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The Law of Lawmaking:

Positive Political Theory in Comparative Public Law

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> *"Laws are like sausages. It is better not to see them being made."*[2]
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> *"If this republic is remembered in the distant history of law, it is likely to be for its enduring adherence to legitimate institutions and processes, not for its perfection of unique principles of justice and certainly not for the rationality of its laws."*
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> Hans Linde *Due Process of Lawmaking* (1975-1976).

Our topic is the law of lawmaking—both in the legislature and in the executive. We compare the United States with South Africa, Germany, and the European Union to show how fundamental differences in institutional design shape the nature of "due process of lawmaking".[3] Presidential and parliamentary forms of government frame the lawmaking process, and fundamental constitutional structures and values influence constitutional court review. We use positive political theory to explain some of the observed differences and evaluate the outcomes through the lens of democratic accountability.

The basic empirical differences are clear and striking. Under the United States presidential system, the federal courts do not review internal legislative processes to check their democratic efficacy. Rather, legislative deliberations only enter the picture, if at all, as an effort to convince the courts that a statute has a valid substantive justification. In contrast, review of executive rulemaking is fundamentally concerned with the public accountability of rulemaking in agencies and cabinet departments. [4]

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[2] Attributed to Otto von Bismarck. According to Fred Shapiro of the Yale Law Library, the quip originated with lawyer-poet John Godfrey Saxe quoted in the *Daily Cleveland Herald*, Mar. 29, 1869 as saying: "Laws, like sausages, cease to inspire respect in proportion as we know how they are made."

[3] Extending discussions of the issues raised here is in Rose-Ackerman, Egidy & Fowkes (2015). See also, Jordão & Rose-Ackerman (2014) for a related comparison of judicial review of administrative decisions in the US, Canada, Italy, and France.

[4] The terminology is not standardized. We use the terms "rules" or "regulations" to refer to government policy documents that have external legal force issued by any executive body or independent agency. Other umbrella terms are "secondary legislation" or "statutory instrument," used in the (unofficial) English translation of the German Basic Law. We distinguish this category of policymaking both from policy built up through adjudication and from "guidelines" or "policy statements" that merely create a framework for implementation without creating legal rights

The German Constitutional Court is more likely than the US Supreme Court to scrutinize the factual basis of statutes, but this is partly because the German list of constitutional rights includes many more substantive policy areas than does the US document. Hence, the German Court reviews the legislative reasoning behind a broader range of statutes than in the US. This enterprise, although nominally substantive and rights based, may influence legislative procedures. In contrast to the US, however, the German administrative courts provide almost no review of rulemaking procedures inside the executive or the regulatory agencies. The applicable law is fragmented and leaves wide gaps. Judicial review focuses on the violation of rights; as a result, the courts rarely check internal rule-making procedures. Their focus is on individual adjudications.

The South African constitution, as interpreted by the courts, includes a richer and broader idea of democracy than Germany's firmly representative conception. Legislatures must explicitly "facilitate public involvement" in their processes, and the South African Constitutional Court has struck down laws whose only defects are procedures that did not sufficiently involve the public. South Africa is closer to Germany when it comes to rulemaking. Although its constitution provides several grounds for reviewing administrative rule-making processes, no legal instrument specifically provides for their review, and the Constitutional Court has yet to treat rules as analogous to statutes when it comes to process (although the issue is not yet settled).[5]

The EU courts struggle to balance deference to other EU institutions with treaty values. The enactment of the Lisbon Treaty has broadened the democratic basis of the EU by emphasizing participatory values in addition to the core principle of representative democracy. However, it remains unclear exactly what these broad statements of principle will mean in practice.

These differences are tied to the constitutional structures of our cases. A presidential system creates different incentives for legislators compared with a parliamentary system or with the EU's complex framework. Hence, certain kinds of judicial review would be more intrusive in one system compared to another.

Our basic comparative analysis is positive, but our goals are ultimately normative. Our primary focus is on democratic accountability, and the ways that it complements or conflicts with the protection of rights and the competent application of expertise to public policymaking.[6] Can the state claim a mandate from the citizenry, and how does the constitution preserve and maintain that mandate? Do citizens participate in policymaking processes, and can they monitor the state in ways that go beyond the ballot box? We also ask which rights have constitutional status, and how the courts enforce them if they conflict with democratic goals. Finally, states gain

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or duties. In Germany the term "agency" is sometimes used only to refer to independent or quasi-independent bodies that regulate particular sectors or that provide oversight of the government itself. However, we use the term in the looser American sense also to cover core executive branch bodies, such as the Environmental Protection Agency.

[5] In South Africa it remains unclear if the term "administrative acts" in the Promotion of Administrative Justice Act includes rulemaking. If the Court reads rule-making into the Act, as seems likely, then rule-making will be subject to an array of procedural standards and duties.

[6] Rose-Ackerman (2005: 5-7, 2010). For a slightly different trichotomy, see Mashaw (2005: 168) (referencing political, managerial, and legal accountability). We build on the classic texts of Dahl (1971, 1989) and O'Donnell (1994, 1998).

legitimacy by acting competently—incorporating relevant expert, technical knowledge into the development of policy. Unless their actions are an effective response to social and economic problems, their claims to public legitimacy ring hollow (Majone, 1997, 2001). Rights constrain democratic choice; but competence is required to implement policies. Hence, the proper design of bureaucratic institutions is a central task of constitutional government. We ask what role the courts should play in furthering this goal given the judges' own lack of technical training and management experience. One route to political legitimacy and policymaking accountability is through legislative and executive branch processes, but the appropriate response is not always obvious. Procedures that further one type of legitimacy—based on, say, individual rights—may limit others—for instance, democratic legitimacy and competence.

We ask if the courts can usefully contribute to the functioning of the political/policymaking system. Our emphasis is on the way broad policies are made in modern democracies, not their implementation in individual cases. We draw on the insights of positive political theory to help explicate the role of courts in the review of policymaking procedures, and we aim for a normative evaluation of that role under different institutional structures.

The judiciary plays a role in policing these tensions and conflicts, monitoring and controlling legislative and administrative procedures. A key feature of judicial review is the link between the separation of powers and checks and balances. The separation of powers counsels courts to show restraint especially when dealing with politically sensitive issues. The doctrine of checks and balances holds that, in exercising its own particular powers, each branch should constrain the others' potential abuses. Some scholars stress that the separation of powers permits independent action by each branch; others see institutional separation as a route to oversight without direct hierarchical supervision.[7]

The fundamental normative issues are comparable across our cases. Do lawmaking processes for statutes and rules further public legitimacy? Can constitutional courts uphold this value without overstepping their bounds? Can checks and balances be compatible with the separation of powers? US courts' review of executive rulemaking embodies key democratic values that could be applied to the other cases. Conversely, the US courts could follow the lead of South Africa and provide limited review of the congressional legislative process that could enhance democratic legitimacy. This second possibility, however, contrasts sharply with the US Supreme Court's recent case law that threatens to interfere with congressional processes in the name of constitutional theories that are only narrowly accepted even within the Court itself. Those cases either fundamentally misunderstand the reality of lawmaking in a presidential system with a separation of powers, or else they are explicitly designed to hamper that process. In the German case judicial requirements of legislative "findings" are much less at odds with institutional reality given that country's parliamentary structure.

I. Positive Political Theory

Positive political theory (PPT) assumes self-interested political and bureaucratic actors who behave strategically to further their goals. The focus is on the reelection motives of politicians and the civil servants' desire for influence and promotion as well as future employment in the

[7] Ackerman (2000) reviews the debate and makes proposals for constitutional reform.

private sector. This perspective is prominent in much recent American scholarship dealing with the behavior of the legislature and of executive agencies.[8] The approach takes certain aspects of the institutional structure as given and explores the behavior of political and economic actors within that structure. PPT, although more fully developed in the United States, need not be limited to a presidential system with a two-house legislature and a supreme court. The claim that political actors behave strategically subject to institutional constraints is a broad and general one. In our case, we apply the PPT model to compare the US presidential system with two parliamentary systems, Germany and South Africa, and with the EU. In doing so we take as given the basic institutional framework in each polity and ask how it affects the behavior of politicians, bureaucrats, and judges as they enact statutes and rules, make policy, and resolve issues in court.[9] The fundamental difference between presidential and parliamentary systems that frames our inquiry is the existence of a powerful, independently elected president. Hence, the executive may be under the control of a different political party or group than the legislature. In a parliamentary system the same party or party coalition controls both the lower house and the executive. A powerful upper house may complicate the picture, but the key distinction for us is the unity of interest between executive and the majority in the legislature. Of course, we recognize that this unity may be fragile and that minority governments can occur, but in a wide range of cases the link between executive and legislative policymaking is much tighter in parliamentary than in presidential systems.

Although we draw on the PPT model, we recognize that members of the legislature, political appointees, and civil servants are not necessarily motivated only by narrow self-interest. They may have public-regarding motives, endorse a particular theory of constitutional law, aim to be faithful agents of the voters, or seek to further a political agenda.[10] However, we do assume that most politicians seek reelection and wish to preserve their own freedom of action tempered only by the collective action problems that dog the legislature—a multi-member decision-making body that persists over time. Politicians and political parties seek to claim credit for benefits to their constituents and to society at large and to avoid blame for imposing costs.[11]

We leave open the motivations of judges. Unlike early PPT models, we do not place judges' motivations on the same single policy dimension as those of officials and politicians in the executive and the legislature. In those models, judges rule strategically to avoid being overturned by the legislature.[12] In contrast, we follow William N. Eskridge, Jr., and John Ferejohn (2010: 22-28) in supposing that judges may be driven by constitutional and legal principles that do not easily translate into the rubric of day-to-day politics. Although they are likely to temper their

[8] Rose-Ackerman (2007) reprints many of the most important PPT articles dealing with the executive branch and with its oversight by Congress.

[9] Some research in the PPT tradition considers the incentives facing those who draft constitutions. See Cooter (2000) and the articles collected in Voigt (2013).

[10] See the similar perspective of the edited volume by Farber & Joseph O'Connell (2010).

[11] Mayhew (1974 [2004], 2008), Fiorina (1977 [1989]). On the connection to judicial review, see Frickey & Smith (2002).

[12] For example, Ferejohn & Shipan (1990) and Eskridge & Ferejohn (1992).

decisions in the light of political reality, they do not flout clear legal mandates. They may bend the interpretation of open-ended texts toward preferred policies, but they are committed to "the rule of law" even if it leads them to rule against their own policy preferences in particular cases. Judges are sensitive to their status as unelected officials who should not interfere too aggressively with political processes.[13] This sense of their role constrains them from imposing doctrines that are deeply at odds with the practical operation of the political system. Such behavior is both principled and strategic.[14] It derives from a normative commitment to a particular judicial role, but it also acknowledges that the judiciary cannot enforce controversial decisions without political and popular support.

We first discuss the incentives for legislatures in presidential and parliamentary democracies to delegate policymaking to the executive while constraining executive power through judicial oversight. The following section asks whether the legislature will ever have an incentive to limit its own behavior by statute, enforced by judicial review.

A. Administrative Rulemaking Processes

Legislators have neither the time nor the expertise to solve all policy problems – delegation to the executive is inevitable. Furthermore, their constituents may benefit from a regulatory system that can respond to changes in underlying conditions without requiring statutory amendments. The alternatives of relying on private lawsuits or on very detailed statutes are not realistic responses to many issues. These motives for delegation apply to all democracies, but they are expressed differently in presidential and parliamentary systems.

1. Presidential Systems

In a presidential system the legislature has an additional reason to support delegation beyond expertise, time constraints, and the need for flexibility. Legislators can increase their reelection chances by shifting hard choices onto the shoulders of cabinet departments and agencies while taking credit for the benefits a statute provides (Wilson, 1980; Fiorina, 1982). However, even if the legislature shifts the burden of implementation to the executive, legislators will seldom want to be completely isolated from executive actions. They will want to be informed, even if only to better criticize the president and his top officials. Members will hold hearings, demand reports, control agency budgets, and threaten to repeal or amend statutes (McCubbins, Noll, & Weingast, 1987). Without checks, a new presidential administration might want to change policymaking priorities by repealing old rules and enacting new ones with no statutory changes—especially if it is governing with a hostile legislature. Even when there is unified government, with the same party controlling both the legislature and the presidency, politicians may favor some review of executive actions to improve their own reelection chances and policymaking influence.

Hence, some legislators might support formal statutory pathways to review executive rulemaking ex post, but only if these mechanisms do not implicate them in unpopular decisions. For example, a statute might require that rules be submitted to the legislature for an up-or-down vote or to give the legislature time to pass a vote of disapproval. Even more intrusively, the law could permit the legislature or its relevant committees to participate directly in drafting the text. The

[13] In the US some state judges are elected. It is an open question whether such judges act as if they have a stronger mandate from the public to oppose other political actors. See Leib & Bruhl (2012).
[14] On judges' motivations, see Cross (1999) and Cross & Tiller (1998).

legislature may not favor such second chances, however. First, the enacting legislature may want to lock in future legislatures and prevent them from interfering with the implementation of a favored policy. Second, second chances undermine many of the arguments for delegation in the first place. A legislature that delegates because it lacks expertise, time, and flexibility will not want to be able to veto rules in subject areas where these reasons are salient. Of course, there are cases where other factors trump these concerns. The legislature may acknowledge the executive's superior expertise but want to be able to check its discretion ex post.

But there is an alternative to ex post legislative review of rules. Because legislation is difficult to enact and to repeal in a presidential system with a strong legislature, incumbents may try to prevent their substantive policies from being immediately undermined by a new administration. The legislature can exercise indirect policy control by requiring procedures, such as notice, an open hearing, and reason-giving before the executive announces its final rule. Such requirements further the goals of transparency, openness to outside input, and justification in ways that help the general public and affected interests to learn about and to influence the policymaking process.[15] They raise fewer separation-of-powers concerns than a legislative vote on rules, but they still constrain the executive. In addition, they aid legislative review. Interested legislators can find out what rules are in the pipeline and seek to affect their development. Hence, a law covering rulemaking procedures may gain the support even of legislators with no strong commitment to the public accountability of the executive per se.

A key feature of administrative procedure laws concerns the provisions for judicial oversight of the rulemaking process. The incentives and bottlenecks of a presidential system suggest that the legislature may support such review. Legislators opposed to an executive policymaking initiative cannot change the law without surmounting numerous veto gates (Tsebelis, 2002). Their control of agency budgets and oversight activities may not be effective. Hence, statutes that permit judicial review of executive policymaking processes are a rational response to the separation of powers between the president and legislature (Landes & Posner,1975; McCubbins, Noll & Weingast, 1987). Judicial review of administrative policymaking processes provides a check that alerts the legislature to particularly serious problems. In the familiar terminology of Matthew McCubbins and Thomas Schwartz (1985), judicial review acts as a "fire alarm" that relieves the legislature from costly, day-to-day monitoring activities, analogous to "police patrols."

However, one might wonder why a president would ever support such a law. Are such laws only feasible if passed over the president's veto? In practice, a president is likely to be opposed unless he expects his party to lose the next election and believes that procedural constraints will make it difficult to undo his legacy. In other situations, a president may accept such constraints, not with enthusiasm, but as part of a political compromise that provides other benefits.

2. Parliamentary Systems

[15] Mashaw (2007-2008: 118) argues that reason-giving enhances the public legitimacy of policies because it "treats persons as rational moral agents who are entitled to evaluate and participate in a dialogue about official policies on the basis of reasoned discussion."

Now, consider an archetypal parliamentary system, where the same party coalition controls both the legislature and the cabinet.[16] In that case, the distinction between statutes and executive rules is less clear-cut than in a presidential system. The same political coalition is behind both forms of policymaking. So long as the constitution's non-delegation principle is not too stringent, the government can decide how much detail to include in the statute and how much rulemaking authority to keep inside the cabinet. This decision can be made on technical grounds based on the relative expertise of government officials inside and outside the legislature. Ministerial drafts may be enacted into law with little or no input from the legislature after their submission. Then there can also be no delegation at all in political terms. Delegation is usually not a way for the legislative majority to avoid blame for hard choices.

The legislature is the prime locus of political legitimacy, and there is no independent executive with its own political power base. The statutes themselves can be rather general because clear and detailed laws are not a feasible way to bind future governments. If a new coalition comes into power, it can modify existing laws comparably easily. It may be in the government's interest to bind its own hands—perhaps in response to popular demands or external pressure from domestic business and international investors. But it cannot be sure that its actions will carry over to a new government, which can always repeal the act. In practice, few statutes may be overruled because a current majority anticipates this risk and drafts statutes accordingly, but the postwar United Kingdom provides a striking example. The steel industry was nationalized and privatized in successive waves as the government changed hands.[17]

Opposition parties in the legislature do have a strong incentive to complain about the government's lack of transparency. Opposition members may chair important committees, giving them a forum to voice complaints or oversee inquiries. The possibility of a contested debate in the parliament is another reason why the government would propose barebones, framework statutes, with little specific policy content, that can be filled in through government rulemaking after passage.[18]

Votes of no confidence are an important way in which the legislature controls the executive in parliamentary systems—an option not available in a presidential system. If members of coalition governments or disgruntled backbenchers join with the opposition, oversight and the veto of individual rules might morph into an effort to bring down the government. Unlike a presidential

[16] The text ignores some special features of the German and South African cases discussed in Rose-Ackerman, Egidy & Fowkes (2015), and it also leaves aside the complications introduced by minority or coalition governments.

[17] Parliament voted to nationalize British Steel in 1949; that law was repealed by the Conservatives in 1951. In 1967 the Conservatives nationalized the company, and it was then privatized by Margaret Thatcher's Conservative government in 1988. British Steel Corporation PLC, Encyclopedia Online Academic Editions, 2014, http://www.britannica.com/EBchecked/topic/80363/British-Steel-Corporation-PLC.

[18] In France some advocate for broad, framework laws that will be implemented by the professional bureaucracy. based on an understanding of the proper division of responsibilities. But to political leaders in the cabinet such laws could also be a way to enact their agenda with a minimum of controversy. See Rose-Ackerman & Perroud (2013).

system with fixed terms, members of the governing coalition must balance the benefits and costs of actions that may cause the government to fall, triggering elections. [19]

In such systems the legislature does not have an incentive to empower the courts to review administrative policymaking. The reason for this is straightforward. So long as the lower house has primary lawmaking authority, the governing coalition has no interest in a statute that would limit its exercise of policymaking discretion (Jensen & McGarth, 2010; Rose-Ackerman, 2005). The legislative majority might seek to provide input into rulemaking directly, but it would not want to open these processes to outsiders or to allow the courts to review the degree of openness and the reasons given. The government may promulgate internal rules of procedure, but these are likely to be prudential matters, not open to outside checks by the courts. Even if some parts of the governing coalition seek to control other parts, they will be unlikely to obtain majority support for formal judicial oversight. An administrative procedure act, if one exists, will mostly govern official dealings with citizens and businesses seeking to obtain individualized benefits or avoid costs, not secondary legislation.

B. **The Law of the Legislative Process**

As a general rule, one can assume that democratic legislatures want to control their own procedures. They will avoid giving either the executive or the courts a role in overseeing their internal deliberations and drafting practices. Judicial review of legislative procedures, nevertheless, may occur, but it generally arises from constitutional texts and fundamental legal principles. Popular discontent with legislative operations can sometimes trigger constitutional provisions that tie the hands of legislatures.

In a parliamentary system the work of the legislature is generally less important than in a presidential system because the same political coalition or party controls both the executive and the lower house. Most drafting occurs inside the executive. Thus, the legislature may not seem as constitutionally salient. Instead, the democratic legitimacy of the governing coalition is a high priority.

There is one important exception to the broad claim of legislative resistance to procedural controls by outsiders. Collective action problems can lead a legislature to tie its own hands – and those of future legislatures. This option is more plausible in a presidential system because it is harder for statutes to be amended by later political coalitions. The legislature may support a hands-tying outcome that will benefit most members or that is arguably in the public interest.

Judicial review is another matter. Legislatures in presidential systems will be very reluctant to give the courts a role in overseeing their internal procedures -- even if it would make their

[19] In Germany, the main constitutional constraint on the government in is the constructive vote of no confidence. Parliament can bring down a government, but only if it also approves a new government to take its place. Grundgesetz, art. 67.

commitments more credible.[20] The courts themselves may impose constitutional limits on the legislative process, but that is a matter that we discuss in the following section.

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In short, the legislative majority in parliamentary systems has little incentive to enact procedural statutes that govern either administrative rulemaking or statutory drafting. Oversight of the administration by opposition parties, coalition partners and back benchers is likely, but passage of a judicially enforceable statute governing rulemaking seems unlikely absent acute external pressure. In contrast, presidential systems face a somewhat more complex situation. So long as one party does not control both the executive and the legislature, the legislature has an incentive to mandate procedures for executive policymaking and to make them subject to judicial review. The chief executive may go along if he expects that his party will lose power in the next election or is in an otherwise weak bargaining position. These procedures help keep both the legislature and the citizenry engaged in and informed about policy. Court review is a complement to direct legislative oversight, provided that the courts are not dominated by the executive or by the political opposition.

II. Constitutional Rights and Constitutional Structures

Constitutional doctrines, as interpreted by high courts, trump statutory language. Individual rights and the distribution of power between levels of government are central constitutional concerns in all of our cases. We do not seek to explain the origins of constitutional provisions. Rather we discuss how provisions dealing with rights and institutional structure can lead constitutional courts to review legislative and executive rulemaking procedures.[21]

A. Constitutional Rights

The scope of procedural review turns on the definition of rights. All constitutional courts recognize that most rights are not absolute. They carry out proportionality analyses to see if there are countervailing reasons for permitting rights restrictions. Even in the US, where proportionality is a less familiar concept, balancing tests are common in the courts (Mathews and Stone Sweet, 2011). If the legislature anticipates this type of review, it has an incentive to do the balancing at the time of the law's passage to preempt subsequent judicial intervention. Balancing can also shape statutes that implicate other constitutional principles, such as federalism. Of course, as the case studies show, the high court need not accept the legislature's exercise in deliberation and reason giving.

Without summarizing the vast scholarship on constitutional rights, we instead, try to understand how the language of rights intersects with the legislative and the administrative process in our case studies. Do constitutional or supreme courts recognize procedural rights that further

[20] As Martinez (2005: 590) states: "Given that a rational legislating requirement would hold state legislators and members of Congress to a higher standard than occurs under current practices, it seems unlikely that either would adopt a rational legislating requirement on its own impetus."

[21] Our work is in the same spirit as Garoupa & Mathews (2014), which compares the incentives of legislatures, agencies and courts under the different constitutional frameworks of the US, Germany, France, and the UK.

democratic values, or do they only consider the process that is due to individuals seeking to protect themselves against state overreaching? In parliamentary systems, does the jurisprudence of rights substitute, in part, for the lack of statutes that specify legislative procedures and administrative policymaking processes? If so, how do these constraints differ from the American presidential system? If the legislature requires open and participatory procedures inside the executive and mandates reason-giving, how do these incentives interact with constitutional mandates grounded in individual rights? In the legislature itself, does judicial protection of rights and federalism conflict with the legislature's own interest in politically efficacious procedures?

B. Constitutional Structures

Given a constitutional court willing to examine the legislative process, how does the structure of government affect judicial oversight of the rationality and coherence of legislation? Part of the answer rests on empirical claims about the real-world of statutory drafting. In a presidential system with a strong legislature, statutory drafting is a messy exercise in compromise. Court-imposed consistency tests would be deeply at odds with realistic legislative practice. In a parliamentary government with a stable parliamentary majority, statutory drafting can be more coherent and logical (Moe & Caldwell,1994). Parliaments generally have quite limited staff, and most statutes are drafted in the executive. Of course, heated disputes do sometimes mark parliamentary debates that can lead to textual revisions. However, if party discipline ordinarily prevails, courts can legitimately review legislative texts for consistency and the use of state-of-the-art data, and check the legislative process for transparency and inclusiveness. If courts review statutes for coherence and adequate reasoning, they will intrude less on democratic prerogatives in parliamentary than in presidential systems. Nevertheless, even if statutes are competently drafted, court review in parliamentary systems raises exactly the same concerns for judicial overreaching as arise in critiques of US administrative law.

If constitutional courts in parliamentary systems do check legislative and administrative rulemaking procedures under their mandate to protect rights, they may not make a sharp distinction between statutes and rules. Such a unified approach may seem unproblematic to courts in parliamentary systems because there is, in fact, less political difference between lawmaking and rulemaking.

In short, looking across parliamentary systems, constitutional doctrines play a large role in explaining inter-country differences. If there is no constitutional mandate, courts will not review process in either branch.[22] In contrast, once given a constitutional green light, courts in parliamentary systems may engage in more searching review of legislative drafting practices than in presidential systems. This may seem legitimate because a unitary parliamentary system is capable of producing more coherent statutes than a presidential system – especially under divided government.

III. Judicial Review and Democratic Legitimacy: Four Cases

[22] The clearest example here is the United Kingdom, at least in the era before the European Court of Human Rights began to intervene and led Parliament to pass the Human Rights Act. United Kingdom, Human Rights Act, 1998 ch. 42. Carnwath, 2009.

The PPT framework stresses the real-world incentives of the executive and the legislature that arise from differing constitutional frameworks. We argue that judges can draw on the insights of PPT to understand how government works, rather than only focusing on abstract rights and principles. If courts adopt that posture, they can play a role in upholding democracy, not just protecting rights.

Judges in our cases gravitate toward the protection of individual rights and the due process values that protect these rights. Their mandate to protect rights is uncontested; other justifications for review are less secure. Yet preserving democratic legitimacy and checking competence are, we argue, appropriate judicial roles, but ones that need to be exercised with restraint. Judges are neither politicians nor technocrats, but they can help prevent abuses and encourage positive developments.

As argued above, the political incentives to pass procedural statutes that govern executive rulemaking differ in presidential and parliamentary systems, and the statutory law illustrates these incentives in our cases. In contrast, legislators in both parliamentary and presidential systems are unlikely to support judicial review of their own legislative procedures. They have no interest in giving the courts authority to review their internal activities. Any procedural constraints that exist will likely be the result of constitutional texts as interpreted by the courts.

A. The United States

The asymmetric legal framework governing statutes and administrative rules is consistent with the positive political theory perspective. The present APA fits well with the incentives of Congress under divided government to create oversight mechanisms. At present, the main challenges to the law are proposals by Republican lawmakers to impose *more* procedural constraints on rulemaking inside the administration.[23] Not surprisingly, members of Congress have not proposed a similar statute governing their own procedures.

1. Executive Rulemaking

The US Constitution says little about administrative procedures. The Administrative Procedure Act (APA) is the primary legal route to bureaucratic control.[24] Passage of the Act in 1946 depended on the joint efforts of Republicans seeking to constrain the exercise of delegated power and of New Deal Democrats seeking to entrench the accomplishments of their fragile political coalition. President Roosevelt vetoed an earlier more restrictive bill. President Truman signed the 1946 bill in spite of the limits it placed on the presidency.[25]

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[23] Regulatory Accountability Act of 2011, H.R. 3010 (112th Congress, 1st session), passed by the House, December 2, 2011.

[24] APA, 5 U.S.C. §§ 551-559, 701-706 (1946).

[25] President Truman may well have sought to maintain New Deal accomplishments by signing the bill. Studies of the passage of the APA in 1946 contrast its fate with the earlier Walter-Logan bill of 1939-1940. The latter, supported by conservative Republican opponents of the President, was vetoed by President Roosevelt. The APA passed by a voice vote. See McNollgast (1999).

The notice and comment provisions in APA §553 set out the barebones of the rulemaking process: public notice, an open-ended hearing, and reason-giving. The statutory language helps guide the court, which seldom considers regulatory decisions de novo. Checks and balances dominate concerns for judicial overreaching. The courts are constrained by the language of the APA that imposes limits on their review authority. True, the judges' opinions may not track the policy positions of the legislature, but the statute mandates that review should concentrate on the rulemaking process and on means/end rationality under the "arbitrary and capricious" standard. Even the less common "substantial evidence" test concentrates on evidence, not the policy itself. The APA forces the courts to monitor democratic values and competence inside the executive and the independent agencies.

However, the courts' role is constrained by a standing doctrine that limits those who can challenge administrative policymaking---a doctrine that is poorly crafted to further democratic values.[26] In addition, the ostensible policy-neutrality of APA review is often violated in practice even if judges do not explicitly take policy positions. In interpreting statutes, the Supreme Court justices claim to be enforcing a set of "canons", not following their own whims and policy preferences. Debate over these canons has long raged with inconclusive results. Nevertheless, as Abbe Gluck and Lisa Bressman (2013, 2014) demonstrate, only a few canons appear to be clear and visible enough to affect the legislative drafting process.

Congress has also included legislative vetoes and other ex post oversight mechanisms in statutes, but they face constitutional restrictions. Congressional vetoes of administrative actions were declared unconstitutional in I.N.S. v. Chadha 462 U.S. 919 (1983). Congress continues to enact them, even though they are not enforceable. However, they were never a general requirement, and their prevalence did not prevent the passage of the APA. Apparently Congress deemed its own direct oversight either insufficient or undesirable.

Bruce Ackerman (2007) designates the APA a "landmark" statute and gives it quasi-constitutional status. It could be repealed like any other statute, but, in practice, it has become part of the structure of government. However, even if the APA did not have de facto landmark status, its repeal would be unlikely because it satisfies the interests of members of Congress. In contrast, no such general statute governs the internal operation of Congress, and the courts seldom review legislative procedures so long as basic constitutional conditions are fulfilled, such as passage by both houses followed by a presidential signature.

2. Statutes Governing the Legislative Process

Few enforceable statutes govern legislative procedures.[27] The US Constitution, art. 1 § 5 cl. 2, gives Congress the power to enact its own rules, and this power is central to its status as an independent branch of government. The congressional majority would be unlikely to interpret this clause to make such rules reviewable. When members of Congress have sought access to the

[26] APA §702 gives the federal courts wide jurisdiction. The Supreme Court has, however, read the Constitution to limit their jurisdiction and to limit standing under the clause that limits the courts to hearing "cases and controversies."

[27] As Strauss (2005-2006: 654-55) states, "members of Congress are under no procedural obligations whatever to the outside world in what they may choose to introduce as legislative business."

federal courts to challenge internal Congressional processes, they are seldom granted standing. Under the separation of powers, the courts are reluctant to permit members of the minority to go to court to seek review of the rules of Congress.[28] In one case where the Senate did seek review of a rule, it did so to counter the President's contrary interpretation.[29]

In a narrow range of cases, statutes seek to bind the hands of future Congresses—for example, statutes that aim to hold down future public spending through spending caps, automatic tax increases, commissions that target some military bases for closure,[30] and the Unfunded Mandates Act.[31] If these provisions were merely internal legislative rules, they could be overcome by a Congressional majority. If the president has signed them into law, repeal is more difficult. These efforts suffer from an obvious time inconsistency problem. If they start to bind, Congress often amends, repeals, or simply ignores them.[32] But formal legal changes may not be possible because they require either a presidential signature or a super-majority vote. However, these statutes provide for little or no judicial review of actions by future Congresses that might wish to ignore the law. Some statutes contain waivers, and judicial review is either explicitly excluded or not mentioned.[33]

3. Constitutional Law

Unlike the constitutions of many US states, the federal Constitution does not constrain the legislative process as a whole beyond certain framework provisions.[34] Until recently, the Supreme Court's interpretation of the separation of powers has led it to refuse to review the legislative process absent a violation of rights, of the separation of powers, or of the most basic features of the legislative process (quorum rules, passage by both chambers with presentment to the president). The Court sometimes explains its deference by saying that the legislature is better equipped to judge the facts and make tradeoffs than the courts, or that, because Congress must make compromises, the Court ought to expect and accept vague statutes and not judge internal deliberative processes.

Traditionally, the separation of powers between the judiciary and the legislature dominates checks and balances. As a result,the courts are reluctant to police the legislative process. The Constitution establishes the basic parameters, but periodic elections, media scrutiny, and

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[28] For example, I.N.S. v. Chadha, 462 U.S. 919 (1983) was brought by the person ordered by the veto.

[29] U.S. v. Smith, 286 U.S. 6, 26 (1932).

[30] The Defense Authorization Amendments and Base Realignment and Closure Act of 1988 set up the first of five executive branch commissions to prepare lists of recommended closures. So long as Congress does *not* act, the list goes into effect. See Brito (2011).

[31] Pub. L. No. 104-4, 109 Stat. 48 requires the Congressional Budget Offices to supply information on federal mandates in proposed bills. Garrett (1997).

[32] Stack & Vandenbergh (2011: 1425-29, 1436-37) discuss hands-tying internal rules and statutes.

[33] Many seemingly hands-tying statutes include opt-out clauses (Bruhl, 2003).

[34] Denning & Smith (1999: 1005-24) list the 43 states with at least one hands-tying provision.

presidential or gubernatorial pressure are the primary loci for oversight of the legislature. Occasionally, plaintiffs challenge the constitutionality of a statute on procedural grounds, but courts are reluctant to interfere explicitly with the internal operation of legislatures except in particularly obvious or egregious cases. In the United States the "law of lawmaking" by the legislature is very thin.

Yet, the democratic legitimacy of lawmaking procedures may be weak because of collective action problems. Individual members of Congress represent particular districts or states. They can appeal to their constituents by position-taking and "bringing home the bacon." They may attach riders to omnibus statutes to benefit their financial supporters. Preserving and enhancing the quality of the deliberative process in the legislature could provide broad public benefits but would be unlikely to further the reelection chances of particular legislators.

In practice, substantive review of statutes for constitutional violations sometimes has indirect procedural implications for particular types of laws. Such review gives Congress an incentive to prepare a better record and to engage in more hearings and background research. The claimed constitutional violations involve due process and equal protection for individuals, and, recently, the Commerce Clause and federalism.

The overall deference to legislative processes sits against a background of quite aggressive judicial oversight of rulemaking in the executive on both substance and process grounds. As the Second Circuit stated: "[A]gencies do not have quite the prerogative of obscurantism reserved to legislatures."[35] This historical asymmetry is largely based on the APA, a statute that has a constitutional link to the separation of powers.[36] Even though both statutes and rules have the force of law, the nature of judicial review differs sharply. The difference depends on the APA's statutory language, but the Court has also cited the greater political accountability of the legislature compared to cabinet departments and independent agencies. If the courts decline to review the legislative process, they frequently argue that the legislature is capable of correcting its own mistakes, and the courts should not interfere. This position is partly a factual claim and partly an "as if" assertion that limits review.

Hans Linde (1975-1976: 224) lays out a vision of a legislative process that, for us, meets the minimum conditions for democratic acceptability:

> A member who never attends the committee meetings should at least examine the record of evidence before casting a vote, or be told about it, and should certainly never vote by proxy. The committee must explain its factual and value premises to the full body. Surely, there is no place for a vote on final passage by members who have never read even a summary of a bill, let alone a committee report or a resume of the factual documentation.

However, the courts do not enforce such a standard. Turning to substance, a deferential attitude toward legislative substance is justified in the US as a response to the realities of statutory drafting in a presidential system with separation of powers and weak party discipline. Few laws

[35] United States v. Nova Scotia Food Prods. Corp, 568 F. 2d 240, 252 (2d Cir. 1977).

[36] Stack (2007: 993-98) argues that agencies are constitutionally required to give reasons.

would ever be passed if they had to be logically consistent and to lack ambiguity (Nourse, 2011: 1148). Justice Rehnquist's efforts to revive the non-delegation doctrine as a check on Congressional incentives to pass on difficult decisions to the bureaucracy could not attract support of the Court. Few statutes include a statement of purpose in their text.[37] Compromise and ambiguous language are a fact of life in the US political system and, in most cases the courts have little comparative advantage in assessing expertise and substantive claims of means/end rationality.[38]

The federal courts "in theory at least" assume that the legislature is politically accountable. The cases reviewed in our detailed case study show that US courts sometimes assert jurisdiction over purely procedural challenges, but that they generally do not intervene unless procedural infirmities either harm an individual's rights—especially if the person is accused of a crime—or violate the chamber's voting rules.

However, recent Supreme Court cases striking down statutes that lack adequate "findings" contain an implicit model of the legislative process that flies in the face of the compromise and horse trading characteristic of the US legislative process. They do not enhance the democratic accountability of the legislature. The federalism cases, decided by a closely divided Court, raise troubling questions about the Court's role in checking the legislative activity of Congress.[39] The Court asks if Congress has issued "findings" that comply with a burden of proof established by the Court itself; in particular, it does not review legislative accountability to the citizenry. This seemingly substantive standard sits at the overlap between substance and procedure. Reason-giving is both an aspect of process and a way of articulating a statute's substance over and above the formal text. The Court's newly aggressive review is selective; it makes a prior judgment that the issue fits into a category subject to scrutiny (Bar-Siman-Tov, 2012).

However, if the Court continues to expand the range of statutes open to challenge, it may affect the operation of Congress in ways inconsistent with the democratic and representative character of the United States system of government. Its jurisprudence risks imposing procedures that are not only intrusive but are also unresponsive to the democratic deficit that does exist within Congress. As we will see, by way of comparison, Germany's constitutional court also scrutinizes the factual basis of statutes that may violate rights, but it has a much longer list of rights to work with. The South African constitution explicitly mandates democratic procedural values, and its constitutional court has enforced these values in some recent cases.

The Court's reason-giving requirement in the federalism cases requires the Congress to provide a record to convince the Justices. These decisions suggest that either the Court's majority has a poor understanding of the way Congress operates, or it affirmatively seeks to limit legislation in areas that these justices view as questionable. As Phillip Frickey and Seven Smith (2002: 1742) state: "One of the most basic legislative facts is that insistence on statutory clarity of ends and means requires a reduction in the role of politics."

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[37] Stack (2012: 392, n. 197) (calculating that fewer than 13% of public laws in the 107th-111th Congresses included enacted statements of purpose).

[38] But see Justice Ginsburg's dissent in Gonzales v. Carhart, 127 S. Ct. 1610 (2007) (Carhart II).

[39] On the federalism cases, see Frickey & Smith (2002: 1746).

The United States cases raise a question and a concern. Will the Supreme Court continue to strike down statutes under a broad reading of the limits of federal power? If so, will these actions lead the Court to mold the legislative process in a way that is destructive of democratic values? Recent opinions, most decided by narrow 5-4 margins, indicate the Court's willingness to impose a high burden of proof on the Congress in core areas of legislative concern. After all, most domestic legislation has *some* impact on state/federal relations. Rather than requiring the legislature to listen to contesting voices, to permit minority party members to have their say, or to increase the transparency and openness of deliberations, the Court's procedural constraints are only designed to help the Court itself to evaluate particular statutes. True, one aim of the exercise is to be sure the legislature has made a deliberate choice, but the actual requirements are for "findings" that ape the very different institutional structures of lower courts and agencies.

If the Supreme Court follows its current direction and provides aggressive review of reason-giving in more areas of law, it will chill the legislative process, not improve it. The Court majority, often only five members, is beginning to impose heavy strictures on Congress that it is structurally unable to meet given its lack of a unitary hierarchical structure. Requirements of something close to "findings" in the judicial sense would impose higher burdens on the legislature than on rulemaking inside the administration. The organization of Congress is complex and multi-faceted, and members must make compromises that frequently result in unclear drafting. It would be deeply troubling for a small majority of the Supreme Court to interfere aggressively with legislative procedures in ways that do not enhance democracy but rather entrench one interpretation of the Constitution that cannot claim broad public support.

B. South Africa and Germany

Both South Africa and Germany are parliamentary systems, but their constitutional backgrounds differ. South Africa's post-Apartheid document emphasizes democratic inclusiveness and participation. In Germany a long list of individual rights introduces the post-war constitution, and popular sovereignty has a problematic history.

1. Executive Rulemaking

Consistent with our positive political theory argument, neither Germany nor South Africa has a statute that mandates a notice and comment rulemaking process subject to judicial enforcement. There are no statutes that explicitly tie judicial review of rules to democratic legitimacy and policymaking competence. The German government has issued internal guidelines for rulemaking, but these have no external legal force. In contrast, sometimes legislatures themselves monitor and participate selectively in rulemakings in both countries. Delegation is not a one-way street, as it is in the US presidential system. Back-benchers and members of the opposition have pushed to include statutory requirements for legislative oversight or approval of rules. If party control of the legislature is strong, as it is in the South African parliament, members of the majority party itself may seek greater powers of legislative oversight to constrain the cabinet. In coalition governments in Germany, even cabinet ministers who are members of parliament may support its involvement in rulemaking. They might do so to limit the discretion of ministers who represent parties in the coalition other than their own. As a result of these pressures, the government might have to include such oversight as part of a deal to pass a law. However, it seeks to avoid provisions that build in considerable delay or that give legislative committees too much power. In these parliamentary systems, even given their strong principled

commitment to legislative dominance, there is only so much that the legislature can do to intervene in rulemaking once it has delegated policymaking to the executive. Of course, in principle, the majority can always entirely withdraw the delegation, but if it does so, the legislature would need to set policy itself—a costly and time consuming effort for which it may have little aptitude or inclination. The German case is exemplary here. Some statutory delegations to the executive mandate Bundestag involvement in the drafting or the approval of executive rules, but these provisions are all relatively modest in terms of added delay and hassle, given the fact that the same majority controls both the cabinet and the Bundestag. Some South African provincial legislatures are experimenting with bolder measures, but they have yet to yield results.

2. Constitutional Checks on Legislative and Rulemaking Processes

Cases involving lawmaking procedures in the South Africa generally include an element of rights protection even when other values are present. The South African Court found that the public had the right to participate in political decision-making processes, thus blending the protection of rights with the maintenance of democratic values. In Germany a recent opinion written to protect individual social rights, has implications for the legislative process—imposing standards of expertise and reason-giving that can enhance both democratic legitimacy and competence.

a. South Africa

In South Africa--a parliamentary system---the Constitutional Court seeks to promote openness and participation as democratic values and not merely as an aid to judicial review, and it engages in limited judicial oversight of lawmaking processes on that basis. The Constitution enshrines a broad conception of democracy, and the Constitutional Court has read the text to require broad participation in the legislative process. This emphasis on democratic accountability affects the judicial review of procedures in substantive rights cases. It would not be a major leap for the Court to foster public participation in rulemaking processes more generally based on the rich conception of democracy in South African constitutionalism. South African constitutional developments hold that the promotion of transparency is an explicit aim of legislative rulemaking and of constitutional checks on legislative behavior.

The 1996 South African constitution, s 59(1)(a), provides that the National Assembly must "facilitate public involvement in the legislative and other processes of the Assembly and its committees." Equivalent provisions apply to the National Council of Provinces, which is the second house of Parliament similar to the German Bundesrat, and to the provincial legislatures [s 72(1)(a), s 118(1)(a)]. The text offers no further guidance.

However, in a leading case, *Doctors for Life International v Speaker of the National Assembly*, 2006 (6) SA 416 (CC), the Court treated this language as the basis for a judicially enforceable obligation of legislative bodies to take reasonable steps to facilitate public participation in the drafting of legislation. The case concerned a challenge to several pieces of legislation, including statutes on the sensitive issues of abortion and traditional healers. The National Council of Provinces determined that provinces should hold public hearings or receive submissions from the public on the bills. Most provinces, however, did not do so.

The majority judgment held that citizens have an implied fundamental right to political participation, and that the Court will apply a relatively demanding reasonableness standard in assessing legislative efforts to give effect to that right, although there is no mention of reasonableness in the relevant text. It held that public participation is one of the requirements for the passage of legislation, so a failure to take reasonable steps to facilitate participation in the legislative process makes the legislation constitutionally invalid. With respect to the controversial bills on abortion and traditional healers, where there had been a good deal of public interest, it held that the paltry efforts made by several provincial legislatures were not reasonable. It placed considerable reliance on the fact that several legislatures had stated that hearings would be appropriate but then had not held them. However, the Court held in para. 43 that the scope of the duty to facilitate public participation varies with context, but so far the case law has not entirely clarified that duty.

The judicial findings in *Doctors for Life* represent a bold, purposive reading of the text. The Constitution does not explain what it means to "facilitate public involvement", and it does not grant citizens explicit political rights beyond the right to vote and to participate in the activities of political parties. One might read the text as simply requiring the legislature to have a general policy for facilitating public participation, just as it must have in place measures providing for openness to the public and the media, the topic of the rest of the relevant sections. Read that way, judicial review would go no further than inquiring whether the legislature had such a policy in place.[40] The majority's approach goes much further. It reads these sections as implying significant judicial scrutiny of public participation processes. It is based on a robust conception of the inclusive, participatory democracy that the 1996 Constitution is said to envisage, and the opinion supports its arguments by reference to international and foreign sources that emphasize citizen participation as an important basis of established democracies. These findings potentially expand judicial oversight of parliamentary procedures considerably, but it is not clear how far the Court will go. So far, it has invalidated four pieces of legislation on this basis--one of them a constitutional amendment. *Doctors for Life* invalidated two, and *Matatiele v. President of the Republic of South Africa (2),* 2007 (2) SA 477 (CC), handed down the same day, invalidated the other two.

The most revolutionary premise of this line of cases is that a court can get involved in judging how legislatures choose to conduct their business. But this premise has provoked little resistance from the legislatures in any of the cases. Opposing arguments have been confined to contending that whatever the justiciable threshold is, the legislature had met it, not that judicial review is inappropriate in this context in the first place. Indeed, in *Doctors for Life*, the jurisdictional questions and the question of the Court's competence to invalidate Acts of Parliament in these circumstances were not raised by any of the respondents. The Court itself had to ask for argument on these points (paras. 8-10).

This attitude suggests that government actors have come to accept judicial authority, even with respect to their own procedures. But it also reflects the extent to which the dominant African National Congress [ANC] government agrees with the idea behind the Court's findings. The ANC has long stressed the importance of involving the public in government (Ebrahim,1998:13-14, 240-42; Putu, 2006: 4). In 2005 – prior to the decision in *Doctors for Life* – a report to the

[40] See especially the dissenting judgment of Justice Yacoob in *Doctors for Life.*

Second World Conference of Speakers of Parliaments in New York took note of the 'whole range of activities' initiated by the South African parliament to involve the public (Inter-Parliamentary Union, 2005:21). So the Court is being less radical than it may appear; it is codifying what legislatures already do or feel should be done, rather than imposing novel obligations in the face of political resistance. Furthermore, the ANC has responded to citizens' complaints and demands for further engagement even in cases where the Court's ruling upheld its original process.[41]

The *Doctors for Life* line of cases is the most striking application of constitutional values to areas courts have traditionally avoided, but it is not alone. A parallel doctrine concerning local government lawmaking is emerging in other courts.[42] Courts have also reviewed other internal parliamentary processes on democratic grounds, overturning rulings by the Speaker on two occasions to date.[43] As noted, the logic of these decisions readily applies to executive rulemaking, and article s 195 of the Constitution stresses the importance of openness and public participation in public administration. Nevertheless, the courts have been cautious, partly because executive rulemaking is not specifically included in the administrative procedure statute, and partly because South African administrative law historically has focused on the review of individual adjudications. However, the sources suggest that the courts eventually will come to review executive rulemaking on one basis or another. A number of the emerging review doctrines, such as those relating to democracy and public participation, are potentially of general application, and as a result, the lines between legislative and executive lawmaking are becoming blurred, similar to developments that one can observe in Germany.[44]

b. Germany

In Germany abstract review of a statute can raise structural issues of constitutional law. If an individual challenges a statute in a concrete case, the only route to review is a claimed violation of rights. Then, the long list of fundamental rights guaranteed in the German Basic Law mandates a strict level of proportionality review independent of the form of state activity. The German Constitutional Court is more willing than US courts to consider the adequacy of the legislative process. It sometimes scrutinizes the quality of the information underlying a statute, but only in the interest of protecting rights. The Court's efforts to protect rights, however, could have a marked impact on both legislative and executive lawmaking processes.[45] These effects result from the text of the Constitution, not the activities of the legislature to control its own procedures.

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[41] See e.g. "ANC meets Forum over Merafong Demarcation," *Mail & Guardian* June 25, 2008; "Merafong to be returned to Gauteng", *Mail & Guardian* April 9, 2009.

[42] Democratic Alliance v eThekwini Municipality, 2012 (2) SA 151 (SCA); South African Property Owners Association v Johannesburg Metropolitan Municipality, 2013 (1) SA 420 (SCA).

[43] Speaker of the National Assembly v De Lille, 1999 (4) SA 863 (SCA); Oriani-Ambrosini v Sisulu, Speaker of the National Assembly, 2012 (6) SA 588 (CC).

[44] These issues are discussed further in Rose-Ackerman, Egidy, & Fowkes (2015).

[45] Rose-Ackerman, Egidy, & Fowkes (2015) discuss this issue.

The most important recent developments arose in February 2010 when the Constitutional Court in Hartz IV, 125 BVerfGE 175, imposed a new level of procedural obligations on the legislature, although the constitutional basis was substantive rights, not democratic legitimacy.[46] The Court reviewed the validity of the legislature's information-gathering processes when it enacted a law on social benefits that amended the German Code of Social Law. In July 2012, the Court ruled on the adequacy of the basic cash benefits included in the Asylum Seekers Benefits Act and essentially affirmed *Hartz IV*.[47] Both decisions were based on the "fundamental right to the guarantee of a subsistence minimum" derived from human dignity in Article 1(1) of the German Basic Law in conjunction with the principle of the social welfare state in Article 20(1), which is a human right that is independent of citizenship. It obligates the legislature to create statutes that ensure a subsistence minimum to all individuals. In doing so, the legislature has latitude to specify the levels of standard benefits because they depend on the state of society and the prevailing conditions of life.[48]

In *Hartz IV*, the Court declared that the social law's standard benefits for adults and children were unconstitutional, primarily because the provisions were not entirely based on an underlying statistical investigation by the legislature. The Court found that instead of conducting separate empirical research, the legislature based parts of the calculation of standard benefits on "random estimate[s]" (paras. 171, 175). Even though the legislature has discretion to choose which statistical models to use to calculate benefits, the Court ruled that it must exercise this discretion consistently and transparently. Instead of declaring the level of social benefits unconstitutional, the Court concentrated on the procedure used to determine the subsistence minimum and found that it violated the Constitution. It intensely examined the statistical analysis underlying the legislature's determination of the standard benefits and concluded that even though the empirical methods employed were suitable, the legislature had failed to apply these tools consistently throughout the calculations. In contrast to prior case-law, this decision emphasizes the necessity of conducting certain procedures that compensate for the substantive latitude the Court gives to the legislature in this area of law.[49] With this reasoning, the Court imposes procedural duties on the legislature en route to an acceptable substantive result.[50]

The legislature's duty of consistency could ultimately be construed to give individuals the possibility of challenging the legislative process as long as the statute touches on a fundamental right (Rixen, 2010; Rothkegel, 2010:141). The principle of consistency obliges the legislature to adhere to a chosen standard, which is a stricter requirement than the prohibition against arbitrary decisions (Michael, 2008: 879). The Court used transparency as a second key aspect of *Hartz IV* (para. 144), stating that: "In order to facilitate this constitutional review, there is an obligation for

[46] Available in English at http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109en.html. This section relies heavily on Egidy (2011).

[47] BVerfGE Jul. 18, 2012 Case No. 1 BvL 10/10, ¶¶ 1–140, *available in English at* http://www.bverfg.de/en/decisions/ls20120718_1bvl001010en.html.

[48] *Hartz IV* ,para. 138.

[49] Brenner (2011: 394); Nolte (2013: 247, n. 8); Dann (2010); Petersen (2013: 114)

[50] Brenner (2011:394); Nolte (2013: 247, 250); Dann, (2010: 636); Petersen (2013: 114).

the legislature to disclose the methods and calculations used to determine the subsistence minimum in the legislative procedure."

It is noteworthy that the procedural violations before the Constitutional Court involved harm to an individual rights holder, not the problems facing the general public as it seeks to evaluate the policy impact of the law and hold politicians to account. The procedural requirements are linked to the violation of individual rights, not the promotion of broad democratic values (*Hartz IV*, para. 133 ff.). The Court demands transparency primarily to facilitate judicial review, not to improve the democratic accountability of the legislature. One might think that basing a decision on improper procedures would be less confrontational than subjecting social welfare legislation to full substantive control and ordering an increase in benefits. However, process control is not always less intrusive than substantive review.

However, the required link to individual rights leaves a gap. There is no concrete ex post review of statutes that indirectly affects the general public in a way that cannot be pulled apart into a set of individualized harms—for instance, where legislative decisions concern the allocation of monetary resources or economic policy. In these cases, no ex post review is possible.

Judicial review of secondary legislation in Germany is not fundamentally different from review of the legislative process and of the substance of statutes. Here too, the violation of rights plays a prominent role. As a result, the system produces some of the same lacunae as for statutes. The ministries and agencies that make rules and the bodies that produce ordinances have less of a claim to democratic legitimacy than does the directly elected legislature. For that reason, judicial review of administrative rulemaking could help strengthen the democratic legitimacy and transparency of policymaking by reviewing compliance with the statutory frame. Indeed, that is one of the motivations for judicial review of administrative rulemaking in the United States. It plays a less important role in Germany. In addition to rights-based judicial review, the delegation of law-making authority to the executive is constrained and checked by formal and informal inter-branch and internal executive control mechanisms. Broad public participation is not seen as a separate strand providing democratic legitimacy. Therefore, German law often requires inter-branch or inter-governmental consultation but not broad public participation.

Recently, the similarities between executive and legislative rulemaking procedures were the subject of several decisions by the State Social Court of Berlin-Brandenburg (Nolte, 2013: 258 f.). Building on the *Hartz IV* decision, the court applied the principles of consistency and transparency to executive-rulemaking. It examined health policy guidelines enacted under the Fifth Book of the German Social Code, § 92, by the Federal Joint Committee, which consists "of the joint self-government of physicians, dentists, hospitals and health insurance funds."[51] As Jakob Nolte (2013: 260 f.) points out, this application blurs an important distinction between judicial review of legislative and executive rules. The legislative margin of discretion in shaping fundamental rights protection does not extend to executive rulemaking. Hence, unlike legislation, executive rules are often subject to detailed substantive review because the empowering statute limits subsequent rulemaking. In cases of wide delegations in complex subject areas, the executive has some discretion to create certain policies. Nevertheless, the empowering statute has to determine the content, purpose, and scope of the regulation. As a result, there is less of a

[51] Cited from the English website of the Federal Joint Committee (*available at* http://www.english.g-ba.de/).

reason to use the review of process as a way of avoiding substantive review. However, as we argued for the U.S. case, procedural review can be valuable in its own right as a way of furthering democratic values over and above substantive concerns. It remains to be seen if German law will develop in that direction or if the Berlin-Brandenburg cases are an exception.

C. The European Union

Whether one views the European Union as a proto-state or as a confederation of independent countries, its lawmaking procedures are unique. It draws on the experience of Member States and of the United States, but its sources of political legitimacy are more problematic and diverse. The democratic legitimacy of European institutions remains contentious, and the democratic status of the EU has been the subject of some Member State/EU conflicts, especially involving the German Constitutional Court.

The European Union courts tend to stress scientific and technical competence sometimes to the detriment of public accountability (Rose-Ackerman, Egidy & Fowkes, 2015: chapter 5). Nevertheless, both democratic values and rights protection are central to debates over the future of the Union. Challenges on all three dimensions come before EU courts, although an emphasis on rights is likely to increase with the EU's accession to the European Convention on Human Rights. In future, claims based on rights may clash with claims based on expert competence.

In our other cases, legislatures with strong democratic credentials delegate policymaking authority to executive departments and to independent agencies. The key difference between the EU and our other cases is the European Parliament's weak position relative to the Council and the Commission. Its role and status have improved over time, but it remains in a struggle for influence that is part of the ongoing debate over how to characterize the EU—as a federal state or a treaty-based association of states.[52]

Even though members of Parliament are directly elected, the Council and Commission are key sources of political power given their links to the Member States. This may have implications for the law of the administrative process. Given its lack of clear dominance in the EU structure, the EU parliament may prefer to avoid imposing procedural requirements on the Commission or the agencies out of concern that they will end up being applied to the parliament itself. Furthermore, because statutes must be initially drafted by the Commission, its officials are unlikely to submit legislative proposals that impose judicially reviewable APA-like constraints on themselves. Although both the Commission and the separate EU agencies often express a commitment to broad participation and have created a range of consultation procedures, they do not endorse judicial enforcement of their participatory procedures (Rose-Ackerman, Egidy & Fowkes, 2015: chapter 5).

The EU courts themselves have not reached out to review legislative and rulemaking procedures. Review of substance is quite aggressive as is review of Member State actions, but the EU courts have little to say about process. This deference is reinforced by the contrasting constitutional and administrative traditions of the judges of the various member states. Rather than exposing these differences in their opinions, they may be reluctant to impose views that would be a direct

[52] For an argument that the latter is more accurate, see Lindseth (2010).

challenge to the existing practices of the Commission, Council and Parliament in the name of the treaty. A move by the EU courts in that direction would be a break with established practices.

But an opening might exist. Although there are no concrete procedural requirements for rule-making, the founding principles of the Lisbon Treaty include elements such as openness, participation, and transparency. These could provide a framework for judicial review. The European Union's concept of democratic legitimacy extends beyond representation. If the courts take the abstract norms of participation and transparency seriously, they could transform these principles into concrete and specific norms governing executive and legislative behavior.

As for secondary rulemaking, the Treaty of Lisbon permits delegation to the Commission to "supplement or amend certain non-essential elements" of legislation (TFEU Art. 290) and gives it "implementing powers" if uniformity across Member States is needed (TFEU Art. 291 (2)). The text does not lay out any required procedures, and it is not yet clear how the EU courts will interpret the key terms. However, it has deferred to a legislative choice of which form to use against a challenge by the Commission. Hence, it may be content to take a hand's off approach.[53] The decision suggests that the court may be reluctant to issue judgments with procedural implications for Commission behavior but will rather leave such actions to the legislative process.

The US courts give a broad reading to the APA's demand for public participation. Given the weak democratic credentials of the European Parliament, transparency and broad public participation in rulemaking seem especially important. Despite the difficulties, this aspect of public accountability should not be ignored by scholars and judges in the years ahead.

IV. Review for Democratic Legitimacy—Old Habits and New Challenges

There are three parts to our positive claims about judicial review of lawmaking—they concern positive political theory, our descriptive account of constitutional texts, and the role of constitutional courts in furthering both democratic legitimacy and competence.

First, especially in times of divided government, legislative majorities in presidential systems have an incentive to impose procedural constraints on executive branch policymaking and to enforce them through judicial review. They will resist judicial review of their own internal processes, unless they seek to solve collective action problems through statutes that tie the hands of future legislatures. They will seldom endorse statutory checks on their procedures because they are harder to modify than internal rules.

In parliamentary systems where the executive and the legislature are controlled by the same political coalition, there is little incentive for the government (or its accompanying parliamentary majority) to support statutes that constrain the process of policymaking in either the executive or the legislature. Opposition parties and disgruntled coalition members along with outside pressure and citizen complaints might force the Government's hand—for example, in the aftermath of a scandal, but the Government's actions will be purely defensive. It may face the same

[53] Case C-427/12, European Commission v. European Parliament and European Council (Biocides Case), 18 March 2014.

coordination and time inconsistency problems as a presidential system, but it has fewer tools to combat them in a credible manner.

Second, modern constitutions sometimes contain explicit provisions dealing with the democratic legitimacy of policymaking in the legislature and in the executive. These arise out of the particular conditions that framed the debate over the creation of a new polity. In the cases only South Africa falls into that category. In Germany, in contrast, popular sovereignty was not seen as an unambiguously good thing. The EU was initially formed by a treaty signed by member states; it was not the result of a popular movement. The United States' written constitution has little to say about administrative or legislative processes, but Supreme Court opinions as well as legislature and executive actions have essentially given constitutional status to the APA's rulemaking procedures (Ackerman, 1991, 2014).

Third, consider the role of courts in furthering democratic legitimacy and competence. Constitutional courts regulate policymaking procedures indirectly through the protection of individual rights and through the enforcement of other constitutional provisions, such as federalism. Constitutions may give rights-holders access to policymaking processes (Levinson, 2012). In such cases, those with protected rights are not guaranteed substantive results, but they must be part of the debate. Court enforcement of other constitutional provisions can spur certain kinds of procedural responses as policymakers try to satisfy the courts' burden of proof. However, except in South Africa, the justices have crafted procedural requirements to satisfy the courts, not to improve democratic accountability. In contrast, the South African Court has built on the text to implement the post-Apartheid emphasis on openness and inclusion and has positioned itself as a conscious promoter of participatory democracy.

There are two key issues related to democratic legitimacy and the courts. On the one hand, holding constitutional provisions constant, high courts ought to be more willing to review the internal coherence and evidentiary basis of statutes in parliamentary compared to presidential systems. Parliaments can more reasonably be held to standards of coherence and consistency because the same coalition or political party controls the government and the legislature. Judges do not obviously overstep their role as apolitical monitors if they demand consistency and factual justification. On the other hand, once again holding the constitutional text constant, a statute providing for review of administrative policymaking is more likely in a presidential system. In such systems constrained judicial review is a necessary but second-best alternative because direct legislative oversight is difficult. However, executive rulemaking in a parliamentary system may also lack democratic accountability and transparency to the citizenry.

Review of technical competence raises vexing problems in all polities. Few judges will be knowledgeable about science, social science, or public administration. Their reluctance to base decisions on non-legal expertise is consistent with the separation of powers as an institutional constraint. If the courts are reluctant to provide substantive review of technical matters, both the legislature and the executive will have greater freedom to act in such areas than in other fields. However, science and data quality frequently interact with claims based on either democratic legitimacy or the protection of rights, and they push the courts into the awkward position of judging mixed questions of fact and law.

We conclude with some normative observations. Courts, we believe, should consider the broader impacts of their decisions. Even when a case ostensibly concerns rights, not the structure of

government, judges ought to ask how their rulings will be implemented in practice. Constitutional provisions and statutes can permit courts to promote the democratic accountability of the legislative process and of executive rulemaking procedures. If courts do reach out to further procedural values, however, they should take institutional structures very seriously. Otherwise, misalignments between judicial orders and political reality can create other problems. The challenge is to create judicial doctrine that harmonizes with the teachings of positive political theory.

As discussed above, a clear example of this kind of disjunction arose in the recent US cases holding that certain statutes violate the federalism provisions of the Constitution. These cases, decided by narrow majorities, impose demands on Congress that are inconsistent with the inherently complex and compromise-laden procedures needed to pass statutes. Parliamentary law-making procedures, in contrast, are capable of greater logic and consistency. Hence, the German Constitutional Court's decision in *Hartz IV*, with its strong demand for factual backup, represents a less serious challenge to legislative operations. Although the South Africa court has aggressively elaborated principles of democratic participation, it applies them cautiously and scrupulously preserves the ultimate right of the majority to govern.

Furthermore, where administrative procedure law tracks the incentives of political actors, the courts need to recognize that efforts to counteract these tendencies will meet with serious opposition. Judicial opinions interpreting the rulemaking process of the US Administrative Procedure Act have produced a drumbeat of criticism that claims that the judiciary has gone beyond its monitoring role as envisaged in the original legislation. . These criticisms threaten to obscure the key role of the APA in furthering the democratic legitimacy of the modern American regulatory state. Conversely, if the German Constitutional Court, on its own, required notice and comment for major executive rules, such a holding would fit awkwardly with German traditions of internal drafting of rules and could produce a backlash. Constitutional courts ought to act in ways that respect and enhance deliberation over policy.

Political opposition to reforms that could further public accountability means: first, that the institutions will not reform themselves, and, second, if courts try to spearhead reforms, they must be prepared to confront serious resistance. Recognizing this, courts tend to shy away from confrontations that impose a contested view of constitutional meaning on the political branches. Even the exceptions to the rule are instructive. In the US a deeply divided court has mustered a narrow majority for a particular interpretation of federalism. Controversial as these rulings are, they effectively block Congressional action – making it difficult for politicians to strike back. In *Hartz IV* the German Court's concern for social rights trumped the political risks, but the decision may have opened up a line of cases that the Court will find difficult to manage. In South Africa the workability of new standards for democratic participation is, rightly, a regular concern of the Constitutional Court.

Old habits of legal thinking sometimes interfere with the courts' response to new situations. South Africa is still working its way free from an administrative law historically focused only on individual adjudicative decisions. The German courts mainly review executive rules as applied in particular cases if they implicate rights. In both cases the review of executive rules is a contested area of concern. In part, this is because courts recognize that review of rules should not be based on classic notions of due process that rely on court-like procedures. If they did begin to review

rules, the focus should be on the strength of democratic links, with a background check assuring the protection of rights.

If legal reformers seek to use the judiciary to respond to the problems of the modern state, they must recognize the courts' limited capacity for substantive review and acknowledge the value of procedure as it relates to all aspects of legitimacy—protection of rights, democratic legitimacy and competence. Modern regulatory tasks make it necessary to delegate to the executive and to defer on substance. Given this reality, the legislature, backed up by the courts, can require the executive and the agencies to consult experts and the public. Procedural reform can respond to the challenges of combining delegation with democratic accountability.

Using the courts to enhance the democratic functioning of elected assemblies is more problematic than administrative law reform. Yet it has been responsibly carried out by the South African court. If democratic values mandate strong links to the citizenry, the courts could be given the authority to be sure that they operate well in practice in the legislature as well as the executive. These new roles for the courts may clash with standard constitutional interpretations in some systems, but they can be consistent with democratic and republican values.

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