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## NEITHER PURSE NOR SWORD: LESSONS EUROPE CAN LEARN FROM AMERICAN COURTS' STRUGGLE FOR DEMOCRATIC LEGITIMACY

Kevin J. Mitchell\*

*The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.*<sup>1</sup>

### I. INTRODUCTION

U.S. President George W. Bush's nominations during his second term to fill Supreme Court vacancies produced substantial debate and commentary among legal scholars, politicians, special interest groups, and even comedians.<sup>2</sup> Amid much tension and increasingly heated discourse, Chief Justice John Roberts and Associate Justice Samuel Alito survived the gruel-

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\* B.A., Ashland University (2004); J.D., Case Western Reserve School of Law (2007). I would like to thank Alexander McClean, Rachel Wyatt, and Dean Hiram Chodosh for their invaluable feedback during the topic development and writing of this Note. Likewise, I am indebted to my parents for their encouragement, and most importantly, to Kim for standing by me through all of life's adventures.

<sup>1</sup> Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

<sup>2</sup> See Molly McDonough, *Alito is Well Known: Is that Good or Bad?*, ABAJOURNAL.COM, Nov. 4, 2005, <http://www.abanet.org/journal/redesign/n4sct.html> (quoting comments made by Duke law professor, Erwin Chemerinsky); Schumer: 'What Kind of Justice Will John Roberts Be?', CNN.COM, Sept. 15, 2005, <http://www.cnn.com/2005/POLITICS/09/15/roberts.schumer/index.html> (asking if Justice Roberts would "use the court to turn back a near-century of progress and create the majority that justices Scalia and Thomas could not achieve"); Joyce Jones, *Alito Controversy Continues*, <http://www.blackenterprise.com> (last visited Mar. 27, 2007), <http://www.blackenterprise.com/exclusivesekopen.asp?id=1493&p=0> (noting the Congressional Black Caucus's letter urging all one hundred Senators not to confirm Justice Alito); Mark Memmott, *Ad Says Roberts Tied to Clinic Violence*, USATODAY.COM, Aug. 8, 2005, [http://www.usatoday.com/news/washington/2005-08-08-roberts-naralad\\_x.htm](http://www.usatoday.com/news/washington/2005-08-08-roberts-naralad_x.htm) (referencing criticism in NARAL Pro-Choice America's advertisement concerning John Roberts' successful argument, made while acting as assistant to the U.S. Solicitor General, that a civil rights statute should not prevent pro-life groups from picketing at abortion clinics); Daniel Kurtzman, *Harriet Miers Jokes*, <http://politicalhumor.about.com/od/harrietmiers/a/harrietmiers.htm> (last visited Mar. 27, 2007) (quoting Jay Leno on supreme Court Justice Harriet Miers' qualifications: "She's never been a judge before, never served on the bench. This is part of President Bush's strategy of surrounding himself with people who are also in over their heads").

ing appointment process,<sup>3</sup> while nominee Harriet Miers bowed out.<sup>4</sup> The possibility that Justice John Paul Stevens could retire,<sup>5</sup> thus opening a third vacancy during the President's term, and the concomitant shift in the Court's balance of power,<sup>6</sup> has led to preparation for the "mother of all battles."<sup>7</sup>

Regardless of her political persuasions, virtually every American embraces strong feelings regarding what type of person should sit on the Court, and how he or she should make decisions.<sup>8</sup> This concern extends to the state level, where every judge wields constitutional authority to strike down democratically enacted statutes.<sup>9</sup> As courts, both at the federal and state level, increasingly involve themselves in policy questions and polarizing disputes, the people observe with a skeptical eye.<sup>10</sup>

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<sup>3</sup> See Charles Babington & Amy Goldstein, *Senate Panel Endorses Roberts*, WASH. POST, Sep. 23, 2005, at A1; *Alito Confirmed to US Top Court*, BBCNEWS.COM, Jan. 31, 2006, <http://news.bbc.co.uk/2/hi/americas/4665216.stm>.

<sup>4</sup> Without suggesting that Democrats would have embraced the nomination, it is interesting to note that Miers' biggest opponents were from the President's own party. This further underscores the volatile nature of these appointments. See Charles Babington & Thomas B. Edsall, *Conservative Republicans Divided over Nominee*, WASH. POST, Oct. 4, 2005, at A11 ("President Bush's nomination of Harriet Miers for the Supreme Court splintered the Republican Party's conservative base, with reaction from key senators and groups ranging from hostility to silence to praise."); Robert H. Bork, Op-Ed., *Slouching Towards Miers*, WALL ST. J., Oct. 19, 2005 ("The administration's defense of the nomination is pathetic: Ms. Miers was a bar association president . . . she shares Mr. Bush's judicial philosophy . . . and she is, as an evangelical Christian, deeply religious.").

<sup>5</sup> See Robert A. Sedler, *The Supreme Court Will Not Overrule Roe v. Wade*, 34 HOFSTRA L. REV. 1207, 1207 n.4 (2006).

<sup>6</sup> See Tom Curry, *Justice Stevens Is Key to Court's Future*, MSNBC.COM, Sept. 21, 2005, <http://www.msnbc.msn.com/id/9408518/print/1/displaymode/1098>.

<sup>7</sup> Jason Barnes & Jim Meyers, *Next Court Pick: Mother of All Battles*, NEWSMAX.COM, Feb. 2, 2006, <http://www.newsmax.com/archives/articles/2006/2/1/210351.shtml?s=lh>.

<sup>8</sup> Indeed, each of the Justices has his or her own opinion on such issues. Compare Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 246-47 (2002) (preferring a constitutional interpretation that "places considerable weight upon consequences—consequences valued in terms of basic constitutional purposes" and that "disavows a contrary constitutional approach, a more 'legalistic' approach that places too much weight upon language, history, tradition, and precedent alone while understating the importance of consequences"), with Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (noting that the purpose of constitutional guarantees is "to require the society [rather than the Court, by implication] to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside").

<sup>9</sup> See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 522 (1962) ("[N]othing in the concept of our federal system prevents state courts from enforcing rights created by federal law.").

<sup>10</sup> See Paul Gewirtz & Chad Golder, Op-Ed, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19 (tracking "activist judges," or those most likely to overturn statutes).

Why should nine Supreme Court justices—or worse, a narrow majority of five—possess final authority to strike down any law, when that law is supported by an overwhelming popular majority? If all courts, federal and state, have this power, what kind of person has the requisite qualities for judging? And if judges decide some of the most compelling issues, over which the nation may be sharply divided, are political beliefs a valid consideration in the selection process? These are some of the most difficult questions with which every twenty-first century American grapples.

However, the counter-majoritarian problem,<sup>11</sup> from which each of these questions stems, is not uniquely an American problem. While American judicial review has its own distinguishing features, the gulf that previously existed between it and the European model narrows rapidly.<sup>12</sup> This is due to broad constitutional reform across the globe, which has “transferred an unprecedented amount of power from representative institutions to judiciaries.”<sup>13</sup> Indeed, even the “last bastions” of pure democracy, where the judicial role traditionally has been most limited, followed this trend by introducing notions of constitutional supremacy.<sup>14</sup>

As judicial power expands on both sides of the Atlantic, Europeans and Americans should ask similar questions. Americans do not have a monopoly in distrusting judges, for Europeans have long dreaded the “government of judges.”<sup>15</sup> Therefore, each of these systems needs to reconcile constitutional rights with self-government and majority rule. If courts have final authority to protect the people’s rights and liberties, as enshrined in constitutional documents, each citizen needs to consider what type of person should be a judge and how to design a system most likely to select these types of people.

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<sup>11</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (2nd ed. 1986). “The root difficulty is that judicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in [sic] behalf of the prevailing majority, but against it.” *Id.* at 16–17. In discussing judicial review and judicial selection, Bickel’s phrase has become commonplace. See, e.g., Michael Richard Dimino, Sr., *Counter-Majoritarian Power and Judges’ Political Speech*, 58 FLA. L. REV. 53 n.1 (2006).

<sup>12</sup> See generally Alec Stone Sweet, *Why Europe Rejected American Judicial Review—And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2746 (2003) [hereinafter *Europe Rejected American Review*] (“[D]espite obvious organic differences between the American and European systems of review, there is an increasing convergence in how review actually operates.”).

<sup>13</sup> RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 1 (2004).

<sup>14</sup> *Id.* at 2.

<sup>15</sup> See Michael H. Davis, *A Government of Judges: An Historical Re-view*, 35 AM. J. COMP. L. 559, 559 (1987).

Judges have been compared to umpires,<sup>16</sup> and the analogy fits in many ways. Regardless of their jurisdiction or level in the hierarchy, judges usually hear cases involving two opposing parties. Each party argues its case before the judge, and throughout the process, that judge makes important decisions in determining the outcome of cases. The judge must ensure that neither party breaks the rules, and in the end, should allow the best argument to win.

With this great power comes a certain amount of distrust. In the athletic context, it might be suspicious if a person referees a game between his alma mater and its most bitter rival. Perhaps there would be even more suspicion if that official had an ongoing relationship with his or her former school. Even worse, imagine the public outcry were it revealed that the school pays the referee's salary, thereby providing security for his or her financial and professional future.<sup>17</sup> When the stakes are even higher, when life and death and one's livelihood are at stake, it is clear why judges must be impartial in their administration of justice.

Virtually everyone recognizes that personal corruption of a judge, such as bribery and extortion, is wrong. As Romania and Bulgaria sought European Union membership between 2002 and 2007, each faced harsh criticism regarding instances of corruption in their judiciary.<sup>18</sup> In Bulgaria, for example, citizens considered the judiciary to be not only ineffective, but also one of the most corrupt branches of the government.<sup>19</sup>

Justice should not be for sale, and considering reform efforts around the world, there is universal agreement on this truth. While personal corruption is certainly a problem, the appearance of judicial bias—or what could be called “perceived corruption”—is also a problem. Many legal systems

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<sup>16</sup> See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738 (1906); see also Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1033 (1975) (“Most of us have had occasion to think of the analogy to the selection of former athletes as umpires for athletic contests. It may not press the comparison too hard to say it serves as a reminder that the ‘sporting theory’ continues to infuse much of the business of our trial courts.”).

<sup>17</sup> See Gregg Doyel, *AD/Referee: Right Calls, Not Bubbles, All That Matter*, CBSSPORTSLINE.COM, Mar. 3, 2005, <http://cbs.sportsline.com/collegebasketball/story/8249532>. Rick Hartzell served as both Northern Iowa's Athletic Director and a referee for non-Missouri Valley Conference [Northern Iowa's conference] games. Because Northern Iowa was a so-called “bubble” team vying for a position in the NCAA tournament, other “bubble” teams questioned Hartzell's objectivity as an official. See *id.*

<sup>18</sup> Dan Bilefsky, *Candidates Vow to Fight Corruption*, INT'L HERALD TRIB., Oct. 26, 2005, at 3. Though Russia is not actively petitioning for admission to the EU, it too has announced efforts to comply with international norms in order to combat corruption in the judiciary. Anatoly Medetsky, *Judicial Reform Headed for Duma*, MOSCOW TIMES, Oct. 24, 2005, at 3, available at <http://www.themoscowtimes.com/stories/2005/10/24/014.html>.

<sup>19</sup> Dan Bilefsky, *Candidates Vow to Fight Corruption*, INT'L HERALD TRIBUNE, Oct. 26, 2005, available at <http://www.iht.com/articles/2005/10/25/news/eu.php>.

view this latter type of corruption as equally dangerous,<sup>20</sup> particularly because it causes public distrust in the judiciary. Public confidence is vital to a well-functioning judiciary, so regardless of whether actual bias exists, the appearance can be sufficient to remove a judge from a particular case.

When litigation centers on controversial public policy issues and constitutional debates, these concerns are magnified. Over the years, the U.S. Supreme Court has deliberated and ruled upon many “hot button” issues,<sup>21</sup> and many question the Court’s ability to remain separate from politics.<sup>22</sup> In the game of constitutional conflicts, many people believe that if you can nominate the right judge, you can get the right outcome. Thus, American judicial selection—whether by appointment or election—has become an exercise of the popular will to determine constitutional questions.<sup>23</sup>

The purpose of this Note is to show that increasing stakes in judicial selection and increasing animosity surrounding judicial review is not unique to the American system, but is inextricably linked to the notion of a constitutional democracy. Thus, European nations should take note: the American experience serves as a preview of what is to come. As courts balance majority rule with minority rights, no liberal democracy can avoid the “counter-majoritarian problem.”

Section II of this Note provides an introduction to the civil law and common law legal traditions. By noting distinctions on the judiciary’s role, its relationship to the other branches of government, and the methods of selection, this Section attempts to provide a basic framework through which

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<sup>20</sup> In the United States, a federal judge whose impartiality might be “reasonably questioned” should be disqualified. See 28 U.S.C. § 455(a) (2006). Courts have interpreted the Due Process clause to protect a person’s right to an unbiased judge. See 48A C.J.S. *Judges* § 239 (2005) (citing *U.S. v. Scuito*, 531 F.2d 842 (7th Cir. 1976); *U.S. v. Conforte*, 457 F. Supp. 641 (D. Nev. 1978), *aff’d*, 624 F.2d 869 (9th Cir. 1980)). Both Germany and Switzerland use a comparable approach. For example, Article 58 of the Swiss Constitution states that “No one may be deprived of his lawful judge,” and the German Constitution uses nearly identical language. See Kenneth S. Kilimnik, *Recusal Standards for Judges in Pennsylvania: Cause for Concern*, 36 VILL. L. REV. 713, 762, 767 (1991). Much like the American example, this approach focuses not only actual impartiality, but also the “impression of impartiality.” See generally *id.* at 768 (noting that German civil procedure provides for recusal where “a reasonable appearance of partiality” exists).

<sup>21</sup> Martha Neil, *Cases & Controversies*, ABAJOURNAL.COM, Sept. 29, 2005, <http://www.abanet.org/journal/redesign/10fmad.html> (tracing this dispute back to the Court’s 1803 *Marbury v. Madison* decision, considered “the poster child of the American legal system”). The *Marbury* decision is discussed more fully *infra* at Part IV.C.

<sup>22</sup> See, e.g., William P. Marshall, *Constitutional Law as Political Spoils*, 26 CARDOZO L. REV. 525, 533–34 (2005) (“[J]udicial nomination is the functional equivalent of a complex piece of legislation. . . . In fact, the nomination of a particular candidate can be seen as akin to proposing legislation.”).

<sup>23</sup> See *id.* at 526.

to view historical trends. However, the European constitutional courts' emergence is cited to show that these traditional distinctions are eroding.

Section III provides an in-depth explanation of how European constitutional courts have emerged in the civil law context. Beginning with Hans Kelsen's proposals for Austria's Second Republic, this Section traces the evolution and development of these courts in order to understand their present-day compositions.

Conversely, Section IV examines the United States constitutional model, and how judicial review developed and eventually polarized the citizenry. While emerging from the common law tradition, quite distinct from the civil law tradition, this section also emphasizes commonalities with the European models.

Lastly, Section V compares the U.S. and European systems, particularly noting how the distinction between these once-distinct systems has all but eroded. This section addresses the volatile nature of judicial selection and judicial review in the U.S. and why Europe must address similar issues in the future. With increasingly similar judicial review mechanisms, Europe's broader constitutional protections eventually could result in a constitutional crisis.<sup>24</sup>

## II. CIVIL AND COMMON LAW TRADITIONS

Each culture has a unique legal tradition, and this tradition relates to societal views about the nature of law, the relationship between law and politics, and the proper functioning of the judicial system.<sup>25</sup> Though each culture is unique, many traditions, particularly in Europe and America, fall within two basic legal systems: civil and common law.<sup>26</sup> Without discount-

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<sup>24</sup> See *infra* Appendix.

<sup>25</sup> See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 2 (2nd ed. 1985). Merryman writes:

A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.

*Id.*

<sup>26</sup> See *id.* at 1. Merryman notes a third strand, the socialist law system. *Id.* Upon the collapse of the Soviet Union, however, this system has become less influential. This Note will focus primarily on the civil and common law traditions.

ing contributions made by several other traditions,<sup>27</sup> this Section focuses on the civil and common law approaches.

A. *Two Distinct Legal Systems*

The common law tradition traces its origins back to the Normans' conquering of England in 1066 A.D. In many ways a vestige of British colonialism, the common law system remains the dominant system in the United States, Canada, England, and Australia.<sup>28</sup> Those in the common law system typically think of the judge as a "culture hero, even something of a father figure."<sup>29</sup>

This system emphasizes the judge's role in shaping policy by recognizing the doctrine of *stare decisis*, that similar cases should be decided similarly. Through robust analysis, the common law judge matches the facts of a case or controversy with the appropriate, previously decided fact pattern.<sup>30</sup> Statutes and legislation, conversely, fulfill an "auxiliary role."<sup>31</sup> Furthermore, and most importantly for the sake of this discussion, those in common law systems generally are accustomed to the notion of judicial review, recognizing that a judge may strike down unconstitutional statutes or governmental actions.<sup>32</sup>

Conversely, the civil law system remains the most dominant legal tradition in Western Europe, Central and South America, and many parts of Asia and Africa.<sup>33</sup> Tracing it origins back to 450 B.C. in Rome, the civil law tradition stands in stark contrast to the common law tradition. One key distinction between the two is that the civil law judge is considered a career civil servant or bureaucrat.<sup>34</sup> Most importantly, in the civil law system, legislatures or parliaments draft the laws, and judges simply interpret their meaning.<sup>35</sup>

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<sup>27</sup> See generally *id.* at 5. Merryman notes the Scandinavian tradition as having evolved independently of the European traditions. See *id.* Similarly, Islamic law, Hindu law, and a variety of more localized systems have existed throughout history and continue today. See *id.*

<sup>28</sup> *Id.* at 4.

<sup>29</sup> See *id.* at 34.

<sup>30</sup> See Ralf Rogowski, *Introductions, in CIVIL LAW*, at xiv (Ralf Rogowski ed., 1996); MERRYMAN, *supra* note 25, at 36.

<sup>31</sup> See Rogowski, *supra* note 30, at xiv.

<sup>32</sup> See MERRYMAN, *supra* note 25, at 34. But see Rogowski, *supra* note 30, at 24 (noting British aversion to American style review).

<sup>33</sup> MERRYMAN, *supra* note 25, at 2.

<sup>34</sup> *Id.* at 37 ("The civil law judge is not a culture hero or a father figure, as he often is [in the common law system]. His image is that of a civil servant who performs important but essentially uncreative functions.").

<sup>35</sup> MARY L. VOLCANSEK, *JUDICIAL MISCONDUCT: A CROSS-NATIONAL COMPARISON 3* (1996) (referencing the French description of judge as "*la bouche de la loi*," or "the mouth of



While judges, including Coke, Mansfield, Marshall, and Cardozo, are cultural heroes in common law regimes,<sup>36</sup> legislators or politicians like Justinian or Napoleon are common law icons.<sup>37</sup> Judging in the common law system is often the “crowning achievement” of a successful career.<sup>38</sup> Conversely, the civil judge’s role of interpreting statutory codes shrinks beneath the more glorious legislative role.<sup>39</sup>

Citizens in common law regimes traditionally revere judges because of their wisdom in decision-making and persuasive reasoning. The civil law judge, while respected, does not garner the same level of admiration. In

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the law,” meaning that he or she has no discretion). This ultimately stems from different philosophical underpinnings about the nature of law. Common law theorists traditionally view the law as “an embodiment of principles of reason and conscience implicit in human nature.” Harold J. Berman, *Historical Foundations of Law*, 54 EMORY L.J. 13, 13 (2005). Conversely, civil law theorists tend to be legal positivists in that they view the law as stemming from a political order (*see id.* at 15)—that is, the law is simply an expression of popular will. *See also* Sweet, *supra* note 8 at 2767 (“In the European positivist’s legal order, judges apply the acts of the lawmaker; in the natural law legal order, judges seek to discover and then apply principles that exist prior to and independent of any sitting legislature.”) (internal quotations omitted).

<sup>36</sup> *See* MERRYMAN, *supra* note 25, at 34.

<sup>37</sup> *See id.* at 36.

<sup>38</sup> *See id.* at 34–35. Merryman writes:

[Common law judges] attend law school and then have successful careers either in private practice or in government, frequently as district attorneys. They are appointed or elected to judicial positions on the basis of a variety of factors, including success in practice, their reputation among their fellow lawyers, and political influence. Appointment or election to the bench comes as a kind of crowning achievement relatively late in life. It is a form of recognition that brings respect and prestige. The judge is well paid, and if he is among the higher judicial echelons, he will have secretaries and research assistants. If he sits on the highest court of a state or is high in the federal judiciary, his name may be a household word. His opinions will be discussed in the newspapers and dissected and criticized in the legal periodicals. He is a very important person.

This is what common lawyers mean when they talk about judges.

<sup>39</sup> *See* Sweet, *supra* note 12, at 2748; *see generally* MERRYMAN, *supra* note 25, at 35:

[The civil law judge] is a civil servant, a functionary. Although there are important variations, the general pattern is as follows. A judicial career is one of several possibilities open to a student graduating from a university law school. Shortly after graduation, if he wishes to follow a judicial career, he will take a state examination for aspirants to the judiciary and, if successful, will be appointed as a junior judge. . . . Before very long, he will actually be sitting as a judge somewhere low in the hierarchy of courts. In time, he will rise in the judiciary at a rate dependent on some combination of demonstrated ability and seniority. He will receive salary increases according to preestablished schedules and will belong to an organization of judges that has improvement of judicial salaries, working conditions, and tenure as a principal objective.

view of these different roles, each system has devised selection methods most suitable to meet its particular needs.

### B. *Judicial Selection in Europe*

The Continental system<sup>40</sup> in Europe generally utilizes merit-based selection. The focus is on a potential judge's abilities, as indicated by performance in schooling and on state-administered examinations,<sup>41</sup> rather than on ideology and political affiliation.<sup>42</sup> This again stems from the basic civil law view that legislatures make the laws, and the judges merely interpret them.<sup>43</sup> Because important constitutional law questions, discussed below,<sup>44</sup> are generally separate from the business of courts of general jurisdiction, the initial selection of judges is not controversial.<sup>45</sup>

Potential attorneys and judges share in the same university education, followed by the first state examination.<sup>46</sup> Those who successfully complete the first state examination, called *Referendars*, gain work experience in both civil and criminal law practices, including some government work.<sup>47</sup> Next, students undergo a second, more rigorous state examination, after which they are referred to as *Assessors*, now eligible for legal practice.<sup>48</sup>

The completion of the second state examination is typically the moment of a career decision.<sup>49</sup> At this point, the career paths of judges and

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<sup>40</sup> In this Note, the "Continental system" refers generally to the Western European civil law countries, particularly Germany and France.

<sup>41</sup> Daniel J. Meador, *German Appellate Judges: Career Patterns and American-English Comparisons*, 67 JUDICATURE 16, 21 (1983) (noting judicial appointees' particularly high scores on the second state examination).

<sup>42</sup> John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 853 (1985).

<sup>43</sup> VOLCANSEK, *supra* note 35, at 3 (referencing the French description of a judge as "*la bouche de la loi*" (mouth of the law), meaning that he or she has no discretion).

<sup>44</sup> See *infra* Part III.

<sup>45</sup> See Langbein, *supra* note 42, at 853.

<sup>46</sup> See Meador, *supra* note 41, at 20.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* This does not mean that judges never have practical experience, but simply means this experience would be in some governmental capacity. Meador examines judges' backgrounds throughout Germany to find some variance in the level of practical experience. See *id.* at 24. In Frankfurt, 75% of the appellate judges served on both trial courts, only 6% in prosecutor's offices, and 0% worked in the ministry of justice. *Id.* at tbl.1. In Dusseldorf, over 75% served on both trial courts, 0% served in prosecutor's offices, and 23% served in the ministry of justice. *Id.* In Munich, only 39% served on both trial courts, 6% served in the ministry of justice, but 100% served in the prosecutor's office. *Id.* The distinction here is that a judge's work experience is in the public sector. This can be contrasted with the practice of common law nations such as the U.S. and England, where the judicial career does not begin until after lengthy experience in the private sector. See *id.* at 26.

private attorneys diverge.<sup>50</sup> A young law school graduate faces a variety of career options, including judge, prosecutor, government attorney, or private attorney.<sup>51</sup> However, after this initial decision, the professional judiciary staff controls advancement, so lateral entry to judging is rare.<sup>52</sup>

This selection process assumes that judges rigidly adapt particular facts to a legislative provision.<sup>53</sup> There is never a question of whether a law is right or wrong; rather, the law simply *is*. The judge must interpret mechanically what the law says, and rule accordingly.

### C. *American Judicial Selection*

In contrast to the Continental system, American judicial selection has long been a divisive topic<sup>54</sup> because nearly every judge, both at the state and federal level, has the ability to interpret the constitution and create social change. American judges do not merely say what the law *is*. Because every governmental act or legislative enactment must conform to the Constitution, judges have a role in stating what the law should be.

Considering this, the Constitution attempted to provide independent and accountable judges at the federal level. To ensure independence, the Constitution bars Congress from cutting judicial salaries for coercive purposes.<sup>55</sup> This allows judges to have freedom from political pressures in order to judge cases fairly and impartially. Conversely, accountability is assured by holding judges to a standard of "good behavior."<sup>56</sup> This assures that judges do not abuse their power by straying too far from their Constitutional authority. In practice, balancing the twin aims of independence and accountability has proved troublesome.

Throughout its history, America has attempted to solve this difficult question, and many times, these attempts were political in nature.<sup>57</sup> During his presidency, Thomas Jefferson sought to impeach and remove Justice Samuel Chase.<sup>58</sup> Prior to the *Marbury* decision, Congress attempted to suspend the Supreme Court term in 1802.<sup>59</sup> Furthermore, attempts were made

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<sup>50</sup> Langbein, *supra* note 42, at 849; see MERRYMAN, *supra* note 25, at 101.

<sup>51</sup> See MERRYMAN, *supra* note 25, at 101; see also *id.* at 101–07 (discussing in detail the various alternatives).

<sup>52</sup> *Id.* at 35. Constitutional courts, discussed *infra*, are an exception to this general rule.

<sup>53</sup> See *id.* at 85.

<sup>54</sup> See Langbein, *supra* note 42, at 853.

<sup>55</sup> See U.S. CONST. art. III, § 1.

<sup>56</sup> See *id.*

<sup>57</sup> See Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges*, 84 JUDICATURE 58, 59 (2000).

<sup>58</sup> PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY 48 (1999).

<sup>59</sup> Fein & Neuborne, *supra* note 57, at 59.

to manipulate the size of the Court in order to assure a desired result.<sup>60</sup> Congress successfully did this during the Civil War, while President Franklin D. Roosevelt later failed in his attempt.<sup>61</sup> Amid the fury that was the Civil Rights movement in America, many sought to impeach and remove Chief Justice Earl Warren.<sup>62</sup>

While many attacked the judges themselves, others focused on judicial selection in hopes of preventing undesirable results in the future.<sup>63</sup> Initially, the colonists preferred a system of judicial appointments, a practice which can be traced back to the 1701 English Act of Settlement.<sup>64</sup> In colonial times, the king appointed colonial judges,<sup>65</sup> whose broad powers extended outside of the courtroom.<sup>66</sup>

Although the colonists disdained abuse of judicial power,<sup>67</sup> the preference for appointed judges nonetheless was transplanted to America.<sup>68</sup> Indeed, after the Revolution, all thirteen colonies, as well as the federal government, appointed their judges.<sup>69</sup> This desire for an independent judiciary was rooted in the belief that “the electorate was not capable of evaluating the professional qualities of judicial candidates.”<sup>70</sup> Furthermore, there was a general belief that judges should remain above or outside of the political fray.<sup>71</sup>

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<sup>60</sup> CARRINGTON, *supra* note 58, at 48.

<sup>61</sup> *Id.*

<sup>62</sup> Fein & Neuborne, *supra* note 57, at 59.

<sup>63</sup> Samuel Latham Grimes, “*Without Favor, Denial, or Delay*”: Will North Carolina Finally Adopt the Merit Selection of Judges?, 76 N.C. L. REV. 2266, 2271 (1998).

<sup>64</sup> JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 196 (Stephen B. Burbank & Barry Friedman eds., 2002) [hereinafter JUDICIAL INDEPENDENCE AT THE CROSSROADS].

<sup>65</sup> CARRINGTON, *supra* note 58, at 47.

<sup>66</sup> *Id.* at 48.

<sup>67</sup> See THE DECLARATION OF INDEPENDENCE para. 10–11 (U.S. 1776) [hereinafter DECLARATION].

<sup>68</sup> JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 64, at 197.

<sup>69</sup> Grimes, *supra* note 63, at 2271.

<sup>70</sup> *Id.* at 2272 (citation omitted).

<sup>71</sup> See Kyle Cheek, *Reconciling Normative and Empirical Approaches to Judicial Selection Reform: Lessons from a Bellwether State*, 68 ALB. L. REV. 577, 577–78 (2005) (“By some [states’] constitutions the members of the [judiciary] are elected, and they are even subjected to frequent reelections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period, that the attack which is made upon the judicial power has affected the democratic republic itself.” (quoting Alexis de Tocqueville, THE REPUBLIC OF THE UNITED STATES OF AMERICA, AND ITS POLITICAL INSTITUTIONS, REVIEWED AND EXAMINED 305 (Henry Reeves trans., 1867))).

However, the nineteenth century ushered in a democratic revolution in judicial selection, influenced heavily by Jacksonian Democracy.<sup>72</sup> Just as Thomas Jefferson had criticized the “runaway, aristocratic, and unaccountable” judiciary of his day, so too this new generation favored highly partisan popular election of judges.<sup>73</sup> With more and more focus on party affiliation, citizens focused on a small number of issues rather than the judicial abilities or experience of candidates.<sup>74</sup> Beginning with Mississippi in 1832, the “democratic spirit swept the young nation,”<sup>75</sup> and by the next decade, cries for popularly elected judges drowned out the status quo.<sup>76</sup>

Still, dissatisfaction remained amongst the citizenry. While selection by appointment and by popular elections each appealed to factions of the citizenry, the Missouri Plan gained popularity because it seemed to find a balance between the extremes. Conceived by Professor Alex Kales and first adopted in the state for which it is named, the Missouri Plan provides a useful model for approximately twenty states today.<sup>77</sup> Professor Kales’ plan resounded particularly with legal scholars, including the likes of future president and chief justice of the Supreme Court, William Howard Taft, and Judge Roscoe Pound.<sup>78</sup> The essential elements were as follows: (1) a judicial nominating committee, composed of attorneys, judges, and citizens, makes a list of possible candidates; (2) an elected official selects one candidate from the list to fill a court vacancy; and (3) after a certain period, the judge stands for a noncompetitive retention election in order to keep her position.<sup>79</sup>

While European judicial selection traditionally has been largely uncontroversial, American selection processes have fluctuated in response to political pressures. The European judge stands above the political fray,

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<sup>72</sup> See Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL’Y REV. 301, 311–12 (2003).

<sup>73</sup> See JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 64, at 198.

<sup>74</sup> See Grimes, *supra* note 63, at 2271.

<sup>75</sup> JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 64, at 198 (citation omitted).

<sup>76</sup> See Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, in JUDICIAL POLITICS: READINGS FROM JUDICATURE 50, 50 (Elliot E. Slotnick ed., 2005) (“The debates on an elective judiciary were brief; there was apparently little need to discuss the abuses of the appointive system, or its failures, or why election would be better. . . . [T]he spirit of reform carried the day.” (citing Niles, *The Popular Election of Judges in Historical Perspective*, THE RECORD OF THE ASS’N OF THE BAR OF THE CITY OF NEW YORK, Nov. 1966, at 523, 526)).

<sup>77</sup> JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 64, at 199.

<sup>78</sup> Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 93 (1998) [hereinafter Carrington, *Independence and Accountability*].

<sup>79</sup> JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 64, at 199.

while the American judge has long been immersed in it. However, the advent of European constitutional courts, discussed *infra*, eroded what was once a clear institutional distinction. In light of this, European nations must prepare themselves for similar controversies regarding judicial review and the judiciary's role in limiting the popular will.

D. *Constitutional Courts: Bridging the Gap*

Constitutional systems, whether in Europe or the United States, face an inherent tension between individual rights and majority rule.<sup>80</sup> A constitution is simply “a body of rules that specifies how all other legal rules are to be produced, applied, and interpreted.”<sup>81</sup> It may identify the legislature as supreme, and thus prevent the judiciary's power from extending over legislative application. Relegating judges to mere interpreters of legislative intent, however, fails to remedy the problem of unjust laws or executive dominance. Fascism, Nazism, and the horrors of World War II revealed the fatal flaws of such a system, paving the way for constitutional courts in Europe.<sup>82</sup>

Accordingly, rather than granting legislative supremacy, a constitution may recognize individual rights, and these rights can trump subsequently enacted legislation. The latter view predominates both in the United States and contemporary Europe.<sup>83</sup> In each of those systems, the judges who wield constitutional authority have immense political power.<sup>84</sup>

This latter view, the “new constitutionalism,” has codified human rights and established constitutional courts in much of Europe.<sup>85</sup> When the

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<sup>80</sup> See BICKEL, *supra* note 11, at 16–17.

<sup>81</sup> ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 20 (2001) [hereinafter *GOVERNING WITH JUDGES*].

<sup>82</sup> See VOLCANSEK, *supra* note 35, at 4 (noting that constitutional judges provide a check on previously unrestrained power); see also *GOVERNING WITH JUDGES*, *supra* note 81, at 37. Cf. U.S. CONST. art. VI (stating that the Constitution is the “supreme Law of the Land” in the United States).

<sup>83</sup> See *GOVERNING WITH JUDGES*, *supra* note 81, at 21 (referencing the trend toward this latter view in Germany, Italy, and Spain). The U.S. is in some ways unique because, unlike most European courts, each court in the United States has constitutional authority. See *id.* at 32.

<sup>84</sup> See Robert Badinter & Stephen Breyer, *Preface*, in *JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION* 1, 2 (Robert Badinter & Stephen Breyer eds., 2004) (referencing Alexis de Tocqueville's observation that, by virtue of the United States Constitution, American judges could make decisions based not only on legislation, but on the Constitution itself).

<sup>85</sup> See *GOVERNING WITH JUDGES*, *supra* note 81, at 31. Examples include Austria (1945), Italy (1948), Germany (1949), France (1958), Portugal (1976), Spain (1978), Belgium (1985), and post-communist nations, including Russia and Poland after 1989. See *id.* The basic elements of European constitutionalism are that (1) state institutions derive their authority from a written constitution, (2) the constitution gives power to the citizenry through

government or legislation violates such rights, constitutional courts have authority to bar the particular action or overturn the law.<sup>86</sup> Consequently, although Europe and America each comes from its own unique tradition, the advent of European constitutional courts has eroded this distinction.<sup>87</sup>

Constitutional courts, whether in Europe or the United States, stem from the fundamental belief that legislative tyranny, or tyranny of the majority,<sup>88</sup> is of greater concern than judicial despotism. Although the traditional view of a civil law judge—that he or she is part of a specific class, trained by a bureaucratic mechanism,<sup>89</sup> constitutional courts, and the judges who sit on them—does not fit this mold.

Rather than relying on the traditional merit-based approach, in some European countries the people indirectly select constitutional judges through legislative selection.<sup>90</sup> This generally requires a super-majority of two-thirds or three-fifths vote, and because single parties rarely possess this number, selection becomes a highly political bargaining process. In the end, the constitutional court roughly resembles the parliamentary makeup.<sup>91</sup> Just as America has grappled with how best to select judges throughout its history, the advent of constitutional courts has changed the traditional merit-based selection process in Europe.

## 1. Fundamental Questions About the Judge's Role

While scholars often write about selection methods, including the costs and benefits of various approaches, they often neglect the most basic

popular elections, (3) use of legislative or governmental authority is lawful to the extent it conforms with the constitution, and (4) the law includes individual rights and system by which those rights are protected. *Id.* at 37.

<sup>86</sup> Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 25 W. EUR. POL. 77 (2002) [hereinafter *Constitutional Courts*] (defining this power, called constitutional review, as “authority to evaluate the constitutionality of public acts, including legislation, and to annul those acts as unlawful when found to be in conflict with the constitutional law”).

<sup>87</sup> See C. Neal Tate, *Comparative Judicial Review and Public Policy: Concepts and Overview*, in *COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 4* (David W. Jackson and C. Neal Tate eds., 1992) (noting that “equally dramatic” controversies surrounding judicial review can be found outside of the U.S.). See also *id.* at 9 for a description of how Canada’s adoption of a Charter of Rights in 1982, combined with an “activist” judiciary, sparked controversy over judicial review.

<sup>88</sup> THE FEDERALIST NO. 51 (James Madison) (“It is of great importance in a republic . . . to guard one part of society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by common interest, the rights of the minority will be insecure.”).

<sup>89</sup> See Langbein, *supra* note 42, at 848.

<sup>90</sup> See *Constitutional Courts*, *supra* note 86, at 88.

<sup>91</sup> See *id.*

questions about the role of judges.<sup>92</sup> To some extent, this is to be expected. Recognizing a problem is easier than proposing a fitting solution.

However, discussion about judicial selection reveals a deeper problem: what *is* the role of a judge? The civil and common law systems traditionally answered this question differently. However, at least in regard to constitutional judges, both Europeans and Americans share increasingly common views. Judges wielding constitutional authority are not mere bureaucrats, interpreting legislation while remaining detached from overarching policy questions.

Constructing proper selection systems begins with examination of the judiciary's ultimate *telos*,<sup>93</sup> Aristotle's term for a thing's most basic purpose.<sup>94</sup> One must understand what "justice for all" means,<sup>95</sup> in order to organize judicial selection processes accordingly. When judges lack those virtues necessary to fulfill the *telos*, or ultimate purpose, of the justice system, it cannot function properly.<sup>96</sup> A legal system directed by the unjust is doomed to fail.<sup>97</sup>

Accordingly, the first question is which virtues are necessary for judging.<sup>98</sup> By identifying and examining judicial virtues, one may identify what constitutes a good judge.<sup>99</sup> To the extent that particular selection sys-

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<sup>92</sup> See Marie A. Failinger, *Virtuous Judges and Electoral Politics: A Contradiction?*, 67 ALB. L. REV. 769, 770 (2004) [hereinafter *Virtuous Judges*] (noting that most scholarship in this area focuses on "second-order" questions of how, rather than "first-order" questions of why it is important).

<sup>93</sup> See *id.* at 771; see also ARISTOTLE, THE POLITICS 275 (Carnes Lord trans., 1984) (editor's glossary defines *telos* as "the character of a thing when fully formed, its completion or perfection").

<sup>94</sup> ARISTOTLE, NICOMACHEAN ETHICS 3 (Martin Ostwald ed., 1999) ("Every art or applied science and every systematic investigation, and similarly every action and choice, seem to aim at some good; the good, therefore, has been well defined as that at which all things aim."); ARISTOTLE, POLITICS, *supra* note 93, at 35 (noting that a city is a partnership, and that every partnership aims toward some good). Lest readers believe this paper focuses solely on words written almost twenty-four hundred years ago, it should be noted that scholars have examined Aristotle's theories anew over the past several decades. See Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1735 (1988); Marie A. Failinger, *Can a Good Judge be a Good Politician? Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433, 433 (2005) [hereinafter *Good Judge*] (citing ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2d Ed. 1984) ("Every activity, every inquiry, every practice aims at some good. . . . [H]uman beings move by nature towards a specific telos.")).

<sup>95</sup> See *Virtuous Judges*, *supra* note 92, at 771.

<sup>96</sup> See *Good Judge*, *supra* note 94, at 467.

<sup>97</sup> See *id.* (citing the Biblical parable of the unjust servant who, after having his debt forgiven, refused to do the same for one indebted to him).

<sup>98</sup> See Solum, *supra* note 94, at 1738.

<sup>99</sup> See *id.*



tems produce particular results, understanding the “first-order” questions (what is a good judge?) can ultimately determine the answers to “second-order” questions (how should judges be selected?). If Europeans and Americans share a common view of what constitutes a good judge on a constitutional court, perhaps they could also share a vision of how best to select these judges.

According to Aristotle, there exist two types of virtue, intellectual and moral.<sup>100</sup> One acquires intellectual virtue through scholarship and exercise of reason.<sup>101</sup> Conversely, one acquires moral virtues through habit, or consistent practice.<sup>102</sup> In order to function effectively, judges must possess certain intellectual and moral virtues.<sup>103</sup>

To that end, Lawrence B. Solum<sup>104</sup> delineates three specific virtues.<sup>105</sup> First, a judge must possess a certain judicial intelligence, enabling him or her to understand and theorize about the law.<sup>106</sup> Second, a judge must also possess practical wisdom in choosing proper legal ends and the means of achieving these ends.<sup>107</sup> Lastly, a judge must possess a sense of duty, or a special concern for preserving the integrity of the law.<sup>108</sup>

## 2. Three Important Judicial Virtues

The adjudication process often hinges on complex legal rules and their application to a specific set of facts. Many times, legal minds come to the same conclusion on such cases, and there is little room for dispute.<sup>109</sup> However, in particularly difficult cases, educated minds could arrive at different conclusions. A substantial body of knowledge is necessary in such instances, and judges must be able to make analogies to come to the proper conclusions.

However, in and of itself, judicial intelligence is insufficient. Even a brilliant legal mind could make the wrong decision.<sup>110</sup> Along with judicial

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<sup>100</sup> ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 94, at 33.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See Virtuous Judges, supra* note 92, at 771.

<sup>104</sup> Lawrence B. Solum is the John E. Cribbet Professor of Law at the University of Illinois College of Law.

<sup>105</sup> Solum, *supra* note 94, at 1740 (noting a fourth virtue, justice, which means sometimes following legal rules and other times departing from them).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1742–43.

<sup>110</sup> *See id.* at 1751 (“[J]udicial intelligence can be used for good or ill. A very intelligent unprincipled judge could use legal reasoning skills to provide clever but sophistic demonstrations that a personal preference is required by the law; a nihilist judge could use judicial

intelligence, judges also need to possess a more basic, practical wisdom. In short, a judge must have “common sense.”<sup>111</sup>

Aristotle distinguished between these two types of wisdom, both of which are necessary in judging.<sup>112</sup> While judges should apply the law, they must not operate in a vacuum, ignoring the common sense application of rules and interpretations. Judges historically have been given a certain amount of discretion because societies realize the near-impossibility of drafting a legal rule for any and every situation.<sup>113</sup> Therefore, practical wisdom is necessary.

While theoretical knowledge of the law and a common sense approach to decision-making are important, judges must possess a sense of fidelity to the law.<sup>114</sup> Considering what is at stake in litigation, whether one’s life, one’s freedom, or one’s property, a judge must recognize his or her duty to uphold the high standards of the law. This virtue operates independently of the judge’s personal preferences because, to the extent that those preferences diverge from the common good, the latter must prevail.<sup>115</sup>

In discussing the basic constitutional structures of both Europe and the United States, it is important to keep these underlying concepts in mind. The basic structure of a legal system defines the role of a judge. A judge may merely interpret the law,<sup>116</sup> or a judge may be given more discretion in policy decisions.<sup>117</sup> In describing the European and American models, it is important to ask if each agrees on the role of the judge, and if not, how they differ.

### III. EUROPEAN CONSTITUTIONAL COURTS

As the civil legal tradition has evolved, the role of the judge has evolved as well. European constitutional courts have drastically altered the traditional belief in legislative sovereignty. In an era of change, Europeans must reevaluate judicial virtues in order to devise appropriate selection systems.

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intelligence to create indeterminacy where stability could be found. In part because of these possibilities, the intellectual virtue of judicial intelligence is necessary but not sufficient . . . .”).

<sup>111</sup> See *id.* at 1753.

<sup>112</sup> *Id.* at 1753; ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 94, at 312–13 (distinguishing in editor’s glossary between Aristotle’s use of *phronesis* [practical wisdom] and *sophia* [theoretical wisdom]).

<sup>113</sup> See Solum, *supra* note 94, at 1753 (discussing the need for judges to have both theoretical and practical wisdom).

<sup>114</sup> See *id.* at 1751.

<sup>115</sup> See PLATO, THE REPUBLIC 473d (Allan Bloom trans., 1991).

<sup>116</sup> See VOLCANSEK, *supra* note 35.

<sup>117</sup> See generally *Constitutional Courts*, *supra* note 86.

A. *Legislative Supremacy in the Civil Law Tradition*

Traditionally, the Continental legal tradition granted legislative supremacy to the parliament. For example, Germany explicitly banned judicial review from 1780 onward, and France did the same beginning in 1791.<sup>118</sup> Over a century later in 1921, law professor Edouard Lambert published a book<sup>119</sup> in which he described an unconstrained system of review. Therein, Lambert famously coined the phrase "government of judges," which embodies the European contempt for an undemocratic system of judicial review.<sup>120</sup>

The civil law judge thus remained subservient to the legislative will; she could stray no further than the rigid interpretation of statutes.<sup>121</sup> It is therefore not surprising that Europeans opposed judicial review, which they understood to denote "the involvement of the judiciary in social policies, in economic policies, and in the quarrels and passions of the electoral battle."<sup>122</sup> Europe, as a whole, thus rejected judicial review out of a fear that activist judges would blur the traditional lines between separate governmental powers.<sup>123</sup>

When considering the three judicial virtues outlined above, the civil law system traditionally focused on the first. Judging was viewed essentially an intellectual exercise, and therefore, judicial intelligence was the most basic necessity. Because judges merely interpreted the law, made no independent policy or constitutional judgments, practical wisdom and a special concern for preserving the integrity of the law were not as important. This in no way diminishes the civil law system; rather, it serves as a useful starting point in understanding the role of the civil law judge.

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<sup>118</sup> See GOVERNING WITH JUDGES, *supra* note 81, at 32; *id.* at 33 (citing French law in 1790, which stated, "courts could not "interfere with the exercising of legislative powers or suspend the application of the laws").

<sup>119</sup> The book's title is *Le Gouvernement des Juges et la Lutte Contre la Legislation Sociale aux Etats-Unis*. Davis, *supra* note 15, at 559.

<sup>120</sup> *Id.*

<sup>121</sup> See generally GOVERNING WITH JUDGES, *supra* note 81, at 1 (noting the old system of "[p]arliamentary supremacy").

<sup>122</sup> Davis, *supra* note 15, at 564 (citations and internal quotations omitted).

<sup>123</sup> See generally *id.* A court vested with review power would not technically be a "court," nor would a judge on that court truly be "judge." See MERRYMAN, *supra* note 25, at 38. Rather, those adhering to the traditional view would consider such a court to be a quasi-legislative body.

B. *Austria's Second Republic: Implementing Kelsen's Vision*

The twentieth century ushered in a new constitutionalism throughout much of Europe.<sup>124</sup> By elevating constitutions above parliaments and legislatures, the advent of constitutional courts changed the way Europeans would view judges.<sup>125</sup> In order to understand the nature of European constitutional courts, one must look to Austrian legal theorist Hans Kelsen, who is considered their “spiritual godfather.”<sup>126</sup>

Kelsen attempted to reconcile judicial review with European democracy, while at the same time rejecting the American model.<sup>127</sup> Kelsen was an influential scholar who drafted Austria's 1920 Constitution, which established the nation's Second Republic (1920–1934).<sup>128</sup> During this time period, Austria became the first nation to adopt a Kelsenian constitutional court, and this model would later provide a model for the rest of Europe.<sup>129</sup>

Kelsen faced opposition from two camps, each of whom he had to persuade.<sup>130</sup> On one hand, politicians were weary of ceding power to the judiciary; on the other, many prominent legal scholars preferred the American system of review.<sup>131</sup> The Kelsenian court, therefore, can be viewed as a compromise between two opposing views.

The essential elements of Kelsenian courts are as follows. First, constitutional courts have exclusive and final jurisdiction to adjudicate constitutional disputes, while the rest of the judiciary remained prohibited from judicial review.<sup>132</sup> Second, unlike their American counterparts, constitutional court judges are appointed by supermajoritarian procedures for fixed, nonrenewable terms.<sup>133</sup> Third, constitutional courts concern themselves with disputes only if individuals or specifically designated authorities seek re-

<sup>124</sup> See GOVERNING WITH JUDGES, *supra* note 81, at 31.

<sup>125</sup> See generally *id.* at 1.

<sup>126</sup> See John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1672 (2004).

<sup>127</sup> See *Constitutional Courts*, *supra* note 86, at 79.

<sup>128</sup> See GOVERNING WITH JUDGES, *supra* note 81, at 34.

<sup>129</sup> See *id.* (citing DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (2nd ed. 1997); Klaus von Beyme, *The Genesis of Constitutional Review in Parliamentary Systems*, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON 21 (Christine Landfried ed., 1989)).

<sup>130</sup> See *Europe Rejected American Review*, *supra* note 12, at 2766. Kelsen wrote an article in 1928 where he elaborated on and defended his concept of judicial review. *Id.* (citing Hans Kelsen, *La garantie juridictionnelle de la Constitution*, 45 REVUE DU DROIT PUBLIC 197 (1928)).

<sup>131</sup> See *Europe Rejected American Review*, *supra* note 12, at 2766.

<sup>132</sup> *Constitutional Courts*, *supra* note 86, at 79–80.

<sup>133</sup> See Ferejohn & Pasquino, *supra* note 126, at 1677–78.

view.<sup>134</sup> Third, constitutional courts, though linked, are formally detached from both the judiciary and the legislature.<sup>135</sup> Fourth, constitutional courts may review legislation or a policy prior to enactment in order to prevent unconstitutional behavior.<sup>136</sup>

While constitutional courts maintained these distinct features, Kelsen also emphasized that they should look like other courts, staffed by professional judges and law professors.<sup>137</sup> This suggests an attempt to not dramatically transform the nature of judging. While constitutional judges necessarily would differ from other judges, Kelsen's vision did not stray too far from the civil law tradition.

Ultimately, Kelsen attempted to achieve benefits of judicial review without devolving into a "government of judges."<sup>138</sup> Maintaining this distinction between judges and legislators was fundamental in Kelsen's mind. He considered parliaments to be "positive legislators" and constitutional judges to be "negative legislators."<sup>139</sup> In essence, judicial review would be limited to striking down unconstitutional statutes, rather than creating or recognizing rights or duties in the way the legislature could.<sup>140</sup> Constitutional courts thus provided an essential check on legislative supremacy by enforcing "the ultimate rule of law."<sup>141</sup>

Kelsen's distinction between judges and legislators depended almost entirely on the absence of an enforceable charter of rights. If a constitution grants broad rights and the court must interpret the constitution, then the judge takes on a legislative role.<sup>142</sup> This is because broad rights are vague and susceptible to many interpretations.<sup>143</sup>

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<sup>134</sup> *Constitutional Courts*, *supra* note 86, at 79–80. See also Ferejohn & Pasquino, *supra* note 126, at 1677 (noting that most cases come before constitutional courts on paper, rather than as presented by opposing parties).

<sup>135</sup> *Constitutional Courts*, *supra* note 86, at 80.

<sup>136</sup> *Id.*

<sup>137</sup> See GOVERNING WITH JUDGES, *supra* note 81, at 36.

<sup>138</sup> *Id.* at 35.

<sup>139</sup> *Id.*

<sup>140</sup> *Constitutional Courts*, *supra* note 86, at 81 ("Although this fact is ignored by his modern-day followers, Kelsen explicitly warned of the 'dangers' of bestowing constitutional status to human rights, which he equated with natural law, because a rights jurisprudence would inevitably lead to the obliteration of the distinction between the 'negative' and the 'positive' legislator.").

<sup>141</sup> Davis, *supra* note 15, at 565.

<sup>142</sup> See GOVERNING WITH JUDGES, *supra* note 81, at 35.

<sup>143</sup> See generally *Europe Rejected American Review*, *supra* note 12, at 2767 (noting Hans Kelsen's qualms with constitutional incorporation of human rights, which are "open-ended [in] nature").

Thus, invoking natural law concepts of absolute, individual rights violates the Kelsenian court's basic structure.<sup>144</sup> These concepts also dramatically alter the nature of the judicial role. The civil law notion of the civil servant, merely interpreting legislation, must give way to a more complex judicial process. The second virtue outline above, practical wisdom, is necessary in determining broad constitutional questions. At the same time, Kelsen's deliberate attempt to avoid broad, rights-based language severely limited the importance of the sense of duty to the law. In essence, Kelsen complicated the judicial role, but he was not willing to altogether dismiss the traditional civil law ideals.

### C. *Post-World War II Europe: Transforming the Kelsenian Court*

Prior to World War II, only Austria had adopted Kelsen's approach.<sup>145</sup> Although seeds of judicial review were planted in the German system during the Weimar Republic,<sup>146</sup> Nazism removed any hope of formally establishing judicial review.<sup>147</sup> Although the Nazi example is unique in its atrocious outcome, the fundamental flaws were common to virtually all European countries.<sup>148</sup> Constitutions could be revised upon legislative whim, they lacked any affirmative grants of positive rights, and the judiciary could not enforce their provisions.<sup>149</sup>

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<sup>144</sup> See *id.*; GOVERNING WITH JUDGES, *supra* note 81, at 36.

<sup>145</sup> See GOVERNING WITH JUDGES, *supra* note 81, at 36.

<sup>146</sup> Hitler ascended to power within the structure of the Weimar Republic (1919–1931). Although the constitution technically remained enforceable until after the beginning of World War II, in effect the Nazi regime rendered its provisions useless and unenforceable in court. For a more complete exposition, see generally Robert Gerwarth, *The Past in Weimar History*, 15 CONTEMP. EUR. HIST. 1 (2006); *Europe Rejected American Review*, *supra* note 12, at 2765 n.94 (“Germany . . . had its own turn to natural law, and legal scholars and judges also intensively debated judicial review. In 1863, a majority of the Association of German Jurists declared itself in favor of judicial review. . . . During the Weimar Republic, the *Reichsgericht* [Germany’s highest court of appeals at the time] nullified the application of several statutes adopted by the parliament during the 1921–25 period.”).

<sup>147</sup> See ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM* 140 (2nd ed. 1977).

<sup>148</sup> Some have argued that the horrors of Nazi Germany can be attributed to its firm belief in legislative supremacy. When a legislature can define the law and change it on a whim, all the while remaining unchecked by an independent judiciary, no institutional obstacle exists for gross abuses of power. See Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law*, 35 CORNELL INT’L L.J. 101, 151 (2002) (“A typical post-war Germany critic of positivism was Judge Weinkauff, whose highly successful career had begun under Hitler, and who remained a judge after the war. His rendition of positivism as the culprit for Nazi judicial abuses implicitly exculpated his own decisions from the bench, as well as those of his judicial brethren.”).

<sup>149</sup> See GOVERNING WITH JUDGES, *supra* note 81, at 31.

However, the fallout from World War II sparked a “rights revolution” throughout Europe.<sup>150</sup> This atmosphere was conducive not only to the adoption of a Kelsenian court, but in many ways conducive to a constitutional court more expansive than Kelsen’s original design.<sup>151</sup> As Alec Stone Sweet<sup>152</sup> writes:

The awesome destruction of World War II made possible the diffusion of the Kelsenian court. The bitter experience of fascism in Italy and Germany before the war, and the massive American presence in both countries after it, conspired to undermine fatally deeply entrenched ideologies that emphasized the state’s omnipotent nature. Taming the state . . . was suddenly at the very top of the European agenda. As democratic reconstruction proceeded, higher law constitutionalism became the new orthodoxy.<sup>153</sup>

Thus, World War II served to “fatally undermine the view that parliaments could do no wrong.”<sup>154</sup> Many consider the distinction between a pure democracy, where the majority always triumphs, and a constitutional democracy, where minority rights expressly limits majority rule, to be the twentieth century’s crowning achievement.<sup>155</sup>

Consequently, the notion of a judge as a mere civil servant, acting in accord with legislative commands, had all but eroded.<sup>156</sup> When states like Austria, Italy, Germany, and Spain created rigid constitutions in the mid-twentieth century, judicial review gained prominence: the judges, not the legislatures, would ultimately guard individual rights.<sup>157</sup> This resulted in a transfer of both power and prestige to constitutional court judges.<sup>158</sup> This completed the transformation of the civil law judge, once defined by judicial intelligence alone, to a constitutional judge, possessing all three virtues, equally important in constitutional adjudication.

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<sup>150</sup> See *id.* at 38.

<sup>151</sup> See *id.*; see also Ferejohn & Pasquino, *supra* note 126, at 1671 (noting that Western European nations “embraced notions of individual rights and limited government”).

<sup>152</sup> Leitner Professor of Law, Politics, and International Studies, Yale Law School.

<sup>153</sup> GOVERNING WITH JUDGES, *supra* note 81, at 37. See also Tate, *supra* note 87, at 8 (arguing that judicial review is closely aligned with democratic government, as evidenced by Japan’s post-World War II creation of a constitutional court).

<sup>154</sup> *Europe Rejected American Review*, *supra* note 12, at 2769.

<sup>155</sup> See HIRSCHL, *supra* note 13, at 2–3.

<sup>156</sup> See Ferejohn & Pasquino, *supra* note 126, at 1675 (noting this trend in post-authoritarian regimes, including post-World War II Europe, Spain and Portugal in the 1970s, and former Soviet countries).

<sup>157</sup> See *id.* at 1676.

<sup>158</sup> See MERRYMAN, *supra* note 25, at 157.

D. *Contemporary Europe's Constitutional Courts*

Despite the post-World War II expansion of positive rights, European constitutional courts still follow Kelsen's basic model.<sup>159</sup> These courts are separate from ordinary courts, and they exercise exclusive and final jurisdiction on constitutional matters. Rather than settling disputes between parties, they solve only constitutional questions. Constitutional courts do have some linkage to both the judiciary and the legislature, but there is no formal attachment. Thus, they are, strictly speaking, entirely separate entities. Lastly, these courts can review statutes before their passage, which enables courts to become legislative advisors.

Thus, the European model essentially functions as follows. First, the judiciary—that is, the ordinary courts—ensures legislative supremacy by enforcing statutes.<sup>160</sup> Second, the constitutional court operates wholly separate from this process, ensuring that the constitution reigns supreme over all government actions.<sup>161</sup> This distinction has helped Europe, as a general rule, to avoid the “politicization of judging that is characteristic of American courts.”<sup>162</sup>

One of the most key features maintained from the Kelsenian model is the exercise of abstract review. American judicial review typically is concrete, which means it addresses a particular case or controversy between two opposing parties.<sup>163</sup> Thus, it is fundamentally a posteriori, or backwards looking.<sup>164</sup> Conversely, European constitutional courts<sup>165</sup> are able to review a statute or policy prior to implementation, and this could be described as a priori review.<sup>166</sup> In sum, abstract review allows “preenforcement constitutional review” of legislative acts.<sup>167</sup>

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<sup>159</sup> GOVERNING WITH JUDGES, *supra* note 81, at 33–34 (listing the basic elements of “the European model of constitutional review”).

<sup>160</sup> *Europe Rejected American Review*, *supra* note 12, at 2770.

<sup>161</sup> *See id.*

<sup>162</sup> Ferejohn & Pasquino, *supra* note 126, at 1672 (internal quotations omitted) (citing John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 43, (2002)).

<sup>163</sup> *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (discussing the constitutional standing requirement that a plaintiff demonstrate an injury that is fairly traceable to the defendant's conduct, and is likely to be redressed by a favorable court decision). Likewise, a court may not hear a case before a controversy exists between actual parties, *see United Public Workers of America v. Mitchell*, 330 U.S. 75, 89 (1947), or when a controversy no longer exists, *see Defunis v. Odegaard*, 416 U.S. 312, 316 (1974).

<sup>164</sup> *See Tate*, *supra* note 87, at 6.

<sup>165</sup> The German Constitutional Court does stray from this general rule. It exercises both abstract and concrete review. *See VON MEHREN & GORDLEY*, *supra* note 147, at 140.

<sup>166</sup> *See Tate*, *supra* note 87, at 6.

<sup>167</sup> *Europe Rejected American Review*, *supra* note 12, at 2770–71.



Therefore, it is important to consider the European courts as a delicate balance between Kelsen's vision and the new constitutionalism. Constitutional courts are able to enforce positive rights and as a result, can exercise essentially legislative functions.<sup>168</sup> Thus, the old vision of courts that merely interpret the law is a remnant of a pre-World War II world. While Kelsen's basic model remains in place,<sup>169</sup> constitutional courts in Europe share much in common with their American counterpart.<sup>170</sup>

#### IV. THE U.S. CONSTITUTIONAL MODEL

While European constitutional courts are only decades old, the American legal tradition has recognized the importance of judicial review for over two hundred years.<sup>171</sup> Contrasted with the traditional civil law model, the American judge has long been admired, her just decrees even compared to those of God.<sup>172</sup> In light of this high view, the ideal American judge is one who possesses all three of the virtues outline above. She must not only be intelligent, but she must also exhibit practical wisdom and a sense of duty to the law.

##### A. *The Declaration as Historical Context*

In order to understand American constitutionalism, one must look to the American Founding. Technically speaking, the American Founding was not a particular moment, but a process, a series of events. However, the Declaration of Independence stands out as a seminal moment in American history, and it provides the context through which the U.S. Constitution may be understood.<sup>173</sup> The Declaration's language records the revolutionary views that provide the metaphysical basis for the Framers' plan for government.

At the heart of the Declaration lie four basic truths, or as Thomas Jefferson refers to them, "self-evident" truths.<sup>174</sup> First, human beings are

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<sup>168</sup> See Tate, *supra* note 87, at 9.

<sup>169</sup> See Sweet, *Europe Rejected American Review*, *supra* note 12, at 2769.

<sup>170</sup> See GOVERNING WITH JUDGES, *supra* note 81, at 1 ("European policy-making has been judicialized.").

<sup>171</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>172</sup> See Carrington, *Independence and Accountability*, *supra* note 78, at 93 (citing President and Chief Justice Taft's 1911 speech in New York).

<sup>173</sup> See also Thomas Jefferson, *A Summary View of the Rights of British America, 1774*, in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 273, 287-88 (Adrienne Koch and William Peden eds., 1993) ("[T]hese are our grievances, which we have thus laid before his Majesty, with that freedom of language and sentiment which becomes a free people claiming their rights as *derived from the laws of nature, and not as the gift of their Chief Magistrate.*" (emphasis added)).

<sup>174</sup> See DECLARATION, *supra* note 67, at para. 2.

created equal. Although there are surely distinctions, the most basic nature of humanity dictates that each is equal to another. Second, the Creator has endowed each human being with certain “unalienable Rights”, including life, liberty, and what Jefferson calls “the Pursuit of Happiness.”<sup>175</sup> Third, the purpose of government is to secure these rights. Indeed, governmental power and legitimacy is derived from the “consent of the governed,” rather than status, class, or lineage. Fourth, when government fails in its essential mission—that is, securing rights—the people have a right to create a new government that is more apt to fulfill that mission.<sup>176</sup>

### B. *Drafting a Constitution*

Immediately following the American Revolution, the original thirteen colonies<sup>177</sup> entered into a “league of friendship.”<sup>178</sup> Organized around a relatively weak national government, the Articles of Confederation allowed the States to retain a substantial amount of sovereignty. Eventually, the Articles’ futility led to drastic revisions.

The Framers of the United States Constitution met in Philadelphia in the year 1787. The goal remained the same as that set forth in the Declaration: to institute a government most likely to secure the people’s safety and happiness. Two opposing camps dominated the convention: the Federalists and the Anti-Federalists.<sup>179</sup> In the end, the Federalists succeeded in strengthening the national government.<sup>180</sup>

Responding to an increasingly powerful national government, the Anti-Federalists’ chief contribution was the Bill of Rights.<sup>181</sup> By 1781, the first ten amendments to the U.S. Constitution were ratified, and several

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<sup>175</sup> See *id.*

<sup>176</sup> See *id.*

<sup>177</sup> Technically speaking, Canada was granted the right to join under the Articles of Confederation, though it never elected to do so. See ARTICLES OF CONFEDERATION art. XI (U.S. 1781).

<sup>178</sup> *Id.* at art. III.

<sup>179</sup> See Murray Dry, *Introduction*, in THE ANTI-FEDERALIST, at 1 (Herbert J. Storing ed., 1985).

<sup>180</sup> See U.S. CONST. art. I, § 8 (giving Congress the power to, among other things, lay and collect taxes, coin money, promote progress in the sciences, and regulate commerce); U.S. CONST. art. II, § 1–2 (vesting executive power in the President, who serves as Commander-in-Chief of the armed forces and can make treaties with the advice and consent of the Senate).

<sup>181</sup> See Murray Dry, *Speeches of Patrick Henry in the Virginia State Ratifying Convention*, in THE ANTI-FEDERALIST, *supra* note 179, at 239 (“[F]or it is also a maxim, that the legislature has a right to alter the common law. Such a power forms an essential part of legislation. Here, then a declaration of rights is of inestimable value. It contains those principles which the government never can invade without an open violation of the compact between them and the citizens.”).

rights, including freedom of speech, religion, and press, among others.<sup>182</sup> Because the government could not infringe upon these rights, the American Founding stands apart from the civil law tradition of legislative supremacy.

Institutionally, the Constitution established three distinct branches of government: the legislative (Congress), the executive (the President), and the judiciary (the Supreme Court). Implicitly rooted in the separation of powers doctrine, the Constitution lays out three distinct and co-equal branches of government for the American system.<sup>183</sup> Similarly, the Constitution divides authority between the federal and state government, which provides another layer of security for the people's rights.<sup>184</sup>

Perhaps most importantly for the purposes of this discussion, Article VI declares that the "Constitution . . . shall be the supreme Law of the Land."<sup>185</sup> If this is true, the inevitable question is presented: who, then, interprets the Constitution? On one level, the answer is quite simple: the Constitution provides that each branch of government interprets the Constitution.<sup>186</sup> However, when two branches disagree in their interpretations, there must be a final arbiter.

Technically, the Supreme Court had operated under the assumption that it had final authority to interpret the Constitution,<sup>187</sup> but it had never actually struck down a federal statute prior to 1803.<sup>188</sup> The traditional view is that John Marshall created the doctrine of judicial review<sup>189</sup> in perhaps the most famous case in American constitutional law, *Marbury v Madison*.<sup>190</sup>

<sup>182</sup> See generally U.S. CONST. amend. I-X.

<sup>183</sup> See, e.g., THE FEDERALIST NO. 51 (James Madison) ("[E]ach department should have a will of its own . . . Ambition must be made to counteract ambition.").

<sup>184</sup> See U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

<sup>185</sup> U.S. Const. art. VI, cl. 2.

<sup>186</sup> See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987) ("[A]s the three branches of government are coordinate and equally bound to support the Constitution, 'each must in the exercise of its functions be guided by the text of the Constitution according to its own interpretation of it.'" (quoting EDWARD BURNS, JAMES MADISON, PHILOSOPHER OF THE CONSTITUTION 159 (1938))).

<sup>187</sup> See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 83 (5th ed. 2005) (citing cases preceding *Marbury*).

<sup>188</sup> See *Marbury v. Madison*, 5 U.S. 137, 137 (1803).

<sup>189</sup> Tate, *supra* note 87, at 4 (noting that the nineteenth century United States Supreme Court should receive credit for the modern practice of declaring laws and government actions to be unconstitutional).

<sup>190</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

C. *Imposing Limits Through Judicial Review: Marbury v. Madison*

In a three-man race for the presidency in 1800, incumbent John Adams, a Federalist, was the clear loser.<sup>191</sup> Prior to leaving office, Adams made several last-minute appointments, some of which remained undelivered when he left office.<sup>192</sup> When President Jefferson, a Republican, took office, his administration refused to deliver any of the remaining commissions, including William Marbury's commission for a justice of the peace position.<sup>193</sup> However, believing that he had a right to the position, William Marbury, in concert with his Federalist allies, filed a writ of mandamus compelling Jefferson's secretary of state, James Madison, to deliver the commission.<sup>194</sup>

John Marshall, the chief justice of the Supreme Court, would hear the claim. Much could be written, and indeed has been written,<sup>195</sup> about this case, but most significant is Marshall's language on the relation between the Constitution and legislation.

It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives, there is no middle ground. *The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.* If the former part of the alternative be true, then the legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.<sup>196</sup>

Justice Marshall later writes that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>197</sup> And when a law conflicts with the Constitution, the Court must strike down such legislation.<sup>198</sup>

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<sup>191</sup> David Forte, *The True Story of Marbury v. Madison*, Nov. 24, 2003, [http://www.claremont.org/publications/crb/id.1183/article\\_detail.asp](http://www.claremont.org/publications/crb/id.1183/article_detail.asp).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 82 (1989).

<sup>195</sup> See generally *id.*; WILLIAM E. NELSON, *MARBURY V. MADISON* (2000); Matthew J. Franck, *Union, Constitutionalism, and the Judicial Defense of Rights: John Marshall*, in *HISTORY OF AMERICAN POLITICAL THOUGHT* 248 (Bryan-Paul Frost & Jeffrey Sikkenga eds., 2003).

<sup>196</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

<sup>197</sup> *Id.*

<sup>198</sup> See *id.* at 178.

D. *Consequences of Judicial Review*

*Marbury* was controversial in 1803, and it continues to be controversial today. Because the U.S. Constitution is the “supreme Law of the Land”<sup>199</sup> and because courts determine what laws actually say, the will of the people, as manifested through legislation, may be deemed unconstitutional. Perhaps even more alarming, “any judge of any court, in any case, at any time” may declare a law unconstitutional.<sup>200</sup> Unlike the European model, where only one court may exercise constitutional jurisdiction, the United States implements an “all courts model,” which means that any court may exercise constitutional authority to strike down a statute.<sup>201</sup>

Judicial review, at its core, is undemocratic.<sup>202</sup> It might support individual rights and constitutional government, but it is fundamentally undemocratic because the will of a few may override the will of many.<sup>203</sup> Because judicial review gives judges substantial power to override the people’s will,<sup>204</sup> the people naturally care who fills judicial vacancies. This concern results in a politicized judicial selection process, regardless of how judges are selected.

The federal selection process has become increasingly divisive over the years. Special interests have become increasingly involved, and candidates are often supported or opposed based solely on results of decisions, rather than judicial capability or the legal reason that informs the decisions.<sup>205</sup> Nomination of Supreme Court justices epitomizes this partisan

<sup>199</sup> U.S. Const. art. VI, cl. 2.

<sup>200</sup> GOVERNING WITH JUDGES, *supra* note 81, at 32 (citation omitted). This is not to suggest that courts use this power recklessly. Judicial doctrines such as act of state or political question are designed to avoid these disputes when possible. *See id.*; *see also supra* note 163 (citing cases involving the doctrines of Article III standing, ripeness, and mootness).

<sup>201</sup> *See Tate, supra* note 87, at 7.

<sup>202</sup> This, of course, does not necessarily undermine the validity of judicial review. As discussed in Curran, *supra* note 148, legislative supremacy, based solely on majority rule, poses a grave threat to the rights of the minority. Nonetheless, judicial review runs contrary to purely democratic values.

<sup>203</sup> The common law tradition can be thought of as similar to a pyramid, with the Supreme Court sitting on top. The general rule is that every case or controversy is subject to the Supreme Court’s final authority, which means a popularly-enacted law might be invalidated by the will of nine, or as few as five, justices. *See MERRYMAN, supra* note 25, at 85.

<sup>204</sup> Judicial review has important implications on the legislative process. Sometimes decisions are made with judges looking over the legislators’ shoulders, while they know the judge could overturn it. *See Tate, supra* note 87, at 3.

<sup>205</sup> *See generally* Norman Dorsen, *The Selection of U.S. Supreme Court Justices*, 4 J. INT’L CONST. L. 652, 655–57 (2006) (describing a nominee’s ideology as an “important basis for appointment”). For a specific example, see Jason Eric Sharp, *Constitutional Law—Separation of Powers—Restoring the Constitutional Formula to the Federal Judicial Appointment Process: Taking the Vice out of “Advice and Consent,”* 26 U. ARK. LITTLE ROCK L. REV. 747, 747–49 (2004) (detailing the confirmation process for Judge Leon Holmes).

tension, as President Bush's nominations of John Roberts, Harriet Miers, and Samuel Alito indicate.<sup>206</sup>

State level selection processes are equally divisive.<sup>207</sup> Although virtually every state has its own unique method or combination of methods for selecting judges, almost all of them are hotly debated. In the laboratories of democracy<sup>208</sup> throughout the U.S., no state has found the solution for the problem.

While politicians battle fiercely over federal appointments, particularly to the Supreme Court, state courts conduct ninety-eight percent of the nation's legal business and face increasingly politicized election processes.<sup>209</sup> Empirical evidence documents the rising stakes. In 1995–1996, the average state supreme court candidate spent \$260,000; in 1997–1998, the average candidate spent \$340,000; and in 1999–2000, the average candidate spent \$431,000.<sup>210</sup>

With each dollar spent on judicial campaigns, the distinction between politician and judge is becoming less and less visible. Indeed, the majority of Americans distrust the popular election of judges, but at the same time, they prefer to maintain the status quo.<sup>211</sup>

#### V. CONSTITUTIONAL COURTS IN A COMPARATIVE PERSPECTIVE

The reality facing both Europeans and Americans is that Constitutional Judges have an increasing role in making policy decisions. Each legal system recognizes broad, fundamental rights, and the judiciary is charged with developing these notions of justice. The civil law notion of the bureaucratic judge no longer prevails, at least on constitutional courts, so both the European and American systems share a vision of the judicial role: one who possesses judicial intelligence, practical wisdom, and a sense of duty to-

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<sup>206</sup> See *supra* notes 2–4 and accompanying text.

<sup>207</sup> See A.B.A., JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY, at i (2003) [hereinafter JUSTICE IN JEOPARDY], available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> (“[T]he escalating partisanship and corrosive effects of excessive money in judicial campaigns, coupled with changes in society at large and the courts themselves, have served to create an environment that places our system of justice, administered by independent and impartial judges, at risk.”).

<sup>208</sup> See generally *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (noting the States’ prerogative to “try novel social and economic experiments”).

<sup>209</sup> See JUSTICE IN JEOPARDY, *supra* note 207, at xiii.

<sup>210</sup> *Id.* at 22.

<sup>211</sup> See *Good Judge*, *supra* note 94, at 442; see also Dimino, *supra* note 72 (arguing that voter participation in judicial elections is a social good because it “promotes popular sovereignty”).

wards the law. The similarities between the two systems enable comparative analysis that would not have been worthwhile several decades ago.<sup>212</sup>

#### A. *Expanding Definitions of Rights*

The substantive chasm that previously divided European and American constitutionalism is quickly narrowing. European nations have constitutionalized not only traditional, liberal rights, such as freedom of speech, equality under the law, and due process, but also more expansive rights to employment, education, and leisure.<sup>213</sup> Therefore, the new constitutionalism in Europe seeks not only to guarantee basic rights, but to expand upon them as well.<sup>214</sup>

Consequently, just as Americans on both sides of the partisan aisle criticize "activist" judges,<sup>215</sup> European constitutional courts have become "super-legislators."<sup>216</sup> Clearly, Europe has not experienced the constitutional conflicts that America has.<sup>217</sup> However, when one considers the broad set of rights protected in European constitutions,<sup>218</sup> this stability will be short-lived. Because the constitutional courts are charged with protecting these rights and because of the unavoidable "interplay of law and politics,"<sup>219</sup> Europeans can no longer rely on the civil law notion that judges merely apply legislation enacted by the parliament.

Thus, in both Europe and the United States, the courts' legitimacy rests in giving persuasive legal justifications for their holdings.<sup>220</sup> As the traditional separation of powers doctrine in both systems continues to blur,<sup>221</sup> constitutional courts must prove that they are worthy of the power bestowed upon them.

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<sup>212</sup> See Ferejohn & Pasquino, *supra* note 126, at 1681 ("On the substantive level there is every reason to emphasize similarities rather than differences, but the institutional chasm remains.").

<sup>213</sup> *Constitutional Courts*, *supra* note 86, at 84.

<sup>214</sup> MERRYMAN, *supra* note 25, at 156–57.

<sup>215</sup> Gewirtz & Golder, *supra* note 10.

<sup>216</sup> See *Constitutional Courts*, *supra* note 86, at 82.

<sup>217</sup> William E. Forbath & Lawrence Sager, *Comparative Avenues in Constitutional Law: An Introduction*, 82 TEX. L. REV. 1653, 1654 (2004) ("European judges engage in almost no public conflicts; they have no ideologically marked public identities (no Justice Scalias or Justice Brennans); and no European politicians run for office promising to appoint certain kinds of judges to the constitutional bench.").

<sup>218</sup> See generally *infra* Appendix.

<sup>219</sup> See Tate, *supra* note 87, at 3 (quoting H.W. EHRMANN, *COMPARATIVE LEGAL CULTURES* (1976)).

<sup>220</sup> See Ferejohn & Pasquino, *supra* note 126, at 1680–81.

<sup>221</sup> See *Europe Rejected American Review*, *supra* note 12, at 2771–72.

### B. *Judges as Policymakers*

America has grappled with judicial selection and the concept of judicial review for over two hundred years. By recognizing unprecedented individual rights, America sparked a fundamental “intellectual revolution” in regards to long-established notions of citizen-state relations,<sup>222</sup> and has valuable experience as a result. As judicial review becomes more prominent in European constitutional law, those systems should draw from the American experience.

The role of government is to secure the rights of the people.<sup>223</sup> And the role of the courts is to ensure that the government does not infringe upon those rights, as recognized in the Constitution. Considering this broad power, some suggest that a judicial nominee’s ideology should take center stage in the selection process.<sup>224</sup> As America continues to answer these questions, Europe needs to keep watch, for they undoubtedly will face similar problems in the future.

As the civil law tradition enters a “new and dynamic stage of its development,”<sup>225</sup> it must recognize the similarities, rather than the differences, with the common law tradition. History has shown that democratic societies place their faith in judicial review, believing it to be a “bulwark against authoritarianism.”<sup>226</sup> Consequently, Europeans may no longer view judges as mere civil servants. Instead, they must recognize constitutional judges as important players in public policy debates. They should be prepared for increasingly volatile judicial selection processes, similar to those experienced in the United States.<sup>227</sup>

### C. *The Difficulty in Selection*

Thus far, Europe has avoided many of the difficulties America faces in judicial selection. While implementing constitutional courts over the last several decades, political pressures have not forced European countries to

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<sup>222</sup> See MERRYMAN, *supra* note 25, at 14–15.

<sup>223</sup> See DECLARATION, *supra* note 67, at para. 2.

<sup>224</sup> See Marshall, *supra* note 22, at 534 (citing Charles E. Schumer, *Judging by Ideology*, N.Y. TIMES, June 26, 2001, at A19).

<sup>225</sup> MERRYMAN, *supra* note 25, at 158.

<sup>226</sup> See Tate, *supra* note 87, at 8 (noting the 1987 Phillipine constitution’s “expansive grant[] of judicial review authority”).

<sup>227</sup> See Marshall, *supra* note 22, at 533–34. Although this Note does not address the European Union specifically, the EU could face interesting developments. By implementing a supranational constitution between many sovereign nations, these same issues could arise on a much larger scale. See GOVERNING WITH JUDGES, *supra* note 81, at 1; see also Michel Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 INT’L. J. CONST. L. 618 (2006).



grapple with the basic problems of selection. However, in light of increasing similarities between the two systems, this tranquility will not continue indefinitely.

No serious rival to the new constitutionalism exists in Europe today.<sup>228</sup> By focusing on abstract, rather than concrete, review, constitutional courts have an even more active role in the legislative process than their American counterpart.<sup>229</sup> Therefore, Europe's ability to avoid extremely politicized selection processes and heated debate surrounding judicial review is not necessarily based on the courts' avoiding public policy disputes.

One could argue that Europe's success in this area stems from an entirely different approach to judicial selection. U.S. Supreme Court justices, and indeed all federal judges, sit during a term of "good behavior," which almost always ensures life tenure. Conversely, the European nations appoint constitutional judges for fixed, nonrenewable terms.<sup>230</sup> Many nations also use supermajoritarian appointment procedures,<sup>231</sup> which is more likely to satisfy the consensus.<sup>232</sup>

However, American history shows that neither popular elections, nor appointments, nor a compromise between the two provide an absolute answer. Longer terms provide more independence, but less accountability. Popular elections provide more accountability, but less independence. Attempting to find a middle ground, while solving some of these problems, does not solve them all. Indeed, the fact that the United States, throughout its history has tried many different variations shows that no single formula solves the problem.<sup>233</sup>

## VI. CONCLUSION

The traditional distinction between civil and common law systems continues to erode, and Europe should not turn a blind eye to what could be a preview of future disputes in their systems. Constitutional democracies are established upon rights, and the courts must protect those rights from governmental actions or legislation. For better or for worse, judges are thrust into the realm of policy determinations because of this.

The twentieth century taught the world that democracies without limits are as dangerous as a world without democracies. Where majority will remains unchecked, the results can be—and indeed have been—

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<sup>228</sup> SWEET, *supra* note 81, at 37.

<sup>229</sup> See Tate, *supra* note 87, at 5.

<sup>230</sup> See Ferejohn & Pasquino, *supra* note 126, at 1677.

<sup>231</sup> See *id.* at 1678.

<sup>232</sup> Forbath & Sager, *supra* note 217, at 1654.

<sup>233</sup> See *supra* notes 54–79 and accompanying text.

disastrous. By implementing constitutional courts, legal systems have a powerful tool against these dangers.

Yet these courts do not come without controversy. Constitutional judges have substantial authority to make important policy determinations, and people desire judges who live up to that calling. These judges must be exceedingly intelligent, practically wise, and unflinchingly devoted to the law.

The American experience has shown that no perfect system exists. Neither popular election nor appointments nor a compromise between the two satisfy the entire citizenry. However, the focus must be on construing selection systems in such a way as to achieve the judiciary's basic functions. To that end, Europe must evaluate its current methods in light of the American experience.

#### APPENDIX

##### *Rights and Responsibilities in European Constitutions*

[This chart is adapted from Table 2.1 in ALEC STONE SWEET, *GOVERNING WITH JUDGES* 42 (2001). "X" denotes that the right, freedom, or duty is expressly provided for in one or more constitutional provisions. "Y" denotes that the right, freedom, or duty exists as a result of a constitutional court's decision. Where neither X nor Y appear, that country's constitutional law does not provide for the corresponding right, freedom or duty.]

<i>Individual Right/Freedom</i>	France	Germany	Italy	Spain
Human Dignity		X		
Security	X		X	X
Privacy	Y	X	X	X
Personal Honor		X		X
Freely Develop One's Personality	X	X		X
Adequate Health Care	X		X	
Private Property	X	X	X	X
Inheritance		X	X	X
Private Enterprise	Y	X	X	X
Work	X	X	X	X
Choose Occupation		X	X	X
Adequate Pay			X	X
Adequate Housing			X	X
Equal Pay for Men/Women			X	
Form/Join Unions	X	X	X	X
Workers Participate in Management	X		X	
Strike	X	X	X	X
Unemployment Compensation	X		X	X
Pensions	X		X	X
Vocational Training			X	X
Leisure/Vacations	X		X	X
Rehabilitation While Incarcerated			X	X
Social Security Benefits While Incarcerated				X
Death Penalty Constitutionally Abolished		X	X	X

<i>Duties of the States</i>	France	Germany	Italy	Spain
Guarantee of Media Pluralism	X	Y	Y	X
Protect Family and Children	X	X	X	X
Facilitate Social/Economic Progress			X	X
Regulate Property Rights in Public Good			X	
Provide Equitable Distribution of Resources				X
Provide Public Health Care	X		X	X
Pursue Full Employment				X
Provide Unemployment Compensation	X		X	X
Guarantee Safe Working Conditions			X	X
Guarantee Leisure/Vacation Time	X		X	X
Protect the Environment			X	X
Protect Linguistic Minorities			X	
Nationalize Industries	X			