ESSAY

COMPARATIVE CONSTITUTIONAL LAW: JUDICIAL REVIEW

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I

Although judicial review is not vital to preserving the integrity and effectiveness of a written constitution, it is undeniable that most Western countries, regardless of their particular system of law, have conferred upon courts the power to set aside legislation that contradicts the constitution. In the United States, judicial review was regarded as a natural function of the judicial department even before the adoption of the Constitution.[1] Conversely, the incorporation of judicial review in Europe occurred slowly and even today some countries, such as Great Britain and the Netherlands, refuse to grant their courts a final say as to the validity of lawfully enacted legislation. Notwithstanding its distinctive features, however, both the United States and continental Europe adopted judicial review as a constitutional device to protect their fundamental laws.

The purpose of this essay is to describe the circumstances that led Europe to introduce judicial review into its legal system. In my opinion, four main factors influenced the creation of the so-called "Constitutional Courts" in Europe rather than the adoption of a diffuse system of review. The legal education of the career judges, the role of judges in deciding policy issues, the merger of executive and legislative powers into the hands of a prime minister, and the importance of protecting individual liberties led Europeans to recognize the need for a separate branch to review legislation. I will argue that the aforementioned circumstances called for a distinct branch of government to perform the task of judicial review in Europe. Furthermore, I will discuss the issue of whether or not the judicial department is the most suitable institution to review legislation, or if it is possible to share this function with other branches of government.

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[1] *See* THE FEDERALIST NO. 78, at 398 (Alexander Hamilton) (Max Beloff ed., 1987) ("It is rational ... to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order ... to keep the latter within the limits assigned to their authority.").

II

There are three forms of determining the constitutionality of enacted legislation. First, there is *political review* whenever a political body determines the validity of one of its own laws. This system prevailed in Europe until this century, and remains the rule in England[2] and the Netherlands,[3] where there is absolute legislative supremacy. Second, there is *jurisdictional*, or *judicial review*, whenever there is a court empowered to set aside statutes conflicting with the constitution.[4] Finally, there is a *mixed* system of review whenever courts review one type of legislation and a political organ examines another type of legislation.[5] That is the method of review adopted in Switzerland, where federal statutes can be reviewed only through the political process established by Section 113 of the Swiss Constitution, whereas cantonal laws can be controlled by the judiciary branch.[6]

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[2] "[U]nlike the appropriate court or tribunal for constitutional laws in the United States, Germany, France, and Russia, and subject to what has been said about European Community law, the British law courts cannot set aside a duly enacted parliamentary statute." VERNON BORGDANOR ET AL., COMPARING CONSTITUTIONS 85 (1995).

[3] Article 120 of the Dutch Constitution determines that "[t]he constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts." GRONDWET [GRW. NED.] [Constitution] ch. 6, art. 120 (Neth.), *available at* http://www.uni-wuerzburg.de/law/nl00000_.html (last visited March 21, 2001).

[4] Arguing that judicial review is essential to preserve a limited constitution, Alexander Hamilton affirmed that a limited constitution is one that contains certain specific exceptions to legislative authority, such as the legislature shall pass no bill of attainder or ex post facto laws. THE FEDERALIST NO. 78, at 397-98 (Alexander Hamilton) (Max Beloff ed., 1987). Hamilton then proceeded to assert that:

> Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.
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> . . . The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well the meaning of any particular act proceeding from the legislative body.

Id.

[5] JOSE AFONSO DA SILVA, CURSO DE DIREITO CONSTITUCIONAL POSITIVO 50 (1992).

[6] The Swiss Federal Supreme Court states:

> [T]he Swiss Federal Supreme Court's jurisdiction is considerably limited by section 113 of the Federal Constitution which provides that federal statutes passed by Parliament are not subject to judicial review. Since such statutes have to be submitted to popular vote if a petition signed by 50,000 citizens has been filed, all federal statutes were either adopted by plebiscite, or they remained unchallenged by a referendum petition before being enacted. Therefore, according to the rationale of section 113 of the Federal Constitution, it is the Parliament's and the electorate's, but not the judiciary's business to watch over the constitutionality of federal statutes. This view reflects Switzerland's democratic tradition and its skepticism towards the judiciary and the rule of law concept, as it is expressed in the famous reasoning of *Marbury v. Madison*.

The Swiss Federal Supreme Court: The Court's Constitutional Position in Historical Perspective, *at* http://www.admin.ch/TF/E/INTRO/HISTORIQ.HTM (last visited March 21, 2001).

The legal systems of Western countries developed two main forms of judicial review: the American common law system and the continental European civil law system. These two systems have many distinct features, though they have many common characteristics as well.

Judicial review in the United States is conceived essentially as a natural function of the judicial department.[7] Contrary to the European approach, the American system of review is placed in the judicial system as a whole. There is no specific court or tribunal with monopolistic jurisdiction to examine only the constitutionality of statutes - either state or federal courts may hear constitutional claims. Moreover, constitutional litigation in the United States does not have a different status from other forms of litigation, such as administrative or commercial. All courts, for example, applying the same procedures, decide either the validity of a contract or the right to an abortion. Generally speaking, the nature of a dispute is irrelevant to whether or not a constitutional issue can be raised.[8]

Furthermore, because judicial review is an ordinary activity of the courts, a constitutional challenge can be made only when there is litigation. The American courts thus can examine the constitutionality of a statute only if the case or controversy requirement is fulfilled. There is no *abstract* review in the American legal system because judicial review may only be exercised in a case properly before a court of law.[9]

As an intrinsic outcome of this *concrete* method of review, the effects of a decision striking down a statute are limited to the case at hand. The conclusion as to the constitutionality of a statute thus has restricted effectiveness and is limited to the parties of the case. However, the principle of *stare decisis* offsets the lack of *erga omnes* effects of the constitutional judgment and determines that the Supreme Court's constitutional interpretation is binding upon all lower courts. This judicial device sidesteps the problem of the limited effectiveness

[7] Judicial review is also exercised in Australia, where its High Court affirmed: "Moreover, the acceptance in Australia of the principle in *Marbury v. Madison* as 'axiomatic', placed a fundamental limitation upon any general acceptance in the exercise of federal jurisdiction of the maxim that the Sovereign could do no wrong. To the contrary, it was for the judicial branch of government to determine controversies as to whether the legislative or executive branches had exceeded their constitutional mandates." Australia v. Mewett, (1971) A.L.R. 1102, 1136.

[8] VICKY JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 461 (1999).

[9] "In general, [the case or controversy principle] means that courts may not issue 'advisory opinions'; may not decide 'political questions'; must have before them someone with 'standing', or some kind of personal stake in the controversy; and may not decide issues that are either 'premature' or 'moot'." GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 88 (1996). As Justice O'Connor affirmed in *Allen v. Wright*:

> [T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the federal government is founded. The several doctrines that have grown up to elaborate that requirement are founded in concern about the proper-and properly limited-role of the courts in a democratic society.

468 U.S. 737, 750 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

of the judgment and guarantees full uniformity in the interpretation of the Constitution.

It was not until the Nineteenth Century that the United States Supreme Court asserted its power as the ultimate and paramount interpreter of the Constitution. In *Martin v. Hunter's Lessee*,[10] the Supreme Court reversed a decision issued by the Virginia Court of Appeals claiming that section 25 of the Judiciary Act of 1789 was unconstitutional insofar as it extended the appellate jurisdiction of the Supreme Court to cases decided by Virginia's highest court.[11] In its opinion, the Virginia court pointed out that the Act placed the courts of one sovereign—Virginia—under the direct control of another, an arrangement incompatible with the notion of federalism.[12] Briefly speaking, the Virginia court claimed that a decision of the Supreme Court could not bind state courts, and thus the Judiciary Act of 1789 was unconstitutional insofar as it extended the appellate jurisdiction of the Supreme Court over the states.

The Court in *Martin* held that if the Supreme Court lacked revising authority over state courts' decisions, the federal system would make possible "jarring and discordant judgment."[13] Whereas in continental Europe, ordinary courts do not have jurisdiction to determine the constitutionality of a statute, and thus cannot say what the Constitution is, in the United States the problem of conflicting decisions regarding the ultimate interpretation of the Constitution is resolved by conferring upon the Supreme Court the power to review any decision issued by a lower court. This mechanism is essential to balance the lack of *erga omnes* effects of the Supreme Court's judgments. In sum, review by the Supreme Court leads to a judgment limited in principle to the case decided, although its decision has general authority for the lower courts.[14]

Conversely, judicial review in continental Europe is exercised by special courts, which stay outside the ordinary judicial system and re-

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[10] 14 U.S. (1 Wheat.) 304 (1816).

[11] Section 25 of the Act stated the following:

> [A] final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . .

Judiciary Act of 1789, § 25, 1 stat. 73.

[12] STONE ET AL., *supra* note 9, at 51.

[13] *Id.*

[14] JACKSON & TUSHNET, *supra* note 8, at 461.

tain a jurisdictional monopoly over constitutional issues. Contrary to the American system, in Europe it is common to differentiate among categories of litigation, such as administrative, civil, commercial, social, or criminal, and to have them decided by different courts of law.[15] Constitutional litigation is distinguished from other litigation and is handled separately.[16] As a result, judicial review in continental Europe is exercised only by extraordinary courts, has a different system of procedure, and does not demand the fulfillment of ordinary requirements for conventional litigation.

In contrast to the model of *Marbury v. Madison*,[17] when the Supreme Court declared that it is the province and the duty of the judicial department to say what the law is, and whether or not it is constitutional, ordinary courts in Europe do not possess jurisdiction to disregard a statute repugnant to the constitution.[18] Due to the fact that European judicial review is to a certain extent associated with notions of parliamentary supremacy and is suspicious of permitting judges to set aside lawfully enacted statutes, the career judge in a civil law country usually cannot strike down a statute in a case properly before her: only constitutional courts have this power.[19]

For example, in Italy, the ordinary civil, administrative, and commercial courts refer constitutional issues regarding the validity of statutes to the constitutional court.[20] In Germany, ordinary courts do

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[15] In Austria, Article 130 of the Constitution confers upon the Administrative Court the power to pronounce on complaints which allege "illegality of rulings by administrative authorities; illegality in the exercise of direct administrative power and compulsion against a particular person; or breach of administrative authorities' duty to take a decision." BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] ch. VI, pt. A, art. 130 (Aus.), *available at* http://www.uni-wuerzburg.de/law.au00000_.htm (last visited March 21, 2001).

[16] JACKSON & TUSHNET, *supra* note 8, at 461.

[17] 5 U.S. 137 (1803).

[18] Article 89 of the Austrian Constitution affirmatively states:

> [T]he courts are not entitled to examine the validity of duly published laws, ordinances, and treaties. Should a court have scruples against the application of an ordinance on the ground of it being contrary to law, it shall file an application with the Constitutional Court for rescission of this ordinance. Should the Supreme Court or a court of second instance competent to give judgment have scruples against the application of a law on the ground of its being unconstitutional, it shall file an application with the Constitutional Court for rescission of this law.

BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] ch. III, pt. B, art. 89 (Aus.), *available at* http://www.uni-wuerzburg.de/law/au00000_.html (last visited March 21, 2001).

[19] JACKSON & TUSHNET, *supra* note 8, at 461.

[20] Article 134 of the Italian Constitution confers upon the Constitutional Court the power to decide:

> [O]n disputes concerning the constitutional legitimacy of laws and acts having the force of law, adopted by the state and the Regions; on conflicts arising over the allocation of powers between branches of government within the State, between the State and the Regions, and between Regions; on accusations raised against the President of the Republic, in accordance with the norms of the Constitution.

CONSTITUZIONE [COST.] tit. VI, sec. I, art. 134 (Italy), *available at* http://www.uniwuerzburg.de/law/it00000_.html (last visited March 21, 2001).

not review legislation either. The German Federal Constitutional Court has exclusive jurisdiction to review legislation and can only strike down a statute provided that the federal government, a state government, or one-third of the *Bundestag* bring suit.[21] In addition, any person who claims that her basic rights were violated can file a constitutional complaint before a three-judge panel, which decides whether or not the constitutional claim has grounds to be heard by the constitutional court.[22] In France, there is no review of *enacted* legislation at all. France's Constitutional Council can examine the constitutionality of a proposed statute only *before* it becomes law.[23] Thus, ordinary courts in Europe do not have jurisdiction to review statutes. This system is called the *centralized model*, whereby the constitutional court has a monopoly on judicial review.[24]

Furthermore, these powerful constitutional courts frequently "offer direct and specific instructions on how an unconstitutional statute can be redrafted into constitutionality. Sometimes the opinions actually provide the draft statutory language that the judges say they would find constitutional."[25] The famous abortion decision of the German Constitutional Court in the 1970s,[26] besides declaring void a statute that had liberalized abortion in West Germany, expressly directed the Parliament to pass a statute making abortion a crime.[27] The opinion of the Court asserted that:

> The legislature may express the legal condemnation of the interruption of pregnancy required by the Basic Law [German Constitution] through measures other than the threat of punishment. The decisive factor is whether the totality of the measures serving the protection of the unborn life guarantees an actual protection which in fact corresponds to the importance of the legal value to be guaranteed. In the extreme case, if the protection required by the constitution cannot be realized in any

[21] Grundgesetz [GG] [Constitution] art. 93 (F.R.G.), *available at* http://www.uniwuerzburg.de/ law/GM0000_.html (last visited March 29, 2001).

[22] JACKSON & TUSHNET, *supra* note 8, at 633.

[23] LA CONSTITUTION [CONST.] tit. VII art. 61 (Fr.), *available at* http://www.uniwuerzburg.de/ law/FR0000_. html (last visited March 29, 2001).

[24] Article 163 of the Spanish Constitution states:

If a judicial organ considers, in some action, that a regulation with the status of law which is applicable thereto and upon the validity of which the judgment depends, may be contrary to the Constitution, it may bring the matter before the Constitutional Court in the cases, manner, and with the consequences which the law establishes, which in no case shall be suspensive [sic].

CONSTITUCIÓN [C.E.] art. 163 (Spain), *available at* http://www.uniwuerzburg.de/law/au00000_.html (last visited March 21, 2001).

[25] Martin Shapiro & Alec Stone, *The New Constitutional Politics of Europe*, 26 COMP. POL. STUD. 397, 404 (1994).

[26] German abortion decision, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [federal constitutional court] 1 (1975).

[27] *See generally* Kim Lane Scheppele, *Constitutionalizing Abortion*, *in* ABORTION POLITICS: PUBLIC POLICY IN CROSS-CULTURAL PERSPECTIVE 29, 39 (Marianne Githens & Dorothy McBride Stetson eds., 1996).

other manner, *the legislature is obligated to employ the criminal law to secure the life developing itself.*[28]

More than simply affirming a power to void all laws offensive to the constitution, the German Constitutional Court declared its power to compel the legislative branch to make laws. This is also the case in Hungary, where the constitutional court defines the limits and the content of most of the legislation.[29]

Another important feature of the European system of review is that the compatibility of a statute with the constitution is determined in the *abstract.* Contrary to the American system of review, where the constitutionality of a statute is asserted within litigation, judicial review in many of the civil law countries of Europe is exercised regardless of the existence of a legal dispute. The constitutionality of a statute is determined by contrasting the challenged legislation with a provision of the constitution. In such a challenge, the controversy is not fact-driven. Rather, the constitutional question is not only an element of the case but is indeed the case itself. Consequently, the "lawfulness of legislation is considered in general, without taking into account the precise circumstances of any particular case."[30]

Furthermore, the decision passed by a constitutional court has *erga omnes* effects. The abstract review of legislation has the power of annulling the statute—or its challenged provisions—and is binding for all branches of government. In contrast to judicial review in the United States, where the decision of the Supreme Court has restricted effectiveness, in the European system, a constitutional decision has the force to make a statute disappear from the legal order. That is exactly why Hans Kelsen named the constitutional court the *negative legislator.*[31]

Because the civil law systems lack the principle of *stare decisis,* the idea of granting exclusive jurisdiction to a constitutional court to review legislation becomes essential. If the power to control the constitutionality of statutes were granted indiscriminately to all judges, conflicting decisions as to the validity of a law would undermine the system altogether. Predictability and uniformity are indispensable tools for any legal system, and a diffuse system of review without *stare*

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[28] JACKSON & TUSHNET, *supra* note 8, at 115 (emphasis added).

[29] As stated by Halmai and Scheppele:

> In fact, the Hungarian Constitutional Court may be the most powerful high court in the world. The court can be said to be powerful [because it] has a very broad jurisdiction to review all legal regulations for consistency with the Constitution and also to judge that the parliament has violated the Constitution by failing to enact laws it is constitutionally required to adopt. These powers the court uses frequently.

Gabor Halmai & Kim Lane Scheppele, *Living Well is the Best Revenge: The Hungarian Approach to Judging the Past, in* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES, 155, 182-83 n.4 (A. James McAdams ed., 1997).

[30] JACKSON & TUSHNET, *supra* note 8, at 461.

[31] *Id.*

decisis undoubtedly would put these two fundamental values at stake.[32]

In addition, the legal education of the professional judges in the civil law systems seems to play a very important role in the way that judicial review is conceived and exercised in Europe. The ordinary judges in most of the civil law countries constitute a separate profession, distinct from the customary legal practice of attorneys. Usually, judges in these systems are selected through a very strict exam after graduating from law school and thereafter receive a more specific education offered by official institutions before undertaking the judgeship.[33] After this "second" education, judges are appointed to small counties and adjudicate cases of lesser importance before reaching the highest positions in their careers.[34] In these systems, the appointment of a judge is not a *political* act but rather a *technical* selection of the most qualified law students to exercise the judicial function.

Furthermore, it has been a Roman law tradition to attempt to insulate the legal system from politics, religion, economics, and everything else that is not purely law. Therefore, ordinary judges are not supposed to play a major role in defining policy issues. Rather, this is precisely the province and the duty of the Legislature, which is supreme. The task of judges is thus to perform a professional and technical activity applying legal devices that only they possess. Consequently, to entrust the power of review—which implies the idea of deciding fundamental issues—in a separate court was seen as the only available alternative. Judicial review requires a unique approach in order to decide issues of general constitutional policy, and the ordinary civil judge was not regarded as having this distinct qualification. The creation of a constitutional court outside the judicial system was then a way of calling into play different skills and aptitudes. [35]

Another reason for the creation of a distinct court to review legislation lays in the fact that it is no longer possible to speak of a traditional or conventional separation of powers. Many countries in Europe adopted the parliamentary system of government as an outcome of legislative supremacy. In these systems, a considerable and important part of the executive powers is placed into the hands of a prime minister, who is usually a member of the legislative branch. Therefore, in the parliamentary systems of Europe there is no strict separation of powers since some of the executive and legislative powers merge in the hands of a prime minister.[36] To counter the huge

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[32] *Id.* at 465.

[33] *See id.* at 457-87 (contrasting the training of common and civil law judges).

[34] *Id.*

[35] *Id.* at 457-58.

[36] The idea of no "bright lines" between the three branches of government is not new. James Madison, when commenting on the structure of the British government in the late Eighteenth Century, affirmed that:

amount of power located in the majority of the legislature, a "fourth" branch of government needed to be conceived as a check on that majority. Without a "separate" branch of government, the minorities in parliamentarian systems would be unprotected due to the fact that the ordinary judicial department had no power to check the acts of the legislative branch and to protect individual rights and liberties. Note that it is not possible to talk of "bright lines" as to the separation of powers in the United States either. The creation of the so-called "independent agencies" and the appearance of the "non-delegation doctrine" are sharp examples that there is no conventional separation of powers anymore. Cases such as *Martin v. Hunter's Lessee*,[37] *Humphrey's Executor v. United States*,[38] *Morrison v. Olson*,[39] *Buckley v. Valeo*[40] and *Bowsher v. Synar*[41] deal either with the problem of Presidential control over delegated powers or with the limits on Congress' power to appoint and to remove. In the United States, the so-called independent agencies may be viewed as a "fourth branch" of government demanding a different system of checks and balances from what the Framers conceived in the summer of 1787.[42]

Furthermore, it is reasonably accepted these days that relying exclusively on the political process to guarantee the protection of a variety of interests is not sufficient. Because both the costs and the benefits of proposed legislation can be either *narrowly concentrated* or *widely distributed*, the need for courts to step in may vary considerably. If, for example, the benefits of a given legislation are narrowly concentrated but its costs are widely distributed, small interest groups will be willing to pay the price of lobbying in the political process whereas the large, diffuse number of people affected by the legislation will not

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[o]n the slightest view the British constitution, we must perceive, that the legislative, executive, and judiciary departments, are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative acts. All the members of the judicial department are appointed by him; can be removed by him on the address of the two houses of parliament, and form, when he pleases to consult them, one of his constitutional councils....

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...What I have wished to evince is, that the charge brought against the proposed constitution, of violating a sacred maxim of free government, is warranted neither by the real meaning annexed to that maxim by its author [Montesquieu]; nor by the sense in which it has hitherto been understood in America.

THE FEDERALIST NO. 47, at 246, 251-52 (James Madison) (Max Beloff ed., 1987).

[37] 14 U.S. 304 (1816).

[38] 295 U.S. 602 (1935).

[39] 487 U.S. 654 (1988).

[40] 424 U.S. 1 (1976).

[41] 478 U.S. 714 (1986).

[42] *See* Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1951) (Jackson, J., dissenting) ("[Administrative agencies] have become a veritable fourth branch of the Government....").

be able to join forces against the measure. On the other hand, if the costs are narrowly placed on a minority and the benefits are widely distributed, the outcome of the legislation will depend on the strength of the referred minority. If the minority is powerful—such as in the case of an industrial sector—the enactment of the legislation is usually difficult. Yet, if the minority is considerably weak, the legislation may be enacted easily and without much debate. In either case, however, the losers in the political process will look to the courts as their last resort and thus the problem of the legitimacy of judicial intervention will depend on whether the said legislation encroaches upon individual rights and liberties or deals with economic or environmental legislation.[43] The new structure of government and power—commonly called "the regulatory state"—led Europe to need a distinct court of law to examine the compatibility of lawfully enacted statutes with constitutions.

Another reason for the emergence of a concentrated method of review in Europe may be attributed to the fact that, when judicial review was effectively absorbed by the civil law systems, its judicial structure was mature and complex.[44] The division of the judicial system in administrative, commercial, labor, and social courts posed an additional problem of conferring upon *all* these courts the power to exercise a certain activity that they had never exercised before.

Moreover, because the appointment of judges is not directly subject to political control—as we have seen, the judgeship in the civil law countries is a professional rather than a political activity—the countermajoritarian issue calls forth a political process in the appointment of judges who may declare statutes unconstitutional. In Germany, according to Article 94 (1) of the Basic Law, half of the judges of the Federal Constitutional Court are *elected* by the *Bundestag* and half by the *Bundesrat*.[45] In France, Article 56 of the Constitution establishes that the Constitutional Council shall consist of nine members. One-third of its members are appointed by the President of the Republic, one-third by the President of the National Assembly, and one-third by the President of Senate.[46] Thus, by conferring upon popularly elected officials the power to appoint the judges of the constitutional court, the civil law countries of Europe granted legitimacy to the exercise of judicial review by these courts.[47]

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[43] STONE ET AL., *supra* note 9, at 301.

[44] *See generally*, Jackson & TUSHNET, *supra* note 8, at 459-61 (comparing the American and European approach to judicial review).

[45] GRUNDGESETZ [GG] [Constitution] art. 94, para. 1 (F.R.G.), *available at* http://www.uniwuerz-burg.de/law/GM0000_.html (last visited March 29, 2001).

[46] LA CONSTITUTION [CONST.] tit. VII, art. 56 (Fr.), *available at* http://www.uniwuerz-burg.de/law/FR0000_. html (last visited March 29, 2001).

[47] This is also an issue in the United States:

One of the most important dilemmas in American constitutional law arises from the ten-

Notwithstanding the indisputable differences between the two systems, both forms of review possess similarities. First, both the United States Supreme Court and the European constitutional courts play a very important role in protecting fundamental rights from governmental encroachment. This specific characteristic of these powerful and unelected courts counterbalances the alleged problem of illegitimacy of these bodies. Due to the fact that the great bulk of the courts' decisions deal with the non-application of legislative acts unlawfully infringing upon individual rights and liberties, the countermajoritarian issue is considerably attenuated. Second, in both systems the constitutional courts attempt to maintain a balance between the central government and the state entities.[48] Finally, the constitutional courts serve as the main check on the other branches of government, thus preserving the principle of separation of powers.[49]

III

We have seen so far that both the political and the legal tradition of Europe did not stand for the adoption of a system of review by which *ordinary* courts could review the constitutionality of legislation. Parliamentary supremacy and the role of courts during the *ancien regime* made it unlikely that the entire judicial branch could be empowered to strike down legislative acts. The peculiar circumstances called for a separate branch of government to exercise the power of judicial review.

However, not all countries in Europe accepted the idea of judicial supremacy. As stated before, in Great Britain and the Netherlands there is no court to set aside statutes allegedly repugnant to the constitution. In Switzerland, only canton laws are reviewed by the Federal Supreme Court. Federal legislation is reviewed only through the political procedure established by section 113 of the constitution. The

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> sion between the basic principle that the Constitution reposes sovereign authority in the people, who elect their representatives, and the (perhaps) competing principle that, in interpreting the Constitution under the doctrine of judicial review, the courts have final say over the political process. Judicial review is a mechanism by which the courts may invalidate decisions of Congress and the President, subject only to the burdensome process of constitutional amendment.... In these circumstances, the existence of judicial review gives rise to a 'countermajoritarian difficulty.'

STONE ET AL., *supra* note 9, at 37.

[48] As the Supreme Court asserted in *New York v. United States*:

> Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'.... While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, *the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions*.

505 U.S. 144, 161-62 (1992) (emphasis added) (citations omitted). The Court, thus, expressly affirmed the anti-commandeering clause and exercised its function of preserving federalism.

[49] JACKSON & TUSHNET, *supra* note 8, at 462.

view that not only the courts but also other branches of government should have the power to interpret the constitution is not peculiar to Europe. Thomas Jefferson expressly affirmed that:

> [N]othing in the Constitution has given [judges] a right to decide for the Executive, any more than to the Executive to decide for [the courts] .... But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their sphere of action, but for the Legislature and Executive also, would make the judiciary a despotic branch.[50]

As we see, the concept of judicial supremacy in the construction of the constitution is not a settled debate even in the country where the role of the courts as the ultimate interpreter seems to have greatest acceptance.

In my opinion, review of legislation is an extraordinary tool for the preservation of a constitution. Because only power can check power, the decision of whether to entrust the power of review to the courts or to other branches of government depends on the legal tradition of each nation. In the countries where the judiciary is regarded as the least dangerous branch to the political rights of the constitution,[51] judicial review is a natural outcome of the system of government. Conversely, in Europe, where for a long time courts were viewed with great suspicion, the creation of a separate court to review legislation was essential to counterbalance the problem of legitimacy of courts.

Despite these undeniable differences, both in the United States and in Europe, courts have been playing a very important role in the preservation of individual liberties. The need for an effective check on legislative majorities, thus, seems to be the main force compelling different legal systems to confer upon their courts—constitutional or not—the power to review legislation repugnant to the constitution. Furthermore, even in the European countries where review of legislation is *political* rather than *judicial*, the European Court of Justice has changed dramatically the concept of legislative supremacy, thus compelling these countries to guarantee individual rights and liberties.

As *The Federalist Papers* affirmed, "[i]t is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part."[52] To perform this task, constitutional courts have been regarded as the most appropriate branch of government, and thus

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[50] STONE ET AL., *supra* note 9, at 55.

[51] *See* THE FEDERALIST NO. 78, at 397 (Alexander Hamilton) (Max Beloff ed., 1987) ("[I]t proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power, that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.") (internal citations omitted).

[52] THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison) (Max Beloff ed., 1987).

they currently possess a legal monopoly to declare what the constitution must be.