chosen among the judges of the Supreme Administrative Court, and three further judges would be chosen among the judges of the Supreme Court.[34] The delegating courts determined these judges themselves.[35] Yet, until the Supreme Administrative Court was established, its judges were replaced by judges delegated from the high administrative courts of Prussia, Saxony and Bavaria; the president of the Supreme Court also presided over the

31. See Caldwell, *Popular Sovereignty*, 164–70.

32. Wolfgang Kohl, *Das Reichsverwaltungsgericht: ein Beitrag zur Entwicklung der Verwaltungsgerichtsbarkeit in Deutschland* (Tübingen, 1991), 392, 396; Wehler, *Staatsgerichtshof*, 252.

33. Verfassunggebende Deutsche Nationalversammlung. Verfassungsausschuß, "31. Sitzung," May 27, 1919, 22–23; Verfassunggebende Deutsche Nationalversammlung. Verfassungsausschuß, "39. Sitzung," June 6, 1919, 61; see also Wehler, *Staatsgerichtshof*, 61–62.

34. Act of July 9, 1921, §§18 Nr. 1, 16. The composition differed for some powers of the Court.

35. Act of July 9, 1921, §32.

State Court.[36] Since the Supreme Administrative Court was, in fact, never established, this arrangement remained in place throughout the Weimar period, entailing the Supreme Court's de facto control over the State Court. Appointments to the Supreme Court itself were made by the president on the basis of proposals by the state chamber.[37]

Immediately after Social Democrats had succeeded with their motion to have parliament elect four of the seven preliminary State Court members, the question of centralized judicial review came up in the Constitutional Committee. The liberal (DDP) Bruno Ablaß, Konrad Beyerle of the Catholic Centre Party (Zentrum), and the Social Democrat Hugo Sinzheimer tabled a motion to enable a minority of at least 100 MPs to request the review of statutes and administrative regulations by the State Court.[38] When Ablaß presented this motion, he also proposed an amendment to ban judicial review by the ordinary courts.[39] This, as well as the fact that Ablaß had repeatedly criticized a supposedly incompetent, formalistic and socially detached judiciary during the monarchy,[40] suggests that he may also have seen centralized judicial review as a way to sideline the ordinary courts. Ablaß' amendment was dropped again during the Committee's discussion; it also rejected the original motion with 11 to 11 votes.[41] Individual votes were not recorded, but the Committee's deliberations provide a clue as to the motives of the motion's supporters and opponents.

The motion's opponents mainly criticized that it would vest the power of judicial review into an "extraordinary court" ("Ausnahmegericht"), a term implying the suspicion that not only the law, but also political expediency would motivate the

36. Act of July 9, 1921, §31.

37. See Gusy, *Weimarer Reichsverfassung*, 107, 258.

38. Verfassunggebende Deutsche Nationalversammlung. Verfassungsausschuß, "39. Sitzung," 62; see also E. Theisen, "Verfassung und Richter," *Archiv des öffentlichen Rechts* N. F. 8, no. 3 (1925): 261; Wehler, *Staatsgerichtshof*, 62. Later this motion was often simply referred to as the Ablaß motion, but it was co-sponsored by Beyerle and Sinzheimer, see the newswires in *Weimarische Landeszeitung 'Deutschland'*, June 16, 17, and 18, 1919, in Jörg-Detlef Kühne, *Die Entstehung der Weimarer Reichsverfassung: Grundlagen und anfängliche Geltung* (Düsseldorf, 2018), 666–76, 676.

39. Verfassunggebende Deutsche Nationalversammlung. Verfassungsausschuß, "39. Sitzung," 62.

40. See, e. g. Verhandlungen des Reichstages, XII. Legislaturperiode, I. Session, "105. Sitzung," February 19, 1908, 3275; Verhandlungen des Reichstages, XIII. Legislaturperiode, I. Session, "41. Sitzung," April 19, 1912, 1258.

41. Verfassunggebende Deutsche Nationalversammlung. Verfassungsausschuß, "39. Sitzung," 68.

decisions of such a court. In this vein, Hugo Preuß, like Ablaß a member of the liberal DDP, warned that removing the power of judicial review from ordinary judges and transferring them onto the State Court would put a vital safeguard of the rule of law into the hands of a politicized institution.[42] If at all, Preuß could only imagine review powers of the State Court in addition to the review powers of the ordinary courts.[43] Echoing this, the far-right (DNVP) MP Adalbert Düringer criticized the ban of diffuse judicial review Ablaß sought as an attack on judicial independence.[44] But also Wilhelm Kahl, an MP of the liberal-right DVP and a staunch opponent of diffuse judicial review, agreed with Preuß insofar as he rejected the exercise of judicial review by the State Court for creating an "extraordinary court."[45] Somewhat surprisingly, Oskar Cohn, an MP of the far-left USPD, also preferred diffuse judicial review because it promoted individual citizens' stewardship of the rule of law. This function would be more difficult to fulfil by centralized judicial review, which also entailed too protracted a procedure.[46]

The strongest case for centralized judicial review was made by the Social Democrat Hugo Sinzheimer: It would enhance democracy and follow the proven example of "great democratic countries, e. g. America."[47] As Sinzheimer argued, "the noble idea of democracy … presupposes not only that the majority is effective, but also that the minority has to be protected and the protection of the minority must have legal safeguards."[48] Sinzheimer seemed to have only a vague sense of the specific conflicts in which judicial review would play a role. He must have imagined that conflict over the distribution of legislative powers between the federation and the states would play a role, since he suggested to exclude the question whether there was a "need for uniform regulation" – a constitutional prerequisite for federal legislation in certain fields – from the scope of review.[49] But he probably also imagined that abstract judicial review would

42. Ibid., 63.

43. Ibid.

44. Ibid., 66.

45. Ibid.

46. Ibid., 67. On the background of Cohn's arguments, see Wendenburg, *Die Debatte*, 50.

47. Verfassunggebende Deutsche Nationalversammlung. Verfassungsausschuß, "39. Sitzung," 66.

48. Ibid.

49. Ibid., 67.

safeguard fundamental rights, although he hardly expected this to play a major role.[50] As Sinzheimer said in the Committee's discussion on the bill of rights, Social Democrats saw the significance of rights in "that specific important spheres of life are … protected by the constitution so as to require a statute amending the constitution" if legislation sought to interfere with these issues.[51] It is plausible that Sinzheimer imagined that abstract judicial review would enable parliamentary minorities to enforce the requirement for a 2/3-majority if a statute was to interfere with fundamental rights.[52]

Apart from Sinzheimer, another Social Democrat, Simon Katzenstein, also supported the motion (without the ban on diffuse judicial review).[53] After the Constitutional Committee had rejected the motion, Ablaß, Beyerle and Sinzheimer tabled an almost identical motion during the Nation Assembly's plenary debate on the constitution, but withdrew it before it was voted on.[54] The motion was not tabled again, although this seems to have been planned.[55]

As the discussion in the Constitutional Committee suggests, the opponents of centralized judicial review rejected it mainly because they were attached to the idea that the rule of law required judicial review to be exercised by its supposedly apolitical guardians in the regular judiciary, not by a politically "contaminated" institution such as the State Court. Others, such as Wilhelm Kahl, may also have opposed centralized judicial review because any form of judicial review, be it diffuse or centralized, contradicted their positivist ideal of judicial subordination to the statute.[56] Moreover,

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50. This already follows from the fact that many rights of the Weimar bill of rights could either explicitly be curtailed by a statute or clearly had a merely programmatic character, see Gusy, *Weimarer Reichsverfassung*, 282.

51. Verfassunggebende Deutsche Nationalversammlung. Verfassungsausschuß, "18. Sitzung," March 31, 1919, 20.

52. With a different view Wendenburg, *Die Debatte*, 49.

53. Verfassunggebende Deutsche Nationalversammlung. Verfassungsausschuß, "39. Sitzung," 67–68.

54. "Abänderungs-Antrag Nr. 427," Verhandlungen der verfassunggebenden Deutschen Nationalversammlung, Band 337, July 2, 1919, 287; Verhandlungen der verfassunggebenden Deutschen Nationalversammlung, "53. Sitzung," July 10, 1919, 1488.

55. Wendenburg, *Die Debatte*, 47; Verhandlungen der verfassunggebenden Deutschen Nationalversammlung, "53. Sitzung," 1488.

56. Similarly Wendenburg, *Die Debatte*, 50.

opposition to centralized judicial review cut across party lines. Hence, it is better explained with the ideational legacy of the monarchy than with policy preferences.

Support for centralized judicial review came (at least) from representatives of all parties of the pro-republican "Weimar Coalition" of DDP, SPD and Centre Party. To some extent, their support may be explained with their interest in keeping the ordinary courts from exercising diffuse judicial review. But Hugo Sinzheimer's case for the motion demonstrates that the idea that centralized judicial review would provide political insurance for parliamentary minorities also played a role. Sinzheimer (and the other Committee members) were behind a veil of ignorance as to the conflicts judicial review would play a role in – far more than their colleagues in Austria would be a few months later. They had therefore little reason to worry that judicial review would disproportionately interfere with Social Democratic policies. Sinzheimer's support for centralized judicial review in 1919 is important because he emerged as one of its most important Social Democratic opponents in 1929, justifying his change of mind with "manifold experience in recent years."[57] As discussed in more detail below, his support for centralized judicial review in 1919 strongly suggests that it was in fact this "manifold experience," and not an ideological commitment, that explains his eventual opposition to it.

57. Hugo Sinzheimer, "Chronik," *Die Justiz* 4, no. 6 (August 1929): 641. The other Social Democrat who supported centralized judicial review in 1919, Simon Katzenstein, expressed greater scepticism about judicial review in 1929, but did not clearly reject it. See section 4.8 below.

4.3 The Emergence of Diffuse Review of Federal Statutes and the Revaluation Conflict

When policy-makers try to predict to what extent judicial review will foster or constrain their policy agenda, two aspects will loom large in their considerations: First, to what degree has judicial review, or the threat thereof interfered with policy-making so far? Second, what trends in the interpretation of the law are under way that might point to changes in the role of judicial review in the future? In this regard, judicial practice and legal scholarship in Weimar Germany saw three important trends: The courts began to exercise diffuse judicial review of *federal* statutes despite the lack of an explicit constitutional mandate, they expanded the notion of expropriation, and legal scholars put forward a new interpretation of the constitution's equality clause. In this section, I discuss the first of these developments. The courts' claim of the power to review the constitutionality of federal statutes, most prominently in the context of hyperinflation, led to a confrontation with the government in which policy-makers saw their leeway constrained by the threat of judicial review. As will be discussed later, this judicial self-empowerment put the centralization of judicial review, rejected in 1919, permanently on the agenda.

As mentioned above, the Weimar Constitution established the judicial review of state laws, but neither explicitly allowed nor banned the courts from reviewing the constitutionality of federal statutes. This left a void which the courts soon filled in an act of self-empowerment whose tenuous constitutional basis and surreptitious style attracted great controversy.[58] The first court to review a federal statute was the Supreme Fiscal Court (*Reichsfinanzhof*), the highest court on matters of tax law. In March 1921, it reviewed, but upheld a 1919 capital gains tax and the 1919 Fiscal Code.[59] Among others, the plaintiff had argued that these statutes violated Article 151 of the Constitution, a provision stipulating that the economic order had to "accord with the

58. F. ex., see Wendenburg, *Die Debatte*, 51ff.; Fangmann, *Justiz gegen Demokratie*, 81ff.; Christoph Gusy, *Richterliches Prüfungsrecht: Eine verfassungsgeschichtliche Untersuchung* (Berlin, 1985), 79ff.

59. Reichsfinanzhof, March 23, 1921 – RFHE 5, 333 (334f.). See also Simon Kempny, "Die obersten Fachgerichte der Weimarer Republik als Wegbereiter des richterlichen Prüfungsrechts," *Die öffentliche Verwaltung* 63, no. 23 (December 2010): 974–78; Fangmann, *Justiz gegen Demokratie*, 81ff.; Gusy, *Richterliches Prüfungsrecht*, 80.

principles of justice and aim at securing for all conditions of existence worthy of human beings."[60]

A month later, in April 1921, the Supreme Court dismissed the challenge of a landlord against a decree that obliged him to rent out vacant housing. However, the Court noted that the "Supreme Court, in settled case law, has declared the courts authorized to review both the formal and substantive legal validity of statutes and secondary legislation, unless this review is excluded by law."[61] This assertion was surprising: First, because it was unnecessary to decide the case at hand – the plaintiff had challenged a decree, not a statute. Second, because the Court supported this claim with a string of citations of past, pre-revolutionary case law that did not support what it pretended to: At best, these cases concerned the judicial review of decrees or state legislation, but not of federal statutes.[62] As contemporary observers quickly pointed out, this error must have been obvious to the judges, suggesting that they had deliberately used misleading citations to bolster their claim that the courts could review the constitutionality of federal statutes.[63]

In October 1924, a high court not only reviewed, but also set aside a federal statute for the first time.[64] The *Reichsversorgungsgericht*, a specialized court with jurisdiction mainly over the welfare claims of (former) military members and their surviving dependents,[65] set aside a 1922 statute.[66] This statute capped a pension raise for former military members insofar as former members of the imperial army could not receive a higher pension than members of the new republican army of the same rank. This meant that the plaintiff in the case, a former member of the imperial army, could not benefit from the more generous rules that had applied to the imperial army. In the view of the court, this constituted a violation of the constitutionally protected vested

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60. As translated in Heinrich Oppenheimer, *The Constitution of the German Republic* (London, 1923), 253.

61. Reichsgericht, April 28, 1921 – RGZ 102, 161 (164).

62. Lübbe-Wolff, "Safeguards," 359–60; Fangmann, *Justiz gegen Demokratie*, 83; Gusy, *Weimarer Reichsverfassung*, 217; Stolleis, "Judicial Review," 272.

63. See Fangmann, *Justiz gegen Demokratie*, 83.

64. Ibid., 89; Kempny, "Die obersten Fachgerichte," 975; Gusy, *Richterliches Prüfungsrecht*, 82.

65. Kohl, *Reichsverwaltungsgericht*, 66.

66. Reichsversorgungsgericht, October 21, 1924 – RVG 4, 168.

rights of professional soldiers.[67] This case was typical of the largest group of judicial review cases, namely those concerning the vested rights of civil servants and professional soldiers.

It was the hyperinflation of 1923 that produced the most important episode of confrontation between the judiciary and the government and led the Supreme Court to unambiguously assert the power of judicial review.[68] This confrontation began not over matters of constitutional law, but over a fundamental principle of private law: nominalism. According to this principle, the obligor owed the numerical value of a monetary obligation, and not its real, inflation-adjusted value. The risk of inflation had to be borne by the creditor, a principle summarized in the formula “Mark for Mark.”[69] With hyperinflation, the nominalist interpretation of contracts led to grave inequities, for example for holders of mortgages, since their claims had become almost worthless, while their debtors benefited greatly. Despite growing calls for revaluation, that is, an adjustment of obligations to inflation, both the courts and the government defended nominalism for a long time. Following the lead of lower courts, the Supreme Court eventually gave up nominalism in its decision of November 28, 1923.[70] In short, the Court argued that the inequities produced by nominalism could contradict the principle of good faith stipulated in the Civil Code; consequently, the nominal value of obligations could therefore be corrected with their real value in mind.[71] There was a parallel to the emergence of judicial review here: Judges had become willing to review legal provisions – in this case, those implying the “Mark for Mark” principle – against the yardstick of other, value-laden legal norms – in this case, the “principle of good faith.”[72]

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67. Case summary based on Kempny, “Die obersten Fachgerichte,” 975ff.

68. See, f. ex. Feldman, *Great Disorder*, 515–27, 812–19; Hughes, “Private Equity, Social Inequity”; Jan Thiessen, “The German Hyperinflation of the 1920s,” in *Money in the Western Legal Tradition: Middle Ages to Bretton Woods*, ed. David Fox and Wolfgang Ernst (Oxford, 2016), 735–69; Lübbe-Wolff, “Safeguards,” 360–61; Fangmann, *Justiz gegen Demokratie*, 97–111; Gusy, *Richterliches Prüfungsrecht*, 83–84; Chlosta, *Nur dem Gesetz unterworfen?*

69. Thiessen, “The German Hyperinflation of the 1920s,” 738; Feldman, *Great Disorder*, 515.

70. Reichsgericht, November 28, 1923 – RGZ 107, 78. See also Feldman, *Great Disorder*, 812ff.; Thiessen, “The German Hyperinflation of the 1920s,” 758ff.

71. RGZ 107, 78 (87ff.).

72. See Feldman, *Great Disorder*, 812f.

As the finance minister Hans Luther later described it in his memoirs, the Supreme Court decision was "a bomb."[73] The decision created hopes for widespread revaluation – in Luther's words, it inspired the public to build "incredible castles in the air."[74] Luther considered reacting with a ban on revaluation, not least since he wanted to stabilize the budget by taxing inflation gains.[75] When, in late 1923, rumours emerged that the government might ban revaluation, the "Association of Judges at the Supreme Court," a non-official association of judges, issued an off-bench declaration that effectively threatened to strike down even a partial revaluation ban as a violation of the principle of good faith, as against public policy, as an unconstitutional expropriation or an unconstitutional special tax.[76] Eventually, a 1924 emergency decree and the 1925 Revaluation Act provided for some degree of revaluation.[77] It was not only the Supreme Court's stance that had moved the government to do so.[78] Nevertheless, Luther later credited the Supreme Court's November 1923 decision with "a fundamental change in the government's policy on the revaluation question."[79]

Eventually, the Supreme Court upheld the constitutionality of both the 1924 decree and the 1925 Revaluation Act – the latter in a seminal decision of November 4, 1925, in which it asserted the courts' power to review federal statutes in the most explicit fashion yet.[80] This completed the mosaic of judicial review powers under the Weimar Constitution with the power to review the constitutionality of federal statutes. Among legal scholars, this development was highly controversial.[81] Typically, right-wing scholars supported diffuse judicial review, whereas liberal and left-wing scholars

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73. Hans Luther, *Politiker ohne Partei: Erinnerungen* (Stuttgart, 1960), 230; see also Feldman, *Great Disorder*, 814.

74. Luther, *Politiker ohne Partei*, 234.

75. See Feldman, *Great Disorder*, 814, 816.

76. See Wendenburg, *Die Debatte*, 53.

77. See Thiessen, "The German Hyperinflation of the 1920s," 761ff.

78. See Feldman, *Great Disorder*, 817f.

79. Luther, *Politiker ohne Partei*, 230.

80. See Lübbe-Wolff, "Safeguards," 360–61.

81. See Stolleis, *Public Law*, 183f.; Wendenburg, *Die Debatte*, 58ff.; Dreier, "Verfassungsgerichtsbarkeit," 332–34.

criticized it; however, this correlation was not perfect.[82] The need to centralize judicial review eventually emerged as a widely shared consensus among scholars.[83]

In any case, the decision of November 4, 1925, meant that policy-makers had to accept the courts' power to review the constitutionality of federal statutes as a given. In this conflict, judicial review did not primarily constrain the political left, but a broader coalition. Calls for revaluation came mainly from the middle class. Some centre-right politicians supported it, whereas some liberal and right-wing politicians closer to business interests rejected it.[84] The SPD, too, came to support some degree of revaluation – "a belated effort to make inroads among groups the SPD had been neglecting and alienating for years,"[85] whereas the socialist trade-unions remained more sceptical.[86] Hence, the renunciation of nominalism and the threat of judicial review of revaluation legislation hardly inflicted higher political costs on the left than the right. Instead, the revaluation conflict demonstrated that judicial review could interfere with crisis management to an extent that policy-makers had reason to resent regardless of their political leanings. As we will later see, the revaluation conflict was among the reasons why federal governments made efforts to centralize judicial review from 1925 on.

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82. Manfred Gangl, "Positivismus und Antipositivismus im Rechts-Links-Gefüge," in *Linke Juristen in der Weimarer Republik*, ed. Manfred Gangl (Frankfurt/Main, 2003), 35.

83. Wendenburg, *Die Debatte*, 74.

84. See Feldman, *Great Disorder*, 817f.

85. Ibid., 820.

86. Ibid.

4.4 Did the Practice of Judicial Review Disadvantage Social Democrats?

With the emergence of a practice of judicial review of federal statutes, the courts demonstrated an unprecedented assertiveness vis-a-vis the legislature. But as the revaluation conflict shows, identifying the political winners and losers of this newfound assertiveness is not straightforward. In order to explain why opposition to centralized judicial review arose in the SPD, we need to know whether this opposition arose against the backdrop of a practice of judicial review that can plausibly be described as disadvantageous to Social Democrats. If they opposed centralized judicial review although the practice of judicial review had so far been to their advantage, then this opposition was probably driven merely by an ideological aversion against judicial review, and my theory can therefore not explain the German case. This section therefore tries to assess what political interests gained and lost from the overall practice of judicial review, both of federal statutes – controversially exercised qua judicial self-empowerment – and of state statutes – uncontroversially mandated, explicitly or implicitly, by the constitution.

Since judicial review powers in Germany were not, as in Austria, bundled in a constitutional court, it is more difficult to describe the overall judicial review practice. The following overview only includes decisions by apex courts – the Supreme Court (*Reichsgericht*), the State Court (*Staatsgerichtshof*) and the *Reichsversorgungsgericht* (RVG), a specialized court with jurisdiction mainly over the welfare claims of (former) military members and their surviving dependents.[87] Lower courts also exercised judicial review, but the effort necessary to find their decisions would probably exceed their importance, since many cases should have reached the apex courts anyway. Even if they did not, lower court decisions were less important than those of apex courts. Cases were collected from the secondary literature, as well as from a collection of State Court decisions.[88]

87. Kohl, *Reichsverwaltungsgericht*, 66.

88. The works used are Lübbe-Wolff, “Safeguards”; Dreier, “Verfassungsgerichtsbarkeit”; Hornauer, *Reichsgericht*; and the collection of cases by Hans-Heinrich Lammers and Walter Simons, eds., *Die Rechtsprechung des Staatsgerichtshofs für das Deutsche Reich und des Reichsgerichts auf Grund Artikel 13 Absatz 2 der Reichsverfassung*, 6 vols. (Berlin, 1929–1939).

In the following, I include judicial review of state and federal laws, regardless of differences in the procedure or of whether the decision had *inter partes* or *erga omnes* effect.[89] I do not include cases in which statutes were reviewed that had come into effect prior to the Weimar Constitution, that is, before August 14, 1919. This is mainly because it is difficult to provide reliable figures on the number of these cases. Adding those cases concerning pre-constitutional statutes that are mentioned in the secondary literature would not change the pattern described here. Additionally, two such cases are discussed in the context of the Supreme Court's jurisprudence on the right to property in section 4.5 below.

89. Generally, the courts could not annul a statute as unconstitutional, but they could only set it aside with *inter partes* effect, that is, they could refuse to apply the provisions in question in the specific case, see Dreier, "Verfassungsgerichtsbarkeit," 328. An exception was the power to annul state laws in conflict with federal law, primarily exercised by the Supreme Court, according to Article 13 (2) of the Constitution, see ibid., 338–40. These Article 13 (2) cases account for 15 of the state statutes counted in Table 4.1. *Erga omnes* effect was also claimed for State Court decisions concerning the constitutionality of state laws, see Chr. Behr, "Die Rechtskraft der Entscheidungen des Staatsgerichtshofes," *Archiv des öffentlichen Rechts* N. F. 17, no. 3 (1929): 442. However, a decision by an apex court setting aside a statute with *inter partes* effect should in practice have had a similar effect as a decision with *erga omnes* effect, since the lower courts could be expected to follow the jurisprudence of the apex courts (although they were not obliged to do so).

Table 4.1. Number of Statutes Entered Into Force from August 14, 1919, With Provisions Declared Unconstitutional, By Violated Constitutional Provision, Type of Statute and Court

	Supreme Court[90]	**State Court**	**RVG**	**Sum**
Statutes declared unconstitutional				
All statutes	23	6	1	30
Federal statutes	3	1	1	5
State statutes	20	5	-	25
By violated constitutional provisions[91]				
Vested rights of civil servants and professional soldiers as well as related provisions (Art. 129)	10	-	1	11
Provisions concerning the prerogatives of religious bodies (Art. 138 (1), 173)	5	-	-	5
Right to property (Art. 153)	3	-	-	3
Equality clause (Art. 109 (1) 1)	1	-	-	1
Principles of state electoral law (Art. 17 (1) 2)	1	5	-	6
Provisions on the federal distribution of powers	-	1	-	1
Other provisions	3	-	-	3

Table 4.1 summarizes the extent to which apex courts set aside or annulled statutes. I do not count statutes that were reviewed, but not declared unconstitutional, since precise figures in this regard are difficult to provide. Overall, I count 30 statutes in which provisions were declared unconstitutional. The large majority – 23 – were declared unconstitutional by the Supreme Court. Only five of the statutes were federal statutes, whereas 25 had been passed by state legislatures. If we look at the constitutional provisions violated by the statutes in question, we see that more than a third of the statutes were (also) declared unconstitutional because they were in conflict with the vested rights of civil servants. The second largest group of six statutes, mainly due to the jurisprudence of the State Court, is formed by provisions of state electoral

90. This includes a case in which a Supreme Court senate sat as court of arbitration (RGZ 126, 161 (*Rentensperrgesetz*)).

91. A statute can fall into multiple categories at once.

law that violated constitutional requirements. Five statutes were declared unconstitutional because they violated provisions concerning the prerogatives of religious bodies. Three statutes were found to violate the right to property. Only one statute was declared unconstitutional because it violated provisions on the distribution of powers between the federal legislature and the state legislatures. One statute was set aside because it (also) violated the equality clause; three statutes were (also) in conflict with other constitutional provisions.

Let us first consider cases concerning constitutional rights: By far the largest number of cases concerned the vested rights of civil servants.[92] In 1919, these rights had been guaranteed by the constitution largely to quell disquiet among civil servants. Their loyalty was crucial for the young republic, but they were also concerned about what the new state, the deep economic crisis, and a possible left-wing majority would hold for them.[93] To some extent, judicial review enabled civil servants to invoke these vested rights against statutes that curtailed advantages the state had once granted to them, such as a certain position or a pay rise. The challenge of the retired soldier against a pension cut,[94] mentioned in the previous section, was a typical case. The civil servant cases were hardly disproportionately costly to the SPD: Civil servants were a socially diverse group, also coveted by Social Democrats;[95] however, due to tough budget constraints, several governments massively laid off civil servants or cut their pay.[96] Governments of all stripes, not only those involving the SPD, had reason to worry that civil servants' vested rights could be invoked against these austerity measures. However, challenges against them were eventually dismissed by the courts.[97]

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92. According to Art. 129 (1) 3 of the Constitution, "the well-established rights of officials are inviolable," as translated in Oppenheimer, *Constitution*, 247; on these cases, see also Dreier, "Verfassungsgerichtsbarkeit," 330–31, 343.

93. See Klaus Sühl, *SPD und öffentlicher Dienst in der Weimarer Republik: die öffentlich Bediensteten in der SPD und ihre Bedeutung für die sozialdemokratische Politik 1918-1933* (Opladen, 1988), 69–76.

94. Reichsversorgungsgericht, October 21, 1924 – RVG 4, 168.

95. Sühl, *SPD und öffentlicher Dienst*, 75ff.

96. See ibid., 100.

97. See Hans Hattenhauer, *Geschichte des deutschen Beamtentums*, 2nd ed. (Köln, 1993), 374, 380.

Table 4.2. Statutes Annulled as Violations of Constitutional Provisions on the Prerogatives of Religious Bodies

Date of Statute	Judgment Annulling the Statute	State Concerned	Government Under Which Statute Was Passed[98]
Feb 26, 1923	L-S I, 519 (= RGZ 111, 134) – Jun 20, 1925	Brunswick	SPD-led government including SPD, USPD, DDP and DVP[99]
Apr 29, 1920	L-S I, 538 – Oct 1, 1927	Lippe	SPD-led government with DDP[100]
Dec 22, 1923	L-S I, 538 – Oct 1, 1927	Lippe	SPD-led government with DDP and DVP[101]
Jun 10, 1921	L-S IV, 297 (= RGZ 129, 72) – May 20, 1930	Saxony	introduced by SPD/USPD minority government and passed without changes[102]
Mar 18, 1924	L-S IV, 306 – Jul 13, 1931	Mecklenburg-Strelitz	DNVP-led government[103]

The second largest group of rights-based cases concerned the prerogatives of religious bodies.[104] The constitution mandated the separation of church and state, but deferred the details of this separation to future legislation. Among others, financial benefits the German states had granted to the churches in pre-revolutionary times had to remain in place until a federal statute regulated the question. Nevertheless, several states tried to curtail these benefits, such as tax exemptions for church property. In consequence, the Supreme Court annulled several statutes on this matter, most of which

98. It would be preferable to know which legislative coalition voted for the statute declared unconstitutional, rather than the government coalitions under which the statute was passed. Yet, this would be difficult to find out. It seems unlikely that legislative and government coalitions diverged strongly; if at all, they will have been more encompassing.

99. “Der Freistaat Braunschweig: Die Landesregierungen 1918-1933,” accessed February 8, 2021, http://www.gonschior.de/weimar/Braunschweig/Ueberblick_Reg.html.

100. “Der Freistaat Lippe: Die Landespräsidien 1918-1933,” accessed February 8, 2021, http://www.gonschior.de/weimar/Lippe/Ueberblick_Reg.html.

101. Ibid.

102. Landtags-Akten aus den Jahren 1920, 1921 und 1922. Beschlüsse Nr. 1 bis 369, “Beschluss Nr. 115,” June 1, 1921, https://digital.slub-dresden.de/werkansicht/dlf/157243/1/.

103. “Der Freistaat Mecklenburg-Strelitz: Die Staatsministerien 1918-1933,” accessed February 8, 2021, http://gonschior.de/weimar/Me-Strelitz/Ueberblick_Reg.html.

104. On these cases, see Dreier, “Verfassungsgerichtsbarkeit,” 341–42. I realise it is questionable whether the constitutional provisions in question here can be classified as rights. In any case, in practice these provisions protected church interests against their curtailment by state legislatures.

had been passed under left-wing coalition governments (see Table 4.2 above).[105] Hence, as a safeguard of church interests, judicial review ran counter to Social Democratic interests.

When it came to the right to property, the Supreme Court declared state statutes (but never a federal statute)[106] unconstitutional in three cases.[107] In 1921, the Supreme Court set aside a 1920 Lippe statute as an unconstitutional expropriation. The statute voided the vested rights of the former royal house of Lippe; in compensation, it merely provided a small pension.[108] In 1924 and 1925, the Supreme Court set aside statutes of the states of Anhalt and Thuringia:[109] The Anhalt statute lowered the fees that land owners received from the owners of coal pits on their grounds while raising the taxes the coal pit owners paid to the state. The Thuringian statute concerned the state's pre-emption right, that is, the state's right to buy land for sale, even if it had been offered to someone else. In this case, the Court took issue with a provision allowing the state to acquire land by entering into contracts that were legally invalid; it could thereby acquire properties that the owner never wanted to sell at such a low price in the first place.

All the statutes declared unconstitutional were passed under state governments led by the SPD, and by parliamentary majorities including the SPD.[110] Even if the majorities passing these statutes sometimes included parties further to the right, the SPD and the USPD were, together with the Communists, generally the parties most favourable towards redistribution, and hence should also have suffered the highest political costs when these statutes were declared unconstitutional.

105. In a similar vein, the Supreme Court also annulled laws passed in Hamburg, Bremen and Saxony during the transitional period in 1919 that abolished religious instruction as a mandatory subject.

106. Lübbe-Wolff, "Safeguards," 365.

107. See Dreier, "Verfassungsgerichtsbarkeit," 328–30, 342–43.

108. Reichsgericht, November 18, 1921 – RGZ 103, 200.

109. Reichsgericht, December 13, 1924 – RGZ 109, 310; Reichsgericht, November 4, 1925 – RGZ 112, 67. On the former decision, see Otto Kirchheimer, "Die Grenzen der Enteignung," in *Otto Kirchheimer – Gesammelte Schriften*, ed. Hubertus Buchstein, vol. 1, *Recht und Politik in der Weimarer Republik* (Baden-Baden, 2017), 313–15.

110. For the Anhalt statute of March 27, 1920, set aside in RGZ 109, 310, this follows from Marina Ahne, "Anhalts Weg zur ersten nationalsozialistischen Regierung eines deutschen Landes," in *800 Jahre Anhalt*, ed. Ralf Regener (Magdeburg, 2016), 44, http://journals.ub.uni-magdeburg.de/ubjournals/index.php/UB-SR/article/view/6/6. For the Lippe statute of September 20, 1920, set aside in RGZ 103, 200, see "Der Freistaat Lippe: Die Landespräsidien 1918-1933." For the Thuringian statute of May 16, 1923, set aside in RGZ 112, 67, this follows from Timo Leimbach, *Landtag von Thüringen 1919/20-1933* (Düsseldorf, 2016), 170ff.

One rights-based case actually had a progressive bent: In this case, the Supreme Court struck down provisions in a 1919 Bavarian statute requiring the dismissal of female primary school teachers once they married.[111] This so-called "teachers' celibacy," a fairly widespread rule, had been among those targeted by a provision of the constitution outlawing rules discriminating against female civil servants.[112] While Social Democrats had spearheaded this provision in the constitutional assembly, they later supported legislation that effectively contravened this provision and allowed the dismissal of married women from the civil service.[113]

Leaving aside a decision concerning the equality clause,[114] as well as one further case of minor importance,[115] let us now turn to judicial review against the yardstick of procedural provisions. The largest group of these cases is formed by five decisions in which the State Court and the Supreme Court annulled provisions of the electoral law of several states.[116] These provisions mandated certain requirements for a party to stand in elections, such as a minimum number of supportive signatures or a deposit, unless the party had already previously participated in elections with some success. Among others, the courts considered these provisions discriminatory against small parties, and hence a violation of the constitutional requirement that representatives had to be elected by "universal, equal, direct and secret suffrage."[117] All of these cases except one had been brought by – at the time – small right-wing parties, including, in two cases, the Nazi

111. Reichsgericht, May 10, 1925 – L-S I, 435.

112. Article 128 (2).

113. See Barbara Greven-Aschoff, *Die bürgerliche Frauenbewegung in Deutschland, 1894-1933* (Göttingen, 1981), 169, 175.

114. This decision (RGZ 126, 161 (*Rentensperrgesetz*)) is discussed in section 4.6 below.

115. This case concerned the state's liability for damages: Reichsgericht, February 20, 1923 – L-S I, 423 (= RGZ 106, 34).

116. Staatsgerichtshof, December 17, 1927 – L-S I, 329, and L-S I, 341; June 22, 1928 – L-S I, 356; July 7, 1928 – L-S I, 321; Reichsgericht, November 23, 1928 – L-S I, 460 (= RGZ 122, 306). On these cases, see Dreier, "Verfassungsgerichtsbarkeit," 359, note 193.

117. Art. 17 of the Constitution, as translated in Oppenheimer, *Constitution*, 223.

Party.[118] Overall, the beneficiaries of this electoral law jurisprudence were small fringe parties,[119] not large parties such as the SPD.[120]

Only one case concerned federalism. In this case, the SPD-led Prussian government challenged a 1927 federal statute on the distribution of revenues from a tax on beer. The statute had been passed against the votes of the SPD,[121] but was defended in court also by the following SPD-led federal government, as well as the states of Württemberg, Bavaria and Baden.[122] The State Court ruled in favour of Prussia that the statute was unconstitutional since legislation on the distribution of revenue from the beer tax passed by the constitutional assembly in 1919 could only be changed via constitutional amendment. In this case, the State Court followed the Supreme Court in claiming the power to review the constitutionality of federal statutes.[123] This case illustrates that an SPD-led government did indeed benefit from the judicial review of statutes in a federalism-related case; the fact that this victory was achieved against an equally SPD-led government also suggests that conflicts over federalism did not necessarily follow the left-right cleavage: The Social Democrats in the federal government apparently had no qualms to fight an SPD-led state government over the distribution of tax revenue.

All in all, the Weimar practice of judicial review did not see the courts strike down important policies. In fact, the courts never curtailed an important social policy. Nevertheless, it is plausible to argue that the practice of judicial review disadvantaged Social Democrats. Again, it is impossible to calculate the "net benefits" from judicial

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118. L-S I, 321 and L-S I, 356. One case – L-S I, 460 – was actually brought by Social Democrats, but the motivation behind the lawsuit was merely strategic. See Willibalt Apelt, "Die Wahlrechtsentscheidungen des Staatsgerichtshofs und die letzte Regierungsbildung im Freistaat Sachsen," *Archiv des öffentlichen Rechts* N. F. 18 (1930): 123.

119. Dreier, "Verfassungsgerichtsbarkeit," 359, note 193.

120. Effectively against Social Democratic interests was also a decision of the State Court annulling a provision in a statute of the state of Anhalt that had merged municipalities in a way that resulted in a disproportionately large share of SPD members on the city council, Staatsgerichtshof, April 28, 1931 – L-S IV, 233 (= RGZ 133, appendix p. 15).

121. Verhandlungen des Reichstages, III. Wahlperiode 1924, "304. Sitzung," April 2, 1927, 10400.

122. Staatsgerichtshof, November 17, 1928 – L-S I, 156 (= RGZ 122, appendix p. 17).

123. L-S I, 156 (166). On this case, see J. J. Lenoir, "Judicial Review in Germany under the Weimar Constitution," *Tulane Law Review* 14 (1939): 361–83; Dreier, "Verfassungsgerichtsbarkeit," 361ff.

review, since we do not know how important all the policies in question were. Yet, when it comes to judicial review of procedural constitutional norms, the State Court's electoral law jurisprudence favoured small fringe parties. Federalism-related conflicts played a marginal role, although the beer tax case shows that in such conflicts, judicial review could be of use to an SPD-led state government – in this case, because the defence of their tax revenue against the federal government was in the interest of state governments regardless of the party in power. When it comes to rights-based judicial review, Social Democrats had little to gain from the jurisprudence on the vested rights of civil servants; the jurisprudence on church privileges ran counter to their interests, as did, more importantly, the Supreme Court's property rights jurisprudence. In comparison, there was hardly ever a case in which a left-wing cause was served by having a statute declared unconstitutional. Hence, this section shows that rights-based judicial review was in any case not an advantageous institution for Social Democrats. This result will be important when I later discuss the causes of the opposition to centralized judicial review that emerged within the SPD.

4.5 The Expansion of the Right to Property and the Conflict Over the Assets of the Former Royal Families

As the previous section has shown, the right to property accounted for only a few cases in which statutes were declared unconstitutional. This is hardly surprising, given that Article 153 (1) of the constitution stipulated that "property is guaranteed by the constitution," but immediately added that "the content and limits of the right to property are defined by the laws."[124] Thus, the legislature could impose important burdens on property owners without paying any compensation, unless these burdens amounted to an expropriation. In this case, stricter requirements applied: Expropriations were only allowed "for the common good and so far as authorised by law,"[125] and they had to be "accompanied by adequate compensation unless a federal law otherwise determines." Hence, the chances to succeed with the claim that a statute violated the right to property hinged on its classification as an expropriation. As this section discusses, these chances increased as the courts and legal scholars expanded the notions of property and expropriation – a trend that contributed to concerns about the interference of judicial review with interventionist economic policies. Moreover, as the conflict over the assets of the former royal families demonstrates, the notion of the "common good" ("Wohl der Allgemeinheit") meant that even federal statutes were at risk of being set aside as unconstitutional expropriation.

The first, fundamental shift concerned the constitutional notion of property.[126] Originally, the notion of property had only encompassed property in corporeal objects, such as a plot of land.[127] Thus, non-corporeal assets, such as the deposits in a bank account, were not protected against expropriation. The Supreme Court gave up this arguably outdated notion and held that the right to property protected all legal claims that had an economic value,[128] a shift also advocated by the legal scholar Martin Wolff

124. As translated in Oppenheimer, *Constitution*, 253f.

125. Oppenheimer translates "Wohle der Allgemeinheit" with "public interest"; I changed this to align it with the equivalent provision in Austrian law.

126. See Lübbe-Wolff, "Safeguards," 364f.

127. See Walter Schelcher, "Artikel 153. Die Rechte und Pflichten aus dem Eigentum," in *Die Grundrechte und Grundpflichten der Reichsverfassung*, ed. Hans Carl Nipperdey, vol. 3 (Berlin, 1930), 201.

128. Gusy, *Weimarer Reichsverfassung*, 344.

in a seminal paper in 1923.[129] Second, the Court expanded the notion of expropriation.[130] According to the traditional view, only an administrative action, but not a statute could constitute an expropriation. According to the Court's new understanding, a statute could constitute an expropriation even absent any administrative measure implementing it.[131] Additionally, the Court also gave up the traditional requirement that a property owner was only being expropriated if their property was transferred into state ownership,[132] and not, for example, destroyed.

Many legal scholars viewed the Supreme Court's expansive property rights jurisprudence with scepticism. As the far-right legal scholar Carl Schmitt put it in 1929, a "dissolution" of the concept of expropriation was under way.[133] Schmitt wondered how much legislative powers would be diminished "if every statute, since it is part of its nature to restrict liberty and property, is turned into an expropriation."[134] His colleague Albert Hensel, who was close to the national-liberal DVP,[135] quipped in 1931 that the Supreme Court's property rights jurisprudence had itself brought about the "expropriation" of the legislative powers of the states.[136] The Social Democratic scholar and attorney Otto Kirchheimer, who also opposed judicial review and had written his PhD under Schmitt's supervision,[137] argued that the expanded notion of expropriation meant that a wide range of economic and social policies, such as the revaluation

129. Martin Wolff, "Reichsverfassung und Eigentum," in *Festgabe der Berliner Juristischen Fakultät für Wilhelm Kahl zum Doktorjubiläum am 19. April 1923* (Tübingen, 1923).

130. Gusy, *Weimarer Reichsverfassung*, 346.

131. Ibid.; Schelcher, "Artikel 153," 212.

132. Gusy, *Weimarer Reichsverfassung*, 346.

133. Carl Schmitt, "Die Auflösung des Enteignungsbegriffs," in *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954* (Berlin, 1958), 110–23.

134. Ibid., 113.

135. Ekkehart Reimer and Christian Waldhoff, "Steuerrechtliche Systembildung und Steuerverfassungsrecht in der Entstehungszeit des modernen Steuerrechts in Deutschland: Zu Leben und Werk Albert Hensels (1895-1933)," in *System des Familiensteuerrechts und andere Schriften*, by Albert Hensel, ed. Ekkehart Reimer and Christian Waldhoff (Köln, 2000), 19.

136. Remarks by Hensel at the convention of German jurists (*Juristentag*), Deutscher Juristentag, ed., *Verhandlungen des sechsunddreißigsten Deutschen Juristentages*, vol. 2, *Stenographischer Bericht* (Berlin, 1932), 432.

137. On Kirchheimer's stance towards judicial review, see the discussion below. Many political scientists will know Kirchheimer for coining the term "catch-all party." On Kirchheimer, see Ruben Hackler and Lucia Herrmann, "'Political Justice' in the Making: Otto Kirchheimer and His Late Work in Historical Perspective," *Redescriptions: Political Thought, Conceptual History and Feminist Theory* 19, no. 2 (2016): 146.

legislation or legislation against housing scarcity could as much be classified as expropriation as the construction of “municipal sewers … or a swimming pool.”[138] The same applied to policies on tenancy protection and employment regulations, for example the regulation of working hours.[139] Kirchheimer admitted that “so far no German scholar and German court has gone so far as to consider this an expropriation,” but it would be consistent with their theoretical vantage point if they did.[140]

Kirchheimer’s concerns, expressed in 1930, were not vindicated. However, in one specific field – urban development – the Supreme Court’s property rights jurisprudence gave rise to concerns that compelled the federal government to prepare legislation to protect the municipalities against compensation claims.[141] These concerns were primarily due to two decisions. In the “Galgenberg” judgment of March 1927, the Court considered the mere listing of a building an expropriation.[142] In the “Betcke” case of February 1930, the Court considered a Prussian planning statute an expropriation.[143] The statute – dating back to 1875 – concerned the power of municipalities to specify the boundaries within which buildings could be constructed on a given property – so-called “set-back lines” (“Fluchtlinien”), especially to preserve empty spaces for the later construction of roads.[144] According to the Court, the statute violated the right to property insofar as it did not provide adequate compensation if municipalities defined set-back lines, but did not formally expropriate (and provide compensation for) the land that now fell outside these boundaries either.[145]

At the time of the Galgenberg judgment, the SPD-led Prussian state government was preparing a new urban development act. The government now faced the risk that planning measures stipulated in the Act would be unconstitutional unless it provided

138. Kirchheimer, “Grenzen der Enteignung,” 304.

139. Ibid., 305.

140. Ibid.

141. See Caldwell, *Popular Sovereignty*, 156ff.

142. Reichsgericht, March 11, 1927 – RGZ 116, 268.

143. Reichsgericht, February 28, 1930 – RGZ 128, 18.

144. RGZ 128, 18. On this case, see Caldwell, *Popular Sovereignty*, 157; Otto Kirchheimer, “Privatbesitz gegen Volksinteresse! Wann kommt das neue Bauland-Gesetz? Reichsgericht und Artikel 155 der Weimarer Verfassung,” in *Otto Kirchheimer – Gesammelte Schriften*, ed. Hubertus Buchstein, vol. 1, *Recht und Politik in der Weimarer Republik* (Baden-Baden, 2017), 206–8.

145. RGZ 128, 18 (33).

compensation for them.[146] In the words of Alfons Riess, the liberal (DDP) deputy mayor of Berlin's Wedding district, the judgment struck the preparations for the act "like a lightning bolt."[147] The Betcke judgment further increased these worries. Writing in May 1930, the Social Democrat Otto Kirchheimer saw "incalculable" consequences arise from the judgment. The city of Berlin alone could be required to pay back hundreds of millions of mark in compensation for set-back lines stipulated since the constitution had come into effect.[148] The Labour Ministry made a similar estimate.[149] The architect and urban developer Martin Wagner, a Social Democrat, echoed these fears when he wrote that the Supreme Court's jurisprudence made "the future of urban development in Germany depend, almost without limit, on the will of a few landowners."[150]

These speculations were possibly somewhat hyperbolic; as the legal scholar Albert Hensel noted in 1931, the anticipated wave of claims for compensation never came and the overall effects of the Betcke judgment were not as important as expected.[151] Nevertheless, the Betcke judgment had created sufficient uncertainty to spur the federal government into action.[152] Since the federal legislature had the power to stipulate exceptions from the constitutional requirement that compensation had to be provided for any expropriation, the federal government prepared an act stipulating that compensation for urban development measures only had to be paid insofar as state legislation provided for it.[153] The work on this act probably began before the Social Democrats left the government coalition in March 1930, but also continued under the

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146. See Alfons Riess, "Enteignungstypen in der Rechtsprechung des Reichsgerichts nach der Weimarer Verfassung," *Leipziger Zeitschrift für Deutsches Recht* XXII, no. 4 (1928): col. 227.

147. Ibid.

148. Kirchheimer, "Privatbesitz gegen Volksinteresse!," 208.

149. See the draft bill to resolve the compensation question that the Minister of Labour sent to the Chancellery in June 1930, "Entwurf eines Gesetzes über die Entschädigungspflicht und den Rechtsweg bei Enteignungen auf dem Gebiete des Städtebaues und der Grundstücksumlegung," BArch, R 43-I/2337 (fol. 56–61), 4.

150. Martin Wagner, "Um die Zukunft des deutschen Städtebaus," *Vorwärts*, May 8, 1930, morning edition, 11.

151. See Hensel's remarks at the 1931 *Juristentag*, Deutscher Juristentag, *Verhandlungen des sechsunddreißigsten Deutschen Juristentages*, 2:424.

152. See the reasons provided for the draft bill cited above, BArch, R 43-I/2337 (fol. 56–61), 3–4.

153. See the draft bill cited above, BArch, R 43-I/2337 (fol. 56–61).

centre-right Brüning government. A watered-down version of it was included in a presidential emergency decree in 1931.[154]

In the case of urban development, the Supreme Court's expropriation jurisprudence was alarming enough to convince even a right-wing federal government to intervene on behalf of the state legislatures. As mentioned, the constitution allowed the federal legislature (but not the state legislatures) to expropriate without compensation. This might suggest that policy-makers at the federal level should have been unfazed by the threat of judicial review on the basis of the right to property. Yet, expropriating without compensating could appear predatory and was therefore politically difficult. During the entire Weimar period, parliament never passed a statute that included an exemption from the requirement of compensation.[155] Additionally, even the federal legislature was bound to the requirement that an expropriation, whether with compensation or without, could only be undertaken "for the common good." In 1926, this requirement stood in the way of both a moderate and a radical-left approach to the greatest conflict over property rights of the time: the fate of the assets of the former royal families.

To some extent, it was a 1925 Supreme Court decision that put this issue on the national agenda in the first place. In this case, the Court annulled a 1919 statute of the state of Gotha, since it expropriated assets of the former Duke of Saxe-Coburg and Gotha without providing any compensation.[156] The left-wing government of Gotha had taken the most radical approach to an issue that concerned most German states: Before 1918, their former monarchs had accumulated assets such as palaces, libraries or landholdings in their capacity as heads of state.[157] Now the former monarchs were ordinary citizens, and the question arose which assets they could keep as their private

154. Decree of June 5, 1931, RGBl. I, 279, part 6, chapter III. See also the remarks of the legal scholar Leo Wittmayer at the 1931 *Juristentag*, Deutscher Juristentag, V*erhandlungen des sechsunddreißigsten Deutschen Juristentages*, 2:398; and Caldwell, *Popular Sovereignty*, 160.

155. Fangmann, *Justiz gegen Demokratie*, 168.

156. Reichsgericht, June 18, 1925 – RGZ 111, 123 (= L-S I, 500). See also Rainer Stentzel, "Zum Verhältnis von Recht und Politik in der Weimarer Republik: Der Streit um die sogenannte Fürstenenteignung," *Der Staat* 39, no. 2 (2000): 275–97.

157. See Ulrich Schüren, *Der Volksentscheid zur Fürstenenteignung 1926* (Düsseldorf, 1978), 283ff.

property. Most states worked out an agreement with their former rulers.[158] But the Gotha decision sparked public outrage; moreover, the former monarchs of several other states were appealing against already concluded agreements. This put the issue in the spotlight.[159] In late 1925, the Communists seized the issue and suggested a referendum on the motion to expropriate all former royal families without any compensation,[160] a cause the SPD reluctantly joined.[161] Since the Communist proposal found considerable appeal also among the middle classes,[162] the centre-right government scrambled to find a compromise alternative that would avert a Communist victory in the referendum.[163]

For the government, a minority coalition of the Catholic Centre Party, the Bavarian BVP, the left-liberal DDP and the right-liberal DVP, the ability to pass a compromise hinged on the support of other parties. Parts of the SPD were open to a compromise,[164] whereas this was very unlikely in the case of the far-right, monarchist DNVP.[165] Hence, constructing a simple majority for a statute was difficult, but feasible. In June 1926, the Interior Ministry, led by the liberal (DDP) Wilhelm Külz, argued that a simple majority could be reached if, apart from the MPs of the government coalition, the MPs of the Party of the German Middle Classes (*Wirtschaftspartei*) voted for the bill and Social Democrats remained absent.[166]

However, it was questionable whether a compromise that expropriated the former royal families to some extent could be passed as a simple statute or had to be passed as a constitutional amendment, and hence with a 2/3-majority: While the federal legislature could expropriate without providing compensation, it was still bound to the requirement that an expropriation had to serve the "common good," i. e., the public

158. See ibid.

159. Ibid., 47–48.

160. Ibid., 49, 62.

161. Ibid., 81.

162. Ibid., 72.

163. See ibid., 72, 145ff.

164. See ibid., 148–49, 151–52.

165. Ibid., 54, 146.

166. See "Das Kabinett Marx III/IV, Dok. Nr. 16," Akten der Reichskanzlei. Weimarer Republik (online), June 7, 1926, https://www.bundesarchiv.de/aktenreichskanzlei/1919-1933/01a/ma3/ma31p/kap1_2/kap2_16/para3_1.html.

interest. If this requirement was not fulfilled, the government faced the even more daunting task of constructing the 2/3-majority needed for a constitutional amendment. This would have required the support of large parts of not only the SPD, but also of parts of the monarchist DNVP.[167]

Thus, an essential question for the government's ability to avert the success of a referendum was the meaning of "the common good," and who had the authority to determine this meaning. In March 1926, president Hindenburg wrote to the government that, in his view, the government bill did not envisage an expropriation for the "common good"; he would therefore refuse to sign the statute unless it was passed as a constitutional amendment.[168] Hindenburg's opinion was based on the established view that the "common good" required that an expropriation was not undertaken merely "for fiscal reasons," that is, to provide additional revenue to the state budget, but for a specific purpose in the public interest (for example, the construction of a railway).[169] It was fairly plausible to argue that the transfer of the former royal families' assets into state ownership was merely an end in itself and hence unconstitutional. In contrast, some jurists took the view that the expropriation of the former royals helped to pacify a heated political conflict and to stabilize public order, and that this was a sufficient purpose in the public interest.[170]

Within the government, the Ministry of Justice, with Wilhelm Marx of the Centre Party at its helm, shared Hindenburg's view.[171] In contrast, the Interior Ministry apparently believed that Hindenburg's opposition could be overcome, refused to take a stance on the question of the "common good" and merely warned of the risk of judicial review. "Since the [constitutional] principles are, in their details, in flux, and since the

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167. "Die Konfliktfragen der inneren Politik," *Vossische Zeitung*, April 17, 1926, morning edition, 1.

168. President Hindenburg to the Minister of Justice Marx (Copy), March 15, 1926, BArch, R 43-I/2206 (fol. 220–225), 4f. See also Schüren, *Volksentscheid*, 146f.

169. BArch, R 43-I/2206 (fol. 220–225), 4f. On the interpretation of the "common good," see, for example, Schelcher, "Artikel 153," 218–23; Erich Eyck, "Verfassungsändernd?," *Vossische Zeitung*, April 20, 1926, morning edition, 1.

170. Arguing along these lines, f. ex. Eyck, "Verfassungsändernd?"

171. See "Die Kabinette Luther I/II, Band 2, Dok. Nr. 334," Akten der Reichskanzlei. Weimarer Republik (online), April 15, 1926, https://www.bundesarchiv.de/aktenreichskanzlei/1919-1933/01a/lut/lut2p/kap1_1/kap2_165/index.html.

ultimate decision on the constitutionality lies neither with parliament nor with the government, but, according to the most recent Supreme Court decisions, with the ordinary courts, the government attaches great importance to passing the law with the majority required for constitutional amendments," the Ministry wrote.[172] However, the Ministry did not want to commit itself to a position that would have required a 2/3-majority. In June 1926, the Ministry presented the rather original proposal to ensure the bill's constitutionality with a preamble that clarified that it did not merely seek to provide additional revenue to the state, but sought to restore "ordered legal circumstances." This preamble, the Ministry hoped, would also be binding for the courts.[173]

In the end, the government did not succeed in passing a compromise, whether in the form of a simple statute or a constitutional amendment. On June 20, 1926, the referendum went ahead. It was now the centre-right government that argued that the proposal supported by Communists and Social Democrats did not serve the "common good" and hence had to pass the threshold for a constitutional amendment, that is, a majority of eligible voters.[174] In the absence of centralized judicial review, this was the government's call to make (although a court would probably not have seen it differently). Although 14.5 of 15.6 million voters voted in favour of expropriation without compensation, this did not reach the threshold of about 20 million votes required for a constitutional amendment.[175] However, it did not reach the number of votes required for passing an ordinary statute either.[176] After the referendum had failed, further efforts to resolve the issue at the federal level remained without success. Some

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172. Ibid.; see also Schüren, *Volksentscheid*, 149–50.

173. "Das Kabinett Marx III/IV, Dok. Nr. 16."

174. See "Gutachterliche Äußerung zu der Frage der Verfassungsmäßigkeit des durch das Volksbegehren begehrten Entwurfs eines Gesetzes zur Enteignung der Fürstenvermögen," Verhandlungen des Reichstages, III. Wahlperiode (1924/1926), Drucksache Nr. 2229, Anlage 4, April 24, 1926.

175. Schüren, *Volksentscheid*, 228.

176. This point is not discussed by Schüren, ibid. The federal government took the view that Art. 75 of the constitution required at least half of eligible voters to participate in the referendum, regardless of whether it concerned a constitutional amendment. That being said, the interpretation of Art. 75 was itself contested, see Gerhard Anschütz, *Die Verfassung des Deutschen Reichs vom 11. August 1919: Ein Kommentar für Wissenschaft und Praxis*, 13th ed. (Berlin, 1930), 346f.

states, such as Prussia, eventually reached an agreement with their former ruling houses; in other states, the issue lingered on until the break-down of democracy.[177]

In summary, the expanding notions of property and expropriation and the requirement that expropriations had to serve the “common good” created concerns that the right to property, backed by the threat of judicial review, would make interventionist policies more expensive, or, as in the case of the assets of the former royal families, stand in their way. These concerns were not mere speculations, fuelled by the Marxist world-view of Social Democrats such as Otto Kirchheimer. Rather, they were shared by legal experts across the political spectrum to some extent. As the conflict over the assets of the former royal families shows, the right to property could even make it more difficult to pass federal statutes or to succeed with a nation-wide referendum. In this case, the right to property was a potential obstacle to both a moderate compromise and the more radical approach preferred by Social Democrats and Communists.

177. Schüren, *Volksentscheid*, 267–73.

4.6 The New Meaning of Equality Before the Law

While the courts extended the scope of the right to property, legal scholars radically transformed the meaning of another, inauspicious provision of the constitution: “All Germans are equal before the law,” its Article 109 stipulated. During the monarchy, this equality clause had simply been understood as the requirement that the administration and the courts had to apply the laws consistently to all citizens, without prejudice to circumstances such as wealth or nobility.[178] In other words, equality was realized through the law itself. The framers of the Weimar Constitution hardly understood the equality clause differently.[179] However, from about 1922 onwards, legal scholars, most prominently Heinrich Triepel and his doctoral student Gerhard Leibholz, advocated an entirely different understanding.[180] In 1924, Triepel wrote a brief at the request of shareholders of one of Germany’s biggest corporations, the electrical equipment manufacturer AEG, who challenged the constitutionality of the valuation of certain preference shares prescribed by a decree in the wake of hyperinflation.[181] In this brief, Triepel argued that not only the courts and the administration, but also the legislature had to respect the equality clause.[182] Specifically, the equality clause prohibited the legislature from making arbitrary distinctions – distinctions for which no reasonable ground could be found[183] – and the courts could review the constitutionality of statutes against this yardstick.

This new understanding of the equality clause, more deeply elaborated by Leibholz in 1925, was a legal revolution.[184] It tied the legislature to a vague standard of justice with regard to all the distinctions it made. Among legal scholars, it was initially the subject of a fierce dispute, part of a larger controversy between legal positivists and

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178. Gusy, *Weimarer Reichsverfassung*, 291.

179. Ibid.

180. See, e. g., Caldwell, *Popular Sovereignty*, 148ff.; Gusy, *Weimarer Reichsverfassung*, 290ff.; Florian Meinel, “Eine ‘revolutionäre Umschichtung unseres Rechtsdenkens’. Gerhard Leibholz und die Gleichheit vor dem Gesetz,” in *Der Parteienstaat: zum Staatsverständnis von Gerhard Leibholz*, ed. Anna-Bettina Kaiser (Baden-Baden, 2013), 169–97; Stolleis, *Public Law*, 182ff.

181. See Meinel, “Gerhard Leibholz,” 173.

182. Heinrich Triepel, *Goldbilanzverordnung und Vorzugsaktien* (Berlin, 1924), 26ff.

183. Ibid., 30.

184. Meinel, “Gerhard Leibholz.”

anti-positivists, especially adherents of natural law.[185] Proponents of the new understanding argued, among others, that the traditional interpretation of the equality clause was pointless, since the equal application of the laws went without saying.[186] Furthermore, as parliamentary democracy concentrated power in the legislature, citizens needed safeguards against "parliamentary absolutism."[187] By assessing whether the legislature had made arbitrary distinctions, the courts could provide such a safeguard. In contrast, the opponents of the new understanding, among them Hans Kelsen, denounced it as motivated by conservative distrust of popular majorities; moreover, they argued that opinions on what distinctions were arbitrary differed. Ultimately, judges' political views would be decisive, and hence the judiciary would be politicized.[188]

Despite these objections, the new interpretation became dominant among legal scholars from about 1930 onwards.[189] In the judiciary, its reception was muted.[190] Some court decisions rejected the new understanding of the equality clause, whereas others left the question open. For example, in its seminal revaluation decision of November 4, 1925 (see section 4.3 above), the Supreme Court did not commit to the new understanding, but engaged in a hypothetical assessment on the basis of the arbitrariness standard proposed by Triepel and Leibholz: Even if the legislature was bound by the equality clause, the distinctions it had made were not unreasonable, and hence the question whether it was bound by the equality clause could be left open.[191] The State Court, too, engaged in such an "even if" assessment in December 1929,[192] whereas it had still rejected the Triepel-Leibholz interpretation in its decision in the Beer Tax Case

185. See Stolleis, *Public Law*, 182ff.

186. F. ex., Triepel, *Goldbilanzverordnung*, 27.

187. Gerhard Leibholz, *Die Gleichheit vor dem Gesetz* (Berlin, 1925), 13, 38; similarly Triepel, *Goldbilanzverordnung*, 28.

188. See the remarks by Kelsen and his colleagues Gerhard Anschütz and Richard Thoma at the 1926 meeting of state law professors in "Aussprache über die vorhergehenden Berichte," in *Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung. Der Einfluss des Steuerrechts auf die Begriffsbildung des öffentlichen Rechts: Verhandlungen der Tagung der Deutschen Staatsrechtslehrer zu Münster i. W. am 29. und 30. März 1926* (Berlin, 1927), esp. 48ff., 53ff., 59; see also Stolleis, *Public Law*, 185.

189. Gusy, *Weimarer Reichsverfassung*, 292.

190. Lübbe-Wolff, "Safeguards," 365.

191. Reichsgericht, November 4, 1925 – RGZ 111, 320 (328ff.)

192. Staatsgerichtshof, December 11, 1929 – L-S II, 99 (= RGZ 126, appendix p. 14) (106).

in November 1928.[193] As Leibholz summarized the courts' reception of his innovation in 1930, they had largely engaged with it in hypothetical fashion, but had also demonstrated that they did not reject it.[194]

Only once, in July 1929, did the Supreme Court – more precisely, its sixth senate sitting as a court of arbitration – set aside a statutory provision as a violation of the equality clause.[195] This statute (*Rentensperrgesetz*) stalled ongoing court proceedings on pensions the German states mainly owed to aristocrats as compensation for territory or privileges lost during the 19th century.[196] Although another Supreme Court senate considered the statute constitutional a few months later,[197] the first decision received considerable public attention, not least since it concerned, like the 1926 referendum, the interests of the former ruling class.[198]

In theory, the new understanding of the equality clause as a ban on arbitrary distinctions was indifferent to the agenda policy-makers pursued. All sorts of policies differentiate among groups. Yet, as we will later see, legal experts in the SPD argued that the new interpretation of the equality clause was particularly dangerous to progressive policies. But leaving aside the special case of the pension claims, judicial practice did not interfere with progressive policies. Was it nevertheless plausible to expect a bias of the equality clause against progressive policies?

A way to assess this is to look at the policies against which the equality clause was invoked. In almost all examples of supposedly arbitrary distinctions given by Triepel and Leibholz and in the court cases in which the equality clause was invoked, economic interests were at stake.[199] Primarily the constitutionality of policies

193. Staatsgerichtshof, November 17, 1928 – L-S I, 156 (168f.)

194. Gerhard Leibholz, "Höchstrichterliche Rechtsprechung und Gleichheitssatz," *Archiv des öffentlichen Rechts* N. F. 19 (1930): 441.

195. Reichsgericht (*VI. Zivilsenat* as court of arbitration), November 30, 1929 – RGZ 126, 161.

196. See "Bericht des 13. Ausschusses (Rechtspflege) über den Entwurf eines Gesetzes zur Regelung älterer staatlicher Renten," Verhandlungen des Reichstages, IV. Wahlperiode (1928), Drucksache Nr. 1473, December 12, 1929, 16ff.

197. Reichsgericht, December 3, 1929 – RGZ 128, 165.

198. See, for example, "Eine Schlappe des Reichstags," *Der Tag*, July 11, 1929, BArch, R 1501/125074, fol. 57.

199. The court decisions considered are those cited in Leibholz, "Höchstrichterliche Rechtsprechung"; Gusy, *Weimarer Reichsverfassung*, 294; Hornauer, *Reichsgericht*; the examples given by Leibholz and Triepel are those contained in Leibholz, *Die Gleichheit vor dem Gesetz*; and in the

concerning the revaluation of claims after hyperinflation, tax or the remuneration of civil servants, was questioned. Mocking the potential for infinite claims of discrimination, the legal scholar Gerhard Anschütz speculated that lowering the wine tax would give rise to claims that the equality clause demanded lowering the beer tax, too.[200] In a case unrelated to economic issues but with an equally conservative bent, president Hindenburg invoked the Triepel-Leibholz interpretation when he refused to sign an amendment of the military penal code. This amendment stipulated that military officers were to be discharged if they engaged in duelling. In Hindenburg's view, it was arbitrary, since only military officers, but nobody else had to suffer such an additional punishment for duelling.[201]

Admittedly, the potential of the new interpretation of the equality clause was not entirely lost on advocates of progressive causes. In one case, for example, the exclusion of girls from some secondary schools was challenged without success.[202] But to a certain extent, progressive issues were already covered by more specific constitutional provisions stipulating, for example, the equality of men and women with regard to their political rights or equal eligibility to public office.[203] Thus, the general equality clause provided little added value for the pursuit of these causes.

More importantly, the decision of what distinctions were arbitrary depended entirely on the values held by the arguably largely conservative judiciary. As proponents of the new understanding of the equality clause argued, this was not a cause to worry, since the legitimacy of important social policies was, in contrast to the U.S., beyond doubt in Germany, even among judges.[204] They also emphasized that judges had to

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minutes of the 1926 meeting of state law professors, "Aussprache."

200. "Aussprache," 49.

201. "Die Kabinette Luther I/II, Dok. Nr. 323," Akten der Reichskanzlei. Weimarer Republik (online), March 26, 1926, http://www.bundesarchiv.de/aktenreichskanzlei/1919-1933/01a/lut/lut2p/kap1_1/para2_154.html.

202. Bayerischer Staatsgerichtshof, July 13, 1927 – L-S III, 185.

203. For example, see Art. 109 (1) 2 and 128 (1) of the Constitution.

204. Erich Kaufmann, "Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung," in *Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung. Der Einfluss des Steuerrechts auf die Begriffsbildung des öffentlichen Rechts: Verhandlungen der Tagung der Deutschen Staatsrechtslehrer zu Münster i. W. am 29. und 30. März 1926* (Berlin, 1927), 18; Leibholz, "Höchstrichterliche Rechtsprechung," 430.

assess whether a distinction was arbitrary with the utmost restraint.[205] But the credibility of these assurances was limited, not least since many advocates of the new understanding were fairly conservative themselves. Heinrich Triepel, for example, was close to the far-right DNVP.[206] Illustrating what Triepel saw as an arbitrary distinction, he argued, in a hypothetical example, that it would be arbitrary to inflict deeper wage cuts on higher civil servants than on lower civil servants merely with the justification that lower civil servants would suffer greater economic hardship from the same wage cut.[207] Thus, a tenet of progressive politics, the consideration of different groups' social circumstances, could be arbitrary in the eyes of conservatives such as Triepel.

In summary, the transformation of the equality clause into a constraint on the legislature remained primarily a theoretical development. The Supreme Court only once set aside a statutory provision as a violation of the equality clause. But the German courts showed themselves open to its new interpretation as a ban on arbitrary distinctions. As the next chapter will show, the Austrian Constitutional Court rejected this interpretation; it only reviewed whether the legislature discriminated on the basis of subjective criteria, such as class or confession. This approach – embraced explicitly also with reference to the implications the more expansive interpretation could have for social policy – avoided concerns that the equality clause would interfere with a left-wing policy agenda. In Germany, judicial practice and the discussion among legal scholars were less reassuring. It was plausible to expect that the equality clause would eventually play a more important role in the practice of judicial review. In principle, this could have served a variety of causes. Yet, in practice, the equality clause was mainly invoked to defend economic interests. This, together with the importance of judicial attitudes for the assessment of what legislative distinctions were arbitrary, made it difficult to rule out that conservative judges would eventually use the equality clause to obstruct important social policies.

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205. Kaufmann, "Die Gleichheit vor dem Gesetz," 19ff.; Leibholz, *Die Gleichheit vor dem Gesetz*, 23ff.

206. Stolleis, *Public Law*, 179.

207. "Aussprache," 53.

4.7 Efforts to Centralize Judicial Review

Within a few years after the Constitution had come into effect, judicial review had turned from the hypothesis that it had been in the Weimar Constitutional Committee into a fact that policy-makers had to deal with. In this section, I focus on the response of parliament and the federal government to the emergence of diffuse judicial review. The scholarly debate on judicial review, extensively covered elsewhere,[208] is largely left aside. This section makes two points: First, government efforts to centralize judicial review were not primarily supposed to offer minority protection, but to rein in the practice of diffuse judicial review for the sake of legal certainty and in order to keep the courts from interfering with complex problems, such as the revaluation problem. Second, Social Democrats in the Reichstag supported centralized judicial review as late as 1927, a stance motivated to some extent by their aversion against the exercise of judicial review by the ordinary courts, but also by the wish to safeguard parliamentary minorities.

In November 1920, when the Reichstag debated the law on the organisation and procedure of the State Court, the Social Democratic MP Gustav Radbruch, a professor of criminal law and later Minister of Justice, proposed on behalf of the SPD parliamentary group that at least 100 MPs or a quarter of state chamber members should be able to request a State Court decision on the constitutionality of a statute before its promulgation.[209] This was very similar to the proposal the Social Democrat Hugo Sinzheimer and others had made in the Constitutional Committee in 1919. Radbruch argued that the question whether a bill was unconstitutional, and therefore could only be passed with a 2/3-majority, should neither be decided by simple majority, as this would leave the parliamentary minority unprotected, nor by the minority, as this would allow for unlimited obstruction.[210] But Radbruch not only wanted to protect parliamentary minorities. He also already suspected that the courts would empower themselves to

208. See Stolleis, *Public Law*, 183f.; Wendenburg, *Die Debatte*, 58ff.; Dreier, “Verfassungsgerichtsbarkeit,” 332–34.

209. Verhandlungen des Reichstages, I. Wahlperiode 1920, “30. Sitzung,” November 19, 1920, 1118; “Bericht des 20. Ausschusses über den Entwurf eines Gesetzes über den Staatsgerichtshof,” Verhandlungen des Reichstages, I. Wahlperiode (1920), Aktenstück Nr. 1592, March 3, 1921, 1137.

210. Verhandlungen des Reichstages, I. Wahlperiode 1920, “30. Sitzung,” 1118.

review federal statutes. Radbruch referred to a debate on a reform of military tribunals a few months earlier, when he had warned that the courts might refuse to apply the reform law unless it was passed with the 2/3-majority required for a constitutional amendment.[211] Judicial review, Radbruch argued, should not be left to the ordinary courts – "which is the case, as is well known, in the United States of America," where, according to Radbruch, diffuse judicial review had created legal uncertainty and stifled legislative development.[212]

In the Reichstag's plenary debate, only the Communist MP Joseph Herzfeld – who, incidentally, had written an article criticizing U.S. judicial review in 1905 – rejected Radbruch's motion, since he deemed it wrong to entrust judges with political questions.[213] But in the Reichstag's Legal Affairs Committee, only six of its 28 members voted for the motion.[214] According to the summary of the Committee's deliberations, the motion's opponents mainly argued that the courts already disposed of diffuse judicial review powers anyway, that the additional exercise of judicial review by the State Court would risk conflicting decisions or would be, in the words of one speaker, "a violation of the well-justified sovereignty of the courts" – an argument echoing the debate in 1919.[215] While individual votes and speeches in the Committee were not recorded, these remarks suggest that some Committee members who rejected Radbruch's motion considered judicial review by another body than an ordinary court an infringement of the rule of law. Others may simply not have deemed it necessary, given that the great wave of judicial self-empowerment was yet to come. In any case, Radbruch's motion shows, again, that some Social Democrats did not harbour a fundamental aversion against centralized judicial review.

In the following five years, judges became far more assertive, not least in the revaluation conflict. According to conventional wisdom, the government began to draw

211. Verhandlungen des Reichstages, I. Wahlperiode 1920, "14. Sitzung," July 30, 1920, 459.

212. Verhandlungen des Reichstages, I. Wahlperiode 1920, "30. Sitzung," 1118.

213. Ibid., 1129; see also Joseph Herzfeld, "Die Arbeitergesetze und die Gerichte in den Vereinigten Staaten," *Die neue Zeit: Wochenschrift der deutschen Sozialdemokratie* 23/2, no. 47 (1905): 664–71.

214. "Bericht des 20. Ausschusses über den Entwurf eines Gesetzes über den Staatsgerichtshof," 1138.

215. Ibid.

up plans to centralize judicial review after the Supreme Court had unambiguously claimed diffuse judicial review powers with its seminal judgment of November 4, 1925.[216] But in fact, civil servants in the Interior Ministry had begun to work on the centralization of judicial review already in February 1925, under the centre-right coalition led by Chancellor Hans Luther. By then, the idea that judicial review should be centralized at the State Court was already emerging as an institutional solution that would find widespread support among legal elites.[217]

On January 31, 1925, federal and state government bureaucrats met to discuss a "draft bill on the preservation of legal unity," a bill that dealt with the problem of conflicting rulings of different high courts. At this meeting, the representative of the Ministry of Labour, judge Schmundt, noted that the *Reichsversorgungsgericht*, a specialized court with jurisdiction mainly over the welfare claims of (former) military members and their surviving dependents,[218] had claimed the power of judicial review.[219] According to Schmundt, the Ministry of Labour doubted whether the *Reichsversorgungsgericht* was suited to exercise judicial review. He therefore suggested vesting the power of judicial review into a separate, adequately composed body. Other participants in the meeting reacted to this proposal with cautious sympathy.[220]

In the following months, a provision that centralized judicial review of federal laws in the State Court was first included in the "draft bill for the preservation of legal unity," before a separate bill on the centralization of judicial review of provisions of federal law (referred to as the "Judicial Review Bill" in the following) was spun off in April 1925. This bill dealt not only with the review of federal statutes, but also with the review of federal decrees, a matter largely left aside here. After amendments by the state

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216. Wehler, *Staatsgerichtshof*, 105; Fangmann, *Justiz gegen Demokratie*, 120; Wendenburg, *Die Debatte*, 37–38.

217. In particular, see the discussions at the 1924 *Juristentag*, a congress of the legal profession, summarized in Wendenburg, *Die Debatte*, 70ff.

218. Kohl, *Reichsverwaltungsgericht*, 66.

219. Minutes of the meeting concerning two draft bills on legal unity ("Gesetzentwürfe zur Wahrung der Rechtseinheit und über die Erhebung des Zuständigkeitsstreits durch die Reichsbehörden"), January 31, 1925, BArch, R 43-I/1211 (fol. 253–259), 3f. Most likely, Schmundt referred to the Reichsversorgungsgericht decision of October 21, 1924 – RVG 4, 168 – in which the Court set aside provisions concerning the pensions of military officers, see above.

220. BArch, R 43-I/1211 (fol. 253–259), 4.

chamber (*Reichsrat*), the bill was introduced into the Reichstag for the first time in December 1926. However, the Reichstag's Legal Affairs Committee did not conclude its deliberations on the bill before the May 1928 general elections. The new "grand coalition" government led by the SPD reintroduced the bill without changes in November 1928. Yet, before the Legal Affairs Committee began to discuss the bill anew, the SPD Interior Minister Carl Severing, in early 1930, asked the Committee to postpone its deliberation of the bill indefinitely. No government pursued the bill any further before the break-down of democracy.

The centre-right government that began the project to centralize judicial review in 1925, and the governments that continued these efforts pursued two main aims: First, as the origin of these plans in the context of the "bill for the preservation of legal unity" suggests, to eliminate the risk to legal certainty posed by the possibility of diverging court decisions. But second, the government hoped that the State Court would exercise judicial review more deferentially than the ordinary courts. A record of the first inter-ministerial meeting on the separate Judicial Review Bill cites Arnold Brecht, the head of the constitutional affairs department at the Interior Ministry, with the opening remarks that

> *"several cases have shown that the courts, insofar as they claimed the power of judicial review, did not sufficiently take into consideration those aspects that were favourable to the constitutionality of federal statutes. This has made it necessary to create an instance with sufficient expertise in the field of public law that would have the task to decide on the question of the constitutionality of norms of federal law in specific cases. The State Court has been chosen as this instance."*[221]

High-ranking bureaucrats such as Brecht yielded great influence in the Weimar administration.[222] Their expertise probably played an important role in defining judicial review as a problem in the first place. As we will later see, they also defended the bill in

221. Minutes of the meeting on May 5, 1925 (draft), BArch, R 1501/125073 (fol. 9–11), 1.

222. Kohl, *Reichsverwaltungsgericht*, 169.

public. In any case, until November 1925, the confrontation with the courts over revaluation was still ongoing and should have provided a compelling case for the centralization of judicial review. In 1926, the risk of judicial review loomed over a possible compromise on the assets of the former royal families. When the Cabinet hesitated to approve the bill in spring 1926, the liberal (DDP) Interior Minister Wilhelm Külz referred to the issue of the assets of the former royal families and urged the Chancellery to put the bill on the Cabinet agenda again. “The need for a legislative solution [of the judicial review issue] has been particularly prominent in recent times,” Külz wrote.[223]

In contrast, the protection of parliamentary or extra-parliamentary minorities was not among the government’s initial motives for centralizing judicial review. Underscoring this, successive government drafts of the bill envisaged an increasingly majoritarian design of judicial review. The first draft, still part of the “bill for the preservation of legal unity,” obliged courts that wanted to set aside a statute to refer the question to the State Court. After its decision, it was up to the government to decide whether the Court’s ruling should be binding for future cases.[224] The second draft no longer obliged or enabled courts to refer cases to the State Court; as the Interior Ministry hoped, this would make it unnecessary to pass the act as a constitutional amendment.[225] Instead, the new draft allowed the federal government, minorities of more than a third of MPs or of more than a third of state chamber votes to request a decision by the State Court.[226] Yet, both the ability of the courts and of parliamentary minorities to trigger judicial review by the State Court met resistance within the government. As a representative of the Ministry of Justice is cited in the record of a meeting, enabling parliamentary minorities to go to the State Court would mean that

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223. Külz to the state secretary in the Chancellery, May 18, 1926, BArch, R 43-I/1974 (fol. 91), 2.

224. Draft bill for the preservation of legal unity (“Entwurf eines Gesetzes zur Wahrung der Rechtseinheit”), BArch, R 3001/7120 (nr. 39), §18.

225. BArch, R 1501/125073 (fol. 9–11), 2. On the latter see also the Ministry of Justice’s notes on the meeting on May 5, 1925, BArch, R 3001/7120 (nr. 57).

226. Draft bill on the judicial review of the constitutionality of federal laws, BArch, R 3001/7120 (nr. 54), §2.

"the minority could delay the entry into force of any statute deemed inconvenient."[227] Representatives of the Ministry of Finance and the Ministry of the Economy even suggested to ban the courts from exercising judicial review altogether.[228]

Reflecting these concerns, the Cabinet approved a far more majoritarian version of the bill in May 1926.[229] Only the federal government and Reichstag or state chamber *majorities* could request a decision of the State Court.[230] The ordinary courts could not directly refer a case to the State Court. Instead, an "executive filter" was built into the path from the ordinary courts to the State Court: Courts deciding in last instance had to notify the federal government if they wanted to set aside a statute or decree; the federal government could then decide whether to request a State Court decision.[231] The ordinary courts were not banned from setting aside statutes, but the "executive filter" provided the government with a convenient choice: If it was confident that the State Court would uphold the statute, it could have the State Court settle the matter with *erga omnes* effect. Otherwise, it could leave the matter with the ordinary courts, whose decisions had only *inter partes* effect.

Only in the state chamber did the design of judicial review become more counter-majoritarian again. Following a proposal of the *Juristentag*, an influential congress of the legal profession, the government itself removed the "executive filter" from the judicial path to the State Court.[232] The Bavarian and Prussian governments, but surprisingly, no other state government, demanded that state governments should be enabled to trigger review by the State Court, too.[233] The federal government rejected this demand, but instead suggested what it had already contemplated before: giving

227. Remarks by Dr Mende, minutes of the meeting on May 5, 1925 (draft), BArch, R 1501/125073 (fol. 9–11), 3.

228. Remarks by Dr Schwandt and Dr Zee-Heraeus, BArch, R 1501/125073 (fol. 9–11), 3–4.

229. See the bill as submitted to the state chamber on June 3, 1926, Reichsrat, Drucksache Nr. 110, BArch, R 43-I/1974 (fol. 99–101), and the Cabinet minutes in "Das Kabinett Marx III/IV. Band 1, Dok. 9," Akten der Reichskanzlei. Weimarer Republik (online), May 31, 1926, https://www.bundesarchiv.de/aktenreichskanzlei/1919-1933/01a/ma3/ma31p/kap1_2/kap2_9/para3_6.html.

230. §1 of the bill, BArch, R 43-I/1974 (fol. 99–101).

231. §2 of the bill, BArch, R 43-I/1974 (fol. 99–101).

232. Further remarks and amendments proposed by the federal government, BArch, R 1501/125073 (fol. 177–181), 2–3. On the important 1926 Juristentag, where the civil servants in charge of the bill discussed it with scholars and judges, see Wendenburg, *Die Debatte*, 72ff.; Dreier, "Verfassungsgerichtsbarkeit," 363ff.

minorities of more than a third of MPs or more than a third of state chamber votes the right to request a decision by the State Court.[234] Somewhat inconsistently, Prussia reacted to this proposal by stating that it saw "the introduction of such minority rights of the Reichstag and the state chamber not without concerns, since such rights could easily be used for obstruction by a purposeful opposition."[235] Nevertheless, the state chamber adopted the government proposal.

With the amendments of the state chamber, the Judicial Review Bill was introduced into the Reichstag in December 1926, and referred to the Legal Affairs Committee without a plenary debate.[236] The Committee began its deliberations on the bill in June 1927. Apart from the Communists, the representatives of all major parties, from the extreme-right, anti-Republican DNVP to the SPD, expressed their general support for the bill.[237] The Social Democrat Otto Landsberg and other SPD MPs tabled an amendment to include an explicit ban of judicial review by the ordinary courts;[238] most likely this amendment was intended to have a merely symbolic function, since Landsberg otherwise did not take issue with the various ways to trigger judicial review by the State Court.[239]

By June 1927, the first critical voices on the bill had already emerged within the SPD. In November 1926, the lawyer Curt Rosenberg warned on the front page of the party newspaper *Vorwärts* that the bill established a "judicial upper chamber." Conservative judges would seek to extend their powers at the expense of parliament; the

233. Remarks and amendments proposed by Prussia, June 28, 1926, BArch, R 3001/7120 (nr. 131), 1; remarks and amendments proposed by Bavaria, September 1, 1926, BArch, R 3001/7120 (nr. 149f.), 2.

234. Remarks and amendments proposed by the federal government, September 10, 1926, BArch, R 1501/125073 (fol. 182–184), 1–2.

235. Further remarks and amendments proposed by Prussia, October 10, 1926, BArch, R 3001/7120 (nr. 160), 3.

236. "Entwurf eines Gesetzes über die Prüfung der Verfassungsmäßigkeit von Vorschriften des Reichsrechts," Verhandlungen des Reichstages, III. Wahlperiode (1924/1926), Drucksache Nr. 2855, December 11, 1926; Verhandlungen des Reichstages, III. Wahlperiode 1924, "296. Sitzung," March 25, 1927, 9951.

237. See the draft notes on the meeting of the Reichstag Legal Affairs Committee on June 14, 1927, BArch, R 1501/125073 (fol. 412–419).

238. List of amendments proposed in the Legal Affairs Committee, June 14, 1927, BArch, R 3001/7121 (fol. 40).

239. This was also how government representatives interpreted Landsberg's proposal, see the notes on the inter–ministerial meeting of June 17, 1927, BArch, R 1501/125073 (fol. 422–426), 4f.

U.S. Supreme Court served as a warning example.[240] In the more academic "Socialist Monthly" (*Sozialistische Monatshefte*), the civil servant Karl Steinhoff rejected the bill as "extraordinarily dangerous." Judicial review was not a purely legal, apolitical exercise. Constitutional questions should be decided by the legislature, not by a court.[241] In a reply to Rosenberg, Gustav Radbruch defended centralized judicial review, but suggested to add politicians to the State Court bench.[242] Radbruch had also called for a ban on diffuse judicial review and the adoption of centralized judicial review in 1925, still before the seminal Supreme Court judgment of November 4, 1925. Among others, Radbruch argued that diffuse judicial review put legal certainty at risk and that inter-branch conflict would damage the authority of the state as a whole, of the constitution, and of the judiciary.[243]

A certain unease about the bill is also reflected in the SPD's annual report for 1926. According to the report, the bill would "have to be assessed very cautiously."[244] It had to be avoided that the career judiciary would decide on the constitutionality of statutes; otherwise, "a reactionary court" could prevail over parliamentary majorities.[245] But in principle, the report acknowledged, in line with Radbruch, the need for the centralization of judicial review. In particular, it pointed out that an umpire of the constitutionality of federal legislation would have been convenient on two occasions in 1926: First, when president Hindenburg signed a decree that allowed German embassies and consulates to fly not only the republican colours, but also the colours of the monarchy – a decree Social Democrats fiercely opposed.[246] Second, in the conflict over

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240. Curt Rosenberg, "Ein juristisches Oberhaus," *Vorwärts*, November 18, 1926, morning edition, 1.

241. Karl Steinhoff, "Rechtswissenschaft," *Sozialistische Monatshefte*, no. 11 (1926): 792–98.

242. Gustav Radbruch, "Ein juristisches Oberhaus? Eine Erwiderung," *Vorwärts*, January 12, 1927, evening edition, 1.

243. Gustav Radbruch, "Richterliches Prüfungsrecht?," *Die Justiz* 1, no. 1 (October 1925): 12–16; reproduced in Arthur Kaufmann, ed., *Gustav Radbruch: Gesamtausgabe*, vol. 13, P*olitische Schriften aus der Weimarer Zeit II* (Heidelberg, 1993), 123–27.

244. Sozialdemokratische Partei Deutschlands, *Jahrbuch der Deutschen Sozialdemokratie für das Jahr 1926* (Berlin, 1927), 106.

245. Ibid.

246. See Eberhard Kolb, *Deutschland 1918-1933: eine Geschichte der Weimarer Republik* (München, 2010), 124.

the assets of the former royal families.[247] As discussed above, efforts to find a compromise on the issue had been hampered by Hindenburg's threat of a presidential veto and by the risk of judicial review of the question whether such a compromise met the constitutional requirement that an expropriation had to serve the "common good." Later, the government invoked this argument to avoid the success of a referendum on the radical expropriation motion supported by Communists and Social Democrats.

As these examples show, Social Democrats could imagine that centralized judicial review would serve their interests. However, Social Democrats' support for centralized judicial review was only motivated by "insurance concerns" in the case of Hindenburg's decree on the flag issue. In the case of the assets of the former royal families, Social Democrats hoped that a constitutional court would take a more moderate approach to the right to property than the government, the president or the ordinary courts. Put differently, Social Democrats hoped that centralized judicial review would not tighten, but relax some constitutional constraints.

In the Reichstag's Legal Affairs Committee, only two aspects were contentious: the State Court's power to review international treaties and, tightly interwoven with this question, its power to review statutes passed before the Judicial Review Bill would come into effect.[248] Concerns that centralized judicial review could interfere with foreign policy had first been raised by the Foreign Office; they may have led to the Cabinet postponing its approval of the bill in March 1926.[249] Especially the 1924 agreement on the Dawes Plan and the 1925 Locarno treaties were considered at risk.[250] The Dawes Plan was supposed to be a first step towards a settlement of the World War I reparations issue; the Locarno treaties were supposed to pave the way for Germany

247. Sozialdemokratische Partei Deutschlands, *Jahrbuch der Deutschen Sozialdemokratie für das Jahr 1926*, 105–6.

248. List of amendments proposed in the Legal Affairs Committee, June 14, 1927, BArch, R 3001/7121 (fol. 40); notes on the meeting with representatives of the government parties on June 20, 1927, BArch, R 1501/125073 (fol. 430–433); Foreign Office summary of the same meeting, June 20, 1927, BArch, R 901/28068.

249. Memo by Friedrich Gaus to the foreign minister and the state secretary in the Foreign Office, February 12, 1926, BArch, R 901/28068, 1. The role of foreign policy concerns for the Cabinet delaying its approval of the bill is suggested by a letter from Külz to the state secretary in the Chancellery, May 18, 1926, BArch, R 43-I/1974 (fol. 91); however, according to a note by Külz on the Cabinet meeting on March 3, 1926, Chancellor Luther had also voiced concerns "that the bill is maybe not necessary after all": note by Külz, March 6, 1926, BArch, R 1501/12073 (fol. 90).

250. Memo by Friedrich Gaus.

joining the League of Nations. Both were highly contested by the extreme right.[251] As a Foreign Office representative is cited in records of a state chamber meeting, the adoption of centralized judicial review could entail that foreign governments "would raise the reproach that Germany is creating a way to have those treaties … annulled … that have become cumbersome after a change in political circumstances."[252]

To deal with this problem, various proposals to exclude international treaties or all past legislation from judicial review entirely or in part were discussed.[253] Especially representatives of the far-right DNVP insisted on the possibility to have treaties reviewed.[254] But the issue of international treaties and the exclusion of past legislation, which government representatives also considered important in order to protect revaluation legislation,[255] was no unsurmountable obstacle to the adoption of judicial review. The positions of the government parties seemed to be moving towards a compromise;[256] ultimately, it was agreed to postpone the question.[257]

The Legal Affairs Committee did not continue its deliberations on the Judicial Review Bill before early elections were called in May 1928. Within the government, efforts to solve the treaties issue continued. In October 1928, the government reintroduced the bill into the new Reichstag without any changes,[258] allowing it to avoid another reading in the state chamber. The new grand coalition kept a cautious stance

251. See Kolb, *Deutschland 1918-1933*, 97ff., 102ff., 120.

252. Foreign Office notes on the first committee reading of the bill in the state chamber, October 20, 1926, BArch, R 901/28068, 2–3.

253. Minutes of the Cabinet meeting on May 31, 1926, in "Akten der Reichskanzlei (online), Das Kabinett Marx III/IV. Band 1, Dok. 9."; notes (draft) on the results of the second committee reading of the bill in the state chamber on November 6, 1926, BArch, R 1501/125073 (fol. 291–294), 2; notes on meeting of June 20, 1927, BArch, R 1501/125073 (fol. 430–433).

254. Notes on the meeting of representatives of the government parties (Interfraktioneller Ausschuss), July 2, 1927, BArch, R 1501/125073 (fol. 437); see also the Foreign Office notes on this meeting, BArch, R 901/28068.

255. Foreign Office notes on the first committee reading of the bill in the state chamber, October 20, 1926, BArch, R 901/28068, 1.

256. Notes on the meeting of July 2, 1927, BArch, R 1501/125073 (fol. 437), 2; notes on the meeting of representatives of the government parties (Interfraktioneller Ausschuss), July 4, 1927, BArch, R 1501/125073 (fol. 438–439), 2–3; see also the Foreign Office notes on the meetings on July 2 and July 4, BArch, R 901/28068.

257. Notes on the meeting of July 4, 1927, BArch, R 1501/125073 (fol. 438–439), 3.

258. "Entwurf eines Gesetzes über die Prüfung der Verfassungsmäßigkeit von Vorschriften des Reichsrechts," Verhandlungen des Reichstages, IV. Wahlperiode (1928), Drucksache Nr. 382, October 16, 1928.

towards the treaties issues. In January 1929, the Cabinet agreed that it would propose several amendments in the Legal Affairs Committee, including a ban on the review of treaties by the ordinary courts, as well as a time limit on the review of treaties by the State Court – review could only be requested within one week of the promulgation of the transposing legislation of a treaty and before its ratification. Additionally, minorities of the legislative chambers should generally only be able to request judicial review within three months after the promulgation of a statute. Past legislation should remain excluded from review at the request of the federal government, the legislative chambers, or their minorities.[259] As this plethora of restrictions shows, safeguarding its leeway on foreign policy remained a priority for the government, despite its changed political composition.

In summary, successive centre-right governments pursued the project of centralizing judicial review in the State Court from 1925 onwards. The motivation of this effort was not to create a strong mechanism of minority protection, but to rein in a potentially obstructive and volatile practice of diffuse judicial review. Consistent with this motivation, a major concern of bureaucrats and political moderates was to avoid that centralized judicial review would interfere with foreign policy. The question of international treaties left aside, all major parties in the Reichstag – except the Communists – supported the government bill in 1927. When the new grand coalition government, led by the SPD, reintroduced the bill into the Reichstag in October 1928, it was therefore reasonable to expect its smooth passage. Writing to the Chancellery in January 1929, the SPD Interior Minister Carl Severing was confident that the Judicial Review Bill would reach the ⅔-majority required for a constitutional amendment.[260] However, a few months later, the eruption of a controversy over judicial review in Severing's own party put the passage of the bill in question.

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259. Minutes of the Cabinet meeting on January 21, 1929, BArch, R 43-I/1435 (fol. 113–119), 5–6.

260. Severing to the state secretary in the Chancellery, January 11, 1929, BArch, R 43-I/1435 (fol. 121–123), 1–2.

4.8 Opposition Against Centralized Judicial Review Within the SPD

In 1927, the Social Democrats in the Reichstag's Legal Affairs Committee had raised no fundamental objections against the Judicial Review Bill. In 1919 and 1921, Social Democrats had themselves tabled motions to centralize the review of federal laws in the State Court. Yet, in October 1929, at a meeting of the "Association of Social Democratic Jurists" in Berlin, it was "established at the end of the discussion as the unanimous view of the meeting that the courts should be banned from reviewing the constitutionality of statutes and that a special court for this [purpose] should be rejected."[261] To be clear, the "Association of Social Democratic Jurists," the official group for jurists in the SPD, was neither exactly identical with the earlier supporters of judicial review, nor with the SPD parliamentary group. Nevertheless, it is remarkable that the group concentrating the SPD's legal expertise, or at least those of its members who were present at the Berlin meeting, rejected a bill that had so far enjoyed the support of the SPD parliamentary group and had even been reintroduced into parliament by an SPD-led government in 1928. What explains this surge of opposition against centralized judicial review in the SPD?

This section takes a close look at the arguments made in favour and against centralized judicial review at the meeting on October 17, 1929, and in several Social Democratic periodicals between June and September 1929.[262] It argues that the expectation that rights-based judicial review by the State Court would obstruct progressive social and economic policies was a necessary cause of the rejection of the Judicial Review Bill by the circle of SPD jurists that met in October 1929. The Social Democratic opponents of centralized judicial review saw no value in it, since they considered it unlikely that it would safeguard Social Democratic interests or democracy itself. They even preferred the status quo of diffuse judicial review, as they feared that the State Court might be a more assertive antagonist of parliament than the ordinary

261. "Die Nachprüfung der Verfassungsmäßigkeit der Gesetze," *Recht und Sozialismus. Mitteilungsblatt der Vereinigung sozialdemokratischer Juristen*, no. 7 (February 15, 1930): 1, Carl Herz Papers, nr. 426, International Institute of Social History, Amsterdam. This summary of the meeting on October 17, 1929 was written later. A shorter report was published the following day in the evening edition of the SPD party newspaper, see "Selbstmord der sozialen Demokratie?," *Vorwärts*, October 18, 1929, evening edition.

262. On the discussion in the SPD, see also Wendenburg, *Die Debatte*, 83–92; Wehler, *Staatsgerichtshof*, 113–19.

courts. While they were sympathetic to the idea that the political influence over appointments to the State Court could be greater than over the recruitment of the regular judiciary, they doubted whether any achievable political appointments mechanism would be sufficient to turn judicial review into an institution that aligned with Social Democratic interests. In contrast, the role of judicial review in adjudicating federalism-related conflicts did not raise concerns.

As discussed above, critical voices on the bill – such as Curt Rosenberg's warning of a "judicial upper chamber" in the party newspaper *Vorwärts* – had already emerged in late 1926. The party's 1926 annual report called for a cautious assessment of the bill, but also acknowledged the need to centralize judicial review. Overall, it seems, the bill did not spawn a major debate in the party before 1929. In the SPD's 1928 annual report, a contribution on the Judicial Review Bill acknowledged that it sought to clarify and stabilize constitutional conflicts, but criticized that judicial review was at odds with parliamentary sovereignty. In the hands of conservative, anti-republican judges, judicial review offered an opportunity for the "sabotage of legislation."[263] At the moment, the piece concluded, the opinions on the bill within the party were still divided.[264]

In contrast to the early criticisms, the opposition against the bill that emerged in 1929 was voiced by a larger number of individuals and with more elaborate arguments.[265] Most importantly, many opponents of judicial review in 1929 were part of a community of Social Democratic labour law experts: Hugo Sinzheimer, a scholar of labour law at the University of Frankfurt who had supported centralized judicial review in 1919, weighed in against the bill, as did his former student, the young attorney Franz Neumann. They were joined by Clemens Nörpel, a lawyer with the German Trade Union Federation (ADGB), the umbrella organisation of the socialist trade unions, and

263. Sozialdemokratische Partei Deutschlands, *Jahrbuch der Deutschen Sozialdemokratie für das Jahr 1928* (Berlin, 1928), 28.

264. Ibid., 29.

265. In 1929, clear opponents of the Judicial Review Bill were Hugo Sinzheimer, Franz Neumann, Otto Kirchheimer, Clemens Nörpel, Curt Rosenberg, Georg Flatow and Carl Herz. At the meeting in October 1929, Hermann Badt, Gustav A. G. Goldschmidt, and Ludwig Bendix spoke in support of the bill. Gustav Radbruch had supported the bill in his *Vorwärts* article in 1927 (cited above). Simon Katzenstein's statement at the meeting in October 1929 is unclear, but overall sceptical. I leave aside the position of the Social Democratic state law professor Hermann Heller, because he did not directly participate in the 1929 discussion. On his ambiguous statements on the question of judicial review, see Wendenburg, *Die Debatte*, 195–204.

Georg Flatow, a civil servant who had been among the drafters of works council legislation.[266] Only few other opponents of judicial review, such as Otto Kirchheimer, who published mainly on constitutional law, and Carl Herz, the mayor of Berlin's Kreuzberg district, did not have a background in labour law.[267]

The expectation that rights-based judicial review threatened the obstruction of progressive social and economic policy was central to the criticisms of three of the five opponents of the bill present at the meeting in October 1929,[268] as well as to Sinzheimer's criticism published in August 1929 in *Die Justiz*, the periodical of the progressive "Republican Association of Judges" (*Republikanischer Richterbund*). As Otto Kirchheimer put it, "in practice, this bill will have the greatest effects in the area of the fundamental rights of the Weimar Constitution."[269] Sinzheimer spelled these effects out: "If this bill becomes law," he warned, "the further development of social legislation is endangered or even halted."[270] Of course, the criticism against the bill had many aspects, including not only the issue of fundamental rights, but also the conservatism of judges and legal scholars, as well as the conflict between judicial review and parliamentary sovereignty. In fact, the statements of a particularly vocal opponent of judicial review, Franz Neumann, show that he rejected rights-based judicial review, regardless of its consequences, out of an ideological commitment to popular sovereignty. The influence of such ideological beliefs will be discussed in detail in the next section. However, even Neumann's argumentation was based to some extent on the expected consequences of rights-based review.[271]

The opponents of judicial review based their expectations about the effects of rights-based judicial review largely on their interpretation of the developments since

266. As an introduction on the community of socialist labour lawyers in Weimar, see the autobiographical conversation with Otto Kahn-Freund: Otto Kahn-Freund and Wolfgang Luthardt, "Autobiographische Erinnerungen an die Weimarer Republik: Ein Gespräch mit Wolfgang Luthardt," *Kritische Justiz* 14, no. 2 (1981): 183–200.

267. On Herz, see Christian Hanke, *Selbstverwaltung und Sozialismus: Carl Herz, ein Sozialdemokrat* (Münster, 2006).

268. Carl Herz, Otto Kirchheimer, Georg Flatow.

269. "Mitteilungsblatt," 4.

270. Sinzheimer, "Chronik," 641.

271. Franz L. Neumann, "Gegen ein Gesetz über Nachprüfung der Verfassungsmäßigkeit von Reichsgesetzen," *Die Gesellschaft*, no. 6 (1929): 521ff.

1919 as a “rebellion of German judges,”[272] a “counter-revolution of the courts,”[273] driven by conservative and anti-Republican judges and supported by legal scholars of the same ilk. Even Gustav Radbruch, a supporter of centralized judicial review, shared the view that the judiciary had claimed the power of judicial review out of animosity against the Republic and distrust of left-wing parliamentary majorities. Radbruch had already complained in 1927 that “the courts during the Germany monarchy would not have arrogated themselves the right to question the constitutionality of federal statutes bearing the signature of the Emperor.”[274] Going further, many opponents of judicial review argued that the key instrument of this judicial anti-parliamentarism were fundamental rights, especially the right to property (Art. 153) and the equality clause (Art. 109) in its new interpretation as binding on the legislature.[275] For example, Otto Kirchheimer claimed that “the Supreme Court has managed, with the help and the use of Art. 109 and Art. 153, to exert a control over the legislation of the Reichstag whose leitmotif is the preservation of the vested interests of the bourgeoisie.”[276]

What social policies did the opponents of judicial review consider at risk of obstruction? The records of the meeting in October 1929 are silent in this regard; more instructive are the articles by Neumann, Nörpel and Sinzheimer published during the summer of 1929.[277] These authors saw the greatest risks in the fields of labour law and economic democracy, that is, the participation of workers in the management of companies. This view was based on two assumptions about the nature of law on these matters: First, as Neumann pointed out, the participation of workers in management necessarily entailed “curtailing the owner’s right to the administration of [their]

272. Herz in “Mitteilungsblatt,” 3.

273. Katzenstein, ibid., 2.

274. Radbruch, “Ein juristisches Oberhaus? Eine Erwiderung,” 1; Radbruch, “Richterliches Prüfungsrecht?”, reproduced in Kaufmann, *Gustav Radbruch: Gesamtausgabe*, 13, *Politische Schriften aus der Weimarer Zeit II*:124; similarly Herz in “Mitteilungsblatt,” 3.

275. See Sinzheimer, “Chronik,” 643; Neumann, “Gegen ein Gesetz,” 521ff.; Clemens Nörpel, “Schlusswort,” *Die Arbeit*, no. 8 (1929): 515; Herz and Kirchheimer in “Mitteilungsblatt,” 3–4.

276. “Mitteilungsblatt,” 4. Kirchheimer had made a similar reproach in a diatribe against the Supreme Court published in the newspaper *Mühlhäuser Volksblatt* on October 1, 1929: Otto Kirchheimer, “50 Jahre Deutsches Reichsgericht,” in *Otto Kirchheimer – Gesammelte Schriften*, ed. Hubertus Buchstein, vol. 1, *Recht und Politik in der Weimarer Republik* (Baden-Baden, 2017), 187–91.

277. Neumann, “Gegen ein Gesetz”; Clemens Nörpel, “Die Prüfung der Verfassungsmäßigkeit von Vorschriften des Reichsrechts,” *Die Arbeit*, no. 6 (1929): 368–73; Nörpel, “Schlusswort”; Sinzheimer, “Chronik.”

property."[278] Hence, legislation on economic democracy could conflict with the right to property. Second, as Sinzheimer argued, progressive "social law" – by which he probably mainly meant labour law – took into account the unequal distribution of power between capital and labour and therefore necessarily treated these groups differently. It had to appear suspect from a perspective of abstract legal equality and was at risk should the courts assess it against the yardstick of the equality clause.[279] As Sinzheimer wrote,

> *"We raise the question whether any further social law with a prospect of permanence can still be passed by the legislature if the judges of the State Court are able to strike down new social law on the basis of the principle of equality before the law at any time. Here is the battleground. Here is the problem. Social law is unequal law. It favours the weak over the strong. It contradicts the abstract ideal of equality of classical bourgeois legal thinking in order to level material inequality. No provision of social law is safe from the encroachment of the State Court … With such oversight, the State Court would not only be an upper chamber superior to the Reichstag, but also a combat base against the further development of social legislation."*[280]

While Sinzheimer did not provide more details on the specific projects of "social law" he worried about, Neumann and Nörpel mentioned a few specific policies they considered at risk: According to Neumann, legislation on worker participation in the administration of corporations in monopoly industries, such as the chemicals and iron industry, might be considered a violation of the right to property, as well as the regulation of trusts and monopolies in general.[281] Neumann admitted that the constitution allowed legislative limits on the right to property, but he argued that several restrictions on the right to property taken together could be seen as amounting to a

278. Neumann, "Gegen ein Gesetz," 6.

279. Sinzheimer, "Chronik," 642–43.

280. Ibid.

281. Neumann, "Gegen ein Gesetz," 527.

violation of the right's "hard core" – a reference to an emerging doctrine in legal scholarship that considered this hard core inviolable by the legislature.[282] Additionally, the equality clause might be invoked against the monopoly of trade union officials to represent employees before labour tribunals – to the exclusion of private attorneys from this lucrative market,[283] or against a planned collective liability of employer organisations if one of their members violated a collective bargaining agreement.[284]

The critics of judicial review actually mentioned only few specific judicial review cases they took issue with: A lower court had set aside the monopoly of trade unions to represent employees before Labour tribunals, although the higher courts had eventually upheld it.[285] The State Court had invalidated a Prussian emergency decree that took exploration rights for a suspected oil reservoir in Brandenburg from their private owners and accorded them to the state.[286] Prussian municipalities had – unsuccessfully – challenged their merger with other municipalities.[287] In his 1926 piece in the SPD party newspaper *Vorwärts*, Curt Rosenberg had also criticized the Supreme Court's ruling on the assets of the former Duke of Saxe-Coburg and Gotha.[288] The *Vorwärts* report[289] on the meeting in October 1929 also mentioned the Supreme Court decision on the pre-revolutionary pension claims discussed above,[290] a case pending before the State Court on the right of civil servants to sign a petition for a referendum on the reparations issue initiated by the far right,[291] a challenge against Prussian electoral law initiated by small extreme-right parties,[292] and a State Court decision that

282. Ibid., 526; on this theory of "institutional guarantees," see also Lübbe-Wolff, "Safeguards," 363f.; Gusy, *Weimarer Reichsverfassung*, 277f.

283. Nörpel, "Die Prüfung," 516; Neumann, "Gegen ein Gesetz," 527.

284. Neumann, "Gegen ein Gesetz," 530.

285. Ibid., 527; Nörpel, "Schlusswort," 516.

286. Neumann, "Gegen ein Gesetz," 526–27.

287. Nörpel, "Schlusswort," 516.

288. Rosenberg, "Ein juristisches Oberhaus," 1.

289. "Selbstmord der sozialen Demokratie?," 2.

290. Reichsgericht (*VI. Zivilsenat* as court of arbitration), November 30, 1929 – RGZ 126, 161 (*Rentensperrgesetz*). Note that the court had declared the statutory provision unconstitutional already in July 1929, months before it rendered its final decision in the case.

291. Staatsgerichtshof, December 19, 1929 – L-S II, 72.

292. Staatsgerichtshof, February 17, 1930 – L-S IV, 131.

declared a Prussian decree ordering municipalities to fly the republican flag unconstitutional.[293] To be clear, some of these cases did not concern the constitutionality of statutes.

More important than judicial practice for shaping expectations towards judicial review were developments in legal scholarship – most importantly, the transformation of the equality clause into a constraint on the legislature. Carl Herz, mayor of the Kreuzberg district of Berlin, described the interplay between scholars and judges thus:

> *"In judicial practice … the judges of the Supreme Court, primarily trained in private law, inexperienced in public law and with often very lopsided political views, tend to take the reasons for their judgments from the theoretical literature. Via the Supreme Court, the professors' state law teachings reach legal practice and the lower courts. Yet, the influential DNVP-affiliated [deutschnationalen] professors of state law are now methodically turning the fundamental rights, which they could not ridicule enough under Bismarck, into an instrument to curtail parliamentary democracy."*[294]

As Herz further elaborated, he had realized the "incredible danger" stemming from the new interpretation of constitutional rights only recently, after the law professor Heinrich Lehmann had put forward his new interpretation of the hitherto hardly relevant Article 151 of the constitution at a talk in April 1929.[295] Article 151 required, among others, that the economy had to be organized in line "with the principles of justice and aim at securing for all conditions of existence worthy of human beings."[296] So far, it had been seen as merely programmatic, that is, as a not justiciable legal norm. In contrast, Lehmann argued that judges could apply this provision as a yardstick of judicial review.[297] As the Catholic Lehmann saw it, the Constitution's ideal of justice was a

293. Staatsgerichtshof, July 9, 1928 – L-S I, 276 (= RGZ 121, appendix p. 13).

294. "Mitteilungsblatt," 3.

295. Ibid.

296. As translated in Oppenheimer, *Constitution*, 253.

297. "Verfassung und Wirtschaftsleben," *Vossische Zeitung*, April 18, 1929, morning edition, sec. *Recht und Leben*, 1; Lehmann developed this idea also in Heinrich Lehmann, "Recht und

synthesis of individualism and socialism, and through judicial review, it could be assessed whether legislation fell too far on either end of this spectrum.[298] As an example of legislation that would be unconstitutional from this perspective, Lehmann mentioned legislation implying the "Mark for Mark" principle,[299] and, at least in Herz' account, also the "Viennese" (by which he probably meant Austrian) rent control legislation because the latter was "too lopsided towards socialism."[300] Herz voiced his concern about Lehmann's efforts to turn a provision that "we hitherto all have considered as juridically entirely devoid of content"[301] into a hard constraint on the legislature. The constitution contained many similar provisions, expressing the compromise of its drafters' different world views. If more and more of these programmatic statements were considered justiciable legal norms, Herz warned, judges could exercise comprehensive control over policy-making, especially over social policy.[302]

In contrast to rights-based judicial review, the role of judicial review in the resolution of federalism-related conflicts was hardly mentioned in the entire debate among the SPD jurists. Only Franz Neumann briefly mentioned and explicitly supported judicial review in federalism-related conflicts. "The power of centralized judicial review for federalism issues should be recognized insofar as conflicts of competence between the federation and the states are concerned," Neumann wrote, since the establishment of an arbiter for such conflicts was inevitable.[303] Neumann also made a positive reference to the role of judicial review in Austria:

> *"There would be nothing to say against controlling parliament if the constitution did not contain fundamental rights. This explains the support for judicial review also by Hugo Preuß [the main author of the Weimar*

Gerechtigkeit. Fest-Rede gehalten bei der Gründungsfeier der Universität Köln am 10. Mai 1930," *Kölner Universitäts-Reden* 25 (Köln, 1930).

298. "Verfassung und Wirtschaftsleben," 1–2.

299. Ibid., 2.

300. As cited by Herz in "Mitteilungsblatt," 3.

301. Ibid.

302. Ibid.; Franz Neumann had voiced similar misgivings about Lehmann's interpretation of Art. 151: Neumann, "Gegen ein Gesetz," 526.

303. Neumann, "Gegen ein Gesetz," 536.

Constitution], who was an opponent of fundamental rights, and by Hans Kelsen … because the masterful Austrian constitution does not contain fundamental rights – and according to Professor Kelsen's communication to the author, this is the reason why a constitutional court is possible in Austria, albeit problematic. In Germany however, Professor Kelsen has literally declared, the implementation of the bill would be a suicide of democracy."[304]

While constitutional rights, as discussed in Chapter 5 below, indeed hardly played a role in the Austrian practice of judicial review, Neumann's characterization of the Austrian constitution is slightly misleading. The constitution did contain a few rights and referenced the 19th century bills of rights. In any case, the political right in Germany would hardly have supported the restriction of judicial review to federalism issues. Neumann's proposal was also rejected by the civil servant Arnold Brecht, who had overseen the preparation of the Judicial Review Bill until 1927 and now worked for the Prussian government.[305] Brecht, as well as Martin Löwenthal, the civil servant in charge of the bill at the Interior Ministry, had published articles defending the bill against its Social Democratic critics.[306] Brecht argued that the idea to exclude fundamental rights from the scope of centralized judicial review had its merits, but would not find a majority.[307]

Most Social Democratic opponents of judicial review would certainly have preferred to ban it altogether. Apart from the rejection of centralized judicial review, a ban on diffuse judicial review was noted as the outcome of the meeting in October

304. Ibid., 534.

305. On Brecht, see Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789*, vol. 5, *Weltkrieg, Revolution und Reichserneuerung 1914-1919* (Stuttgart, 1978), 748.

306. Arnold Brecht, "Für ein Gesetz über Nachprüfung der Verfassungsmäßigkeit von Reichsgesetzen," *Die Gesellschaft*, no. 6 (1929): 511–16; Martin Löwenthal, "Die Prüfung der Verfassungsmässigkeit von Vorschriften des Reichsrechts: Erwiderung," *Die Arbeit*, no. 8 (1929): 508–13. Wendenburg, *Die Debatte*, 91, wrongly claims that Brecht and Löwenthal were SPD members, hence overstating the degree of support for the bill among Social Democrats. In fact, Löwenthal was a member of the liberal DDP; Brecht was not member of any party (though both certainly had sympathies for the SPD). On Löwenthal, see Dieter Pohl, *Justiz in Brandenburg 1945–1955: Gleichschaltung und Anpassung* (München, 2001), 28. On Brecht, see Hannah Bethke, *Das politische Denken Arnold Brechts: eine transatlantische Ideengeschichte des 20. Jahrhunderts* (Berlin, 2013), 163.

307. Brecht, "Für ein Gesetz," 516.

1929.[308] Yet, as the civil servants Brecht and Löwenthal pointed out, such a ban would not find a majority either.[309] Interestingly, Löwenthal attended the meeting. In contrast to his article published a few months earlier, he now hardly made an effort to defend the bill he was in charge of. Now, he argued that a ban of diffuse judicial review might in fact find a majority if the moderate parties and the SPD joined forces.[310]

Nevertheless, it seems unrealistic that a ban of diffuse judicial review without, at the same time, allowing for some form of review by the State Court, would have found a majority. The discussion at the meeting in October 1929 also suggests that the opponents of judicial review had resigned themselves to this fact. Yet, if the choice was between the status quo of diffuse judicial review and the centralization of judicial review in the State Court, why did the opponents of judicial review prefer to keep the status quo? After all, as Brecht and Löwenthal, but also the supporters of the bill in the SPD argued, it offered the chance to exert some influence over the composition of the court that exercised judicial review.[311] As things stood, it would at least have taken judicial review out of the hands of the much-detested ordinary courts, with the Supreme Court at their apex, and put it into the hands of the State Court, the bench of which was supposed to to be staffed mainly with judges of the future Supreme Administrative Court. Additionally, as two supporters of the bill, Gustav A. G. Goldschmidt and Ludwig Bendix argued, removing the risk of erratic judgments by conservative lower court judges would help stabilize the republic’s legal order.[312]

Yet, as illustrated by the few cases the opponents of judicial review actually mentioned as problematic, they considered the current practice of judicial review inconvenient, but not unbearable. As Otto Kirchheimer summarized it, judicial review was currently exercised “only rarely, incidentally and on the basis of a random

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308. “Mitteilungsblatt,” 1.

309. See Brecht, “Für ein Gesetz,” 513; Löwenthal, “Erwiderung,” 511.

310. “Mitteilungsblatt,” 4.

311. Brecht, “Für ein Gesetz,” 514; Löwenthal, “Erwiderung,” 510; Goldschmidt and Bendix “Mitteilungsblatt,” 2, 4.

312. “Mitteilungsblatt,” 2, 4.

jurisprudence,"[313] or, in Clemens Nörpel's words, with "far-reaching restraint."[314] This restraint was attributed to the lack of an explicit legal mandate for judicial review,[315] "inertia" especially among lower court judges,[316] and the familiarity of the ordinary courts with the matter at stake.[317] Moreover, not only were judges exercising judicial review with restraint, but at least in theory, their rulings had only *inter partes* effect.[318] In contrast, the State Court was expected to exercise judicial review more frequently and assertively. The Court would become a rallying point for a wide range of interest groups seeking to challenge legislation.[319] It would not exercise restraint, but take a more activist approach, as it was more detached from the practical experience of applying legislation,[320] and as it would develop an institutional sense of purpose.[321] As Georg Flatow put it, "such an institution, already to prove … its raison d'être with respect to the tasks assigned to it, will have to tend, unconsciously, towards a critical stance."[322] Moreover, according to the bill, its judgments would not only have *inter partes* effect, but *erga omnes* effect.[323]

The prospect that the centralization of judicial review could allow greater political control over the appointments of the judges exercising it was certainly welcome to Social Democrats.[324] Wresting judicial review from the hands of the conservative regular judiciary was probably a necessary condition of Social Democrats' support for judicial review – especially Social Democrats' animosity towards the Supreme Court is hard to overemphasize.[325] But Social Democrats' expectations about

313. Ibid., 4.

314. Nörpel, "Die Prüfung," 370.

315. Ibid.

316. Rosenberg in "Mitteilungsblatt," 2.

317. Neumann, "Gegen ein Gesetz," 533.

318. Carl Herz in "Mitteilungsblatt," 3.

319. Ibid., 4.

320. Neumann, "Gegen ein Gesetz," 533.

321. Georg Flatow in "Mitteilungsblatt," 4.

322. Georg Flatow, ibid.

323. Herz, ibid., 3; similarly Flatow, ibid., 4.

324. See Neumann, "Gegen ein Gesetz," 536; Radbruch, "Ein juristisches Oberhaus? Eine Erwiderung," 1; Goldschmidt and Bendix "Mitteilungsblatt," 2, 4.

325. See, f. ex., Kirchheimer, "50 Jahre Deutsches Reichsgericht."

the costs of judicial review were not merely based on judges' political attitudes. The extensive discussion of the changing interpretations of constitutional provisions such as the equality clause would have been unnecessary, had Social Democrats believed that judicial decisions were merely a product of judges' political attitudes. These attitudes could only be effective if judicial decisions could be based on defensible legal interpretations.

These interpretations were not themselves entirely the invention of a conservative judiciary. As discussed above, legal scholars, not judges, first put forward the new interpretation of the equality clause. Another case in point was the view that merely "fiscal reasons" did not satisfy the requirement that an expropriation had to serve the "common good." This view had already been accepted long before the Weimar period.[326] Of course, the conservatism and anti-parliamentarism of many legal scholars will explain to some extent why certain doctrines emerged or persisted. But whether these doctrines were accepted or not was not something that could be influenced by political appointments to the State Court alone. Even if the Court had featured the political appointment mechanism of the Austrian Constitutional Court, it is questionable whether its judges would have ruled in line with Social Democratic interests, or would, as Carl Herz described the practice of Supreme Court judges, have taken "the reasons for their judgments from the theoretical literature."[327]

In any case, the most plausible scenario for the composition of the State Court at the time was that the majority of its judges would eventually be drawn not from the Supreme Court, but from the future Supreme Administrative Court. As the trade union lawyer Clemens Nörpel argued, this would not make a difference.[328] Georg Flatow argued that efforts to ensure the pro-republican staffing of the entire judiciary were preferable to a State Court with a political appointment mechanism. With such a mechanism in place, a change in government might entail changing, possibly

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326. See Foroud Shirvani, "Entwicklung des Enteignungsrechts vom frühen 19. Jahrhundert bis zur Weimarer Reichsverfassung," in *Die Enteignung: Historische, vergleichende, dogmatische und politische Perspektiven auf ein Rechtsinstitut*, ed. Otto Depenheuer and Foroud Shirvani (Berlin, 2018), 36.

327. "Mitteilungsblatt," 3.

328. Nörpel, "Schlusswort," 513.

undesirable majorities on the State Court, too.[329] All in all, the Social Democratic opponents of judicial review did not believe that a politically achievable mechanism of staffing the State Court would fundamentally change the character of judicial review.

Finally, why did the opponents of centralized judicial review not see its value as political insurance mechanism? Although they considered rights-based judicial review biased against the Social Democratic policy agenda, they might still have valued centralized judicial review as a safeguard of the democratic system. In 1926, Gustav Radbruch made a case for judicial review as insurance: "Since any party can belong to the minority disadvantaged by … a violation of the constitution at some point, every party has the same interest in establishing the opportunity to review properly promulgated, but unconstitutionally adopted statutes," Radbruch wrote.[330] Similarly, Arnold Brecht warned that "simple majorities in constitutionally dubious questions are not always left-wing majorities, but sometimes also right-wing majorities."[331] But the opponents of judicial review considered it neither an effective nor a necessary instrument to protect democracy. "Since in a parliamentary democratic republic, the power of the state emanates from the people, it can be ruled out that the courts could preserve *the spirit* of a constitution if this spirit did not prevail among a majority of the people itself any more," Clemens Nörpel wrote (emphasis in the original).[332] In Italy, for example, the courts had been unable to prevent Mussolini's autocratic take-over.[333] Franz Neumann argued that the electorally accountable president was better suited to protect the constitution than the courts, as was the electorate itself. "Parliamentary minorities primarily have to protect themselves politically," Neumann wrote. "If a parliamentary majority abuses its power, the electorate will take care of the protection of the minority."[334]

In summary, my theory explains why a majority of participants in the discussion among SPD jurists opposed centralized judicial review, and why their arguments were

329. "Mitteilungsblatt," 5.

330. Radbruch, "Ein juristisches Oberhaus? Eine Erwiderung," 1.

331. Similarly Brecht, "Für ein Gesetz," 515; Löwenthal, "Erwiderung," 510.

332. Nörpel, "Die Prüfung," 372.

333. Nörpel, "Schlusswort," 514.

334. Neumann, "Gegen ein Gesetz," 534.

apparently persuasive enough to bring the meeting of SPD jurists to the unanimous conclusion that the bill should be rejected. A decade after the adoption of the constitution, judicial review had become entangled into an expanding structure of constitutional rights. Whereas the Norwegian left based its expectations about judicial review primarily on the decisions of the Norwegian Supreme Court, German Social Democrats were not only concerned about developments in judicial practice, such as the expansion of the right to property, but also about trends in legal scholarship, such as the new interpretation of the equality clause. Although their expectations about the effect of these rights on specific policies remained fuzzy, Social Democrats had reason to expect that their policies would interfere with the right to property or would entail a different treatment of social groups that could be considered a violation of the equality clause. At the same time, Social Democrats were hardly interested themselves in invoking these rights against legislation. Nor did judicial review appear a necessary or effective safeguard of democracy. The courts appeared too weak and too unreliable to protect democracy against an autocratic take-over. Thus, the risks of vesting judicial review into an institution with the authority of the State Court did not outweigh its very limited benefits. However, as Franz Neumann's statement, as well as a lack of critical statements by others in this regard suggests, Social Democrats would have accepted judicial review if it had been confined to an arbiter role in federalism-related conflicts. Yet, this was not a realistic option.

4.9 The Influence of Social Democrats' Ideological Commitments

An alternative explanation for the opposition against judicial review in the SPD is that its opponents rejected it out of principle – for example, because they considered judicial review in tension with an ideal of popular sovereignty or because they espoused the incorrigible belief that the courts were an instrument of bourgeois domination. The question here is not whether the opponents of judicial review held beliefs that predisposed them unfavourably towards judicial review. Of course, some of them did – a thinker such as Otto Kirchheimer, who was not only influenced by Marxism, but also by his PhD supervisor Carl Schmitt, certainly held ideological priors that made it difficult for him to support judicial review. And surely important ideological differences separated opponents of judicial review such as Kirchheimer and the most prominent Social Democratic supporter of judicial review, Gustav Radbruch. Instead, the question merely is whether an ideological aversion alone was a sufficient cause for the rejection of judicial review. Put differently, this aversion would still have given rise to opposition against centralized judicial review even without the developments described here, such as the exercise of judicial review by a conservative judiciary, the expansion of the right to property and the transformation of the equality clause. In this section, I argue that this was not the case.

First, the perception of these developments might itself have been the result of an ideological aversion. By this, I do not mean that different ideological preconceptions affect the evaluation of the same phenomenon in the sense that a judgment outraging a Social Democrat with a strong attachment to popular sovereignty leaves a Social Democrat without such an attachment unfazed. Such an influence of ideology is likely, but unproblematic for my argument, since such beliefs only become effective once certain events trigger them. Instead, I mean the impact of ideology on the perception of events to an extent that individuals with different ideological priors cannot agree on the very description of these events. For example, in Otto Kirchheimer's account, the Supreme Court had "managed, with the help and the use of Articles 109 and 153, to exert a control over the legislation of the Reichstag whose leitmotif is the preservation of the vested rights of the bourgeoisie."[335] Was this an assessment that the supporters of judicial review could agree with?

Admittedly, it is debatable whether the extent of judicial review warrants Kirchheimer's claim. But some rhetorical flourish left aside, the supporters and opponents of judicial review varied remarkably little in their assessment of the status quo. As discussed above, the diagnosis that judicial review of federal statutes emerged as a product of animosity towards the Republic, parliamentarism and left-wing majorities was widely shared, also by supporters of centralized judicial review. Furthermore, as the previous sections have shown, observers outside the SPD agreed that developments such as the "dissolution" of the right to property or the transformation of the equality clause were under way; they also shared the view that judicial threats of interference had to be taken seriously, for example in the conflicts over revaluation, the assets of the former royal families or compensation for urban planning measures. This agreement suggests that the SPD opponents of judicial review did not merely construct a narrative of potential judicial obstructionism out of an ideological aversion.

Second, an ideological aversion may have led to the rejection of judicial review even absent the expectation that it would impose disproportionate constraints on the SPD's policy agenda. Among the SPD opponents of judicial review, Franz Neumann clearly rejected it out of principle. In 1930, Neumann wrote in an article on fundamental rights that judicial review should be rejected even if a progressive interpretation of fundamental rights ultimately were to prevail, "because … parliament is sovereign and the decisions of parliament do not tolerate legal oversight by a judicial upper chamber."[336] Other opponents of judicial review also referred to the theme of popular sovereignty, often using the metaphor of the "judicial upper chamber."[337] Of the opponents of judicial review, Hugo Sinzheimer, Clemens Nörpel and Curt Rosenberg

335. "Mitteilungsblatt," 4.

336. Franz L. Neumann, "Die soziale Bedeutung der Grundrechte in der Weimarer Verfassung," *Die Arbeit*, no. 9 (1930): 582.

337. This expression was first used by Rosenberg, "Ein juristisches Oberhaus"; later by Sinzheimer, "Chronik," 640; cited approvingly in Alfred Delmar, "Richterliche Unabhängigkeit und politische Justiz," *Die Justiz* IV, no. 5 (1929): 427.

combined principled and consequence-based arguments against judicial review, but neither of them established the sufficiency of principled arguments against judicial review as clearly as Neumann.[338] Carl Herz and Georg Flatow explicitly framed the question as a pragmatic one – in Flatow's words, it was "not so much a question of socialist principles as rather a tactical one."[339] Herz, Flatow and Kirchheimer almost entirely justified their opposition against judicial review in terms of its consequences.[340] Simon Katzenstein, who seemed to reject centralized judicial review, but is somewhat ambiguous, also only made consequence-based arguments.[341]

Thus, if we look at the statements of the seven certain, and including Katzenstein, eight Social Democratic opponents of judicial review, Neumann's statements clearly imply that he rejected judicial review out of principle. In contrast, three opponents mixed principled and consequentialist arguments, and three further certain opponents, as well as Katzenstein, based their rejection of judicial review solely on its consequences. Moreover, in the case of Hugo Sinzheimer, his change of mind on judicial review between 1919 and 1929 strongly suggests that not an ideological commitment, but changed circumstances and hence changed expectations about the consequences of judicial review led him to reject it. As discussed above, Sinzheimer had supported centralized judicial review, as a device of minority protection, in the Constitutional Committee in 1919. Back then, he was not yet under the impression of the political and class justice of the Weimar period and could not foresee the developments in judicial practice and scholarship. As Sinzheimer explained his change of mind, his view had been "clarified by manifold experience in recent years."[342] If we interpret Katzenstein's 1929 statement as a rejection of judicial review, the same applies to him: He supported centralized judicial review in 1919, but rejected it in 1929.

Finally, the dynamics of the October 1929 meeting also suggest that consequentialist considerations are necessary to explain some of the Social Democratic

338. See Sinzheimer, "Chronik"; Nörpel, "Die Prüfung"; Nörpel, "Schlusswort"; "Mitteilungsblatt," 2.

339. "Mitteilungsblatt," 4; see also Herz, ibid., 3.

340. "Mitteilungsblatt," 3–5.

341. Ibid., 2.

342. Sinzheimer, "Chronik," 641.

opposition against the Judicial Review Bill. As discussed, some SPD jurists spoke in favour of the bill, others spoke against it. Yet, the unanimous rejection of the bill was noted as the meeting's outcome. Assuming that this was noted correctly, some arguments of the bill's opponents must have convinced its initial supporters to acquiesce in noting the result of the meeting as unanimous rejection. It seems unlikely that opponents of the bill such as Kirchheimer or Neumann convinced its supporters of their ideological vantage point. Instead, it is more likely that the initial supporters of the bill agreed that the risks its opponents highlighted were plausible.

Altogether, an ideological aversion certainly played a role in the Social Democratic opposition against the Judicial Review Bill. In the case of Franz Neumann, this aversion was sufficient for the rejection of the bill. But as a sufficient cause, ideology cannot explain the rejection of the bill noted as the outcome of the meeting of Social Democratic jurists in October 1929: First, since both the bill's supporters and opponents described developments in judicial practice and legal scholarship similarly. Second, many of its opponents based their case against it on its expected consequences, and not on principled arguments. Third, an important opponent of the bill, Hugo Sinzheimer, changed his mind about centralized judicial review between 1919 and 1929. Finally, it seems unlikely that the meeting's unanimous rejection of the bill was due to a sudden ideological consensus, suggesting instead that even the bill's initial supporters accepted that centralized judicial review was a risk not worth taking.

4.10 The Influence of the U.S. Experience

As in Norway, the German discussion on judicial review made reference to the U.S. experience, albeit less extensively. The conflict over the New Deal could obviously not play a role in Germany. Nevertheless, the German case, too, raises the question whether knowledge of the U.S. experience of judicial review, by presenting an example of its obstructive effects on social policy, was a sufficient cause of opposition against judicial review among Social Democrats. In this section, I briefly show that this was not the case. Not only opponents, but also supporters of judicial review in the SPD cited the U.S. experience as a cautionary tale; moreover, they appreciated the differences between the U.S. and Germany and did not simply extrapolate from the U.S. experience.

Judging from the coverage in the SPD party newspaper *Vorwärts*, Social Democrats perceived the U.S. Supreme Court as an anti-progressive institution already long before the Weimar period – and before Lambert's 1921 book on the "government of judges." In 1903, the author of an article on the Australian general elections wrote that "by and large, the highest federal court is an institution that impedes the progress of social policy both in the U.S. and Australia."[343] Five years later, an article on *United Hatters v. Loewe* considered it ironic that the courts, "and above all the Supreme Court, this bulwark of reaction," appeared to have a mobilizing effect on the U.S. labour movement. "Almost every day the trade union movement is dealt new blows, but the worst of all is the recent Supreme Court decision on the illegality of boycotts."[344] A brief academic treatise on the interference of judicial review with progressive labour legislation – possibly not the first – appeared in 1905.[345] In the SPD's theoretical periodical *Die Neue Zeit*, the Social Democratic attorney Joseph Herzfeld, later a Communist, summarized much of the material in this treatise. "The fundamental rights have become the Magna Carta of the great bourgeoisie in the class struggle with the

343. "Die australischen Bundeswahlen," *Vorwärts*, December 18, 1903, 3.

344. "Gegen die Gewerkschaften," *Vorwärts*, March 5, 1908, 2; similarly "Zu der Entscheidung des amerikanischen Ober-Bundesgerichts," *Vorwärts*, April 30, 1905, 6.

345. Walter Loewy, *Die bestrittene Verfassungsmäßigkeit der Arbeitergesetze in den Vereinigten Staaten von Nordamerika* (Heidelberg, 1905).

proletariat, because the application and interpretation of this Magna Carta lies in the hands of the great bourgeoisie," Herzfeld wrote.[346]

Considering this early negative perception of the U.S. Supreme Court, it is unsurprising that Weimar Social Democrats, including both opponents and supporters of centralized judicial review, had an almost entirely negative view of judicial review in the U.S. Heckling a Liberal MP who claimed that U.S. judicial review had stabilized the constitutional system, Gustav Radbruch – who supported centralized judicial review – shouted during a debate on legislation on the State Court that "nothing has shaken the reputation of parliament so much as this."[347] In 1925, Radbruch wrote that the risk to progressive legislation that stemmed from an overly strict interpretation of fundamental rights was "irrefutably illustrated by the American experience of judicial review," especially by "the battle of the American judiciary against the constitutionality of legislation on the protection of workers," and referred to the 1905 book on the issue.[348] Curt Rosenberg, an opponent of centralized judicial review, made a similar point: "What a court can make of the power to assess the constitutionality of statutes can be seen in the U.S., where the Supreme Court, on the basis of this power, has been able to frustrate any legislation for the protection of workers. We can certainly expect similar things from the State Court, by virtue of its character," Rosenberg wrote in 1926.[349]

Other Social Democrats, such as Franz Neumann and Simon Katzenstein, essentially took the same view.[350] A notable exception was Hugo Sinzheimer in the Constitutional Committee in 1919: He praised U.S. judicial review as an institution that had "proven itself."[351] Possibly the labour law expert Sinzheimer did not consider the *Lochner* jurisprudence relevant to Germany. When the debate on judicial review in the SPD came to a head in 1929, the attorney Gustav A. G. Goldschmidt, a supporter of centralized judicial review, cautioned against extrapolating from the U.S. example.

346. Herzfeld, "Die Arbeitergesetze und die Gerichte in den Vereinigten Staaten," 666.

347. Verhandlungen des Reichstages, I. Wahlperiode 1920, "30. Sitzung," 1127.

348. Radbruch, "Richterliches Prüfungsrecht?," 14.

349. Rosenberg, "Ein juristisches Oberhaus," 2.

350. Neumann, "Gegen ein Gesetz," 531–32; Katzenstein in "Mitteilungsblatt," 2.

351. Verfassunggebende Deutsche Nationalversammlung. Verfassungsausschuß, "39. Sitzung," 66.

"One should … not let oneself be scared by allegedly negative experiences abroad," Goldschmidt argued. "Even if these concerns are justified, they cannot be transferred to our political situation."[352]

Yet, this was hardly what the sceptics of the Judicial Review Bill did. Some of them saw nuances in the role of the U.S. Supreme Court. Franz Neumann pointed out "that it should readily be admitted that a few anti-social laws have been struck down by the judiciary. Essentially, however, laws protecting workers have gone down."[353] Neumann was well aware that the U.S. experience could not simply be transposed to Germany. "In Germany," he noted, "the danger [to progressive legislation] will never materialize to the same extent as it has in the U.S., because German social legislation is too deeply rooted and partly also protected by the constitution, and because the organisation of the American judiciary and the character of the American judge are very different."[354] Simon Katzenstein – whose stance towards judicial review is unclear – concluded his reference to the U.S. by noting that the "Court has given in somewhat in the course of time and at least dropped the most scandalous obstruction of social legislation."[355]

Overall, Social Democrats were well aware that they were not witnessing the beginnings of a German *Lochner* era. As the case of Gustav Radbruch shows, it was simultaneously possible to cite the U.S. experience as a cautionary tale and support centralized judicial review. The opponents of judicial review would not have drawn parallels to the U.S. if they had not observed domestic developments that made these parallels relevant in the first place. As the next chapter will show, Austrian Social Democrats were aware of *Lochner*, too, but given their domestic context, they had no reason to draw parallels with their domestic institutions. Hence, the *Lochner* experience is hardly sufficient to explain the opposition to judicial review among German Social Democrats.

352. "Mitteilungsblatt," 2.

353. Neumann, "Gegen ein Gesetz," 532.

354. Ibid., 531.

355. "Mitteilungsblatt," 2.

4.11 The End of Efforts to Centralize Judicial Review

Before the SPD jurists debated the bill to centralize judicial review from June 1929 on, the SPD-led grand coalition government had reintroduced the bill into the Reichstag in October 1928.[356] A Communist MP was the only speaker in a short plenary debate on the bill in November 1928; he opposed the bill along similar lines as the SPD jurists.[357] Afterwards, the bill was referred to the Legal Affairs Committee.[358] However, the Committee never discussed the bill, and the government shelved further work on it in early 1930. After the 1930 elections, the bill was not re-introduced into the Reichstag. In this section, I discuss what role the opposition within the SPD played for the shelving of the bill. It is possible that it was shelved in order to wait until a related problem – the composition of the State Court – would be resolved. However, there is equally evidence suggesting that the burgeoning opposition within the SPD made the SPD-led government reconsider whether judicial review should be centralized in the State Court at all.

Bureaucrats in the Interior Ministry initially met the Social Democratic criticism of the bill with mixed reactions. In April 1929, the SPD Interior Minister Carl Severing had replaced the head of the Ministry's constitutional affairs department, Karl Otto von Kameke, affiliated with the far-right DNVP, with the Social Democrat Hans Menzel.[359] In a note to Severing attached to a copy of Hugo Sinzheimer's criticism of the bill of August 1929, Menzel wrote that it would be worth considering "whether the current, dissatisfying state created by the Supreme Court judgment of 1925 is not actually better than the exaltation of judicial power legalized by the bill."[360] The bill, Menzel argued, would shape the existing, fragmented powers of judicial review into a coherent, more potent institutional whole. Influence over appointments to the Court could hardly mitigate the risks this posed, since the composition of the State Court could change

356. "Entwurf eines Gesetzes über die Prüfung der Verfassungsmäßigkeit von Vorschriften des Reichsrechts," October 16, 1928.

357. Speech by Edward Ludwig Alexander, Verhandlungen des Reichstages, IV. Wahlperiode 1928, "16. Sitzung," November 17, 1928, 403–5.

358. Ibid., 405.

359. Huber, *Verfassungsgeschichte*, 6:478.

360. Note to the Interior Minister by Hans Menzel, August 8, 1929, BArch, R 1501/125074 (fol. 105), 1.

quickly. This "temporary relief could hardly outweigh the damage caused by the fundamental deviation from the German form of parliamentarism," Menzel wrote.[361] In contrast, his superior, the state secretary Erich Zweigert, added a note that he considered the centralization of judicial review "at least a mitigation of the current ills."[362] In the same vein, Martin Löwenthal, the civil servant in charge of the bill, had, as discussed above, written an article in defence of the bill for the trade union periodical *Die Arbeit*.[363]

When the Social Democratic opposition against the bill began to mount from June 1929 on, government bureaucrats still had to deal with another vexed question that affected the bill: the composition of the State Court – the Court where judicial review was to be centralized. As discussed above, State Court judges were currently drawn from the Supreme Court in most cases. In the long run, the State Court was supposed to migrate to the yet to be established Supreme Administrative Court. The definitive composition of the State Court would be defined in legislation on the Supreme Administrative Court, under preparation since 1922.[364]

From late 1928 on, government ministers grew increasingly frustrated with the State Court, especially since the Court had threatened to interfere with reparations policy in a case concerning the German railways.[365] The SPD Finance Minister, Rudolf Hilferding, emerged as the fiercest critic of the Court.[366] Hilferding wanted to ban the Court from passing temporary injunctions;[367] with a view to the Judicial Review Bill, he also wanted to keep the Court from reviewing decrees. Most importantly, Hilferding wanted to reduce the presence of Supreme Court judges on the State Court, since he had identified their training in private, and not public law, as the cause of their inconvenient

361. Menzel note, 2.

362. Comment by state secretary Erich Zweigert on Menzel's note, August 9, 1929, BArch, R 1501/125074 (fol. 105), 2.

363. Löwenthal, "Erwiderung."

364. The development of this legislation has been comprehensively researched in Kohl, *Reichsverwaltungsgericht*, 161–396.

365. See ibid., 341–55; see also Wehler, *Staatsgerichtshof*, 197–252.

366. See Kohl, *Reichsverwaltungsgericht*, 358.

367. Hilferding to the state secretary in the Chancellery, April 12, 1929, BArch, R 43-I/988 (fol. 296–297), 2–3. See also Kohl, *Reichsverwaltungsgericht*, 347ff.

decisions.[368] His bourgeois cabinet colleagues also had their issues with the State Court as Supreme Court in disguise, and supported Hilferding to some extent.[369] In late 1929, the ministries involved agreed that the State Court would be composed of the president of the Supreme Administrative Court, a further judge from this Court, one judge each from the Supreme Court and the Supreme Fiscal Court, as well as one judge from the apex court deciding in social insurance matters (*Reichsversicherungsamt*) or the apex court deciding on pension claims of former military officers (*Reichsversorgungsgericht*).[370] However, the last word on the matter was not yet spoken, also because the Supreme Court fiercely defended its control over the State Court.[371]

Matters came to a head when civil servants from the ministries involved met in the Interior Ministry on October 18, 1929, to discuss one of the questions raised by Finance Minister Hilferding, namely the State Court's power to review decrees.[372] It may or may not have been a coincidence that this meeting took place on the day after the "Association of Social Democratic Jurists" had debated and rejected the Judicial Review Bill. In any case, since the Reichstag's Legal Affairs Committee was set to start its deliberations on the bill in November, it was time for anyone with an interest in the bill to make up their mind.[373]

368. Hilferding to the Interior Minister Severing, April 3, 1929, BArch, R 1501/125074 (fol. 155–157), 4–5. On the latter, with reference to a further letter by Hilferding, see also Kohl, *Reichsverwaltungsgericht*, 358f.

369. See Kohl, *Reichsverwaltungsgericht*, 350, 354, 359.

370. Ibid., 367. This seems to be the final agreement as it was included into the bill on the Supreme Administrative Court introduced into the state chamber on August 26, 1930, Reichsrat, Drucksache Nr. 155, BArch, R 43-I/988 (fol. 435–450). However, Kohl implies that Reichsversorgungsgericht and Reichsversicherungsamt would both be represented, not alternatively.

371. See Kohl, *Reichsverwaltungsgericht*, 357–67.

372. See Interior Minister to the Finance Minister (copy), October 7, 1929, BArch R 3001/7121 (fol. 119).

373. See Löwenthal's handwritten note on the invitation draft, October 1929, BArch R 1501/125074 (fol. 165), 1.

The initial purpose of the meeting quickly faded into the background.[374] The meeting's participants supported the Interior Ministry's suggestion to restrict the State Court's power to review decrees to the question of their constitutionality and the constitutionality of the underlying enabling act, but to exclude the question whether the decree itself stayed within the limits of the enabling act.[375] Yet, the representative of the Ministry of Finance, Trapp, urged a more fundamental discussion of the bill.[376] Trapp opened the, according to the notes of the Foreign Office's representative, "lively"[377] discussion, with a complaint about "the way the Interior Ministry was handling the bill. In particular, he criticized that the bill had been introduced into the current Reichstag without changes, although all the departments involved had reached an agreement that it had to be changed in essential aspects."[378]

Trapp not only took issue with procedure, but also emerged as the fiercest critic of the bill's substance. Echoing the concerns voiced recently by Finance Minister Hilferding, Trapp suggested that the State Court was, due to its composition, ill-suited to review the constitutionality of federal laws.[379] Instead, the apex courts of the ordinary and the specialized jurisdictions, i. e., the Supreme Court, the Supreme Fiscal Court and the Supreme Administrative Court, should be in charge of reviewing the constitutionality of federal laws.[380] The current proposal would diminish the reputation of the ordinary and specialized courts (*Fachgerichte*) and overburden the State Court with trivial cases.[381] Moreover, Trapp criticized that the envisaged number of nine judges would make the Court "too unwieldy" (a number of five judges was therefore

374. The following discussion is based on three summaries of the meeting on October 18, 1929: a summary by the Interior Ministry, dated January 13, 1930, BArch, R 1501/125074 (fol. 167–170), a summary by the Ministry of Justice, dated October 23, 1929, BArch, R 3001/7121 (fol. 129–130), and a summary by the Foreign Office, dated October 18, 1929, BArch, R 901/28068. These summaries, and hence also the quotes from them, are not verbatim records of the meeting. According to the summary by the Ministry of Justice, the civil servants at the meeting "could only express their personal opinion" (p. 2). Yet, it seems very unlikely that the views they expressed did not correlate with the view the political leadership of their ministries took or would have taken.

375. Proposal on §1 (2) of the bill, BArch, R 3001/7121 (fol. 128); Foreign Office summary, 1.

376. Interior Ministry summary, 1; Ministry of Justice summary, 1.

377. Foreign Office summary, 1.

378. Ministry of Justice summary, 1.

379. Ministry of Justice summary, 1–2.

380. Ministry of Justice summary, 1–2; Interior Ministry summary, 1.

381. Foreign Office summary, 2–3.

preferable),[382] and he questioned whether the Court's decisions should have the force of law.[383] His suggestion to vest the power of judicial review into other apex courts was met with mixed reactions by the other department representatives.[384]

Trapp also raised the issue of the growing criticism against the bill "in public."[385] According to the Foreign Office notes, Trapp observed that "this was happening especially on the Social Democratic side where the effects of the bill were described as anti-social," and referred to Hugo Sinzheimer's criticism against the bill in the periodical *Die Justiz*.[386] The Cabinet should therefore consider withdrawing the current bill and elaborating a new one that would take the recent discussion into account.[387] Trapp was not the only bureaucrat who raised the question what the scepticism towards it within the SPD meant for the bill's future. Reflecting the outcome of the SPD meeting he had attended the night before, Martin Löwenthal of the Interior Ministry stated that the SPD preferred to ban the courts from engaging in judicial review altogether and that he expected that Social Democrats would table a motion to this effect in the Reichstag's Legal Affairs Committee.[388] "Then the entire bill could be dropped and instead an amendment on the unassailability of properly promulgated statutes could be added to the constitution," the notes of the Foreign Office summarized Löwenthal. "The Interior Ministry would indeed welcome such a solution."[389] However, Löwenthal also acknowledged that a ⅔-majority for such an amendment was difficult to achieve.[390]

The meeting ended without an agreement on the issues raised during the discussion.[391] Yet, the participants agreed that there was no need to rush the bill and that it would instead be sensible to wait until the deliberations on the bill on the Supreme Administrative Court were concluded, since this bill would specify the composition of

382. Foreign Office summary, 3.

383. Foreign Office summary, 6; Interior Ministry summary, 1.

384. Interior Ministry summary, 2–3.

385. Foreign Office summary, 1.

386. Foreign Office summary, 1–2.

387. Foreign Office summary, 2.

388. Foreign Office summary, 5.

389. Foreign Office summary, 5.

390. Foreign Office summary, 5–6.

391. Ministry of Justice summary, 2.

the State Court.[392] According to Löwenthal's notes, "The view also prevailed that the specific issues dealt with in the bill, especially considering the opinions in the literature in recent times, particularly by members of the Social Democratic Party, had not yet been settled so far that it would be possible to take a final stance on all problems."[393] As for now, Löwenthal suggested that the Interior Ministry would ask the Reichstag's Legal Affairs Committee to shelve deliberations on the Judicial Review Bill until the bill on the Supreme Administrative Court had made more progress.[394] This was also what the Interior Minister, the Social Democrat Carl Severing, suggested to the other ministries involved in January 1930. Severing wrote that he shared the view that any further deliberations on the bill would only make sense once the composition of the State Court was clarified.[395] No objections to Severing's proposal are recorded. While a letter from Severing asking the Reichstag's Legal Affairs Committee to postpone deliberations on the bill is not contained in the files either, there is therefore nothing to suggest that Severing did not follow through with his proposal.

After Severing had effectively shelved the bill on the centralization of judicial review in January 1930, the window of opportunity to pass such a bill rapidly closed. In March 1930, the SPD-led grand coalition government resigned.[396] All subsequent governments until the Nazi seizure of power were minority governments backed by President Hindenburg that ruled through emergency decrees.[397] Even if they had wanted to, these governments would have had immense difficulties to pursue the project of centralizing judicial review further. The September 1930 elections turned out a Reichstag in which Nazis and Communists controlled almost a third of the seats; the idea that the remaining parties, which had many other things on their mind anyway, could have joined forces to support the bill to centralize judicial review appears unrealistic. In January 1931, the civil servant Martin Löwenthal wrote in a note that the

392. Interior Ministry summary, 3; Foreign Office summary, 7–8.

393. Interior Ministry summary, 2–3.

394. Foreign Office summary, 8; Ministry of Justice summary, 3.

395. Interior Minister Severing to other ministers, January 13, 1930, BArch, R 3001/7121 (fol. 135).

396. Kolb, *Deutschland 1918-1933*, 136.

397. On the period of these "presidential cabinets," see ibid., 187ff.

necessary ⅔-majority to pass the bill was out of reach. He therefore suggested not to re-introduce the bill in the new Reichstag.[398] Moreover, the bill on the Supreme Administrative Court, which was supposed to stipulate the composition of the State Court, was not pursued further after 1931, presumably to a large extent because the Supreme Court fiercely resisted its looming loss of influence over the State Court.[399]

To what extent can the Interior Ministry's decision to shelve the bill be attributed to the open question of the composition of the State Court, and to what extent to the fundamental opposition against centralized judicial review among Social Democrats? On the one hand, Severing justified his request to postpone the deliberation of the bill with the unresolved question of the State Court's composition. This was also an important question in the inter-ministerial discussions. Moreover, the opposition against the bill by the Association of Social Democratic Jurists does not necessarily mean that the SPD parliamentary group would have taken the same view.

On the other hand, it would have been remarkable if the SPD parliamentary group had contradicted the group with the greatest legal expertise within the party, as well as opponents of judicial review with the intellectual or political weight of Hugo Sinzheimer or the trade union lawyer Clemens Nörpel. As Löwenthal's remarks at the inter-ministerial meeting show, the opposition of the SPD jurists could be expected to translate into SPD opposition in the Reichstag. However, if this expectation of opposition in the Reichstag, or the opposition of the SPD government members themselves really was the reason to shelve the bill, it would have been difficult to admit. Such a U-turn on a bill that the SPD-led government had itself re-introduced into the Reichstag a year earlier would have exposed the government and the SPD to charges of indecisiveness and hypocrisy.

Finally, as the Ministry of Justice summarized the meeting on October 18, it yielded "such far-reaching differences of opinion that the Interior Ministry envisages to ask the chairman of the Reichstag's Legal Affairs Committee to postpone the deliberation of the bill, until the introductory bill on the Supreme Administrative Court is ready. This request is to be given the justification that this bill will first stipulate the

398. Handwritten note by Löwenthal, January 2, 1931, BArch, R 1501/125074 (fol. 174).

399. Kohl, *Reichsverwaltungsgericht*, 392, 396; Wehler, *Staatsgerichtshof*, 252.

composition of the State Court which is also essential for the bill on the review of the constitutionality of norms of federal law."[400] This note motivates the request to shelve the bill not merely with the question of the composition of the Supreme Administrative Court, but with "far-reaching differences of opinion"; it also suggests that the justification "to be given" is not identical with the reasons underlying the request.

Thus, the opposition of the SPD jurists may have been a crucial reason to shelve further work on the Judicial Review Bill. Would the SPD have supported the bill if the question of the State Court's composition had later been resolved and parliamentary majorities for a constitutional amendment had been attainable? There are no indications that the SPD jurists changed their stance towards judicial review. In February 1930, the Supreme Court published its decision on the 1875 Prussian statute on set-back lines. This decision was criticized especially by Otto Kirchheimer, who published several critical pieces on the transformation of the right to property in 1930.[401] Franz Neumann reiterated his fundamental opposition against judicial review in 1930 and 1931.[402] Otherwise, the debate on judicial review among the SPD jurists did not continue. Thus, during the Weimar period, their stance on judicial review did not evolve further than the "unanimous rejection" noted at the meeting of the Association of Social Democratic Jurists in October 1929.

400. Ministry of Justice summary, 2–3.

401. Reichsgericht, February 18, 1930 – RGZ 128, 18. On the criticism of this decision by Kirchheimer and others, see section 4.5 above and Kirchheimer, "Privatbesitz gegen Volksinteresse!"

402. Neumann, "Soziale Bedeutung," 582; see also his remarks at the 1931 *Juristentag*, Deutscher Juristentag, *Verhandlungen des sechsunddreißigsten Deutschen Juristentages*, 2:448.

4.12 Conclusion

Constitutional conflict was a regular part of Weimar politics. Hence, there was a strong case for establishing a sole arbiter of the constitutionality of federal laws. From an insurance perspective, the political antagonists in the competitive Weimar political system should have supported judicial review. In the early Weimar years, the chances for its adoption were still good. Especially Social Democrats still supported centralized judicial review as late as 1927, when judges had already empowered themselves to review federal statutes and had thereby put the centralization of judicial review on the government's agenda. Yet, the Supreme Court also expanded the scope of the right to property and scholars argued that not only the administration and the courts, but also parliament had to heed the precept that "all Germans are equal before the law." The opposition against centralized judicial review that arose among SPD jurists in 1929 cannot be explained without the threat the expansive interpretation of constitutional rights posed to progressive social policy. In contrast, the role of judicial review in arbitrating federalism-related conflicts remained uncontested. Possibly it was the burgeoning opposition within the SPD that made the government halt its efforts to centralize judicial review. Overall, the Weimar case is well explained by my theory, according to which a focus on safeguarding rights rather than federalism makes political support for judicial review less likely.

Additionally, I considered and rejected three alternative explanations: First, that the Social Democratic opponents of judicial review took issue not with the rights-based character of judicial review, but merely with a conservative judiciary exercising it. Yet, even conservative judges needed to base their decisions on constitutional norms. These constitutional norms were not entirely endogenous to judicial attitudes: For example, legal scholars, not judges invented the new interpretation of the equality clause. Put differently, rights served as the conduit that only made judges' conservatives attitudes effective. Social Democrats would surely have accepted judicial review exercised by a bench of staunch socialists. But this was not an available option. Many Social Democrats saw the possibility to influence the composition of the State Court as an advantage of centralized judicial review over diffuse judicial review. Yet, it was uncertain to what extent a political appointments mechanism to the State Court bench could be established. Moreover, the reliability of such a mechanism was questionable. At best, it would have yielded a more moderate court, but not a left-wing court. However, merely moderate judges might still have followed the prevailing constitutional interpretations developed by overall conservative legal elites.

Second, did the SPD opponents of judicial review reject it merely because of an ideological aversion against it, regardless of whether they expected it to foster or hamper the implementation of the Social Democratic policy agenda? Franz Neumann can be identified as such a principled opponent of judicial review. But apart from him, the argumentation of most opponents of judicial review shows that they neither saw judicial practice and the developments in legal scholarship in an ideologically entirely distorted way, nor did they justify their rejection of judicial review merely with principled arguments. Instead, the potential effects of judicial review loomed large in their case against judicial review. Moreover, the change of mind of Hugo Sinzheimer, an important opponent of judicial review in 1929, is hard to explain without the developments in judicial practice and legal scholarship. Finally, it is unlikely that the participants of the meeting of Social Democratic jurists in October 1929 would have come to the unanimous conclusion that centralized judicial review should be rejected because of an ideological consensus, given that the records of the meeting show that some of its participants actually spoke in favour of centralized judicial review.

Third, I showed that the SPD opponents of judicial review did not merely reject it because they had formed their expectations about its negative effects on the basis of the U.S. experience. The Supreme Court's *Lochner* jurisprudence was frequently invoked to illustrate the dangers of judicial review to progressive policies. But *Lochner* was, above all, an illustration, and not the model that the opponents of judicial review used to predict its effects. Instead, they appreciated the differences between the U.S. and Germany that made a repetition of the *Lochner* experience in Germany unlikely.

From a historical-institutionalist perspective, this chapter highlights the continuities between the institutional development of judicial review in Weimar Germany and post-World War II Germany. The narrative of the establishment of the powerful post-war Constitutional Court as a lesson from Nazi tyranny tends to obscure the important institutional and ideational antecedents of the Weimar period.[403] The practice of judicial review in Weimar Germany had a noteworthy quantitative extent and was politically important. The fact that five federal governments pursued a project to vest the power of centralized judicial review into the State Court shows how close to realization this key element of post-World War II constitutionalism had already come in Weimar Germany. To some extent, the entrustment of the 1949 Constitutional Court with judicial review powers represented the completion of the Weimar plans.[404] Importantly, the 1949 constitution barred the ordinary courts from setting statutes aside as unconstitutional, obliging them to request the decision of the Constitutional Court instead. The controversial self-empowerment of the regular judiciary in Weimar could therefore not repeat itself after 1949.

After 1945, Social Democrats supported the establishment of a constitutional court with comprehensive judicial review powers. In fact, the powers of the new Constitutional Court, even its power to declare statutes void, were hardly controversial during the drafting of the constitution.[405] The constitution explicitly stipulated that fundamental rights were binding on the legislature. At least in its wording, the 1949 Constitution provided stronger safeguards for the right to property than the Weimar Constitution; for example, the federal legislature could no longer stipulate exemptions from the requirement to provide compensation for expropriations.[406] The interpretation of the equality clause as binding on the legislature – anathema to the SPD opponents of judicial review during the Weimar period – became a fixture of the Constitutional

403. On continuities between the Weimar and the post-World War II Rechtsstaat models, see Clara Maier, “The Weimar Origins of the German Rechtsstaat, 1919–1969,” *The Historical Journal* 62, no. 4 (2019): 1069–91.

404. This continuity was also acknowledged by the Constitutional Court itself, see its judgment of July 30, 1952 – BVerfGE 1, 396 (403).

405. Christoph Schönberger, “Anmerkungen zu Karlsruhe,” in *Das entgrenzte Gericht: eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht*, by Matthias Jestaedt et al. (Berlin, 2011), 13.

406. Hans Peter Ipsen, “Enteignung und Sozialisierung,” in *Ungeschriebenes Verfassungsrecht. Enteignung und Sozialisierung: Verhandlungen der Tagung der Deutschen Staatsrechtslehrer zu Göttingen am 18. und 19. Oktober 1951* (Berlin, 1952), 78.

Court's jurisprudence, and its inventor, Gerhard Leibholz, one of the most important judges of the Court's first decades.[407]

None of the Social Democrats who had opposed judicial review in 1929 were involved in drafting the 1949 constitution. Many of the protagonists of the debate on judicial review within the SPD – most of whom were Jewish or had Jewish ancestors – were forced to flee or murdered by the Nazi regime.[408] Franz Neumann and Otto Kirchheimer became prominent political scientists after their emigration. Both remained concerned about issues of judicial power,[409] but as far as I know, there are no direct statements by the surviving Weimar opponents of judicial review about its rise in post-World War II Germany.[410]

Several factors may explain why the SPD supported judicial review after the War. First, a widespread explanation for the establishment of a powerful Constitutional Court in post-war Germany is the experience of the Nazi dictatorship.[411] The Court should be a safeguard against the resurgence of an autocratic regime.[412] In other words, the catastrophic consequences of the break-down of Weimar democracy made constraints on legislative powers in return against safeguards of the democratic system more acceptable. Importantly, this explanation implies that the two major political opponents – Christian Democrats and the SPD – did not primarily conceive of the Court as a safeguard against each other, but as a safeguard against anti-democratic tendencies from the political margins. Conceived in this way, judicial review should have been expected to be of little relevance in day-to-day politics. In fact, the centre-right

407. See Meinel, "Gerhard Leibholz," 187ff.

408. On the milieu of progressive Jewish lawyers in Weimar Germany destroyed by the Nazi regime, see Theo Rasehorn, *Justizkritik in der Weimarer Republik: Das Beispiel der Zeitschrift "Die Justiz"* (Frankfurt/Main, 1985), 98ff.

409. In particular, see Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, 1961).

410. However, in 1950, Franz Neumann commented on the 1949 Basic Law that it entailed a "hypertrophy of the courts": Franz L. Neumann, "Deutsche Demokratie," in *Wirtschaft, Staat, Demokratie: Aufsätze 1930-1954*, ed. Alfons Söllner (Frankfurt/Main, 1978), 333; as translated in Maier, "Weimar Origins," 13.

411. Rainer Wahl and Frank Rottmann, "Die Bedeutung der Verfassung und der Verfassungsgerichtsbarkeit in der Bundesrepublik – im Vergleich zum 19. Jahrhundert und zu Weimar," in *Sozialgeschichte der Bundesrepublik Deutschland: Beiträge zum Kontinuitätsproblem*, ed. Werner Conze and M. Rainer Lepsius (Stuttgart, 1983), 360.

412. Dieter Gosewinkel, *Adolf Arndt: die Wiederbegründung des Rechtsstaats aus dem Geist der Sozialdemokratie (1945-1961)* (Bonn, 1991), 183.

Adenauer government had periods of intensive confrontation with the Court;[413] however, as Collings writes, “never in the 1950s did the Court directly invalidate an initiative of the Adenauer government.”[414] Additionally, given West Germany’s limited sovereignty, any serious efforts to curb the Court would have risked confrontation with the Western Allies.

Moreover, judicial review could not become a constraint on an SPD federal government simply because Social Democrats found themselves in opposition to a centre-right federal government for the first 17 years of the Federal Republic. Consequently, they had a strong interest in the possibility to challenge the governing majority in court.[415] Even if the SPD had controlled the federal government before 1966, confrontations between the Court and an SPD government would have been unlikely. Compared to Weimar, polarization in post-World War II Germany was lower. Left- and right-wing positions on the role of the state in the economy converged.[416] The 1949 constitution seemed to protect the right to property more strictly than the Weimar Constitution, but its interpretation had become more open to far-reaching state intervention.[417] Finally, even if there had been efforts to give fundamental rights a more anti-progressive bent, it would have been difficult to influence the Court’s jurisprudence. The Court’s judges were elected by parliamentary super-majorities. Additionally, the Courts’ First Senate, in charge of fundamental rights cases, featured a majority of judges nominated by the SPD.[418] Designed in this way, post-World War II judicial review was less likely to develop a rights jurisprudence that was unacceptable on the left than its Weimar precursor.

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413. See Justin Collings, *Democracy’s Guardians: A History of the German Federal Constitutional Court, 1951–2001* (Oxford, 2015), 19.

414. Ibid., 26.

415. Schönberger, “Anmerkungen zu Karlsruhe,” 16; see also Collings, *Democracy’s Guardians*, 9.

416. See Sheri Berman, *The Primacy of Politics: Social Democracy and the Making of Europe’s Twentieth Century* (Cambridge, UK, 2006), 177ff.

417. Ipsen, “Enteignung und Sozialisierung,” 84; see also Fabian Michl, “Das Sondervotum zum Apothekenurteil,” in *Jahrbuch des öffentlichen Rechts der Gegenwart*, ed. Oliver Lepsius et al., vol. 68, N. F. (Tübingen, 2020), 340ff.

418. Collings, *Democracy’s Guardians*, 16.

Chapter Five. Austria

5.1 Introduction

The First Austrian Republic (1919–1934) is widely seen as the birthplace of the centralized model of judicial review,[1] that is, a monopoly on its exercise held by a court separate from the regular judiciary.[2] While it was not Austria, but, a few months earlier, Czechoslovakia that established the first constitutional court with judicial review powers,[3] the Austrian Court combined an innovative institutional design with unparalleled political relevance.[4] Between 1920 and the break-down of democracy in 1933, the Constitutional Court reviewed provisions in 36 state and federal statutes, of which 16 were declared unconstitutional, as well as 55 decrees, of which 39 were annulled.[5] The Court's wide range of powers, including not only the judicial review of statutes and decrees, but also complaints against violations of fundamental rights by the administration, as well as electoral matters, put it front and centre in the struggle over some of the most contentious issues of the time. The Court suffered fierce attacks from the political right amid increased political instability from 1927 onwards; yet, its continued political relevance was proven by the effort the right-wing government devoted to incapacitating the Court as it established an authoritarian regime in 1933.

The immediate political context of the adoption and exercise of judicial review in inter-war Austria has so far received less attention than the ideational context of the Constitutional Court, especially the Vienna school of legal positivism and the work of

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1. F. ex., Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971), 71; Lustig and Weiler, "Judicial Review in the Contemporary World," 322.

2. Lustig and Weiler, "Judicial Review in the Contemporary World," 322.

3. Herbert Haller, "Hans Kelsen – Schöpfer der verfassungsgerichtlichen Gesetzesprüfung?," Discussion Papers, Reihe Rechtswissenschaft (Wien: University of Economics, 1977), 20; Osterkamp, *Verfassungsgerichtsbarkeit*, 1.

4. Öhlinger, "The Genesis," 208.

5. By my own count, see Table 5.1 below for more details. Different figures – three federal statutory provisions and provisions in nine state statutes annulled – in Öhlinger, "The Genesis," 208. Yet other figures – 31 statutes reviewed, 16 invalidated between 1920 and 1933 – in Manfried Welan, "Der Verfassungsgerichtshof," in *Demokratie und Verfassung in Österreich*, by Anton Pelinka and Manfried Welan (Wien, 1971), 217. These differences are due partly to different counting methods, esp. since I include procedures on the basis of Article 138 (2) after the 1925 revision of the constitution.

Hans Kelsen, professor at the University of Vienna, advisor during the drafting of the 1920 constitution, and judge of the Constitutional Court between 1919 and 1930.[6] It has been questioned whether Kelsen deserves the title of "inventor" or "father" of the Constitutional Court.[7] But there is no doubt that the ideational and institutional legacy of the Austro-Hungarian Empire largely explains why the framers of the Austrian constitution considered establishing centralized judicial review in the first place.[8] It would otherwise be hard to explain why another successor state of the Empire, Czechoslovakia, adopted it too.

Yet, ideas that are under debate do not automatically become institutional reality, and the precise characteristics of an institution are rarely determined by ideas alone. To illustrate this, consider the difference between judicial review as imagined by the legal scholar Georg Jellinek – arguably the first prominent voice to call for it – in his 1885 treatise "A Constitutional Court for Austria," and judicial review as established by the 1920 Constitution.[9] Under Jellinek's proposal, a minority of MPs could initiate the review of a bill;[10] under the 1920 Constitution, only the state and federal governments, as well as the Court itself within an existing proceeding (*ex officio*) could trigger the review of a statute.[11] Thus, if judicial review as adopted in 1920 stood in the same tradition as Jellinek's proposal, a good deal of its minority-protecting character had been lost on the way.

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6. The literature on Hans Kelsen is massive. See most recently Thomas Olechowski, *Hans Kelsen: Biographie eines Rechtswissenschaftlers* (Tübingen, 2020).

7. Sceptical, f. ex., Schmitz, "Constitutional Court," 111–12; Theo Öhlinger, "Verfassung – Demokratie – Verfassungsgerichtsbarkeit," in *Sozialdemokratie und Verfassung*, ed. Manfred Matzka (Wien, 1985), 179; Ewald Wiederin, "Der österreichische Verfassungsgerichtshof als Schöpfung Hans Kelsens und sein Modellcharakter als eigenständiges Verfassungsgericht," in *Schutz der Verfassung: Normen, Institutionen, Höchst- und Verfassungsgerichte: Tagung der Vereinigung für Verfassungsgeschichte in Hofgeismar vom 12. bis 14. März 2012*, ed. Thomas Simon and Johannes Kalwoda (Berlin, 2014), 306; Alfred Ableitinger, "Grundlegung der Verfassung," in *Österreich, 1918-1938: Geschichte der Ersten Republik*, ed. Erika Weinzierl and Kurt Skalnik, vol. 1 (Graz, 1983), 147.

8. See Christian Neschwara, "Verfassungsgerichtsbarkeit im Spannungsfeld von Monarch und Parlament: Österreichs Reichsgericht von 1869 bis 1918," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte / Germanistische Abteilung* 123 (2006): 310; Wiederin, "Verfassungsgerichtshof," 286ff.

9. On Jellinek's proposal, see Öhlinger, "The Genesis," 211; Olechowski, *Hans Kelsen*, 245.

10. Georg Jellinek, *Ein Verfassungsgerichtshof für Österreich* (Wien, 1885), 23–24; on Jellinek's proposal see also Öhlinger, "The Genesis," 211; Wiederin, "Verfassungsgerichtshof," 289–90.

11. Art. 140 (1) of the 1920 Constitution.

To understand why judicial review was adopted in its specific form in 1920 and why its exercise was accepted without interference by the major political actors, including the Social Democratic Party, until 1929, we need to look beyond ideational and institutional legacies. The political context in post-World War I Austria was, at first glance, not entirely favourable to the adoption of judicial review, at least when it came to judicial review of *federal* legislation. As the German case shows, federalism was not sufficient for its adoption. The political system Social Democrats established in 1920 in a compromise with conservatives[12] was characterized, above all, by a high degree of parliamentarism – a feature that did not sit easily with judicial review at the time.[13] Nevertheless, among the three cases studied here, Austria stands out as the only positive case, i. e., where judicial review was consistently supported across the political spectrum as long as the country was a competitive democracy. Why did actors across the Austrian political spectrum, above all the Social Democrats, support – at least until 1929 – what left-wing politicians sought to abolish in Norway and came to oppose in Germany?

In this chapter, I show that my theory partly explains why judicial review of *federal* laws was adopted and sustained in Austria until 1929 (as discussed in the theory section, the question why judicial review of *state* laws was supported is left aside). A necessary condition for support for judicial review in Austria was its almost complete confinement to demarcating the spheres of federal and state power. When the constitution was drafted in 1919/1920, conservative-led state governments voiced the most vocal demands for judicial review of federal laws. Social Democrats were more sceptical, but hardly resisted its adoption, since both conservatives and Social Democrats had an interest in containing possible transgressions by a federal legislative majority of their opponents. This episode shows, as discussed in the theory section, that not only abstract normative considerations, but also the expected costs of an institution can play a role already at the constitution-making stage. Later, judicial review proved valuable to Social Democrats to protect their hegemonic control over the capital, "Red

12. For the purpose of this chapter, "conservative" encompasses the Catholic Christian-Social Party, but also the less important pan-German Nationalists (*Großdeutsche Volkspartei*) and related groups, such as the *Landbund*.

13. See Öhlinger, "The Genesis," 208f.

Vienna." Most importantly, and in contrast to Norway and Germany, judicial review on the basis of rights relevant to social policy could be expected to be so marginal that Social Democrats did not expect judicial review to be of disproportionate utility to the political right and therefore necessarily costly to themselves. Hence, the Austrian case confirms my theoretical expectation that judicial review is more likely to be supported where it is expected to safeguard primarily the boundaries between state and federal powers, rather than rights. A right-wing assault on the Court's independence in 1929, ending the tenure of the sitting justices, does not contradict my argument, since it can be explained with the threat of violence as the country slid towards autocracy.

The Austrian case comes with two challenges for the collection and analysis of empirical evidence. First, since the power of judicial review as such enjoyed widespread political support, political actors discussed it less, making it difficult to trace the factors shaping their attitudes towards it. Second, while the institution of interest here is judicial review, i. e., a specific power, the concept central to the Austrian discussions was not judicial review, but the constitutional court, i. e., the umpire exercising this and other powers. This is not to say that political actors were unable to analyse the implications of specific powers of the Court and consequently support or reject them. But since a wide variety of powers were given to the Court, the exercise of powers other than judicial review also influenced attitudes towards the Court as a whole and how it would handle its judicial review powers. In particular, this was the case when the Court's composition became contentious in 1929. Sometimes, this chapter therefore goes beyond matters of judicial review and takes a broader look at the Court's political role and the attitudes towards it.

Legal historians have studied various aspects of the Court's history and its political context.[14] Regarding the adoption of judicial review in 1919/1920, its purpose

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14. A comprehensive treatment of the Court's history and the political context is Kurt Heller, *Der Verfassungsgerichtshof: Die Entwicklung der Verfassungsgerichtsbarkeit in Österreich von den Anfängen bis zur Gegenwart* (Wien, 2010); with regard to the First Republic, Christian Neschwara, "Verfassungsgerichtsbarkeit im Spannungsfeld von Regierung und Parlament: Österreichs Verfassungsgerichtshof 1918-1934," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte / Germanistische Abteilung* 130 (2013): 435–53; with regard to Kelsen's time on the Court, Robert Walter, *Hans Kelsen als Verfassungsrichter* (Wien, 2005).

is unanimously seen in safeguarding the federal distribution of powers.[15] It is widely accepted that the adoption of judicial review of *federal* laws was a concession by the federal government to the state governments.[16] There is less research on the practice of judicial review during the First Republic and its political context. The conflictual relationship between the Court and the political right has been treated quite extensively, at least with regard to the conflict over the so-called “dispensation marriages” and the court-curbing of 1929. Concerning the 1929 court-curbing, there is widespread agreement that right-wing dissatisfaction with the Court was rooted primarily in its jurisprudence, above all in its stance on the dispensation marriages.[17] In contrast, there is little research on Social Democrats’ stance towards judicial review after the adoption of the 1920 constitution.[18] The question asked here – why did Social Democrats support judicial review throughout the First Republic – has not been answered directly.

This chapter deals with both the stages of adopting (1918–1920) and of sustaining judicial review (1920–1933), primarily up until the 1929 constitutional reform. The empirical material for this chapter is provided by the secondary literature, and by some primary sources, most of which have already been used in the existing literature. It has proven difficult to find original evidence on political actors’ views towards judicial review in government, parliamentary and party documents. Instead, I rely on articles on the Court that appeared in newspapers with ties to the two most

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15. See Schmitz, “Constitutional Court”; Öhlinger, “The Genesis,” 209; Öhlinger, “Verfassung – Demokratie – Verfassungsgerichtsbarkeit,” 181; Wiederin, “Verfassungsgerichtshof”; Haller, “Hans Kelsen,” 92; Herbert Haller, *Die Prüfung von Gesetzen: Ein Beitrag zur verfassungsgerichtlichen Normenkontrolle* (Wien, 1979), 68.

16. Schmitz, “Constitutional Court,” 254; Öhlinger, “The Genesis,” 212; Öhlinger, “Verfassung – Demokratie – Verfassungsgerichtsbarkeit,” 181; Wiederin, “Verfassungsgerichtshof,” 293; Haller, “Hans Kelsen,” 68ff.; implied also by Gerald Stourzh, “Hans Kelsen, die österreichische Bundesverfassung und die rechtsstaatliche Demokratie,” in *Die Reine Rechtslehre in wissenschaftlicher Diskussion: Referate und Diskussion auf dem zu Ehren des 100. Geburtstages von Hans Kelsen von 22. bis 27. September 1981 abgehaltenen internationalen Symposion* (Wien, 1982), 28.

17. Klaus Berchtold, ed., *Die Verfassungsreform von 1929: Dokumente und Materialien zur Bundes-Verfassungsgesetz-Novelle von 1929*, vol. 1 (Wien, 1979), 17; Klaus Berchtold, *Verfassungsgeschichte der Republik Österreich*, vol. 1, *1918-1933: Fünfzehn Jahre Verfassungskampf* (Wien, 1998), 476ff.; Christian Neschwara, “Kelsen als Verfassungsrichter: Seine Rolle in der Dispensehen-Kontroverse,” in *Hans Kelsen: Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts*, ed. Stanley L. Paulson and Michael Stolleis (Tübingen, 2005), 374ff.; on the row over the marriage dispensations, see comprehensively Ulrike Harmat, *Ehe auf Widerruf? Der Konflikt um das Eherecht in Österreich 1918-1938* (Frankfurt/Main, 1999).

18. But see more broadly the contributions in Manfred Matzka, ed., *Sozialdemokratie und Verfassung* (Wien, 1985).

important political parties – the Social Democratic party newspaper *Arbeiter-Zeitung*, as well as the *Reichspost*, a newspaper close to the Christian-Social Party. The articles were selected from the results of a full-text search in digitized newspapers.[19] Moreover, I also use the Court's decisions, as well as the minutes of the judges' deliberations preserved in the Austrian National Archives.[20] Although this is not a study of judicial behaviour, these files are helpful especially because they allow us to know how close the judges' votes were and thereby get a better sense of the judicial risks policy-makers faced. Given the political ties of many judges, much of what went on in the Court's deliberations was probably known among political elites and could therefore influence attitudes towards the Court.

In the following, I first discuss why the framers of the 1920 Constitution entrusted the Court not only with the power to review the constitutionality of state laws, but also of federal laws (2.). This section also considers the question whether lacking knowledge of the U.S. experience of judicial review may have facilitated its adoption. The two following sections discuss the Court's practice of judicial review and its political costs, both with regards to rights cases (3.) and federalism cases (4.). I then consider whether, as per my theory, Social Democrats' support for judicial review can be explained with the relative absence of rights-based judicial review, and hence the expectation of politically balanced costs, or whether their support is better explained with an ideological commitment to judicial review (5.). As a further alternative explanation, I discuss whether a sufficient cause of Social Democratic support for judicial review was the presence of Social Democratic judges on the Court (6.). Finally, I consider the implications of the 1929 court-curbing for my argument (7.), before concluding (8.).

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19. Search term: Verfassungsgerichtshof* in the ANNO database (anno.onb.ac.at), for all newspapers and magazines, for the entire period between November 1, 1918 and March 31, 1933, as well as numerous more permissive or different search terms for specific periods, for example after certain judgments.

20. All these files are located in: ÖStA AdR, Oberste Behörden, Höchstgerichte 1. Republik, Verfassungsgerichtshof 1. Republik.

5.2 The Adoption of Judicial Review with the 1920 Constitution

After the defeat of the Austro-Hungarian Empire in November 1918 and Emperor Charles' I abdication – in all but name – a few days later, the multi-national Empire shattered into pieces. The political leaders of the German-speaking parts of Austria elaborated a new constitution for the rump state they had been left with. This constitution, which came into effect on November 10, 1920, entrusted the Constitutional Court, among others, with reviewing the constitutionality of both state and federal statutes. Neither the Court's establishment, nor its powers were particularly contentious. Why did the Court and its judicial review powers so easily find the support of the major political actors?

I argue that this was due to two factors: First, the Court as such was effectively the Imperial Court of the Habsburg period under a new name. Second, the major political actors at the time, the Christian Social Party – a Catholic, conservative party – and the Social Democrats, expected judicial review to be used to decide conflicts over the federal distribution of powers. Such a limited role for the Court was in their mutual interest. While Social Democrats were more concerned about containing transgressions by the states than transgressions by the federation, they also did not expect to be disadvantaged by the review of federal laws. The idea that the Court would protect rights against the federal legislature was hardly on their mind. Hence, the adoption of judicial review is in line with my theoretical expectation that federalism-based review tends to entail the expectation of balanced political costs and therefore more easily finds political support. Additionally, I show that Social Democrats did not support judicial review merely because they might have been unaware of the *Lochner* example. The problematic role of judicial review in the U.S. was known at the time; the fact that it was not discussed rather suggests that it was hardly plausible that judicial review would obstruct progressive policies.

After the end of the Empire, many politicians hoped or expected that the new German-Austrian state would merge with Germany. These hopes and expectations came to an end when the Treaty of St Germain, concluded on September 10, 1919, outlawed such a merger.[21] It was only then that the constitution-making process began in earnest.[22] After Hans Kelsen and others had prepared several drafts for the Chancellery, headed by the Social Democrat Karl Renner until July 1920, consultations with the state governments began.[23] Most of the state governments included representatives of all the major parties, but were led by Christian Socials.[24] In the last stage of the constitution-making process, from July to September 1920, the Constitutional Committee of the National Assembly and a sub-committee worked on the final document, before the constitution was passed in the National Assembly on October 1, 1920.[25] During the transition period, the federal government was most of the time either formed by a coalition of Social Democrats and Christian Socials, or was a government with proportional representation of the three major political currents, including the pan-German nationalists.[26]

Overall, the 1920 constitution established a federal, parliamentary political system with the directly elected lower chamber of parliament – the National Council – at its centre. A state chamber, composed of representatives elected by the state parliaments, could only exercise a suspensive veto against legislation passed by the National Council. Changing the constitution required a 2/3-majority in the National Council. The president, elected jointly by the National Council and the state chamber, had a largely ceremonial function until 1929. Legislative and executive powers were split between the federation and the states, but as the parties could not agree on the exact distribution of powers in 1920, the distribution of powers from the time of the monarchy remained in place until 1925.[27]

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21. Thomas Olechowski, “Verfassungsentwürfe, Föderalismus und ‘Anschlussfrage,’” in *Die junge Republik: Österreich 1918/19*, ed. Maria Mesner et al. (Wien, 2018), 80.

22. Felix Ermacora, ed., *Quellen zum österreichischen Verfassungsrecht (1920): Die Protokolle des Unterausschusses des Verfassungsausschusses samt Verfassungsentwürfen* (Wien, 1967), 9.

23. Ableitinger, “Grundlegung der Verfassung,” 171ff.

24. Ibid., 150.

25. See ibid., 178ff.

26. See Berchtold, *Verfassungsgeschichte*, 1:155–58, 205, 245.

27. See Wilhelm Brauneder, *Österreichische Verfassungsgeschichte*, 9th ed. (Wien, 2003), 213–20.

Although the Constitutional Court is perceived as an institutional innovation today, one of the reasons why it was so uncontroversial was that it hardly appeared radically new in 1919/1920. The Constitutional Court was the heir to the old Imperial Court (*Reichsgericht*) of the Austrian part of the monarchy in many ways.[28] The Imperial Court, established with the "December Constitution" of 1867, adjudicated, among others, conflicts over the scope of authority of the administration and the judiciary, conflicts over the scope of authority of different levels of government, as well as complaints of citizens regarding the violation of their political rights by the administration.[29] However, the Imperial Court could only render declaratory judgments – at least formally speaking, they had no immediate legal consequences,[30] and the Court did not have the power to review the constitutionality of statutes or decrees.[31] Most Imperial Court judges were nominated by the two chambers of parliament.[32] This was an important precursor to the role parliament later played in appointments to the republican Constitutional Court.

Even before the work on the 1920 Constitution began, the provisional parliament transferred the Imperial Court's powers onto what was now called the Constitutional Court in January 1919.[33] Many Imperial Court judges continued to serve on the Constitutional Court.[34] The transfer of the Imperial Court into the republican order corresponded to earlier demands by the Social Democrat Karl Renner, now the Chancellor. In 1917, Karl Renner wrote that "this Constitutional Court also has to safeguard the subjective public rights of citizens and state organs, … i. e., has to continue the important function of our Imperial Court."[35] Even after the 1920

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28. See Olechowski, "The Beginnings of Constitutional Justice in Europe," 84–85; Wiederin, "Verfassungsgerichtshof," 284–85; Neschwara, "Österreichs Verfassungsgerichtshof," 436.

29. Erwin Melichar, "Die Freiheitsrechte der Dezember-Verfassung 1867 und ihre Entwicklung in der reichsgerichtlichen Judikatur," *Zeitschrift für öffentliches Recht* N. F. 16 (1966): 256–90; Neschwara, "Österreichs Reichsgericht," 312–13.

30. Karl Gottfried Hugelmann, "Das österreichische Reichsgericht," *Zeitschrift für öffentliches Recht* 4 (1925): 526.

31. Neschwara, "Österreichs Reichsgericht," 312.

32. Ibid., 313.

33. Olechowski, *Hans Kelsen*, 247; see also Heller, *Verfassungsgerichtshof*, 149.

34. Olechowski, *Hans Kelsen*, 247.

35. Karl Renner, *Das Selbstbestimmungsrecht der Nationen in besonderer Anwendung auf Oesterreich. Erster Teil: Nation und Staat* (Leipzig; Wien, 1918), 292.

Constitution had extended the powers of the Constitutional Court far beyond those of the Imperial Court, the sense of continuity still persisted. "The Constitutional Court has taken over the legacy of the Imperial Court and combined it with further, even bigger tasks," the legal scholar Karl Hugelmann wrote in 1925.[36]

The institutional continuity between the Imperial Court and the Constitutional Court surely made it easier to entrust the latter with the power of judicial review later. However, as of January 1919, the new Court did not have such powers yet. It received the power to review state legislation already during the transitional phase in March 1919 – much earlier than the power to review federal legislation, which was only vested into the Court with the enactment of the constitution in November 1920.[37] Moreover, the power to review federal laws only made it into the drafts of the 1920 constitution relatively late. Kelsen did not include this power into the drafts he prepared between May and September 1919[38] – "nobody resisted the review of federal laws for a longer time than him."[39] It has been argued that the federal government, where Social Democrats had the strongest presence, only agreed to include the power to review federal laws as a concession to (conservative-led) state governments.[40] Did Social Democrats agree to an institution that, by itself, ran counter to their interests?

The Court was first empowered to review the constitutionality of state laws in March 1919, providing an instrument of oversight for the federal government.[41] Originally, the federal government had claimed a veto over state legislation under the transitional arrangements in force before the 1920 constitution came into effect.[42] However, conservative state representatives protested against the centralist tendencies

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36. Hugelmann, "Reichsgericht," 538.

37. See Wiederin, "Verfassungsgerichtshof," 285.

38. Schmitz, "Constitutional Court," 250–51.

39. Wiederin, "Verfassungsgerichtshof," 297.

40. In this vein, Schmitz, "Constitutional Court," 254; Öhlinger, "The Genesis," 212; Öhlinger, "Verfassung – Demokratie – Verfassungsgerichtsbarkeit," 181; Wiederin, "Verfassungsgerichtshof," 293; implied also by Stourzh, "Hans Kelsen," 28; similarly Leo Wittmayer, "Die Überprüfung der Verfassungsmäßigkeit von Gesetzen als Problem der Rechtsannäherung," *Österreichische Zeitschrift für Öffentliches Recht 6* (1927): 62–63.

41. Wiederin, "Verfassungsgerichtshof," 291–92; Schmitz, "Constitutional Court," 248; Öhlinger, "The Genesis," 211–12; Olechowski, *Hans Kelsen*, 254–55.

42. Wiederin, "Verfassungsgerichtshof," 291.

of the federal government.[43] As a compromise, the federal government was enabled to request, a priori, a decision of the Court on whether a state law exceeded the states' legislative powers.[44] Extending this, Kelsen's early drafts of the 1920 constitution allowed the federal government to challenge, a posteriori, whether state laws complied with federal law, including with the constitution.[45] Confined in scope to the *constitutionality* of state laws, this power remained part of all later drafts of the constitution until it was passed.[46]

The federal government's demand for an instrument to oversee the state governments is hardly surprising. The centrifugal forces, especially in the Western states, were strong. Already from December 1918 on, state governments increased their demands for autonomy.[47] In the westernmost state of Vorarlberg, a movement to join Switzerland was afoot. The state of Upper Austria restricted entry to its territory. Given the general shortage of food, the rural states were reluctant to supply the capital.[48]

Judicial review as a means of control over, above all, the administration, but also the legislature in the conservative rural states was particularly important for Social Democrats; in fact, it was probably the Court's most important function for them. This interest was rooted in the poor political prospects of Social Democrats outside Vienna. At the 1919 national elections, Social Democrats had achieved an absolute majority only in the capital.[49] Moreover, the Social Democratic support base within the conservative rural states was concentrated in small urban enclaves, creating the potential for immense tensions.[50] Hence, Social Democrats had reason to worry that conservative-

43. See the minutes of the third conference with state representatives in Felix Ermacora, ed., *Materialien zur österreichischen Bundesverfassung*, vol. 1, *Die Länderkonferenzen 1919/20 und die Verfassungsfrage* (Wien, 1989), 7ff.; see also Wiederin, "Verfassungsgerichtshof," 291.

44. Wiederin, "Verfassungsgerichtshof," 291–92.

45. Schmitz, "Constitutional Court," 250–51; Wiederin, "Verfassungsgerichtshof," 292.

46. See the collection of drafts in Felix Ermacora, ed., *Die Entstehung der Bundesverfassung 1920*, vol. 4, *Die Sammlung der Entwürfe zur Staats- bzw. Bundesverfassung* (Wien, 1990). The fact that the Court no longer could assess whether state law complied with any provision of federal law, but only with the constitution is due to successful conservative resistance against the precedence of federal law over state law. On this discussion, see Schmitz, "Constitutional Court," 252ff.

47. Ableitinger, "Grundlegung der Verfassung," 160f.

48. Berchtold, *Verfassungsgeschichte*, 1:106ff.

49. Ableitinger, "Grundlegung der Verfassung," 162.

50. See Charlie Jeffery, *Social Democracy in the Austrian Provinces, 1918–1934: Beyond Red Vienna* (London, 1995), 19ff.

led state administrations could thwart the implementation of statutes passed by the legislature in Vienna, and that state parliaments could counteract federal policies by legislating outside their spheres of power.

Illustrating this, the Social Democratic Chancellor Karl Renner warned at the Social Democratic party conference in autumn 1919: “Let us not forget that any act has to be implemented by a state government out there. Against it, we only have the power to complain to the Administrative Court, in constitutional questions to the Constitutional Court, but we do not have any other means to force the states.”[51] Before the end of the Empire, Renner had already suggested, in a treatise setting out his vision for a multinational federation, that a constitutional court should assess, among others, whether state legislatures had exceeded their powers.[52] Karl Seitz, chairman of the Social Democratic Party and later mayor of Vienna, saw similar risks attached to federalism at a meeting in January 1920: “If I am talking about the individual rights of citizens, I am attaching importance to their safeguarding by well-designed administrative courts … The more autonomy we create, the higher is the probability of party rule and this threatens the individual citizen very much in his individual rights.”[53]

Many Social Democrats would probably have been satisfied if the Court’s judicial review powers had not gone further.[54] Summarizing the new constitution in October 1920, the Social Democratic party newspaper *Arbeiter-Zeitung* emphasized the Court’s function as a means of keeping the conservative states in check, but omitted that the Court had by then also been empowered to review federal laws:

51. *Protokoll (Protocoll) der Verhandlungen des Parteitages der sozialdemokratischen Arbeiterpartei Deutschösterreichs. Abgehalten in Wien vom 31. Oktober bis zum 3. November 1919* (Wien, 1920), 261.

52. Renner, *Selbstbestimmungsrecht*, 292; see also Schmitz, “Constitutional Court,” 242; Wiederin, “Verfassungsgerichtshof,” 291.

53. See the minutes of the meeting on January 22, 1920, reproduced in Felix Ermacora, ed., *Die Entstehung der Bundesverfassung 1920*, vol. 2, *Dokumente der Staatskanzlei über allgemeine Fragen der Verfassungsreform* (Wien, 1989), 130–148 (142).

54. For further examples how Social Democrats primarily emphasized judicial review of state law, see Öhlinger, “Verfassung – Demokratie – Verfassungsgerichtsbarkeit,” 181. See also Otto Bauer’s retrospective emphasis on this function of the Court, Otto Bauer, *Die österreichische Revolution* (Wien, 1923), 222.

"So far, the federal government was entirely powerless in the face of the despotism of the state governments that embodied the clerical-agrarian rebellion against the Republic. Now safeguards against the despotism of the state governments are being created. The federal government can complain about every caprice of the state governments to the Constitutional Court; the Constitutional Court has the power and the duty to invalidate any unconstitutional state law and any illegal decree of a state government and to remove from office any state governor who does not comply with the decrees or orders of the federal government."[55]

Further underscoring that judicial review of state laws mattered more to Social Democrats than review of federal laws is their suggestion, made more than once, that the regular courts, and not only the executive, should be able to trigger the review of state laws – but not of federal laws.[56] This would have provided a way to trigger judicial review of state legislation even when the Social Democrats did not control the federal government.

When it came to judicial review of *federal* laws, the most vocal demands for this power came from conservative rural states.[57] The first state representative to demand judicial review of federal laws was Stephan Falser, a consultant to the Tyrol state government, who included it in his own draft constitution.[58] Falser's draft, presented to the Tyrol state parliament on December 18, 1919, was strongly federalist in character.[59] On December 29, 1919, Falser and other representatives of the conservative-led Tyrol government met with Michael Mayr, a Christian-Social politician and minister for

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55. "Die neue Verfassung," *Arbeiter-Zeitung*, October 1, 1920, 1.

56. See Article 75 (2) in the draft constitution by the Social Democrat Robert Danneberg in Ermacora, *Sammlung der Entwürfe*, 290–413 (357); the Social Democrat Otto Bauer later also demanded this, see the records of the 11th session of the Constitutional Committee's subcommittee on August 25, 1920 in Ermacora, *Protokolle des Unterausschusses*, 357–373 (363); see also Wiederin, "Verfassungsgerichtshof," 292; Öhlinger, "Verfassung – Demokratie – Verfassungsgerichtsbarkeit," 180.

57. On these demands, see Schmitz, "Constitutional Court," 252; Haller, *Die Prüfung von Gesetzen*, 48–50.

58. See Art. XVII of Falser's draft, reproduced in Ermacora, *Sammlung der Entwürfe*, 503–522 (513); see also Falser's newspaper op-ed on his draft, Stephan Falser, "Der Tiroler Entwurf einer Bundesverfassung für die Republik Oesterreich," *Neue Freie Presse*, December 28, 1919, 5.

59. Olechowski, "Verfassungsentwürfe, Föderalismus und 'Anschlussfrage,'" 81.

constitutional reform in the Chancellery. As emissary of the Chancellery, Mayr was touring the Austrian states to sound their views on the constitution.[60] According to a summary of their meeting, Falser argued that “parity demands that the states are also given the opportunity to challenge a federal law before the Constitutional Court, if they believe that the federal law has interfered with the powers of the states. As an example, he cites the law on housemaids.”[61] Two weeks later, the deputy head of the Salzburg state government, the Christian Social Franz Rehrl, sent his views on the constitution to Chancellor Renner. Rehrl also suggested the review of federal laws. “While the principle that the judge is only allowed to review whether statutes have been properly promulgated has to be upheld,” Rehrl wrote, “it could also be stipulated in the constitution that a judge has to request the review of the constitutionality of a … statute by the Constitutional Court, if a properly promulgated federal statute collides with a properly promulgated state statute.”[62]

But when Falser and Rehrl demanded judicial review of federal laws in December 1919 and January 1920, Renner’s Chancellery was already willing to establish it, too. In October 1919, Chancellor Renner presented a conceptual note on a future constitution in a meeting of government officials. According to this note, a “council of the states,” but not the state governments individually, could request judicial review of a federal bill before it was passed.[63] Renner’s presentation of his ideas suggests that he also considered allowing individual state governments to trigger judicial review.[64] Falser and Rehrl were probably not aware that the Chancellery was

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60. Ableitinger, “Grundlegung der Verfassung,” 171.

61. See the record of Mayr’s meeting with the Tyrol government, reproduced in Ermacora, *Dokumente der Staatskanzlei,* 110–114 (113). The law on housemaids, passed in February 1920, regulated the employment conditions of housemaids. Some state governments considered it a transgression of federal powers. Even before the introduction of judicial review of federal laws, the states’ objections succeeded and resulted in changes to the law. See “Arbeiterkammern und Hausgehilfengesetz,” *Reichspost*, February 27, 1920.

62. See Rehrl’s notes on a constitution, reproduced in Ermacora, *Sammlung der Entwürfe,* 530–539 (532).

63. See §13 of the note, reproduced in Ermacora, *Dokumente der Staatskanzlei*, 59–73 (63); on this note, see Stourzh, “Hans Kelsen,” 18f.; Schmitz, “Constitutional Court,” 250; Wiederin, “Verfassungsgerichtshof,” 293.

64. See the records of the meeting on October 11, 1919 in Ermacora, *Dokumente der Staatskanzlei*, 73–81 (74, 78); inferring this Schmitz, “Constitutional Court,” 250.

already willing to meet their demands.[65] Although Tyrol and Salzburg demanded judicial review of federal laws, and although this had already previously enjoyed Renner's support, it was not included in the draft that Mayr, the Chancellery's emissary, took to a conference with state representatives in Salzburg in February 1920.[66] This draft had been declared Mayr's private work, since the federal government was still reluctant to take an official stance, but was essentially Kelsen's work.[67] Between February and April 1920, Kelsen prepared the first draft that allowed the state governments to request judicial review of federal laws.[68] Mayr only attended the following conference with the state governments, in Linz in April 1920, with a draft that included this power.[69] From this point on, judicial review of federal laws remained part of all further drafts of the constitution.[70]

Many authors argue that the inclusion of judicial review of federal laws was a concession to the mainly conservative-led state governments:[71] Renner (and the rather centralist Social Democrats more broadly) wanted to restrict the powers of the Court to the review of state laws. Renner included the review of federal laws into his drafts even before Falser and Rehrl voiced their demands because he could foresee that the state governments would not accept unilateral powers of the federal government to challenge state laws.[72] As Stourzh argues, the fact that judicial review of federal laws was not part of the draft Mayr took to the Salzburg conference, although the Chancellery had already

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65. According to Olechowski, "Verfassungsentwürfe, Föderalismus und 'Anschlussfrage,'" 81, Falser was unaware of Kelsen's drafts.

66. See the draft ("Mayr-Privatentwurf") reproduced in *Ermacora, Sammlung der Entwürfe,* 290ff.

67. Olechowski, *Hans Kelsen*, 286.

68. Schmitz, "Constitutional Court," 254; for the date of this draft, see Olechowski, *Hans Kelsen*, 286.

69. Art. 150 (1) of the "Mayr-Entwurf, Zweite Fassung", reproduced in Ermacora, *Sammlung der Entwürfe*, 290–413 (408); on this draft, see Olechowski, *Hans Kelsen*, 289, note 387.

70. See the collection of drafts in Ermacora, *Sammlung der Entwürfe*.

71. In this vein, Schmitz, "Constitutional Court," 254; Öhlinger, "The Genesis," 212; Öhlinger, "Verfassung – Demokratie – Verfassungsgerichtsbarkeit," 181; Wiederin, "Verfassungsgerichtshof," 293; implied also by Stourzh, "Hans Kelsen," 28; similarly Wittmayer, "Die Überprüfung der Verfassungsmäßigkeit von Gesetzen als Problem der Rechtsannäherung," 62–63.

72. Wiederin, "Verfassungsgerichtshof," 293; see also Öhlinger, "The Genesis"; Wittmayer, "Die Überprüfung der Verfassungsmäßigkeit von Gesetzen als Problem der Rechtsannäherung," 62–63.

accepted it, suggests that it might have been supposed to be used as a bargaining chip in the negotiations with the state governments.[73]

An explicit statement by Renner, Kelsen or anybody else involved in the drafting of the constitution that judicial review of federal laws was a concession to the – mainly conservative-led – state governments does not seem to exist. But there is much to suggest that Social Democrats would only have included the power to review state laws, not federal laws, had predominantly Christian Social state governments not demanded it: Judicial review of state laws made it far earlier into the drafts than judicial review of federal laws; the latter was only included in the context of a defensive battle of primarily the more centralist-minded Social Democrats against mainly conservative state governments over the extent of federalism.[74] Moreover, Social Democrats consistently emphasized how important judicial oversight of the state administrations and legislatures was, but barely mentioned judicial constraints on the federal legislature. As discussed above, they also wanted to enable the ordinary courts to refer state laws, but not federal laws to the Court for review.

However, it would be an exaggeration to claim that Social Democrats made a big concession to conservatives when they accepted judicial review of federal laws. Social Democrats did not put up a fight. The records of the conferences with the state representatives and of the National Assembly's Constitutional Committee do not show any traces of controversy over the object of judicial review.[75] This lack of conflict is in line with Social Democrats' ambivalent interests when it came to federalism. On the one hand, Social Democrats favoured a more centralized state.[76] With the exception of Lower Austria – the state where Vienna was situated – Social Democrats had so far achieved far stronger results in the national elections than in the state elections.[77] During

73. Stourzh, "Hans Kelsen," 28, note 84; according to Wiederin, "Verfassungsgerichtshof," 294, Kelsen and Mayr "insisted on the precedence of federal law and the review of only state laws, but met a brick wall."

74. See Wiederin, "Verfassungsgerichtshof," 293–95.

75. See the records reproduced in Ermacora, *Länderkonferenzen*; Ermacora, *Protokolle des Unterausschusses*.

76. See Ewald Wiederin, "Die verfassungspolitische Diskussion über die Einrichtung Österreichs als Bundesstaat," *Beiträge zur Rechtsgeschichte Österreichs* 2 (2011): 364, 366ff.

77. At the 1919 national elections, Social Democrats received 41 per cent of the vote. In their best result in a 1919 state election, they achieved 47 per cent of the vote in Lower Austria. In contrast,

almost the entire transitional period between 1918 and 1920, they formed the federal government together with Christian Socials. On the other hand, legislative majorities at the federal level without Social Democrats were entirely conceivable. After the 1919 elections, Social Democrats were the strongest group in the National Council, with 72 of 170 seats, but the conservative parties – Christian Socials and the pan-German Nationalists – held 95 seats between them.[78]

Indeed, conservative majority governments eventually became a permanent phenomenon from 1920 onwards. In 1920, Social Democrats held an absolute majority only in the state parliament of the industrial state of Lower Austria.[79] Within Lower Austria, the bulk of the Social Democratic vote was garnered in Vienna. Due to demands of Christian Socials from mid-1919 on, it soon emerged that Vienna would be split from Lower Austria and become a state of its own.[80] Thus, a state with Social Democratic hegemony was in the making while the party's position at the federal level was precarious. A situation where the Social Democratic government of "Red Vienna" would confront a conservative federal government was realistic. Given this prospect, the ability to challenge the transgressions of a conservative-dominated federal legislature was in Social Democrats' interest.

Moreover, shortly before the Constitution was adopted, Social Democrats and the other parties agreed to an extension of the Court's judicial review powers that later turned into an important way of triggering judicial review: Judicial review could not only be initiated at the request of a state government or the federal government, but also by the Court itself – *ex officio* – when it heard cases pertaining to its other prerogatives, for example to decide on complaints over the violation of fundamental rights by the administration, and the Court had doubts about the constitutionality of a statute.[81] With

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Social Democrats received only 19 per cent of the vote in the state elections in Tyrol and Vorarlberg, their worst results among the Austrian states. See the election results in Ernst Bruckmüller, ed., *Parlamentarismus in Österreich* (Wien, 2001), 186ff.

78. See ibid., 186.

79. See ibid., 196.

80. Maren Seliger and Karl Ucakar, *Wien, politische Geschichte 1740-1934: Entwicklung und Bestimmungskräfte grossstädtischer Politik,* vol. 2: *1896-1934* (Wien, 1985), 1002.

81. See the records of the 18th session of the Constitutional Committee's subcommittee on September 23, 1920 in Ermacora, *Protokolle des Unterausschusses*, 474–500 (495); see also Wiederin, "Verfassungsgerichtshof," 296.

ex officio review, the federal and state governments lost their exclusive control over the initiation of judicial review. Indirectly, this made it possible for individuals to trigger judicial review, since they could complain about a violation of their rights by the administration and hope that the Court would, *ex officio*, review the statute underlying the administrative measure.[82]

The adoption of *ex officio* review is best explained by the institutional entrepreneurship of Hans Kelsen.[83] He originally wanted to increase the Court's autonomy even further by establishing a federal attorney – a member of the Court who would monitor legislation and initiate proceedings in the case of doubts about constitutionality.[84] While the Constitutional Committee rejected this proposal, it supported *ex officio* review. It seems unlikely that Social Democrats would have supported this extension of the Court's powers if they had been deeply concerned about the political costs of judicial review of federal laws. Some authors argue that the Committee members did not understand the implications of *ex officio* review when they passed it,[85] or even that (some) Social Democrats did not notice that the Court could now not only review state, but also federal legislation.[86] But this appears unlikely, given that some aspects of the Court's powers, such as *ex officio* review, were discussed. It is hard to imagine how Committee members could get into the details of how judicial review could be triggered, but ignore its scope.[87]

As this section shows, judicial review was adopted in the context of the discussion over federalism. There is nothing to suggest that the constitution's framers imagined that the Court would safeguard rights against encroachments by the federal legislature to a significant extent. This was not, formally speaking, impossible. The 1920 Constitution did not contain a bill of rights, because Social Democrats and

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82. See Öhlinger, "The Genesis," 213–14.

83. See ibid., 213; Haller, "Hans Kelsen," 94; Olechowski, *Hans Kelsen*, 294f.

84. See the records of the 13th session of the Constitutional Committee's subcommittee on August 31, 1920 in Ermacora, *Protokolle des Unterausschusses*, 414–422 (421); see also Öhlinger, "The Genesis," 213; Wiederin, "Verfassungsgerichtshof," 295–96.

85. Öhlinger, "The Genesis," 213.

86. Öhlinger, "Verfassung – Demokratie – Verfassungsgerichtsbarkeit," 181; Wiederin, "Verfassungsgerichtshof," 297.

87. Specifically with regard to *ex officio* review, Olechowski, *Hans Kelsen*, 295, note 422.

Christian Socials could not agree on its content.[88] But a few rights provisions, such as the right to equality before the law and the right to be tried before a lawful judge, were included.[89] The Treaty of St Germain – the peace treaty between Austria and the victorious Allies of World War I – also stipulated legally binding rights, mainly provisions of non-discrimination along religious, ethnic or linguistic lines.[90] More importantly, the constitution incorporated the fundamental rights of the 1862 and 1867 Bills of Rights of the old Empire.[91] Thus, judicial review against the yardstick of an extensive set of rights was well within the realm of possibility. Some of these rights, such as the right to property,[92] the right to acquire and dispose freely of real property,[93] as well as the right to equality before the law,[94] also had potential implications for social and economic policies, especially those advocated by Social Democrats.

Yet, in 1919/1920, Social Democrats were manifestly not afraid of the obstructive potential of rights-based judicial review. The discussion on judicial review was firmly focused on issues of federalism;[95] there is hardly any trace that the implications of rights-based review were considered. In a rare note on what judicial review was *not* expected to be about, the legal expert Rudolf Hermann, who was involved in the constitution-making process at the Ministry of Justice,[96] commented on the scope of judicial review of state legislation that "being unconstitutional means that the authority exceeds the lawmaker's competence, not that the content is problematic."[97] In 1921, the legal scholar Adolf Merkl managed to write a detailed exposition of the system of judicial review without mentioning rights even once.[98] Moreover, the heated

88. Berchtold, *Verfassungsgeschichte*, 1:266.

89. Brauneder, *Verfassungsgeschichte*, 218.

90. Ibid.

91. Ibid.

92. Art. 5 of the 1867 Bill of Rights.

93. Art. 6 of the 1867 Bill of Rights.

94. Art. 2 of the 1867 Bill of Rights and Art. 7 of the 1920 Constitution.

95. This is also implied by Berchtold, *Verfassungsgeschichte*, 1:254, note 126.

96. Schmitz, "Constitutional Court," 253.

97. See Hermann's note of February 26, 1920, reproduced in *Ermacora, Dokumente der Staatskanzlei*, 167–173 (171); quote and translation in Schmitz, "Constitutional Court," 253.

98. Adolf Merkl, "Die gerichtliche Prüfung von Gesetzen und Verordnungen," *Österreichisches Zentralblatt für die juristische Praxis*, 1921, 569–609.

debate on a bill of rights was entirely separate from discussions of judicial review. This suggests that the scenario of rights as a yardstick for the review of legislation was hardly relevant.

If we focus on the right that could have turned out to be most problematic for the Social Democratic policy agenda – the right to property – we see that there was little reason to be afraid. There was neither a historical precedent of nor any new-found enthusiasm for an expansive interpretation of this right among legal elites. The right to property could not be invoked at all before the old Imperial Court because the Court's mandate had been to safeguard only "political rights" and, crucially, the Court had decided that the right to property did not count as a *political* right.[99] The new Constitutional Court was no longer confined to policing "political rights," so it could theoretically have developed a more expansive property rights jurisprudence.[100] But the leeway of the legislature was well protected, since the right to property in the 1867 Bill of Rights not only stipulated that it was subject to statutory limitations, but also did not require any compensation in the case of expropriation.[101] As we will see, the Constitutional Court also did not make creative efforts to turn the right to property into a constraint on the legislature.

Further evidence that nobody feared the obstructive potential of judicial review for a progressive policy agenda stems from the absence of any discussion of the implications of the U.S. experience for the judicial empowerment under way in Austria. As the Norwegian and the German case shows, the U.S. Supreme Court's *Lochner* jurisprudence lent itself to be presented by the left as a cautionary tale about the risks of judicial review. In Austria, there is no trace of any contribution during the drafting of the constitution or later that relates the Austrian and the U.S. experience to each other.[102]

If nobody wanted to draw any parallels between the two countries, it was not because nobody knew: The confrontation between the U.S. Supreme Court on the one

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99. Melichar, "Freiheitsrechte," 259.

100. See Julius Ofner, "Die Tragweite der Grundrechte," *Zeitschrift für öffentliches Recht* 4 (1925): 56.

101. See Art. 5 of the 1867 Bill of Rights.

102. Insofar as the drafting of the 1920 Constitution is concerned, this observation is shared by Öhlinger, "The Genesis," 209.

hand, and the labour movement and interventionist economic legislation on the other, was reported in Austrian newspapers. In 1908, in an *Arbeiter-Zeitung* report entitled "Economic Crisis and Class Justice," the author gave a well-informed overview of labour-unfriendly judgments by U.S. courts in early 1908, including the judicial review cases of *Adair* and the Employer's Liability Cases, as well as the application of anti-trust law to labour unions.[103] Drawing a parallel to the English Taff Vale case, the author claimed that "the American workers, too, feel the punch the Supreme Court gave them."[104] A year later, commenting on President Taft's plans to introduce a federal income tax – after the Supreme Court had ruled such a tax unconstitutional in 1895[105] – the *Arbeiter-Zeitung* suggested that he should nominate the right justices to the Court instead of making complicated efforts to amend the constitution.[106] In October 1915, the *Arbeiter-Zeitung* described the U.S. Supreme Court as, "as is well known, the safest stronghold of reaction in the United States."[107] Thus, both in 1919/1920 and later, experts should have been sufficiently familiar with the events in the U.S. to evaluate the development of judicial review in Austria with the American experience in mind.[108] But at least in 1919/1920, there was nothing to suggest that it would make sense to draw parallels between the U.S. and Austria.

In summary, Austria's adoption of comprehensive judicial review powers in 1920 is largely the product of federalism: As Öhlinger puts it, "only within the context of a federal system could a power of the judicial review of statutes find its way into a constitution that was dominated by the idea of parliamentary supremacy."[109] The conversion of the Habsburg Imperial Court into the Constitutional Court facilitated the adoption of judicial review, since it provided a tried and tested institution for the

103. "Wirtschaftliche Krisis und Klassenjustiz," *Arbeiter-Zeitung*, February 26, 1908.

104. Ibid., 2.

105. *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (157).

106. "Der neue Zolltarif," *Arbeiter-Zeitung*, August 30, 1909, 1.

107. "Ein Achtstundengesetz für die amerikanischen Eisenbahner," *Arbeiter-Zeitung*, October 4, 1916, 6.

108. In this vein, see also Wiederin, "Verfassungsgerichtshof," 291, note 51. Apart from the articles in the Austrian press cited here, the contributions discussed in the chapter on Weimar Germany may of course also have been read in Austria.

109. Öhlinger, "The Genesis," 213.

exercise of these powers.[110] Above all, Social Democrats wanted the Constitutional Court to oversee the administration and legislature in the more conservative states. This is why they were far more eager to adopt judicial review of state than of federal legislation. With their preference for centralism, Social Democrats would have preferred to leave the federal legislature unconstrained by judicial review. Nevertheless, Social Democrats accepted the demands for judicial review of federal laws voiced by Christian-Social-led state governments. This was not a big concession for Social Democrats to make, already because their electoral fortunes at the federal level were uncertain, whereas their control over the government of the future state of Vienna was certain. Rights were hardly expected to serve as an important yardstick for the review of federal laws. Although the *Lochner* experience was known, it was not discussed during the drafting of the constitution. This suggests that Social Democrats did not expect judicial review to be a disproportionately costly institution. Hence, the adoption of judicial review of federal laws in 1920 is consistent with my expectation that judicial review is more easily supported in the context of federalism than if it is expected to safeguard rights.

110. It should be mentioned that the 1920 Constitution not only vested the power of judicial review into the Constitutional Court, but also explicitly banned the regular courts from exercising judicial review, see Art. 89 (1). Hence, a development of judicial self-empowerment, as in Germany, was impossible.

5.3 The Marginal Role of Rights in the Practice of Judicial Review

In the previous section, I argued that the framers of the Austrian constitution expected judicial review to serve, above all, as arbiter of conflicts around the distribution of powers between the federation and the states, and to engage very little in rights-based review. On this basis, none of them, especially not Social Democrats, expected that judicial review would turn out to be an overall costly institution for them. Yet, the practice of judicial review can run counter to the expectations at the time of adoption. As the Norwegian and the German cases show, political actors can become more sceptical of judicial review once they are confronted with its actual practice and costs. Austrian Social Democrats, however, did not turn against judicial review as its role in day-to-day political conflict became clear.

Theoretically, I argue that rights-based judicial review is more likely to be opposed by a part of the political spectrum than judicial review that mainly adjudicates federalism-related conflicts, because rights-based review is more likely to inflict higher costs on some political actors than others. This partly explains the left-wing opposition to judicial review in Norway and Germany: Left-wing politicians were concerned about the constraints that the judicial enforcement of the right to property, as well as some other rights, would impose on progressive economic policies. If this argument also explains at least partly why Austrian Social Democrats supported judicial review, then we should see the Constitutional Court largely refrain from rights-based review, and hence not inflict disproportionate political costs on Social Democrats. This section shows that this was the case. First, a brief quantitative overview of judicial review between 1920 and 1933 helps to get a sense of its extent, its object and its yardstick. Additionally, I show, on the basis of the 1928 Rent Act judgment, that the Court was deferential with regard to the right to property and the equality clause – two provisions whose expanding scope concerned German Social Democrats. Again, it should be noted that this is not an overview of the Court's activities as a whole, since these not only included judicial review cases. Some of the Court's most controversial decisions, for example on the ban of Arthur Schnitzler's sexually explicit play "La Ronde,"[111] or on

111. Judgment of 26 April 1921 – VfSlg 1921, Nr. 8.

the launch of the Vienna crematorium (a scandal in the eyes of the Catholic church),[112] concerned administrative, not legislative powers.[113]

Table 5.1. Laws Under Judicial Review Between November 10, 1920 and March 15, 1933[114]

	Review on the basis of any constitutional norms		**Review on the basis of rights**	
	reviewed	invalidated	reviewed	invalidated
Federal laws				
statutes	13 (+6)	5 (+1)	4	0
decrees	34	21	2	1
All state laws				
statutes	17	10	1	1
decrees	21	18	1	1
Vienna state laws				
statutes	7	4	0	0
decrees	3	3	1	1

112. Judgment of March 27, 1923 – VfSlg 1923, Nr. 206.

113. On these two cases, see Heller, *Verfassungsgerichtshof*, 220–23.

114. This only counts laws in cases on which a decision was published in the Court's official collection. Thus, cases that were closed without a decision – f. ex. because the case was withdrawn – are not counted. Moreover, only unique decisions count, i. e. if the same law was challenged twice, I only count it once. Only included were decisions published in the period between the entry into force of the 1920 Constitution and the Dollfuß government barring the National Council from sitting on March 15, 1933, which I take as the date of democratic breakdown. Numbers in brackets refer to cases under Art. 138 (2) of the constitution after the 1925 reform, i. e., cases on conflicts over legislative competences between the states and the federal government relating to Articles 10–15 of the constitution. These cases are not strictly speaking cases of judicial review of statutes, but are a form of abstract, a priori review of bills which do not result in the invalidation of a law, but in an abstract statement on the scope of legislative powers. Whether these cases can be included may be debatable – I consider them as functionally equivalent to judicial review in the narrow sense. However, I only included Art. 138 (2) cases in which state and federal governments held different views. In Art. 138 (2) cases, I use "invalidated" in the sense that the Court stated a narrower scope of legislative powers than claimed by the state or federal government in question. In general, "invalidated" means that at least a provision in the statute or decree, but not necessarily the entire statute or decree was invalidated. A law is counted as reviewed "on the basis of rights" if the decision discusses, however briefly, the question of a rights violation. I define as rights the provisions contained in the 1862 and 1867 Bills of Rights, in Part V of the Treaty of St Germain, and in Art. 7, 8, and 83 (2) of the 1920 Constitution.

For the sake of completeness, Table 5.1 not only includes reviewed statutes, but also reviewed decrees. In unique decisions, a total of 36 statutes was reviewed. Of these, 19 were federal statutes (including two statutes from the pre-revolutionary period), and 17 were state statutes. Of the former, six were invalidated entirely or in part; of the latter, ten. Regarding decrees, the Court reviewed a total of 34 decrees issued by the federal government, and invalidated 21 entirely or in part, as well as 21 decrees issued by state governments, of which 18 were invalidated entirely or in part. In the case of decrees issued by the state government of "Red Vienna," all three challenged decrees were invalidated.

The yardstick of review did not surprise the framers of the 1920 constitution: Excluding the a priori review under Art. 138 (2) of the constitution after the 1925 revision, which did not allow for rights-based review anyway, only four of 13 federal statutes, two of 34 federal decrees, one of 17 state statutes and one of 21 state decrees were reviewed on the basis of rights. Most cases concerned the distribution of powers in federalism or, when it came to decrees, the limits on the powers delegated to the executive.

In fact, no federal statute was subject to rights-based review *and* annulled – the outcome for only one state statute, one federal government decree, and one state decree. And even then, the sole state decree subject to rights-based review – a decree by the Vienna state government on itinerant merchants – was not annulled *because* of the violation of a right, but because it exceeded the powers delegated by statute.[115] The federal government decree was invalidated because it violated the right to a lawful judge – a politically hardly important case concerning the government's interference with a court decision.[116] The only important statutory provision declared unconstitutional, in June 1929, because it violated a constitutional right, was a provision in the Tyrolean state law on municipal elections.[117] This provision stipulated that teachers at public schools could not run for election as mayor or deputy mayor. In the

115. Judgment of October 17, 1928 – VfSlg 1928, Nr. 1073.

116. Judgment of June 23, 1924 – VfSlg 1924, Nr. 313. See also "Verordnungen, die in ein Gerichtsverfahren eingreifen," *Arbeiter-Zeitung*, June 24, 1924, 4.

117. Judgment of June 26, 1929 – VfSlg 1929, Nr. 1230.

eyes of the Court, this violated the teachers' right to equality before the law (Art. 7 of the 1920 Constitution), specifically the ban on privileges for specific estates explicitly stated in this constitutional provision. Yet, the provision in question had already been amended when the Court rendered its judgment.[118]

As the Court never annulled a politically important statute because it violated a constitutional right, there was, at first glance, hardly a reason to believe that rights could get in the way of important policies. However, one might argue that the remaining cases in which the Court upheld the statutes in question might have been quite close. As the Norwegian "Waterfall Case" of 1918 illustrates, an only narrow confirmation of a statute's constitutionality could cause policy-makers great concern. Yet, with one exception, large majorities upheld the challenged provisions in the four remaining rights-based cases: The dismissal of these cases was supported by majorities of 7:5,[119] 9:4,[120] and 9:3 votes,[121] and, in one case, unanimously.[122] The first case, decided with seven to five votes, did not concern an economic policy, but the power of municipalities to expel Austrian citizens from their territory.[123] Only the three latter cases concerned economic policies – the 1922 Rent Act, a 1919 act on the acquisition of farmland, and the 1919 "Schumpeter Decree" that established equivalence between the old imperial banknotes and the new German-Austrian banknotes. The Rent Act judgment is worth considering in some detail. It demonstrates the Court's approach to two important rights – the right to property and the equality clause.[124]

The 1922 Rent Act was challenged by the conservative-led state governments of Vorarlberg and Styria after landlord associations had lobbied them.[125] The Act, passed

118. VfSlg 1929, Nr. 1230, 186.

119. Minutes of the Court's deliberations, January 22, 1924, ÖStA AdR, ... box 72, file G 1/24, 18. Judgment: VfSlg 1924, Nr. 259.

120. Minutes of the Court's deliberations, December 13, 1928, ÖStA AdR, ... box 72, file G 4/28, fol. 30. Judgment: VfSlg 1928, Nr. 1123.

121. Minutes of the Court's deliberations, October 15, 1928, ÖStA AdR, ... box 72, file G 2/28, fol. 6. Judgment: VfSlg 1928, Nr. 1068.

122. Minutes of the Court's deliberations, December 15, 1924, ÖStA AdR, ... box 89, file V 6/24, 80. Judgment: VfSlg 1924, Nr. 360.

123. Judgment of January 22, 1924 – VfSlg 1924, Nr. 259.

124. On this much discussed judgment, see also Öhlinger, "The Genesis," 218.

125. "Eine stürmische Protestkundgebung der Hausbesitzer Vorarlbergs," *Tages-Post*, October 9, 1927, 6.

with both Christian Socials' and Social Democrats' support, stipulated restrictions on the termination of tenancies and fixed-term tenancies, as well as a strict rent cap.[126] As the Social Democrat Robert Danneberg put it, Austria had "the most radical law on the protection of tenants of all states" with rent control so strict that it was "an expropriation of the landlord."[127] While Danneberg hardly meant an expropriation in the legal sense, this was what the governments of Vorarlberg and Styria alleged, alongside a violation of any other conceivable right: equality before the law, the right to free movement of individuals and their possessions, as well as the right to acquire and freely dispose of real estate.[128]

The plaintiffs' shotgun approach allowed the Court to pronounce itself on almost all constitutional rights of economic relevance. In its judgment, supported by a majority of nine against four judges,[129] and written by the Court's vice-president, the legal scholar Adolf Menzel,[130] the Court held that none of these rights had been violated.[131] A violation of the right to freely acquire and dispose of real estate (Article 6 of the 1867 Bill of Rights) came under closest consideration. Hans Kelsen noted during the Court's deliberations that "the unconstitutionality of the Rent Act could seriously only be based on Article 6 of the 1867 Bill of Rights."[132] Yet, as in its judgment on the 1919 Land Transfer Act a few months earlier, the Court embraced a historical interpretation of Article 6. At its adoption in 1867, Article 6 had the purpose of abolishing old privileges

126. Johannes Stabentheiner, "Das ABGB und das Sondermietrecht – die Entwicklung der vergangenen 100 Jahre," *Wohnrechtliche Blätter* 25, no. 3 (March 2012): 99. Claims of unconstitutionality had also been raised against a similar 1922 Act on tenancy regulation in Germany (*Reichsmietengesetz*), primarily on the basis of the argument that it exceeded federal legislative powers. See Fritz Poetzsch, "Vom Staatsleben unter der Weimarer Verfassung (vom 1. Januar 1920 bis 31. Dezember 1924)," *Jahrbuch des öffentlichen Rechts der Gegenwart* 13 (1925): 234.

127. Robert Danneberg, *Die sozialdemokratische Gemeinde-Verwaltung in Wien*, 2nd ed. (Berlin, 1926), 38; as quoted in Leon Kane, *Robert Danneberg, ein pragmatischer Idealist* (Wien, 1980), 130. According to Kane, this sentence was removed from later editions of Danneberg's book.

128. Judgment of December 13, 1928 – VfSlg 1928, Nr. 1123, 365–367.

129. Minutes of the Court's deliberations, December 13, 1928, ÖStA AdR, ... box 72, file G 4/28, fol. 30.

130. In the literature, it is sometimes assumed that Kelsen authored the judgment as rapporteur. Yet, as the Court's files show, it was Menzel.

131. VfSlg 1928, Nr. 1123.

132. Minutes of the Court's deliberations, December 13, 1928, ÖStA AdR, ... box 72, file G 4/28, fol. 30.

that only allowed certain social groups, for example the clergy or aristocrats, to acquire some properties. It had nothing to say about the Rent Act.[133]

The Court also engaged with the plaintiffs' argument that the provisions of the Rent Act, especially the rent cap, deprived landlords so strongly of the enjoyment of their property that they constituted an expropriation – which, in their view, a statute could only stipulate if it served the "common good" and in return against compensation.[134] The judgment shows how difficult it was to succeed with claims that the legislature had violated the right to property. First, and in contrast to the German courts, the Court stuck with the traditional definition of the expropriation requiring that the owner's property be taken away and transferred onto a public entity through an administrative action.[135] This was not the case with the Rent Act, since it only imposed certain limits on the unfettered enjoyment of the owner's property.[136] And even if the Rent Act were an expropriation, this would not mean that landlords were entitled to compensation. In fact, the right to property in the 1867 Bill of Rights did not require any compensation for an expropriation – in contrast to the 1919 Weimar constitution, which only allowed the federal legislature, but not the state legislatures, to make exemptions from the requirement of compensation. While there were ways to construe a requirement of compensation also in Austria, the Constitutional Court refrained from doing so.[137] Finally, the Court also rejected the argument that a – hypothetical – expropriation was unconstitutional because it did not serve the "common good." As the Court emphasized, it was for the legislature, not the courts, to define the "common good":

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133. VfSlg 1928, Nr. 1123, 369.

134. VfSlg 1928, Nr. 1123, 366.

135. VfSlg 1928, Nr. 1123, 370. There were actually tendencies to expand the notion of expropriation also in the jurisprudence of the Austrian Constitutional Court, see Ewald Wiederin, "Die Unverletzlichkeit des Eigentums: Metamorphosen einer verfassungsgesetzlichen Gewährleistung," in *Wirtschaftsverfassung und Binnenmarkt: Festschrift für Heinz-Peter Rill zum 70. Geburtstag*, ed. Stefan Griller et al. (Wien, 2010), 279f. However, since both the provision of compensation and the question of whether the expropriation served the "common good" remained a matter of legislative discretion, such expansionary tendencies did not need to raise the same concerns as in Germany.

136. VfSlg 1928, Nr. 1123, 369.

137. VfSlg 1928, Nr. 1123, 371–372. See also Eduard Westphalen-Fürstenberg, "Die Wandlung des verfassungsrechtlichen Eigentums- und Enteignungsbegriffes im Deutschen Reich und in Österreich," *Österreichisches Verwaltungsblatt*, 1931, 284.

> *“It has to be emphasized in the strongest possible way that the Constitutional Court cannot engage in a discussion of this question. The common good or the common best is a term that cannot be interpreted through legal reasoning; it is exclusively a matter for the legislature to determine whether this requirement is given … It is downright the main function of the legislative bodies to form an opinion on the often conflicting interests, to favour the – in their view – more important interest or to forge a compromise among conflicting interests. The Constitutional Court, however, decidedly has to refuse to give an opinion on such a question.”*[138]

Again, this stood in contrast to the prevailing view in Germany, where the question whether an expropriation served the common good was considered a justiciable question.[139] The Austrian Constitutional Court only took this view from 1949 on.[140] As discussed in the chapter on Germany, the constitutional requirement of serving the “common good” was seen as a legal obstacle to both moderate and radical-left approaches to deal with the assets of the former German royal families. Given the position of the Austrian Constitutional Court, this problem could hardly have arisen in Austria.[141] In essence, the Court adopted a position of legislative omnipotence regarding the right to property.[142]

Finally, the Rent Act judgment also rejected the idea that the equality clause could be turned into a constitutional constraint on social legislation. As in pre-World War I Germany, the prevailing view under the monarchy had been that the equality

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138. VfSlg 1928, Nr. 1123, 370.

139. On the German position, see Schelcher, “Artikel 153,” 218–22, 226–27. See also the judgment of the German Supreme Court of November 4, 1925, in which the Court assessed (not very thoroughly) whether the Revaluation Act served the “common good” – RGZ 110, 320 (326).

140. Judgment of June 27, 1949 – VfSlg 1949, Nr. 1809. This marks the turn of the Court’s jurisprudence on the “common good” according to Ludwig Adamovich and Bernd-Christian Funk, *Österreichisches Verfassungsrecht: Verfassungsrechtslehre unter Berücksichtigung von Staatslehre und Politikwissenschaft* (Wien, 1982), 350, note 43.

141. In Austria, Crown property was transferred without compensation into the property of the Republic in 1919. Schüren, *Volksentscheid*, 22, note 2.

142. See Westphalen-Fürstenberg, “Die Wandlung,” 283–84.

clause merely demanded the equal application of the laws by the administration.[143] Yet, since the clause did not explicitly stipulate that it could be restricted by statute, it would have lent itself – as it happened in Germany – to be turned into a wide-ranging constraint on the legislature. It was such an expansive – and in this case, arguably daring – interpretation that the Vorarlberg state government put forward. First, it argued, the Rent Act treated landlords and tenants unequally, by imposing many burdens and obligations on the former, but few on the latter. Second, the Act disadvantaged landlords relative to any other property owners, since other forms of property were not as strictly regulated.[144] The Court rejected this as far-fetched. It pronounced itself against an expansive interpretation of the equality clause, also considering the implications such an interpretation would have for the emerging welfare state:

> *"Article 7 only prohibits to make differences based on a citizen's membership of a specific population group, explicitly mentioned are: privileges of birth, of sex, of estate, of class, and of confession. Thus, it concerns differences tied to the person …; such subjective factors and aspects should not be considered by legislation. Yet, … a tenancy contract is an objective legal relationship, in the same vein as a sales contract or an employment contract. If the legislature allegedly favours one of the parties to such a legal relationship, it does not stand in conflict with Article 7 of the constitution. The opposite view would lead to the absurd consequence that the entire social policy legislation could be challenged as unconstitutional, since it allegedly favours one of the parties, specifically the employee. In the same vein, tax legislation, if it stipulates a progressive tax rate, could be challenged for violating the principle of equality among taxpayers."*[145]

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143. Karl Korinek, "Gedanken zur Bindung des Gesetzgebers an den Gleichheitsgrundsatz nach der Judikatur des Verfassungsgerichtshofes," in *Im Dienst an Staat und Recht: internationale Festschrift: Erwin Melichar zum 70. Geburtstag,* ed. Heinz Schäffer, Klaus König, and Kurt Ringofer (Wien, 1983), 29.

144. Submission of the Vorarlberg state government, October 12, 1928, ÖStA AdR, ... box 72, file G 4/28, fol. 3f.

145. VfSlg 1928, Nr. 1123, 368.

This passage summarizes the narrow interpretation of the equality clause that the Court and most legal scholars maintained throughout the First Republic. In contrast to Germany, there were no efforts by legal scholars to promote a more expansive interpretation of the equality clause.[146] This does not mean that the Court considered the equality clause entirely irrelevant to the legislature; as emphasized in the quote above, it did consider the legislature banned from discriminating on the basis of subjective criteria, some of which were enumerated in Article 7.[147] For example, the Court struck down the exclusion of teachers from the office of (deputy) mayor in Tyrolean municipalities on the ground that it was an "estate"-based discrimination.[148] However, anything else but a discrimination on the basis of subjective criteria, primarily on the basis of those enumerated in Article 7, could not be invoked before the Court. The conservative lawyer Demeter Koropatnicki, who regularly published fierce attacks on the Court in the Christian-Social *Reichspost*, noted as late as 1930 that "in Austria, the Constitutional Court cannot be appealed to with the claim of a violation of the general equality clause by the legislature."[149] The prevailing view in legal history is that the Court only acknowledged after 1930 that the equality clause bound the legislature.[150] But even then, unequal treatment could only be claimed with regard to subjective criteria – and although the Court had taken a more conservative turn after the 1929 court-curbing, it still rejected a more expansive interpretation of the equality clause in 1932, citing the 1928 Rent Act judgment: Such an interpretation would "let the entire social policy legislation … appear unconstitutional."[151]

Altogether, rights played an insignificant role in the Court's judicial review practice. This was different when it came to the Court's role reviewing administrative

146. See Magdalena Pöschl, *Gleichheit vor dem Gesetz* (Wien, 2008), 137.

147. Sabine Bernegger, "Der allgemeine Gleichheitsgrundsatz (Art. 7 B-VG, Art. 2 StGG) und das Diskriminierungsverbot gemäß Art. 14 EMRK," in *Grund- und Menschenrechte in Österreich*, ed. Rudolf Machacek, Willibald Pahr, and Gerhard Stadler (Kehl, 1991), 715.

148. Judgment of June 26, 1929 – VfSlg 1929, Nr. 1230.

149. Demeter Koropatnicki, "Die Gleichheit vor dem Gesetz," *Österreichische Richterzeitung* 23, no. 10 (October 1930): 185.

150. Korinek, "Gedanken," 41; Alfred J. Noll, *Sachlichkeit statt Gleichheit? Eine rechtspolitische Studie über Gesetz und Gleichheit vor dem österreichischen Verfassungsgerichtshof* (Wien, 1996), 48; Raoul Kneucker and Manfried Welan, "Zur Entwicklung des Gleichheitsgrundsatzes in Österreich," *Österreichische Zeitschrift für Politikwissenschaft* 4, no. 1 (1975): 14.

151. Judgment of June 1, 1932 – VfSlg 1932, Nr. 1451, 67.

decisions, but the federal and state legislatures hardly had to fear that constitutional rights would constrain them. Rights were rarely invoked against legislation, and the few rights-based challenges almost never succeeded – in fact, not in a single case when it came to social and economic policy. Judicial majorities curtailing social policy on the basis of rights were very unlikely. As the discussion of the Rent Act judgment shows, large majorities on the Court supported legislative discretion and refused to transform old liberal safeguards against the administration, such as the right to property and the equality clause, into important constraints on parliament. This stands in contrast to Germany, where the courts and legal scholars expanded the scope of the right to property and of the equality clause in order to provide safeguards against the legislature.

In consequence, the Austrian Constitutional Court disappointed those who hoped that it would defend their economic interests against the legislature. In the courtroom, landlords reacted with cries of "Bolshevik Court" when the Court delivered its judgment on the Rent Act.[152] In the periodical of a landlords' association, an anonymous author claimed that the judgment demonstrated "the contamination of any sense of justice by political influence."[153] In contrast, the Social Democratic party newspaper *Arbeiter-Zeitung* reacted with satisfaction. It published the entire judgment, printing in bold, among others, the Court's proposition that it was the legislature's prerogative to determine the meaning of the "common good."[154] Austrian Social Democrats had little reason to worry that constitutional rights could successfully be invoked against progressive policies, in contrast to their German, and also Norwegian counterparts.

152. "Das Mietengesetz ist verfassungsmäßig!," *Arbeiter-Zeitung*, December 19, 1928, 3.

153. "Der Verfassungsgerichtshof gegen den Rechtsstaat," *Hausbesitzer-Zeitung*, January 1, 1929, 4.

154. "Das Mietengesetz ist verfassungsmäßig!," 3.

5.4 The Balanced Nature of Federalism-Related Judicial Review

As the previous section has shown, rights hardly played a role in the practice of judicial review. The Constitutional Court's narrow interpretation of the right to property and the equality clause could leave Social Democrats confident that the Court would not, on the basis of rights, interfere with their policy agenda. This section turns to the role of federalism in the Court's practice of judicial review. If my argument is correct, then it should have been reasonable to expect for Social Democrats that the Court's power to review whether federal statutes exceeded federal legislative powers would inflict costs on both conservatives and Social Democrats in equal measure. Unfortunately, it is difficult to say whether the Court's federalism-related practice of judicial review came with balanced costs across the political spectrum, because the Court decided in only four cases that federal statutes exceeded federal legislative powers. One of these cases, concerning the costs of hospital meals, was hardly important.[155] A 1932 judgment abolished, manifestly against Social Democrats' interests, a parliamentary commission overseeing the military.[156] Social Democrats also suffered a major defeat when the Court struck down the health insurance of farm and forestry workers in 1924.[157] However, the Court's 1928 decision on the Vienna street police showed that Social Democrats could both win and lose from the enforcement of constraints on federal legislative powers.[158] It made sense for Social Democrats to accept the occasional defeat in court, since they had a strong interest in protecting their control over the Vienna state government against federal encroachments.

The 1924 decision on the health insurance of farm and forestry workers strongly ran counter to Social-Democratic interests. This case concerned a 1921 federal statute extending health insurance to this group. The Salzburg state government challenged it on the ground that it exceeded federal powers.[159] The Court agreed with this view, since the relevant provisions on the federal distribution of powers at the time were still

155. Judgment of March 20, 1931 – VfSlg 1931, Nr. 1388.

156. Judgment of June 4, 1932 – VfSlg 1932, Nr. 1454.

157. Judgment of June 27, 1924 – VfSlg 1924, Nr. 328.

158. Judgment of June 19, 1928 – VfSlg 1928, Nr. 1030.

159. VfSlg 1924, Nr. 328. On this judgment, see Berchtold, *Verfassungsgeschichte*, 1:377.

contained in the 1867 Constitution of the monarchy. By agreement of the political parties, these provisions were to remain in place until 1925. Since the 1867 Constitution preceded the introduction of social insurance, it did not provide for any federal powers on the matter – as the Court remarked, "not so much because the 1867 Constitution wanted to allocate these important functions to the … member states, but rather because it did not want to put these matters into the power of the state or any state organ at all."[160] Thus, the federal provisions on the health insurance of farm and forestry workers were invalid – and so would have been any other social insurance schemes, if someone had challenged them.[161]

The Court's judgment outraged Social Democrats. The Court had mitigated the costs of its decision by stipulating that the judgment would only take effect six months later, but the National Council did not reach an agreement within this period. Hence, it fell to the states to pass their own laws on the matter – a shift of power farmers' representatives noted with satisfaction.[162] A patchwork of different rules ensued, and, as Social Democrats complained, agrarian interests in some states used the opportunity to cut down on health insurance. The *Arbeiter-Zeitung* called the Court's judgment "a frivolous decision that has already caused more harm now than could be made up for by hundred decisions."[163] When a new federal act was finally passed in 1928, the Social Democrat MP Pius Schneeberger, an official of the farm and forestry workers' union, complained that "the bourgeois majorities in the state parliaments … have torn the health insurance of farm and forestry workers into pieces, and have passed laws with the consequence that more than 100,000 agriculture and forestry workers in Austria have been deprived of their insurance by these state laws and more than 100,000 have had a miserable pseudo-insurance."[164] Yet, Social Democrats were not the only ones to dislike the judgment – the conservative federal government had defended the law in Court and

160. VfSlg 1924, Nr. 328, 95.

161. See Berchtold, *Verfassungsgeschichte*, 1:378.

162. "Landwirtschaftliche Krankenversicherung," *Der Bauernbündler*, August 2, 1924, 1.

163. "Fort mit der Schande der Einlage!," *Arbeiter-Zeitung*, June 19, 1925, 1.

164. Nationalrat, Stenographische Protokolle, III. Gesetzgebungsperiode, "53. Sitzung," July 18, 1928, 1474.

the minister of social affairs, Josef Resch, called the judgment an “error.”[165] Nevertheless, the conservative government later tried to perpetuate the power of the states over the health insurance of the farm and forestry workers during the 1925 constitutional reform.[166]

With the 1925 constitutional reform, the distribution of legislative powers between the federation and the states negotiated in 1920 finally came into effect. The health insurance judgment had reinforced Social Democrats’ desire to replace the old distribution of powers of the Empire.[167] While Social Democrats criticized the Constitutional Court for its judgment, they did not question the institution of judicial review, but pushed for the replacement of the outdated constitutional framework. In fact, both Social Democrats and conservatives further increased the Court’s powers to decide federalism-related conflicts in 1925: At the request of the federal government or a state government, the Court could now be asked to decide, in an abstract fashion, whether a law or an administrative measure fell into federal or state powers.[168] It was now effectively possible to review statutes, at least with regard to the federal distribution of powers, not only after, but also before their enactment. This extension of the Court’s powers was entirely uncontroversial during the negotiations on the 1925 constitutional reform.[169] It shows that Social Democrats did not expect to be merely at the receiving end of the Court’s federalism jurisprudence in the future.

On the basis of this new power, the Court handed Social Democrats an important political victory in 1928. The Social Democratic state government of Vienna had requested that the Court state that a federal bill on traffic police exceeded its powers: In general, policing was a federal matter, but with regard to traffic policing, the constitution only allowed the federal government to legislate on its “principles,” whereas the implementation was a matter for the states.[170] Yet, the federal government’s

165. “Darlegungen des Ministers,” *Arbeiter-Zeitung*, February 18, 1925, 3.

166. Klaus Berchtold, ed., *Die Verfassungsreform von 1925: Dokumente und Materialien zur Bundes-Verfassungsnovelle* (Wien, 1992), 43, 50.

167. Berchtold, *Verfassungsgeschichte*, 1:378; Berchtold, *Verfassungsreform 1925*, 25ff.

168. Berchtold, *Verfassungsgeschichte*, 1:415.

169. See the collection of documents on the reform in Berchtold, *Verfassungsreform 1925*.

170. Berchtold, *Verfassungsgeschichte*, 1:479.

bill put the federal police in charge of traffic policing. This, the Court ruled, was an unconstitutional excess of federal legislative powers.[171] For Social Democrats, this was a big success in the escalating power struggle between "Red Vienna" and the federal government.[172] "The Street Police belongs to Vienna!" the *Arbeiter-Zeitung* titled on its front page the day after the judgment.[173] Who controlled the police in Vienna had become a highly contentious question, at least since the violent unrest surrounding the fire of the Palace of Justice in July 1927. Social Democrats blamed the police president of Vienna, the conservative Johann Schober, for the death of protestors.[174] To Social Democrats, the events of July 1927 demonstrated the risks of federal, i.e., conservative control over the police. The Vienna state government was therefore keen on any inch of control over the police that it could get. As the Christian-Social *Reichspost* saw it, Social Democrats were engaging in "politics of revenge against the Vienna police."[175]

As the traffic police judgment shows, judicial review of federal laws was valuable to Social Democrats because it helped to fend off encroachments of the conservative-dominated legislature on their political stronghold. It is hard to overstate how important "Red Vienna" was to Social Democrats. The capital had become a state of its own in 1920, and reliably turned out Social Democratic majorities of 60 per cent and more of seats in the state legislature.[176] In contrast, Social Democrats had been excluded from the federal government since 1920 and performed poorly in the conservative rural states.[177] "Red Vienna" therefore had to be a model city where Social

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171. Judgment of June 22, 1928 – VfSlg 1928, Nr. 1030. Later, the Court struck down a Vienna state law on the traffic police at the request of the federal government (judgment of November 16, 1928 – VfSlg 1928, Nr. 1114), but this was merely because the state legislature had to wait for a federal statute on the "principles" of traffic policing, before it could legislate on the implementation. What ultimately mattered was that it fell within the powers of the Vienna state parliament to decide who was responsible for the traffic police. On the traffic police issue generally, see Berchtold, *Verfassungsgeschichte*, 1:479ff.

172. See Berchtold, *Verfassungsgeschichte*, 1:481.

173. "Die Straßenpolizei gehört Wien!," *Arbeiter-Zeitung*, June 23, 1928, 1.

174. Adam Wandruszka, "Das 'nationale Lager,'" in *Österreich, 1918-1938: Geschichte der Ersten Republik*, ed. Erika Weinzierl and Kurt Skalnik, vol. 1 (Graz, 1983), 301.

175. "Schwere Niederlage der Rachepolitik," *Reichspost*, November 22, 1928, 1; on the poisoned climate between the Social Democratic state government and the federal police, see also "Volk und Polizei in Wien," *Arbeiter-Zeitung*, September 7, 1929, 1.

176. Felix Czeike, "Wien," in *Österreich, 1918-1938: Geschichte der Ersten Republik*, ed. Erika Weinzierl and Kurt Skalnik, vol. 2 (Graz, 1983), 1059.

177. In the early years of the Republic, Social Democrats also achieved relatively strong results in Carinthia. See the regional distribution of votes in national elections in Manfred Scheuch, *Historischer*

Democrats could demonstrate the transformative potential of their interventionist policies on fields such as housing, taxation and education.[178]

The uneven distribution of Social Democrats' electoral base resulted in an ambivalent stance of the party towards federalism.[179] Social Democrats generally favoured centralism; in particular, they demanded federal powers over social policy, since a Social Democratic majority at the federal level could only be achieved with the help of a substantial number of rural votes.[180] In contrast, the idea of Social Democratic majorities in the deeply Catholic rural states was fanciful. But a Social Democratic majority at the federal level was only a possibility, whereas it was inconceivable that Social Democrats would be voted out of office in Vienna. In the words of the party's constitutional law expert Robert Danneberg in 1925,

> *"There are eight states in Austria where the others rule, among those several where a Social Democratic majority will not be possible in the foreseeable future; but there is a state where we already command a strong Social-Democratic majority today. Thus, it goes without saying that we … make use of the federalist system, since it already is a given, as much as possible to the advantage of this Social-Democratic state of Vienna."*[181]

Hence, Social Democrats had great interest in making sure that conservatives could not curb their hegemony in Vienna through encroachments of the federal government.

While it is not the purpose of this chapter to explain support for judicial review of *state* laws, it is worth noting that this power of the Court caused the Social Democrats of "Red Vienna" some frustration. In 1922, the Court struck down a Vienna state law on the employment conditions of janitors, a fairly large demographic in the

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Atlas Österreich (Wien, 2008), 234.

178. See Czeike, "Wien," 1048ff.; Jeffery, *Beyond Red Vienna*, 2f.; comprehensively Felix Czeike, *Wirtschafts- und Sozialpolitik der Gemeinde Wien (1919-1934)*, vol. 1 (Wien, 1958).

179. See Berchtold, *Verfassungsgeschichte*, 1:378, 396; Berchtold, *Verfassungsreform 1925*, 53.

180. Berchtold, *Verfassungsgeschichte*, 1:378.

181. *Protokoll des sozialdemokratischen Parteitages 1925* (Wien, 1925), 219; see also Berchtold, *Verfassungsreform 1925*, 75.

capital.[182] The law, which also stipulated a minimum wage, was found unconstitutional by the Court because it concerned a matter of private law, but private law fell within the scope of federal, not state powers. "What the social-political reaction cannot achieve in parliament, it seeks to achieve via back roads through obliging courts," the *Arbeiter-Zeitung* complained.[183] In January 1930, the Court invalidated a state law stipulating a "luxury tax" on expensive food and drink for falling outside the scope of state powers.[184] Robert Danneberg estimated that the judgment cost the state of Vienna 13 million Austrian Schilling in tax revenue,[185] about two per cent of the state's total revenue.[186] After an agreement between the state of Vienna and the federal government in January 1931, a federal law was passed to protect the tax against further judicial challenges until 1935.[187] In contrast, the few cases in which the Court struck down statutes of other, more conservatives states than Vienna were far less important.[188] Hence, while the Court refrained from curtailing social policies as violations of constitutional rights, it did not give such policies a free pass.

All in all, was it in Social Democrats' interest that the Constitutional Court could review whether federal statutes exceeded federal legislative powers? With only four cases in which the Court considered a federal statute an excess of federal legislative powers, it is hard to say whether its practice overall benefited Social Democrats.[189] Yet, the health insurance and street police judgments show that Social Democrats could both

182. Judgment of March 14, 1922 – VfSlg 1922, Nr. 90.

183. "Sozialpolitische Reaktion," *Arbeiter-Zeitung*, July 27, 1922, 1.

184. Judgment of January 22, 1930 – VfSlg 1929/1930, Nr. 1304.

185. Nationalrat, Stenographische Protokolle, IV. Gesetzgebungsperiode, "18. Sitzung," December 18, 1930, 107.

186. This follows from "Finanzen," Wien Geschichte Wiki, accessed March 12, 2021, https://www.geschichtewiki.wien.gv.at/Finanzen.

187. Law of March 27, 1931, BGBl. Nr. 105. See "Die Aufhebung vollzogen," *Arbeiter-Zeitung*, September 8, 1933, 2.

188. For example, when the Court invalidated Tyrolean state laws concerning a tourism levy, pest control and municipal elections (VfSlg 1925, Nr. 414; VfSlg 1927, Nr. 871; VfSlg 1929, Nr. 1230), none of these judgments were even reported in the *Arbeiter-Zeitung*.

189. Besides the Court's safeguarding of federalism though its judgments, there may have been an additional autolimitation effect; that is, the mere threat of its judgments may have convinced the federal and the state governments to abstain from violating the constitution. In this vein, the legal scholar Adolf Merkl claimed that judicial review exerted a strong "prophylactic effect" and considered it among the Court's main achievements that it had prevented violations of the rules of fiscal federalism, Adolf Merkl, "Der 'entpolitisierte' Verfassungsgerichtshof," *Der Österreichische Volkswirt* 22, no. 19 (1930): 509–11.

see an important social policy curtailed by the Court, and appeal to it to protect their control over their political stronghold. Probably the most compelling evidence that Social Democrats saw the value of the Court as an umpire of federalism is the fact that they supported the extension of its powers in precisely this respect with the 1925 constitutional reform. In the long run, Social Democrats may have preferred a more centralized state, but in the short run, they defended their control over the Vienna state government. To this end, the ability to challenge the federal legislature's transgressions in court was valuable.

5.5 The Influence of an Ideological Commitment and Expected Consequences on Social Democrats' Support for Judicial Review

According to my argument, the expected costs of judicial review matter for policy-makers' support for it. In the previous sections, we saw that there was little reason to expect that rights-based judicial review would be costly to Social Democrats, and that federalism-based judicial review could be expected to be an overall balanced affair. But how can we know that this was why Social Democrats supported judicial review? In other words, can it be ruled out that, if the Court had safeguarded rights more extensively, and had hence given rise to the concern that it would disproportionately interfere with Social Democratic policies, Social Democrats would still have supported judicial review out of an ideological commitment to it? In this section, I briefly discuss and reject this alternative explanation. Social Democrats cared about the costs of judicial review, and critical statements about rights-based judicial review suggest that they would have rejected judicial review had it safeguarded socio-economic rights such as the right to property.

An ideological commitment to judicial review might have stemmed from Social Democrats' "Austromarxist" ideology. Austromarxism can be situated at the centre-left of the socialist spectrum, as a current "between Reformism and Bolshevism."[190] It is associated with the periodical *Der Kampf*;[191] its most important thinkers included Karl Renner, Otto Bauer, Max Adler, and Rudolf Hilferding.[192] At least the most important institutional thinker of Austromarxism, Karl Renner, had developed a rather positive view of the state, including the courts, already during the Habsburg monarchy. The defining political issue of the late Austro-Hungarian Empire was the struggle of its constituent nations over rights and political autonomy. For Social Democrats, this conflict raised the question what stance a class-based party should take towards an issue that cut across the class cleavage. As long as the national question was unresolved, the

190. Norbert Leser, *Zwischen Reformismus und Bolschewismus: Der Austromarxismus als Theorie und Praxis* (Wien, 1968), 177.

191. Raimund Löw, "Theorie und Praxis des Austromarxismus," in *Der Austromarxismus, eine Autopsie: drei Studien*, by Raimund Löw, Siegfried Mattl, and Alfred Pfabigan (Frankfurt/Main, 1986), 11.

192. Leser, *Zwischen Reformismus und Bolschewismus*, 175.

working class remained fragmented and its mobilization stifled, since many of its members demanded redress of their national, and not only their class-related grievances.[193] Austromarxists, especially Renner, sought an institutional solution to this problem.[194] Renner suggested a quasi-federal structure of the Empire, with overlapping territorial units and legally recognized national communities. These units, including the national communities, would have been empowered to take legal action against each other, its members and the state as a whole.[195]

In this context, it was necessary to understand the state, including the courts, as a neutral arbiter among conflicting interests, rather than as a partisan instrument of certain interests. At least Renner held this view of the state as a neutral arbiter also with regard to class conflict.[196] It was also within the context of national conflict that Renner criticized any adulation of majority rule.[197] In fact, several authors have pointed out that Renner's view of the state was actually not Marxist at all.[198] However, other Austromarxists had a less favourable view of the state. The scholar Max Adler considered the state as necessarily a class state and democracy as the rule of the bourgeoisie.[199] The leading Social Democrat Otto Bauer had an instrumental view of the state, too,[200] but saw the possibility for the working class to use it for its ends.[201] He also argued that the state could emancipate itself from class influence at times when there was an equilibrium of power between the bourgeoisie and the working class – an

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193. See ibid., 254.

194. See ibid., 249ff.

195. Ibid., 251–52.

196. Hermann Böhm, "Theorie und Praxis des Austromarxismus bei Otto Bauer" (PhD thesis, University of Vienna, 1976), 165; Christoph Butterwegge, *Austromarximus und Staat: Politiktheorie und Praxis der österreichischen Sozialdemokratie zwischen den beiden Weltkriegen* (Marburg, 1991), 112.

197. Karl Renner, *Was ist die nationale Autonomie? Was ist soziale Verwaltung?* (Wien, 1913), 213.

198. Böhm, "Theorie und Praxis des Austromarxismus bei Otto Bauer," 167; Löw, "Theorie und Praxis des Austromarxismus," 62.

199. Manfred Matzka, ed., "Sozialdemokratie und Verfassung," in *Sozialdemokratie und Verfassung* (Wien, 1985), 15.

200. Böhm, "Theorie und Praxis des Austromarxismus bei Otto Bauer," 165.

201. Matzka, "Sozialdemokratie und Verfassung," 1985, 14.

equilibrium Bauer saw in place notably between 1919 and 1922.[202] As Kelsen pointed out, this was as a departure from the Marxist understanding of the state.[203]

Hence, Austrian Social Democrats, most importantly Karl Renner, had moved away significantly from a position of categorical opposition to state institutions. This suggests that they did not reject judicial review as a matter of principle, though it does not follow that they were ideologically committed to judicial review, regardless of its political costs. As discussed above, Social Democrats were quite reluctant to establish judicial review of federal laws in 1920. The lack of an ideological commitment is also suggested by the harsh criticism that their party newspaper levelled against the Court after inconvenient decisions. After the Court had, for the first time, invalidated a statute – a Vienna state law on janitors – the *Arbeiter-Zeitung* complained that efforts were under way "to elevate the Constitutional Court into a censor of legislation." The proponents of a wide interpretation of the Court's powers were motivated by "animosity against democracy"; they tried to create the impression that the "parliament of the Republic, because it is sovereign and is not supervised by an emperor and an upper house, has to be put under a different supervision … by the Constitutional Court."[204]

This broadside against judicial review was probably written by Friedrich Austerlitz, the *Arbeiter-Zeitung's* editor, who also sat on the Court's bench between 1919 and 1930.[205] In 1925, Austerlitz argued in the Social Democratic periodical *Der Kampf* that the "both wilful and wrong" judgment on the health insurance of farm and forestry workers could be an opportunity "to think about whether it was right to allow challenges against statutes and their annulment at all" – considerations that would be useful "because the Constitutional Court is making efforts to extend its review powers far beyond the intention of Article 140 of the constitution [the provision stipulating the Court's judicial review powers] and in all seriousness seeks to act as a censor of the National Council."[206]

202. Hermann Böhm, *Die Tragödie des Austromarxismus am Beispiel von Otto Bauer: ein Beitrag zur Geschichte des österreichischen Sozialismus* (Frankfurt/Main, 2000), 71–75.

203. Hans Kelsen, "Otto Bauers politische Theorien," *Der Kampf* 17, no. 2 (1924): 50–56; on this, see Böhm, *Die Tragödie*, 80–82.

204. "War die Hausbesorgerordnung verfassungswidrig?," *Arbeiter-Zeitung*, June 16, 1922, 3.

205. On the periods of tenure, see Neschwara, "Österreichs Verfassungsgerichtshof," 446, 449.

206. Friedrich Austerlitz, "Verfassungsrevision," *Der Kampf* 18, no. 5 (1925): 162–63.

With Social Democrats lacking a strong ideological commitment to judicial review, would they have changed their calculus about the utility of judicial review if the Court had been engaging in a more extensive practice of rights-based judicial review? Again, Austerlitz' writings provide a clue. In the 1925 article cited above, Austerlitz focused on a critique of rights-based review. Originally, Austerlitz claimed, the intended purpose of judicial review had only been to decide federalism-related conflicts. "The constitution wanted to limit the constitutional review of statutes to the question whether the statute exceeds the powers of the state organ concerned; certainly nothing else was intended," Austerlitz argued.[207] Yet, the fact that the Court had reviewed the Land Transfer Act with regard to the 1867 Bill of Rights demonstrated that the Court now exceeded its mandate to scrutinize "the legislation of the National Council, of which one would think that it is passed in a sovereign fashion; thus, the Constitutional Court supervises the body representing the people."[208] This, Austerlitz argued, entailed dangers for progressive legislation:

> *"It would not bear witness of precaution [to argue] that the Constitutional Court wants to demolish a law that is maybe ready to be dismantled anyway. Because tomorrow it could be the turn of a truly social law, whose essence it is not rarely to restrict individual rights to the benefit of common needs and that therefore often has to set limits on the freedom and the use of property."*[209]

Austerlitz reiterated this criticism in 1930, after the judgments on the Rent Act and Vienna's luxury food tax. Pointing to Germany, where the debate on judicial review had just peaked, Austerlitz claimed that "all modern and enlightened [German] legal scholars take the view that such [rights-based] judicial review causes far more damage than it brings advantages."[210] Besides the use of rights as yardstick for judicial review, Austerlitz took issue with the Court's power of *ex officio* review – the power to trigger

207. Ibid., 164; on Austerlitz' criticism of the Court, see also Öhlinger, "The Genesis," 215; Öhlinger, "Verfassung – Demokratie – Verfassungsgerichtsbarkeit," 183ff.

208. Austerlitz, "Verfassungsrevision," 164–65.

209. Ibid., 165.

210. Friedrich Austerlitz, "Der Verfassungsgerichtshof prüft," *Der Kampf* 23, no. 3 (1930): 117.

judicial review from within a pending case that Kelsen had suggested in 1920.[211] In Austerlitz' eyes, the Vienna luxury food tax case showed that the Court exercised this power excessively. *Ex officio* review was only allowed if necessary to decide the pending case, but the original food tax case could easily have been decided without reviewing the constitutionality of the underlying statute.[212]

Austerlitz, who was known for his polemical style, was certainly not representative of Austrian Social Democrats. But scepticism of the reactionary potential of rights-based review went even beyond Marxists. To some extent, it was also shared by Hans Kelsen, who, while not a Social Democrat himself, was probably the legal scholar whose view counted most among Social Democrats. Kelsen was not opposed to rights-based judicial review as such, but, if only because of his positivist vantage point, he rejected a conception of fundamental rights that offered large interpretive leeway to judges and served as a back door for natural law ideas.[213] In 1928, Kelsen warned that a constitutional court could "become the exponent of entirely different political forces than those represented in parliament" if its yardstick of review included vague terms such as "justice," "freedom" or "equality."[214] This warning was also a comment on the resurgence of natural law ideas, as well as the enthusiasm for judicial review and the new interpretation of the equality clause as a ban on arbitrariness among German legal thinkers. Kelsen would undoubtedly have been similarly sceptical of such developments in Austria, and Austrian Social Democrats would probably have taken such scepticism as seriously as German Social Democrats.

Overall, some Social Democrats, especially Karl Renner, may have inherited beliefs from the Habsburg Empire that predisposed them favourably towards the idea that a court could review the constitutionality of legislation. These beliefs may have contributed to the adoption of judicial review in 1920. But it is hard to see a deep-seated

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211. Ibid., 116–18.

212. Ibid., 118ff.

213. See Shu-Perng Hwang, "Die Grundrechtsbindung des Gesetzgebers aus der Sicht Hans Kelsens," *Der Staat* 54 (2015): 223–25.

214. Hans Kelsen, "Wesen und Entwicklung der Staatsgerichtsbarkeit," in *Wesen und Entwicklung der Staatsgerichtsbarkeit. Überprüfung von Verwaltungsakten durch die ordentlichen Gerichte: Verhandlungen der Tagung der Deutschen Staatsrechtslehrer zu Wien am 23. und 24. April 1928* (Berlin, 1929), 69–70; see also Öhlinger, "The Genesis," 217.

commitment to judicial review, rather than an instrumental relationship, arise from Renner's ideas about the need for an umpire in a multi-national federation. Moreover, other Social Democrats had a less favourable view of the state, and as this implies, the courts. The themes of Austerlitz' criticism of the Court after it took inconvenient decisions – the Court as an "upper house" or a "censor of parliament" – are familiar from the German and Norwegian cases. This, as well as the fact that Social Democrats were reluctant to establish judicial review of federal laws suggests that their support for this power did not stem from an ideological commitment to it. Austerlitz' concerns about the possible obstructive effects of rights-based judicial review even at the marginal level at which the Court exercised it also suggests that Social Democrats would have seen a greater extent of rights-based review as threatening higher costs of judicial review. Considering that Austrian Social Democrats were sensitive to the costs of judicial review, as well as the opposition of their German counterparts, it is likely that Austrian Social Democrats would have rejected judicial review had it safeguarded socio-economic rights more extensively.

5.6 The Influence of Political Appointments to the Court

The Austrian Constitutional Court brought a key innovation in the institutional design of judicial review: It was exercised not by all courts, but by a specialized, separate court. This detachment of judicial review from the regular judiciary was accompanied by direct political control over appointments to the Court. Formally, the 1920 Constitution divided appointments powers between the National Council and the state chamber;[215] in practice, the major parties concluded informal agreements that allocated nomination rights for most seats on the Court according to the parties' seat share in the National Council. The remaining seats, including the president's and vice-president's, were earmarked as "neutral" and nominated by the government.[216] This institutional design, one might argue, is sufficient to explain why Austrian Social Democrats supported judicial review, as it allowed them to put party loyalists on the Court who kept the costs of judicial review low. In a similar vein, the legal scholar Leo Wittmayer, who sympathized with Social Democrats,[217] wrote in 1927 that "the deeper reason" why the parties entrusted the Court with ever-growing powers seemed that its composition, "almost man to a man, on the basis of the calculation of every single membership, enjoy[ed] the proportionally highest trust or the lowest distrust of both large parties in the National Council."[218]

If the politicized appointments to the Court allowed the parties to disentangle judicial review from the structure of constitutional norms and their prevailing interpretations, my argument does not hold. According to my argument, the Court's restraint regarding constitutional rights with socio-economic relevance should not merely have been due to the presence of judges who favoured Social Democratic policies, but to some extent a product of the legal orthodoxy of the time. In this section, I argue that the institutional design of judicial review contributed to Social Democrats' support for it. Social Democrats distrusted the career judiciary too much to entrust it

215. Art. 147 (2) of the 1920 Constitution.

216. Thomas Zavadil, "Die Parteienvereinbarungen über den Verfassungsgerichtshof und die Bundes-Verfassungsnovelle 1929," in *Geschichte und Recht: Festschrift für Gerald Stourzh zum 70. Geburtstag*, ed. Thomas Angerer, Birgitta Bader-Zaar, and Margarete Grandner (Wien, 1999), 342–48.

217. Stolleis, *Public Law*, 152.

218. Wittmayer, "Die Überprüfung der Verfassungsmäßigkeit von Gesetzen als Problem der Rechtsannäherung," 65–66.

with judicial review. But this was not a sufficient condition, since Social Democratic judges never were in the majority on the Court. Instead, they had to form coalitions with legal elites who may have sympathized with the Social Democratic Party, but who did not shy away from inflicting costs on it. This suggests that it was to some extent elites' legal views, not their partisan sympathies that explain their restrictive stance on socio-economic rights.

Social Democrats would hardly have accepted the exercise of judicial review by the regular courts, or even by a separate court, without political control over judicial appointments.[219] Social Democrats considered the judiciary as too biased against the working class to allow this. During the late monarchy, the relationship between the labour movement and the judiciary had been improving, since the judiciary no longer considered the labour movement primarily a "group of seditious traitors, but a, maybe even the strongest integrating factor within the monarchy as a whole."[220] In 1919, after the Empire had perished, Karl Renner acknowledged its judiciary, "with the exception of the criminal courts and focussing on the civil courts," as "the part of our public authorities that was relatively the best. This is why the revolution did not primarily take over the judiciary."[221] In 1924, in a speech in the National Council, Friedrich Austerlitz also found the Austrian judiciary *relatively* good – it "is free from some degenerations and excesses exhibited by the judiciary of other countries and … distinguishes itself favourably especially from the Prussian judiciary and now also, if you will, from the Bavarian."[222]

Despite this favourable comparison, Social Democrats still distrusted the career judiciary. Former members of the German-Nationalist student corporations were over-represented among professional judges.[223] The party's 1926 manifesto demanded

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219. See Schmitz, "Constitutional Court," 262: "Renner had … reservations about professional judges."

220. Helmut Konrad, "Recht, Justiz und Arbeiterbewegung bis zum Ersten Weltkrieg," in *Justiz und Zeitgeschichte: Symposionsbeiträge, 1976-1993*, ed. Erika Weinzierl (Wien, 1976), 42.

221. *Protokoll (Protocoll) der Verhandlungen des Parteitages der sozialdemokratischen Arbeiterpartei Deutschösterreichs. Abgehalten in Wien vom 31. Oktober bis zum 3. November 1919*, 262.

222. Nationalrat, Stenographische Protokolle, II. Gesetzgebungsperiode, "29. Sitzung," May 6, 1924, 661.

223. Gernot Stimmer, *Eliten in Österreich 1848-1970*, vol. 2 (Wien, 1997), 883; a tendency of Austrian judges towards pan-German nationalism is also noted by Gerhard Botz, "Zum Verhältnis von

popular or parliamentary elections of all judges,[224] a demand already voiced before World War I.[225] Social Democrats complained about class justice,[226] a criticism that intensified after the Schattendorf trial of July 1927. The acquittal of right-wing paramilitaries after killing two people and injuring five during an attack on a meeting of Social Democrats triggered riots in Vienna; it is widely seen as a turning point in the history of the First Republic.[227] At the 1927 party congress, Karl Renner found it "entirely out of question that the Austrian people permanently tolerates the state in which our judiciary has ended up."[228]

However, the ability to influence the Court's composition was insufficient to ensure that its jurisprudence aligned with Social Democratic interests. As mentioned above, the major political parties negotiated informal agreements on appointments to the Court. These agreements allocated some, but not all seats on the Court to the parties proportionately to their representation in the National Council.[229] Beside these party-affiliated judges, the agreements explicitly flagged some judges as "neutral" – effectively judges who had distinguished themselves by their legal expertise and were known to have no strong ties to the political parties.[230] The Court's president and vice-president were supposed to be neutral, too.[231] The 1921 agreement – the most favourable one to Social Democrats under the 1920 Constitution – allocated three judges to Social Democrats, four judges to Christian Socials, one to the pan-German nationalists and

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Politik und Rechtswesen in der Ersten Republik. Symposium 1976: Justiz und Zeitgeschichte," in *Justiz und Zeitgeschichte: Symposionsbeiträge, 1976-1993*, ed. Erika Weinzierl (Wien, 1976), 111.

224. "Das Linzer Programm," November 3, 1926, https://www.marxists.org/deutsch/geschichte/oesterreich/spoe/1926/linzerprog.htm.

225. See Otto Lang, "Die Volkswahl der Richter," *Der Kampf* 7, no. 2 (1913): 76.

226. For example, see the records of the 1924 party congress, *Protokoll des sozialdemokratischen Parteitages 1924* (Wien, 1924), 24ff.

227. Löw, "Theorie und Praxis des Austromarxismus," 35. As has been pointed out before, not professional judges, but the lay jury was to blame for the acquittal in the Schattendorf case, illustrating that lay participation in the judiciary – advocated by Social Democrats since the 19th century – came with its own problems. See Olechowski, *Hans Kelsen*, 462.

228. Minutes of the party congress from October 29, to November 1, 1927, reproduced in Alfred Pfabigan, ed., *Vision und Wirklichkeit: ein Lesebuch zum Austromarxismus* (Wien, 1989), 176.

229. See Zavadil, "Parteienvereinbarungen."

230. See ibid., 347ff.

231. Ibid., 356.

marked the remaining four judges (Hans Kelsen, Friedrich Engel, Robert Neumann-Ettenreich and Julius Ofner) as “neutral.”[232]

With all the 12 ordinary members of the Court present, a majority required either seven ordinary members, or in the case of a tie, the decisive vote of the chair – either the Court’s president or the vice-president.[233] Since the Court’s vice-president was free to sit on the bench and vote when he was not in the chair, a seven to six majority could also be achieved.[234] In any case, if both the conservative and the Social Democratic Party-affiliated judges voted in a strictly partisan way, they could only build a majority with the support of at least some of the neutral judges.[235] Hence, by vesting judicial review into the Constitutional Court, Social Democrats avoided to empower the ordinary courts, but they still depended on the support of the legal elites that were appointed as “neutral” judges: law professors such as Hans Kelsen, but also high judges such as Robert Neumann-Ettenreich or Paul Vittorelli, the Court’s president until 1930.

Partisan effects probably also existed among the “neutral” judges. Their precise extent would have to be assessed in a quantitative analysis. Some neutral judges clearly had political sympathies: Hans Kelsen, for example, sympathized with Social Democracy and was friendly with its leaders.[236] But a look at the voting behaviour in a few important cases already shows that Social Democrats could not rely on the neutral judges to avoid adverse decisions: The health insurance of the farm and forestry workers was struck down by a coalition of conservative and “neutral” judges, including Kelsen, with the two Social Democratic judges voting to uphold it.[237] A Vienna state law on janitors was struck down with all neutral, all conservative and even two Social

232. Ibid., 346–47.

233. See §29 of the 1921 Constitutional Court Act, BGBl. Nr. 364, §31 of the 1925 and 1930 Acts, BGBl. Nr. 454 and Nr. 127.

234. See §3 (5) of the Acts cited above.

235. While there is no data on the precise extent of partisan effects on the Court, there is little doubt that party-affiliated judges tended to vote in line with their party interests when push came to shove. See Olechowski, *Hans Kelsen*, 436.

236. Tamara Ehs, “Demokratie und politische Bildung,” in *Hans Kelsen: eine politikwissenschaftliche Einführung*, ed. Tamara Ehs (Baden-Baden, 2009), 105; Olechowski, Hans Kelsen, 184.

237. Minutes of the Court’s deliberations, June 27, 1924, ÖStA AdR, ... box 72, file G 2/24, 24.

Democratic votes against the sole vote of the Social Democrat Friedrich Austerlitz.[238] Following the judgment on the federal statute on the street police, a Vienna state statute on the same subject was struck down as well, against all Social Democratic and one Christian Social vote, by a coalition of conservatives and all neutral judges.[239] Hence, even if some of the "neutral" judges had sympathies for Social Democrats, these were not strong enough to reliably deliver outcomes favourable to Social Democrats. Moreover, this suggests that the behaviour of the "neutral" judges can to some extent be explained by their legal views.

The "neutral" judges were also pivotal in the 1928 judgment that rejected all claims that the Rent Act violated constitutional rights and maintained a restrictive interpretation of the right to property and the equality clause. In this case, four of the five Christian-Social judges voted to strike down the Act against a majority composed of all Social Democratic judges, the pan-German national judge, and all "neutral" judges, including the Court's vice-president Adolf Menzel.[240] Given their willingness to vote against Social Democratic interests in other cases, it is plausible that the "neutral" judges in this case voted for the draft judgment of vice-president Menzel because it corresponded with their sincere legal preferences. Illustrating their weight, the "neutral" judge Friedrich Engel voted to uphold the Act, although, as he said in the deliberations on the judgment, he considered it a violation of the right to freely dispose of real estate. Yet, he saw himself bound by precedent.[241]

The unwillingness of the neutral judges to support expansive interpretations of constitutional rights was probably rooted in the positivist attitudes of Austrian legal elites. The Court's judgment on the Rent Act has been seen as illustrative of these attitudes.[242] Austrian legal positivism went beyond Hans Kelsen and the Vienna school

238. Minutes of the Court's deliberations, March 14, 1922, ÖStA AdR, ... box 72, file G 1/22, 18.

239. Minutes of the Court's deliberations, November 16, 1928, ÖStA AdR, ... box 72, file G 3/28, fol. 16.

240. Minutes of the Court's deliberations, December 13, 1928, ÖStA AdR, ... box 72, file G 4/28, fol. 30.

241. ÖStA AdR, ... box 72, file G 4/28, fol. 30.

242. Öhlinger, "The Genesis," 218. With a different view Wiederin, who sees specifically Kelsen's reluctance regarding the right to property as motivated by "concern for the young democracy that has to perish if there is no room for the agenda of the Austro-Marxists," Wiederin,

of legal positivism. It cut across a wide spectrum of political attitudes, including "so-called Austromarxists and Austrofascists, members of the conservative bourgeoisie, and left-liberal social reformers."[243] The prevalence of legal positivism in Austria can be traced back to the Habsburg empire, especially to the desire to isolate legal thinking from the moral demands of the Catholic church, but also from the conflicting political demands and cultural assumptions of the multi-ethnic Empire.[244] Austrian administrative law developed an approach to legal interpretation in which "vagueness in the statutary language is to be understood as lending discretion to the authority applying the statute."[245] Constitutional interpretation continued this approach.[246]

Consistent with the argument that the prevalence of legal positivism explains the Court's reluctance to embrace expansive rights interpretations, the Austrian courts refused to allow the discretionary revaluation of claims affected by inflation – a stark contrast to the activist defence of creditor interests by the German courts.[247] The Austrian Supreme Court justified its commitment to the "a Crown is a Crown"-principle with the lesser extent of inflation in Austria compared to Germany; in Austria, the Crown was still worth 1/14,000 of its pre-war value.[248] Yet, it is plausible that Austrian judges did not revaluate because their positivist views made them reluctant to assert themselves vis-a-vis the legislature. As the German jurist Oscar Mügel, an advocate of revaluation, commented, "Austrian jurists are proud of their Supreme Court's loyalty to the statute; I for my part prefer the stance that the German Supreme Court … has taken."[249]

"Verfassungsgerichtshof," 305.

243. Stolleis, *Public Law,* 152.

244. See ibid., 155.

245. Öhlinger, "The Genesis," 217.

246. Ibid.

247. See Arthur Nussbaum, *Das Geld in Theorie und Praxis des deutschen und ausländischen Rechts* (Tübingen, 1925), 136–37; Alois Zeiler, *Meine Mitarbeit* (Braunschweig, 1938), 153; Feldman, *Great Disorder*, 812.

248. Zeiler, *Meine Mitarbeit*, 153.

249. Oscar Mügel, "Aufwertungsfragen," *Zeitschrift für die gesamte Staatswissenschaft* 80 (1926): 69. The victims of inflation also tried to enlist the Constitutional Court in their struggle for revaluation. Their rather hapless challenge against the "Schumpeter Decree" of 1919 was dismissed by the Court, leaving an enraged audience in the courtroom. See "Die Entscheidungsgründe," *Neue Freie Presse*, December 23, 1924, 3.

Hence, Leo Wittmayer's claim that "the deeper reason" why politicians entrusted the Constitutional Court with an increasing range of powers was the proportional representation of parties on its bench deserves some nuance: it was not the only reason. Social Democrats would not have supported the exercise of judicial review by the ordinary courts. But on the Constitutional Court, Social Democrats and conservatives more or less cancelled each other out, making the "neutral" judges pivotal. Although some "neutral" judges sympathized with Social Democracy, they often voted against Social Democratic (and also conservative) interests. This suggests that the "neutrals" not only followed partisan preferences. Instead, the sincere legal views of the "neutrals" probably influenced their decisions, and this probably also explains their reluctance to embrace expansive interpretations of the right to property and the equality clause. Thus, the political attitudes of the Court's judges are not sufficient to explain why its judgments were not disproportionately costly to Social Democrats and why they hence supported judicial review. Instead, in line with my theoretical expectations, the structure of legal norms and interpretations in which judicial review is embedded has to be taken into account for explaining Social Democrats' support for it.

5.7 The Conservative Court-Curbing of 1929

Until 1928, the Constitutional Court was sometimes harshly criticized, but its independence and its powers were never seriously questioned. As discussed above, its powers were even extended further in 1925. However, in 1929, conservatives pushed through a constitutional reform that, among others, ended the tenure of all sitting judges – who had been appointed for life – by January 1930 and increased executive powers over appointments to the Court. Justified as "depoliticization" by its conservative proponents, characterized as "repoliticization" by its opponents and in the later literature,[250] the 1929 reform raises doubts on whether my argument correctly predicts Austria as a case where independent judicial review was not only adopted, but also sustained as long as the political system was competitive. If a government changes the rules to replace the sitting judges with politically more convenient ones, independent judicial review is arguably out of equilibrium. Yet, I argue that the 1929 attack on the Court's independence can be explained, within the framework of my argument, with the demise of democracy. Social Democrats voted for the 1929 reform – their support was necessary to reach the required 2/3-majority in the National Council. But they would hardly have done so had they not faced a by then dominant political right, parts of which threatened violence.

The 1929 constitutional reform strengthened executive influence over appointments to the Court at the expense of the National Council and the state chamber. Under the rules of 1920, the National Council appointed six of the Court's 12 ordinary members, three of its six substitute members, as well as the Court's president and vice-president. The state chamber appointed the other half of the Court's (substitute) members.[251] Under the rules adopted in 1929, the president appointed all judges on the basis of nominations by the National Council, the state chamber and the federal government. The two former bodies had to submit three nominations for each vacant seat, among whom the president could choose, at least in theory. The National Council

250. For example, Merkl, "Der 'entpolitisierte' Verfassungsgerichtshof," 510; Tamara Ehs, "Das politische Moment der Verfassungsgerichtsbarkeit," in *Hans Kelsens politische Philosophie*, ed. Elif Özmen (Tübingen, 2017), 138; Olechowski, *Hans Kelsen*, 472.

251. Art. 147 (3) of the 1920 Constitution, see Zavadil, "Parteienvereinbarungen," 339.

now nominated three of the Court's 12 members and two of the six substitute members, the state chamber nominated three members and one substitute member. The remaining six members and three substitute members as well as the Court's president and vice-president were nominated by the federal government.[252] Hence, the influence of the National Council over appointments had formally been more than halved, and the federal government was now able to install a majority in the Court, given that the president or vice-president cast the decisive vote in case of a tie.[253] Moreover, the tenure of the sitting judges, originally appointed for life,[254] was terminated by January 1930.[255]

Additionally, supposedly to "depoliticize" the Court, its members were now required to hold a law degree and have ten years of experience in a relevant position. They were also not allowed to be members of the Court and members of government or parliament at the same time.[256] Hence, cases such as those of the Social Democrat Friedrich Austerlitz, who did not have a law degree and was simultaneously member of parliament, were now impossible. Finally, a third way of triggering judicial review, besides challenges brought by the federal and state governments and the Court's power of *ex officio* review was established: The Supreme Court and the Administrative Court could now refer statutes to the Constitutional Court for review.[257] Initially, conservatives had also tried to make complaints to the Court about violations of individual rights by the administration more difficult. Plaintiffs were supposed to take action in the Administrative Court first, and the Administrative Court could refer the question whether the rights of the plaintiff had been violated to the Constitutional Court.[258] Yet, Social Democrats successfully opposed this proposal.[259]

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252. Art. 147 (2) of the Constitution after the 1929 revision, see ibid., 342.

253. See §29 of the 1921 Law on the Constitutional Court, BGBl. Nr. 364.

254. Art. 147 (3) of the 1920 Constitution.

255. §25 (1) of the Act of December 7, 1929, BGBl. Nr. 393, see Zavadil, "Parteienvereinbarungen," 364.

256. Art. 147 (2)–(4) of the constitution after the 1929 revision, see Neschwara, "Kelsen als Verfassungsrichter," 376.

257. Art. 140 (1) of the constitution after the 1929 revision.

258. Art. 131a, 144 of the Constitutional Reform Bill, Nationalrat, III. Gesetzgebungsperiode, Nr. 382 der Beilagen.

259. See Berchtold, *Verfassungsgeschichte*, 1:563.

There is widespread agreement that Christian Socials' main motive for demanding changes to the Court's mode of appointment and ending the tenure of its current bench was their dissatisfaction with some of its decisions, including the 1928 judgment on the Vienna street police and, above all, the Court's jurisprudence on the so-called marriage dispensations.[260] Under Austrian civil law, it was impossible for Catholics to obtain a divorce; at best, couples could enter a so-called "separation from bed and board." However, some state governments, especially the Vienna state government, issued dispensations that allowed spouses in "separation from bed and board" to marry again. The courts often annulled the marriages entered into on the basis of a dispensation with the argument that these dispensations were illegal.[261] In this conflict over the demarcation of administrative and judicial powers, the Court, with a sharply divided bench, sided with the administration, arguing that the courts could not question the legality of the dispensations.[262] Christian Socials, enraged about the practice of marriage dispensations and the Court's support for it, saw – quite rightly – Hans Kelsen as the main force behind the Court's jurisprudence. Kelsen was the subject of vicious, often anti-Semitic attacks in the conservative press.[263] When, in 1929, plans for a constitutional reform came up, Christian Socials saw an opportunity to obtain a more favourable composition of the court and change its position on the marriage dispensations.[264]

Interestingly, after the 1929 reform, conservatives did not extend their control over appointments to the Court as far as the new constitutional rules would have allowed them. Instead, they stuck with a practice of informal agreements among the major parties that had already been in place since 1919. As discussed above, these agreements – a "real constitution"[265] – earmarked some of the seats on the Court as

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260. Berchtold, *Die Verfassungsreform von 1929*, 1:17; Berchtold, *Verfassungsgeschichte*, 1:476ff.; Neschwara, "Kelsen als Verfassungsrichter," 374ff; compelling evidence for the importance of the marriage dispensations issue in Thomas Zavadil, "Die Ausschaltung des Verfassungsgerichtshofs 1933" (Diploma thesis, University of Vienna, 1997), 49.

261. Neschwara, "Kelsen als Verfassungsrichter," 362–66.

262. Judgment of November 5, 1927, VflSlg 1927, Nr. 878, see also ibid., 366–68.

263. Ibid., 368, 382.

264. Ibid., 375–76.

265. Zavadil, "Parteienvereinbarungen," 342.

“partisan”; they were divided among the major parties roughly proportionally to their seat share in the National Council. The remaining seats, including the Court’s presidency and vice-presidency, were earmarked as “neutral” and nominations were made by the government, although it did not formally have a role in appointments before 1929.[266] This happened on the basis of the understanding that the government would nominate judges who had not been active in party politics, but had outstanding legal expertise.[267] Before the tenure of the sitting judges was terminated in January 1930, Christian Socials negotiated a new agreement with the other political parties on the judgeships to be nominated by the National Council and the state chamber. As before, this agreement allocated the seats for which the National Council and the state chamber had nominating powers proportionally to the major parties, although the conservative majority could well have taken them all.[268] Thus, conservatives refrained from exploiting the new constitutional rules as much as they could have.

The 1929 reform left the Court a good deal more conservative than it had been before, but did not make independent judicial review disappear from the Austrian political system. “Who still wants to take these courts … seriously?” the Social-Democratic *Arbeiter-Zeitung* asked about both the Constitutional Court and the Administrative Court, which had been “depoliticized,” too.[269] Yet, the Constitutional Court did not become a mere pawn of the conservative government. Conservatives achieved the main aim of their reform when the newly appointed Court, now without Kelsen, overturned its jurisprudence on the marriage dispensations in 1930.[270] But the new Court rejected challenges against taxes raised by the Social Democratic government of “Red Vienna”;[271] it also asserted itself when it invalidated the antisemitic by-laws of the University of Vienna.[272] During the break-down of democracy in 1933, the Christian-Social Dollfuß government worried that the Court might strike down the

266. Ibid.

267. See ibid., 350.

268. A record of this agreement has not been found so far, but its contents have been reconstructed in Zavadil, “Die Ausschaltung des Verfassungsgerichtshofs 1933,” 49.

269. “Ein hohes Gericht kann immer auch anders,” *Arbeiter-Zeitung*, May 25, 1930, 4.

270. Judgment of July 7, 1930, VfSlg 1930, Nr. 1341.

271. Judgments of May 5, 1930, VfSlg 1930, Nr. 1322, and October 15, 1931, VfSlg 1931, Nr. 1426.

emergency decrees that it used to entrench its powers. To prevent this, the government passed a decree that allowed judges nominated by the National Council and the state chamber to sit only as long as all these judges were in office; at the same time, it persuaded judges to resign, leaving the Court incapacitated.[273] As these efforts show, even the "depoliticized" post-1929 Court was still a force to reckon with.

Nevertheless, the 1929 reform, especially the removal of the Court's sitting judges, aimed at aligning the Court more closely with the preferences of the right-wing government. The fact that conservatives succeeded with these efforts, even with the votes of Social Democrats, is best explained by the wider context of the 1929 constitutional reform. Among others, this reform also increased presidential powers at the expense of the National Council and added a corporatist component to the state chamber.[274] It was a right-wing effort to renegotiate the 1920 Constitution under more advantageous conditions; conditions that were present because the Social Democrats were in an increasingly weak position of power after the riots in July 1927.[275] In fact, the First Republic already entered an authoritarian stage in 1929.[276] The constitutional reform took place in the shadow of the threat of violence by the right-wing paramilitary Heimwehr movement.[277] Conservative leaders declared that they sought a reform of the state by constitutional means, but this was an offer Social Democrats could hardly refuse. As Berchtold writes, they "had fought a successful defensive battle" over the constitutional reform, having extracted concessions from conservatives on issues such as electoral law and the constitutional status of Vienna.[278] Yet, it remained a defensive battle. The Social Democrat MP Arnold Eisler, a (substitute) member of the Court

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272. Judgment of June 20, 1931, VfSlg 1931, Nr. 1397. See also Heller, *Verfassungsgerichtshof*, 243–46.

273. See Berchtold, *Verfassungsgeschichte*, 1:750–55; Heller, *Verfassungsgerichtshof*, 255–71; and in detail Zavadil, "Die Ausschaltung des Verfassungsgerichtshofs 1933."

274. Brauneder, *Verfassungsgeschichte*, 213ff.

275. See Gerhard Botz, "Der '15. Juli 1927', seine Ursachen und Folgen," in *Österreich 1927 bis 1938: Protokoll des Symposiums in Wien, 23. bis 28. Oktober 1972* (München, 1973), 39ff.

276. Oliver Rathkolb, "Demokratiegeschichte Österreichs im europäischen Kontext," in *Die österreichische Demokratie im Vergleich*, ed. Ludger Helms and David Wineroither (Baden-Baden, 2012), 66.

277. Berchtold, *Verfassungsgeschichte*, 1:560f.; see also Felix Kreissler, *Von der Revolution zur Annexion* (Wien, 1970), 163f.; Olechowski, *Hans Kelsen*, 471.

278. Berchtold, *Verfassungsgeschichte*, 1:569, 562ff.

between 1919 and 1930,[279] claimed that Social Democrats had only agreed to the Court's reform because they had hoped that it would end the right-wing agitation against it.[280] In other words, the right-wing capacity to mobilize against constitutional institutions was so large that Social Democrats merely tried to save what could be saved.

Hence, in 1929, conservatives had gained the upper hand over Social Democrats to an extent that a scope condition for my argument – the existence of a democracy – was no longer present in a crucial respect: Backed by the threat of violence of the *Heimwehr* movement, conservatives could force Social Democrats to accept the constitutional reform, including the reform of judicial appointments, as well as the removal of the sitting judges. In this situation, conservatives could unilaterally free themselves of constitutional constraints without having to expect that Social Democrats would be able to retaliate under democratic conditions. Absent such a threat of retaliation, neither insurance theory nor my extension expects that a political actor will unnecessarily tie its own hands. Thus, the "depoliticization" of the Court in 1929 does not contradict my expectations, but is in line with them.

279. Neschwara, "Österreichs Reichsgericht," 448–49.

280. Nationalrat, Stenographische Protokolle, III. Gesetzgebungsperiode, "122. Sitzung," March 12, 1930, 3497.

5.8 Conclusion

In this chapter, I argued that a necessary condition for political support of judicial review in the First Austrian Republic was its almost complete confinement to adjudicating conflicts over the distribution of powers between the federal and the state legislatures. This is in line with my theoretical expectation that judicial review more easily finds political support where it primarily safeguards federalism-related constitutional norms, rather than rights. Due to this logic, Austrian Social Democrats had different expectations about the costs of judicial review than left-wing politicians in Norway and Germany. In the latter two countries, judicial review mainly safeguarded rights, including rights with socio-economic relevance, such as the right to property or the equality clause. On the political left, this raised concerns that judicial review would disproportionately interfere with progressive economic policies. Austrian Social Democrats hardly had any such concerns. The framers of the 1920 Constitution conceived of judicial review as an instrument of adjudicating conflicts between the federal and the state governments. The later practice of judicial review, in which rights hardly played a role, stayed in line with these expectations. As an instrument of enforcing constraints on the federal legislature independently of substantive policy preferences, judicial review was valuable both to conservatives and Social Democrats. The Constitutional Court's independence was respected until 1929, when Austria's descent into authoritarianism had already begun.

When the 1920 Constitution was drafted, Austrian Social Democrats actually were more reluctant towards centralized judicial review of federal legislation than German Social Democrats had been in Weimar in 1919 – the latter proposed it, the former only accepted it. To be precise, the proposals under discussion were not exactly identical: In Weimar, the Social Democrat Hugo Sinzheimer co-sponsored a motion to give parliamentary minorities the right to request judicial review by the State Court. In Austria, the question was whether the state governments should be allowed to challenge federal statutes. But the trigger mechanism left aside, German Social Democrats were more inclined at the moment of constitution-making to have federal laws reviewed by a specialized court than Austrian Social Democrats. The cause of these differences lies in the lack of clarity in Weimar about what conflicts judicial review would play a role in. German Social Democrats did not imagine finding themselves at the receiving end of this institution. In 1919/1920 Austria, it was expected that judicial review cases would arise from the antagonism between the predominantly conservative state governments and a federal government, possibly under Social Democratic control. On the basis of these expectations, Social Democrats were eager to have a means of constraining the conservative states, but sceptical of means for the conservative states to constrain the federal legislature.

The greatest advocates for judicial review of federal laws in 1919/1920 came from conservative-led states. But it would go too far to claim that Social Democrats, by accepting their demands, accepted an institution that they expected to inflict important political costs on them. The powers of the Constitutional Court were discussed very little. Karl Renner's Chancellery had included judicial review of federal laws into the drafts of the constitution even before conservative states explicitly demanded it – an unusual move if the question had been seen as truly crucial. Instead, Social Democrats had reason to believe that not only conservative-led state governments, but also Social Democratic state governments could benefit from the possibility of challenging federal laws. In 1919/1920, the separate state of Vienna was already in the making. The political hegemony of Social Democrats in the capital turned it into the part of Austria where they could go furthest with the implementation of their policy agenda. At the same time, this made it tempting for a federal legislature controlled by conservative majorities to encroach on the powers of Vienna. Hence, it was a realistic scenario for Social Democrats that the ability to challenge federal laws was in their interests, too.

In 1919/1920, the framers of the constitution hardly expected that the Court would safeguard constitutional rights against the federal legislature. The later practice of the Court did not bring surprises in this regard. No federal statute, and no statute concerning a social policy, was annulled because it violated a constitutional right. In its jurisprudence, the Court was explicitly deferential to the legislature in its interpretation of rights whose obstructive potential had caused concerns among German Social Democrats – the right to property and the equality clause. Hence, Austrian Social

Democrats had little reason to fear the Court's rights jurisprudence. However, Friedrich Austerlitz' criticism of the Court, Kelsen's scepticism towards vague rights provisions, and the German case suggest that Austrian Social Democrats would have opposed judicial review had the Court protected socio-economic rights more extensively. Given the ambitious urban development programme and the highly targeted taxes Social Democrats implemented in Vienna, it is hard to imagine that they would have accepted it if the Constitutional Court had embraced the interpretation of the right to property of the German Supreme Court or the interpretation of the equality clause en vogue among German legal scholars.

The Court's practice of judicial review was largely confined to conflicts between the federal government and the state governments. If Social Democrats had initially been sceptical of enabling the Court to review federal laws, it proved to be a valuable instrument for conservatives and Social Democrats alike. The uneven geographical distribution of Social Democratic votes pitted the capital, under Social Democratic hegemony, against a rest of the Republic dominated by political Catholicism. Conservative majorities controlled the federal government from 1920 onwards. In this situation, the possibility to challenge federal legislation was a valuable instrument to Social Democrats to prevent encroachments on their control over the capital. While the Court also inflicted defeats on Social Democrats, its decision on the Vienna street police shows that the costs of judicial review of legislation could be expected to be balanced across the political spectrum.

As in the other case studies, three alternative explanations were considered and rejected: First, was judicial review supported so easily because the U.S. Supreme Court's *Lochner* jurisprudence, often cited as a cautionary tale in Norway and Germany, was not known in Austria? Since it was known, this can be ruled out. Second, did Austrian Social Democrats hold ideological beliefs that made them accept judicial review no matter its costs? Admittedly, Karl Renner had a positive view of courts as arbiters of political conflict already in the monarchy, but other Social Democrats did not. As discussed above, Renner also was not enthusiastic about judicial review of federal laws. Hence, as a sufficient explanation, a "pro-judicial" ideology of Social

Democrats seems unlikely. Finally, did Social Democrats support judicial review because they could appoint some judges to the Court? This can hardly have been sufficient, since a group of "neutral" judges with an ostensibly not entirely partisan behaviour were pivotal on the Court. The decisions of these "neutral" judges are better explained by their sincere legal interpretations, rooted in the prevailing legal positivism. It was a political achievement of Austrian legal positivism that it gave rise to a form of judicial review palatable for Social Democracy, thanks to its reluctance to embrace broad interpretations of constitutional rights that could have obstructed social policies.[281]

The institutional characteristics and the practice of judicial review in post-World War II Austria exhibit certain continuities with the inter-war period. Unlike West Germany, post-war Austria did not adopt a new constitution, but re-enacted the 1920 Constitution, remarkably, in the version of the contested 1929 reform. Formally, the essential features of the Constitutional Court and judicial review therefore remained unchanged, including the appointment rules that had been the result of the 1929 court-curbing. Only in 1975 were parliamentary minorities of at least a third of MPs empowered to refer a statute to the Court for review, and individuals were enabled to challenge the constitutionality of statutes and decrees directly before the Court.[282]

In quantitative terms, the Court's activity strongly increased after World War II. In the 13 years from 1947 to 1960 alone, the Court reviewed 213 statutes (and annulled 92),[283] seven times as many as the 30 statutes reviewed in the 13 years between 1920 and 1933. However, the Court stuck to its positivist approach of constitutional interpretation.[284] It also continued to apply fundamental rights cautiously for a long time.[285] Of all statutes annulled between 1946 and 1980, only five per cent were

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281. In a similar vein, Öhlinger argues that the legalistic heritage of the Habsburg Empire allowed judicial review to coexist with parliamentary supremacy, see Öhlinger, "The Genesis," 219.

282. Anton Pelinka and Manfried Welan, *Austria revisited: Demokratie und Verfassung in Österreich* (Wien, 2001), 72; Öhlinger, "Verfassung – Demokratie – Verfassungsgerichtsbarkeit," 184.

283. Welan, "Der Verfassungsgerichtshof," 217.

284. Walter Antoniolli, "Die österreichische Verfassungsgerichtsbarkeit 1945-1969," *Archiv des öffentlichen Rechts* 94, no. 4 (1969): 592.

285. Tamara Ehs, "Der VfGH als politischer Akteur: Konsequenzen eines Judikaturwandels?," *Österreichische Zeitschrift für Politikwissenschaft* 44, no. 2 (2015): 19.

annulled because of a violation of fundamental rights.[286] It was only in the 1980s that the Court developed a more extensive fundamental rights jurisprudence.[287]

As the extension of its powers in 1975 indicates, the Court has been a largely uncontested institution in post-World War II Austria.[288] This may partly have been due to a political environment that has not been favourable to the Court's significance, but to stable political support for it. At the federal level, Social Democrats and Christian Socials governed in a grand coalition between 1947 and 1966. Together, the two major parties held between 144 and 161 of the 165 seats in the National Council during this period.[289] These generous majorities entailed an enormous proliferation of constitutional amendments, both within the text of the constitution itself, and by passing many ordinary statutes as constitutional amendments. In 2001, more than 100 amendments to the constitution itself, 250 separate constitutional laws, 500 provisions with constitutional rank in ordinary statutes, as well as 220 such provisions in international treaties were counted.[290] The purpose of this amendment-mania – "unique within Europe"[291] – has also been to protect the outcomes of political negotiations against judicial review by giving them constitutional rank.[292] Since this made judicial review of many important policies impossible, the salience of the remaining policies under review should have been lower. Yet, the time of hegemonic grand coalitions in Austria has passed decades ago. The Constitutional Court has remained a stable institution also amid the more contested politics that have since followed.

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286. Theo Öhlinger, "Die Grundrechte in Östereich: ein systematischer Überblick," *Europäische Grundrechte-Zeitschrift* 9 (1982): 244; as cited in Ehs, "Der VfGH als politischer Akteur," 19.

287. Ehs, "Der VfGH als politischer Akteur," 19; Öhlinger, "The Genesis," 220.

288. For the 1945–1969 period, Antoniolli, "Die österreichische Verfassungsgerichtsbarkeit 1945-1969," 582.

289. See the election results in Bruckmüller, *Parlamentarismus in Österreich*, 186ff.

290. Pelinka and Welan, *Austria revisited*, 71.

291. Ibid.

292. Ibid., 72.

Chapter Six. Conclusion

The left-wing critics of judicial review in inter-war Norway, Weimar Germany and the First Austrian Republic shared the same favourite figure of speech: To them, judicial review established a "judicial upper chamber." Yet, this idea resonated far more with left-wing politicians in Norway and Germany than with Austrian Social Democrats. The former had concerns that judicial review was an instrument to defend the interests of the well-off against parliamentary majorities. The latter perceived the Austrian Constitutional Court not as an upper house, but as an umpire, giving Social Democrats and conservatives alike a chance at their day in court. These different expectations and the conclusions left-wing politicians drew from them are explained partly by my legal norms theory of support for judicial review. This theory implies that federalism-based judicial review is more likely to find political support than rights-based judicial review. In this conclusion, I summarize my theory and its explanatory power for the three case studies, discuss how well it travels beyond these cases – to inter-war Europe, the inter-war U.S., and into the post-World War II world, consider additional theoretical insights emerging from the case studies, and avenues for further research.

6.1 Summary of the Theory

Theoretically, this thesis asked under what conditions judicial review is likely to find political support. Its starting point was the assertion of insurance theory that politicians accept the constraints judicial review imposes on their leeway in return for the opportunity to challenge the policies of their opponents in the future, giving them a possibility to cut their losses during periods of opposition. Hence, the key variable that leads politicians to support judicial review is the expectation of alternation in government. Yet, this requires judicial review to provide actors across the political spectrum with equal opportunities to challenge policies of their opponents. The possibility of a slant of judicial review that makes it more difficult for a part of the political spectrum to succeed with challenges against their opponents is either not considered by insurance theory, or such a slant is expected to self-equilibrate. In contrast, I argue that the possibility of such a slant needs to be accounted for, and that it tends to arise more easily where judicial review primarily safeguards policy-interactive rather than policy-indifferent legal provisions. Value-laden, policy-interactive provisions allow politicians to form expectations about the utility of judicial review on the basis of their policy preferences, whereas policy-indifferent provisions leave them behind a veil of ignorance as to the utility of judicial review conditional on their policy preferences. Hence, where judicial review is based on policy-interactive provisions, politicians will more easily expect that judicial review will not be a neutral arbiter, but a spoke in the wheels of their policy agenda, and will therefore reject it.

In practice, the most important policy-interactive and policy-indifferent provisions are, on the one hand, rights, and, on the other hand, the constitutional norms demarcating the distribution of powers between the states and the federal government in federations. Where judicial review primarily safeguards rights, politicians can form expectations about its utility on the basis of whether they expect the policies preferred by themselves and their opponents to fall within the interval of permissible policies stipulated by these rights. If they expect this to be the case more rarely with regard to their own policies than with regard to the policies of their opponents, they will reject judicial review – even if they expect to be in opposition as often as in government. In contrast, conflict over the constitutional norms distributing legislative powers between federal and state governments arises independently of where policy-makers' policy preferences are situated, simply by virtue of them being different from the preferences of their opponents. Hence, whether it is attractive for a political actor to challenge a policy in court depends primarily on whether a political actor expects to be in power at the level of government whose legislative powers are in question: A slant of judicial review against a part of the political spectrum does not arise and electoral alternation alone is sufficient to maintain judicial review in equilibrium. Thus, I argue that widespread support for, and hence an equilibrium of independent judicial review is more likely where it mainly safeguards the constitutional norms distributing legislative powers in a federation than where it primarily safeguards rights.

6.2 Summary of the Case Studies

Empirically, this argument helps to explain differences in support for judicial review in three European democracies of the inter-war period. In Norway, Labour and to a lesser extent socially progressive Liberals sought to abolish judicial review or the rights it safeguarded between 1917 and 1937. Similarly, Weimar Germany saw strong opposition against plans to establish centralized judicial review of federal statutes arise in the Social Democratic Party in 1929. In contrast, Austrian Social Democrats supported the establishment of a constitutional court with this power in 1920 and did not voice fundamental opposition to it throughout the First Republic. Hence, the Austrian case does not follow the pattern of increasing opposition to judicial review towards the left end of the political spectrum in Norway and Germany.

As the case studies show, a necessary cause of the left-wing opposition to judicial review in Norway and Germany was that the practice of and the scholarly debate on judicial review focused on safeguarding a set of constitutional rights that disadvantaged a left-wing policy agenda. In Norway, almost all judicial review cases concerned the right to property and the ban on retroactive legislation; in Germany, the set of rights safeguarded by judicial review was somewhat broader, but cases concerning the right to property and the development of the equality clause into a constraint on the legislature were particularly salient. In Norway, the assertiveness of the Supreme Court vis-à-vis the legislature decreased over the inter-war period. This contributed to the end of Social Democrats' campaign against judicial review. In contrast, in Germany, courts and legal scholars increasingly tended to assert constitutional boundaries on parliament from the mid-1920s on; scepticism towards centralized judicial review therefore arose within the Social Democratic Party in the late 1920s.

In Austria, judicial review had very little to do with rights, neither in the minds of the framers of the 1920 constitution, nor in the practice of the newly established Constitutional Court. From the beginning, the function of judicial review was firmly concentrated on demarcating the legislative spheres of the state legislatures and the federal legislature. Initially, it was primarily conservatives who demanded that the Constitutional Court should not only review the constitutionality of state, but also of federal legislation. However, both conservatives and Social Democrats became interested in an instrument to contain a federal legislature controlled by their opponents and thereby preserve the legislative powers of the states where they were dominant themselves. To be sure, the Austrian case had further characteristics that probably facilitated support for judicial review across the political spectrum: The conversion of the Habsburg Imperial Court into the Constitutional Court provided a tried and tested institution to exercise the new judicial review powers. Social Democrats would not have accepted the exercise of judicial review by the distrusted ordinary courts. Yet, Social Democratic support for judicial review was only possible because they did not expect the Court to put them at a disadvantage compared to conservatives; this, in turn, was partly due to the fact that the Court refrained from giving conservative interests the opportunity to challenge progressive legislation on the basis of constitutional rights. The conservative government's assault on the Court's independence in 1929 can be explained with its ability to force through a constitutional reform in the shadow of violence.

Additionally, I discussed and rejected three alternative explanations for the left-wing stance towards judicial review. First, were judicial attitudes, and not the constitutional norms safeguarded by judicial review the key driver of an anti-left slant of judicial review and of the expectation of this slant by left-wing politicians? In other words, did an attitudinal, not a legal model, underpin both judicial behaviour and expectations about their behaviour? There is no doubt that political attitudes influenced judges' interpretations of constitutional norms. Unsurprisingly, therefore, especially German Social Democrats were concerned about judicial appointments; conversely, the mechanism of political appointments to the Austrian Constitutional Court probably resulted in a court that was friendlier towards Social Democrats than the average ordinary court. But as the case studies show, judges sometimes decided against their partisan interests or followed precedent. The pivotal judges on the Austrian Constitutional Court were the "neutral" ones, not those affiliated with a political party.

In Germany, we saw the new interpretation of the equality clause as binding the legislature seep from legal scholarship into court decisions. Hence, we cannot reduce the costs of judicial review to judges' political attitudes. For the left-wing opponents of judicial review, it therefore made sense to look at least as closely at the legal norms safeguarded by the courts and discussed by legal scholars as at the judges who applied them.

Second, I considered whether an ideological commitment rather than the expected consequences of judicial review is a better explanation of the left-wing stance towards it. Especially for the socialist opponents of judicial review it is plausible that the Marxist idea of the state, and hence the courts, as a committee of the ruling class as well as an attachment to the ideal of popular sovereignty, gave rise to an aversion against judicial review regardless of whether it imposed constraints on a leftist policy agenda or was advantageous to it. Again, there is little doubt that ideological preconceptions biased left-wing parties in Norway and Germany against judicial review. Yet, in Norway and Germany, the trajectory of opposition towards judicial review is difficult to explain in the absence of a practice of judicial review that disadvantaged the left or discussions in legal scholarship that could plausibly be expected to give rise to such a disadvantage. In the Austrian case, some Social Democrats may have inherited a friendlier view of the courts from the monarchy, but it is questionable how widespread such a view was; even if it was, it did not call for a blanket empowerment of the courts.

Finally, I discussed whether, in Norway and Germany, expectations about the obstructive effects of judicial review on progressive social policies were based on the U.S. experience rather than domestic experiences. There is no question that the U.S. Supreme Court's *Lochner* jurisprudence, and in the Norwegian case, the conflict over the New Deal were omnipresent in the discussion about judicial review and served as a cautionary tale of its reactionary potential. Yet, both left-wing opponents and supporters of judicial review saw the *Lochner* jurisprudence as a negative example, and many opponents of judicial review acknowledged that even though they were afraid of judicial obstructionism, it was unlikely to reach *Lochner* levels. Thus, the U.S. example did not by itself provide a compelling case against judicial review, and it was appreciated with a degree of nuance that makes it unlikely that expectations about the effects of judicial review were derived from it to a relevant extent. Hence, it seems more convincing to see *Lochner* as illustration of the negative effects of judicial review rather than as an important influence on the attitudes towards judicial review. In Austria, the fact that the *Lochner* experience was known rules out the possibility that the absence of this knowledge facilitated the adoption of judicial review.

6.3 Generalizability of the Argument

How well does the argument made here travel beyond the three cases studied, first, with regard to some other European democracies of the inter-war period? In particular, Ireland and Czechoslovakia run counter to my theoretical argument, since they adopted judicial review despite the absence of federalism. The case of Czechoslovakia is especially intriguing, given the country's relatively strong Social Democratic Party.[1] Yet, it should be noted that the judicial review powers of the Czechoslovak Constitutional Court were not designed in a very counter-majoritarian way; in particular, only the majorities of the two essentially identically composed chambers of parliament, a few high courts and the parliament of the autonomous region of Sub-Carpathian Rus (which was never established)[2] could request the judicial review of statutes.[3] The Court also remained rather inactive: Overall, it reviewed one single statute and declared it unconstitutional in July 1939 (when Czechoslovakia was already under German occupation);[4] a second judicial review case in the same year remained undecided.[5] The Irish case, while incorrectly predicted by my argument, is at least consistent with the left-right pattern of judicial review that my cases studies show: The Irish 1937 constitution was created under the strong influence of Catholic natural law ideas in a

1. For election results, see Richard Crampton and Benjamin Crampton, *Atlas of Eastern Europe in the Twentieth Century* (London, 1996), 57ff.

2. Osterkamp, *Verfassungsgerichtsbarkeit*, 16.

3. Ibid., 12f., 16.

4. As pointed out by Olechowski, “The beginnings of constitutional justice in Europe,” 88.

5. Ibid., 2, 153ff.

political system with a very weak Labour Party.[6] In practice, judicial review only became politically important from the 1960s onwards.[7]

The most interesting positive case of the inter-war period is the Second Spanish Republic, whose 1931 constitution vested the power of judicial review into a constitutional court.[8] Given the strong and radical Spanish left, the creation of this institution is remarkable. Yet, consistently with my argument, this happened in a quasi-federal context that provided some regional autonomy. In practice, most judicial review cases concerned conflicts over the powers of the autonomous region of Catalonia.[9] Furthermore, the composition of the Court was very political – only eight of its 25 members were, at least implicitly, required to be lawyers; its members included sitting MPs and members elected by the regions.[10] Finally, to protect important left-wing projects such as land reform from judicial review, all laws passed before the act on the Court's procedure came into effect were exempted from review.[11]

Some negative cases – where judicial review was discussed, but not adopted – seem consistent with my argument, too. In Denmark, a proposal in the context of an envisaged constitutional reform in 1937/1938 implied the recognition of judicial review, but also allowed the legislature to exclude a statute from judicial review. This proposal was rejected in the Constitutional Committee since "in the [Social Democratic and Social Liberal] government's opinion this went too far in favour of judicial review, whereas in the Conservatives' opinion this went too far in favour of the exclusion of judicial review."[12] In Sweden, judicial review seems to have been debated to some extent in the inter-war period, with more favourable views among conservatives and

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6. On the weakness of Irish Labour, see Tom Garvin, "Nationalist Elites, Irish Voters and Irish Political Development: A Comparative Perspective," *Economic and Social Review* 8, no. 3 (1977): 179f.; on the influence of Catholic natural law on the constitution Thomas P. Murray, *Contesting Economic and Social Rights in Ireland: Constitution, State and Society, 1848–2016* (Cambridge, UK, 2016), 130ff.

7. O'Tuama, "Judicial Review under the Irish Constitution," 13.

8. Boucsein, *Verfassungssicherung und Verfassungsgerichtsbarkeit in der zweiten spanischen Republik*, 190.

9. See ibid., 254–88.

10. See ibid., 199, 221.

11. Ibid., 235–38.

12. Carl Rasting, "Det Danske Forfatningsudkast af 1938," *Tidsskrift for Rettsvitenskap*, 1938, 545.

more sceptical views among Social Democrats. However, Social Democrats apparently were more concerned about the non-binding "judicial preview" of bills exercised by the Law Council than about judicial review.[13] In France, mainly right-wing legal scholars and advocates of institutional reform supported judicial review in the 1920s and 1930s, but these proposals did not get very far.[14]

In Switzerland, the rejection of judicial review of federal laws in 1939 was apparently not driven by a left-wing aversion against rights-based judicial review. In a referendum in January 1939, judicial review of federal laws was rejected with 71 per cent of the votes.[15] As this figure suggests, opposition to judicial review went far beyond the left. The case for judicial review was made in the context of the emergency measures of the 1930s; the opponents of judicial review primarily argued that the legislature needed leeway to steer the country through a time of crisis.[16] Interestingly, one of the main proponents of judicial review, the legal scholar Zaccaria Giacometti, suggested to exclude the equality clause, highly contested in Germany, as yardstick of judicial review.[17] Even the rather bourgeois Swiss broadsheet *Neue Zürcher Zeitung* recommended to vote against judicial review in the 1939 referendum – also with reference to the U.S. experience: "The old gentlemen of the Supreme Court … have stalled the entire social legislation of the United States for decades," the newspaper wrote. "Precisely the experience in the United States, where some aspects, in contrast to us, militate in favour of constitutional review (for example, the lack of a referendum), is not encouraging at all."[18]

This brings us to the case of the inter-war U.S. The conflict over the U.S. Supreme Court's interference with the New Deal is hard to explain with my theory, at least if we take Roosevelt's court-packing plan, although it remained unimplemented, as

13. See Barry Holmström, "The Judicialization of Politics in Sweden," *International Political Science Review / Revue Internationale de Science Politique* 15, no. 2 (1994): 157; on "judicial preview," see also Karl-Göran Algotsson, "Lagrådets Politiska Betydelse," *Svensk Juristtidning*, 2009, 165–76.

14. See Maulin, "Réforme de l'état et contrôle de constitutionalité des lois sous la IIIe république: Charles Benoist et Jacques Bardoux," 58–60, 80–81; Milet, "La controverse de 1925 sur l'exception d'inconstitutionnalité. Genèse d'un débat."

15. Küffer, *Eine liberale Kritik am Notrecht*, 120.

16. See ibid., 117–20.

17. Ibid., 117.

18. "Ja und Nein," *Neue Zürcher Zeitung*, January 20, 1939, evening edition.

indication that judicial review was out of equilibrium. Key rulings that struck down New Deal policies and provoked Roosevelt's plan did not concern rights, but limits on federal legislative powers under the Commerce Clause.[19] There are several possible reasons why judicial review became contentious over matters of federalism in the inter-war U.S., but not in Europe. One such reason may lie in stronger attitudinal effects on judicial behaviour in the U.S. Where such effects are strong, the structure of the prevailing interpretations of constitutional norms in judicial doctrine and scholarship, crucial to my argument, will matter less. Consistently with this idea, it was the fact that the Supreme Court split in crucial cases that convinced Roosevelt to seek changes to the Court's composition rather than pursue other approaches, such as a constitutional amendment, to protect the New Deal from judicial review.[20]

Another reason why my argument works poorly in the U.S. may lie in the different functions of judicial review in European and U.S. federalism. Switzerland never extended the scope of judicial review to include federal legislation; in Austria and Germany, major stages of welfare state development preceded the adoption of judicial review. Their constitutions therefore already provided the federal government with the requisite powers when the courts began to police them.[21] In contrast, the U.S. constitution predates welfare state development; it did not originally provide the federal government with the powers that proponents of welfare state expansion later wanted to give it. Given the constitution's age and the difficulty of amending it, there is a stronger need for judicial review to function as an instrument of transforming the distribution of powers between the federal and state level in the U.S., than for example in Austria and Germany. Hence, political actors in favour of an expansion of federal powers can incur far higher costs from federalism-related judicial review in the U.S. than in European federations.

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19. William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (Oxford, 1995), 89.

20. Ibid., 92, 100.

21. A case in point is the judgment of the Austrian Constitutional Court on the health insurance of farm and forestry workers described in the previous chapter. The Court could only strike down the insurance as an excess of federal powers because the framers of the 1920 Constitution disagreed on the division of legislative powers between the federal government and the states and therefore left the provisions from the monarchy in place, until the issue was resolved in 1925.

After World War II, rights-based judicial review, whether exercised by domestic or international courts, has been adopted and politically sustained in many countries. However, I would argue that the great wave of the institutional proliferation of judicial review and the increase in its political relevance only began in the 1970s. Several factors, such as the experience of authoritarianism or changing political attitudes within a judiciary recruited from wider social strata, may explain why rights-based judicial review has found widespread political support since then – also on the political left.[22] Moreover, the set of rights safeguarded by judicial review has become much broader than it was in the inter-war cases studied here, making judicial review valuable to a larger part of the political spectrum. In wealthy countries, this broadening of the scope of judicial review coincided – or was driven by – a shift towards post-materialist values and a weakening of collective political identities.[23] A higher number of social groups with distinct political interests reinforces the co-ordination problems attached to resisting transgressions of the constitution and hence increases the demand for judicial review as a co-ordination device. While, for example, working class voters in the inter-war period may have seen the legislative implementation of a socialist policy agenda as the key instrument to the advancement of their interests, voters' more complex identities today will align less well with large political movements and increase their worries that future legislative majorities will ride roughshod over their interests. Consistent with this development, the literature on "exogenous support" for judicial independence and judicial authority argues that the wider public can support the courts in conflicts with political elites.[24]

The rise of left-wing support for judicial review after World War II is unsurprising, given that the left has embraced post-materialist causes. Before the rise of post-materialism, the left in some Western-European countries was still sceptical

22. See Carlo Guarnieri, "Courts as an Instrument of Horizontal Accountability: The Case of Latin Europe," in *Democracy and the Rule of Law*, ed. José María Maravall and Adam Przeworski (Cambridge, UK, 2003), 236.

23. On postmaterialism, see, a. o., Ronald Inglehart, *The Silent Revolution: Changing Values and Political Styles among Western Publics* (Princeton, 1971); on the influence of post-materialism on demand for judicial review, see *Erdos, Delegating Rights Protection*.

24. For example, see Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge, UK, 2005).

towards judicial review: In France, left-wing parties (but also parts of the centre-right) rejected the adoption of judicial review with the 1946 constitution;[25] in Italy, Communist Party leader Togliatti still called the Constitutional Court a “bizarre” institution at the making of the constitution in 1947.[26] Yet, Communists and Socialists soon turned into strong advocates of the Court’s institutionalisation.[27] This points to a further factor that may have helped the left’s acceptance of judicial review in the three Western-European countries that (re-)adopted judicial review shortly after World War II – Austria, Germany and Italy: In all these countries, Socialists or Social Democrats either were in opposition or governed only together with the centre-right at least until 1966, that is, the dawn of post-materialism. Of course, episodes of left-wing dissatisfaction with the courts also occurred later – for example, consider the conflict between the Socialist government in France and the Constitutional Council over its nationalization policies in the 1980s.[28] But most of these episodes hardly affected left-wing support for judicial review fundamentally.

6.4 Further Theoretical Insights and Avenues for Future Research

What additional theoretical insights emerge from the case studies? First, the possibility that judicial review aggravates a crisis that may diminish the returns from future rounds of the “democracy game.” Insurance theory assumes that the returns from a given round of the game do not depend on the outcome of the previous round. In other words, it assumes that the constraints imposed on a political actor by judicial review today do not matter for what happens tomorrow. However, as the case studies from the crisis-ridden inter-war period show, political actors may fear that the inability to implement a policy today will diminish the future prosperity of their country.[29] For example, this is how we

25. Gordon Wright, *The Reshaping of French Democracy* (London, 1950), 136.

26. Maria Cicconetti et al., eds., *La Costituzione della Repubblica: Nei Lavori Preparatori della Assemblea Costituente*, vol. 1 (Rome, 1970), 330; as quoted and translated in Volcansek, “Bargaining Constitutional Design,” 286.

27. Volcansek, “Bargaining Constitutional Design,” 288.

28. See Stone Sweet, *Birth of Judicial Politics in France*, 159–63.

29. A similar point – the probability of being in power in the future can be influenced by the acceptance of judicial constraints in the present, possibly making this unattractive – is made by Brinks and Blass, *DNA of Constitutional Justice*, 54.

can interpret the concerns of politicians and bureaucrats in Weimar Germany that judicial review would interfere with issues such as revaluation and World War I reparations. These concerns were not about a slant of judicial review that would put one side of the political spectrum permanently at a disadvantage – the main concern among Social Democrats – but about one-off decisions that could do lasting damage. In such a situation, it is less attractive to accept constraints on political discretion today in exchange against judicial insurance in a less prosperous future.

A second insight is the need to distinguish between "policy insurance" and "system insurance." Insurance theory does not distinguish as to what sort of costs political actors seek judicial safeguards against. They may seek to prevent adverse policies, for example, higher taxation, or they may seek to protect the democratic system from attacks, for example through the passage of unfair electoral rules. Politicians may find it difficult to appreciate the value of this latter "system insurance," since both the scenario of a democratic break-down and the utility of judicial review therein are uncertain. Social Democratic opponents of judicial review in Weimar Germany were sceptical about the role that the judiciary could play in averting a democratic break-down, whereas the Norwegian Supreme Court justice Thomas Bonnevie had high hopes in the ability of abstract judicial review to stop Labour from establishing a dictatorship. Given the high uncertainty of the value of judicial review as "system insurance," it is unlikely that political actors will accept constraints on their policy-making discretion today in exchange against nothing else than "system insurance," and not also "policy insurance" for themselves – unless they consider the break-down of democracy in the near future a realistic possibility.

The interaction of these two aspects can influence the political sustainability of judicial review further. First, there is a possibility of anti-judicial review coalitions composed of actors with different misgivings: Some may reject judicial review because they perceive a persistent slant against their policy agenda, others may reject it because they see themselves at a critical juncture where even sporadic judicial constraints today can have long-run costs in the future. There is a whiff of such a coalition in the German case, where bureaucrats concerned about their policy-making legroom and some Social

Democrats, expecting a fundamental bias of judicial review against their agenda, both were sceptical of judicial review, although they did not draw the same conclusions. Second, in a situation where a country faces, for example, an economic crisis as well as a related threat to its democracy by a rising authoritarian challenger party, pro-democratic forces themselves, rather than the authoritarian challenger may demolish judicial safeguards. This may be because the pro-democratic forces believe that the judiciary will hamper the implementation of policies they deem necessary to resolve the crisis. With regard to the constitutional framework in general, this "something's got to give" view was voiced among Norwegian Liberals in the 1930s. In contrast, the willingness of threatened pro-democratic actors to demolish judicial safeguards in order to gain policy-making discretion will be lower where the autocratic challengers already occupy some positions of power and the judiciary can contain small-scale encroachments on the democratic system undertaken from these positions.

Further research could elaborate these ideas and put them to the test. Empirically, the first half of the 20th century deserves more attention by students of judicial politics, not only as a formative period that has left ideational and institutional legacies in the post-World War II world, but also as a period that offers ample material for, among others, studying the role of courts in democratization and democratic break-down, judicial bias and the contestation of judicial authority. Much of the Europe-centred literature on judicial politics has been written essentially against the backdrop of the "golden years" of judicial empowerment between the 1970s and the early 2000s and may therefore be overly optimistic about the chances of sustaining judicial authority. Given the development of recent years, it is unsurprising that scholars of democracy have increasingly returned to the study of the pre-World War II period. In the study of judicial politics, too, this period could yield further insights.

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