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Subnational Courts of Last Resort in Germany and the USA

by

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Abstract

In this article I explore the judicial dimension of federal systems from a subnational perspective. The findings show that regardles of the type of federalism subnational courts of last resort underscore plurality and diversity and thus inject federal ideas into the two systems. Federalism is, hence, not only an overall structure that shapes the judicial system but an intrisic part of judcial review. If we discuss constitutional adjudication and high courts in federal systems, we must take the subnational level into account. Without giving this level its due credit, we are unable to understand neither federalism in general nor judicial federalism in particular.

Key-words

Constitutional adjudication, federalism, subnational courts of last resort, comparative rule of law

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1. Introduction

Comparative studies on federalism mostly ignore the judicial dimension. Similarly, comparative research on judicial review is 'national-centric' (Williams 2006: 68). These might be reasons why there is much disagreement about the role that courts of last resort – such as supreme or constitutional courts – might play in federal systems. While Daniel Halberstam (2009: 18) believes that the judiciary can be 'useful' in 'sustaining the federal system, and national courts 'are not irredeemably biased in favor of the center', others argue that the central judiciary in general and national courts of last resort in particular can hardly be independent umpires of federalism (Bzdera 1993; Aroney and Kincaid 2017a). Although case studies show 'that there is a great deal of variation among federal countries in the importance of judicial review in settling constitutional disputes about federalism' (Russell 2017: 8), many scholars share Dicey's (1915: 100) assumption that federalism 'lastly means legalism', which in turn can give reason to the 'predominance of the judiciary in the constitution'. From this perspective, national high courts are crucial for the functioning of federal systems. They shape the balance between centralization and decentralization 'directly by ruling on the constitutional distribution of powers and indirectly by ruling on social issues, individual rights, economic affairs, and other matters' (Aroney and Kincaid 2017b: 3). Consequently, many take it for granted that high courts and the central judiciary in federal countries mostly show a 'centralist bias' (Russell 2017: VIII) and are a 'natural ally of the central government in the control of the states' (Halberstam 2009: 6). Put simply, federal systems seem prone to turn into 'unitarian juristocracies' because national judges make crucial decisions and favor the national government.[1]

In this paper, I follow up on this debate on the judicial dimension in federations or on judicial federalism. Nonetheless, I will provide a new and fresh look at the issues at hand in three respects. First, I shed light on institutions that are mostly ignored in this debate, namely subnational courts of last resort. Thus, in contrast to the main strand of research (Aroney and Kincaid 2017a, 2017b; Benz 2017; Somin 2017, Kramer 2009) I will explore the judicial dimension of federations from a subnational perspective and focus on subnational courts of

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last resort. Second, according to Peter H. Russell, the 'judicial dimension of federations is one of the least studied aspects of comparative federal governance' (Russell 2017: VIII). Moreover, most scholars in this field analyze how the judiciary shapes federalism. By contrast, I examine whether and how subnational courts of last resort inject federal ideas into the judicial system. Thus, instead of exploring the judicial dimension in federal systems like in most other studies, I highlight the federal dimension in judicial systems. Third, according to Daniel Halberstam, the 'role of the judiciary as federal umpire has taken place within two separate disciplinary compartments: comparative politics and law' (Halberstam 2009: 3). In this paper, I will bridge this gap and adopt a comparative perspective to explore the role of subnational courts of last resort in the American and German federal system. The findings show that regardles of the federal system subnational courts of last resort underscore plurality and diversity and thus inject federal ideas into the two systems. Accordingly, if we discuss constitutional adjudication and high courts in federal systems, we must take the subnational level into account. Without giving this level its due credit, we are unable to understand neither federalism in general nor judicial federalism in particular.

Comparing constitutional courts across nations is methodologically tricky. As it turns out comparing subnational courts of last resort across nations is even trickier because case selection is limited. There are not many countries with subnational constitutional courts (e.g. FRG, USA, AUS, Brazil). This choice with limited options left me with two cases: the USA and Germany. My research design has to accommodate this methodological bottleneck. Luckily, with my case selection I can still verify the hypothesis that subnational constitutional review reinforces federalist ideas and is a check on unitarian tendencies in the judicial system.

In order to answer the research question at hand I use a most different systems design (Przworski and Teune 1970) and follow Aroney and Kincaid (2017b: 18), who highlight that 'explaining the behaviour of courts across diverse federal systems must necessarily be multidimensional.' They list seven 'key explanatory factors' (ibid.) such as historical, cultural, political, and institutional dimensions that might affect the power of national high courts in federalist systems. However, I limit my analysis to two subnatinal courts of last resort, namely the New York Court of Appeals (NYCoA) and the Berlin Constitutional Court (BCC). Both

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courts engage in judicial review and are thus 'countermajoritarian' institutions in that both 'force the majority (either the parliamentary or the popular majority) to revisit an issue it had tried to settle' (Ferejohn and Pascuale 2010: 353 and 354; see also Bickel 1962: 16-32). Furthermore I will focus the analysis on four dimensions, namely the overall constitutional framework, the selection of judges, institutional factors, and rulings. Finally, I will draw some tentative conclusions.

2. Federalism, Constitutional Adjudication, and Subnational Courts of Last Resort in Germany and the USA

A federal system separates public powers vertically. It divides sovereign authority among the constitutionally-defined levels of government and consequently allows 'self-rule' and 'shared rule' (Elazar 1987; Bednar et al. 2001: 224). This also applies to American and German states. All 50 American states and all 16 German Länder have their own executive, legislative and judicial branch of government. At the same time, in these federal democracies the judiciaries are not only juxtaposed horizontally to the executive and the legislature at the national and subnational level, but they are also vertically separated. Nonetheless, this general classification does not tell us much about the structure and functioning of judicial federalism and the role that subnational courts of last resort might play in these systems. Moreover, subnational courts of last resort are part of a regime of constitutional adjudication because they make their decisions 'within the broader legal and political system' (Clayton and May 1999: 233f.). Three basic principles govern this regime of constitutional adjudication at the subnational level and define the role of subnational courts of last resort in Germany and the USA: the legal tradition, the type of federalism, and the structure of the judicial system (table 1).

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Table 1 Subnational courts of last resort and regimes of constitutional adjudication

	USA	FRG
Legal tradition	Common law (single cases, inductive)	Civil law (systemic, deductive/syllogistic)
Type of federal democracy	Dualist and decentral (horizontal)	Cooperative and unitarian (vertical)
Subnational courts of last resort	Court of appeals; nonspecialized, autonomy and supremacy	Constitutional court, specialized; autonomy and supremacy
Regime of constitutional adjudication	'Horizontal stratarchy'	'Vertical stratarchy'

Sources: my compilation.

Legal tradition: In American state supreme courts, the common law tradition is prevalent, while German constitutional adjudication is shaped by the civil law tradition. 'Common law adjudication is understood as an inductive, and empirical process [...] This stands in stark contrast to the paradigmatic model of adjudication issuing from the civil law tradition, which conceives of the judicial task as a deductive one involving the syllogistic application of a general rule – embodied in a code – to a set of particular facts' (Rosenfeld 2006: 628). In a common law tradition, precedence and stare decisis are crucial factors shaping the judgments of courts. By contrast, the civil law tradition favors courts speaking with one institutional voice while in a system with common law tradition courts very often speak with a 'multiplicity of individual voices' (Rosenfeld 2006: 635). For this paper, it is even more important that the common law tradition allows state supreme courts to shape policy areas independently of the legislature (Tarr 2010: 321-333). At the same time, the two courts represent different types of judicial review (Kelsen 1942). Like the other state constitutional courts in Germany, the BCC is a specialized court on constitutional issues. It has the exclusive power to invalidate statutory laws passed by the parliament of this German Land. Depending on the proceeding, it can be a court of last resort as well as a court of first instance. By contrast, the NYCoA is a non-

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specialized appellate court that has the prerogative to refuse to apply a statute that it has declared unconstitutional. Hence, like other state supreme courts, the NYCoA can engage in 'constitutional policymaking in the realm of civil liberties' (Williams 2006: 70).

Type of federalism: textbooks teach us that American and German federalism radically differ from each other. For example, Daniel Halberstam (2009) labels the American model as 'horizontal' because the two levels of government are independent of each other. By contrast, the German model is called 'vertical', giving the 'federation the primary prerogative of enacting legislation and the Länder the prerogative of executing such legislation' (Halberstam and Hills 2001: 175). Although these interpretations are somehow 'misleading' (Halberstam and Hills 2001: 175), they bring an important difference to the fore as the two systems balance centralizing and decentralizing tendencies in different ways (Benz 2017: 195-200; Somin 2017: 441-446). The German system has a strong unitarian tendency because all major legislation is passed at the federal level. Furthermore, the Basic Law provides a long list of human rights that give the federation an overriding influence in shaping public policies for the whole country. By contrast, American states enjoy the 'ability to formulate, execute and adjudicate [their] own policies' (Halberstam 2009: 4) and American state constitutions are longer and more detailed than their German counterparts. Some American state constitutions even include provisions on public policies and provide a bill of rights (Tarr 2000; Dinan 2006; Dinan 2012). This paved the way for a New Judicial Federalism in which state supreme courts became increasingly important for developing and expanding state civil liberties (Tarr 1999; Fino 1987; Williams 2003).

Judicial federalism/system of constitutional courts: both the German and American states possess state autonomy, which entails the privilege of installing and sustaining constitutional courts (Germany) or state supreme courts (USA). In this regard, both judicial federalisms are dualistic with two levels that in most cases operate autonomously and independently of each other (Tarr 2009; Kramer 2009). The national courts of last resort are supposed to refer to the national constitution and interpret national law without interfering in the legal and territorial jurisdiction of subnational units. Similarly, the subnational courts of last resort simply say 'what the law' is at the subnational level to use the famous expression from Marbury vs. Madison. In

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fact, all 16 German Länder and all 50 American states have used this prerogative to establish a high court or a court of last resort. Subnational courts of last resort use subnational constitutions as their legal benchmark for adjudicating political or legal issues. Put differently, the constitutional courts in the German Länder and the state supreme courts in the USA are manifestations of self-rule in subnational units. They apply and interpret laws and their constitutions autonomously, as long as they can refer to 'adequate and independent state grounds' to use the proper American expression (Tarr 2015).

Nonetheless, it would be misleading to assume that judicial federalism is exclusively based on 'self-rule'. By contrast, according to the Supremacy Clause of the U.S. Constitution (Art. VI, Clause 2), American state supreme courts must comply with rulings of the U.S. Supreme Court and statutory laws promulgated at the national level. Similarly, Art. 31 of the German Basic Law gives federal law precedence over Land Law, which includes the notion that subnational courts of last resort are bound by rulings of the Federal Constitutional Court. Even more, national courts of last resort can invalidate subnational law if the latter is in conflict with national law. For example, G. Alan Tarr (2010, 258) reports that between 1791 and 2007 the U.S. Supreme Court invalidated almost 1,000 state laws (or 4.4 per year). Similarly, between 1951 and 2018 the German Federal Constitutional Court declared 273 statutes of the Länder as unconstitutional (4.1 per year) (Tarr 2010: 258; Federal Constitutional Court 2018). In sum, we not only find 'self-rule' or autonomy of the two levels in the judicial system but also 'shared rule', supremacy, and interdependence.

Although German and American judicial federalism provide subnational courts of last resort with a similar status defined by self-rule and shared rule, the legal and political environment create two different regimes of constitutional adjudication. The American type can be coined as 'horizontal stratarchy', indicating that there is a system in which we find multiple institutions with the power to invalidate laws and engage in judicial review. It is horizontal because the two levels of government can act independently from each other (Halberstam 2009). The German regime of constitutional adjudication also includes various courts that have the mandate for constitutional adjudication. Nonetheless, it is vertical rather than horizontal because the legal tradition and the system of federalism underpin unitarian, integrative tendencies and leave little room for policy-making by subnational courts of last resort.

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3. Appointment of Justices and Composition of the Courts

The participation of subnational courts of last resort in a democratic regime of constitutional adjudication presupposes that the appointment of justices and the composition of the courts comply with two basic principles: the rule of law and democratic legitimacy (Tarr 2010: 198). In the two cases examined in this paper, we find that the 'balance between judicial independence and judicial accountability' (Tarr 2010: 198) has taken varying forms. In addition, in most studies on high courts in federal countries, the selection of judges counts as a key factor for explaining unitarian tendencies of national courts of last resort (Aroney and Kincaid 2017b; 2017a: 519-523; Halberstam 2009: 18; Bzdera 1993: 27). Moreover, we even find the notion that national 'courts should in some sense be representative of the various political and regional identities within the country' (Aroney and Kincaid 2017a: 523). Applying the same reasoning to subnational courts of last resort, we come to other conclusions. Judicial independence, accountability, and representativeness not only differ between the two courts but also compared with their national counterparts. Consequently, subnational courts of last resort inject diversity and plurality into judicial federalism and thus constitutional adjudication.

The NYCoA is composed of seven judges, i.e. the chief judge (CJ) and six associate judges (AJ). Following an amendment to the constitution in 1974, these judges are appointed to a fourteen-year term based on the so-called Missouri Plan (Art. 6 § 2a Constitution of New York State). The Governor selects a candidate from a list made by the Commission on Judicial Nomination, which evaluates 'the qualifications of candidates for appointment to the court of appeals' and recommends to the Governor 'those persons who by their character, temperament, professional aptitude and experience are well qualified to hold such judicial office' (Art. 6 § 2c Constitution of New York State). The State Senate must confirm the nominee. This type of appointment is supposed to ensure that judges have the necessary qualification and that the pitfalls and downsides of popular elections or legislative appointments can be avoided (Tarr 2010: 59-61). When a judge steps down prior to the end of his/her term in office or when an incumbent judge reaches the age of 70, the Governor can appoint a new judge, who is once again subject to confirmation by the State Senate. The judges

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are tenured full-time officers of the court. In 2018, their salary ranged between 215,700 USD per year (= 193,852 Euro) for associate judges and 222,500 USD (=199,861 Euro) for the Chief Justice (Perkins 2018). Judges of the court of appeals enjoy independence. They can only be removed 'for cause' and 'by concurrent resolution of both houses of the legislature, if two-thirds of all the members elected to each house concur therein' (Art. VI § 23a Constitution of New York).

Table 2: Composition of the BCC and the NYCoA according to legal stipulations

	Berlin Constitutional Court	**New York Court of Appeals (since 1974)**
Established	1992	1847
Number of judges	9	7
Number of appointed judges (1992-2018)	37	29
Length of term (since 1974)	7 years	14 years
Minimum age	35	None
Appointment (since 1974)	Election by Land parliament	Missouri Plan
Status of the judges	Part-time (non-tenured)	Full-time (tenured)
Expense allowance / salary (2018)	No salary (expense allowance [up to 12,000 Euro])	222,500 USD (CJ) 215,700 USD (AJ)
Gender quota	At least three men and three women	—
Judges without law degree	Possible	Not possible

Sources: my compilation; based on Gesetz über den Berliner Verfassungsgerichtshof (Act on the Berlin Constitutional Court); the Constitution of New York; Perkins 2018.

By contrast, the BCC comprises nine judges who serve a seven-year term at the court. They cannot be reappointed. While in New York State representatives of all three branches of government are involved in the selection and appointment of judges, in Berlin the election of judges to the constitutional court rests exclusively with the regional parliament. Only parliamentary parties enjoy the privilege to propose candidates to the parliament for election.

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The House of Representatives of Berlin elects judges to the BCC with a two-thirds majority of the votes cast. The executive or the judiciary have no say whatsoever in the appointment process. There is no hearing before the election of a judge takes place in a secret ballot in parliament. Judges cannot be recalled or ousted from office by the parliament or the government. Only the court itself can depose a judge from office. Any judge can submit a request to be relieved from office at any time. In addition, there is a minimum age of 35 years. Most importantly, the judges work only part-time at the BCC. In Berlin, constitutional adjudication is a sort of moonlight job or honorary office. The judges of the BCC make their living as professor at a university, as a judge in another court, or as an attorney in a law firm. As judge at the BCC, they only receive an expense allowance between 400 and 1,000 Euro per month depending on the caseload. In their main profession, three of the nine judges of the BCC must be judges at a specialized court, while three others have to have a law degree. Consequently, three judges of the BCC could have no law degree, an option that has not been put into practice thus far. All 37 judges elected between 1992 and 2018 have studied law and passed the first and second state bar examination. Finally, there is a gender quota at the BCC, whereby at least three men and three women must serve.[II]

Notwithstanding these legal differences, the composition of the two courts is surprisingly similar in some respects. Between 1992 and 2018, the House of Representatives of Berlin elected 37 judges, while the Senate of New York State confirmed 29 nominees of the Governor. On average, in the two courts judges were already in their fifties when appointed to the court. Accordingly, becoming a judge in a court of last resort seems to be the climax in a legal career and not simply a stepping stone towards future ambitions, notwithstanding the fact that a number of judges of the NYCoA later became judges at the U.S. Supreme Court (Bierman 1995: 1412). When appointed, judges of the NYCoA are on average six years older than their colleagues from Berlin. Furthermore, judges of the NYCoA stayed in office for 1.7 years longer than their colleagues in Berlin, which is not much considering that in Berlin judges are elected for 7 years and in New York State for 14 years. In addition, between 1992 and 2018 only nine female judges out of 29 served at the NYCoA (31%), while in Berlin the parliament elected 15 female judges out of 37 (40.5%). Nevertheless, at the NYCoA the nine female

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judges together spent 79.1 years in office (out of a total of 186.5 years), while their female colleagues of Berlin covered 94.1 years (=44.0%). Finally, the political composition is also similar: in Berlin, 21 out of 37 judges have been nominated by parties of the left (SPD; Greens, Pirates, PDS) while in New York State Governors of the Democratic Party nominated 21 out of 29 judges. Consequently, in Berlin left-leaning judges – at least according to the nominating party – covered 56.7 percent of all of the time that judges spent at the court of last resort in this German Land. In New York State, the same group of judges covered 66.4 percent at the Court of Appeals.

The findings prompt two conclusions. On the one hand, for judges at subnational courts of last resort, judicial accountability seems more important than for their colleagues at the national level. This does not mean that judicial independence is somehow limited. Nonetheless, in most dimensions of the appointment processes, the balance between judicial independence and judicial accountability is struck in favor of the latter: the tenures are shorter, and the representativeness of the courts is greater. In all of these dimensions, the appointment process of judges to subnational courts of last resort significantly differs from their national counterparts. These differences between the national and subnational level underscore the notion that subnational high courts inject federal ideas such as pluralism and diversity into the judicial system. On the other hand, the appointment of judges and the composition of the two courts fit perfectly well into the two regimes of constitutional adjudication: legal tradition, the type of federalism and the court system seem to require tenured judges in American state supreme courts, while the narrow jurisdiction of Land constitutional courts would hardly justify full-time judges.

4. Institutional Preconditions and Modes of Operation

Institutionalists believe in organizations because organizations privilege actions that follow established patterns and routines. Consequently, the institutional design of the two courts in question should affect the role that these courts might play in a regime of constitutional adjudication. Surprisingly enough, upon first glance American and German courts of last resort

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seem to be similar institutions. They are constitutionally mandated and can manage their internal affairs and their budgets autonomously. Nonetheless, the comparison ends here, given that the institutional structure and mode of operation of the two courts could hardly be more different.

Table 3: New York Court of Appeals (NYCoA) and Berlin Constitutional Court (BCC): Institutional Features

	Berlin Constitutional Court	**New York Court of Appeals**
Resources	0.7 Mio. € (2019); staff: 6 (without judges)	17.7 Mio $; (2019); staff: 129 (without judges)
Organizational culture	Discontinuous court; weak organizational structure	Permanent court, strong organizational structure
Mode of decision-making	Few hearings; ex ante (rapporteur judge); collective body	Permanent court, ex post (opinion-writer), single judge
Composition	9 honorary, part-time judges	7 tenured full-time judges
Competencies	To ensure that the constitution of Berlin is effectively enforced	'to unify, clarify, and pronounce the law of New York State'
Matters/Motions	179 per year (1992-2018)	4,035 per year (1997-2018)

Sources: Senatsverwaltung für Finanzen von Berlin 2017: 9; Reutter 2017: 94f.; NYCoA 1998-2018; New York State 2019: 13.

According to the Annual Report of the Clerk to the Judges of 2018, the NYCoA employed 129 non-judicial staff. By contrast, in the same year the BCC's staff comprised six employees, who mostly worked on cases and prepared decisions of the court. In other words, the BCC's administrative infrastructure is minimal. In addition, the BCC is organizationally 'embedded'. It is affiliated to the Higher Regional Court of Berlin (Kammergericht), to whose services the court can refer, if necessary. Finally, compared with the NYCoA, the budget of the BCC is negligible, at well below one million Euro per year. In fact, adding up all budgets since 1992, Berlin's taxpayers had to spend less on the BCC than the taxpayers of New York State for the NYCoA in one year alone. In 27 years of its existence, the BCC could dispose of 13.9 Mio.

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Euro, while the NYCoA's budget for the 2019-2020 fiscal year alone exceeded 15.8 Mio. Euro (= 17.7 Mio. USD).

It goes without saying that the organizational differences laid out above also reflect on the mode of operation of the two courts. Legally, the BCC comprises the president, the plenary meeting of all judges, members of the research staff, and the administration. The president chairs the plenary meetings, manages the general administration, and represents the constitutional body externally. According to the rules of procedure, the plenary deals with basic questions and decides on cases by majority. A judge prepares the final ruling as a rapporteur. The court is entitled to come to a decision if at least six judges are present, although this minimum number can be further reduced if a judge reports a conflict of interest. Abstention from voting is not an option. On average, the judges meet once per month for one day. If we take reports of former presidents and vice presidents as a reliable source, we should find teamwork, expertise, and collegiality reigning among the judges (Reutter 2017: 89-92). The part-time basis of the call presents a challenge as the judges must acquire the necessary expertise on constitutional law on top of their ordinary professional duties. These preconditions make deliberation an exception and privilege decision-making. Moreover, they are a hurdle for submitting dissenting votes. Put simply, the BCC comes close to what M. Cohen (2014) has coined an 'ex-ante model' of deliberation in which a rapporteur prepares the decision for the whole court and in which deliberation among the judges precedes the oral argument.

The NYCoA works in a sort of reversed fashion and represents the ex-post model in which the deliberative part of judicial decision-making takes place after the case has been orally argued (Cohen 2014; NYCoA 2018: 3-7). Following the self-description in the Annual Reports, the judges can rely on a large number of staff who provide administrative and judicial support. The Clerk of the Court and its staff are responsible for case management, whereby they prepare reports on civil motions and selected appeals in criminal cases. In addition, while the BCC only knows decisions made by the whole plenary (apart from dissenting votes), the NYCoA grants single judges much more discretion. A decision needs the vote of four judges, while five judges constitute a quorum. All judges of the NYCoA must decide collectively on

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appeals, motions, certified questions, and issues concerning the State Commission on Judicial Conduct. However, single judges decide individually on applications for leave to appeal in criminal cases and 'emergency show case orders' (NYCoA 2018: 2). In contrast to the BCC, the judges of the NYCoA individually sign or concur with opinions, while dissenting opinions are published, of course. Appealed decisions by lower courts can be affirmed, reversed, modified, dismissed or dealt with in other ways. The judges of the NYCoA 'commute' between in-court and in-chambers sessions. In-court sessions take place on a monthly basis (except in July) for two weeks in Albany at the Court of Appeals Hall. The judges spend the time between the in-court sessions in their Home Chambers to prepare pending cases, write opinions and attend to other businesses related to their professional responsibilities. These so-called in-chambers sessions generally last three weeks. During in-court sessions, the judges meet every day 'in conference' to discuss cases and reach decisions. Public hearings or oral arguments take place on a regular basis during in-court sessions (Tuesday to Thursday). The court is known to be 'a hot bench'. Hearings are question-and-answer sessions in which the lawyers have to quickly respond to very specific and sometimes painstaking questions raised by the judges. According to the Annual Report (NYCoA 2018: 3), in most cases each judge receives copies of the briefs well in advance of the oral argument. Consequently, each judge is familiar with the cases and can thus use the oral argument to address issues and raise questions triggered by the briefs. Each appeal is assigned randomly to one of the judges for reporting. The ensuing conference of the judges follows strict rules. In this model, deliberation among judges takes place before a decision has been proposed. Decisions are made by simple majority (NYCoA 2017: 8-9).

In addition, both courts use oral arguments and dissenting votes on a mirror-inverted basis (table 4). From a legal perspective, an oral argument should take place before the BCC hands down its decision. This rule is laid down in the Act on the Berlin Constitutional Court. Nonetheless, the parties involved or the court can forgo this procedural step. In effect, the legal exception has turned into a practical rule. Between 1992 and 2018, the BCC only scheduled 39 oral arguments or hearings, i.e. two per year. Out of 4,824 incoming cases, more than 99 percent did not entail an oral hearing at the BCC. Almost 97 percent of all decisions

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on the merits (1,157 out of 1,196) were issued as a 'court order', i.e. as a 'Beschluss' or a decision without prior hearing. At the NYCoA, the 'fast track' is the exception. This track of *Sua Sponte Merits* (SSM) allows the NYCoA to decide appeals without oral argument, 'saving the litigants and the court the time and expense associated with the filing of bound briefs and oral argument' (NYCoA 2018: 4). Such an alternative track may be granted if the parties have requested SSM review and 'if, for example, it involves narrow issues of law or issues decided by a recent appeal' (NYCoA 2018: 4). Since 2005, only 460 appellants have been granted such a fast track, i.e. 35 per year. Based on the very small number of oral arguments, the BCC can hardly be understood as a court that extensively deliberates on cases. It not only corresponds to the ex-ante model that M. Cohen (2014) has described but also the public part of deliberation is minimal, in most cases non-existent. By contrast, in most cases the NYCoA grants a public venue in which the appellant can clarify issues and defend the case.

Similarly, there is a significant discrepancy regarding the number of dissenting votes. In both courts, a dissenting vote is possible, although in Berlin dissenting votes are extremely rare. Between 1992 and 2018, we find only 38 dissenting votes in which a judge publicly disagreed with the opinion of the court's ruling (Reutter 2017b). This reflects only 3.7 percent of all 753 decisions included in the dataset of the BCC, whereby 64 judges have either signed or concurred with a dissenting vote. The NYCoA provides a reversed image in this respect. Although Luke Bierman (1995: 1410) states that the NYCoA showed strong traditions 'concerning congeniality among its members and its decision-making', dissenting votes became frequent and a sort of routine. Between 2005 and 2018, overall 831 dissenting votes were handed down (63.9 per year), while from 2012 and 2014 less than half of the appeals found the support of all judges.

Obviously, the institutional preconditions and the mode of operation of the two courts significantly differ. The NYCoA enjoys a fully-established organizational infrastructure and full-time judges. By contrast, the BCC's institutional resources are minimal. Having hardly any staff, limited organizational resources, and part-time judges who convene only a dozen times per year provide no indication that the BCC could be as powerful as the NYCoA. Put differently, without 'resources, principally time and expertise, opportunities for activism may

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escape or simply go unrecognized' (Wenzel et al. 1997: 369). At the same time, the institutional layout of the two courts fits with the two regimes of constitutional adjudication outlined above.

Table 4: Input, throughput, and output: caseload, type of proceeding, oral arguments and dissenting votes

	Berlin Constitutional Court		**New York Court of Appeals**	
Period	1992-2018		2005-2018	
Caseload (Input)	Abs.	Per year	Abs.	Per year
• Incoming cases per 100,000 population (2018)[a)]	—	6.1	—	19.8
• Docket[b)]	4,824	179	54,497	3,892
Throughput				
• Number of oral arguments	39	1.4	2,464	190
• Without oral argument / SSM	4,553	169	460	35
• Number of dissenting votes	38	1.5	831	63.9
Type of Proceeding (Output)				
• Constitutional Complaint / Appeals[b)]	4,609	171	4,312	308
• Disputes between State Organ	79	2.9	—	—
• Judicial Review / Constitutional Question	15	0.6	93	6.6
• Others	120	4.5	363	28

a) BCC: cases 230, population 3.75 Mio; NYCoA: 3,875 filings; population 19.54 Mio; b) BCC: all registered cases; NYCoA: appeals plus orders granting leave to appeal plus motions plus criminal leave application filings.
Sources: NYCoA 2005-2018; Verfassungsgerichtshof Berlin 2012-2018.

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5. Comparing Constitutional Adjudication of Subnational Courts of Last Resort

Numerous studies have aimed to capture the effects of constitutional adjudication and judicial review (Hagan 1998; Kmiec 2004). For Arend Lijphart (1999: 225), for example, the 'impact of judicial review depends […] vitally on the vigor and the frequency of its use by the courts, especially supreme and constitutional courts.' According to Lijphart (1999: 225f.), Germany and the USA possess 'strong judicial' review, although the author did not mention subnational courts of last resort. I will complete Lijphart's approach and try to explore the impact of subnational constitutional courts by assuming that the accessibility, caseload, and type of proceedings shape the role that a court might play in a federal democracy. Unsurprisingly, the two courts significantly differ once again (table 4).

According to Art. VI § 3 of the Constitution of New York State, the jurisdiction of the Court of Appeals is in most cases 'limited to the review of law'. Its main task is to 'unify, clarify, and pronounce the law of New York State' (NYCoA 2018: 2). Only in few and exceptional cases might the court also decide on facts. Like the other state supreme courts in the USA, the NYCoA is the final appellate tribunal for civil and criminal appeals. Appeals as of right (e.g. constitutional question, certified question, death penalty, appellate division order) are possible but do not happen too often. Some 95 percent of the incoming appeals must obtain permission by either the court, a single judge of the NYCoA (in criminal cases) or an Appellate Division. Notwithstanding this qualification, between 2005 and 2018 the NYCoA registered on average 3,892 new filings per year, i.e. appeals plus orders granting leave to appeal plus motions plus criminal leave application filings. Per 100,000 members of the total population, this was some 19.8 incoming cases in 2018. However, ultimately fewer than 10 percent of the incoming cases were appeals that received permission by the court. Consequently, each year some 308 appeals, 6.6 constitutional questions, and 28 other cases were eventually accepted.

By contrast, the BCC does not work as a proper court of appeals. The BCC's major task is to enforce the constitution and apply constitutional stipulations to political or legal issues. Thus, we find various applicants that can bring a case to the court. For example, an individual can lodge a constitutional complaint, or a parliamentary party, the incumbent government or a

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lower court can ask the court to review a statute or decide on conflicts between state organs. Compared with the NYCoA, the number of cases registered at the BCC is much lower. Since 1992, each year some 179 motions were submitted to the BCC on average. Constitutional complaints always accounted for the vast majority, representing more than 95 percent of all incoming cases. In principle, all filings registered at the court are 'motions as of right'. The court must deal with each of them if the applicant insists. Nonetheless, it can do so in different ways so that only a minority of the cases brought before the court are honored with final a decision on the merits. Most constitutional complaints are rejected for formal reasons.

Between 1992 and 2018, the BCC registered a total of 4,824 incoming cases. The court found 2,261 petitions inadmissible or obviously unsubstantiated, while 833 motions were withdrawn and another 302 were dealt with in other ways not specified in the statistics of the BCC. Ultimately, there were only 1,196 cases that triggered a decision on the merits (= 24.8 percent) The discrepancy between incoming cases and appeals honored by a disposition of the court is even greater at the NYCoA: between 2005 and 2018, the NYCoA registered almost 55,000 incoming matters, i.e. 3.892 per year. This is more than 20 times the caseload of the BCC. Nonetheless, in this period only 4,312 appeals, 93 constitutional questions and 363 other matters were granted a final disposition of the court.

Once again, we find similarities and differences. Most importantly, both courts have the privilege to invalidate laws and can thus contribute to answer constitutional issues. At the same time, the jurisdiction, type of proceedings, and accessibility create institutions that do not share much in common. The BCC speaks as an integrated institution that is rarely called upon. Oral arguments and dissenting votes only happen in exceptional cases. By contrast, the NYCoA is institutionally strong, its decisions are individualized and these make differences among the judges a matter of routine. In addition, it is frequently called upon. Put simply, caseload, throughput, and output represent different court types.

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6. Subnational Courts of Last Resort and 'Unitarian Juristocracy': Some Tentative Conclusions

Most studies on the judicial dimension in federations are national-centric. They overwhelmingly focus on the national level and explore the impact of the judiciary on federalism. This paper has applied a different approach. Empirically, I address a dimension that has hitherto been overlooked in the debate on judicial federalism. Methodologically, I apply a most different systems design to the study of subnational constitutional adjudication, and theoretically I try to describe and capture whether and how far subnational courts of last resort inject federalist impulses into the judicial system. Moreover, I assume that subnational courts of last resort are part of a regime of constitutional adjudication. They act in a legal, constitutional and political environment, which shapes their role and defines their impact on federalism and democracy. The findings lead to three conclusions.

First, it is not possible to make general statements about causal links between constitutional adjudication and federalism. The two cases examined in this paper differ in almost all respects. They share the right to invalidate laws. Nonetheless, the appointment of judges, the composition of the court, the mode of operation, and the role these two courts play in their respective polity vary not only in degree but also substance. While these might seem to be trivial findings, it rules out arguments like the notion that federalism means legalism that causes a strong judiciary that in turn will lead to juristocracy. Moreover, we also cannot say that judicial review will always strengthen unitarism. In fact, we might even say that the NYCoA privileges the judiciary only because it works as a decentralizing institution. At the same time, by comparison the BCC looks less powerful and it combines a weak(er) judiciary with vertical integration and thus unitarian tendencies.

Second, in both countries constitutional adjudication is not monopolized in a single court. In both regimes, it rather manifests itself as stratarchical structure. This pluralistic power structure not only injects plurality and diversity into judicial federalism but also makes varying rulings on the same issue feasible. For example, with its ruling Goodrigde v. Department of Public Health (2003) the Massachusetts Supreme Judicial Court allowed same-sex marriage in

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this state, while the NYCoA refused to legalize same-sex marriage in Hernandez v. Roblez (2006). Similarly, there are diverging rulings of German Land constitutional courts on religious issues (Henkes and Kneip 2009). Once again, this favors a pluralistic understanding of constitutional law and underscores federal principles.

Third, if we discuss constitutional adjudication and court of last resort in federal systems, we must take the subnational level into account (Williams 2006; 2003; Tarr 2009). Without giving this level its due credit, we are unable to explain neither federalism in general nor judicial federalism in particular. G. Alan Tarr has rightfully highlighted that American state supreme courts are not simply legal institutions; instead, they 'actively participate in governing and they are the target of political action designed to influence their decisions and their membership' (Tarr 2009: 204). Arguably, German Land constitutional courts have not acquired such a status. Nonetheless, they also rule on controversial issues, safeguard the subnational constitution and protect civil liberties. In this sense, both courts contribute to the development and functioning of federalism.

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[I] I borrow the term 'juristocracy" from Ran Hirschl (2004 and 2007).

[II] See Reutter 2020; 2018; 2017. My compilation based on: Abgeordnetenhaus Berlin, 'Parlamentsdokumentation'. Available at: https://www.parlament-berlin.de/de/Dokumente/Parlamentsdokumentation; NYCoA 1998-2018; 'List of associate judges of the New York Court of Appeals' (Wikipedia) https://en.wikipedia.org/wiki/List_of_Associate_Judges_of_the_New_York_Court_of_Appeals; Historical Society of New York Courts, 'Biographies' http://www.courts.state.ny.us/history/legal-history-new-york/history-legal-bench-court-appeals.html accessed 31 July 2019. To make comparisons possible, the time period begins with the election of the first judges to the BCC (03/26/1992) and ends on 12/31/2018, which covers a period of 26.8 years. Consequently, at the BCC the judges served 241.1 years in office (=26.8 years x 9 judges) and at the NYCoA seven judges stayed 186.5 years in office (26.8 years x 7 judges).

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