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Citation: 82 Tex. L. Rev. 1671 2003-2004

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Constitutional Adjudication: Lessons from Europe

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One of the most remarkable political developments of the twentieth century has been the development of constitutional democracy in Europe after World War II. The defeated powers in the western part of the continent adopted new constitutions that embraced notions of individual rights and limited government. It is difficult to overstate how fundamental these changes have been in transforming preexisting legal systems and cultures and indeed, in transcending historical political divisions. The most important transformation in these new constitutions was the introduction of constitutional courts with power to review and strike down legislation, and also to adjudicate conflicts among governmental departments.¹ These new courts have grown in activity and importance since their introduction. And, they have spread to other countries throughout Europe with each wave of democratization—to Spain and Portugal in the 1970s and to Eastern Europe with the establishment of postcommunist constitutional regimes after 1989.

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1. In the German Federal Republic, the Federal Constitutional Court was given authority to resolve conflicts between the national and Länder (state) governments. See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 12 (2d ed. 1997) (noting that the Federal Constitutional Court has jurisdiction to hear public law disputes “between the federation and the states, between different states, or within a state if no other legal recourse is provided”). One should note that this is the first important difference between the European mechanism of constitutional adjudication and the American judicial review of legislation. In the European model, the constitutional court has explicit jurisdiction over the conflicts among branches of the central government (*Organstreit* in Germany, *conflitti di attribuzioni* in Italy). See *id.* at 12 (stating that the Federal Constitutional Court has jurisdiction over *Organstreit* proceedings, which are “constitutional disputes between the highest ‘organs,’ or branches” of the German government); Pasquale Pasquino, *Lenient Legislation: The Jurisprudence of the Italian Constitutional Court* (June 1999) (unpublished manuscript, on file with author) [hereinafter Pasquino, *Lenient Legislation*] (stating that the Italian Constitutional Court is empowered to pass judgment on “[c]onflicts arising from allocation of powers of the State and those allocated to State and regions, and between regions”). The U.S. Supreme Court has not exercised any equivalent power. The American Court has traditionally been reluctant to intervene in interbranch disputes. See MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 138 (Paul J. Kollmer & Joanne M. Olson eds., 1989) (arguing that the U.S. Supreme Court often avoids cases involving disputes between the political branches). The European constitutional courts are outside the judiciary and play the role of an umpire when there are conflicts among the branches of the government. Pasquale Pasquino, *Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy*, 11 *RATIO JURIS* 38, 48 (1998) [hereinafter Pasquino, *Constitutional Adjudication*]. It is clear that the constitutional philosophies underlying the two institutional systems are quite different. This topic is worth serious inquiry.

Each new constitution has introduced new constitutional courts and new constitutional adjudication.²

From an American perspective, it is easy to see these constitutional innovations as somehow a successful American export. The United States has enjoyed a system of constitutional adjudication—which we call *judicial review*—for two centuries, and the Germans and Italians were led to adopt these institutions under American “tutelage,” or even pressure. But this view is mistaken for two reasons. It is true of course that the Americans wanted the Italians and Germans to establish constitutions with bills of rights and restraints on national government.³ But, the struggle over the creation of the new constitutions was dominated by indigenous leaders, not by the Americans.⁴ The compromises settled upon reflected historical conflicts within the countries. Indeed, it would have been both unattractive and impossible to import American-style judicial review to Europe, and, in the end, nothing like it was put in place. As we shall see, when we look for intellectual ancestors of constitutional adjudication in Europe, we need to look at Austria after the First World War rather than to the U.S. Constitution. And we need to recognize Hans Kelsen, the first Chief Justice and designer of the Austrian Court, and not James Madison, as its spiritual godfather.

We think it is also important to avoid the opposite mistake: to think that one can import, directly from Europe, institutions and practices created there over the past half century. The European constitutional courts have in many respects been remarkably successful in implanting constitutional restraints on governments in systems long inhospitable to such restraints.⁵ Moreover, they have done so while avoiding the kind of “politicization” of judging that is characteristic of American courts.⁶ The decisions of European courts are not

2. See, e.g., Bojan Bugarcic, *Courts as Policy-Makers: Lessons from Transition*, 42 HARV. INT’L L.J. 247, 260 (2001) (noting that almost all European countries have constitutional courts). The few countries without constitutional adjudication include Libya and Syria, which have authoritarian regimes, and the United Kingdom and the Netherlands, which have democratic regimes. See ARNE MAVČIČ, *THE CONSTITUTIONAL REVIEW* 27, 94–95 (2001) (listing Great Britain, the Netherlands, and Libya as systems without constitutional review and discussing the limited preventative review permitted in Syria).

3. In Germany, the American forces insisted on the establishment of robust federal institutions. See KOMMERS, *supra* note 1, at 7 (asserting that the Allied powers “insisted that any government of Germany be federal, democratic, and constitutional”).

4. See *id.* at 7 (asserting that “[t]he Germans decided on their own to establish a Constitutional Court, to vest it with authority to nullify laws and other government actions contrary to the Constitution, and to elevate this authority into an express principle of government”).

5. See CAPPELLETTI, *supra* note 1, at 118–81 (discussing the history, evolution, and legitimacy of judicial review in Europe).

6. John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 43 (2002).

marked by the publication of separate and conflicting opinions.⁷ Perhaps for that reason European judges are not able to develop ideologically distinct public personalities.⁸ And, even though European legislatures do struggle over appointments to the constitutional courts, political leaders do not campaign for election by claiming they will appoint certain kinds of judges to these courts. But, for all their attractions, we do not think it would be easy—and possibly not even desirable—to try to import European practices into the American setting. Reforms of any legal system need to fit with the internal requirements of that system and not be imposed. Still, we are hopeful that at least some lessons might be learned from the European experiment and those experiences might suggest some possible paths of constitutional or subconstitutional reform in the United States.

The idea that we shall pursue here is that the U.S. Supreme Court may have gone too far in encouraging members of the Court to engage in public conflict, and that some simple reforms may have the effect of reducing the expression of political differences in published opinions. We are not suggesting that the Court should adopt formal rules in order to suppress the publication of multiple opinions, or even that individual Justices feel obliged to adopt restrained postures toward those with whom they disagree. The public expression of diverse legal views about controversial issues has a direct value in a constitutional *democracy*. However, there seems to be a genuine conflict between the pursuit of this value and the development of a shared or common view of what the Constitution requires.⁹ The European courts have plainly made a different choice: preferring, wherever possible, to

7. See HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 246 (noting that the disallowance or absence of dissents in many European constitutional courts reflects “the archaic civil law notion that the law is fixed, clear and discoverable and that all judges do is discover and apply it”).

8. An exception may be found in some members of the French Constitutional Council. *See id.* at 192 (relating that the French model of publishing dissenting opinions is an anomaly in today’s Europe). This is probably due to the fact that the members are not appointed through supermajoritarian procedures as in most other European countries. Instead the President of the Senate, the President of the National Assembly and the President of the Republic are each entitled to three positions on the Conseil whom they appoint without any minority checks. LA CONSTITUTION tit. VIII, art. 56 (Fr.) (“The Constitutional Council shall consist of nine members Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate.”).

9. We do not have the time to justify why it is valuable for a court to seek common or consensual opinions about what the law requires. Ronald Dworkin argues that in law there is generally a right answer even in “hard” cases. RONALD DWORIN, *LAW’S EMPIRE*, at vii–ix (1986); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058–60 (1975). We need not agree with this view however to endorse the idea that constitutional judges ought to commit themselves to try hard to find an opinion that everyone on their court can endorse. Issues may arise in some cases, however, that remain divisive even after arduous attempts to find common ground.

pursue consensual decisions. Perhaps there are some European-style reforms that may lead the Supreme Court to balance the values of pluralism and consensus in a somewhat different way than it has in the past. Whether these reforms are feasible or worth doing is a judgment we leave to the reader.

1. European Constitutional Adjudication

The reasons that the transfer of constitutional practices is difficult in either direction are rooted in political and legal differences separating the United States from those countries that have adopted new constitutions in Europe. The striking political fact is this: European constitutional adjudication is essentially a postauthoritarian phenomenon. The old democracies—the Netherlands, the United Kingdom, and Luxembourg—did not rush to adopt new constitutions and certainly not to institute constitutional courts.¹⁰ They still have not done so, and there are many reasons for this. One is, for instance, that the left parties historically opposed constitutional adjudication throughout most of Europe. After World War II, the German Social Democrats embraced the new constitutional court despite initial strong opposition, and the Italian left came to do so as well. Nothing like this happened in the old democracies or even in France: in those countries the left remained intransigently opposed to constitutional innovation.

What explains this bifurcation? Probably the new idea that constitutional courts would protect personal and not merely property rights weakened traditional left opposition in the defeated countries. After all, one of the significant features of previous authoritarian rule was the absence of protections for human rights against an established government.¹¹ But the established democracies probably did not see that their rights needed additional protections against their governments, especially not if those protections were to be bought at the price of weakening their parliaments.

10. The Dutch Constitution (1815) explicitly forbids constitutional adjudication; instead, it provides that “[t]he constitutionality of laws and treaties shall not be reviewed by the courts.” GRONDWET [Constitution of the Kingdom] ch. 6, art. 120 (Neth.). For another example see the Luxembourg Constitution, which provides that “[t]he interpretation of laws by way of authority may only be effected through the law.” CONSTITUTION DU GRANDE-DUCHE DE LUXEMBOURG [Constitution] ch. 3, art. 48 (Lux.). This provision is similar to the *référé législatif* introduced under the French Revolution, meaning the obligation for the judge to ask the legislature to produce an interpretation of a statute in cases where the statute was not unambiguously applicable to the concrete case. CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 46 (1993). Needless to say, the *référé législatif* never worked!

11. For an example of the fundamental opposition of authoritarian rule with the protection of human rights, see generally DARREN G. HAWKINS, INTERNATIONAL HUMAN RIGHTS AND AUTHORITARIAN RULE IN CHILE (2002).

So new constitutions and courts were instituted only in postauthoritarian countries including Germany and Italy after World War II, Spain and Portugal following the collapse of their authoritarian regimes in the 1970s, and the former communistic countries of Eastern Europe after the collapse of the Soviet Union. The only possible exception to this statement is France. In 1958, after De Gaulle's return to power, France adopted a new constitution that established the *Conseil Constitutionnel*, an institution that has gradually and unexpectedly developed into a forum that performs functions resembling constitutional adjudication. But as we shall see, at best this is a minor caveat as it remains controversial how far the *Conseil Constitutionnel* has actually succeeded in becoming a genuine constitutional court, rather than a third legislative chamber.¹²

We do not think it is accidental that constitutions and constitutional courts followed failed authoritarian regimes, at least within the context of European (or continental) legal systems. European systems had and retained a characteristic legal shape in which the legislative power is superior to the executive and judicial powers; today we would call such systems parliamentary governments or parliamentary sovereignty regimes. Executives are responsible to the legislature in European systems, in the sense that the executive must maintain majority support in order to govern, and judges are required to apply enacted legislation, or codes, and not to rely on other sources of legal authority.¹³ Judges are to act essentially as career civil servants whose job it is to carry out the commands of the legislature.

For this reason, judges in failed authoritarian systems are implicated in the application and enforcement of authoritarian laws and because of this

12. ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 8–10 (1992); John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1782 (1988) (noting that although the Council's "formal characteristics would lead few to challenge the court-like nature of the Council, doubts linger partly because of the tasks it performs"). Moreover, the Conseil was established to permit the majority to control the minority. The only access to the Conseil under the 1958 Constitution was by a referral from the Presidents of the Senate or the National Assembly, the Prime Minister, or the President of the Republic. LA CONSTITUTION tit. VII, art. 61 (Fr.). With the exception of the Senate presidency, all of these offices were controlled by the Gaullists. STONE, *supra*, at 57. It was not until 1974 that the Constitution was amended to permit the political minorities of the legislative chambers to the Conseil because the conservatives thought they would lose control of the institutions of the national government. Pasquino, *Constitutional Adjudication*, *supra* note 1, at 46. This amendment changed the role of the Conseil fundamentally into an institution that permitted political minorities to check the majority. See STONE, *supra*, at 78–91 (detailing constitutional referrals by rightist and leftist minorities during the years 1981–1986 and 1986–1988, respectively).

13. See JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 140–48 (1969) (discussing a variety of ways courts handle public law matters).

complicity, are usually regarded as politically untrustworthy.¹⁴ Moreover, in all of these systems judges have no trace of a “democratic pedigree.”¹⁵ Instead, they qualify for the bench by passing a merit examination and advance from one court to the next in the same way, or simply by seniority (as in Italy).¹⁶ So, for these reasons, none of the new postauthoritarian constitutions contemplated permitting regular judges to exercise powers of judicial review. Rather, if there were to be powers of constitutional adjudication, they would need to be vested in a wholly new institution that stood outside of the monistic system of legal authority and in which the members were appointed by the legislature.

As it happened, just such a system had been invented in Austria following World War I. This system, which we call Kelsenian after its inventor,¹⁷ instituted the Constitutional Court, separate from the judiciary, which had the authority to review legislative commands as well as executive actions and strike down those that offended the Constitution.¹⁸ The members of this new Court were appointed politically from among legal scholars and lawyers, and they were to sit for fixed, nonrenewable terms.¹⁹ The new

14. See *id.* at 16–19 (arguing that because *ancien regime* courts in France had opposed popular reforms, after the Revolution there was a great mistrust of the judiciary and a widespread view that the judiciary should not interfere in any way with the application of the will of the people as embedded in the statutes); see also Alec Stone, *Where Judicial Politics are Legislative Politics: The French Constitutional Council*, in JUDICIAL POLITICS AND POLICY-MAKING IN WESTERN EUROPE 29, 29 (Mary L. Volcansek ed., 1992) (noting that “judicial review (in the American sense) was made a punishable offence by the penal codes of 1791”).

15. Christopher Eisgruber argues that federal judges should have a democratic pedigree. See Christopher L. Eisgruber, *Democracy and Disagreement: A Comment on Jeremy Waldron’s Law and Disagreement*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 35, 45 (2002) (claiming a democratic pedigree ensures that “judges will not be idiosyncratic political radicals, but rather will express moral judgments more or less consistent with some current of mainstream . . . political thought”).

16. See CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 65 (2001).

17. Hans Kelsen wrote frequently on the concept of international law. Nicoletta Bersier Ladavac, *Hans Kelsen (1881–1973): Biographical Note and Bibliography*, 9 EUR. J. INT’L L. 391 (1998). He was a prolific publisher throughout the 1940s and 1950s, producing more than 400 works before his death in 1973. *Id.* at 392. His works have been translated into twenty-four languages and continue to be important in many areas of legal thought. *Id.*

18. In the Austrian Constitution, the Constitutional Court (*Verfassungsgerichtshof*) is a subsection of chapter 6, devoted to the constitutional and administrative guarantees. BUNDESVERFASSUNGSGESETZ [Constitution] ch. 6, art. 137–48 (Aus.).

19. *Id.* ch. 6, art. 147. The only exception in the European model was the Portuguese Constitutional Court, which permitted reappointment until a reform was introduced in 1997, when the mandate was changed to nonrenewable nine-year terms from the original six-year terms that were renewable once. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [Constitution] § VI, art. 222(3) (Port.). Another exception is the European Court of Justice in Luxembourg, where the Justices, appointed for six years, can be reappointed by the governments of the member states. Treaty Establishing the European Community, Mar. 25, 1957, art. 223, 37 I.L.M. 56. Note that opinions of the Court of Justice are always signed by all Justices who took part, and are issued with no

Court was to be essentially outside the preexisting system of law and to have the special duty to protect the constitutional allocation of authority and rights from all the other governmental bodies.²⁰ In Kelsen's time, the Austrian Court protected the new federalist system of powers.²¹ But after World War II, the new courts were empowered to protect a wide range of individual rights as well as the allocation of governmental authority.

The new constitutional courts have differed in many ways from Kelsen's original court, but they have all tended to share certain common features that distinguish them from the U.S. Supreme Court. First, the justices are not appointed for life but serve for fairly long, fixed terms (from nine to twelve years) and are not eligible for reappointment.²² Second, the European constitutional courts have a monopoly on applying constitutional norms: ordinary courts are not empowered to review legislation, nor to review other governmental actions for congruence with the constitution.²³ Third, issues come before the constitutional courts mostly on paper, as references or petitions, and are not normally heard by justices in oral argument.²⁴ Fourth, all of the courts meet and deliberate in closed or secret

dissenting opinions. See Court of Justice, Rules of Procedure, arts. 63–64, 1991 O.J. (L 176) 30 (mandating publication of only the decision of the Court).

20. John Ferejohn & Pasquale Pasquino, *Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 21, 31–33 (Wojciech Sadurski ed., 2002) [hereinafter CONSTITUTIONAL JUSTICE].

21. John E. Ferejohn, *Constitutional Review in the Global Context*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 52 (2002) (noting that in "post-World War I Austria, the concern was mostly for maintaining federal arrangements, that is, regulating the relationship between the national and provincial governments").

22. As previously noticed, the Portuguese Constitution was amended to bring this Court into line with the standard model of a single, long, nonrenewable term. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [Constitution] § VI, art. 222 (Port.). The Hungarian Constitution, however, still permits reappointment to the Constitutional Court. LÁSZLÓ SÓLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 71 (2000).

23. In the continental legal system, special courts (referred to as "administrative") adjudicate conflicts between citizens and public officials or state organs; however, these conflicts involve breaches of legality, not constitutionality. See, e.g., BUNDES-VERFASSUNGSGESETZ [Constitution] ch. 6, art. 129 (Aus.) (vesting authority to determine the legality of all acts of public administration in the administrative court); COSTITUZIONE pt. II, art. 103(1) (Italy) (vesting civil law claims against public administration in the administrative courts).

24. Cases are never heard in France and very rarely heard in Germany. Louis Favoreu, *The Constitutional Council and Parliament in France*, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON 81, 91–92 (Christine Landfried ed., 1988); KOMMERS, *supra* note 1, at 13. The Italian Constitutional Court hears about twenty percent of the cases, but "hearing" has to be understood in a very literal sense. Justices sit together one out of fifteen days, for a couple of hours, and briefly listen to lawyers presenting arguments. They never speak with

sessions and either require or encourage a single decision for the whole court.²⁵ Fifth, as already noted, the justices on the constitutional courts are not drawn solely from the judiciary but from a wider population including lawyers and prominent legal scholars.²⁶ Sixth, appointment to the courts is made mostly through supermajoritarian procedures, which have the effect of requiring that all of the major parties approve any justice appointed to the court.²⁷ And seventh, the constitutional courts primarily decide questions rather than cases.²⁸

The contrast with the American system of judicial review is sharp: American federal judges have lifetime tenure, while state judges may have

them, nor do they take a public position! MARY L. VOLCANSEK, *CONSTITUTIONAL POLITICS IN ITALY: THE CONSTITUTIONAL COURT* 26–27 (2000).

25. See, e.g., Christine Landfried, *Introduction to CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON* 7, 11 (Christine Landfried ed., 1988) [hereinafter Landfried, *Introduction*] (noting that the dissenting opinion does not exist in Austria and that decisions are not discussed in the media or in public opinion). The German and Spanish Courts do permit dissenting opinions, but both have informal norms that discourage their frequent use. See CONSTITUCIÓN tit. IX, ch. 3, art. 164 (Spain) (“The verdicts of the Constitutional Court shall be published . . . with the dissenting votes, if any.”); KOMMERS, *supra* note 1, at 26 (discussing the reluctance of German constitutional Justices to publish dissenting opinions). Perhaps one reason the German and Spanish Courts may safely permit dissent is that they know that dissents will rarely be written because their Justices are under a very heavy burden of responding to constitutional complaints, which number in the thousands every year. See *id.* at 27 (explaining the German constitutional complaint procedure, which produced 5,194 complaints in 1994); ELENA MERINO-BLANCO, *THE SPANISH LEGAL SYSTEM* 100 (1996) (discussing the constitutional complaint process in Spain).

26. See, e.g., Landfried, *Introduction, supra* note 25, at 13 (noting that Germany selects judges from the judiciary, administration, and university professors, while France selects a high proportion of judges from former members of the legislative bodies).

27. See, e.g., Klaus von Beyne, *The German Constitutional Court in an Uneasy Triangle Between Parliament, Government and the Federal Laender*, in *CONSTITUTIONAL JUSTICE, supra* note 20, at 103 (discussing how politicization in the election of judges is mitigated in Germany by a two-thirds majority rule).

28. See, e.g., Ferejohn & Pasquino, *supra* note 20, at 31 (describing how constitutional courts may be asked to compare constitutional and statutory texts abstractly, may be presented with a constitutional issue arising in an ongoing case before a lower court, or may be presented with a whole decided case). There is a partial exception to this claim. In Germany and Spain, the constitutional courts accept constitutional complaints from persons who believe that their fundamental rights have been violated by a state actor, usually a judge or civil servant. See Christine Landfried, *Constitutional Review and Legislation in the Federal Republic of Germany*, in *CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON, supra* note 25, at 152 [hereinafter Landfried, *Federal Republic of Germany*] (noting that under German law a constitutional complaint can be filed by any person who claims that one of his basic rights was violated by a public authority). In such cases, the Court may respond in favor of the petition either by reversing the decision or referring the case back to the original court or agency for a new decision. In rare cases, the Court may decide that an unconstitutional statute was the cause of the complaint and invalidate it. See *id.* at 152–53 (noting that between 1951 and 1987, over 67,000 constitutional complaints were filed, while only 185 federal laws were invalidated by the Court).

fixed terms but are eligible for reappointment. The Supreme Court has no monopoly on judicial review but sits as the highest court of appeals with respect to constitutional as well as other issues. Multiple opinions are common with American courts and per curiam opinions are relatively rare. Supreme Court Justices nearly always are drawn solely from the state or federal judiciaries, and appointment requires only a bare majority of the Senate. Although American courts make decisions in closed sessions, many of their processes are fairly open to view from the outside. The Supreme Court and other courts of appeals generally hear oral arguments and commonly respond to the lawyers who present them, and the multiple opinions common in American courts at all levels expose variations in legal reasoning to public view and comment.

There are, no doubt, good reasons for each of these features of American-style judicial review, which we cannot examine in detail here. Surely foremost among these reasons is the American acceptance of separation of powers at both the state and federal level, and the associated notion that courts are a coordinate branch of government, deriving their authority directly from the constitutions, and are not subordinated to the legislature. This notion supports the idea that courts naturally have the authority to interpret and apply diverse systems of law—constitutional as well as statutory, state as well as federal—to the cases before them, and that this confers the power of judicial review to every court.²⁹ Moreover, the politics of the ratification process probably made it impossible to concentrate the power of judicial review in the federal Supreme Court to the exclusion of state judges.³⁰ At the time of ratification, state judges were probably more trusted to oppose unconstitutional legislation than their distant and unknown federal counterparts.³¹

In any case, we should emphasize again the peculiar history of European constitutional adjudication, especially as compared with the history of American judicial review. At the time the Constitution was adopted, the United States was not rejecting an authoritarian past but was grafting a

29. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

30. See John R. Schmidhauser, *Judicial Activism and Congressional Responses in the United States*, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON, *supra* note 25, at 45 (discussing how the Supreme Court was created through a series of important compromises).

31. See Patrick Henry, *Shall Liberty or Empire be Sought?*, Speech at the Virginia Ratifying Convention (June 5, 1788), in 8 THE WORLD’S FAMOUS ORATIONS 67–76 (William Jennings Bryan ed., 1906) (suggesting that federal judges would not have the fortitude to oppose unconstitutional laws because they would be “dependent on Congress”).

national government and judiciary on top of functioning republican entities.³² The founders certainly thought that these state-based systems were flawed in various ways, but they hoped that these flaws could be corrected by devising a national government and a federal judiciary competent to restrain the states from producing bad legislation, at least in areas where the federal government was authorized to act.³³ This difference is simple to state, but it explains why the European practice of constitutional adjudication has been so different from its American counterpart.

That said, there are some similarities which give hope that some lessons may be shared. For one thing, constitutional courts everywhere are “deliberative institutions,” whose base of legitimacy has to be established in reasons.³⁴ The authority of the courts ultimately rests on giving persuasive legal reasons in support of their holdings.³⁵ Unlike the executive and legislative branches, courts do not have the coercive resources to ensure acceptance of their holdings.³⁶ The effectiveness of any judicial system relies on the acceptance and respect of the other branches of the government, as well as the people themselves.³⁷ This is especially true in the constitutional domain where a constitutional court is sometimes in the position of arguing against the expressed will of a political majority of elected representatives. This is as true in the United States as in the new European systems. So, the opinions or holdings of constitutional courts do bear some resemblance to one another. Indeed, there is a growing trend for justices on the various courts to reference the reasoning of older courts on

32. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 56 (Harvey C. Mansfield & Delba Winthrop trans., 2000) (“The form of the federal government of the United States appeared [after that of the states]; it was only a modification of the republic, a summary of the political principles spread through the entire society before it and subsisting independent of it.”).

33. See Schmidhauser, *supra* note 30, at 45–46 (noting that the federal Supreme Court was created with broad original and appellate jurisdiction to fulfill a decisive role as final arbiter in federal-state relations).

34. See JOHN RAWLS, *POLITICAL LIBERALISM* 231–40 (1993) (describing courts as exemplary deliberative institutions in which reasons, explanations, and justifications are both expected and offered); Ferejohn & Pasquino, *supra* note 20, at 22 (noting that constitutional courts, despite being differently situated in various political systems, retain an exemplary deliberative character).

35. See THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”).

36. *Id.* at 465 (relating that, compared to the executive and legislative branches, the judiciary “has no influence over either the sword or the purse” and “must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments”).

37. *Id.* at 466 (noting that “the judiciary . . . is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches” and that “the general liberty of the people can never be endangered” by the judiciary).

related issues.³⁸ On the substantive level there is every reason to emphasize similarities rather than differences, but the institutional chasm remains.

II. Variations Among European Courts

We have spoken so far as though there are two different approaches to constitutional adjudication—American and Kelsenian—but, in fact, substantial differences have evolved among the European courts. This variation may make European lessons more instructive to the outsider in that a wide variety of practices have been tried, some successful practices have spread, and others have been discarded. The European constitutional courts have adopted somewhat different practices of appointing justices, obtaining questions to decide, reasoning or deliberating about cases, and issuing decisions.

A. Appointment

We can distinguish three basic models: monocratic, majoritarian,³⁹ and supermajoritarian. The first model is used, to our knowledge, only in France where the president of the Republic and the presidents of the two houses of Parliament each appoint three members of the *Conseil Constitutionnel* by their own choice and without consultation.⁴⁰ The supermajoritarian model, used in most of the European countries, originated in the German system. There, the sixteen Justices on the Federal Constitutional Court are appointed by supermajority rule—de facto by the agreement between the SPD and the CDU—in the *Bundestag* and *Bundesrat*, the two houses of the German Parliament, and serve nonrenewable terms of twelve years.⁴¹

In Italy, the system is mixed. The Italian Constitutional Court has fifteen members serving a single term of nine years: five are appointed by the highest courts of the country (*Cassazione*, *Consiglio di Stato*, *Corte dei conti*) that pick up old, prominent magistrates who have been in the judiciary their entire life, normally with a low political profile; five by the president of the Republic who, having relatively little democratic legitimacy—because he is elected by the Parliament, not by citizens—chooses the Justices from

38. See Sergio Bartole, *Conclusions: Legitimacy of Constitutional Courts: Between Policy Making and Legal Science*, in CONSTITUTIONAL JUSTICE, *supra* note 20, at 420 (noting that courts seek to legitimize their constitutional holdings by referencing decisions of past courts).

39. This is the model that characterizes the appointment of federal judges in the U.S. (mostly when there is no divided government): the President needs the consent of the Senate to appoint federal judges.

40. See Favoreu, *supra* note 24, at 82–83 (describing the appointment of the justices of the constitutional courts).

41. See Landfried, *Federal Republic of Germany*, *supra* note 28, at 147–49 (describing the selection of the Justices of the Constitutional Court in the German system).

among preeminent scholars (mostly law professors) with a medium political profile and near to the center of the political spectrum; the last five members are selected by the two houses of the Parliament sitting together with a supermajority of two-thirds in the first three ballots and then with a majority of three-fifths, which again excludes Justices with extreme positions since the minority can veto any candidate.⁴²

In Spain, the *Tribunal Constitucional*, is made up of twelve members with terms of nine years (like in Germany and Italy, the mandate cannot be renewed).⁴³ The members of the *Tribunal Constitucional* are formally appointed by the King who has to ratify de facto the choices of other bodies.⁴⁴ Four members are chosen by the House of the Representatives, four by the Senate, in both cases by a three-fifths majority—the same needed for constitutional amendments!⁴⁵ Two members are chosen by the government, and two by the *Consejo General del Poder Judicial*.⁴⁶ In Portugal, since 1997, the thirteen Justices are appointed for nine years (six have to be judges, and seven must be jurists).⁴⁷ Ten are elected by the Assembly of the Republic with a two-thirds majority.⁴⁸ The other three are co-opted by the first ten.⁴⁹

B. Access to Courts

There are three varieties of constitutional adjudication in Europe that can be differentiated on the basis of the mechanism of referral. We will call the three “ideal types” the French, the German, and the Italian. To further this analysis we need to distinguish between three *mechanisms* activating the court—a typically “passive” organ.⁵⁰ These mechanisms are put in motion

42. See generally Alessandro Pizzorusso, *Constitutional Review and Legislation in Italy, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON*, supra note 25, at 111–12 (discussing the composition of the Italian Constitutional Court). An interesting example is the case of Filippo Maneuso, a relatively extreme candidate for the Italian Constitutional Court proposed by Berlusconi’s majority a few years ago. After many months of stubborn opposition by the center-left in the Parliament, even Berlusconi was forced to give up and to propose a much less extreme candidate.

43. CONSTITUCIÓN tit. XI, art. 159 (Spain).

44. *Id.*; see also CHARLOTTE VILLIERS, *THE SPANISH LEGAL TRADITION* 35 (1999) (“In practice, the constitutional provisions leave the king reduced to a symbolic and almost decorative figure.”).

45. CONSTITUCIÓN tit. XI, arts. 159, 167 (Spain).

46. *Id.* art. 159.

47. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [Constitution] § VI, art. 222(1)–(2) (Port.).

48. *Id.* § III, art. 163(1).

49. *Id.* § VI, art. 222(1).

50. The “passivity” of the court is an important aspect of its functioning that it has in common with judicial organs. Still, there are a few exceptions of self-referral (known as *autosaisine* in

by three different *actors* of the political-constitutional system: the parliamentary minority (the French *saisine parlementaire*); the citizens (the German *Verfassungsbeschwerde*, and the Spanish *recurso de amparo*); and the judges (the Italian *eccezione di inconstituzionalità*).

It is important to stress that these are intended as *ideal* types and that there is not a complete congruence between the type and the country we chose to designate it. While it is true that France uses only the French type of referral, the German Federal Constitutional Court can employ all of them. Nonetheless, about ninety-five percent of the referrals in Germany are actually *Verfassungsbeschwerden* (constitutional complaints),⁵¹ and moreover a certain number of important decisions are answers to constitutional complaints.⁵²

Doctrinal authority dictates that most of the time a constitutional court controls the constitutionality of laws (or some other acts of the state organs), which concurs with Marshall and Kelsen with regard to the superiority of the constitution and the hierarchy of norms. This seems to be the predominant ideology, not only among legal scholars,⁵³ but also among justices.⁵⁴ We call

French): the first Constitutional Court of Russia and the Hungarian Constitutional Court. Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 135 (2001) (outlining the powers of the first Constitutional Court of Russia, including the power to "take up cases, on its own initiative, involving the constitutionality of decisions made by the President and other high officials"); Andras Sajó, *Constitutional Adjudication in Light of Discourse Theory*, 17 CARDOZO L. REV. 1193, 1199 n.16 (1996) (noting that the Hungarian Constitutional Court has the power to initiate cases on its own, but had yet to exercise that power due to self-restraint). Note, however, that the second, and current, Constitutional Court of Russia no longer may decide cases on its own initiative. Epstein et al., *supra*, at 137; Bugaric, *supra* note 2, at 276.

51. See KOMMERS, *supra* note 1, at 11 (summarizing the Court's docket by type of proceeding from 1951 to 1994).

52. *Id.* at 15 ("[Constitutional] complaints result in some of [the Court's] most significant decisions and make up about 55 percent of its published opinions.")

53. *But see, e.g.*, Michel Troper, *The Logic of Justification of Judicial Review*, 1 INT'L J. CONST. L. [I•CON] 99, 103–05 (2003) (critiquing justifications for judicial review that are based on the supremacy of the constitution). Unfortunately, this article is biased by the focus on the unique French mechanism of *a priori* control.

54. The fact that many justices present their action as the "mouth of the constitution" may have something to do with the circumstance that Montesquieu's ideology of the "null power" has been for a long time the predominant—even though largely mystifying—discourse legitimating judicial power. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, 160–66 (Anne M. Cobler et al. eds., 1989). Christine Landfried gives the results of two inquiries concerning the "consciousness of policy making by the judges of the [German] constitutional court," respectively from 1972 and 1983. Christine Landfried, *Germany*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 307, 311 (C. Neal Tate & Torbjörn Vallinder eds., 1995) [hereinafter Landfried, *Germany*]. To the question, "Do you think that your work as Judge of the Constitutional Court primarily consists of norm enforcement or of the development of law?" the answers were the following:

this the “constitutional syllogism,” drawing on Beccaria,⁵⁵ Condorcet,⁵⁶ and Kant,⁵⁷ where the major premise is the constitutional norm, the minor premise the law (or some other state act), and the conclusion the decision of the court. We suggest that this is essentially the rhetorical structure of the courts’ “reason giving,” something that needs to be analyzed accurately, but we cannot do that here. It is enough to describe the normal practices of the European constitutional courts. But they also do something more complex and interesting, which we illustrate below.

We believe, and this is a point on which everyone should agree, that a constitutional court exercises legislative or normative power “in a judicial form.”⁵⁸ The court, moreover, works according to a very old judicial procedure: a triadic structure, in which we recognize two parties on one side, and a third, supposedly independent and impartial judge, on the other. Behind the rhetorical form of the constitutional syllogism, the court acts *de facto* as a judge who has to produce the resolution of a conflict.⁵⁹ We suggest, more specifically, that the European constitutional courts work in one of the following ways: judge of the government (the equivalent of the political majority), in the French ideal type; judge of the judge, in the

Response	1972	1983
Norm Enforcement	63.0%	37.5%
Development of Law	7.4%	25.0%
Both	22.2%	37.5%
No Answer	7.4%	—

Id. The shift between 1972 and 1983 is very interesting.

55. See generally CEASARE BECCARIA, *ESSAY ON CRIMES AND PUNISHMENTS* (Edward D. Ingraham trans., 2d Am. ed. 1819) (1764), reprinted in *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 346, 346–47 (Morris R. Cohen & Felix S. Cohen eds., 1951).

56. See generally M. CONDORCET, *A COMMENTARY AND REVIEW OF MONTESQUIEU’S SPIRIT OF LAWS* 107 (Thomas Jefferson trans., William Duane ed., 1811) (1807).

57. See generally IMMANUAL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* (W. Hastie trans., T. & T. Clark 1887) (1796).

58. Mauro Cappelletti made this point some years ago. CAPPELLETTI, *supra* note 1, at 53–56. By this expression we mean that a constitutional court in making its normative (norm-producing) decision operates under constraints that are typical of judicial bodies and that differentiate them from a “legislative” legislator, the parliament. First, the deliberation is secret; second, the decision has to be justified or motivated; third, it has to be presented as bound by and referring to a previous decision—mostly the constitution, but sometimes a previous decision of the court as such, a precedent; fourth, as already noted, the decision is always an answer to a question coming from another actor of the system (passivity); fifth, and in what concerns the Italian and the German models, it has to do with an issue that arises in the context of a specific case or decision.

59. On the conflict-resolution function of the judiciary, see the contributions of the Scandinavian legal sociological school, VILHELM AUBERT, *IN SEARCH OF LAW, SOCIOLOGICAL APPROACHES TO LAW* 58–76 (1983), and TORSTEIN ECKOFF, *Impartiality, Separation of Powers and Judicial Independence*, in 9 *SCANDINAVIAN STUDIES IN LAW* 11–48 (Folke Schmidt ed., 1965).

German type; and, judge of the law, in the Italian type. We illustrate this typology below.

In France, normally, since the establishment of the Fifth Republic, the government introduces a bill, and the government-controlled parliamentary majority passes that bill.⁶⁰ Before its publication two weeks later as a statute law in the *Bulletin Officiel*, the minority (at least sixty deputies or senators, since the crucial constitutional reform of 1974) can send a referral to the *Conseil Constitutionnel*.⁶¹ The Council has less than one month to accept or repeal, in part or in full, the enacted bill. This is a form of constitutional control or a guarantee of the superiority of the Constitution. But, it is also plausible to claim that the Constitutional Council's ability to strike down an unpromulgated statute limits the possibility of the minority becoming too powerless and the majority too powerful. In this setting a constitutional court is an instrument of a "moderate,"⁶² or limited government—a mechanism of the liberal tradition, which guards against potentially tyrannical majorities. From this point of view, the court plays a "corrective" role relative to the democratic, majoritarian principle embodied by popular elections. It counteracts the logic of "winner-takes-all" where whoever wins the election wins everything. Thanks to the mechanism of constitutional adjudication, the electoral victory is not an "all or nothing" game.

The fact that politicians—even in states with a long democratic pedigree, like France—gave this power to a constitutional court shows that political actors look for protections against the abuse of power by elected majorities.⁶³ Since a democracy is a political system where the winners of today are inevitably doomed to be losers tomorrow, it may be welcome and in the common interest of the players to introduce a sort of insurance, minimizing, up to a certain point, the risks and the costs of a defeat. It is in

60. JOHN D. HUBER, *RATIONALIZING PARLIAMENT: LEGISLATIVE INSTITUTIONS AND PARTY POLITICS IN FRANCE* 3 (1996).

61. CAPPELLETTI, *supra* note 1, at 197. The immediate motivation for the constitutional amendment in 1974 was Giscard D'Estaing's worry that the Socialists would win election and attempt to nationalize various industries (as they had promised in their political program). By permitting a minority of representatives to refer such legislation to the *Conseil Constitutionnel*, property owners would have some opportunity to contest the actions of a new socialist government. See Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice"*, 35 CATH. U. L. REV. 1, 17 (1985) (observing that the constitutional amendment of 1974 granted parliamentary minorities standing to challenge legislation before the *Conseil Constitutionnel*).

62. As this adjective was used by Montesquieu, who opposed moderate to despotic forms of government. MONTESQUIEU, *supra* note 54, at 28.

63. Which was explicitly the case with the constitutional reform of 1974! See Cappelletti, *supra* note 61, at 17 (explaining that France passed a constitutional amendment in 1974 "granting parliamentary minorities standing to challenge legislation before the *Conseil Constitutionnel*").

the court's own interest not to abuse this position of arbitrator between the government and the opposition. It has to promote and preserve its reputation as a neutral organ performing "nonpartisan" political decisions in order to avoid backlashes from the politicians, who can always exhibit a democratic legitimacy and in any event modify the powers of the court if they feel under threat—because in those cases the supermajority needed to amend the constitution will easily appear!

In Germany, any person, regardless of her nationality, can complain about an infringement upon constitutionally protected rights by the acts of a civil servant,⁶⁴ usually a judge.⁶⁵ Once she has exhausted the legal remedies through the ordinary court,⁶⁶ she can send a *Verfassungsbeschwerde* (a constitutional complaint) to Karlsruhe, the city in which the Federal Constitutional Court sits. Is the citizen asking the Court to maintain the superiority of the Constitution? Perhaps, but it seems more persuasive to assume that the Court is being asked to protect individual rights, expanding in that sense the function of the administrative courts up to the constitutional level.

Administrative law and administrative courts were first established on the European continent, to the great discomfort of Albert Venn Dicey, to protect the state (i.e., public officials).⁶⁷ But, as often happens, the institution, disregarding the intentions of the authors, ended up fulfilling a different role. It began to protect citizens from public officials and, later on, from judges. Rubio Llorrente, a prominent Spanish legal scholar who was a member of the *Tribunal Constitucional*—modeled on the *Bundesverfassungsgericht*—speaks of it as a super Supreme Court.⁶⁸ At the end of a legal conflict, a citizen can appeal to the Constitutional Court if she

64. "Any person who claims that one of his basic rights . . . has been violated by public authority may lodge a constitutional complaint with the Federal Constitutional Court." BUNDESVERFASSUNGSGERICHTGESETZ [Constitutional Court Act] art. 90(1) (F.R.G.).

65. See *supra* note 28.

66. Exceptionally, the Federal Constitutional Court has direct jurisdiction "if recourse to other courts first would entail a serious and unavoidable disadvantage for the complainant." BUNDESVERFASSUNGSGERICHTGESETZ [Constitutional Court Act] art. 90(2) (F.R.G.).

67. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 344 (6th ed. 1902) (1885). Venn Dicey remarks:

[T]he one point which should be impressed upon every student is that the *droit administratif* of France rests upon political principles at variance with the ideas which are embodied in our existing constitution, and contradicts modern English convictions as to the rightful supremacy or rule of the law of the land.

Id.

68. Francisco Rubio Llorrente, *Constitutional Review and Legislation in Spain*, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON, *supra* note 25, at 127, 127.

thinks that the judiciary did not protect her constitutional rights, or infringed them.⁶⁹

Considering the relationship between constitutional justice and democracy, this mechanism of referral develops a new dimension of citizens' participation in public life and a new type of right: the right to complain and ask for a remedy when one's constitutional rights have been infringed. We may describe this system as one in which citizens have more than just the political right to participate in the legislative process, choosing by competitive elections representative legislators (as well as—directly or indirectly—the executive). They are also able to engage in a continuous, uninterrupted dialogue with their government by sending constitutional complaints to the Justices in Karlsruhe and getting answers to their questions. This is certainly one important element of what Jürgen Habermas calls "*Verfassungspatriotismus*," which is not simply an element of an abstract normative political philosophy, but up to a certain point a concrete institutional aspect of the German political constitutional system!⁷⁰ It is quite intriguing that Habermas himself seems never to have realized the important role the *Bundesverfassungsgericht* plays from his own theoretical standpoint. German citizens (like the Spaniards through the *amparo*, or the Hungarians through *actio popularis*⁷¹) do not just add their own vote to millions of other ballots every four or five years, but are part of a constitutional conversation and exchange of arguments with their Justices, the representatives of legal and constitutional order in the country.⁷²

69. CONSTITUCIÓN tit. I, art. 53 (Spain); *id.* tit. IX, arts. 161–162 (Spain).

70. For a fuller discussion of Habermas's theory of "constitutional patriotism," see JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 465–66, 499–500, 507, 512 (William Rehg trans., 1996).

71. The Hungarian *actio popularis* is a significantly broader right to appeal to the Constitutional Court. Rainer Arnold, *Constitutional Courts of Central and Eastern European Countries as a Dynamic Source of Modern Legal Ideas*, 18 TUL. EUR. & CIV. L.F. 99, 109–10. Any person may appeal to the Court regardless of whether she has suffered harm in some legal proceeding, and there is no requirement that other avenues of appeal be exhausted beforehand.

72. It may be noted here that the democratic logic is based essentially on aggregation of votes. The paradoxical element of that logic is that the individual vote doesn't matter (it is an irrelevant quantity); what matters is the aggregate. The constitutional complaint is an individual act that may matter. Democracy functions on the basis of collective action. In a system of constitutional justice, individual acts, like a *Verfassungsbeschwerde*, can have important legal consequences. Consider that of 129,284 *Verfassungsbeschwerden* filed from 1951 through 2001, the Court accepted 3,268 (or 2.5%) for the complainants. Das Bundesverfassungsgericht, Aufgaben, Verfahren und Organisation: Jahresstatistik 2001: Verfahrenszahlen [German Constitutional Court, Tasks, Procedures and Organization: 2001 Statistics: Procedure Numbers], at <http://www.bundesverfassungsgericht.de> (last visited Apr. 1, 2004). To the objection that 2.5% is too small a quantity, one can answer that this is more or less the proportion of articles accepted by the *American Political Science Journal* among the manuscripts sent to it.

In Italy, a referral is generally sent to Rome by an “ordinary court.”⁷³ The Constitutional Law of 1948 dictates that *motu proprio*, whether or not a party in a trial has requested it,⁷⁴ the judge can send the case to the Italian Constitutional Court if she has the *slightest doubt* concerning the “constitutionality” of a statute she has to apply in the case.⁷⁵ The judge solicits the advice and the opinion of the Constitutional Court when she feels that the strict enforcement of the statute law may possibly result in injustice.⁷⁶ The Constitutional Court answers, accepting or rejecting the question. Sometimes the Constitutional Court proposes an interpretation of the statute, which makes it compatible with constitutional principles and values (an hermeneutic strategy that the Germans call *verfassungforme gesetzesauslegung*, or “interpretation that conforms to the constitution,” and the Italians call *sentenze interpretative*).⁷⁷ More and more, by answering these questions, the Justices have to rewrite the law in consideration of circumstances unforeseen by the legislators. In that sense, constitutional adjudication appears to be a lenient sort of legislation, which reconsiders the content of the parliamentary abstract legislation in light of its concrete enforcement in concrete cases.⁷⁸

We need to repeat that this typology is only the ideal or typical scenario; France employs only the French model of abstract and a priori review, but the German Federal Constitutional Court can receive cases in all three manners.

A fourth, already mentioned, function of European constitutional adjudication has to be taken into account, one that can be found in both the German and the Italian model: the adjudication of conflicts among different

73. It is worth noting that the opinions of the Italian Constitutional Court never take the form of a direct reversal of a judicial sentence, since the judge asks the “question of constitutionality” *before* making her own decision. Pizzorusso, *supra* note 42, at 120–22.

74. *Id.* at 116–17. There are no statistics on this question in order to know how many times the ordinary judges send the question of constitutionality *motu proprio* or if they do it because a party in the trial asked for it. Nor do we know exactly how many times the request by a party in the trial is accepted or rejected by the judge. If the judge rejects the exception, the party can ask the same question again in the appellate court. We know that there are no sanctions or disincentives for a judge to ask even quasi-frivolous questions about the unconstitutionality of a norm she would have to apply.

75. The constitutional law says that the judge can send a question to the Constitutional Court in any case in which the question is not “manifestly unjustified” (*se non vi sia manifesta infondatezza*). *Id.*

76. *See id.*

77. *Id.* at 122. Recently the French *Conseil Constitutionnel* has developed a similar hermeneutic strategy. *See generally* ALEXANDRE VIALA, *LES RÉSERVES D’INTERPRÉTATION DANS LA JURISPRUDENCE DU CONSEIL CONSTITUTIONNEL* [THE METHODS OF INTERPRETATION OF THE FRENCH CONSTITUTIONAL COURT] (1999).

78. *See Pasquino, Lenient Legislation, supra* note 1.

organs of the state (in German, *Organstreitichkeit*; in Italian, *conflitti di attribuzioni*). Here the court plays a double role. On one side, it sits as a neutral third party among litigants that are not citizens, but constitutional organs of the state. On the other side, the court has to operate as an agency filling the holes of an incomplete contract. We want to suggest that since constitutions or constitution-making actors cannot foresee ex ante all potential conflicts of competences,⁷⁹ they can at least stipulate that a judge will adjudicate quarrels that are going to emerge inevitably. In such a case, it is possible to use the rhetoric of constitutional interpretation only in an extreme and loose meaning of the phrase. The point is that the court has to decide cases involving issues on which the constitution is silent or vague, sometimes even in the absence of any legal precedent.

Thus, in order to sum up what we have been describing, it is possible to divide the European constitutional courts into roughly three groups, according to how they tend to exercise jurisdiction: Italian style, German style, and French style. Constitutional decisions in Italy usually come about as follows: an ordinary judge sitting at trial, or a panel of judges on an appeals court, decides that the resolution of a case depends on determining whether a specific law is constitutional. The judge or judges then stop the proceedings and refer the constitutional question to the Italian Constitutional Court, which then decides this issue and refers its decision to the original court so that the case may resume.⁸⁰ So, in Italian constitutional adjudication, the Court typically decides an abstract question. For instance, whether a particular statutory text is congruent or consistent with the constitution. They are not to decide the case before them; that is left to the original court, even though the concrete case may play a role in the abstract argument of the Court. Technically the Court is only a judge of the law.

The Italian procedure has a number of notable features. First, for an issue of constitutionality to come before the Constitutional Court, an ordinary judge must take notice of it. This implicates ordinary judges in the constitutional review process, but in a moderate way.⁸¹ Second, the final resolution of constitutional questions can happen quite early in the history of a statute: as soon as a law is applied the Constitutional Court may receive a reference and resolve the issue at that point rather than waiting for many

79. They probably do not believe in the automatic self-enforcing equilibrium of a mechanism of checks and balances!

80. The decision of the Court requires judging the law: upholding, canceling, or more often, interpreting and "rewriting" it.

81. This path only opens the door of the Constitutional Court, but ordinary judges need not and cannot exercise judicial review.

years. Third, since only the Constitutional Court decides the constitutional question, there is a single authoritative determination of the constitutionality of a text.

The German and Spanish procedures provide several ways in which constitutional issues may arise before the constitutional court. While either court can receive “political” references directly from one of the other branches, the most common way that constitutional issues come before the constitutional courts in those two systems is the constitutional complaint (in Germany, the *Verfassungsbeschwerde*; in Spain, the *amparo*).⁸² After a case has been completely resolved by the courts or an administrative agency, a party (without any need for a judicial approval, like in Italy) may file a complaint in writing to the constitutional court, alleging a constitutional violation that must be answered one way or the other.⁸³ The petition requires the constitutional court to reexamine the case as a whole for constitutional issues, and, in the context of such a case, the constitutional court may even strike down all or part of a statute.⁸⁴ More commonly, the court may find that some administrative or judicial action was inconsistent with the constitution.⁸⁵

So, the German or Spanish methods differ from the Italian method in several ways. First, the resolution of constitutional issues may take a long time. Because of this, ordinary judges may persist in maintaining different

82. See KOMMERS, *supra* note 1, at 11 (providing a statistical summary of federal constitutional cases docketed and decided in the German system in the period between 1951–1994 and showing that, of the 82,516 cases decided in this period, 80,767 came to the Federal Constitutional Court as a constitutional complaint); Tribunal Constitucional de España, Sentencias 2003, at <http://www.tribunaleconstitucional.es/JC2003.htm> (last visited Apr. 1, 2004) (indicating that 210 of the 230 cases in which the Spanish Constitutional Court issued a judgment in 2003 came to the Court through the *amparo* procedure).

83. See Herbert Hausmaninger, *Judicial Referral of Constitutional Questions in Austria, Germany, and Russia*, 12 TUL. EUR. & CIV. L.F. 25, 31 n.51 (1997) (stating that the constitutional complaint in Germany is the most common source of constitutional issues); Dennis P. Riordan, *The Rights to a Fair Trial and to Examine Witnesses Under the Spanish Constitution and the European Convention on Human Rights*, 26 HASTINGS CONST. L.Q. 373, 384 (1999) (describing the importance of the constitutional complaint in Spain).

84. Jibong Lim, *A Comparative Study of the Constitutional Adjudication Systems of the U.S., Germany and Korea*, 6 TULSA J. COMP. & INT'L L. 123, 150–51 (1999) (describing the process of the German constitutional complaint); Riordan, *supra* note 83, at 383–84 (describing the process of the Spanish constitutional complaint).

85. See MERINO-BLANCO, *supra* note 25, at 101–02 (explaining that Spain’s Constitutional Court protects “against any act of public power which violates any of” a number of constitutional rights); Volker F. Krey, *Characteristic Features of German Criminal Proceedings—An Alternative to the Criminal Procedure Law of the United States*, 21 LOY. L.A. INT’L & COMP. L.J. 591, 593 (“Germany’s Federal Constitutional Court has the power to declare void federal and state law, as well as to overrule court decisions and measures of the executive branch, if these acts are inconsistent with the Federal Constitution.”).

views about what the Constitution requires until the Constitutional Court receives and acts on a complaint that focuses the issue. Secondly, the relation between the Constitutional Court and the ordinary judge is that the Constitutional Court functions as an appellate body on the outcome of a whole case.

The French model is unique in many respects in that the determination of the constitutionality of a statute can only take place before the statute goes into effect.⁸⁶ After a statute has been approved by majorities in the Assembly and Senate, sixty members of either chamber, before the official publication of the statute, may refer the question of constitutionality to the *Conseil Constitutionnel*. The *Conseil Constitutionnel* must then decide whether the legislation is constitutional, and if it is not, either refer it back to the chambers with instructions to change the text in certain ways, or ask that the Constitution itself be modified. A constitutionally defective statute will not go into effect, at least not if it has been referred to the *Conseil* and rejected. By the same token, an unconstitutional law may go into and remain in effect if it is not referred to the *Conseil*.

There are other referral systems that bear a superficial resemblance to French *a priori* review. In Spain, a statute may be challenged as soon as it is enacted (for instance by fifty representatives or fifty senators—who have three months to challenge the law), but the statute goes into effect upon passage and remains in effect unless the Spanish Constitutional Court decides that it is constitutionally defective.⁸⁷ Moreover, the Spanish Constitutional Court can receive issues in other ways, as by *amparo*.⁸⁸ The French system is unique in limiting the test of statutory constitutionality to a point in time before the law can be applied to a case. So the *Conseil* never has facts about application before it; rather, in the course of its internal decisionmaking, it must imagine potential fact situations. Furthermore, in France, there is no way to challenge a judge or a bureaucratic agency for acting unconstitutionally.

86. See Official Site of the Constitutional Council of the French Republic, *Constitutional Council*, at <http://www.conseil-constitutionnel.fr/langues/anglais/ang4.htm> (last visited Apr. 1, 2004) [hereinafter *Constitutional Council*] (explaining that the Constitutional Council conducts constitutional review of legislation only “after Parliament has voted but before promulgation of the law”); see also JOHN BELL, FRENCH CONSTITUTIONAL LAW 42–45 (1992) (describing the Constitutional Council’s procedure for adjudicating the constitutionality of pending legislation).

87. See MERINO-BLANCO, *supra* note 25, at 98–100 (describing the procedural aspects of this form of challenge, known as “*recurso de inconstitucionalidad*” or “appeal of unconstitutionality”). In fact, the Spanish Constitution experimented with French style *a priori* review from 1980 to 1985, and abolished it because of concerns that it might lead to minorities using referrals to filibuster legislation that they could not defeat.

88. *Id.* at 74.

III. Deliberative Practices in Constitutional Courts

In Europe and the United States, constitutional courts play a vital role in deciding what the constitution requires. In Europe, the role of the constitutional courts in constitutional interpretation tends to be closed and exclusive; in the United States, the role of the Supreme Court on constitutional matters is more open, and it often involves other political and judicial actors. We may distinguish two kinds of deliberative practices as “internal” and “external.” Internal deliberation by a group is the effort to use persuasion and reasoning to get the group to decide on some common course of action. External deliberation is the effort to use persuasion and reasoning to affect actions taken outside the group. Internal deliberation involves giving and listening to reasons from others within the group. External deliberation involves the group, or its members, giving and listening to reasons coming from outside the group. Constitutional courts commonly engage in both practices, but the U.S. Supreme Court is much more externalist in its deliberative practices than are the European courts.

As we pointed out earlier, European courts tend to meet in closed sessions and decide cases based on briefs without oral argument.⁸⁹ Oral arguments never take place before the *Conseil Constitutionnel* and are extremely rare in Germany and Spain. In Italy, however, about 20% of the referrals do have a kind of hearing that involves outsiders, but it is extremely one sided and provides little opportunity for interaction. The Justice *rapporteur* presents the case to his colleagues, and then the lawyers speak briefly.⁹⁰ The Justices never speak with the lawyers, nor among themselves in public.⁹¹

Moreover, the Justices typically engage in extensive face-to-face interaction among themselves in deciding cases.⁹² The decisions of the courts are nearly always rendered unanimously, or at least without any record of dissent, and anonymously.⁹³ While the German and Spanish courts, as we said, do permit dissenting opinions, there seem to be strong internal norms

89. See *supra* notes 24–25 and accompanying text.

90. See THOMAS GLY WATKIN, *THE ITALIAN LEGAL TRADITION* 92 (1997) (describing the structure and function of the Italian Constitutional Court).

91. See VOLCANSEK, *supra* note 24, at 26 (describing a hearing before the Italian Constitutional Court and stating that there are “no questions, no interchanges, no theatrics and little moving rhetoric”).

92. Corte Costituzionale della Repubblica Italiana, *Come Lavora la Corte Costituzionale: La Camera di Consiglio*, at <http://www.cortecostituzionale.it/eng/lacortecostituzionale/cosaelacorte/> (last visited Apr. 1, 2004) (describing the lengthy private sessions held by the Justices).

93. Pizzorusso, *supra* note 42, at 113.

against such public display of disagreement.⁹⁴ Indeed, in most of the European courts most of the time, the justices seek to deliberate to a consensus or common decision.⁹⁵ They aim at unanimity wherever that is possible.

Internal deliberative practices may best be illustrated by considering the typical activity of the Italian Constitutional Court. It is important to note that the Italian Court functions largely out of the public spotlight. There is no corps of specialized journalists who cover the Court and speculate on its inner workings, but legal scholars and judges often provide commentary on the *sentenze*, or holdings, of the Court. The members meet and decide on cases face to face; deciding a single issue can take days of argument and persuasion.⁹⁶ The members try hard to find a way to write a common opinion and, from the little that can be seen from outside, have devised various techniques of compromise and accommodation.⁹⁷ Without the possibility of multiple opinions, the Justices are forced to try to persuade their brethren and reconcile themselves to a common decision.⁹⁸ While there

94. See KOMMERS, *supra* note 1, at 26 (positing that “institutional bias against personal judicial opinions” and “a sense of institutional loyalty” among dissenting Justices explain why well over 90% of the reported cases of the German Constitutional Court lack dissenting opinions). According to Jutta Limbach, the previous President of the German Federal Constitutional Court, only 6% of the German *Entscheidungen* (opinions) had a dissent during the twelve years of her mandate. See Christian Walter, *La pratique des opinions dissidentes à l'étranger: En Allemagne*, in LES CAHIERS DU CONSEIL CONSTITUTIONNEL [J. CONST. COUNCIL], No. 8 (2000), at <http://www.conseil-constitutionnel.fr/cahiers/ccc8/etudes.htm> (noting remarks by Limbach in 1988). From 1981 to 1998, 10% of the opinions by the Spanish Constitutional Court have been accompanied by dissents. See Teresa Freixes, *La pratique des opinions dissidentes à l'étranger: En Espagne*, in LES CAHIERS DU CONSEIL CONSTITUTIONNEL [J. CONST. COUNCIL], No. 8 (2000), at <http://www.conseil-constitutionnel.fr/cahiers/ccc8/etudes.htm> (reporting that of the 3,722 decisions issued during this time, 387 contained dissenting opinions). Only six of these opinions contained splits equivalent to the “5-4” majority of the U.S. Supreme Court. *Id.*

95. See *supra* note 94 and accompanying text; INTRODUCTION TO ITALIAN LAW 55 (Jeffrey S. Lena & Ugo Mattei eds., 2002) (“The [Italian Constitutional] Court’s opinions . . . are always rendered per curiam and dissenting opinions are not permitted.”); *Constitutional Council*, *supra* note 86 (indicating that the procedure of the Constitutional Council requires deliberations to be conducted in secret and does not provide for dissenting opinions).

96. See VOLCANSEK, *supra* note 24, at 26–27 (describing the deliberative process of the Italian Constitutional Court).

97. See *id.* at 27 (“Despite the prohibition on individual opinions, judges have on at least two occasions voted against the Court’s ruling and made their positions public.”).

98. Recently the Italian Constitutional Court discussed a statute that made it impossible to sue or prosecute the five highest public officials in Italy: the President of the Republic, the President of the Government, the President of the Constitutional Court, and the Presidents of the two houses of Parliament. Eight Justices in the first discussion claimed that the law was unconstitutional because it contradicted the principle of equality. Such a provision would have required a constitutional amendment. Seven Justices opposed this argument. This is the equivalent of a five to four decision of the U.S. Supreme Court, with dissents. In Italy the majority tried to persuade the minority to

is some variation in Spain and Germany, which do permit dissenting opinions, there is still an attempt to deliberate to a common decision.⁹⁹ This attempt fails only in very controversial cases, as in the German consideration of abortion rights.¹⁰⁰

There are various modes of working within the European courts. Some courts, like the Italian, permit the justices to specialize in different areas of law. So, if a constitutional issue arises in some area—a matter of criminal law, for example—a specialized justice will take the lead in crafting the decision, and the others will normally exhibit some deference to this specialized reasoning. In Germany, where the Court must manage its very large caseload in large panels (senates, eight Justices) or smaller ones (chambers, three Justices), there is no norm of specialization. Without a specialization norm, each Justice must try to write from the point of view of the Court as a whole, even though she is sitting as a member of a “senate” or a small panel. Something of the same practice occurs in Spain where, as in Germany, the use of the *amparo* produces immense workloads that cannot be managed by the full court sitting together.¹⁰¹

The result of these norms and practices is that the justices on the European courts are invisible to the public and most of the time do not have

adopt its reasoning, and it offered to modify its original position. The result was a decision that the statute was unconstitutional, but could be rewritten in a way that would make it constitutional without going through the cumbersome process of amending the Constitution. So to avoid the internal split of the Court, the majority accepted a much weaker fallback position in order to conceal the internal divisions in the Court and to allow it to present itself as a neutral arbiter among the political contestants. Technically the *sentenza* was *interpretative di accoglimento*—the statute was rejected, but a version of it was suggested which would pass the scrutiny of the Court. In effect, this resembles John Marshall’s strategy of writing unanimous opinions to present the U.S. Supreme Court as speaking in a single and neutral voice. See *infra* notes 120–22 and accompanying text. The new President of the ICC, Gustavo Zagrebelsky, is perhaps emulating Marshall in this respect. Then again, there are reasons to believe that Zagrebelsky really thinks that neutrality is a value in itself, not merely a strategy of survival in the transitional periods, and that neutrality necessarily involves compromise and not mere accession to majoritarian decisions.

99. See KOMMERS, *supra* note 1, at 26 (explaining that the German Constitutional Court continues to decide over 90% of its reported cases unanimously, even though signed dissenting opinions were introduced in 1971). See Alfonso Ruiz Miguel & Francisco J. Laporta, *Precedent in Spain*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 259, 262–64 (D. Neil MacCormick & Robert S. Summers eds., 1997) (discussing that the process of writing the judgments of the Court lessens the chance of dissents and that dissents are less likely in individual cases because in those circumstances the Court is more likely to have reached a settled jurisprudence).

100. See KOMMERS, *supra* note 1, at 343–46 (providing an English translation of the dissenting opinion of Justice Rupp-von Brünneck in *Abortion I*, 39 BverfGE 1 (1975)); *id.* at 355 (describing the two dissenting opinions in *Abortion II*, 88 BverfGE 203 (1993)).

101. The twelve-Justice Constitutional Court sits in six-Justice *Secciones* to hear the *recurso de amparo* and in three-Justice *Salas* to decide the admissibility of cases. See MERINO-BLANCO, *supra* note 25, at 98.

public judicial identities.¹⁰² While outsiders can speculate about who wrote or influenced a passage in a decision, and perhaps leadership can plausibly be attributed to certain justices who have written academic articles on a subject, no one outside the courts can know for sure who has argued or compromised or why. This “anonymity” may well facilitate internal deliberative practices by making members amenable to compromise and mutual persuasion and not giving them a reason to have pride in their jurisprudential consistency as individual judges.¹⁰³ Certainly, discussions about the possibility of permitting dissents in the European courts reflect many of these internal considerations.

The German Federal Constitutional Court decided to permit dissents in a 1970 reform and dissenting opinions began to be published the year after.¹⁰⁴ Discussions about the desirability of dissents and of publishing them had taken place from the time of the institution of the Court itself.¹⁰⁵ A former member of the Federal Constitutional Court, Dieter Grimm, said that even after this reform, dissents were not common for two reasons. First, they are not in the “continental tradition.”¹⁰⁶ Six members of the Federal Constitutional Court come from the regular judiciary; they would not have any experience writing dissenting opinions and thus would tend to avoid writing them.¹⁰⁷ Even recently, the members of the Court continue to worry about whether dissents are a good thing.¹⁰⁸ Secondly, the former Justice remarked:

Different from the U.S. Supreme Court there is always a lengthy deliberation on controversial matters in the German court. Arguments count, and very often, judges change their mind as a result of the deliberation, either as to the outcome or to the reasoning. I am convinced that this experience contributes to reducing the number of

102. See Ferejohn, *supra* note 21, at 58 (“Their Justices are seldom public figures with articulated public identities and recognizable voices.”).

103. This internal deliberation is familiar to Americans if they only think of the constitutional decision making process in Philadelphia—completely opposed, by the way, to the public deliberations of the French Revolution’s constituent assemblies.

104. KOMMERS, *supra* note 1, at 21, 26.

105. The 1969 meeting of the German law professors discussed the introduction of dissents and took a favorable position *vis-à-vis* it. See AMERICAN INSTITUTE FOR CONTEMPORARY GERMAN STUDIES, FIFTY YEARS OF GERMAN BASIC LAW: THE NEW DEPARTURE FOR GERMANY 8 (1999) (discussing the 1969 amendments).

106. E-mail Interview with Dieter Grimm, Former Justice, German Federal Constitutional Court (Jan. 27, 2004). The term “continental tradition” refers generally to the law and procedure of civil law systems.

107. *Id.*

108. *Id.*

dissents. When everybody has moved and some sort of compromise has been reached, one is less determined to file a dissenting opinion, even if one does not fully agree with the final result.¹⁰⁹

The more recent experience with this issue comes from Italy, where the Constitutional Court decided to continue the tradition of not permitting dissents.¹¹⁰ Indeed, when it became clear that ordinary dissents were not likely to gain adherents on the Court, the proposal was made to permit anonymous or unsigned dissents. In this way, it was hoped, individual judges would neither have the opportunity nor the temptation to form public judicial identities that might inhibit their willingness to compromise during the deliberative process. In the end, even this modest but interesting proposal was rejected not only because it discouraged internal deliberation, but also because it encouraged too pluralistic a view of the Constitution.

Current American deliberative practices depart quite sharply from this norm.¹¹¹ For one thing, Justices interact regularly and officially with outsiders during oral argument. Indeed, some observers claim that the Solicitor General can be seen as the tenth Justice.¹¹² Moreover, the Justices spend relatively little time sitting together deliberating and reasoning face to face as is common in Europe.¹¹³ Rather, after a brief session following the oral arguments where opinions are assigned, the Justices develop their individual views privately and present them to others in written memos.¹¹⁴ While practices differ among Justices, court clerks often play an active and regular role in crafting and developing these documents, which are then circulated among the Justices in a kind of negotiation process. These documents sometimes form the basis for published dissenting or concurring opinions; the possibility that they might later be published in this form motivates the Justices to compromise and to adjust their views. Moreover, in the United States, there is a specialized press whose task it is to watch and

109. *Id.*

110. See *The Gavel and the Robe*, *ECONOMIST*, Aug. 7, 1999, at 44 (noting that the Italian Constitutional Court enters all of its opinions without dissent); Michele Taruffo & Massimo La Torre, *Precedent in Italy*, in *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY*, *supra* note 99, at 145.

111. For a description of American deliberative practices, see generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 56–107 (1998).

112. See, e.g., LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987).

113. With respect to European practices, see *supra* note 92 and accompanying text.

114. See ELLEN GREENBERG, *THE SUPREME COURT EXPLAINED* 72–74 (1997) (describing the process from oral argument to the issuance of a decision).

expose the inner workings of the Court.¹¹⁵ So, one way or another, internal court processes are penetrated by outsiders and by the omnipresence of an audience, or perhaps multiple audiences.

We think that the best way to understand the relatively open American process is that it is partly a form of external as well as internal deliberation. We doubt, for example, that it is possible to understand the opinions of American Justices as largely internally aimed at persuading their fellows. Does Justice Scalia, to take an admittedly extreme example, really think, or even hope, the publication of a strident dissent will move one of his fellow Justices to change his or her mind? Or is his target audience elsewhere? Sitting perhaps in Congress or in the Oval office, in courthouses throughout the country, in law schools, or in legal or political interest groups and foundations? The answer seems plain enough in this case: Justice Scalia is trying to persuade the public, or parts of it, as much as he is his fellow Justices. And we think that all of the Justices, however modest they may seem personally, to a greater or lesser degree, share in this external or public aim.

If internal deliberation involves the Justices arguing and persuading each other as to what the Court should do, external deliberation is part of the wider public process of deciding what the Constitution requires of us as citizens and potential political actors. A constitutional democracy has need both for external as well as internal deliberation. At minimum, the Court needs to present reasoned arguments to other political actors based on the Constitution and the laws justifying its decisions. Indeed, reasoned justification connecting decisions to prior democratic acts (embodied in the Constitution or in statutes) is a kind of substitute for democratic legitimacy.¹¹⁶ But internal and external deliberation are somewhat different kinds of activities. Internal deliberation is fundamentally about deciding what the Court should do: it is aimed at persuading fellow Justices or being persuaded by them to agree on a common action. It must result in a decision of some kind, whether or not all of the Justices are convinced that it is the correct or best decision. External deliberation is not so obviously con-

115. See Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1540–41 (noting that approximately three dozen accredited news correspondents cover the Supreme Court on at least a part-time basis).

116. Ferejohn & Pasquino, *supra* note 20, at 24. Note that Christopher Eisgruber argues that the Court enjoys some kind of direct democratic legitimacy. See Eisgruber, *supra* note 15, at 45 (arguing that the appointment process results in a “democratic pedigree” for judges). But we think that this would be so indirect as not to diminish the need to root decisions in specific democratically chosen policies.

strained in this way. It seems aimed more at shaping the best or most persuasive view about the Constitution. It may lead citizens and politicians to take or to refrain from actions of various sorts, or perhaps to respect the Court and its decisions. There is, however, no singular focus on a particular course of action that politicians or citizens must take.

There are various ways in which a court may play a role in external deliberation. It may present crafted internal compromises as opinions of the court, and offer more or less complete justifications for them.¹¹⁷ This is the common European practice. Or a court may encourage or permit individual justices to engage in external deliberative practices as individuals. One may well raise the question of whether the practice of issuing multiple opinions has gone too far in the United States. Is it good for the U.S. Supreme Court to show that the policies established in *Roe v. Wade*¹¹⁸ and ensuing cases¹¹⁹ remain open to severe constitutional doubts, and even more, remain vulnerable as the composition of the Court shifts? The same question arises with respect to civil rights and federalism and numerous other issues.

A number of considerations seem relevant. First, internal and external deliberation are at least partly in conflict. If the individual Justices see themselves as involved in a large discussion in the public sphere, they may be less inclined to seek to compromise their own views with others on the Court. They may aim not to persuade their fellow Justices, but to argue with them and others in the public sphere. On rare occasions members of the Court seem to have decided that internal requirements ought to dominate and that the Justices ought to try hard to reach a common understanding. Early in his term, Chief Justice John Marshall believed that it was best that the Court attempt to reconcile its differences internally and then to present a united front to the outside political world.¹²⁰ He was fairly successful in persuading his fellow Justices to follow his lead for a few years at least.¹²¹ At other times the Court has decided that there is a need to struggle internally for a unanimous Court in order, again, to persuade outsiders that the Constitution's

117. We must acknowledge some variation among European courts in the level of detail and completeness of their opinions. In France, the Constitutional Court's opinions are very short and cryptic because, among other reasons, the Court is given only a short time to make decisions on statutes. On the other hand, in Italy, Germany, and Spain opinions are more detailed and more thoroughly reasoned.

118. 410 U.S. 113 (1973).

119. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (replacing *Roe*'s trimester framework with the undue burden test, while reaffirming a woman's right to choose an abortion before fetal viability).

120. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 293 (1996).

121. *See id.* ("During the next four years [after the initial unanimous opinion of *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801)], the Marshall Court rendered forty-six written decisions, all of which were unanimous.").

requirements are clear.¹²² Perhaps the relatively young constitutional courts in Europe have made the judgment that it is more important to create conditions propitious for internal deliberation than to engage in open external dialogue about constitutional norms with outside actors. That the German Court decided to permit dissents only after twenty years of successful operation, and that the Italian Court contemplated permitting dissents and rejected the idea after half a century, supports the idea that newly established courts cannot afford, or do not think they can afford, to present a public image of discord.

But something is lost in every tradeoff. There is something to be said for the kind of public deliberation and discourse that takes place in the United States with regard to complex and emotional issues such as abortion, euthanasia, and affirmative action. The open display of competing viewpoints invites the attentive and affected public to discuss, argue, petition for new laws, and otherwise work to shape these controversial policies. There are often many conflicting ideas that will justify or explain a particular action, and Justices may well disagree about the best or most effective way that constitutional requirements should be understood. Of course, Justices may disagree with the decision itself, thinking that a better view of the Constitution or the statute required some other decision. External deliberation involves the justices, either acting as a court (as in most European courts) or as individuals, helping to decide what we—the people—should do. So, in the sequence of cases from *Roe* to *Casey*, the multiple opinions offered by the various Justices are best understood as attempts to persuade the state legislatures, interest groups, members of Congress, and the people themselves about what kind of abortion policies ought to be permitted under the Constitution.¹²³ There is, on this account, some kind of action focus, but it is not an action of the Court.¹²⁴

But there is a price for this openness. For one thing, the state of law can remain unsettled, hopeless and futile activities may be needlessly encouraged, and inadequately reasoned doctrine can be produced. Worse than this, the exposure of internal divisions in the Court may encourage political actors to respond politically by trying to reshape or pack the Court rather than persuade its members. The dissents in *Casey* that argued that *Roe* was not only wrongly decided but ought to be overturned were not so much

122. The hard-won unanimity of *Brown v. Board of Education*, 347 U.S. 483 (1955), is perhaps the most striking example, but it is hardly unique in American history.

123. For a similar interpretation of *Roe* and its progeny, see Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 659–67 (1993).

124. See *id.* at 653 (arguing that the process of judicial review in America is best described as a dialogue “between judges and the body politic”).

part of a reasoned deliberative exchange of ideas, but seemed rather an invitation to people outside the Court to try to replace sitting Justices with others with correct views.¹²⁵ One could plausibly say that in a democracy all these issues should be settled in ways that are responsive to majorities, but the effect of this recognition is that court appointments will be political and partisan issues.¹²⁶

IV. Lessons

The American system of constitutional adjudication combines a rigid and nearly unchangeable constitutional document with a Court that is staffed by simple political majorities. The result of this combination is that disputes over how best to understand or interpret the Constitution are transformed into political struggles over the composition of the Court. In one sense, this transformation seems unavoidable: political disagreement about fundamental matters is a fact of democratic life, and people can be expected to use all of their resources—their votes as well as their arguments—to get the outcomes they think are right. We think that matters are made much worse by the fact that there is too little genuine internal deliberation on the Supreme Court. In our view, this is at least partly due to the efforts of individual Justices to develop and exhibit their own personal views of the Constitution and to resist accommodation with others on the Court.

So, how might the tradeoff between internal and external deliberation be influenced or altered? Specifically, in the case of the U.S. Supreme Court, is there any plausible way by which the Justices might be induced to spend less time and effort as individuals trying to influence external publics to accept their constitutional views and more time engaged in deliberation and persuasion with their fellow Justices in sincere efforts to reach common ground? To put the matter this way is already to suggest that the question might as easily be posed as follows: are there any reforms of practices relating to the Supreme Court that would make it likely to become a more genuinely deliberative body, as many of the European constitutional courts arguably have been?

125. See *Planned Parenthood v. Casey*, 505 U.S. 833, 1001 (1992) (“Value judgments, after all, should be voted on and not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.”) (Scalia, J., concurring in part and dissenting in part).

126. See SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 351–52 (1997) (noting that over 90% of appointees to the federal bench were members of the President’s political party); JOHN MASSARO, *SUPREME POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS* 1–32 (1990) (stating that Court nominees Fortas, Haynsworth, and Carswell were rejected because of their perceived ideologies).

There is of course no prospect of simply banning the publication of multiple opinions. Indeed, there are powerful reasons not to do so as arguments in dissents and concurrences can, and have, played a role in deliberation through time, at times becoming the basis for settled doctrine.¹²⁷ So we do not urge that, but rather wonder whether it is possible that the Justices themselves might develop deliberative norms that would lead them to engage more seriously in the effort to persuade and be persuaded by their fellow Justices in face-to-face discussion, to seek consensus as a general practice, and to work hard to compromise their differences. Such a norm would also urge self-restraint when it comes to publishing dissents and concurring opinions, and a norm of this kind seems firmly in place in the German and Spanish courts.

Even this idea seems hopeless given the makeup of the current Court. The jurisprudential differences between the Justices seem too wide and too public to bridge with mere normative exhortations. While there may be variation over time, the fact of wide differences on the Court seems more or less normal in our political history. So, we cannot really have much hope that these Justices, or this Court, will suddenly begin to place more value on internal deliberation than on participating in externally oriented public debate. If we want to encourage restraint and judicial patience and forbearance to deliberate internally, we need to understand the circumstances in which courts will tend voluntarily to adopt internal deliberative practice. That is, we need an explanatory theory of deliberative practice. Drawing upon the European experiences, the elements of such a theory seem close at hand.¹²⁸

Why have European constitutional courts been capable of adopting such norms and rules of self-restraint? They face more or less the same issues that the American Court does, and their societies and political systems seem comparably conflictual and ideologically divided. One possibility, already suggested above, is that the European courts are “infant” constitutional courts that voluntarily adopt practices to protect their fragile legitimacy. This may have been true in their early years, but we suspect that consideration has

127. See generally PERCIVAL E. JACKSON, *DISSSENT IN THE SUPREME COURT* (1969) (providing a detailed analysis of how dissenting opinions have often served as the basis for subsequent doctrine); ALFRED LIEF, *THE DISSENTING OPINIONS OF MR. JUSTICE HOLMES* (3d ed. 1981) (highlighting many of Justice Holmes’s influential dissents).

128. It is also possible to draw on the experience of the Supreme Court throughout its history to develop an account of when the Court has been able to adopt norms suppressing dissent. Robert Post demonstrated that the Taft Court appeared to have such a norm, though the presence of great dissenters on that Court implies that it could not have worked flawlessly. Robert Post, *The Supreme Court Opinion As Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in The Taft Court*, Institute for Governmental Studies, at <http://repositories.cdlib.org/igs/WP2001-1> (Jan. 1, 2001).

largely faded for all but the newest courts in Eastern Europe. The more likely answer is that European courts are much less ideologically diverse than the United States Supreme Court. We think the principle reason for this is to be found in features of judicial appointment and tenure.

Generally speaking, European justices are appointed by supermajorities, or by other processes that lead to justices who are acceptable to all major parties.¹²⁹ Universally, justices on those courts sit for long nonrenewable terms, and not for life.¹³⁰ The resulting courts tend not to be populated by justices from any ideological or jurisprudential extreme, but to be dominated by judicial moderates.¹³¹ And those justices serve for perhaps a decade rather than anticipating a judicial career that might extend for thirty years. This results in courts whose members are less likely to be tempted to speak to external audiences in their own names and who are much more willing to accept deliberative norms that urge compromise and accommodation.

It seems easy enough to explain why the American Justices are so heterogeneous. The fact that a bare majority of the Senate is sufficient to confirm an appointment means that, unless his nominee is filibustered, a president whose party enjoys a majority in the Senate need not seek support from any members of the other party. Of course, when the government is divided the President needs a few votes from the other party, but he may be able to find ideological outliers from the other party to serve that purpose.¹³² Indeed, as the American political parties have become more ideologically homogeneous and more polarized, this has permitted an increase in judicial heterogeneity over time.¹³³ Moreover, life tenure makes the opportunity for judicial appointments random and rare and provides the President with a motivation to make sure that Justices sympathetic to his favored positions are appointed to the Court. We suggest that a more homogeneous Court may evolve by adopting the European practices of appointing justices for long, nonrenewable terms and requiring a supermajority in the Senate for appointment to the Court.

129. See Lee Epstein, *Constitutional Courts—Presentations*, at <http://artsci.wustl.edu/~polisci/epstein/courses/conct/asml.html> (last visited Mar. 5, 2004).

130. *Id.*

131. For example, in Germany, “[d]ue to the requirement of a two-thirds majority, the necessary bargaining process between the parties results in a preference for candidates who are politically ‘middle-of-the-roaders.’” Landfried, *Federal Republic of Germany*, *supra* note 28, at 148.

132. It is worth noting that the possibility of finding such outliers seems to have diminished in the last quarter century. So perhaps periods of divided government may be counted on to produce moderate court appointments. While divided government is fairly common, however, so too are periods when the Senate and the Presidency have been in the same hands.

133. The stability of the membership on the current Court, which has not had a new member in a decade, suggests that ideological heterogeneity may well increase in the near future.

It is not unimaginable that a supermajority requirement could be adopted in the United States. Mandating nonrenewable terms would of course require a constitutional amendment, and this would face the usual and perhaps insuperable obstacles that all such proposals face. But imposing a supermajority requirement really only requires a continuation of the Senate practices on judicial appointments that seem to have evolved during the Clinton and Bush administrations.¹³⁴ Senators of both parties have proved willing to use the procedural tools available to them as senators to hold up or even block the appointment of judges who seem objectionably extreme to them.¹³⁵ As long as forty senators are willing to filibuster an appointment—or rather are unwilling to support a proposal to stop a filibuster—a president will not be able to put judicial extremists on the Court. This practice has evolved in the context of appointments to the lower federal courts.¹³⁶ There has been no opportunity in the last decade to see if senators are willing to take the same actions when it comes to appointing Supreme Court Justices.

Of course, the majority party has opposed and disparaged this minority tactic and attempted to discourage and delegitimize this practice.¹³⁷ But we have argued that a principled argument can be made for the minority's right, and even obligation, to use its senatorial prerogatives in this way. It does not seem impossible that both parties could eventually come to see this practice as embodying a kind of *modus vivendi*, if not an actual agreement. Perhaps it would be better to enshrine these practices in the Constitution through amendment. Doing that would make the people a party to an explicit understanding, and a popular endorsement might be read by the Justices themselves as a public expectation that the Court try harder to arrive at common opinions. But, in light of the Constitution's reservation to each chamber of the power to devise its own rules of procedure,¹³⁸ no such amendment seems necessary.

134. See Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 77–101 (providing a summary of how senators have exploited the "blue slip" practice during the Clinton and Bush Administrations in a manner that allowed "individual senators to wield a *de facto* veto over presidential nominees"); Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups"*, 12 CORNELL J.L. & PUB. POL'Y 503, 532 (2003) (describing how Democrats have filibustered several judicial nominees and arguing that the last decade of contentiousness over judicial nominees is distinctive because of "(1) efforts by Senate Republicans to hold open unprecedented numbers of lower court seats . . . (2) the unwillingness of a sitting President to compromise in any serious way with the opposition party in Congress . . . and (3) the breakdown of inter-party comity within the Senate").

135. Shane, *supra* note 134, at 530–33.

136. *Id.* at 532–33.

137. See *id.* at 532 (relating that "Republicans tried to break the filibuster [against the Estrada nomination] through an unprecedented series of cloture votes").

138. U.S. CONST. art. I, § 5.

Once a supermajoritarian requirement was securely in place we would expect a transition to a more centrist court, one which would voluntarily adopt practices of internal deliberation. Such a transition would be long and uneven, as long as the nation clings to the guarantee of lifetime tenure for federal judges. After all, majority parties will still wish to populate the Court with ideological Justices who can be counted on to further their own policies long after they have left office. They will predictably attempt to find “stealth” nominees who can somehow gain the requisite supermajority requirement for Senate confirmation. And the occasional success in achieving such an appointment will be rewarded by a lifetime of favorable rulings.

Speeding things up by moving to long nonrenewable terms will require changing the Constitution itself, and we cannot be sanguine about the prospect of a successful amendment. But perhaps, eventually, the sad stories of Justices trying to “time” their retirements until the political conditions are right, or the more worrisome possibility that the Justices might occasionally be tempted to bring those favorable conditions about, will undermine popular support for life tenure. We cannot dare even to hope for that.

The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism

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I. Introduction

If one examines the legal landscape of contemporary Europe, one will be struck by the institutional salience of constitutional courts. In a long evolution that started after the First World War and reached its climax after the fall of communism, most European countries have established these special courts in order to protect their national constitutions against offensive legislation.¹ Europe is now clearly associated with a “centralized model” of constitutional review, where only one court has authority to strike down a law as unconstitutional, while the United States exemplifies the “decentralized model,” where all courts are empowered to set aside legislation if it violates the Constitution.²

Historically, the European option in favor of a centralized model is linked to the value of legal certainty. Disagreements arise among courts if they are given the power to review the constitutional validity of legislation. These disagreements make the law more uncertain for both citizens and governmental authorities. In contrast, if only a constitutional court has the power to check legislation, no risk of disagreement among courts exists. Centralization is thought to be an efficient solution to the problem of judicial divergence.³

* This Article was presented at the *Comparative Avenues in Constitutional Law* symposium, which was held at the University of Texas School of Law, on February 27–28, 2004. I profited greatly from the discussion. Special thanks to Willy Forbath, Larry Sager, John Ferejohn, Mark Tushnet, Kim Lane Scheppelle, Frank Michelman, and Sanford Levinson, all of whom took part in the conference, for their helpful suggestions to improve the original version of this Article. Bruce Ackerman, Barry Friedman, and Mattias Kumm sent me useful remarks too. I am also very grateful to the editors of the Texas Law Review for their wonderful job. None of them is to be blamed for my errors.

1. See generally Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38, 39–40, 51–55 (Louis Henkin & Albert J. Rosenthal eds., 1990) (discussing the development of separate constitutional courts in various European countries).

2. For example, 17 out of 25 countries within the European Union (after the 2004 enlargement) have constitutional courts: Austria, Belgium, France, Germany, Italy, Luxembourg, Portugal, Spain, Cyprus, Czech Republic, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. For a very complete description of the different ways in which constitutional review has been articulated in Europe, see LA GIUSTIZIA COSTITUZIONALE IN EUROPA (Marco Olivetti & Tania Groppi eds., 2003).

3. To a certain extent, this justification of the centralized model is now in crisis. In contemporary Europe there are forces, both internal and external, pressing in a decentralizing