CHAPTER VI

CONSTITUTIONAL COURTS: STRUCTURE AND PROCEDURE

Does constitutionalism require judicial review of the constitutionality or lawfulness of the acts of governments and their officers? In the United States, "law" and "courts" go together as seemingly natural companions. Whether law is seen as simply a prediction of the decisions courts will make, or as having some principled existence apart from particular decisions, courts are experienced as primary in the determination of the meaning and force of law. See U.S. Constitution, Art. VI, Section 2 ("Supremacy Clause," declaring the Constitution and laws of the United States to be supreme over state law, followed by an admonition to state court judges to enforce federal law when it conflicts with state law).

Associated with the introduction of modern written constitutions has been the development of special institutions to enforce the constitution. Constitutions do not necessarily provide for judicial enforcement, as the Note in Chapter III on the People's Republic of China shows. Many constitutional scholars believe that courts are needed to secure the enforcement of constitutions in the western liberal tradition, though others question how large or definitive a role courts, as compared to legislatures, should play in defining the legal environment. Political scientists argue that the "growing influence of judicial institutions" and the accompanying "jurisdiction" of politics is both a global phenomenon and a highly significant trend in governance.

Canada and Australia have long had judicial review of both statutes and other government actions under written constitutions; India has had judicial review for over 60 years under its post-colonial constitution, as has Germany under its 1949 Basic Law. Judicial review was adopted in Argentina in the nineteenth century, and today most European and Latin American constitutions, and many of the newer Asian constitutions, provide for some form of judicial enforcement of the constitution, but they may create institutions that—at least formally—are quite different from the decentralized judicial review found in the United States. In this Chapter we examine the various forms in which judicial review of constitutional claims is carried out and the various

methods by which judges deciding constitutional claims are chosen and consider both positive and negative claims about the effects of judicial review.

A. STRUCTURE AND FUNCTION OF CONSTITUTIONAL COURTS: AN INTRODUCTION

In addition to considering the relationship between judicial review and constitutionalism, students of comparative constitutional law are interested in the relationship(s) between the outcomes of judicial review and the institutional structures and procedures through which it is carried out. For a thoughtful exploration of judicial legitimacy, see Wojciech Sadurski, Constitutional Courts in Transition Processes: Legitimacy and Democratization, Sydney Legal Studies Research Paper No. 13/03 (Aug. 30, 2011), available at SSRN: http://ssrn.com/abstract=1910983 (discussing "input" legitimacy from selection methods, "output" legitimacy from courts’ decisions, and, in Central and Eastern Europe, "emulation" and "Europeanization" as sources of legitimacy).

The U.S. Supreme Court represents just one mode of constitutional review in a range of choices made by other nations about judicial review of constitutional issues. It engages in judicial review of the constitutional acts of other branches and levels of government, and can review the constitutionality of acts of legislation as well as of executive acts. So too do other federal and state courts in the United States, and in Canada and Australia as well. But this diffusion of authority to decide constitutional questions is not universal even among legal systems that incorporate judicial review. The U.S. Supreme Court functions not only as a constitutional decisionmaker, but as an adjudicator of issues of federal common law and of the interpretation of federal statutes; it also is the court of last resort for review of decisions in the lower federal courts. In acting thus as more of a "generalist" court, the U.S. Supreme Court differs from many European constitutional courts, which specialize in the resolution of constitutional questions, often on referral from the ordinary court system. See Louis Favoreu, American and European Models of Constitutional Justice, in COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN (David Clark ed., 1990). In the United States, the federal courts can review executive action both for its conformity with statutes and its conformity with the Constitution. In some other systems, "ultra vires" review of the legality of acts of executive and administrative officials is performed by one court (for example, the Conseil d'Etat in France), and review of the constitutionality of laws enacted by the Parliament in another (in France, the Conseil Constitutionnel). Thus, "constitutional review" should not be confused with "judicial review." In the following materials, we highlight some differences between the U.S. Supreme Court and other high courts, in other nations, that engage in constitutional judicial review.

1. CENTRALIZED V. DECENTRALIZED REVIEW; HYBRID MODELS; THE SIGNIFICANCE OF INSTITUTIONAL STRUCTURE

There are at least two major models for the organization of constitutional judicial review within a court system: the decentralized model and the centralized model. (For helpful treatments on which this discussion in part relies, see Mauro Cappelletti, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 132 (1989); Favoreu, American and European Models of Constitutional Justice, supra; see also Allan Randolph Brewer-Carias, JUDICIAL REVIEW IN COMPARATIVE LAW (1989)).

The decentralized model (also known as the "American" or "diffuse") model involving "incidental" review is represented by the organization of the United States' judicial jurisdiction. A key characteristic of this model is that the jurisdiction to engage in constitutional interpretation is not limited to a single court. It can be exercised by many courts, state and federal, and is seen as inherent to and an ordinary incident of the more general process of case adjudication. It has been used in such countries as Argentina, Australia, Canada, India, and Japan. In the United States, we might think of it as a model in which courts are "generalists," deciding common law, statutory, and constitutional questions as the case demands.

The centralized model (also called the "Austrian" or "European" model) is characterized by the existence of a special court, exercising either exclusive or close to exclusive jurisdiction over constitutional rulings. The Austrian Constitution of 1921 created such a court, theorized by legal scholar Hans Kelsen, and similar "constitutional courts" exist today in countries like Germany, France, Italy, and some of the eastern European nations as well. Often, in such legal systems, there is a "Constitutional Court" that decides on the constitutionality of legislation, and at least one separate "supreme court" with jurisdiction over matters of statutory interpretation and administrative law. Centralized constitutional courts are, in a sense, "specialists" in constitutional decisionmaking, that sit outside of, rather than on top of, the normal structure of judicial jurisdiction. See Favoreu, supra, at 111.

Centralized constitutional review is closely associated, philosophically, with notions of parliamentary supremacy and a corresponding suspension of permitting judges to set aside laws. To the extent this philosophical tradition was strongly held in the
culture, even proponents of constitutional review could think it better to limit the number and visibility of judges authorized to act aside legislative decisions, rather than to permit every judge in every court to exercise such power. "Rehabilitated constitutional review" includes both its function of defending constitutional law as higher, while retaining the general prohibition on judicial review." Alec Stone Sweet, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 40 (2000).

Yet hybrid models also exist, in which, for example, the ordinary courts may have power to refuse to apply an unconstitutional law, but only a single court has the power to declare a law invalid. Brewer-Carias has argued that Latin America deserts credit for originating hybrid systems in the 19th century. See A.R. Brewer-Carias, REFLEXIONES SOBRE EL CONSTITUCIONALISMO EN AMERICA 33–36 (2001). See also Louis Favoreu, CONSTITUTIONAL COURTS 125 (2001) (stating that there is a Latin American model in addition to U.S. and European models of constitutional review). Other hybrids also have developed. See, e.g., Peter Krag, Departure from the Centralized Model: The Russian Supreme Court and Centralized Control of Legislation, 57 Va. J. Int'l L. 725 (1997) (discussing the competition in Russia between the Constitutional Court and the Supreme Court over authority to review the constitutionality of laws); see also William Burnham & Alex T. Tocchez, Russia's Way Between the Courts, 55 Am. J. Comp. L. 582 (2007) (describing the re-intensification of jurisdictional struggle starting in 1998). For an introduction to the impact of institutional design on judicial behavior, see Tom Ginsburg & Robert A. Kagan, Institutionalist Approaches to Courts as Political Actors, and other essays in INSTITUTIONS & PUBLIC LAW: COMPARATIVE APPROACHES (Tom Ginsburg & Robert A. Kagan eds. 2009).

Moreover, in important respects systems that are formally organized around centralized review by specialized constitutional courts are increasingly incorporating elements of decentralized review of the legality of government activity. See Victor Ferreras Conella, The European Model of Constitutional Review of Legislation: Towards Decentralization?, 2 Int'l J. Const. L. (1-CON) 461, 470–82 (2004). Ferreras Conella argues that normally centralized review systems in Europe are increasingly under pressure toward decentralization of review, from factors internal to the centralized model (such as delays that may encourage judges on other courts to engage in statutory interpretation in the shadow of the constitution) and external features arising from the role of national courts in conforming national law to European Union law. See Nadine Lenzer, The Constitutional Council and the European Convention of Human Rights: The French Paradox, in JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE 145, 153 (Mads Andenas ed., 2000) ("Thanks to the international human rights law [the European Convention], for the first time in French history, French courts have the opportunity to challenge domestic law.") Indeed, many attribute the recent change in France, for the first time allowing the Conseil Constitutionnel jurisdiction to declare a law unconstitutional after its enactment (if the issue is referred to it by one of the other high courts in France), to a desire to regain control (that is, from the European Court of Human Rights and its jurisprudence) over the validity of French statutes. Ferreras Conella argues for retention of the centralized constitutional court model in European countries, but with modifications to allow ordinary courts to sit aside legislation when, under constitutional court precedent, it is clear that the law is distinguishable from one held invalid by the constitutional court. Victor Ferreras Conella, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES 118–21 (2009). Consider, as you read these chapters, whether the differences between centralized and decentralized review may be converging in other respects: is the U.S. Supreme Court becoming more like a European constitutional court?

2. THE POSSIBLE SIGNIFICANCE OF CIVIL LAW VS. COMMON LAW TRADITIONS

(a) Civil Law Judges: Careerist vs. Recognition Models of Judicial Selection

Political scientists sometimes distinguish between "careerist" and "recognition" tracks for becoming a judge. A "careerist" track entails entry into judicial positions early in one's career, with advancement through the bureaucratic hierarchy of court systems. "Recognition" appointments to the bench occur later in one's career, after having gained recognition as a practicing lawyer or professor. Civil law judges in Europe are typically career judges, whose professional training emphasizes skills of technical interpretation, rather than the broader issues often involved in constitutional judicial review. This limitation in training is consistent with continental notions of parliamentary supremacy, and suspicion of according substantial power to judges. (A standard epithet in France for the work of constitutional courts was "gouvernement des juges," from the title of a well-known 1921 book by Edouard Lambert, highly critical of American judicial review.) Cappelletti argued that constitutional adjudication "often demands a higher sense of discretion than the task of interpreting ordinary statutes." And that the ordinary training of civil law judges does not conform to the task of constitutional interpretation. Favoreu suggested as well that the election or appointment of judges in the United States by political branches gives them a legitimacy in constitutional interpretation that continental career judges lack. In civil law countries, establishing a special and separate court, distinct from the ordinary judicial system, may be a way of calling into play different skills and aptitudes, and different qualifications to enhance the legitimacy of a court engaged in the "political" act of reviewing legislation.

In addition, many European nations adopted constitutional review at a time when their ordinary judicial systems were mature and complex; adding to the duties of existing court systems may have seemed a less satisfactory solution than the creation of the specialized "constitutional court." Favoring this was the "absence of unity between the legal order and the judicial apparatus," and argues that where there are complicated and separate jurisdictions for dealing with most legal questions, it is more difficult to permit decentralized constitutional adjudication than in countries like the United States were there is a "unity of jurisdictions." Moreover, it has been suggested that in countries in transition from authoritarian regimes, it would be very difficult to implement decentralized review, since the general corps of available judges would be unlikely to have either the training or the independence from prior regimes to function with legitimacy as constitutional adjudicators. Finding a small number of respected and untainted jurists, who might constitute a centralized and specialized constitutional court, is simply more doubtful. Finally, controlling the appointment of constitutional court judges allows elected legislatures, or executive officials, more control over those who pass judgment on their legislative output, in ways that those skeptical of constitutional review may find reassuring or necessary to produce a workable system.

b. Stare Decisis

In the United States, as in other common law countries, the doctrine of stare decisis extends the effect of rulings of law from the parties in the case before it to the broader legal community within the jurisdiction of the deciding court. The rationale for, and legal effect, of stare decisis in constitutional decisions in the Supreme Court has been the subject of significant debate. But many constitutional courts function in civil code systems, which do not have the same tradition of stare decisis in ordinary adjudication.

The absence of principles of stare decisis in civil law countries may have contributed to a tendency towards centralized judicial review. If all courts could decide constitutional questions without stare decisis effect, Cappelletti suggested, a chaotic situation would result in which respect to the decentralized constitutional courts may be set forth in the constitutions that create them. Where specialized constitutional courts exist their decisions are often described as binding on all, European commentators sometimes draw a contrast with U.S. decisions, described as binding only on the parties to the litigation. Such a description is, however, far too simplistic—and may not be accurate at all, cf. Cooper v. Aaron, 395 U.S. 1 (1965), with respect to constitutional adjudication in the U.S. Supreme Court.

3. ABSTRACT VS. CONCRETE REVIEW; CASE OR CONTROVERSY LIMITATIONS

As discussed further below by Professor Sadurski, many of the "case or controversy" limitations that are an important part of United States' constitutional jurisprudence do not apply to pre-litigation review in the European constitutional court model. For example, many European constitutional courts give dissenting members of the national legislature the right to challenge, on an "abstract" basis, the constitutional validity of laws. Indeed, until 2008, in France review of the constitutionality of legislation could take place only after it went into effect. Professor Cappelletti and others have argued that the make-up of European centralized constitutional courts recognize the political character of judicial review, both in the nature of and qualifications for appointments, and in the types of cases they hear, more overtly than is the case in the United States.

Convergences? Some comparative scholars have argued that the world's systems of constitutional review are in many respects "converging"; similarities in practice, procedure, and jurisprudential problems and methods have emerged in recent decades in notable respects. See, e.g., Alec Stone Sweet, Why Europe Rejected American Judicial Review: And Why It May Not Matter, 101 Mich. L. Rev. 2744 (2003). Consider, as you read the following descriptions of "constitutional review" in Europe, as well as the readings on "hybrid" review in Latin America, the extent of the convergences as well as differences between the systems of judicial review.

4. DEVELOPMENT OF JUDICIAL REVIEW IN EUROPE: CONSTITUTIONAL COURTS, NOT SUPREME COURTS


As a leading comparative constitutional law scholar, Alec Stone Sweet of Yale Law School observed, at the time the US legal system established a model for judicial review of statutes under its newly adopted Constitution [noting Marbury v. Madison], France was busy dismantling any traces of the power of judges to control statutes that they applied for their constitutionality... [The French] Law of 1790 (which remains in operation today) ... formally prohibited the judicial review of legislative and administrative acts. The system was constructed on the principle—a corollary of legislative sovereignty—that courts must not participate in the lawmaking function” [citing Stone Sweet, Why Europe, supra, 101 Mich. L. Rev. 2744]

This is the beginning for two different ... trajectories for the developments of models of relationship between the judge and the constitution: an all-powerful judge who has a power—indeed, an obligation—to declare the law invalid under the higher (but often vague) constitutional provisions and a judge who is solely disempowered from any such review... . [But today,] France (and many other European constitutional systems) has a powerful constitutional court (Constitutional Council, as it is called) the authority of which is...
no less...[that] the US Supreme Court, even though its modus operandi is completely different. And the American Court's powers, as eloquently asserted by Justice Marshall, have been under a constant challenge from scholars and judges alike, often united in the depiction of so-called "counter-majoritarian difficulty", which is just another way of questioning the Court's legitimacy to upset democratically reached legislative choices.

...I will try to give an account of these constitutional trajectories...[through] a highly stylized account of the contrasts, similarities and paradoxes which emerge when reflecting upon the American and the European models of constitutional review....

One caveat: I will be referring to the "European model" but there is an important over-inclusiveness implied by this terminology. There are many European states which do not have constitutional courts designed and operating in the way in which the French, German, Italian, Spanish, Portuguese courts (with all the differences among these national institutions) function. There is no concentrated abstract constitutional review in Nordic states, in the Netherlands, in Switzerland and in many other European states—not to mention the United Kingdom. In fact, the abstract-concentrated review (which I will refer to here as the "European model") exists in a little over one half of the European states. This caveat must be kept in mind, and whenever I will be referring to the "European model" I will only have in mind the paradigm exemplars of the abstract-concentrated model as seen in Germany, France, Spain, Portugal, Italy, Austria, Belgium, Cyprus, Turkey and all the post-communist states of CEE, with the partial exception of Estonia.

1. US Constitutionalism and its influence on Europe

Modern European constitutionalism owes a great deal to the powerful American example, and it would be totally distorting and unfair to dwell on the contrasts between two models of constitutional review without first identifying the ways in which the United States has affected the European approaches to constitutionalism more generally. These ways can be described as three great influences [on matters] now taken for granted so much that they are almost invisible and considered to be the attributes of constitutionalism as such. But these were periods in European history when they were not considered as obvious—indeed, when they were quite categorically rejected. If they are now endorsed without much challenge; indeed, if they are now taken as intrinsic features of constitutionalism simpliciter, it is because the American model proved so attractive. ... First, it has been under the influence of [the] American model that the constitutions came to be seen as genuinely and unquestionably legal instruments...[at] the end of the 2nd World War; before, constitutions had been considered in Europe to be fundamentally political documents containing important institutional guidelines to be followed by governments but without any direct legal effects which may control legally, upon governments and the governed alike. As the leading public law scholar in France in the first decades of the 20th Century, Raymond Carré de Malberg stated: "In France...the Parliament, if confronted with a court decision of unconstitutionality, could rather easily...

overcome the resistance of the court: the parliamentary majorities that adopted the law paralyzed by the judicial action have only to reaffirm their original measure by a simple majority in order to make their will prevail. In such circumstances, it is likely that the judiciary would hesitate to refuse to apply a law on grounds of its unconstitutionality". In contrast, the American approach from the very beginning was founded on the perception that, whatever else it may be, the Constitution is first and foremost a law, and a superior law at that, with all the consequences of this fact. As Laurence Tribe puts it, the main implication of Chief Justice Marshall’s position in Marbury v. Madison was that the Constitution was "the fundamental and paramount law of the nation", and not merely the statement of an ideal political structure to which American government should aspire, or an initial distribution of rights and responsibilities which defined the starting point to bargaining among political institutions and individuals.8

Second, it was the American example that in the end convinced the Europeans that a constitution is not self-executing, and must not be left to political execution only, but that it needs the legal instruments for giving effect to its supremacy over other legal acts. An idea that a judicial or quasi-judicial institution should be set up with the authority to enforce constitutional supremacy was, for many decades, an anachronism in the European continent. As Carré de Malberg propounded: "The legislature when making law has to examine whether the law considered is consistent with the Constitution and resolve cases in this regard...Because it is exercising the powers of the sovereign, Parliament is the judge of the constitutionality of its own laws. Therefore, courts are not to interpret the Constitution; at least they do not have that power in relation to the legislature". This suspicion of judges was fuelled, in the first decades of the 20th Century, by...[a] book published in France in 1921 by Edouard Lambert entitled anonimously "The Government by Judges and the Struggle Against Social Legislation in the United States". This book was extremely influential in the left-leaning French legal scholarship of [the] 1920s: it depicted American judges as staunch and effective opponents to social welfare legislation and all other progressive reforms, and constituted a powerful warning against experimenting with judicial review in Europe. That is why the ideas of Hans Kelsen—which found their fulfillment between the two World Wars in Austria and Czechoslovakia [— were] widely seen as so revolutionary—even with all the protestations by Kelsen himself that a constitutional court should remain a "negative legislator" only, and that it should not have powers to invalidate statutes under constitutional rights but only under structural provisions of constitutions. A traditional European (and particularly, French) attitude to the judicial role was marked by a fear of the "government by judges" and led to explicit prohibitions upon enabling judges to give effect to the primacy of a constitution over the statute. So it has been a real revolution, and a result of the impact of the US approach to constitutional enforcement, that constitutional courts mushroomed in post-War II Europe.

The third great lesson that European constitutionalism acquired from the US is that a bill of rights is an indispensable ingredient of a

8 Tribe, American Constitutional Law, at 97.
fully-fledged constitution. Again, it has not been obvious in European constitutionalism prior to the end of the 2nd World War, and structural provisions were viewed as the most important part of a constitution. A litany of rights was considered as something either as much or less a declaratory or decorative only—and it is significant that the oldest surviving European constitutions, such as the Constitution of Sweden, have very scant catalogues of rights. And it was definitely the influence of the US approach to constitutional rights that informed the proliferation of charters of rights in European constitutions. These charters are often very different from the US bill of rights in that they often [contain socio-economic rights and, also they explicitly list the grounds and the criteria of statutory limitations of constitutional rights. But the very idea that a constitution is badly incomplete unless it spells out citizens’ rights and liberties which no legislator can transgress is a great contribution of American constitutionalism to constitutional practice worldwide, including in Europe. And it was only after the 2nd World War, and after the excesses of unaccounted governments that the constitutional drafters in Europe took on board an idea of clearly formulated, directly enforceable constitutional rights and liberties as intrinsic components of constitutional texts. As a great dozen of French constitutional law scholarship, Louis Faveure recognized, “From an historical viewpoint, the United States example undoubtedly has had a decisive impact on constitutional development and the protection of rights”.15

2. Two models of constitutional review

Having sketched [how] the American example influenced positively the European constitutional model, I will now identify the main differences between the two models, as far as the institutional forms of the enforcement of the primacy of a constitution are concerned . . . in an extremely schematic and stylized fashion, by depicting ten fundamental differences.

First . . . the US model is based on a concrete review while the European model is predominantly abstract. In the United States, courts review the statutes for their constitutionality in the process of hearing specific “cases and controversies”: the constitutional review is a by-product, so to speak, of the performing of a standard judicial function. Hence, the constitutional question presents itself to US judges in the context of a specific grievance, with the life-stories of specific persons who complain of a violation of their constitutional rights. In contrast, the European model is fundamentally abstract; constitutional judges do not hear any specific case other than a general assertion that a law is unconstitutional. Their reasoning is therefore separated from any individual context and is rather oriented towards a general, theoretical (and often philosophical) comparison of the legislative text with the text of the Constitution, as they construe it.

What are the implications of this distinction? . . . [in the process of considering a law in abstracto, the court behaves much more as a quasi-legislator than as a judicial body, and . . . the implications for the

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15 Bruce Ackerman, The Future of Liberal Revolution (Yale University Press, New Haven 1960) at 198.
13 Id.
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ordinary court, it still conducts its reasoning in an abstract way but not in ignorance of the specific case which triggered the constitutional doubt—hence the major aspect of "abstractness" is missing.

Third, the concrete model of judicial review may be triggered only by private parties; an idea that the constitutionality of a law may be tested by the behest of public officials who are unhappy about it is an anathema to the system. This would amount to an attempt by the outvoted minority to regain what it has lost on the floor of the legislature, or by the executive to use courts, rather than an executive veto, to undo the legislative product. As the Supreme Court of the United States once proclaimed, "[i]t was never thought that . . . a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." The legislators in the US system are allowed to sue only to vindicate some concrete individual interests connected with their official duties (such as the right not to be excluded from Congress) but never as representatives of their constituents and never to test the constitutionality of laws adopted despite their objections. The ground for this is that, when "the individual legislator is really only complaining of a failure to persuade fellow colleagues" the method is to pursue a legislative, rather than a judicial, solution. This, therefore, renders more remote the prospect of a constitutional court performing the role of the "third chamber." But this is exactly what happens in cases of abstract control exercised by a European constitutional court where the process has been initiated by parliamentarians or other political officials. In the European model, constitutional challenge often is a device for an outvoted parliamentary minority to turn the legislative defeat into a judicial victory.

Fourth, . . . in the American system, a court does not "invalidate" the law but "merely" sets it aside: the law becomes ineffective, so to speak, but does not disappear from the legal universe altogether, in contrast to the European system, where the law is unconditionally struck down. This distinction often does not carry much practical consequences except for the situations where, in the US model, a decision setting aside a particular law becomes subsequently overruled. In such cases, it may not be necessary to bring the legislative action into play in order to restore the law in question. So, with respect to the US model, the talk of "striking down" a statute is somewhat careless, and it even happens that the outvoted judges announce that they would apply this very statute in later cases, despite its being now found unconstitutional by the majority. 19

* [Editors' Note: But of United States v. Windsor, 133 S. Ct. 2675 (2013) upholding the standing of the U.S. government to appeal from a lower court holding a statute unconstitutional, even though the government agreed with the court below that the statute—enacted more than 15 years earlier—was unconstitutional.]

19 Chicago & Great Trunk Ry. v. Wallhouse, 143 U.S. 300 (1892).


21 See, e.g. Dickerson v. United States, 509 U.S. 346 (2000). In this decision, the Court found unconstitutional, by a 7-2 majority, a provision adopted by Congress that the admissibility of suspects' statements in criminal cases turns solely on whether they were made voluntarily, regardless of whether the suspects had received so-called Miranda warnings before being interrogated. In his dissent, Justice Scalia warned that, unless this law is held invalid, the rule of judicial review is that judges are invited to pronounce about the conformity with the constitution of political choices pur chased by the people. To adopt a "political question" doctrine would therefore invalidate the very rationale of having an abstract review in the first place.

Seventh, in the US model the courts are banned from considering constitutional matters which directly reprise purely "political questions" .22 In contrast, in abstract review there is no need to adopt a "political question" doctrine as a factor of restraint that would limit the role of judges; after all, the whole point of having abstract judicial review is that judges are invited to pronounce about the conformity with the constitution of political choices pur chased by the people. To adopt a "political question" doctrine would therefore contradict the very rationale of having an abstract review in the first place.

Eighth, the American model, due mainly to its concrete character, implies certain [other] principles of "judicialization" (precautions against deciding when the decision is not required) which do not apply to the European model. For instance, "concrete review" courts cannot decide lawsuits that are "moot" (because the harm, if ever it was, ceased to
system: once the law has been promulgated, no future challenge is possible. The ex post system introduces more uncertainty and instability to the law. . . . On the other hand, an ex ante system seems to create an incentive for frivolous or obstructive uses of constitutional review by the opposition. . . . [This was] one of the major factors in Spain's decision to abandon ex ante review; hills referred to the Court before they became effective caused delays in the introduction of reforms devised by the Spanish government in 1983-85. As Stone Sweet says, "those referrals delayed the reforms for ludicrous periods of time." In this, however, is a matter that can be remedied by, for example, strict time limits imposed upon the constitutional courts; in Spain, the constitutional court is required to rule within one month. In any event, the gain in terms of stability and certainty is achieved only if the ex ante review is the only available type of review in a given system; as soon as it is supplemented by ex post forms of review, this certainty is inevitably and irresolvably eroded.

Tenth, and lastly, the American model is much more hostile towards advisory opinions provided by courts for the benefit of the legislatures than the European constitutional courts. . . . [The principle of separation of powers provides stronger arguments against the availability of advisory opinions in a system of concrete judicial review than in an abstract system. This is because one might argue that the ideal of an independent, apolitical judiciary would be underfitted if judges expressed an opinion about a law that might later come before them in a lawsuit.] No such concern, however, applies to a system in which the courts are called upon to review the laws in abstracto. To the contrary, in the abstract (European) model, judges often engage in providing suggestions to the legislature about how to repair constitutionally defective laws; they see it as a public mission, as well as a way of reducing the force of the clash between the court and the parliament. The mechanism of issuing such positive recommendations about how to rewrite the law has been well described by Alex Stone Sweet (who described) constitutional courts as "specialized legislative chambers" [using] various techniques (to issue) "constitutional commands . . . to the government[s] and parliament[s], to (re)-legislate in a given area." 44

3. Reasons for these contrasts

. . . I will outline four hypotheses which are frequently provided for the contrast. Each of them, taken in separation, is clearly under-determining for the outcome, but taken together they may give a reasonable picture of the reasons why the two legal and political contexts generated two models of constitutional review so distinct from each other.

First, the attitudes towards the "regular" (non-constitutional) judiciary: while in the United States judges are viewed with a high
degree of admiration and without much fear that they can be vehicles of oppressive rule, in Europe career judges have been traditionally seen as unable to undertake the burden of constitutional adjudication. Against the American glorification of the judiciary as the "least dangerous branch," in Europe judges were viewed with a degree of contempt. This has been largely due to completely different structures of judicial careers in both legal cultures; while in the Anglo-American tradition, judges remain a judge is an epiphany of a long and usually distinguished career, in Europe judges are professionals who often come on the bench soon after graduation from law school, and then slowly progress in the judicial structure of their country. Their professional training stresses skills of technical interpretation and is thought to be myopic towards the broader philosophical and political issues involved in constitutional interpretation.

Second, as a variant of the first explanation, many European legal systems in which constitutional courts were set up can be described as "transitional" democracies: they succeeded periods of oppressive authoritarian rule (as was the case of post-World War II Germany and Italy, of post-authoritarian rule in Spain and Portugal, and all post-communist states in CEE). With regard to these countries, the view has been often expressed that a regular judiciary, trained as it was by its involvement in the ancien regime, cannot be trusted to interpret new (or newly amended) constitutions in the properly democratic spirit. One can see certain logic in the question by Louis Favares: How could an American system function in the Federal Republic of Germany, Italy, Spain, or Portugal, with judges from the preceding period of dictatorship named to the court? Adopting judicial review in these countries would require "purification" on a massive scale of a corps of magistrates, while one could immediately find a dozen or so constitutional judges with no prior culpability during those periods..."84

"In the United States no such reasons for distrust towards the 'regular' judiciary existed.

Third, a rule of precedent (or "stare decisis") which has been adopted in the US as a controlling principle of the legal system guarantees a degree of consistency between different court decisions. When all the courts have to follow the rationales decided of the Supreme Court, and of the relevant higher appellate courts in their respective jurisdictions, the dangers of arbitrariness, uncertainty and lack of uniformity are minimised. No such rule, formally speaking, prevails in European constitutional legal systems: judges are obliged to follow the statute, not the decisions of other courts (or earlier decisions of their own court). This at least is an official ideology of continental statute-based law. Hence, a fear exists that founding all courts with the power of constitutional adjudication would bring a fundamental clash and incoherence into the system. But this is a weak explanation as there are many legal systems within the civil-law family, with no doctrine of precedent, which nevertheless have not adopted a centralized model of constitutional review. . . . [T]he distinction between the two systems . . . is one of a degree rather than of kind, and it does not correspond neatly to the issue of uniformity assured by complying with the rule of precedent. The decentralised system yields a degree of uncertainty and inconsistency, regardless of the stare decisis doctrine. In the United States, unless and until the Supreme Court has pronounced on a given issue . . . , the Courts of Appeals for different circuits [may] come up with different solutions to one and the same constitutional controversy. [And] it is simply not the case that a system of judicial precedent does not in fact operate in the legal orders of continental Europe. In that state, consistent decisions of the courts—especially of the highest courts—are in practice treated as unquestionable sources of law. . . . Consider this exposition of the French approach by two leading French constitutional theorists: 'The courts very rarely cite precedents and must not base their decisions on them, because the only legitimate source of law consists of statutes. On the contrary, if one looks at the material that is in fact used, one realizes that precedents are the most important . . . Precedents, without being formally binding, may have force if created by a court superior to that where the case is pending. This simply reflects the hierarchical structure of the courts'.85

Fourth, and finally, the European model reflects a wish to exercise control by political elites over the operations of constitutional review. It is naturally easier to control a single constitutional court than a diffusive structure of all courts of which is authorized to decide about the unconstitutionality of statutes. The European model is therefore said to express a traditionally European degree of trust in a state, perhaps even a degree of paternalism, while the US model reflects better the traditionally American distrust in governmental institutions... The stronger the role of the state in society and the economy, the more there is a tendency towards state-controlled review of constitutionality. Such an argument has been made by John C. Reitz, who describes a close correlation between the forms of review adopted and the general approach to the role of the state.86 In the US, where a market-centred approach prevails, only concrete review is available. . . . At the other extreme of the spectrum, in the most statist-centrist tradition (France), only abstract review initiated by political actors has until recently been allowed.

4. Paradoxes about the American-European comparison

There are several puzzles, or paradoxes, raised by the comparison of the two contrasting models of constitutional review, as discussed so far.

First, judicial review in the United States is much older, much more established in the local legal culture, much more "canonical"—in fact, it can be called the mother of all judicial reviews—while the European model has been established, historically speaking, only very

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recently... And yet, it is the American system that has been continuously challenged and questioned within the United States, and its legitimacy has been always precarious and vulnerable—to a degree incomparable with that of the European model.

Second, the idiom in which the main challenges to constitutional review in the United States have been articulated is that of the "counter-majoritarian difficulty": an idea that "when the Supreme Court declares unconstitutional a legislative act or the act of an elected executive, it threat[s] the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it." The concern that judicial review is fundamentally antithetical to majority rule operates much of the American discourse about the role of the... courts in giving effect to their interpretation of constitutional structures. In Europe, those majority-rule-based arguments against the very principle of constitutional review, or against specific judgments by constitutional courts, are very rarely heard. And yet, it is the European model of constitutional democracy, much more than the American, which is based on the principle of majority rule as an expression of the will of the demos. This goes back to Jean-Jacques Rousseau's idea that, in the absence of unanimity (pursuit of which may be often chimerical), the majority is the closest that we have to consensus, and thus to the proper detection of the specific content of the "general will" on any given issue under deliberation. And the specific design of the patterns of separation of powers in the continental-European countries places much more emphasis on the capacity of the system of government to properly give effect to the majority preferences. In contrast, the US political model is, overall, much less "majoritarian": with checks and balances, an election of the President by the Electoral College rather than directly by the people, the non-majoritarian character of the composition of the Senate, and multiple "veto players" built into the system, the role of the actual majority is less emphasized, and less worthy of pursuing by all costs. So it is hard to say that... majority rule is the cornerstone of the American model of democracy. And yet, it is in the United States rather than in the more majority-sensitive Europe that the complaint of "counter-majoritarian difficulty" has gained so much more weight in the public discourse...

Third, it is in the United States rather than in Europe that the courts (and, in particular, the Supreme Court, of course) are frequently accused of being excessively political; of usurping to itself the role of a political actor which properly belongs to elected branches of government... And yet, it is the European model which is much more explicitly "political", in the sense that in the abstract process of constitutional court becomes a body charged with the oversight of a legislative product without any need to wait for a par excellence "legal"

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12 [This] is reflected in such matters as the political character of the initiation of the review (with the members of parliament or the executive entitled to activate the courts), the absence in the doctrine of "political question"... and in charging constitutional courts with additional functions which bring them into the very heart of political controversies, such as pronouncing about electoral disputes, about bans on political parties, about conflicts of competences among various branches of government, etc. It is, however, the very logic of abstract review which renders European constitutional courts much more "political" than is the case in concrete and decentralized review. When engaged in abstract review, constitutional courts rather act as an additional legislative chamber which may, often on the basis of vague and eminently controversial constitutional pronouncements, strike down legislation enacted by another body, which is also committed to implementation of the same constitutional norms... And yet, they seem to escape the public charge of "politicization" much more effectively than their American counterpart.

How to explain these (at first blush) puzzling differences?...

... First, European constitutional courts are constitutionally established and have a constitutional mandate to do what they are doing:... [T]hey cannot be criticized as reaching out beyond their legitimate powers... [T]hey may be accused of taking wrong decisions in particular cases and, for instance, of overstepping the boundaries of their powers by adopting wrong methods of reasoning, or drawing wrong conclusions from the premises, or improperly balancing competing values under proportionality analysis etc. But these are reflections of a different, and less dramatic, nature than those addressed against the Supreme Court of the US which, when deciding about the unconstitutionality of a law, exercises power not explicitly conferred upon it by the Constitution.

Second, decisions of the European constitutional courts are easier to undo through legislative action—by constitutional amendments. European constitutions are much less firmly entrenched than the US Constitution—in the sense that it is much easier to amend them. For example, in France (with respect to any constitutional provision other than that providing for the republican form of government), a three-fifths majority of both chambers sitting together is sufficient. Hence, the anxiety about the decisions of constitutional courts which may frustrate the current legislative will (and, presumably, societal majoritarian preferences) are less likely to emerge if those decisions may be relatively easily (in comparison with the US situation) overridden by constitutional amendments. Compare the French model to the American requirements of a two-thirds vote in each of the houses of Congress followed by ratification by three quarters of the state legislatures!

Third, European constitutional courts operate—in contrast to the autarchic US legal system—in a broader context of the European architecture of human rights, in particular with the European Court of Human Rights performing a role of a sort of supranational
Constitutional courts for Europe. ... Decisions of constitutional courts may be, and occasionally are, countered by the judgments of the European Court in Strasbourg. ... Hence, again the anxiety about the European Court in Strasbourg. ... constitutional court taking a wrong decision is significantly lowered [because] there is another, higher, instance which may repair the bad decision.

Fourth, there is a distinctly different role played by the “doctrine,” that is, by the constitutional-law scholarship in these somewhat different legal cultures. In the United States, there is— at least, in the elite law schools—a healthy tradition of critical, polemical legal scholarship: articles, which are openly ... Supreme Court decisions, are unlikely to contribute to the professional reputation of the author. ... European legal doctrine, in comparison with the US, is much more conservative and supportive of the institutions it describes ... The constitutional discourse has been primarily produced by those who stand to gain the most from the theories supporting a strong role for constitutional courts; academic constitutional lawyers and constitutional judges themselves (the latter being largely drawn from the former category). Self-congratulatory rhetoric supports both the position of the constitutional judiciary and European law professors linked with each other in a symbiotic relationship.

5. Convergences?

When presenting, in Part 2 [above], a litany of contrasts between the European and the American models of constitutional review, I warned the reader that the account was extremely “stylized.” As everyone knows, in the academic literature the word “stylized” is a proxy for “dreadfully over-simplified” ... The reality never fits the abstract models (“ideal models”), and especially in recent decades, there have been movements towards a growing convergence of both models ... For one thing, a variant of a concrete constitutional adjudication plays a constantly increasing role in the functioning of European constitutional courts. For some courts, it is a separate, equally important function as that of abstract review [as in Germany], others, it is basically the main form of access to the Court (as in Italy), and in others, it is still at a stage of experimentation, introduced only recently, but with the awareness that the exclusivity of abstract constitutional review ... unduly restricts the access of the general public to the constitutional court [as in France]. In the European model, the “concrete” review means that an ordinary court, when considering a case and encountering a problem in terms of the constitutionality of a relevant rule, stays the proceedings and asks a constitutional court (either on its own initiative, or at the behest of one of the parties) to pass judgment on the validity of the law. Hence, the constitutional court in a “concrete” case is engaged in an “abstract” fashion; that is, it normally does not take into account the factual circumstances of the case, but merely applies the contentions law with the constitution in abstracto. In this sense, the “concrete” review in Europe is not quite like a concrete review in the US. But there are important similarities: like a concrete review in the US, the access to the constitutional court is through an ordinary litigation before a regular court of law, and the constitutional court, while using constitutional issues can be raised in any proceeding, but only by persons with standing; the judge is obliged to decide the constitutionality of a challenged law. Constitutional issues generally go up to the Supreme Court, which has the final say. The decision as to constitutionality in any case affects only the parties to the case, since the inapplicability of the statute is pronounced only for that case, but, as in the United States, all courts, and political authorities, respect a
decision of unconstitutionality after it is rendered final by the Supreme Court.

Norway

Norway's system of judicial review... developed on the basis of the 1814 Constitution and has been confirmed in the jurisprudence of its Supreme Court since the 1860s.

There have been (as of 1990) twenty to thirty cases in which the Supreme Court held a law to be unconstitutional; most of them occurred between 1885 and 1930. Since then... the Court has tended to be more restrained, probably because of the relative political and social stability in the country, for more than thirty years, and of the increasing influence within the Supreme Court of the 'social' ideology which is dominant today among the governing classes. [Evind Smidt]

... The 1814 Constitution included a catalogue of fundamental liberties and rights, but this bill of rights, unlike the 1789 French Declaration, was drafted with an eye to solving the problems of the time; it did not attempt to formulate general principles and was not intended to last. However, there have been some attempts to modernize the text... In recent years, the Supreme Court has referred to unwritten principles as grounds for constitutional review. For example, in 1968 the Court referred to 'unwritten principles which bind the legislature' as a basis for challenging the constitutionality of an abortion law. Many of the 'unwritten principles' have been derived from international human rights documents, particularly the European Convention on Human Rights."

Sweden

Unlike the Constitutions of Norway and Denmark, the contemporary Swedish Constitution expressly provides for constitutional review.

* [Editors' Note: In 1976 the Supreme Court of Norway undertook a statutory effort to move away from 'market values' towards 'human values' for compensation in cases of injury. In 1980, on review of new legislation designed to cut payments of social insurance in future years, the Court held that only 'interconnection' with the ordinary law was 'clearly unreasonable or unjustifiable.' The courts, however, were careful to note that the test was merely a guide for interpretation, not a basis for decision.]

* [Editors' Note: In 1999 Norway's Supreme Court held in a number of cases that the European Convention on Human Rights did not apply to the country.]

Switzerland

Switzerland is often included among states that have review on the United States model, but constitutional review in Switzerland is limited to federal acts, i.e., to the acts of the cantonal authorities. In that respect, it differs greatly from the United States... The decision to bar judicial review of federal laws was justified as designed to prevent judicial supremacy over the legislature...
The exclusion of constitutional review of federal laws has been attributed to the historical context of the adoption of the 1874 constitution. At that time, the leading party, the Radicals, controlled all branches of the federal government. Naturally they felt it was important to have review of cantonal rather than federal acts. Also stressed is the democratic character of the federal legislative process: The Constitution-makers of 1874, who were democrats before they were liberals, would not have wanted a group of judges to be able to undo the work of a parliamentary majority, and even of a popular majority. Thus Article 113(3) of the Constitution represented the victory of democracy over liberalism...

The European Model...

Although many countries have followed the European model, each has tailored its system to its own needs and circumstances...

Austria

The Austrian High Constitutional Court, the oldest in Europe, was established in 1920 according to a plan developed by Hans Kolbin, who was a member of the Court and its general reporter until 1929. The Court was suppressed on March 13, 1938, when Germany invaded Austria, but was reestablished in the constitutional law of October 12, 1945.

The Court has jurisdiction over several matters: elections, conflicts between courts, and litigation between the federal state and the Länder (states). It acts as an administrative court to review administrative acts alleged to violate rights guaranteed by the constitution. It acts also as a high court of justice to bring to trial the head of state or ministers accused by the houses of Parliament. The Court can exercise judicial review at the request of any of the following: a Land government, higher courts, a third of the members of the National Council (or a third of the members of a Land legislature), or, under some conditions, individuals. The Court may also raise constitutional issues on its own initiative. The Court's case law, developed over the last sixty years, is extensive, particularly in relation to fundamental rights. The impact of its decisions on the legal and political system is strong even though the Court's decisions are not binding on ordinary courts, unlike the decisions of the German and Spanish high courts.

* [Editors' Note: In 1999 Switzerland adopted a new constitution, effective in 2000. The new Constitution was an important change but was designed to incorporate into a single text the original constitution with all amendments. The new constitution preserves the rule barring judicial review of the constitutionality of national laws, but there has been some scholarly discussion of the possibility for review of an inconsistency between a federal law and a constitutional provision that has been adopted later in time for measures not constitutional norms adopted through referendum after the federal law in question was adopted. Report du Council Fédérale, La relation entre droit international et droit interne, March 3, 2006, p. 44 and B. Cuny Cattle. Measures relating to the new constitution (Fédérale), November 20, 1996, p. 487.)

* [Editors' Note: In 2001, supra at 35, 46-47, noted the importance of administrative cases involving constitutional rights in the Austrian court's docket, as well as its willingness to protect the rights of minorities despite the "displacement" of the political parties. In 2001, the Austrian Court for the first time found that a recently adopted constitutional amendment itself was unconstitutional, and could be adopted only by the more rigorous procedures for "total review" of the constitution. The decision VII 11 October 2001, C 120/99 et al. 30 (striking down a law that precluded judicial review of certain procurement decisions), described in Harald Bierhardt & Konrad Lehmayer, Constitutional Reform 2000 in Austria, 2 Vienna Online 4 on Int'l Court, 1, 112, 117 (2000).]

Italy

The Italian Constitutional Court was established by the 1947 Constitution, and came into force in 1958. The Court is composed of fifteen judges appointed equally by the Parliament, the President of the Republic, and the Supreme Courts (the Council of State, the Court of Cassation, and the Court of Auditors).

The Constitutional Court has jurisdiction over conflicts of jurisdiction between various state authorities and between regions; over allegations against the President of the Republic, the President of the Council of Ministers, and the ministers; the acceptance of abrogative referendums; and constitutional review of laws. This last area of jurisdiction is by far the most important. Constitutional issues regarding laws are referred to the Court by the ordinary civil, administrative, and commercial courts that would have had to apply them...

France

The French Constitutional Council was established in 1958 and came into force in 1960. It is composed of nine judges—three appointed by the President of the Republic, three by the chairman of the Senate, and three by the chairman of the National Assembly. Former presidents of the Republic are de jure members, but since 1962 none has sat on the Constitutional Council.

The Constitutional Council has jurisdiction over electoral issues (elections to the National Assembly and Senate, election of the President, and referenda); conflicts regarding the division between the legislative domain and regulations (laws and decrees); the constitutionality of the rules of a chamber of Parliament; the constitutionality of international treaties; and the constitutionality of laws—upon request by one of the four highest authorities of the state (the president of the Republic, the chairman of the National Assembly...
and of the Senate, and the prime minister), or by sixty members of the National Assembly or sixty members of the Senate.

[Editors' Note: In 2008, the French Constitution (art. 61–1) was amended to permit referrals to the Conseil Constitutionnel of constitutional challenges to legislation that arise after enactment in concrete cases; legislation enacted at the end of 2009 authorized applications for "priority preliminary rulings" on issues of constitutionality to enable the Conseil d'Etat and Cour de Cassation to refer to the Conseil Constitutionnel issues about the constitutionality of enacted laws if issues arise in ordinary cases before those courts. Between May 28, 2010 and May, 2013, more than 90 rulings on such applications have been given. The Court's official website states that "since 2010, the Constitutional Council has been issuing two to three times as many decisions each year than it did prior to the reform of the application for a priority preliminary ruling on the issue of constitutionality."]

The Constitutional Council has developed constitutional review of laws challenged as being beyond the authority of Parliament. But other nonconstitutional issues, particularly electoral issues, remain important. On the other hand, it is unnecessary for the council to ensure that the bureaucracy or the courts respect constitutional rules because the bureaucracy is subject to review by the Council of State (Conseil d'Etat), and the courts by the Court of Cassation. But the Council of State and the Court of Cassation have the power to review the Constitutional Council's decisions and to overrule them.

...[In recent] years, members of Parliament have often used their power to raise constitutional issues before the Constitutional Council, and its case law has therefore become an important factor in France's legal and political system. For a further discussion see infra Part B(3).

Spain

The Spanish Constitutional Tribunal was established by the 1978 Constitution, and started its work in 1980. It is composed of twelve judges appointed by the king, four upon nomination by Congress, four by the Senate, two by the government, and two by the General Council of the Judicial Power.

The Constitutional Tribunal has jurisdiction over conflicts between state authorities; the petition of amparo against administrative acts and court decisions interfering with fundamental rights; the lawfulness of treaties in the light of the Constitution; and the constitutionality of laws. In this last category, issues can be raised by the President of the Government, by fifty deputies or fifty senators, by the authorities of autonomous communities, or by the people's defender (defensor del pueblo). Constitutional issues can be raised by courts when they are confronted with them during litigation. The Constitutional Tribunal's role already appears important, particularly concerning respect for the balance between the state and the autonomous communities.

The writ of amparo, the origins of which go back to the Kingdom of Aragon, is an institution that has been used since the sixteenth century in Latin America and was adopted in the Spanish Constitution of 1951. Under the present Spanish Constitution, an individual may invoke this writ to request the Constitutional Tribunal to assure the protection of his or her fundamental rights against an administrative act or a judgment of a court, when the ordinary courts have not provided such protection. (In fact, the writ of amparo is invoked particularly against judicial acts.) Amparo cannot be invoked directly for review of the constitutionality of a statute (unlike constitutional review in the Federal Republic of Germany), but the chamber of the Constitutional Tribunal that reviews writs of amparo may refer questions on the constitutionality of an underlying statute to the full court. The petition of amparo is the basis of 90 percent of the registered cases. This action is popular because claimants doubt the ability of ordinary courts to formulate proper constitutional principles.

Major Trends in the Evolution of the Courts

Today, the German, Italian, and Spanish constitutional courts resemble the United States Supreme Court. Indeed, German constitutional review mainly covers lower court decisions and often appears as a third- or fourth-level appellate court. Because of the issues referred by the judge a quo, the Italian Constitutional Court increasingly decides civil, criminal, and administrative cases. The Spanish writ of amparo is mostly used against judicial decisions. These courts, therefore, deal mostly with ordinary cases from which they extract and consider constitutional issues. German and Italian constitutional judges devote themselves essentially to [what Gustavo Zagrebelsky calls] "microconstitutional review": "They slide from reviewing for conformity to the constitution, to reviewing the implementation of the laws."...

The procedures for screening petitions to the German, Italian, Austrian, and Spanish high courts can be linked to the trend just noted. Because of their increasing numbers most of the cases go through committees or panels of judges. Thus they are decided, not by the court itself as constitutional review requires, but by "branches" of the court, by summary procedure. ...

THE SIGNIFICANCE OF THE DIFFERENCES BETWEEN THE TWO MODELS

... From a theoretical perspective, differences between the two systems may reflect different conceptions of the separation of powers. In the American model, limitations on executive and legislative power have been achieved by the progressive recognition of a third power, the judiciary, described as "the least dangerous branch." That third power [did not exist in most European countries. European constitutional theory acknowledged only executive and legislative power. There was no recognition of a "judicial power" and judges do not enjoy the legitimacy and authority of their American counterparts.}
It was therefore necessary to build—following Kelsen—a system in which constitutional review, entrusted to a single court, constitutes not a third parallel power but one above the others that is charged with monitoring the three essential functions of the state (executive, legislative, and judicial) to ensure that they are exercised within the limits set by the Constitution. That has been clearly explained (by Vezio Crisafulli) with reference to the Italian Constitutional Court: [The Court] is neither part of the judicial order, nor part of the judicial organization in its widest sense; ... [T]he Constitutional Court remains outside the traditional categories of state power. It is an independent power whose function consists in ensuring that the Constitution is respected in all areas.

The impetus for constitutional courts in Europe owes much also to the increased concentration of political power. In most Western European countries with a parliamentary regime, the balance of powers between the executive and the legislature has been replaced by a concentration of power in a bloc composed of the government and its majority in the lower house and, in some cases (as in France and Portugal), also the President of the Republic. There is no longer a quest for a balance between the Government and the Parliament, but between the majority (government and Parliament) and the (parliamentary) opposition. Constitutional review therefore serves to assure a balance between the majority and the opposition.

The need for constitutional review as a counterweight to majority power has been expressed as follows:

In the parliamentary system of government, the governing political party or coalitions of parties, displacing both the legislative and executive powers, becomes omnipotent. The popular belief in judicial review establishes the courts, on the one hand, as the guarantors of the basic consensus on which democracy is founded, and, on the other hand, as the arbitrators that adjudicate how far the reforms of regulations dictate the social, economic, and cultural life conform with this consensus, without reversing it. [E. Spiropoulos]

Whatever the theoretical differences, the practical differences between the European and American models of constitutional review may be less significant than their similarities. There are many similarities ... as regards the appointment and the qualifications of judges. In both cases, appointments are political—made by political authorities and taking into account the political inclinations of the judges....

The two models are similar also in their judicial methodology. European constitutional courts resort to techniques used by the United States Supreme Court half a century earlier. One of these techniques, for example, used increasingly by German, Austrian, Italian and French courts, allows the judge to interpret a law so that it would not violate the constitution. Another technique complementing that one is the rule of reasonableness, which was developed in the United States at the beginning of this century for interpreting antitrust laws. German and Italian courts, for the most part, began to use it by the early 1960s...

There are increasing similarities also in how the U.S. Supreme Court and the European constitutional courts conduct their business. ... [As Cappelletti and Cohen observe], "Through the use of certiorari, the United States Supreme Court, with the growing number of cases in which review is sought each year, confines itself more to the most significant—mostly constitutionally grounded—questions."

The two types of courts are also beginning to resemble each other in another way: some European constitutional courts, contrary to their original function, are turning into ordinary courts and becoming more like the United States Supreme Court. This is the case in Italy, for example, because of the increased number of cases referred to the Constitutional Court by ordinary courts. ... CONCLUSION: DOES CONSTITUTIONALISM “WORK WELL” IN EUROPE?

Can one compare the results of the American and European systems of judicial review? It is difficult, since their contexts are so different. [In the United States] state laws and regulations constitute a much larger part of the corpus of the laws of the country than in Europe and European countries. In Europe, moreover, the legislature makes the law, whereas in the United States judges enjoy real lawmaking power. For these reasons, comparing figures is hardly meaningful.

Comparing the systems nevertheless suggests some conclusions. First, the European system seems to have the advantage of isolating important constitutional issues for decision by a specialized court, which is free from other duties and can devote the time required for this delicate task. The constitutionality of a national law is taken immediately to the constitutional court and does not have to go through the various stages of the jurisdictional ladder.

On the other hand, one might ask whether—with a view to strengthening constitutionalism—the European system is as successful as the American system in spreading constitutional rules throughout the various branches of law. In the European system the ordinary judge is excluded from the process of constitutional review, although he can sometimes set the process in motion (as in Italy, Spain, or Germany). If the judge later has to apply the decision of a constitutional court and follow its interpretation, he is not in the same position as are the lower courts in the United States in relation to the Supreme Court....

QUESTIONS AND COMMENTS

1. Consider Professor Favorens’s suggestion that the European system permits the final constitutional court to do a better job, but that the system of diffuse review, as in the United States, permits better distribution and reception of constitutional ideas. By what criteria do you measure how good a job a constitutional court does? Do any of those criteria relate to the ease of distributing constitutional ideas? Are there different audiences to whom
other Latin American countries there is a separate, special constitutional tribunal.

In earlier work, Brewer-Carias argued that there is no necessary connection between the way constitutional review is organized, e.g., decentralized or “diffuse” review v. centralized review, and the common law or civil law tradition of the nation. Brief excerpts follow.

Allan-Ralphal Brewer-Carias, JUDICIAL REVIEW IN COMPARATIVE LAW (1988)

The Compatibility of the [Diffuse] System with All Legal Systems

The diffuse system of judicial review of constitutionality of legislation is not a system peculiar to the common law system of law. It has existed since the last century in most Latin American countries, all of which belong to the roman law family of legal systems.

This is the case in Mexico, Argentina and Brazil, which followed the American model, and also of the mixed systems in Colombia and Venezuela. It has also existed in Europe in countries with a civil law tradition, like Switzerland, Portugal and Greece. . . in the mixed system of Greece, the 1975 Constitution entrusts all courts with the power not to apply legal dispositions whose contents they consider to be contrary to the Constitution. In particular, Article 86 establishes that “The courts shall be bound not to apply laws, the contents of which are contrary to the Constitution.” Although certain authors have commented on the suitability of a diffuse system of judicial review to civil law systems, it appears as if the determining factor is not the system of law but the acceptance of constitutional supremacy.

If the principle of constitutional supremacy is adopted the logical and necessary consequence is that the courts must have the power to decide which norm is to be applied when a contradiction exists between a particular law and the Constitution. Regardless of whether the legal system of the country is the common law or roman law system, the courts are obliged to give priority to the Constitution.

[Rejecting Kelsen’s emphasis on the distinctive role of stare decisis in common law systems, he argued:] Where the essence of the criticism is the conflicting decisions of a diffuse system will result in uncertainty, the situation will be the same in common law or civil law countries. If . . . the doctrine of stare decisis may be a correction of the problem, such correction will not be absolute since even in common law systems not all cases in which constitutional matters are decided upon by lower courts can go before a Supreme Court . . .

Alternatively, although stare decisis is a common law concept, certain roman law countries have a related concept. For instance, the Mexican Constitution has adopted the principle that with regard to the particular law of amparo, the jurisprudencia or the procedures derived from previous decisions of the federal courts are to be considered obligatory for lower courts. This happens only after five consecutive decisions to the same effect, uninterrupted by any incompatible ruling, have been rendered. . . .
In the same sense, in some European countries with a roman law tradition but which have adopted the diffuse system of judicial review, special judicial mechanisms have been established to overcome the problems deriving from contradictory decisions of different courts on constitutional issues. This is the case in Greece under the 1975 Constitution where . . . the decisions of the Special Highest Court have absolute and general effect regarding the constitutionality of laws.

Finally, in other countries . . . the problems of uncertainty and conflictiveness have been established by . . . having the diffuse and concentrated systems operate in parallel. This is the case in Guatemala, Colombia and Venezuela. Through the functioning of the concentrated system of judicial review, the Supreme Court is empowered to formally annul any law, on the grounds of unconstitutionality, with ergo omnes effects . . . .

As indicated earlier, the essence of the diffuse system of judicial review is the very notion of constitutional supremacy: if the Constitution is to be the supreme law of the land, prevailing over all other laws, no state act contrary to the Constitution can be an effective law. In the words of Chief Justice Marshall, if the Constitution is “the fundamental and paramount law of the nation . . . an act of the legislature, repugnant to the Constitution, is void” . . . .

[Brewer-Carías argues that a diffuse system must allow judges sua sponte to raise constitutional problems even if the parties do not, in order to enable diffuse review to function as “an objective check” of the Constitution. He recognizes, however, that in many diffuse systems procedural rules prevent this.]

[The rationality of the diffuse system of judicial review is that the decision adopted by the court only has in cassel inter partes effects; that is, restricted to the concrete parties and the concrete process in which the decision is adopted. This is a direct consequence of . . . the incidental character of the diffuse system of review as raised in a concrete process. Thus, if a law is considered unconstitutional in a judicial decision, this does not mean that the law has been invalidated and that it is not enforceable or applicable elsewhere. . . . To avoid the uncertainty of the legal order and of contradictions in relation to the value of the laws, corrections have been made to these inter partes effects through the doctrine of stare decisis or through positive law, in instances when the decision has been given by a Supreme Court.]

[The most fundamental aspect of the rationality of the diffuse system of judicial review is that of the supremacy of the Constitution over all state acts . . . . Any act which is created without the authority of the Constitution has no validity whatsoever. Consequently when a court decides upon the constitutionality of a law and declares it unconstitutional, it is because it considers the law null and void as if it had never existed.

Since the law has never had any validity, the court need not do any positive act in order to invalidate the law. They need only to declare that the law is unconstitutional and consequently, that it has been unconstitutional ever since its enactment . . . . That is why it is said that the decision of the court, as it is a declarative one, has ex tunc, pro-

prae terito or retroactive effects in the sense that they go back to the moment of the enactment of the statute considered unconstitutional . . . .

Of course, this logic of the diffuse system of judicial review is not always consistent. Each legal system has modified this pure form to its own particular specifications . . . .

The compatibility of the [Centralized] System with all Legal Systems

The concentrated or centralized system should not be thought of as peculiar to the civil law system of law, and incompatible with the common law tradition . . . . Considered in relation to its origin as a system that must be expressly established and regulated in a written Constitution . . . . it can . . . exist in systems with a common law tradition or with a civil law basis, although it is most commonly found in civil law countries.

[Brewer-Carías notes the use of centralized review in several common law countries, including Papua New Guinea (after its 1975 independence from Australia), Uganda (in its 1966 Constitution) and Ghana (in its 1960, 1969, and 1979 constitutions).]

Three conclusions can be drawn . . . first, the concentrated system of judicial review can only exist when it is established expressis verbis in a Constitution, and it cannot be developed by interpretation of the principle of the supremacy of the Constitution; second, the concentrated system of judicial review is compatible with any legal system, whether common law or roman law legal systems; third, the concentrated system of judicial review does not imply the attribution of the functions of constitutional justice to a special Constitutional Court . . . . It may also exist when constitutional justice functions are attributed to the existing Supreme Court of the country, even though in the latter case the system generally tends to mix its trends with elements of the diffuse system of judicial review. . . .

. . . The main element that leads to the differentiation between both systems of judicial review is the type of guarantee adopted in the constitution system to maintain the[s]e supremacy [of the constitution]. As Hans Kelsen pointed out in 1929, these objective guarantees are the nullity or the annulability of the unconstitutional act . . . .

[When state acts are considered to be contrary to the Constitution, they may be annulled. This annulability of a state act . . . means that a state act, even if it is irregular or unconstitutional, once issued by a public body, it must be considered as valid and effective until it is repealed . . . . or until it is annulled by [the] state organ with constitutional power to do so.]

. . . [In a concentrated system] the power to declare the nullity of legislation is assigned to one single constitutional organ with jurisdictional functions . . . . Under the influence of the European model, but in an incomplete way, the system was adopted in the early seventies in Chile where a Constitutional Tribunal was established, and more recently in Ecuador and Peru, where Constitutional Guarantees Tribunals have been created. . . .
The incorporation of a system of constitutional justice in Europe was due to the influence of Hans Kelsen's pure theory of law, which conceived constitutional norms as the basis for the validity of all the norms, of a given legal order. This basic concept had a fundamental corollary: the need for a state body to guarantee the Constitution, that is to say, to settle disputes over the consistency of all legal norms, both specific and general, with the superior hierarchy on which they are based, and in the last instance with the Constitution...

Kelsen's conception of the concentrated system of judicial review... results in an attribution of an exclusive power to declare the unconstitutionality of a law to a single state body.

In its original theoretical conception, this concentrated system was conceived by Kelsen as being "a system of negative legislation". A Constitutional Court does not specifically decide upon the unconstitutionality of statutes on any assumption of a single fact.... Its competence is normally limited to the purely abstract issue of the logical compatibility which must exist between the statute and the Constitution.... This led Kelsen to maintain that when the Constitutional Tribunal declares a statute unconstitutional, the decision with erga omnes effects was a typical legislative action: hence the common assumption that the Constitutional Tribunal's decision had the force of law. Consequently, until a decision is adopted, the statute is valid and the judges of ordinary courts are obliged to enforce it.

This reasoning was developed by Kelsen in response to possible objections that the jurisdictional control of legislative action, based on the European concept of the supremacy of Parliament, could produce. For forbidding ordinary judges to abstain from enforcing the laws and granting the power to declare a statute unconstitutional with erga omnes effect to the Constitutional Court, the judiciary was subject to the laws adopted by Parliament and at the same time the primacy of the Constitution over Parliament could be maintained. In this way, it was considered that the Constitutional Tribunal became Parliament's logical complement. Its function was reduced to judging the validity of a statute with simple and rational logic, completely separate from the need to settle disputes in specific cases and acting as a negative legislator. In this way, legislative power was, for Kelsen, divided between two bodies: the first, Parliament, the holder of political initiative, the positive legislator; and the second, the Constitutional Tribunal, entrusted with the power to annul laws which violate the Constitution. Under this conception, of course, the Constitutional Court needed to be a constitutional body separate from all traditional state powers: thus it was not a strict judicial body.

...
Centralized Model: The Russian Supreme Court and Centralized Control of Legislation, 57 Va. J. Int’l L. 725, 727 (1997) (noting both the possibility of conflicts and also possible benefits from such a system which might "create opportunities for complainants to receive more accessible and adequate adjudication of their assertions of constitutional rights than might be available under the centralized model."). The need for coordination among specialized courts of final jurisdiction exists in other systems, including France, as noted below.

5. Professor Brewer-Carias’ argument in the textual excerpt is formalist in character, based largely upon the legally established aspects of the system for judicial review and on legal doctrine. It thus differs substantially from efforts to describe law as reflected in, and interacting with, culture. But his argument might also be seen as a rejection of the claim that the formal elements of law tell you very much about more important aspects of the legal system since his claim is that there is no necessary connection between one, and another, formal element.

NOTE ON POLITICAL EXPLANATIONS FOR JUDICIAL REVIEW

In contrast to legal scholars’ focus on the legal forms and theory of judicial review, political scientists have focused on the political context, origins, and effects of judicial review. Classifying systems of judicial review by their political origins rather than by their legal forms, Ren Hirsch concludes that in the post-World War II era, there are 6 different "scenarios of constitutionalization and the establishment of judicial review at the national level," Ren Hirsch, TOWARDS JURISPRUDENCE, THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 7-8 (2004). According to Hirsch, these include:

1. The "reconstruction" wave, in which judicial empowerment was a by-product of political reconstruction in the wake of World War II. Examples include the German Basic Law of 1949 and its ensuing creation of the Federal Constitutional Court.

2. The "independence" scenario, in which the constitutionalization of rights and the establishment of judicial review were part of decolonization processes, primarily in former British colonies. A classic example of this pattern was the 1950 proclamation of the new Indian constitution and the establishment of the Supreme Court of India.

3. The "single transition" scenario, in which the constitutionalization of rights and the establishment of judicial review were the by-products of a transition from a quasi-democratic or authoritarian regime to democracy. South Africa adopted its Interim Bill of Rights in 1995 and a final Bill of Rights in 1996, along with a Constitutional Court in 1995, as part of its transition to full democracy in the mid-1990s.

4. The "dual transition" scenario, in which constitutionalization is part of a transition to both western model of democracy and a market economy. Obvious examples include the numerous constitutional revolutions of the postcommunist and post-Soviet countries (like the Polish Constitutional Tribunal in 1989; the Hungarian Constitutional Court in 1989–90; and the Russian Constitutional Court in 1991).

5. The "incorporation" scenario, in which constitutionalization is associated with the incorporation of international and trans- or supranational legal standards into domestic law. Important examples include the incorporation of the European Convention on Human Rights into Denmark’s domestic law in 1993 ... and the recent passing in Britain of the Human Rights Act (1998) ...

6. The "no apparent transition" scenario, in which constitutional reforms have been neither accompanied by nor the result of any apparent fundamental change in political or economic regimes. Some examples would be ... the enactment of the New Zealand Bill of Rights in 1990; the adoption of two new Basic Laws in Israel protecting a number of core rights and liberties; and the adoption of the Canadian Charter of Rights and Freedoms in 1982.

Professor Hirsch argues that adoption of judicial review in the "no apparent transition" category should be understood as a response to expanded opportunities for majoritarian politics and as an effort at what he calls "self-interested hegemonic preservation," through the interactions of political elites, economic elites and judges. With South Africa’s experience as a possible counter example, Hirsch urges skepticism about the move towards "jurisprudence," or rule by judges. See also Tom Ginsburg, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 18 (2003):

Why is it that judicial review is adopted in the democratic constitution[?] ... The answer has to do with the time horizons of those politicians drafting the constitution. If they foresee themselves in power after the constitution is passed, they are likely to design institutions that will allow them to govern without encumbrance. On the other hand, if they foresee themselves losing in postconstitutional elections, they may seek to entrench judicial review as a form of political insurance. Even if they lose the election, they will be able to have some access to a forum in which to challenge the legislature.

As Hirsch, Ginsburg, and others suggest, independent judiciaries engaged in active judicial review may be related to the development, or practice, of a competitive political system. Compare Hirsch’s skepticism ...
about judicial review with the following observation: "Whatever the possible normative tension between democracy and independent judicial review, there is a positive explanation for the close association between these institutions. Specifically, independent judicial review serves a valuable insurance function for competitors in a stable democracy." Matthew C. Stephenson, When the Devil Turns... The Political Foundations of Independent Judicial Review, 39 J. Legal Stud. 89 (2000).

Stephenson's work suggests that independent judicial review depends on the existence of a competitive political system, an observation that suggests that courts may have institutionally self-interested reasons to engage in "representation reinforcing" review, in addition to the normative reasons John Hart Ely has described.

Recall that Hans Kelsen, whose work was so important to the creation of the European-style constitutional courts, had argued that constitutional courts should not be charged with enforcing bills of rights, for they would allow too much room for judicial discretion. Yet since World War II, "human rights consciousness," including the constitutionalization of rights and judicial review, has spread to Kelsenian centralized review systems and to others. In Germany, whose court has been most influential within Europe, "the protection of human rights was intended from the first to be an essential element of the tribunal's jurisdiction, and so it has turned out." Herman Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe 19 (2000). Consider whether the development of human rights consciousness provides a counter-narrative to explain judicial review in some of Hirsch's categories.

B. STRUCTURE, COMPOSITION, APPOINTMENT, AND JURISDICTION

The following materials provide some greater detail concerning the jurisdiction and composition of several major constitutional courts. After the introductory chart, a brief description and some short excerpts on the composition of the U.S. Supreme Court are included, followed by a more detailed introduction to the system of constitutional review in France and Germany. These materials provide some history and background to the formation of constitutional courts in France and in Germany, and address the structure, composition, and appointment methods of the judges of the courts charged with constitutional review. Finally, we briefly identify some of the issues and dynamics of constitution-making and judicial review in Eastern Europe.

As you read this section, issues to think about include: (1) whether, and how, appointment mechanisms for judges and the composition of the constitutional courts relate to the types of jurisdiction exercised by the court; (2) the relative mix of "careerist" and "recognition" elements in the various selection mechanisms; (3) the benefits and costs of life


tenure for constitutional court judges, and its relationship to the independence of the judiciary; (4) whether there are different "packages" of provisions concerning appointment, advancement, tenure, salary, or retirement that will foster judicial independence; (5) the role of other institutions outside the judiciary in affecting its independence, and (6) whether an independent judiciary is necessary for a constitutional system (and, if not, what role an institutionally subordinate judiciary might play).

1. SURVEY OF CONSTITUTIONAL COURTS, JURISDICTION AND COMPOSITION

As the following chart of selected examples suggests, among the constitutional courts that have had experience with judicial review in recent years, the United States is quite unusual in its provisions for life tenure. Neither Japan, nor Germany, each of which adopted its constitution under some U.S. influence after World War II, provides for life tenure; Japan provides for mandatory retirement at a set age (70), as does Germany (68).

2. THE UNITED STATES AND THE U.S. SUPREME COURT

Although judicial review was not explicitly provided for by the Constitution, it is well accepted under the reasoning of Marbury v. Madison, 5 U.S. 137 (1803), that the government of the United States is one of limited powers, that the constitution is intended to act as law in enforcing those limits, and that "[i]t is emphatically the province and duty of the judicial department to say what the law is," and to apply the constitution as superior to "any ordinary act of legislation" in cases in which they both apply and are in conflict. For a detailed description of the early history of the Court, see Julius Goebel, Antecedents and Beginnings to 1801, HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1971).
<table>
<thead>
<tr>
<th>Court</th>
<th>Targeted on High Court</th>
<th>Appointment Power</th>
<th>Legal Qualifications</th>
<th>Organizational Structure</th>
<th>Other Facts</th>
<th>Access to the Public</th>
<th>Jurisdictional Power</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Supreme Court</td>
<td>Life tenure by process</td>
<td>President's area</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>Life tenure by process</td>
<td>Yes</td>
</tr>
<tr>
<td>Canadian Supreme Court</td>
<td>Life tenure by process</td>
<td>President's area</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>Life tenure by process</td>
<td>Yes</td>
</tr>
<tr>
<td>Federal Constitutional Court of Canada</td>
<td>Life tenure by process</td>
<td>President's area</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>Life tenure by process</td>
<td>Yes</td>
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<tr>
<td>U.S. Constitutional Court</td>
<td>Life tenure by process</td>
<td>President's area</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>Life tenure by process</td>
<td>Yes</td>
</tr>
<tr>
<td>English Supreme Court</td>
<td>Life tenure by process</td>
<td>President's area</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>Life tenure by process</td>
<td>Yes</td>
</tr>
<tr>
<td>Mexican Supreme Court</td>
<td>Life tenure by process</td>
<td>President's area</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>Life tenure by process</td>
<td>Yes</td>
</tr>
<tr>
<td>South African Constitutional Court of South Africa</td>
<td>Life tenure by process</td>
<td>President's area</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>No. of judges</td>
<td>Life tenure by process</td>
<td>Yes</td>
</tr>
</tbody>
</table>
In the United States all judges, state and federal, can decide on constitutional issues. The Supreme Court has jurisdiction to review those decisions, however, and we therefore focus on it. The Supreme Court of the United States (like all federal Article III courts) has jurisdiction only over concrete “cases and controversies.” The Court has therefore declined to provide “advisory opinions,” beginning from when President Washington sought the justices’ advice on the effects of certain treaties and laws on maintaining U.S. neutrality, See Opinion of the Justices (Aug. 8 1793), reproduced in Richard H. Fallon, John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler’s THE FEDERAL COURTS AND THE FEDERAL SYSTEM 52 (6th ed. 2009). The Justices explained their refusal to respond, in part, by noting that “[t]he lines of separation drawn by the Constitution between the three departments of the government . . . being in certain respects checks upon each other—and our being judges of a court in the last resort—are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to . . .”

The Supreme Court can review all questions of federal law (constitutional, statutory, regulatory, treaty, admiralty or federal common law) that were disposed of in the lower courts, as well as any other matter decided by a lower federal court, e.g., in diversity cases. The Supreme Court’s jurisdiction is largely discretionary; as a matter of statute, the Court sets its own agenda of cases that it decides on the merits. Most requests for review (called petitions for certiorari) are denied, with the denial having, as a formal matter, no implications for the Court’s view of the merits, and no precedential effect. The Court’s jurisdiction is primarily appellate (which is subject to regulation by Congress), though in a small number of cases (mostly litigation between two or more states) a matter is commenced originally in the Supreme Court.

There are nine justices on the Court. The number may be fixed by Congress but has not changed since the 1870s. Given public outrage at President Roosevelt’s court-packing plan of 1937, the number may have become a fixture. (Is this an unwritten U.S. constitutional “convention”?) The Constitution provides no qualifications for Justices, who are nominated by the President but must be confirmed by majority vote of the Senate. They serve essentially for life “during good Behaviour,” and they can be removed from office only by impeachment. No Supreme Court justice has been removed from office by impeachment.

The Senate has, however, refused to confirm presidential nominees—just over one-fifth of all presidential nominees to the Supreme Court have failed to be confirmed by the Senate. See Henry J. Abraham, PRESIDENTS AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 28 (1999); Susan Low Bloch, Vicki C. Jackson & Thomas Krat Tyler, INSIDE THE SUPREME COURT: THE INSTITUTION AND ITS PROCEDURES 88–89 (2d ed. 2008) (reporting that as of 2008, there had been 158 nominations to the Supreme Court, 36 of which failed to be confirmed). Although the Senate did not generally hold public hearings on Supreme Court nominees until the 1930s, current practice is for a nominee to undergo investigation by the Senate, various interest groups, and the media,
Constitutional Courts: Structure and Procedure

Chapter VI

imposed on the tenure of persons appointed judges of the Supreme Court....

II.

The Senate's actual role in the confirmation process depended upon the shifting balance of political power between Congress and the President. The Senate's significant nineteenth-century role reflected the general congressional dominance of that era. Scarcely one hundred years ago, Woodrow Wilson argued that national government was congressional government—more precisely, government by the chairmen of the Standing Committees of Congress. Wilson put aside the President with the dismissive observation that his "business...occasionally great, is usually not much above routine." Although some such model of congressional government could be defended as late as the beginning of the New Deal, modern government is presidential government, at least in its most important aspects. Presidential ascendancy in the appointment process reflects this fact.

The modern Presidency, even a lame-duck Presidency facing a Senate controlled by the opposite party, has enormous resources for mobilizing support and for disciplining those senators who refuse to go along. Such resources—party discipline, ideology, and the various carrots and sticks—can be concentrated on any issue of significant importance to the President. One could speculate extensively about why those resources failed in the case of Judge Bork. For us it suffices that the Bork proceedings themselves arose in a special context, one in which the administration's hard-line attitude on judicial nominations had left a bitter residue. Many parties were spoiling for a fight, and Judge Bork, who was perceived as far outside the mainstream of legal thinking, was the perfect catalyst to provoke one. Such a configuration is unlikely to be repeated frequently, suggesting Judge Bork's rejection portends no important institutional changes in the President's ability to win confirmation of nominees.

The institutionally important point is that it takes enormous energy for senators to unite in order to resist the President. Once undertaken, such conduct cannot easily be sustained, as evidenced by the relief with which the Senate greeted Judge Kennedy's nomination. The senators made every effort to see him as different from Judge Bork, regardless of whether he actually was. Commenting on Judge Kennedy's "smooth sailing" on his initial Senate visit, Senator John McCain, a conservative Republican from Arizona, put the point well: the Senate was simply "weary" of fighting. "Nobody wants to go through that again. There's just too much blood on the floor." At most, Judge Bork's hearings may have established a tradition of more probing Senate interrogation of a nominee, but the political background in which the entire confirmation process functions remains one with a powerful Presidency. To be sure, the rejection reminds us that periodically the American people seem to need a battle over a Supreme Court appointment. But symbolism aside, the hard fact is that the President's vision of what is proper judicial philosophy ultimately will prevail, as Judge Kennedy's confirmation demonstrates.

Nonetheless, some believe that Judge Bork's rejection shows that the Senate's role is less marginal than I have argued. The Senate's failure to confirm Judge Bork is said to reflect popular rejection of...