

Contents

1	General Introduction	1
1.1	Background: Ineffective Rule-of-Law Reforms in Mexico	1
1.2	The Research Gap: ‘Culture’ as the Miscellaneous Explanation . . .	3
1.3	Methodology: A Critical Comparative Legal Analysis	5
1.4	Overview of the Study	7
	References	8
2	Rule-of-Law and Judicial Federalism: The Role of Ordinary Courts in the Enforcement of Fundamental Rights	11
2.1	The Rule-of-Law Concept Revisited: The Rule-of-the-Constitution	13
2.1.1	A Concept Within Two Debates	13
2.1.2	A Matter of Predictability	17
2.1.3	Constitutional Supremacy and Fundamental Rights	21
2.2	Constitutional Scrutiny as Judicial Review	24
2.2.1	Constitutional Review, the Courts, and the Individual	24
2.2.2	Fundamental Political Decisions and Constitutional Review	28
2.2.3	Horizontal Separation of Powers and Constitutional (Judicial) Review	32
2.3	Judicial Review and Judicial Federalism	37
2.3.1	Vertical Separation of Powers and Judicial Review	37
2.3.2	“American” Judicial Federalism	39
2.3.3	“European” Judicial Federalism	42
2.3.4	Constitutional (Judicial) Review of Judicial Action	45
2.4	Ordinary Courts and the Realization of Fundamental Rights: Towards an Adequate Functional Division in Constitutional Review	49
2.4.1	Two Dimensions of Constitutional Scrutiny (Rights)	49
2.4.2	Towards an Adequate Division of Tasks in Constitutional Scrutiny	54

2.4.3	The Role of Ordinary Courts in Fundamental Rights Issues: The ‘Direct Effect of the Constitution’	58
2.4.4	The Guiding Role of Constitutional Jurisdiction	60
2.5	Chapter Conclusions	66
	References	67
3	Constitutional Review in the United States of America: Does “Diffused” Mean Complete Decentralization?	71
3.1	Basic Rights Enforcement Before the Civil War (1776–1860)	76
3.1.1	The Federal Bill of Rights as a Guarantee <i>for</i> the States	76
3.1.2	Judicial Enforcement of Fundamental Rights in the Antebellum	87
3.2	Postwar Increase on Federal Oversight: The Blurring of Boundaries Between State and Federal Jurisdiction (1865–1988)	96
3.2.1	Reconstruction: The Federal Bill of Rights as a Guarantee <i>Against</i> the States	96
3.2.2	The “Due Process Revolution” and the Maximization of Federal Judicial Power over the States	105
3.3	American State Courts as Primary Guarantors of Fundamental Rights	116
3.3.1	The Assumption of Judicial Parity and Its Limits: Exclusive Federal Court Jurisdiction	116
3.3.2	Fostering Federalism: Concurrent Jurisdiction with State Courts	122
3.4	The Guiding Function of the Federal Judicial Review of State Court Judgments	129
3.4.1	Lower Federal Court Collateral Relief Through Habeas Corpus: A ‘Right’ to Federal Review of a State Court Decision?	129
3.4.2	Supreme Court Appellate Review via Writ of Certiorari	139
3.5	Chapter Conclusions	145
	References	148
4	The German System of Constitutional Review: Prototype of a Concentrated Model?	155
4.1	Basic Rights as a Core Element of the German <i>Rechtsstaat</i>	158
4.1.1	Formal Versus Material <i>Rechtsstaat</i>	158
4.1.2	Concretizing the ‘Basic Rights <i>Rechtsstaat</i> ’	164
4.2	The Blurring of Boundaries Between Ordinary and Constitutional Judicial Review	170
4.2.1	The Need for a Specialized Constitutional Jurisdiction	170
4.2.2	The Jurisprudential Expansion of the Constitutional Jurisdiction	174
4.3	Ordinary German Courts as the Main Protectors of Basic Rights	181

4.3.1	Ordinary Court Empowerment to Review the Constitutionality of Legislation: An Invalidation Monopoly?	181
4.3.2	Recourse Against Basic Rights Violations due to the Incorrect Interpretation and Application of ‘the Law’	187
4.4	The Federal Constitutional Court as a Lighthouse	195
4.4.1	An Individual’s Way to the BVerfG: A “Citizens’ Court”?	195
4.4.2	Constitutional Judgments on the Merits: The BVerfG’s Deference to German Ordinary Courts	200
4.5	Chapter Conclusions	206
	References	207
5	Constitutional Review in Mexico: A Best of All Worlds Solution?	213
5.1	A Brief Recap on the Leading Systems of Constitutional Review and Fundamental Rights	218
5.1.1	The American and the European “Models” Prima Facie	218
5.1.2	The “Models” and Fundamental Rights Enforcement	220
5.2	The Mexican System Between Two Models (1847–2011)	224
5.2.1	American Influence in Mexican Judicial Review (1847–1987)	224
5.2.2	A “Turn” Towards Continental Europe (1987–2011)	231
5.3	The <i>Expediente Varios 912/2010</i> and the Incorporation of Diffused Constitutional Review in Mexico	237
5.3.1	The “Judicial” Incorporation of Diffused Review	238
5.3.2	The <i>Nuevo León</i> Judgment and the Bills on Diffused Control	242
5.4	Qualified Majorities in the Supreme Court as a Rule-of-Law Distortion	246
5.4.1	What the Constitution Says	246
5.4.2	What the Supreme Court Does	249
5.5	Some Urgent Reforms	250
5.5.1	Real Empowerment for the Ordinary Courts	250
5.5.2	Let the Supreme Court Be Supreme: Exemplary Function of the Constitutional Jurisdiction	251
5.6	Chapter Conclusions	253
	References	256
6	General Conclusions	259
6.1	Theoretical Legal Requirements for Rule-of-Law Achievement	259
6.2	Current American Constitutional Review Matches the Model	260
6.3	Present-Day German Constitutional Review Matches the Model	261
6.4	Mexican Constitutional Review Does Not Match the Model	262