

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

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

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

- 1 The most recent Canadian example of this literature is Katherine E. Swinton, *The Supreme Court and Canadian Federalism* (Toronto: Carswell, 1990), 8. Most general theories of judicial review are not without serious problems. See Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge: Harvard University Press, 1988); or Joel Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought," *Osgoode Hall Law Journal* 27 (1989), 123-93.
- 2 Kenneth C. Wheare, *Federal Government* (4th ed.; New York: Oxford University Press, 1964), 60-61. He writes that federal high courts "have exhibited a considerable impartiality in the exercise of their function as interpreters of the division of powers." See also Ivo D. Duchacek, *Comparative Federalism* (New York: Holt, Rinehart and Winston, 1970), 258.

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Courts A Comparative And Political Analysis

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