Abstract review is 'abstract' because the review of legislation takes place in the absence of litigation, in American parlance, in the absence of a concrete case or controversy. Concrete review is 'concrete' because the review of legislation, or other public act, constitutes a separate stage in an ongoing judicial process (litigation in the ordinary courts). In individual complaints, a private individual alleges the violation of a constitutional right by a public act or governmental official, and requests redress from the court for this violation.

Abstract review processes result in decision's on the constitutionality of legislation that has been adopted by parliament but has not yet entered into force (France), or that has been adopted and promulgated, but not yet applied (Germany, Italy, Spain).

Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* 44–45 (2000).

Louis Favoreu, CONSTITUTIONAL REVIEW IN EUROPE, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD

38, 40–42, 44–46, 51–56, 58–59 (Louis Henkin and Albert J. Rosenthal eds., 1990)

* * *

TWO MODELS OF CONSTITUTIONAL REVIEW

European and American models of constitutional review differ principally in how the system of constitutional review is organized. The difference between the two models has been summarized as follows:

> One might distinguish two broad types of judicial control over the constitutionality of legislation: (a) the "decentralized" type gives the power of control to *all the judicial organs* of a given legal system. This has also been called the "American" system of control * * * (b) the "centralized" type of control confines the power of review to *one single judicial organ*. By analogy, the "centralized" type may be referred to as "Austrian."[6]

In the American system, constitutional review is lodged in the judicial system as a whole, and is not distinct from the administration of justice generally. All disputes, whatever their nature, are decided by the same courts, by the same procedures, in essentially similar circumstances. Constitutional matters may be found in any case and do not receive special treatment. At bottom, then, there is no particular "constitutional litigation," anymore than there is administrative litigation; there is no reason to distinguish among cases or controversies raised before the same court. Moreover, in de Tocqueville's words, "An American court can only adjudicate when there is litigation; it deals only with a particular case, and it cannot act until its jurisdiction is invoked."[7] Review by the court, therefore, leads to a judgment limited in principle to the case decided, although a decision by the Supreme Court has general authority for the lower courts.

6. Cappelletti and Cohen, *Comparative Constitutional Law*, p. 14.

7. [Alexis de Tocqueville, *De la démocratie en Amerique* 78 (1835) (1963).]

In the European system, constitutional review is organized differently. It is common in Europe to differentiate among categories of litigation (administrative, civil, commercial, social, or criminal) and to have them decided by different courts. Constitutional litigation, too, is distinguished from other litigation and is dealt with separately. Constitutional issues are decided by a court specially established for this purpose and enjoying a monopoly on constitutional litigation. That means that, unlike United States courts, the ordinary German, Austrian, Italian, Spanish, or French courts cannot decide constitutional issues. At most they can refer an issue to the constitutional court for a decision; the decision of the constitutional court will be binding on the ordinary courts.

In Europe, moreover, in general, the constitutionality of a law is examined in the abstract, not, as in the United States, in the context of a specific case; therefore the lawfulness of legislation is considered in general, without taking into account the precise circumstances of any particular case. This is because in Europe constitutional issues are generally raised by a public authority (the government, members of Parliament, courts) and not by individuals.

As a consequence, the effect of the decision is *erga omnes,* i.e., applicable to all, absolute. When a European constitutional judge declares an act unconstitutional, his declaration has the effect of annulling the act, of making it disappear from the legal order. It is no longer in force, it has no further legal effect for anybody, and sometimes the ruling of unconstitutionality operates retroactively. Kelsen characterized the constitutional court as a "negative legislator," as distinguished from the "positive legislator," the parliament.

The United States model and the European model, however, are two means to the same end. Both have to fulfill the same tasks:

- Above all, the United States and the European systems protect fundamental rights against infringement by governmental authority, particularly the legislature. The means are different, but the ends are the same and the results similar
- Both systems generally try to maintain a balance between the state and the entities of which it is composed. In a federal state, constitutional review serves that function whether the system of review follows the United States model or the European one. The United States Supreme Court and the German Constitutional Tribunal play a similar role in maintaining the balance between the federal government and the member states.
- United States and European constitutional courts perform the same tasks, as contemplated by their respective constitutions, when they protect the separation of powers—the division of authority between various organs of the state, whether between the executive and the legislature, or between the chambers of Parliament * * *

The United States Model in Europe Between the Wars

A different model of constitutional review emerged in Europe because in various European countries the United States model could not strike root. At the beginning of the twentieth century, several European states wished to adopt the American model, but despite numerous efforts, the "graft" proved unsuccessful. * * *

Why the Graft Failed to Work

The graft of the United States system onto the European legal and political order was not successful * * * [One reason for that failure is that i]n Europe, the law is identified with legislation, whereas in the United States there is still a substantial common law and, in the past at least, legislation was seen as an exception to the common law. In Europe, courts cannot interpret the constitution and apply their interpretation to legislation, whereas in the United States the opposite attitude was established at the beginning by Chief Justice Marshall.

In the United States, the Constitution is sacred. In Europe, "the law"—legislation is sacred.

A second reason for the failure of the graft is the inability of the ordinary European judge to exercise constitutional review. As Mauro Capelletti stressed,

> The bulk of Europe's judiciary seems psychologically incapable of the value-oriented, quasi-political functions involved in judicial review. It should be borne in mind that continental judges usually are "career" judges who enter the judiciary at a very early age and are promoted to the higher courts largely on the basis of seniority. Their professional training develops skills in technical rather than policy-oriented application of statutes. The exercise of judicial review, however, is rather different from [the] usual judicial function of applying the law is * * * [T]he task of fulfilling the Constitution often demands a higher sense of discretion than the task of interpreting ordinary statutes. That is certainly one reason why Kelsen, * * * considered it to be a legislative rather than a purely judicial activity.[17]
>
> * * *

Another reason why the United States model was rejected by some European countries between the two world wars was that constitutions, in those countries at that time, were not in fact supreme and binding on parliaments. This was clear with respect to France during the Third Republic:

> In America, a court decision declaring a law unconstitutional has the effect of raising an impassable barrier since the legislature is powerless by itself to modify the constitution * * * In France, on the contrary, the Parliament, if confronted with a court decision of unconstitutionality, could rather easily overcome the resistance of the court: the parliamentary majorities that adopted the law paralyzed by the judicial action have only to reaffirm their original measure by a simple majority in order to make their will prevail * * * *In such circumstances, it is likely that the judiciary would hesitate to refuse to apply a law on grounds of its unconstitutionality.*

17. [Mauro Capelletti, *Judicial Review in the Contemporary World* 45 (1971).]

Similarly, in Germany under the Weimar Constitution, laws passed with the special majority provided for in Article 76 of the Constitution could "materially depart" from the Constitution to the prejudice of fundamental rights.

Models of Review in Contemporary Europe

After World War II, Western European countries rebuilt their political institutions, with particular concern to assure respect for fundamental rights. Inevitably, the influence of the United States was strongly felt, both for reasons of international politics and because the success of its constitutional system was commonly recognized. The influence of the ideas that the United States and France had developed and helped spread was reflected in new national constitutions and in international instruments—the Universal Declaration of Human Rights, and, in Europe, the European Convention on Human Rights. New European constitutions reflected also the appeal of United States institutions, especially judicial review. In time, countries of western and northern Europe (except Great Britain, the Netherlands, Finland, and Luxembourg) moved toward some system of constitutional review. Some—the Scandinavian countries, Greece, and Switzerland—adopted the United States model; others—Austria, the Federal Republic of Germany, Italy, and France—opted for the European model.

* * *

The European Model

"It is impossible * * * to propose a uniform solution for all possible constitutions: constitutional review will have to be organized according to the specific characteristics of each of them."[35] Kelsen's wise warning was followed by countries establishing systems of constitutional review. Although many countries have followed the European model, each has tailored its system to its own needs and circumstances.

Countries that have adopted the European model include Austria (since 1920), the Federal Republic of Germany (1951), Italy (1956), France (1958), Cyprus (1960), Turkey (1961), Yugoslavia (1963), Portugal (1976 and 1983), Spain (1980), Belgium (1984), and Poland (1985). I consider the principal examples.

Austria

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

The Court has jurisdiction over several matters: elections, conflicts between courts, and litigation between the federal state and the *Länder* (states). It acts as an administrative court to review administrative acts alleged to violate rights guaranteed by the constitution. It acts also as a

35. [Hans Kelsen, *La garantie juridictionnelle de la Constitution*, 45 Revue du droit public et de la science politique 201 (1928).]

high court of justice to bring to trial the head of state or ministers accused by the house of Parliament.

The Court can exercise judicial review at the request of any of the following: a *Land* government, higher courts, a third of the members of the National Council (or a third of the members of a *Land* legislature), or, under some conditions, individuals. The Court may also raise constitutional issues on its own initiative. The Court's case law, developed over the last sixty years, is extensive, particularly in relation to fundamental rights. The impact of its decisions on the legal and political system is strong even though the Court's decisions are not binding on ordinary courts, unlike the decisions of the German and Spanish high courts.

About 90 percent of the registered or decided cases of the Court in 1982 dealt with the constitutionality of administrative acts. This is probably due to the fact that it is easier to challenge the constitutionality of an administrative act than to bring a case by direct petition.

The Federal Republic of Germany

[See the discussion by Wolfgang Zeidler below.]

Italy

The Italian Constitutional Court was established by the 1947 Constitution, and came into the force in 1956. The Court is composed of fifteen judges appointed equally by the Parliament, the President of the Republic, and the Supreme Courts (the Council of State, the Court of Cassation, and the Court of Auditors).

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

The number of cases submitted to the Court is noteworthy. In 1983, 1,100 issues were referred to the Court, which made 400 decisions as to the constitutionality of laws. In 1984, out of 1,489 cases registered, 1,384 (93 percent) were referred to the Court by ordinary courts. The other areas of jurisdiction appear less important. Since ordinary courts have a tendency to refer difficult cases to the Constitutional Court, the Court has been increasingly overwhelmed by these issues.

Clearly, the Court plays a large legal and political role.

France

[See the discussion by John Bell below.]

Spain

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

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

The writ of *amparo*, the origins of which go back to the Kingdom of Aragon, is an institution that has been used since the nineteenth century in Latin America and was adopted in the Spanish Constitution of 1931. Under the present Spanish Constitution, an individual may invoke this writ to request the Constitutional Tribunal to assure the protection of his or her fundamental rights against an administrative act or a judgment of a court, when the ordinary courts have not provided such protection. (In fact, the writ of *amparo* is invoked particularly against judicial acts.) *Amparo* cannot be invoked directly for review of the constitutionality of a statute (unlike constitutional review in the Federal Republic of Germany), but the chamber of the Constitutional Tribunal that reviews writs of *amparo* may refer questions on the constitutionality of an underlying statute to the full court. The petition of *amparo* is the basis of 90 percent of the registered cases. This action is popular because claimants doubt the ability of ordinary courts to formulate proper constitutional principles.

* * *

The Significance of the Differences Between the Two Models

Differences between the United States and European models of constitutional review are mostly clearly seen in the way such review is organized, which can be explained by differences in the institutions and political culture of the different countries. Are these differences merely technical, or do they have theoretical significance? Have they made a difference in practice? Are there convergences between the two systems? There has been no thorough study of these questions, but some preliminary observations are now in order.

The fact and the form of constitutional review pose the fundamental question—first addressed and resolved by the United States—of how to limit power, executive as well as legislative, and reduce confrontation between judge and legislature. The United States has resolved these problems in its own way by a diffused, or decentralized, system of constitutional review. Europe, unable to adopt the American system, has provided a solution by creating constitutional review that is concentrated or centralized. From a theoretical perspective, differences between the two systems may reflect different conceptions of the separation of powers. In the American model, limitations on executive and legislative

power have been achieved by the progressive recognition of a third power, the judiciary, described as "the least dangerous branch." That third power does not exist in most European countries. European constitutional theory acknowledges only executive and legislative power. There is no recognition of a "judicial power" and judges do not enjoy the legitimacy and authority of their American counterparts.

It was therefore necessary to build—following Kelsen—a system in which constitutional review, entrusted to a single court, constitutes not a third parallel power but one above the others that is charged with monitoring the three essential functions of the state (executive, legislative, and judicial) to ensure that they are exercised within the limits set by the Constitution. That has been clearly explained with the reference to the Italian Constitutional Court:[43]

> [The Court] is neither part of the judicial order, nor part of the judicial organization in its widest sense: * * * the Constitutional Court remains outside the traditional categories of state power. It is an independent power whose functions consist in insuring that the Constitution is respected in all areas.
>
> * * *

Conclusion: Does Constitutionalism "Work Well" in Europe?

Is constitutionalism, the doctrine of constitutional supremacy which owes so much to the United States, well established in Europe—thanks, notably, to constitutional review?

One can say that constitutionalism has made great progress in countries that have established constitutional courts. Because of their decisions, constitutional courts have engendered respect for constitutions and for fundamental rights that did not exist previously and that are still absent in countries that lack an efficient system of constitutional review (e.g., the Scandinavian countries), even though these countries proclaim the supremacy of their constitutions. The recent Spanish, Portuguese, and Greek constitutions show that modern constitutions in democratic countries necessarily include constitutional supremacy and constitutional review. The effective supremacy of the constitution is always affirmed. It is a fundamental change from the situation that prevailed before World War II; one that cannot be reversed. The constitution has finally become "holy writ" in Europe as it is in the United States.

Can one compare the results of the American and European systems of judicial review? It is difficult, since their contexts are so different. * * *

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

43. Vezio Crisafulli, "Le système de contrôle de constitutionnalité des lois en Italie," R.D.P. (1968), No. 84, p. 130.

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

Notes and Questions

1. Of the European constitutional courts discussed above, the French Constitutional Council seems by far the most political. Its function under France's 1958 Constitution was to ensure, above all, that Parliament not infringe on the newly expanded powers of the executive concentrated in the strong presidency crafted for the Fifth Republic's principal architect, Charles de Gaulle. As Professor Alec Stone Sweet notes in *Governing with Judges: Constitutional Politics in Europe* 41 (2000):

> the new constitutionalism emerged [in France] by a * * * circuitous route. * * * The Gaullists replaced France's traditional, British-style, parliamentary system with a 'mixed presidential-parliamentary' one, strengthening the executive. The constitution established a Constitutional Council, but its purpose was to guarantee the dominance of the executive (the government) over a weak parliament. Beginning in 1971, however, the Council began to assert its independence. In that year, for the first time, it declared a government-sponsored law unconstitutional on the grounds that the law violated constitutional rights. This decision paved the way for the incorporation of a charter of rights into the 1958 constitution, a charter that the Council has taken upon itself to enforce. Thus, for the first time, and against the wishes of de Gaulle, his agents, and the other political parties in 1958, France has both an effective bill of rights and an effective constitutional court. [However, in France there is abstract review only; the jurisdiction of the Constitutional Council is limited to Acts of Parliament and only before the promulgation of the law (preliminary review).]

Alec Stone Sweet specifies:

> [A]lthough its rule in reviewing legislation was that of a referee engaged in settling conflicts between the executive and the legislature, *the Council was not meant to be a fair or impartial referee* (any more than the constitution was designed to be fair or impartial). Its field of play was to be exclusively parliamentary space; it was to have jurisdiction only over legislative and *not* executive acts; and a proposal to balance the equation—to allow legislative authorities to refer executive acts to the Council—was not seriously considered. Moreover, the mode of recruitment proposed all but guaranteed that a majority of the Council's members would be active supporters of the government. Indeed, the

government's working draft (as well as the final product) strictly limited access to the institution for rulings on constitutionality of proposed legislation to four officials—the president of the Republic, the prime minister, the president of the Senate, and the president of the National Assembly * * *.

Alec Stone Sweet, *The Birth of Judicial Politics in France* 48 (1992).

2. Professor Stone Sweet further observes that:

> 1. Constitutional adjudication * * * is implicated in the exercise of legislative power. If in exercising review authority, the judges simply controlled the integrity of parliamentary procedures, and not the substance of legislation, the judges would be relatively minor policy-makers (akin to Kelsen's 'negative legislator'). But the judges possess jurisdiction over rights which are, by definition, substantive constraints on law-making powers. The political parties thus transferred their own entirely unresolved problem—what is the nature and purpose of any given rights provision, and what is the normative relationship of that provision to the rest of the constitutional text?—to judges. This transfer constitutes a massive, virtually open-ended delegation of policy-making authority. Similarly, review jurisdiction organizes the elaboration of higher law rules governing federalism and regional autonomy in Germany, Italy, and Spain. To the extent that it is costly or difficult to activate constitutional review of legislation, the importance of review within policy processes, and the authority of judges over outcomes, would be mitigated. But initiating abstract review is virtually without cost for oppositions; concrete review procedures entail delays for the litigants, but other costs are essentially borne by the state; and individual complaints can be scribbled by anyone on notebook paper. If it were relatively easy for the governing majority to overturn the case law of the court, or to curb the judges' powers, the court's authority over the legislature might be fleeting * * *. [However, the only direct control over constitutional judges is thorough constitutional amendment, which in most cases is not within the exclusive purview of the Parliament.]
>
> Alec Stone Sweet, *Governing With Judges,* above, at 48.

What implications derive from this?

3. The role of the Constitutional Council changed dramatically, however, as a consequence of its landmark 1971 *Associations Law Decision*, 71–41 DC of 16 July 1971 (as summarized and translated in John Bell, *French Constitutional Law* 272–73 (1992)):

> *Background*: This is the first decision of the Conseil constitutionnel that struck down a provision of a *loi* for breach of fundamental rights. Its justification appealed to the Preamble of the 1958 Constitution and to a fundamental principle recognized by the laws of the Republic, to be found in the *loi* of 1 July 1901 on associations. That *loi* provides that, before an association may be recognized as having legal status, it must file certain particulars with the prefect, who must then issue a certificate of registration.
>
> In this case the National Assembly sought, against the opposition of the Senate, to pass a *loi* that would empower the prefect to refuse registration pending a reference to the courts over the legality of the objectives of a proposed association. The President of the Senate referred the *loi* to the Conseil. The principal issue was the constitutionality of prior restraint of the freedom of association.
>
> *DECISION*
>
> * * * In the light of the *ordonnance* of 7 November 1958 creating the organic law on the Conseil constitutionnel, especially chapter 2 of title II of the said *ordonnance;*
>
> In the light of the *loi* 1 July 1901 (as amended) relating to associations;
>
> In the light of the *loi* of 10 January 1936 relating to combat groups and private militias;
>
> 1. Considering that the *loi* referred for scrutiny by the Conseil constitutionnel was put to the vote in both chambers, following one of the procedures provided for in the Constitution, during the parliamentary session beginning on 2 April 1971;
>
> 2. Considering that, among the fundamental principles recognized by the laws of the republic and solemnly reaffirmed by the Constitution, is to be found the freedom of association; that this principle underlines the general provisions of the *loi* of 1 July 1901; that, by virtue of this principle, associations may be formed freely and can be registered simply on condition of the deposition of a prior declaration; that, thus, with the exception of measures that may be taken against certain types of association, the validity of the creation of an association cannot be subordinated to the prior intervention of an administrative or judicial authority, even where the association appears to be invalid or to have an illegal purpose. * * *
>
> From a purely formal standpoint, this decision falls within the powers explicitly granted to the Constitutional Council by the 1958 Constitution. See the excerpt by Alec Stone Sweet above. From a substantive standpoint, in contrast, this decision is truly a transformative one as it paves the way for the Council to evolve from a narrowly confined arbiter of the boundary between executive and legislative powers to a guardian of fundamental individual rights against legislative infringement.
>
> As Professor Morton observes:
>
> > In the 1970's, two events transformed the *Counseil Constitutionnel* from a secondary and relatively unimportant institution to a central agent in the governing process. [Because of the *Associations Law Decision* above,] *Parlement's* freedom to legislate was suddenly fenced in by the full panoply of liberal rights and freedoms. Subsequent decisions incorporated additional rights declared in previous French laws and constitutions. By 1987, "fundamental rights" accounted for forty percent of the Conseil's annulment of ordinary laws.
> >
> > The second catalyst of the *Conseil's* rise to political prominence was the 1974 reform that extended its authority to rule on the constitutionality of a law upon petition by any sixty members of the National Assembly or the Senate. * * * The 1974 reform conferred th[e] power of reference on opposition parties (providing they could muster sixty signatures), who immediately seized this opportunity as a way to obstruct, at least temporarily, new government policies. By 1987, parliamentary references accounted for eighty percent of all decisions dealing with ordinary laws. Even more striking—since 1979, forty-six of the forty-eight deci-

sions nullifying laws have been initiated by members of *Parlement.* * * *

It is now common practice for all major government bills to be challenged * * * by the opposition. The more important the bill, the more likely the challenge. Combined with the vastly expanded scope of constitutional restrictions imposed by the Declaration of the Rights of Man and other implied liberties, this new procedure has thrust the *Conseil Constitutionnel* to the center of the policy-making process. It is now a "hurdle" that every major piece of legislation must clear before becoming law.

F. L. Morton, *Judicial Review in France: A Comparative Analysis,* 36 Am. J. of Comp. Law 89, 90–92 (1988).

While there is an ongoing debate as to whether it is a true court, see *id.* at 106, by examining legislation to test the latter's compatibility with constitutionally protected individual rights, the Constitutional Council performs essentially the same task as other constitutional courts or as the U.S. courts when they adjudicate constitutional claims. Does that mean that, beginning in 1971, the Council has become a genuine court? Or does the fact that only politicians can raise issues before it and that they can do so only before a law goes into effect relegate the Council to a mere extension of the legislature, thus making it a political body rather than a judicial one?

4. From the accounts provided above, it seems that the various European constitutional courts discussed here are to varying degree political rather than merely judicial bodies. Is this the result of their structure and place in the parliamentary systems in which they are embedded? Or does this stem from the very nature of constitutional review? In this connection it may be useful to focus on the salient features of the decentralized system of constitutional review based on the American model. In the U.S., both federal and state courts are empowered to adjudicate constitutional claims that arise in the course of ordinary litigation. Article III of the U.S. Constitution confines the jurisdiction of federal courts to "cases or controversies," precluding abstract review or advisory opinions. Because of this, constitutional adjudication is concrete, spread out, and piecemeal. American courts, moreover, are not supposed to adjudicate constitutional claims raised in cases before them unless the particular case at stake cannot be resolved without deciding the constitutional claim(s) involved. Thus, for example, if a plaintiff seeks a judgment on both statutory and constitutional grounds, a determination that such plaintiff should prevail on statutory grounds obviates the need for the court involved to consider the constitutional claim. See, e.g., *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), in Chapter 6, Section D. (four of the nine justices held that the case could be decided on statutory grounds obviating the need to adjudicate the constitutional issues raised by plaintiff). Furthermore, as a consequence of decentralization, different courts may well adjudicate similar claims in diametrically opposed ways. Unity within the system is eventually achieved through adjudication by the USSC, which binds all courts within the country. Whereas all decisions of the highest state courts and of the federal courts of appeals relating to constitutional issues may be appealed to the USSC, since 1988 the latter enjoys virtually unlimited discretion in the selection of cases for review. See 28 U.S.C. § 1257 (1988). Indeed the USSC can agree to entertain an appeal by granting a *writ of certiorari,* which requires an affirmative vote

of four of the nine justices. Often, in the context of a controversial issue, the USSC awaits the development of different, at times contradictory, jurisprudences among various lower courts before agreeing to tackle such issue, to bring unity within the system. Presumably, the Court does so to be in a better position to evaluate the relative merits and drawbacks of the clashing approaches reflected in the decisions below it. The reason for this is to allow the Court to benefit from the experience accumulated regarding plausible approaches to important constitutional issues. Does this way of proceeding render the American approach less prone than its European counterparts to being coopted by politics?

5. The Kelsenian objective of setting constitutional courts as "negative legislators" is compromised when such courts evaluate legislation in terms of compatibility with fundamental rights. Indeed, given the generality of rights, such as free speech, equality, privacy, and the like, and given their amenability to a variety of interpretations, constitutional courts charged with enforcing these rights seem bound to enjoy great latitude to set public policy, thus becoming "positive legislators" while lacking the democratic legitimacy enjoyed by members of parliament. Whether constitutional adjudicators are more like legislators than like judges depends significantly on the nature, scope, and limits of constitutional interpretation, which are addressed below. To some extent, however, the functioning of a constitutional court as a positive legislator seems to depend on institutional factors, as indicated by the above discussion of the French Constitutional Council. In this respect the German Federal Constitutional Court (GFCC) provides an interesting example, inasmuch as it falls somewhere between the French Council and the USSC in that it engages in abstract as well as concrete review and deals with matters initiated by members of Parliament as well as with claims brought by individuals. Consider the following description of the GFCC's jurisdiction.

Wolfgang Zeidler, THE FEDERAL CONSTITUTIONAL COURT OF THE FEDERAL REPUBLIC OF GERMANY: DECISIONS ON THE CONSTITUTIONALITY OF LEGAL NORMS

62 Notre Dame L. Rev. 504, 504–507 (1987).

In the Federal Republic of Germany, the Federal Constitutional Court is the principal body of constitutional jurisdiction. The Court's exclusive jurisdiction is to decide constitutional questions arising under the Federal Republic's Constitution, the Basic Law (das Grundgesetz). A constitution, particularly one that contains an extensive catalogue of basic rights binding on all public authority, will necessitate a greater degree of interpretation than other legal norms. Unlike other courts of last resort, access to the Federal Constitutional Court is limited, except in the case of constitutional complaints, to state and federal governments, state and federal courts, and parliamentary groups such as party factions and minorities in national and state legislatures. * * *