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Global Judicial Transparency Norms: A Peek Behind the Robes in a Whole New World – A Look at Global “Democratizing” Trends in Judicial Opinion-Issuing Practices

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**GLOBAL JUDICIAL TRANSPARENCY NORMS: A
PEEK BEHIND
THE ROBES IN A WHOLE NEW WORLD—
A LOOK AT GLOBAL “DEMOCRATIZING”
TRENDS IN JUDICIAL OPINION-ISSUING
PRACTICES**

J. LYN ENTRIKIN*

The emergence of global judicial relations is rooted in the pluralism of multiple legal systems, but driven by the expression of a deeper common identity. Dialogue is prized over uniformity; debate and reasoned divergence over adherence. So it must be, because global legal authority, except in [limited] areas . . . does not exist. A global community of courts . . . is a more realistic and desirable goal.

Anne-Marie Slaughter, *A Global
Community of Courts*, 44 HARV.
INT’L L.J. 191, 219 (2003).

ABSTRACT

Global developments over the last two decades have debunked the traditional understanding that separate opinions are idiosyncratic of courts in nations following the common law tradition. History reflects that judicial opinion-issuing practices have evolved around the world, adapting to the increasing globalization of legal systems. And recent research confirms that most international and supranational tribunals, even those headquartered in continental Europe, expressly permit individual judges to issue separate opinions, although in some courts various internal norms and customs operate to discourage the practice. In addition, the majority of European national constitutional courts now permit individual judges to publish separate opinions, and judicial members of many “ordinary” supreme courts may do so as well.

The United States Supreme Court is known globally for its justices’ regular practice of issuing separate opinions, and some international scholars hold up the Court as a shining example of the common law

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tradition of transparency. Yet even in the United States, few if any formal norms govern the Supreme Court's opinion-issuing practices, which have also evolved quite significantly, if incrementally, over time. Without any formal constraints whatsoever, a time might come when a bare majority of the Court could choose secrecy over transparency in the blink of an eye. Yet the many United States scholars who have long championed the dissenting opinion, and who urge that tradition on other sovereigns, generally overlook the absence of formal norms that protect federal courts' judicial opinion-issuing practices against change.

A few scholars have advanced preliminary theories that seek to explain institutional variations in opinion-issuing practices, but those theories are narrow in scope and warrant considerably more testing and refinement. A predictive model has little value unless it can be generalized beyond a small group of international and supranational courts. While theoretical models hold promise, more scholarly work is warranted to better conceptualize the competing "judicial values" that influence the practices of national and subnational multi-member courts. Scholarly research is also needed to identify the reasons for individual judicial choices about disclosing votes and publishing separate opinions.

The remarkable contemporary global interest in the opinion-issuing practices of national, supranational, and international tribunals reflects our expanding vision of the rule of law and each sovereign's role in that new world order. In our increasingly global, interconnected legal community, should judicial tribunals speak with one institutional voice? Or should a cacophony of individual judges communicate judgments, each writing seriatim? The polarized views of many scholars who advocate for and against separate opinions disregard legitimate differences in the underlying norms and values that inform judicial practices. There is no clear, "one-size-fits-all" answer. Much more comparative scholarly work remains to be done. But the global trend is clearly in favor of "democratizing" justice by defrocking the myth of judicial consensus and unanimity.

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I. INTRODUCTION

When a multi-member collegial court renders a decision, does it speak as a single institutional entity, or as a group of individual judicial officers?¹ How and why do global courts vary in the institutional style of issuing opinions? Why do some courts write lengthy opinions giving detailed rationales, while others write short, cursory opinions with little explanation?² What are the policy reasons for global variations in judicial opinion-issuing practices and other measures of transparency? What norms and values do global courts appear to share, and what are the points of difference? How are these global practices evolving, and why? Finally, what do judicial opinion-issuing practices and transparency norms reflect about each court's institutional role in its own legal culture and its global

1 William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 432 (1986).

The Court is something of a paradox—it is at once the whole and its constituent parts. The very words "the Court" mean simultaneously the entity and its members. Generally, critics of dissent advocate the primacy of the unit over its members and argue that the Court is most "legitimate," most true to its intended role, when it speaks with a single voice. Individual justices are urged to yield their views to the paramount need for unity. It is true that unanimity underscores the gravity of a constitutional imperative But, unanimity is not in itself a judicial virtue.

Id.; see Claire L'Heureux-Dube, *The Dissenting Opinion: Voice of the Future?*, 38 OSGOODE HALL L. J. 495, 495-96 (2000) ("Courts . . . may speak in unison or in a plurality of voices: the tradition of dissent in the courts of common law countries has long allowed for a certain measure of polyphony in the voices of the law."); Arthur J. Jacobson, *Publishing Dissent*, 62 WASH. & LEE L. REV. 1607, 1632 (2005) ("Rather than oracles of law bearing legal truth to a feckless mass, common law judges are participants with citizens in an ongoing struggle over plural visions of justice. . . . The principle of [judicial] decision is and is seen to be no different than the principle of decision in the political branches of government."); see also Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 803 (1982) (distinguishing "criticism of the Court as an institution from criticism of the foibles of particular Justices"); Adrian Vermuele, *The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 555 (2005) (discussing the "fallacy of division," which attributes the interpretive basis for collective decisions to a group's individual members; "[j]udges vote on cases within a collective judicial bureaucracy that, at appellate levels, always sits on merits cases in multi-judge panels."); *id.* at 584 (concluding that arguments and reasoning that assume the feasibility of judicial coordination on a particular interpretive approach "commit the fallacy of division").

2 One author has described two distinct styles of judicial opinions that co-exist in European countries. The more traditional of the two, characteristic of courts in France and Italy, issues relatively short, terse, syllogistic decisions in a predictable pattern that focuses on citing relevant legal authorities. The other, followed by courts in Germany and Spain, more closely resembles the traditional practice of courts in common law countries: more comprehensive opinions in what might be called an almost "literary" and "more openly argumentative" style. ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 145 (2000).

influence on other tribunals?³ These are the questions this article aims to address.

The article's focus is on global variations in the transparency of judicial deliberation processes and outcomes, including voting patterns⁴ and opinions (sometimes known as "judgments" in European parlance) that reflect the results of judicial decision-making. First, the article offers some historical background on United States courts, generally understood globally as among the most transparent of judicial systems.⁵ Second, the article explores the wide range of global norms that govern how courts communicate decision-making outcomes, including voting records, consensus or majority opinions, and separate opinions.⁶ Third, the article considers some of the value-based policy justifications for the many

3 See, e.g., ELAINE MAK, JUDICIAL DECISION-MAKING IN A GLOBALISED WORLD: A COMPARATIVE ANALYSIS OF THE CHANGING PRACTICES OF WESTERN HIGHEST COURTS 2 (2013) (noting the trend in favor of "judicial internationalisation," meaning the increased interaction between judges from different jurisdictions around the world"); see also Henrik Litleré Bentsen, *Court Leadership, Agenda Transformation, and Judicial Dissent: A European Case of a "Mysterious Demise of Consensual Norms,"* 6 J.L. & CTS. 189, 210 (2018) (observing that as courts' and judges' political role has expanded, and they exercise broader "discretion to decide . . . the constitutional and individual rights of European citizens, [t]he conditions have thus been set for increased disagreement over precedent, legal development, and the proper role of courts and justices in democracies throughout [Europe]") (citation omitted).

4 Easterbrook, *supra* note 1, at 814–15 (noting that deciding cases by majority vote influences a court's capacity to yield "consistent, principled decisions," and explaining that "voting systems are subject to many problems"). Judge Easterbrook posits, for example, that "[m]ajority voting plus stare decisis is . . . a formula under which the Court may produce any outcome favored by any number of Justices, however small, even though a majority of Justices would reject that rule if they could [vote individually] on the basis of first principles." *Id.* at 819. Two Canadian scholars have recently published the results of an empirical study of the many variables that influence judicial voting in constitutional courts. Benjamin Alarie & Andrew James Green, *Quantitative Analysis of Judicial Voting* (Dec. 19, 2017) (unpublished manuscript), <https://ssrn.com/abstract=3090789>. They conclude by noting the need for more comparative work on the issue. *Id.* at 4, 33–34.

5 See, e.g., Benjamin Bricker, *Breaking the Principle of Secrecy: An Examination of Judicial Dissent in the European Constitutional Courts,* 39 L. & POL'Y 170, 172 (2017) (noting that United States courts have been the locus of most contemporary research on dissenting practices, but "relatively little is known about the practice of dissent in other environments"); Jacobson, *supra* note 1, at 1630 (referring to "American exceptionalism in the practice of dissent [that] has . . . enormous jurisprudential and political implications"); Katalin Kelemen, *Dissenting Opinions in Constitutional Courts,* 14 GERMAN L.J. 1345, 1345 (2013) (noting extensive literature on dissenting practices in the United States and the lack of comprehensive empirical research on European practices).

6 Many variations in global court opinion-issuing practices are no doubt attributable to legal history, cultural tradition, and religious influences. For a helpful overview of the world's primary legal systems and how they differ, see G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING 3–8 & tbl. 1.1 (6th ed. 2012). For a more philosophical perspective on legal systems as a feature of modern legal education, see H. Patrick Glenn, *Doin' the Transsystemic: Legal Systems and Legal Traditions,* 50 MCGILL L.J. 863, 893 (2005) ("[T]he concept of a legal system is . . . a particular exemplification of tradition. [T]raditionality is to be found in almost all legal systems . . . In a larger sense, . . . a legal system is a tradition and can be only understood, like a film, as part of a larger story."). See generally LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA (Herbert M. Kritzer ed., 2002).

differences in global courts' opinion-issuing norms and practices. The discussion underscores the need for further theoretical and conceptual research that distinguishes between norms, values, and contextual factors to better understand how these interdependent variables influence dissenting practices and other transparency outcomes.⁷ Finally, the article concludes with some observations about the trend favoring transparency in the judicial decision-making process, in particular transparency's "democratizing" influence on the global community of courts.

For purposes of this article, the term "global" court includes both national and "supranational" tribunals: national supreme ("apex"⁸) courts with "diffuse" appellate jurisdiction;⁹ national constitutional courts with specialized jurisdiction; national courts of cassation, with more traditional appellate jurisdiction but excluding constitutional issues; supranational tribunals with jurisdiction over national courts of signatories to the relevant convention or treaty; and international tribunals, which apply international law. All are multi-member tribunals (sometimes known as "collegial" courts¹⁰) with clearly defined institutional jurisdiction. In every instance, judgments are issued on behalf of the court, and those decisions

7 For jurisdictions that publicize voting records and judges' separate opinions, the reasons why dissenting rates vary over time (a fascinating topic in its own right) is beyond the scope of this article. Dissenting (or concurring) rates often ebb and flow over time for a particular court (or group of courts). Several authors have recently published studies testing hypotheses for variations in dissenting rates in multi-member courts in a single jurisdiction. *E.g.*, Bentsen, *supra* note 3 (empirical analysis of Norway Supreme Court's dissenting and concurring rates from 1987 to 2014); Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011) (empirical analysis of dissenting rates in U.S. Supreme Court and federal appellate courts in selected years spanning several decades).

Bentsen's review of the current literature yielded three primary hypotheses that explain a court's changing dissent rates over time: "(1) the idiosyncrasies and leadership of the chief justice; (2) changes in the demographic and ideological composition of the court, including changes to the procedures for appointing justices; and (3) the development of stricter docket control followed by the treatment of more principled and contentious legal issues." Bentsen, *supra* note 3, at 191.

8 Bricker, *supra* note 5, at 172 (referring to European apex courts).

9 "[A] diffuse rule of jurisdiction over constitutional matters and judicial review . . . means that all courts within the system have the power to strike down legislation that is found to violate the Constitution." Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971, 986 (2010). In the United States, the diffuse structure of constitutional review means that lower courts have the authority to strike down state and federal legislation, a decision that stands unless a higher court reviews that decision and reverses. *Id.* at 986-87.

10 *E.g.*, Dimitri Landa & Jeffrey R. Lax, *Legal Doctrine on Collegial Courts*, 71 J. POL. 946, 946 (2009) (using the term "collegial" to refer to multimember courts; observing that traditional theories of adjudication are incomplete with respect to "the collegial nature of most appellate courts"); *see also* Easterbrook, *supra* note 1, at 832 (reasoning that while consistency might be expected from individual judges, it is unrealistic and utopian to call for unity and consistency from a multi-member court).

represent the outcome of internal group deliberations.

The details about each court's internal deliberation process are generally unknowable unless a court publishes its internal operating procedures, or a member of a particular tribunal publishes anecdotes from personal experience.¹¹ As a general rule, each tribunal's deliberations occur in secret, a norm that is shared across jurisdictions despite the many other variations in transparency addressed in this article.¹²

II. THE AMERICAN EXPERIENCE: ORIGINS OF PUBLISHED COURT OPINIONS (INCLUDING DISSENTS)

The author's interest in comparing the various ways global tribunals communicate decisions began while studying the historical variations in United States appellate court practices, both state and federal.¹³ In the early years of the republic, Supreme Court opinions resolving substantive legal disputes were issued orally and seriatim from the bench, consistent with the practice of English common law courts of the time.¹⁴ Each justice,

11 *E.g.*, L'Heureux-Dube, *supra* note 1, at 500-01 (describing Canada Supreme Court's internal deliberation process); *see also* Dieter Grimm, *Some Remarks on the Use of Dissenting Opinions in Continental Europe*, in GLOBAL CONSTITUTIONALISM: JUDICIAL DISSENT (2008) (relating personal experiences as a former member of the German Constitutional Court), http://www.irpa.eu/wp-content/uploads/2011/06/3_Come-ha-avuto-origine-il-dissent-nelle-corti-inglesi-e-americane-e-come-si-evoluto-nella-prassi-della-Corte-suprema-e-nella-corte-tedesca_2008-I-1-73.pdf; *see generally* GLOBAL CONSTITUTIONALISM: JUDICIAL DISSENT (2008) [hereinafter JUDICIAL DISSENT], http://www.irpa.eu/wp-content/uploads/2011/06/3_Come-ha-avuto-origine-il-dissent-nelle-corti-inglesi-e-americane-e-come-si-evoluto-nella-prassi-della-Corte-suprema-e-nella-corte-tedesca_2008-I-1-73.pdf; Freda M. Steel, *The Role of Dissents in Appellate Judging*, 67 U. TORONTO L.J. 1 (2017) (writing from personal experience as judge on the Manitoba Court of Appeal).

12 *See, e.g.*, Bricker, *supra* note 5, at 170 (referring to the "tradition of secrecy" among European courts); Niels F. van Manen, *The Secret of the Court in the Netherlands*, 24 SEATTLE UNIV. L. REV. 569, 570-71 & n.6 (2000) (describing Netherlands' "formal-legal 'secret of the court,'" the violation of which is a criminal offense). One Spanish political science scholar has observed that the principle of deliberative secrecy is particularly sacrosanct among European courts:

European courts meet in closed sessions and no record of the deliberation is made public. Even where dissenting opinions are permitted, the deliberative moment remains an essentially secret affair. In that respect – but in that respect alone – to say that European courts are "black boxes" . . . is not entirely inaccurate. Any account of judicial decision-making in terms of collegial interactions and internal strategies is bound to remain speculative.

Arthur Dyeve, *Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour*, 2 EUR. POL. SCI. REV. 297, 303 (2010) (citation omitted), <http://www.mpil.de/files/pdf2/dyevejudicialbehaviour.pdf>.

13 *See* J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201, 202 (2017).

14 *E.g.*, Karl M. Zobel, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 191-92 (1959); *see* Andrew Lynch, Introduction—What Makes a Dissent 'Great?', in GREAT AUSTRALIAN DISSENTS at 1, 2 (Andrew Lynch ed., 2016) ("The precise origins of the practice of judicial dissent are unclear."). *But see* Chris Young, *The History of Judicial Dissent in England: What Relevance Does It Have for Modern Common Law Legal Systems?*, 32 AUSTL. B. REV. 96, 110 (2009). Young argues that English judges have always had the opportunity to express disagreement, but until the sixteenth century, "the usual consequence . . . was judicial

one by one, announced an individual opinion on the matter, and when published, all were reported together along with the name of each author, followed by a brief order reflecting the Court's collective judgment.¹⁵ The Court did not issue what we now know as majority and minority opinions until the first decade of the nineteenth century, and even then published separate opinions were highly unusual.¹⁶

The earliest decisions of the Court were not published in "official" reports.¹⁷ In fact, they were not necessarily even *written* opinions.¹⁸ As

indecision [in the absence of unanimity or consensus]." *Id.* While judicial decision-making during the Middle Ages sought consensus and unanimity, *id.* at 100, 104-05, by the end of the sixteenth century majority decisions were accepted as the price for securing a final decision, *id.* at 105 (citing VI SIR J. BAKER, OXFORD HISTORY OF THE LAWS OF ENGLAND 51 (2003)).

15 *E.g.*, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 220-85 (1796), <http://cdn.loc.gov/service/ll/usrep/usrep003/usrep003199/usrep003199.pdf> (original image, Library of Congress).

16 *See* *Zobell*, *supra* note 14, at 195 (citing the first substantial separate opinion in the Supreme Court, a concurrence authored by Justice William Johnson in *Huidekoper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1, 72 (1805) (including a lengthy footnote reprinting seriatim opinions of lower courts addressing the same issue)), <http://cdn.loc.gov/service/ll/usrep/usrep007/usrep007001/usrep007001.pdf> (original image, Library of Congress); *e.g.*, *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 405-09 (1792), <http://cdn.loc.gov/service/ll/usrep/usrep002/usrep002402b/usrep002402b.pdf> (original image, Library of Congress); *see also* M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 316-17 (2008). For a recent article addressing the value of concurring opinions in particular, *see* Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide and Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 877 (2018).

American scholars who favor the practice of issuing separate judicial opinions seldom acknowledge the single feature that virtually all global courts appear to have in common: a norm of secrecy as to the court's internal deliberations. *See supra* note 12 and accompanying text. Whether or not a jurisdiction's judges are authorized to issue separate opinions, and whether or not a particular court is authorized to disclose the individual members' votes, virtually all collegial courts expect and require secrecy regarding internal deliberations. *See, e.g.*, ROSA RAFFAELLI, DISSENTING OPINIONS IN THE SUPREME COURTS OF THE MEMBER STATES 8 (2012) (distinguishing secrecy of deliberations from norms allowing separate opinions). This feature is particularly salient for supranational and international tribunals whose judges, while presumably "independent," are expected to represent the interests of their respective home countries. *See id.* at 10 (positing that prohibiting separate opinions in international courts could protect individual judges' independence, while allowing separate opinions could facilitate perceptions that individual judges represent interests of appointing nations).

17 While the early Supreme Court followed the English common law courts' practice of issuing opinions seriatim from the bench, England had no established practice of publishing judicial opinions until much later. England published no "official" reports between 1537, when the last of the Yearbooks was published (of questionable accuracy themselves), and 1865. During the centuries in between, various private reporters published judicial opinions with varying degrees of credibility and accuracy. *See* Van Vechten Veeder, *The English Reports, 1292-1865*, 15 HARV. L. REV. 1, 3 (1901). Veeder decried the state of published English precedent before the mid-eighteenth century: "It is curious that while adherence to judicial precedent was unfailingly recognized [in England,] the preservation of such precedents should have been for centuries in so precarious a state; it is nevertheless a fact that the thoroughly reliable reporters prior to Lord Mansfield's time may be counted

mentioned earlier, the justices announced their opinions orally from the bench. Supreme Court opinions appeared in “reports,” as we know them today, only because private reporters attended Court on their own initiative and took notes based on each justice’s oral delivery of the opinions. Formally speaking, the Court “handed down” its decisions in the late eighteenth century consistent with the official records maintained by the Court’s clerk.¹⁹ Not until 1817 was the Court authorized for the first time to appoint its own official “reporter,”²⁰ whose duty it was to report the

upon the fingers of one hand.” *Id.* at 2.

18 See, e.g., *Houston v. Williams*, 13 Cal. 24, 26 (1859) (“The practice of giving the reasons in writing for judgments, has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the Judges, and taken down by the Reporters in short hand.” (citing 1 BLACKSTONE 71)). “[T]he idea of preserving a written record of the Court’s opinions was not a foregone conclusion at the time of the Nation’s founding. During the colonial period, the decisions of American courts were rarely published at all. In practice, lawyers relied on English reports or personal notebooks of local decisions.” Ryan Schwier, *William T. Otto: The U.S. Supreme Court’s First “Anonymous” Reporter, 1875-1883* (May 28, 2015), IND. LEGAL ARCHIVE J., <http://www.indianalegalarchive.com/journal/otto>.

19 The Judiciary Act of 1789 expressly authorized appointment of the Supreme Court clerk, who was directed “seasonably to record the decrees, judgments and determinations of the court of which he is clerk.” Pub. L. 1-20, 1 Stat. 73, § 7 (1789). The Act made no other provision for reporting the Court’s decisions. The first clerk was John Tucker of Boston, appointed February 3, 1790. See 5 U.S. (1 Cranch) xv (1803).

In an order dated August 8, 1791, Chief Justice John Jay announced that the Court would “consider the practice of the courts of the king’s bench, and of chancery, in England, as affording outlines for the practice of the court; and that [the Court] will, from time to time, make such alterations therein as circumstances may render necessary.” SUP. CT. R. 7, 2 U.S. (2 Dall.) 413-14 (1792); see also 5 U.S. (1 Cranch) xvi (1803) (reprinting Rule 7); *California v. S. Pac. Co.*, 157 U.S. 229, 248-49 (1894) (summarizing evolution of “original general rule 7, adopted August 8, 1791”); ROBERT DESTY, A MANUAL OF PRACTICE IN THE COURTS OF THE UNITED STATES 246 (2d. ed. 1876) (citing history of the rule, by then renumbered to Sup. Ct. R. 3). Not until 1834 did the Court adopt a rule providing that justices’ opinions were to be “filed” with the clerk (presumably in writing) immediately after they were announced from the bench. Gerald T. Dunne, *Early Court Reporters: Proprietors—Sometimes Predators*, in SUPREME COURT HISTORICAL SOCIETY YEARBOOK 61, 62 (William F. Swindler ed., 1976) (citing 33 U.S. (8 Pet.) vii (1834)); see Alfons J. Beitzinger, *Chief Justice Taney and the Publication of Court Opinions*, 7 CATH. UNIV. L. REV. 32, 33 (1958) (referring to a Court rule that required justices’ written opinions to “follow immediately upon oral delivery”); Peter Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age*, 53 VILLANOVA L. REV. 1, 10 (2008) (noting that an 1834 order “marked the end of the [Court’s] practice of rendering oral opinions and regularized the flow of written decisions to the reporter”) (citing ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 64 (1990)).

20 SUP. CT. R. 41 (duty of Reporter of Decisions to prepare opinions for publication); Richard J. Lazarus, *The (Non)finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 548 (2014) (citing An Act to Provide for Reports of the Decisions of the Supreme Court, ch. 63, 3 Stat. 376 (1817)); see TODD C. PEPPERS, COURTIERIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 38-39 (2006). In its current form Rule 41 provides,

Opinions of the Court will be released by the Clerk immediately upon their announcement from the bench, or as the Court otherwise directs. Thereafter, the Clerk will cause the opinions to be issued in slip form, and the Reporter of Decisions will prepare them for publication in the preliminary prints and bound volumes of the United States Reports.

SUP. CT. R. 41. The most recent version of the Supreme Court Rules took effect November 13, 2017. See SUPREME COURT OF THE U.S., RULES OF THE SUPREME COURT OF THE UNITED STATES (2017),

Court's decisions in written form within six months after they were delivered.²¹ Until then, reporters were private members of the bar who literally took independent notes of the justices' orally announced decisions and published them for profit.²² Occasionally individual justices provided private reporters access to the justices' own notes of decision, which were incorporated into the unofficial reports of the Court's decisions at the sole discretion of the reporters themselves.²³

Most American scholars simply assume that opinions issued by the

<https://www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf>.

21 ALFRED CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 10 (4th ed. 1864) (citing An Act to Provide for Reports of Decisions of the Supreme Court, Pub. L. 14-63, 3 Stat. 376 (1817) (requiring reporter to publish decisions "within six months after such decisions shall be made")). The first "official" reporter of decisions was Henry Wheaton, who served in that capacity from 1817 to 1827 after he was unofficially appointed in 1816. CATHERINE L. FISK, WORKING KNOWLEDGE: EMPLOYEE INNOVATION AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800-1930, at 64 (2009).

Notably, the practice of reporting published opinions was not well entrenched until decades later. The Court's initial statutory authority for appointment of an official reporter was temporary; it did not become permanent until 1842. CONKLING, *supra*, at 10 (citing Pub. L. 27-264, 5 Stat. 545 (1842) (requiring reporter, as condition of receiving compensation, to publish decisions "within six months after the said decisions shall be made")). Before then, a series of enactments had extended the Court's authority to appoint a reporter for only three years at a time. *E.g.*, An Act to Provide for Reports of Decisions of the Supreme Court, Pub. L. 19-18, 4 Stat. 205 (Sess. II, 1827), <https://www.loc.gov/law/help/statutes-at-large/19th-congress/session-2/c19s2ch18.pdf> (requiring reporter to publish decisions "within six months after such decisions shall be made," § 1, and providing that the Act would remain in force "for three years, and no longer," § 3). Apparently, the Court's increasing caseload imposed significant time pressures on the official reporter's ability to carry out the statutory duties of the office. In 1911, Congress enacted legislation expressly requiring the Court's reporter to "cause the decisions of the Supreme Court to be printed and published within eight months after they are made." Pub. L. 61-475, § 225, 36 Stat. 1087, 1153 (1911) (codified as amended at 28 U.S.C. § 411(a) (2018)). In 1948, the statute was amended to eliminate the time limit entirely, instead providing that Supreme Court decisions must be "printed, bound, and distributed in the preliminary prints and bound volumes of the United States Reports as soon as practicable after rendition." 28 U.S.C. § 411(a); *see also* 28 U.S.C. § 673(c) (2018) ("The reporter shall, under the direction of the Court or the Chief Justice, prepare the decisions of the Court for publication in bound volumes and advance copies in pamphlet installments."). Not until 1922 did Congress provide full financial support for the reporter's salary, support staff, and expenses, including government publication of the Reports. *See* Pub. L. 67-267, 42 Stat. 816 (1922).

22 Lazarus, *supra* note 20, at 547 (noting that the Court's early reporters "were essentially self-appointed" and were not government officials). Henry Wheaton unsuccessfully sued his successors alleging copyright infringement after they had prepared condensed versions of Wheaton's reporters. The Supreme Court held, in its first copyright decision, that Wheaton had no common law copyright and could proceed only if he had complied with the conditions of the Copyright Act. *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834). While two justices dissented, the author of the Court's principal opinion took it upon himself to add the following: "It may be proper to remark that the [C]ourt are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this [C]ourt; and that the judges thereof cannot confer on any reporter any such right." *Id.*

23 *See* Lazarus, *supra* note 20, at 547-48.

United States Supreme Court have always been published. But in the early years, private reporters had total discretion whether to publish orally-delivered Supreme Court decisions.²⁴ A reporter's discretion included deciding which opinions to eliminate entirely from publication.²⁵ "Reporting" opinions was a proprietary enterprise, and for the Court's first quarter-century, the copyright was presumed to belong to the private reporter, whose sole remuneration amounted to royalties from sales of published reports carrying the reporter's name.²⁶

Even after 1817, when Congress first authorized the Court to appoint an official reporter, the Justices themselves generally did not issue written decisions. After announcing decisions orally, justices would provide the reporter with the notes they had used to announce their decisions from the bench; it was up to the reporter to craft a written decision consistent with the Court's oral pronouncements.²⁷

State appellate courts in the United States preceded the Supreme Court in requiring justices to produce written opinions, and states also issued the earliest volumes of published reports. Considerable scholarly debate has focused on whether Connecticut²⁸ or Pennsylvania²⁹ was the first state to

24 *Id.* at 548. Moreover, before 1970, in-chambers opinions authored by individual justices on such matters as applications for bail, stays, and injunctions (on which justices rule alone as assigned circuit representatives), were not included in the official *United States Reports*. See Bennett Boskey & Eugene Gressman, *The 1970 Changes in the Supreme Court's Rules*, 49 F.R.D. 679, 695 (1970); Ira Brad Matetsky, *The History of Publication of U.S. Supreme Court Justices' In-Chambers Opinions*, 6 J. OF L. 19, 31 (2016); see also James A. Thomson, *Inside the Supreme Court: A Sanctum Sanctorum? The Unpublished Opinions of the Rehnquist Court*, 66 MISS. L. J. 177, 207 (1996) (book review; noting that papers of justices are sometimes published privately, but only after they leave the Court). Prior to 1970, one-justice opinions in those matters were published exclusively by private reporters.

On a related issue pertaining to written opinions, the Court has been criticized for its practice of revising opinions after their official release but before "official" publication in the *United States Reports*. E.g., Lazarus, *supra* note 20, at 623-24 (criticizing Court's practices allowing opinion revisions after issuance and calling for improvements). *But cf.* Frank D. Wagner, *The Role of the Supreme Court Reporter in History*, 26 J. SUP. CT. HIST. 9, 10-14 (Mar. 2001) (explaining in detail the Court's internal editorial process that occurs from the date a slip opinion is issued until its "official" publication in the *United States Reports*), http://supremecourthistory.org/pub_journal_2001_vol_1.html.

25 Lazarus, *supra* note 20, at 548.

26 Schwier, *supra* note 18; see Lazarus, *supra* note 20, at 548 ("With no government salary, the Reporter's sole source of income for this work derived from the sale of published volumes.")

27 See Dunne, *supra* note 19, at 62 & n.10; Wagner, *supra* note 24, at 15; see also Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1223 (2007).

28 KURT X. METZMEIER, WRITING THE LEGAL RECORD: LAW REPORTERS IN NINETEENTH-CENTURY KENTUCKY 5 (2017) (citing Kirby as having already "shown the path" by publishing the "first volume of printed decisions of an American court" in 1789); WILLIAM D. POPKIN, EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES 184 (2007) (crediting Connecticut's Ephraim Kirby for publishing the first volume of unofficial state court reports in 1789).

29 A volume of Pennsylvania admiralty opinions was published in early 1789. Dunne, *supra* note 19, at 61, 62 & n.10.

publish reports of judicial opinions.³⁰ Most scholars give the nod to Connecticut, which issued its first volume of published reports in 1789, a few years after the state legislature had enacted a statute requiring the Supreme Court of Errors to issue written opinions, each signed by at least one of its justices.³¹

Unofficial reports of the United States Supreme Court were first published in 1790 by Alexander James *Dallas*, whose first volume ironically included only decisions issued by Pennsylvania courts dating back as early as 1754.³² His second, third, and fourth volumes included Pennsylvania cases and a few Federal Circuit opinions, as well as Supreme Court opinions.³³ Dallas was the first of several private reporters appointed by the Supreme Court. The first ninety volumes of the *United States Reports* spanning the years 1790 to 1875 were “nominative reporters,” meaning that they carried the names of the various reporters who had prepared them for publication.³⁴

In the twenty-first century, most Americans take for granted that appellate court opinions on the merits are virtually always issued in

30 Richard A. Danner, *More than Decisions: Reviews of American Law Reports in the Pre-West Era* 3-4 & n.14 (Duke Law Sch. Pub. Law & Legal Theory Series No. 2015-27, 2015), <http://dx.doi.org/10.2139/ssrn.2622299> (citing EPHRAIM KIRBY, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT (1789) and several other sources reflecting the scholarly debate); see also Daniel R. Coquillette, *First Flower—the Earliest American Law Reports and the Extraordinary Josiah Quincy Jr. (1744-1775)*, 30 SUFFOLK U. L. REV. 1, 2 n.3 (1996) (citing Francis Hopkinson's JUDGMENTS IN ADMIRALTY IN PENNSYLVANIA (1789) and various sources disputing whether Pennsylvania or Connecticut was first); Dunne, *supra* note 19, at 62 n.10 (citing WALLACE, THE COMMON LAW REPORTERS 471 n.2 (4th ed. 1882)).

31 See ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA 268 (New London, Timothy Green 1784).

Be it further Enacted by the Authority aforesaid, That it shall be the Duty of the Judges of the Superior Court, in all Matters of Law by them decided, . . . each one to give his Opinion *seriatim*, with the Reasons thereof, and the same reduce to Writing and subscribe; to be kept on File, that the Case may be fully reported, and if removed by Writ of Error, be carried Up with greater Advantage; and thereby a Foundation be laid for a more perfect and permanent System of common Law in this State. And it shall be the Duty of the Supreme Court of Error, to cause the Reasons of their Judgments to be committed to Writing, and signed by one of the Judges, and to be lodged in the Office of the Clerk of the Superior Court.

Id.

32 See 1 U.S. (1 Dall.) (1790); Wagner, *supra* note 24, at 14-15; see also Clarence Thomas & Frank Wagner, *Role of the Supreme Court Reporter*, C-SPAN (Nov. 16, 2000), <https://www.c-span.org/video/?160586-1/role-supreme-court-reporter> (video describing reporter's role and functions).

33 See 2 U.S. (2 Dall.); 3 U.S. (3 Dall.); 4 U.S. (4 Dall.).

34 Schwier, *supra* note 18; see *About this Collection*, LIBRARY OF CONGRESS, <https://www.loc.gov/collections/united-states-reports/about-this-collection/> (last visited Aug. 29, 2018).

writing,³⁵ and that they regularly include separate opinions authored by individual judges.³⁶ And these days, a unanimous opinion of the United States Supreme Court is so unusual as to be remarkable. State appellate and federal circuit appellate judges issue separate opinions less frequently, but the practice is certainly not uncommon, and individual judges' votes are typically disclosed to the public.³⁷ The practice of issuing a majority opinion together with separate opinions authored by individual judges has

35 See William H. Carpenter, *Courts of Last Resort*, 19 YALE L. J. 280, 290 (1910) ("The decisions of courts of last resort must, at least, according to our American notions, be in written form. This is done for the double purpose of insuring accuracy – for writing is a great aid to exactness – and also that the world may know the rule of law declared and applied."). But as noted earlier, United States Supreme Court justices, unlike some of their state counterparts, were not expected to file written opinions until 1834, when the Court itself first adopted an internal rule requiring opinions to be filed with the Clerk of the Court promptly after they were announced. See 33 U.S. (8 Pet.) vii (1834); see also Max Radin, *The Requirement of Written Opinions*, 18 CAL. L. REV. 486 (1930) (critiquing Cal. Const. art. VI, § 2 and several other state constitutional or statutory provisions requiring written appellate decisions, including reasons).

36 See, e.g., EDWARD MCWHINNEY, SUPREME COURTS & JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS & CONSTITUTIONAL REVIEW 37 (1986) ("The dissenting opinion has occupied a place of honour, in American jurisprudence, since the era of Holmes and Brandeis when their dissents . . . became, in effect, appeals to the future . . ."); Edward Dumbauld, *Dissenting Opinions in International Adjudication*, 90 U. PA. L. REV. 929, 929 (1942) ("To the Anglo-American lawyer, dissenting opinions are a familiar feature of the judicial process."); *id.* at 935 ("[I]t is very natural that we find dissenting opinions in English and American law, where the doctrine of stare decisis is in force."); see also Brennan, *supra* note 1, at 438 ("The right to dissent is one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births.")

Other nations with a common law judicial tradition have a similar perspective on the value of dissenting opinions. See, e.g., Michael D. Kirby, *Judicial Dissent – Common Law and Civil Law Traditions*, 123 L.Q. REV. 379, 379 (2006) (noting the degree of transparency characteristic of common law courts in disclosing disagreement); Julia Laffranque, *Dissenting Opinion and Judicial Independence*, 8 JURIDICA INT'L L. REV. 162, 164 (2003) ("In common law countries, the dissenting opinion became quickly a completely normal part of the decision-making process."), https://www.juridicainternational.eu/public/pdf/ji_2003_1_162.pdf; Joe McIntyre, *In Defence of Judicial Dissent*, 37 ADELAIDE L. REV. 431, 431 (2016) (explaining that the practice of issuing dissenting opinions is generally taken for granted in common law judicial systems).

37 The exception to this general rule is per curiam opinions, which courts occasionally issue to avoid disclosing the identity of the author. Even then, on rare occasions judges have appended separate opinions, which indirectly allow a careful reader to identify judges who voted with the majority. *E.g.*, *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam, with one concurring opinion by Chief Justice Rehnquist, joined by Justices Scalia and Thomas, articulating "additional grounds that require us to reverse"; and four individual dissenting opinions authored by Justices Stevens, Souter, Ginsburg, and Breyer). By process of elimination (but not because they were identified by name), the reader can of course conclude that Justices O'Connor and Kennedy alone supported the reasoning articulated in the per curiam opinion. The reason why neither claimed authorship remains a mystery. See Ed Telfeyan, *Recalling Bush v. Gore and Anthony Kennedy's Role in It*, MEALS FROM THE MARKETPLACE (Apr. 26, 2012), <http://mealsfromthemarketplace.com/2012/04/recalling-bush-v-gore-and-anthony-kennedy%E2%80%99s-role-in-it/> (speculating that Justice Kennedy wrote the per curiam opinion but did not want to be identified as the swing vote). Some have speculated that the Court's per curiam opinion was "actually written largely behind the scenes by [Justice Sandra Day] O'Connor and Justice Anthony Kennedy." Michael Kirkland, *Under the U.S. Supreme Court: O'Connor Regrets Bush v. Gore. So What?*, UPI (May 12, 2013), <https://www.upi.com/Under-the-US-Supreme-Court-OConnor-regrets-Bush-vs-Gore-So-what/59231368343800/>.

become well entrenched in American appellate courts, both state and federal.³⁸ The practicing bar and the legal academy no longer question the propriety of individual judges issuing separate judicial opinions, sometimes with lengthy written explanations appended, which are published along with the majority decision.³⁹

But it was not always that way. Chief Justice John Marshall famously abandoned the Court's early practice of issuing seriatim opinions in favor of issuing a single opinion "of the Court" under his own name.⁴⁰ The Chief Justice's stronghold on Court communications would soon yield to occasional dissent, first by Justice Washington in 1805 and later by others.⁴¹ Separate opinions gradually became increasingly common in the Marshall Court and later the Taney Court, although their authors generally delivered them reluctantly – almost apologetically, emphasizing the significance of the issue before the Court.⁴² As the stain of slavery could no longer be suppressed and the Civil War drew near, the nation's deep social, political, and economic divides were mirrored in the justices' nine seriatim opinions in *Dred Scott v. Sandford*.⁴³

At the end of the nineteenth century and continuing for two more decades, a significant controversy arose among the bench and even the general public regarding the practice of issuing separate concurring or dissenting opinions accompanying the Court's "majority" opinion.⁴⁴ A few

38 General acceptance of judicial dissents extends to most every nation with a common law heritage. See John Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, 20 OXFORD J. LEGAL STUD. 221, 221 (2000) ("The dissenting judgment is usually taken for granted as an integral feature of the common law."); Lynch, *supra* note 14, at 1 ("The delivery of dissenting opinions is such a familiar phenomenon of appellate court decision-making in common law systems as to often go unremarked."). But cf. RAFFAELLI, *supra* note 16, at 7 ("There is no sharp distinction between 'common law' and 'civil law' countries: in many 'civil law' countries, dissents may be published, while in some 'common law' countries they are either limited or forbidden."); Kirby, *supra* note 36, at 381 (acknowledging recent trends in civil law countries favoring individual judges' right to dissent).

39 An underexplored related issue pertains to separate opinions issued by members of United States administrative tribunals, which have far-reaching, varied jurisdiction in the United States. See Sharon B. Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541, 617 (2017) ("This preliminary assessment of administrative dissents and concurrences demonstrates that commission decision-making is more fractured than the standard account would indicate.").

40 Henderson, *supra* note 16, at 313.

41 See John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. UNIV. L. REV. 137, 146-47 & n.55 (1999).

42 See *id.*

43 60 U.S. 393 (1857). Each justice issued a separate opinion in the case.

44 See Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J.L. & HUMAN. 507, 508-09 (2012) (summarizing the thirty-year debate regarding the publication of dissenting opinions in courts of last resort); see, e.g., V.H. Roberts, *Dissenting Opinions*, 39 AM. L. REV. 23, 23-24 (1905) (defending dissenting opinions against

states even barred their appellate courts from issuing dissenting opinions for a time.⁴⁵ For example, two years after the United States Supreme Court decided *Plessy v. Ferguson*,⁴⁶ upholding the separate-but-equal doctrine, Louisiana amended its state constitution to deny its justices authority to publish dissenting opinions.⁴⁷ Pennsylvania limited publication of separate opinions by statute for several decades.⁴⁸ On occasion, state appellate courts have even refused to publish a fellow justice's separate opinion.⁴⁹ American scholars continue to debate the merits and the demerits of issuing dissenting opinions,⁵⁰ but in United States appellate courts, the practice of issuing separate judicial opinions is almost certainly here to stay.

While the United States Supreme Court is known worldwide for its longstanding practice of issuing separate judicial opinions, the Court did

numerous severe criticisms by a leading member of the bar); see also Robert G. Flanders, *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 403-05 (1999) (summarizing opposition to dissenting opinions by leading American jurists and scholars, including Judge Learned Hand).

45 *E.g.*, LA. CONST. of 1898, art. 92 (repealed 1921).

Article 92. Publication of Decisions of the Supreme Court. The decisions of the Supreme Court shall be reported under the direction of the court; the publication thereof shall be let out by contract to the lowest bidder

Concurring and dissenting opinions shall not be published. The General Assembly shall annually appropriate the sum of two thousand dollars, as salary of stenographers to be appointed by the court. and for the use of the Justices thereof.

Id.; see Alder, *supra* note 38, at 238 (noting that Louisiana banned dissents between 1898 and 1921); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1311 n.138 (2001) (noting that the Louisiana Constitution prohibited publication of dissenting opinions from 1898 to 1921); see also *infra* note 48 and accompanying text.

46 163 U.S. 537 (1896).

47 See Alder, *supra* note 38, at 238 (noting that Louisiana, which follows the civil law tradition, banned dissents between 1898 and 1921).

48 Alex. Simpson, Jr., *Dissenting Opinions*, 71 U. PENN. L. REV. 205, 207-08 (1923) (quoting the various statutes). In 1845, the Pennsylvania Legislature enacted the State Reporter Act, which required justices to issue opinions in writing and to decide whether they warranted publication, with an express proviso that "no minority opinions of the said court shall be published by said reporter." Act of Apr. 11, 1845, No. 250, 1845 Pa. Laws 374, § 2 (1845) (repealed 1951). In 1868, the Legislature enacted a statute expressly authorizing the reporter to publish "minority opinions of the said court," but only on constitutional questions. *Id.* at 208; Act of Mar. 3, 1868, No. 12, 1868 Pa. Laws 46 (repealed 1951); see also Joel Fishman, *History of the Court Reporter in the Appellate Courts of Pennsylvania*, 7 WIDENER J. PUB. L. 1, 4-6 (1997).

49 *E.g.*, *Musmanno v. Eldredge*, 1 Pa. D. & C.2d 535 (Pa. Com. Pl.), *aff'd*, 114 A.2d 511 (Pa. 1955); see Michael A. Musmanno, *Dissenting Opinions*, 60 DICK. L. REV. 139, 150 (1956); see also Fishman, *supra* note 48, at 17-34 (describing the Musmanno saga in detail).

50 Alder, *supra* note 38, at 239 (referring to the "American schizophrenia towards the practice of dissent," and observing that "[a]crimonious dissent is a more common feature of US jurisprudence"). Compare, *e.g.*, Jacobson, *supra* note 1, at 1635-36 ("A judiciary that publishes dissents and concurrences serves as the exemplar of justice."); with, *e.g.*, Post, *supra* note 45, at 1348 ("[D]issent potentially undermines the certainty and confidence which is a principal virtue of judicial decisionmaking.").

not consistently disclose the individual justices' voting records to public view for nearly a century and a half after the nation's founding. In the Court's early years, the reason may have been expediency in rendering decisions when the justices were required to "ride the circuit."⁵¹ But beginning in the early nineteenth century and continuing off and on until at least the 1930s, the Court was challenged for issuing important decisions with only a bare majority of the justices' votes.⁵² In the early part of the nineteenth century, judgments were sometimes rendered even when a majority of the Court's justices did not vote in favor of the outcome.⁵³

51 See Robert Eugene Cushman, *Constitutional Decisions by a Bare Majority of the Court*, 19 MICH. L. REV. 771, 795-96 (1921) (describing legislative initiatives in the early 1800s that would have required a supermajority vote of the Supreme Court to invalidate a statute). Similar bills were introduced after the Civil War. *Id.* In 1867, a bill was introduced that would have required all decisions of the Court on constitutional questions to be unanimous. *Id.* at 795-96 n.60. Another introduced the following year would have required a two-thirds majority vote to invalidate an act of Congress. *Id.* Bills curtailing the Court's power to decide constitutional issues were also introduced in the 1920s. See, e.g., George E. Sloan, *The Supreme Court and Five-to-Four Decisions*, 23 CENT. L.J. 404, 404 (1923) (criticizing legislation proposed by Senator Borah from Idaho that would have required at least seven of the Court's nine justices to concur before invalidating an act of Congress); Thomas J. Norton, *Supreme Court's Five to Four Decisions*, 9 A.B.A. J. 417, 417 (1923) (criticizing two proposals then pending in Congress; one would have forbidden the Court from holding a federal statute unconstitutional unless at least seven justices agreed; the other would have amended the Constitution to provide that if a federal statute were held unconstitutional, Congress would have authority to reenact it with a two-thirds majority vote of each chamber).

52 "It is natural for people to feel, and there is not the slightest question that many people do feel, that a five-to-four decision [by the Supreme Court] is not a permanent or satisfactory disposition of a constitutional question. The margin is too close." Cushman, *supra* note 51, at 799; Note, *Judgments of the Supreme Court Rendered by a Majority of One*, 24 GEO. L.J. 984, 985-87 (1936) (reviewing several legislative initiatives designed to prevent the Court from invalidating legislation with a bare majority of votes). For a more contemporary view of bare majority votes on the Supreme Court, see Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692, 1697 (2014) (imagining a supermajority rule for judicial review, but without mentioning the authorities cited above or any of the legislative proposals repeatedly introduced in Congress over many decades). Waldron also posited (without citing published authority) that "[i]n [civil law judicial] systems, judges do not appear to vote. Presumably there is often dissensus in their private deliberations, and maybe [majority decision-making] (or something like it) is used behind closed doors to determine what will be the consensus position." *Id.* at 1697. For another perspective proposing a supermajority voting requirement, see Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003).

53 United States statutes currently provide for nine justices, including the Chief Justice. A quorum, however, consists of only six justices. 28 U.S.C. § 1 (2018) ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."). If the Court were to decide cases strictly based on majority rule, in theory it could decide a case with only four votes concurring, if three of the nine justices were either absent or disqualified from considering the matter. A majority of a six-justice quorum would require a minimum of four votes to decide a case. In practice, the Court rarely considers cases with a bare quorum, but it has decided some very important cases with as few as six justices participating. *E.g.*,

In 1834, for example, the Court heard arguments in consolidated cases challenging the constitutionality of two state statutes. Two of the Court's seven members were not present for the arguments.⁵⁴ Chief Justice John Marshall set the two cases over for re-argument the following term with an unusual announcement:

The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court.⁵⁵

The fact that this newly announced rule of the Court was a revelation dictating re-argument to obtain a majority vote suggests that on at least some occasions, the Court had felt a necessity—or at least considered it appropriate—to issue judgments with *fewer than a majority* of the justices concurring. And in cases not involving constitutional questions, apparently it would continue to do so. But because the Court's reports traditionally failed to reflect how each justice voted in a case, it was impossible to know from the published record which of the justices participated and of those who did, whose votes had prevailed.⁵⁶

Before 1947, when the Court, under then-Chief Justice Stone's leadership, adopted a number of internal administrative innovations, the official *United States Reports* identified only the justice who had authored the Court's opinion (unless issued per curiam) and any published separate opinion, the author of which has always been identified by name. The other justices' votes were not disclosed unless they specifically asked to be

Chevron v. Nat'l Res. Def. Council, 467 U.S. 837 (1984) (6-0 opinion; Marshall, Rehnquist, & O'Connor, JJ., not participating in the decision).

⁵⁴ *Briscoe v. Commonwealth's Bank*, 33 U.S. 118, 122 (1834).

⁵⁵ *Id.* (Marshall, C.J.). In the United States, the terms "decision," "judgment," and "opinion" have distinct meanings. *See, e.g., Rogers v. Hill*, 289 U.S. 582, 587 (1933) (noting that the terms "opinion" and "decision," "while often loosely used interchangeably, are not equivalents. The court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests."). To the contrary, other nations sometimes use the term "judgment" to include a judge's separate opinion. *See, e.g., Alder, supra* note 38, at 221 (English legal scholar; referring to "dissenting judgment . . . as an integral feature of the common law" (emphasis added)); *id.* at 234 (referring to "dissenting judgments" (emphasis added)); *id.* at 235 (referring to "separate judgments" (emphasis added)); Andrew Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, 27 MELB. U. L. REV. 724, 735 (2003) (Australian legal scholar; referring to "dissenting and concurring judgments" (emphasis added)); *see also* KELEMEN, *infra* note 74, at 79 (Hungarian legal scholar; explaining that "[i]n continental European languages 'opinion' or its equivalent is not used with reference to judgments," while in common law countries the distinction between a court's judgment and its opinion is highly relevant in light of the binding nature of precedent); Edward A. Hartnett, *A Matter of Judgment, Not A Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (1999) (American legal scholar; distinguishing between "judgment" and "opinion" as used in United States).

⁵⁶ *See supra* text accompanying note 51; *see infra* notes 57-61 and accompanying text.

identified with the opinion of the Court or with any separate opinion authored by another justice.⁵⁷ A justice who disagreed with the majority opinion had the option of issuing a dissenting opinion explaining the reasons for not voting with the majority, or declaring publicly that the justice joined another's separate opinion. No other mechanism existed for registering a justice's disagreement.⁵⁸ Thus, a justice could (and apparently often did) "silently acquiesce" in the majority opinion without publicly disclosing the justice's individual opposition to the Court's decision.⁵⁹ Even now, the Court's opinions do not always identify the author. A *per curiam* opinion⁶⁰ is occasionally issued to convey a united front and to avoid identifying the author of the opinion by name.⁶¹

57 G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. PA. L. REV. 1463, 1503–04 (2006).

[I]t was still possible, as late as the 1930s, for a Justice to have dissented from an opinion of the Court but not [to have] recorded that dissent. As late as the 1940s, the official United States Reports only identified the author of the "opinion of the Court" and those Justices who either filed concurring or dissenting opinions or who had themselves identified as either concurring in the majority result or dissenting. The current practice of listing the votes of all the Justices who participated in a case in the headnote to that case in the United States Reports did not begin until 1947. With the adoption of that protocol, silent acquiescence became a rare phenomenon.

Id.; see also Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 797 (2015) (crediting White for this observation). *But cf.* Wagner, *supra* note 24, at 20 (explaining that the syllabus, prepared by the Reporter, did not identify justices by name as joining the majority or any separate opinion until 1970, and then only at the behest of the media).

58 See Post, *supra* note 45, at 1327 (explaining that unless justices gave "some expression" to individual views, "their function is reduced to registering a vote which is not even published" (quoting Harlan Fiske Stone, Memorandum to James McReynolds (Apr. 3, 1930))).

59 *E.g.*, Post, *supra* note 45, at 1340–46 (referring to the "norm of acquiescence" as opposed to a norm of consensus; quoting numerous illustrations drawn from justices' private papers); G. Edward White, *Toward A Historical Understanding of Supreme Court Decision-Making*, 91 DENVER U. L. REV. ONLINE 201, 206 (2014) (explaining that early justices used the term "silent acquiescence" to mean that an "opinion of the Court" did not necessarily mean the opinion was unanimous or even reflected the conclusions of a majority); White, *supra* note 57, at 1481 ("The norm of silent acquiescence had been a technique by which Justices suppressed their differences, conveying the impression that the Court was a unified body. An understood corollary to silent acquiescence was that once a Justice produced an opinion of the Court, and read it to his colleagues, they would not fuss publicly about its language."). One scholar has noted that the practice continues today in the somewhat modified form of "silent concurrences," meaning that Justices request to be identified individually as concurring with the result, without filing a separate opinion. See Greg Goelzhauser, *Silent Concurrences*, 31 CONST. COMMENT. 351, 352 (2016) (citing Justice Alito's one-line concurrence in *Los Angeles County Flood Control District v. National Resources Defense Council, Inc.*, 568 U.S. 78, 84 (2013) (Alito, J., concurring) ("Justice Alito concurs in the judgment.")).

60 Richard Lowell Nygaard, *The Maligned Per Curiam: A Fresh Look at an Old Colleague*, 5 SCRIBES J. LEGAL WRITING 41, 47–48 (1994–1995) (making the case for anonymous opinions, arguing that anonymity has been historically successful as a means to achieve unanimity).

61 See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000) (*per curiam*).

Another important but less-well-known factor in the transparency of federal court opinions remains a point of major controversy among legal scholars in the United States. Federal intermediate appellate courts, and many state intermediate appellate courts, exercise authority to decide which opinions are “published” and which are not, a decision typically made by the three-judge panel before releasing its slip opinion.⁶² If the panel designates its opinion “for publication,” it carries precedential value and is later “published” in the *West Federal Reporter*.⁶³ But if the panel designates an opinion “not for publication,” it has no binding precedential value, except to the extent a later panel of the same court, or another court, might elect to treat the opinion as persuasive authority.⁶⁴ Opinions so

62 The designation “not for publication” is somewhat misleading, if unintentionally so, because even those opinions often appear in commercial legal research databases. And since 2003, all opinions issued by the federal courts, whether designated for “publication” or not, must be made available online in text-searchable format. E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501) (providing that each court’s website must include “[a]ccess to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format”). But compliance with the Act remains problematic, especially among federal district courts. *See, e.g.*, Statement of Professor Jonathan L. Zittrain Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the Comm. on the Judiciary (Feb. 14, 2017), <http://etseq.law.harvard.edu/wp-content/uploads/2017/02/Zittrain-statement.pdf> (recommending amendments to E-Government Act of 2002). *See generally* Peter W. Martin, *District Court Opinions that Remain Hidden Despite a Longstanding Congressional Mandate of Transparency – The Result of Judicial Autonomy and Systemic Indifference*, LAWARXIV (Sept. 10, 2017), <https://osf.io/preprints/lawarxiv/bpmxe>.

63 Except opinions of the United States Supreme Court, which are published in the official *United States Reports*, federal court opinions are not published in print form by the federal government. Since the 1880s, designated opinions issued by other federal courts have been published by West Publishing Company. Like federal circuit judges, district court judges have broad discretion to decide whether an opinion warrants publication in the *Federal Supplement*, the unofficial West reporter for district court opinions. Karen Swenson, *Federal District Court Judges and the Decision to Publish*, 25 JUST. SYS. J. 121, 121-22 (2004); *see* Allan D. Vestal, *A Survey of Federal District Court Opinions: West Publishing Company Reports*, 20 SW. L.J. 63, 74-77 (1966) (explaining how federal district court opinions are selected for publication).

64 For opinions issued by a federal appellate court and designated “not for publication” before January 1, 2007, a lawyer who cited such an opinion in an appellate brief submitted to the issuing court could be disciplined for violating court rules prohibiting their citation. *See* J. Lyn Entrikin Goering, *Legal Fiction of the “Unpublished” Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIR. REV. 27, 79 (2005); *see also* Hart v. Massanari, 266 F.3d 1155, 1180 (9th Cir. 2001) (Kozinski, J.) (threatening to discipline attorney who had cited an unpublished opinion in an appellate brief footnote, but ultimately declining to impose sanctions). Effective December 1, 2006, the Federal Rules of Appellate Procedure were amended to bar federal courts from sanctioning attorneys for citing “unpublished” federal court opinions issued on or after January 1, 2007. FED. R. APP. P. 32.1(a).

Rule 32.1 . . . does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as “unpublished” or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court.

FED. R. APP. P. 32.1(a) Advisory comm. cmt. No court is bound to give precedential value to an opinion so designated, although some federal circuits elect to treat them as persuasive authority. *E.g.*,

designated by the issuing court are never binding.⁶⁵

The implications of the federal courts' practice of designating opinions for "publication" or "not for publication" are substantial in light of the longstanding doctrine of *stare decisis* in common law jurisdictions. It would be one thing if federal appellate courts seldom designated opinions "not for publication."⁶⁶ But in every year since the practice began in the mid-1970s, the proportion of federal appellate court opinions designated "not for publication" (and therefore nonprecedential) has grown, and rather dramatically. In fiscal year 2017, the most recent year for which statistics are available, the federal appellate courts issued 36,992 opinions on the merits. Of that number, the great majority — 86.9% — were designated "not for publication."⁶⁷

It is indeed remarkable that in a nation that purports to follow the common law tradition of *stare decisis*, more than eighty-five percent of the appeals terminated on the merits in federal appellate courts are nonprecedential as a matter of law, solely at the issuing panel's discretion.

As we have seen, federal and state courts in the United States generally subscribe to modern norms of transparency by reporting judges' votes, issuing written judicial opinions, "publishing" court opinions (more or less), and allowing judges to file and publish separate opinions. But those formal and informal norms have evolved significantly over time from what they once were. Even in the United States, the courts have not always operated as transparently with respect to opinion-issuing practices as some international observers might assume.

The United States Supreme Court's practice of regularly issuing separate opinions is just that — the Court's own practice, developed over

Gibbs v. United States, 865 F. Supp. 2d 1127, 1133 n.3 (M.D. Fla. 2012), *aff'd*, 517 F. App'x 664 (11th Cir. 2013); see Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 901 (2008).

65 See, e.g., Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808, 816 (2018). "As of 2017, every circuit has rules permitting litigants to cite to unpublished opinions, but these rules specifically disclaim unpublished opinions' precedential effect." *Id.*

66 Some, but not all, of the federal circuit opinions designated "not for publication" are published in West's *Federal Appendix*. But a private publisher's decision to include an opinion in that reporter (or in a commercial database like Westlaw or Lexis) has no effect on the precedential or persuasive value a court elects to give it.

67 See Table B-12. U.S. Courts of Appeals—Type of Opinion or Order Filed in Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2017, U.S. COURTS: CASELOAD STATISTICS DATA TABLES, http://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2017.pdf (last visited Dec. 5, 2018). The figures exclude data for the U.S. Court of Appeals for the Federal Circuit, which has limited subject-matter jurisdiction. *Id.*

time by custom and tradition. Article III of the United States Constitution does not address how the Court is to decide cases, issue judgments, or even render opinions. Statutes provide little more guidance, although the Supreme Court's official reporter is directed to "prepare the decisions of the Court for publication"⁶⁸ and to publish the Court's decisions in the *United States Reports* "as soon as practicable after rendition."⁶⁹ The Court's own rules provide little more in the way of formal norms governing the issuance of its opinions.⁷⁰ No external norms constrain the Court's method of communicating decisions.⁷¹ Nothing requires unanimity, consensus, or even majority decision-making. Nothing requires the Court's opinions even to include the reasoning for the judgments, let alone permit or require publication of separate opinions along with the opinion of the Court.

The Court's well-known practices of publicizing the votes of individual justices, and publishing separate opinions along with the Court's judgment and decision, are largely the result of the Court's own initiative. Those practices have changed quite dramatically since the Court issued its earliest decisions in 1790.⁷²

68 28 U.S.C. § 673(a) (2018).

69 28 U.S.C. § 411(a) (2018); *see supra* note 21.

70 *See* SUP. CT. R. 41 (2017), <https://www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf>.

Rule 41. Opinions of the Court.

Opinions of the Court will be released by the Clerk immediately upon their announcement from the bench, or as the Court otherwise directs. Thereafter, the Clerk will cause the opinions to be issued in slip form, and the Reporter of Decisions will prepare them for publication in the preliminary prints and bound volumes of the *United States Reports*.

Id.; *see supra* note 20. The Rules are silent on the issuance of separate opinions by individual justices. Nor do they provide for publication of those decisions. "Opinions of the Court" are generally understood to refer only to opinions in which a majority of the justices have joined as to the judgment (including plurality opinions), together with the separate opinions of concurring judges who vote with the majority.

71 The sole exception is the E-Government Act of 2002, which applies to all federal courts. *See supra* note 62. It simply requires all opinions to be made available online in text-searchable format, whether or not designated for publication in the official reporter. *See supra* note 62.

72 The Supreme Court does not publish its internal operating procedures, although most other federal courts do. However, the Supreme Court's formal rules, as they have been amended over time, are available on the Supreme Court's website. *Historical Rules of the Supreme Court*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/ctrules/scannedrules.aspx> (last visited Aug. 29, 2018). In 1834, for example, the Court issued the following order:

Ordered, That the original opinions of the Court, delivered to the reporter, be filed in the office of the Clerk of the Court for preservation as soon as the volume of Reports for the term, at which they are delivered, shall be published.

S. CT. R. 16, 42 U.S. (1 How.) xxxv (1834). In 1835, the Court issued a more comprehensive order providing for prompt publication of its opinions:

All the opinions delivered by the Court since the commencement of the term shall be forthwith delivered over to the Clerk to be recorded.

Even today, courts and judges in the United States have ways of avoiding (or at least discouraging) public scrutiny and identification of their views in a case if they wish to exercise the available options. But in most respects United States courts, as well as individual judges, err on the side of openness and transparency in disseminating the outcomes of judicial deliberations, although their internal deliberations remain cloaked in secrecy.⁷³

III. GLOBAL JUDICIAL TRANSPARENCY NORMS

Today, international interest is on the rise regarding how courts issue judicial opinions and other features of judicial transparency.⁷⁴ Contrary to the conventional wisdom that courts of last resort in civil law countries

And all opinions hereafter delivered by the Court shall immediately, upon the delivery thereof, be in like manner delivered over to the Clerk to be recorded. And it shall be the duty of the Clerk to cause the same to be forthwith recorded, and to deliver the originals with a transcript of the judgment or decree of the Court thereon to the reporter, as soon as the same shall be recorded.

And all the opinions of the Court, as far as practicable, be recorded during the term, so that the publication of the reports may not be delayed thereby.

S. CT. R. 17, 42 U.S. (1 How.) xxxv (1843). Other than the Court's formal rules of practice and procedure, *Rules of the Supreme Court of the United States* (Nov. 13, 2017), <https://www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf>, the Court's internal operating rules are not published. However, the Supreme Court has provided the public with information about its internal practices in less formal ways. See, e.g., *The Supreme Court: Home to America's Highest Court*, C-SPAN (Dec. 20, 2010), <https://www.c-span.org/video/?297213-1/the-supreme-court-home-america-highest-court-2010-edition> (video explaining Court's practices).

⁷³ Unlike many other global courts, the Supreme Court has no formal norms requiring its internal deliberations to remain secret. But like so many other practices of federal courts in the United States, secret deliberations are a long-standing custom that few have ever questioned, with the possible exception of former President Thomas Jefferson. See Zobell, *supra* note 14, at 194 & n.44 (quoting letter from Thomas Jefferson to Thomas Ritchie dated Dec. 25, 1820, hypothesizing that opinions were issued by a Supreme Court "huddled up in a conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning").

⁷⁴ See, e.g., KATALIN KELEMEN, *JUDICIAL DISSSENT IN EUROPEAN CONSTITUTIONAL COURTS* (2018) (explaining that most European national constitutional courts allow judges to issue dissenting opinions); CAROLINE WITTIG, *THE OCCURRENCE OF SEPARATE OPINIONS AT THE FEDERAL CONSTITUTIONAL COURT* (2016) (analyzing separate opinions issued by the German Constitutional Court); Bricker, *supra* note 5, at 173 ("[T]he single opinion for the court has begun to wane in the modern era."); Kelemen, *supra* note 5 (comparing dissenting practices in European constitutional courts); Laffranque, *supra* note 36, at 165 (comparing practices in other countries and generally favoring the practice of issuing separate judicial opinions); Trevor Shiels, *Multiple Judgments and the New Zealand Supreme Court*, 14 OTAGO L. REV. 11, 16-32 (2015) (comparing practices in other common law nations and analyzing New Zealand Supreme Court's dissenting practices since 2004).

issue only unanimous opinions,⁷⁵ recent studies reveal that global opinion-issuing practices vary considerably, even among civil law nations and certainly among supranational and international tribunals.⁷⁶ Recent research has confirmed a clear global trend in favor of allowing judges to issue separate opinions, especially (but not exclusively) members of European constitutional courts.⁷⁷ In 2008, Yale Law School's annual *Seminar on Global Constitutionalism* addressed judicial dissent, among other topics.⁷⁸ In late 2012, a justice of the High Court of Australia, then

75 See, e.g., JOHN MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 37 (2d ed. 1985); RAFFAELLI, *supra* note 16, at 8, 10; Bricker, *supra* note 5, at 172, 186; Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT'L L. 225, 239 (2017); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 134 (1990); Henderson, *supra* note 16, at 291 & nn.30, 32 (suggesting that courts in civil law countries such as "France and Germany" do not publish separate opinions); Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on A Multi-Member Court*, 100 CAL. L. REV. 1445, 1448 (2012) ("In most civil law countries, even the highest courts, acting through multi-member chambers, announce their judgments in a single, impersonal document."). As recently as 2005, one American scholar glibly (but inaccurately) described the practice of courts in civil law nations as follows:

The civilian appellate panel issues only one opinion, and it is the opinion of the court. Every opinion is per curiam, "by the court." The public record does not reveal dissenting or concurring opinions. No judge signs the opinion of the court. It is an institutional, not personal, opinion.

Jacobson, *supra* note 1, at 1609. *But see* John Merryman & Rogelio Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* 122 (3d ed. 2007) (acknowledging "[a] recent tendency toward noting dissents and separate concurrences, and even toward the publication of separate opinions," in some civil law jurisdictions' constitutional courts); Alder, *supra* note 38, at 237 (acknowledging that even courts in civil law nations were showing a tendency to publish dissents); *cf.* Dumbauld, *supra* note 36, at 945 ("Dissenting opinions appear to have become a well established feature of the judicial process in international practice.").

76 RAFFAELLI, *supra* note 16, at 8 ("[T]his [traditional] perception no longer fits reality."). One former German Constitutional Court judge explained the European tradition against separate opinions as an outgrowth of the absolute monarchy.

The absolute monarchs concentrated all powers in their hand[s] including the judicial power. The judges were servants of the monarch and rendered decisions in his name. Their personal views did not matter. . . .

This basic understanding [of the judge's role] survived absolutism. It was and still is the institution, not the person that decides. The court adjudicates, not the judge. Nothing depends on the individual office holder.

Grimm, *supra* note 11, at I-1. In England, the King's Privy Council historically followed this tradition by issuing a single opinion in the King's name. Raffaelli, *supra* note 16, at 9 ("Traditionally, the role of judges was to declare the will of the King – and, since the King cannot but have one and only one will, judgments had to be, or at least to seem unanimous." (citations omitted)). *But see infra* notes 93, 437 (explaining the Privy Council's 1966 order providing for a single dissenting opinion).

77 RAFFAELLI, *supra* note 16, at 39; Kelemen, *supra* note 5, at 1345; *see also* Alder, *supra* note 38, at 237 ("[I]t is often assumed that the publication of dissents is a peculiarity of Anglo-Saxon legal systems. This is not however the case."). As early as 2000, Alder observed that national courts, even in civil law nations, reflected an "increasing tendency towards publishing dissents." *Id.*

78 *Global Constitutionalism Seminar Sept. 25-27*, YALE L. SCH. (Sept. 10, 2008), <https://law.yale.edu/yls-today/news/global-constitutionalism-seminar-sept-25-27>; *see also* JUDICIAL DISSENT, *supra* note 11 (written materials distributed to conference participants). Grimm accurately

approaching retirement, delivered a provocative speech that set off a rousing debate among scholars and jurists about the merits of seeking consensus on the High Court as opposed to issuing separate judicial opinions.⁷⁹ At about the same time, the European Parliament, responding to numerous calls for the Court of Justice of the European Union to adopt the practice of issuing dissenting opinions,⁸⁰ issued a detailed report studying the opinion-issuing practices of national appellate courts in the European Union, as well as other international tribunals.⁸¹ In March 2017, a major university in Milan, Italy hosted a conference on dissenting judicial opinions, in which scholars worldwide participated and presented papers.⁸² And in late 2017, the American Journal of International Law published an online symposium for scholarly critique of a novel descriptive framework, developed by two American scholars, conceptualizing the reasons why some international tribunals regularly issue separate opinions, while others either do not or are much less likely to do so.⁸³

observed that just because these courts now have authority to issue separate opinions does not mean that individual judges exercise that option. Grimm, *supra* note 11, at 1-2.

79 McIntyre, *supra* note 36, at 432.

80 E.g., Vlad F. Perju, *Reason and Authority in the European Court of Justice*, 49 VA. J. INT'L L. 307, 309 (2009) ("The ECJ finds itself alone among supranational and international courts and one of only a handful of national apex courts that bans its judges from writing concurring or dissenting opinions.").

81 RAFFAELLI, *supra* note 16.

82 *Dissenting Opinion: International Conference*, UNIVERSITA DEGLI STUDI DI MILANO, (Feb. 16, 2017), <http://www.dirittopubblico.unimi.it/ecm/home/aggiornamenti-e-archivi/tutte-le-notizie/content/dissenting-opinion-p-international-conference-p.0000.UNIMIDIRE-53169>. One of the keynote conference speakers was Guido Raimondi, President of the European Court of Human Rights. *Id.*

83 *Symposium on Jeffrey L. Dunoff and Mark A. Pollack*, "The Judicial Trilemma," AM. J. INT'L L. ONLINE (Nov. 13, 2017), <https://www.cambridge.org/core/journals/american-journal-of-international-law/listing?q=trilemma&searchWithinIds=3CCFB3BC2DB31CE79FBA01995D5B6028%2CAE91B7FFE2D0AD1F516C8B33BA4A8E1>. The co-authors presented an earlier version of the article, *International Judicial Dissent: Causes and Consequences*, at the 2015 Biennial Conference of the European Union Studies Association and at the Max Planck Institute for Procedural Law in Luxembourg.

Whether or not international arbitration panel members have the authority to issue dissenting opinions has been widely debated in Europe, but the trend is clearly in favor of permitting them. *See, e.g., Final Report on Dissenting and Separate Opinions*, in 2 ICC INTERNATIONAL COURT OF ARBITRATION 32 (June 1991); Patricia Jimenez Kwast, *Prohibitions on Dissenting Opinions in International Arbitration*, in WHAT'S WRONG WITH INTERNATIONAL LAW? 128, 128 (Cedric Ryngaert, Erik J. Molenaar & Sarah Nouwen eds., 2015) (explaining that "[t]he dominant view today is that dissenting opinions should not be prohibited, but this has not always been the accepted wisdom"); Hans-Patrick Schroeder & Tanja V. Pfitzner, *Recent Trends Regarding Dissenting Opinions in International Commercial Arbitration*, 2 Y.B. ON INT'L ARB. 133, 136 (2012) ("Today, it appears to be

Other global developments over the last decade call for a fresh look at opinion-issuing practices around the world.⁸⁴ Most European nations now permit judges to issue dissenting opinions in at least some tribunals,⁸⁵ although judges may elect not to exercise that authority.⁸⁶ Yet many European courts still keep individual judges' voting records secret.⁸⁷ Even those continental courts whose judges are permitted to dissent continue to subscribe to a norm of secrecy with respect to internal deliberations, and informal consensus norms generally discourage judges from issuing separate opinions unless they significantly disagree with the court's judgment.⁸⁸

Less than a decade ago, the United Kingdom Supreme Court was established effective October 1, 2009, replacing the centuries-old practice of issuing appellate decisions in the name of the Appellate Committee of the House of Lords, the upper chamber of Parliament. The newly established Supreme Court hears direct appeals from lower courts in England, Wales, Scotland, and Northern Ireland.⁸⁹ Like justices of the United States Supreme Court, justices of the United Kingdom's high court

common ground that the dissenting opinion is and will be part of the practice of international commercial arbitration.”).

84 The most comprehensive scholarly work on global judicial opinion-issuing practices published in a United States law journal remains the 1959 masterful work by Kurt H. Nadelmann, *The Judicial Dissent: Publication v. Secrecy*, 8 AM. J. COMP. L. 415 (1959) [hereinafter Nadelmann (1959)]; see also Kurt H. Nadelmann, *Non-Disclosure of Dissents in Constitutional Courts: Italy and West Germany*, 13 AM. J. COMP. L. 268 (1964) [hereinafter Nadelmann (1964)]; cf. Edward McWhinney, *Judicial Concurrences and Dissents: A Comparative View of Opinion-Writing in Final Appellate Tribunals*, 31 CAN. B. REV. 595 (1953). As this article demonstrates, much has changed in the six decades since Nadelmann's work was published.

85 E.g., Bricker, *supra* note 5, at 173 (“[T]oday most European judicial systems allow individual judges to write dissenting opinions in at least some courts within their respective legal systems.”).

86 KELEMEN, *supra* note 74, at 1 (explaining that while most European national constitutional courts allow dissenting opinions, judges are less likely to do so than are common law judges); Grimm, *supra* note 11, at I-3 (grudgingly conceding that “a few exceptions” had been made for European constitutional courts, but just because judges were given that authority did not mean they exercised it); Kelemen, *supra* note 5, at 1354 (noting that dissenting is an individual's right, not a duty, leaving room for strategic behavior); Shiels, *supra* note 74, at 19 (noting that even when judges have authority to issue separate opinions, “there is no doubt a complex web of institutional and inter-personal factors that influence when and how often they do so”).

87 See *supra* note 12 and accompanying text.

88 See, e.g., Grimm, *supra* note 11, at I-3-I-4. In some cases, formal norms mandate secrecy of deliberations, which at least one supranational court has cited as the basis for declining to permit individual judges to issue separate opinions. E.g., Statute of the Court of Justice of the European Union 2010 O.J. (C 83) art. 35 (“The deliberations of the Court of Justice shall be and shall remain secret.”); see *infra* note 426 and accompanying text.

89 The 2005 Constitutional Reform Act established the Supreme Court of the United Kingdom. Diana Woodhouse, *The Constitutional Reform Act 2005 — Defending Judicial Independence the English Way*, 5 INT'L J. CONST. L. 153, 155 (2007), <https://academic.oup.com/icon/article/5/1/153/722475>.

may issue concurring or dissenting opinions.⁹⁰ The Judicial Committee of the King's Privy Council, at one time the “highest court of civil and criminal appeals for the British Empire,”⁹¹ continues in existence, but with much narrower jurisdiction than it once had.⁹² Since 1966, even the Judicial Committee of the Privy Council, which traditionally followed the “one-opinion” practice, permits publication of dissenting opinions.⁹³ Like many other European courts, it too has long since departed from its traditional unanimity principle.⁹⁴

Another factor reflecting the pace of global change in judicial opinion-issuing practices is the relatively recent decisions of some British Commonwealth nations to depart from the longstanding practice of allowing appeals to be taken from national supreme courts to the Judicial Committee of the Privy Council. For example, in 2003 New Zealand enacted the Supreme Court Act, which ended the longstanding practice of allowing appeals from decisions of the New Zealand Supreme Court to the Judicial Committee of the King's Privy Council.⁹⁵

90 See RAFFAELLI, *supra* note 16, at 29. The United Kingdom's Constitutional Reform Act of 2005 does not expressly address the issue of separate opinions, and it grants authority to the Supreme Court to adopt rules governing court practice and procedure. United Kingdom Constitutional Reform Act 2005, c.4, § 45 (UK), <http://www.legislation.gov.uk/ukpga/2005/4/contents>. The Supreme Court's rules do not address how judgments are to be issued. Rule 28 simply provides, “A judgment may be— (a) delivered in open court; or (b) if the Court so directs, promulgated by the Registrar.” The Supreme Court Rules 2009, SI 2009/1603, r. 28 (UK), <http://www.legislation.gov.uk/uksi/2009/1603/article/28/made>.

91 *The Judicial Committee*, JUD. COMMITTEE OF THE PRIVY COUNCIL, <https://www.jcpc.uk/about/judicial-committee.html> (last visited Sept. 12, 2018).

92 Beginning in 2009, the Privy Council's Judicial Committee was relocated from its chambers on Downing Street to shared facilities with the United Kingdom Supreme Court. *Id.* The Privy Council's appellate jurisdiction was substantially narrowed by the Constitutional Reform Act 2005. For example, it no longer considers “devolution appeals” pertaining to legislative and administrative matters from Wales, Northern Ireland, and Scotland. United Kingdom Constitutional Reform Act 2005, c.4, § 40; *Practice Direction 10: Devolution Jurisdiction*, THE SUP. CT., <https://www.supremecourt.uk/procedures/practice-direction-10.html> (as amended Oct. 2016). For more details about the modernization of the United Kingdom court system and a call for further reform, see Graham S McBain, *Modernising the English Court System - Time for a Gastric Band*, 6 J. POL. & L. 17 (2013), <http://www.ccsenet.org/journal/index.php/jpl/article/viewFile/29973/17756>.

93 Lord Neuberger of Abbotsbury, *The Judicial Committee of the Privy Council in the 21st Century*, 3 CAMBRIDGE J. INT'L & COMP. L. 30, 41 (2014) (“[I]n 1966, the Judicial Committee (Dissenting Opinions) Order was issued, since which time the expressing of dissenting opinions has been permissible, and where appropriate, is now commonplace.”).

94 See *infra* notes 420-23 and accompanying text.

95 Shiels, *supra* note 74, at 13 & n.5 (citing Supreme Court Act 2003, s 42 (N.Z.)). A total of 53 countries are currently voluntary members of the British Commonwealth, having subscribed to the Charter of the Commonwealth. *Our Charter*, THE COMMONWEALTH, <http://thecommonwealth.org/our-charter> (last visited Sept. 12, 2018); *Member Countries*, THE COMMONWEALTH, <http://thecommonwealth.org/member-countries> (last visited Nov. 3, 2018) (“Fifty three countries are

This section describes the global variations among contemporary judicial tribunals, both national and international, in how judicial decisions are issued and published, including judges' voting records. In particular, it compares the formal and informal norms governing the various practices courts use to communicate their decisions to the bench, bar, and general public. This section of the article also addresses the various sources of law, court rules, traditions, or informal practices that govern how courts communicate their decisions to the parties, the practicing bar, and the general public. Later sections explore some of the reasons why the topic of dissenting opinions has generated worldwide interest. Those sections describe recent theoretical work on the issue, and they predict how the general trend favoring judicial "individuation" by identifying votes and issuing separate opinions might influence the role judicial tribunals play in an increasingly global, interconnected legal system.⁹⁶

A. Global "Collegial" Courts

Judicial systems vary greatly around the world, but every nation that recognizes the judicial process as a means of resolving public and private disputes has at least one "high court," and many have two. In addition, watershed economic and political events in the twentieth century led to the establishment of several "supranational" and international tribunals, on the European continent and also elsewhere. This section provides a general overview of the various judicial institutions to provide background and context for the article's discussion of opinion-issuing norms and practices.⁹⁷

members of the Commonwealth."). Other Commonwealth nations include the United Kingdom, South Africa, Canada, India, Australia, and Malta. *Id.* (specifically listing these nations and 47 others). Many Commonwealth nations were formerly part of Great Britain but are now independent sovereigns. *See Our History*, THE COMMONWEALTH, <http://thecommonwealth.org/our-history> (last visited Nov. 3, 2018).

⁹⁶ *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192-93 (2003) ("It stretches too far to describe [international and domestic courts] all as part of one global legal system, but they certainly constitute a global community of courts."); *cf.* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 815-18 (2009) (referring to Slaughter as a member of a scholarly group espousing the "modern Internationalist" perspective, in contrast to other scholars who represent the "Sovereignist" perspective: wary of international law and its institutions).

⁹⁷ For an overview of the International Court of Justice, see R.P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 INT'L & COMP. L.Q. 788, 794-800 (1965) (describing history of the court's dissenting practices); Dumbauld, *supra* note 36, at 940-45 (same with respect to the Permanent International Court of Justice, ICJ's predecessor). For an overview of the Court of Justice of the European Union and the European Court of Human Rights, see Dunoff &

I. National Courts

Several European nations have two “high courts” – a special court that decides exclusively constitutional issues, and a court of cassation that considers appeals from lower courts on other kinds of legal issues. Other nations have a single supreme court or court of appeals with “diffuse,” “decentralized,” or general jurisdiction, comparable to the United States Supreme Court. They typically consider appeals without regard to the nature of the legal issue. A few nations have other specialized appellate tribunals with limited jurisdiction.

a. National Supreme Courts: General (“Diffuse”) Jurisdiction

Many countries have a unitary supreme court with general or “diffuse” jurisdiction over both constitutional and “ordinary” matters. A single apex court hears all appeals, including constitutional questions. In some countries the Supreme Court is subdivided into “chambers,” each with its own specialized jurisdiction. Unlike state and federal supreme courts in the United States, which generally hear cases en banc, most supreme courts in other nations consider cases in panels of three, five, or some other odd number of judges, much like intermediate appellate courts generally do in the United States. But under specific circumstances, even these courts occasionally consider cases in larger chambers or en banc.

b. National Constitutional Courts

Of the twenty-seven member nations of the European Union (EU), eighteen have established separate constitutional courts with jurisdiction limited to constitutional questions.⁹⁸ Some consider constitutional issues on direct appeal or by referral from other national courts. In many nations, constitutional questions may be referred to the court by government

Pollack, *supra* note 75, at 18-34. For an overview of international criminal tribunals, see Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILL. L. REV. 763, 777 (2003); *see also* KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 303-51 (2009); KENNETH S. GALLANT, INTERNATIONAL CRIMINAL JURISDICTION, OR, WHOSE LAW MUST I OBEY? (forthcoming) (unpublished manuscript on file with author).

⁹⁸ *See* RAFFAELLI, *supra* note 16, at 7; Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT’L J. CONST. L. 44, 44-45 (2007).

officials or, in some cases, even by individuals.⁹⁹ Several nations outside the European Union have also established constitutional courts separate from ordinary supreme courts. Examples include China, Egypt, the Republic of Georgia, South Korea, Ecuador, Peru, Myanmar, the Russian Federation, Turkey, Thailand, and South Africa, among many others.¹⁰⁰

As a general rule, national constitutional courts have jurisdiction to address one or both of two distinct kinds of constitutional issues. The first is “abstract” or a priori review, in which the court considers the constitutionality of legislation (before or after enactment) without regard to a specific legal dispute or controversy. In effect these are advisory opinions, and in some cases abstract review occurs upon referral by the chief executive before a statute is finally enacted into law. The second is “concrete” or a posteriori review, which addresses the constitutionality of an enacted statute in the context of a specific set of facts in a legal dispute. The second type of constitutional review is analogous to the “case or controversy” prerequisite for federal court jurisdiction under Article III of the United States Constitution.¹⁰¹

c. National Supreme Courts (Courts of Cassation)

The eighteen European Union member nations that have established constitutional courts, all established since the early twentieth century, also retain their predecessor supreme courts (sometimes known as courts of cassation or “ordinary” courts), which consider only non-constitutional issues.¹⁰² Other nations worldwide that have separate constitutional courts generally follow the same pattern. In general, “ordinary” supreme courts

⁹⁹ RAFFAELLI, *supra* note 16, at 17-29.

¹⁰⁰ See Venice Commission, COUNCIL OF EUR., <https://www.venice.coe.int/webforms/courts/?lang=EN> (listing websites for constitutional courts worldwide) (last visited Oct. 6, 2018).

¹⁰¹ E.g., Michael C. Dorf, *Abstract and Concrete Review*, in GLOBAL PERSPECTIVES ON CONSTITUTIONAL LAW 3-4 (Vikram D. Amar & Mark V. Tushnet eds., 2009). Scholars have recognized that United States federal courts sometimes apply relaxed standing requirements in a way that permits a modified form of abstract constitutional review, notwithstanding the restrictions of Article III and the general disregard in the United States for issuing “advisory opinions.” See *id.* at 3-4, 8-13.

¹⁰² See, e.g., John Henry Merryman & Vincenzo Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 AM. J. COMP. L. 665, 666-68 (1966) (describing the establishment of Italy’s Constitutional Court in 1948 upon adoption of the post-World War II Constitution that provided for constitutional review, and explaining the two national courts’ respective roles).

are required by law to refer or formally certify constitutional questions in pending cases to the nation's constitutional court for resolution before resolving the remaining legal or factual issues on the merits.¹⁰³

d. National Courts with Specialized Appellate Jurisdiction

The United Kingdom has a unique configuration of appellate courts, partly for historical reasons but also as a result of longstanding tradition derived from ancient England's political evolution from a former absolute monarchy.¹⁰⁴ The United Kingdom, effective 2009, established a Supreme Court with general jurisdiction over both constitutional and other legal issues.¹⁰⁵ The Supreme Court replaced the Appellate Committee of the House of Lords, a subdivision of the upper chamber of Parliament, whose judges historically had the final word with respect to appeals from the common law courts and the King's Bench. The Judicial Committee of the Privy Council (JCPC), once considered the highest appellate tribunal in the Commonwealth, has been physically and functionally integrated into the new Supreme Court, whose justices also sit as members of the JCPC.

Historically, the JCPC was composed of judges who advised the monarchy how to resolve disputes presented to the King for decision. The JCPC remains the highest appellate tribunal for British colonies and Commonwealth nations that elect to use it for that purpose. While the two bodies formally merged in 2009, each has a rather unique history with respect to judges' authority to issue separate opinions, as explained in more detail below.¹⁰⁶

2. Supranational and International Tribunals

Treaties, conventions, charters, protocols, or organic statutes generally delineate the jurisdiction of these multi-member courts. They include courts that consider whether national laws and court decisions conflict with the terms of a treaty, convention, or charter to which the nation is a signatory, as well as courts that apply international public law and trade

103 *Id.* at 668-69.

104 See generally James Daly, *The Idea of Absolute Monarchy in Seventeenth-Century England*, 21 *HIST. J.* 227, 249 (1978) (“[W]hatever absolutism was, it was never a possibility after [the Glorious Revolution of] 1688.”).

105 See *supra* notes 89-94 and accompanying text.

106 See *infra* notes 435-38 and accompanying text.

law to resolve disputes. The following discussion addresses all but the latter group.¹⁰⁷

a. Court of Justice of European Union (CJEU)

The Court is an organ of the European Union, serving as a “supranational” tribunal.¹⁰⁸ Some scholars have referred to it as the EU’s “most supreme judicial institution.”¹⁰⁹ Its primary function is to review the activities of the twenty-seven member states and their institutions (including national courts) to ensure compliance with superseding European Union law.¹¹⁰

b. European Court of Human Rights (ECtHR)

107 The author has somewhat arbitrarily excluded the various international trade organizations from this discussion, including the Appellate Body of the World Trade Organization (WTO), the Court of Justice of the European Free Trade Association States (EFTA), and similar multi-member trade tribunals. While they offer important variations in transparency norms, the trend in international arbitrations appears to clearly favor allowing dissenting opinions, although some tribunals require them to be filed anonymously. See *supra* note 83. Moreover, the nature of disputes resolved by international trade tribunals differs significantly from legal issues of a more general nature. For some representative examples of scholarly work in the international trade arena, see James Flett, *Collective Intelligence and the Possibility of Dissent: Anonymous Individual Opinions in WTO Jurisprudence*, 13 J. INT’L ECON. L. 287, 287 (2010) (acknowledging increasing frequency of “[a]nonymous individual opinions” in WTO jurisprudence); Kwast, *supra* note 83, at 128 (“The dominant view today is that dissenting opinions should not be prohibited”); Meredith Kolsky Lewis, *Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement*, 48 STAN. J. INT’L L. 1, 3-4 (2012) (calling for WTO Appellate Body to issue dissenting opinions); Schroeder & Pfitzner, *supra* note 83, at 136 (noting that dissenting opinions are now “common ground” in international commercial arbitration).

108 See RAFFAELLI, *supra* note 16, at 31 (acknowledging that the Court is a “peculiar institution having a unique role in the context of the EU judicial system,” unlike other international courts). The Court was established by the Treaty on the Functioning of the European Union (TFEU). Article 15, paragraph 1 expressly provides, “In order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible.” Consolidated Version of the Treaty on the Functioning of the European Union art. 15, Oct. 26, 2012, 2012 O.J. (C 326). Further, “[e]ach institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents” *Id.* But the transparency mandate expressly applies to the CJEU only when the court undertakes “administrative tasks.” *Id.* (“The Court of Justice of the European Union . . . shall be subject to this paragraph only when exercising their administrative tasks.”). For a detailed history of the CJEU, see Ditlev Tamm, *The History of the Court of Justice of the European Union Since Its Origin*, in THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW 9 (2013).

109 Hjalte Rasmussen & Louise Nan Rasmussen, *Comment on Katalin Kelemen - Activist EU Court Feeds on the Existing Ban on Dissenting Opinions: Lifting the Ban is Likely to Improve the Quality of EU Judgments*, 14 GERMAN L.J. 1373, 1378 (2013).

110 Julia Laffranque, *Dissenting Opinion in the European Court of Justice – Estonia’s Possible Contribution to the Democratization of the European Union Judicial System*, 9 JURIDICA INT’L L. REV. 14, 17 (2004) (citing Article 220 of the Treaty establishing the European Community), https://www.juridicainternational.eu/public/pdf/ji_2004_1_14.pdf.

The European Court of Human Rights¹¹¹ decides cases initiated by individuals who challenge signatory nations' laws or court decisions as inconsistent with the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights.¹¹² The Convention was adopted in Rome in 1950 by the then-newly formed Council of Europe and its member states, taking effect in 1953.¹¹³ The Council's forty-seven member nations are governed by the Convention and agree to abide by its guarantees protecting human rights.¹¹⁴ The Court of Human Rights was established in 1959.¹¹⁵ Its judges, one representing each member nation, are elected by the Parliamentary Assembly of the Council of Europe.¹¹⁶

The court hears cases alleging that the laws or acts of member nations violate the Convention's terms.¹¹⁷ Individual applications are considered by chambers consisting of one to fourteen judges. Panels of seven and fourteen judges are reserved for hearing the most important cases. The Grand Chamber, the highest tribunal within the court, is composed of seventeen judges and at least three substitute judges.¹¹⁸

c. *International Court of Justice (ICJ)*

Known as "The Hague," the ICJ is the principal judicial organ of the United Nations. It was established by the Charter of Nations at the end of World War II.¹¹⁹ Its fifteen elected members each serve a nine-year term,

111 *The Court in Brief*, EUR. CT. OF HUM. RTS., https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last visited Sept. 2, 2018).

112 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

113 *The Court in Brief*, *supra* note 111.

114 *47 Member States*, COUNCIL OF EUR., <https://www.coe.int/en/web/portal/47-members-states> (last visited Sept. 12, 2018). Member nations include the Russian Federation, Turkey, Greenland, Iceland, Ireland, the United Kingdom, and all nations on the European Continent, except Belarus and Kosovo. *Id.* More than 820 million persons are subject to the protections of the Convention.

115 A.H. Robertson, *The European Court of Human Rights*, 9 AM. J. COMP. L. 1, 1 (1960).

116 *Composition of the Court*, EUR. CT. OF HUM. RTS., <https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=> (last visited Oct. 6, 2018).

117 See generally European Court of Human Rights, *ECHR - Film on the European Court of Human Rights (English Version)*, YOUTUBE (Oct. 17, 2016) (video describing the court's history, purpose, functions, and representative cases), <https://www.youtube.com/watch?v=EPWGdhgQlgk&list=PLT-6qb4oU5fiINe8Cp23qVZ5kNHEX747X&index=1>.

118 EUROPEAN COURT OF HUMAN RIGHTS, RULES OF COURT 12 (2018), https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

119 Charter of the United Nations and Statute of the International Court of Justice, June 26,

renewable once.¹²⁰ In addition, ad hoc judges who represent a nation party to the litigation may be appointed if none of the court's current members is from that nation. Before World War II, the court's predecessor was the Permanent Court of International Justice (PCIJ),¹²¹ established by the League of Nations in 1922 and dissolved in 1946.¹²²

The ICJ applies international law to resolve legal disputes submitted by United Nations member states, and it also issues advisory opinions on matters that specified United Nations agencies and organizations refer to it for consideration.¹²³

d. *International Criminal Court (ICC)*

The International Criminal Court, also seated at The Hague in the Netherlands, was established under the Rome Statute of the International Criminal Court, drafted in 1998.¹²⁴ The treaty grants the ICC "international legal personality"¹²⁵ with jurisdiction over serious crimes, specifically genocide, crimes against humanity, war crimes, and aggression.¹²⁶ Currently, 123 nations around the world are signatories or "States Parties" to the treaty.¹²⁷ The ICC's role is to investigate alleged human rights violations contrary to international law and, if warranted, prosecute the alleged offenders before the court.¹²⁸

The ICC includes a pre-trial division, a trial division, and an appellate

1945, 59 Stat. 1031 [the Charter], 1055 [ICJ Statute], T.S. No. 993 [I.C.J. Statute at 25], available at <https://www.icj-cij.org/en/statute> (last visited Sept. 2, 2018).

120 *Id.* art. 13, ¶ 1; see also *id.* arts. 3 & 4. Judges are elected by the United Nation's General Assembly and Security Council. *The Court*, Int'l Ct. of Just., <http://www.icj-cij.org/en/court> (last visited Sept. 2, 2018).

121 Dumbauld, *supra* note 36, at 938; see also *Permanent Court of International Justice*, INT'L CT. OF JUST., <https://www.icj-cij.org/en/pcij> (last visited Oct. 6, 2018). Notably, the Statute of the Permanent Court of International Justice, adopted by the League of Nations in 1921, included the following language: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion." Dumbauld, *supra* note 36, at 942 & n.72 (citation omitted). The Rules of Court subsequently adopted in 1922 provided for attaching a dissenting opinion to the ICJ's judgment at the request of the dissenting judge. *Id.* at 942 & n.75 (citation omitted).

122 *Permanent Court of International Justice*, *supra* note 121.

123 *The Court*, *supra* note 120. See generally *Basic Documents*, INT'L CT. OF JUST., <https://www.icj-cij.org/en/basic-documents> (last visited Nov. 3, 2018) (providing links to Charter of the United Nations, Statute of the Court, Rules of Court, Practice Directions, and Other Texts).

124 Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544.

125 *Id.* art. 4.

126 *Id.* art 5.

127 *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Sept. 2, 2018). The United States is a signatory but has not ratified the Rome Statute. *Id.*

128 INT'L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Sept. 2, 2018).

division.¹²⁹ The court has a total of eighteen judges.¹³⁰ They serve staggered nine-year terms without the possibility of renewal.¹³¹

e. International Tribunal for the Law of the Sea (ITLOS)

This unique international tribunal was established by the United Nations in 1996 to oversee disputes arising under the United Nations Convention on the Law of the Sea.¹³² The Convention was designed to peacefully resolve disputes dealing with the resources of the sea and ocean space beyond the territorial boundaries of any sovereign nation, which belong to the world's people by declaration.¹³³ As of this writing, 168 nations are parties to the convention.¹³⁴

Disputes that cannot be resolved by other means may be submitted to the ITLOS, to the International Court of Justice, or to an arbitration tribunal. The Tribunal's twenty-one members are elected by the parties to the Convention by secret ballot, and members serve staggered nine-year terms with the possibility of one renewal term.¹³⁵ The members are selected to serve on specialized chambers of up to eleven judges each for three-year terms, with one possible renewal.¹³⁶ In addition to resolving disputes concerning the Convention's interpretation or application, the

¹²⁹ Rome Statute of the International Criminal Court art. 34, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute of the International Criminal Court].

¹³⁰ *Id.* art. 36(1).

¹³¹ *Id.* art. 36(9)(a). The only exception applies when a judge was initially elected to a three-year term. In that case, the judge is eligible for reelection to one subsequent nine-year term. *Id.* art. 36(9)(c).

¹³² United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 31363; *History*, INT'L TRIBUNAL FOR THE L. OF THE SEA, <https://www.itlos.org/the-tribunal/history/> (last visited Sept. 2, 2018).

¹³³ See *The Tribunal*, INT'L TRIBUNAL FOR THE L. OF THE SEA, <https://www.itlos.org/the-tribunal/> (last visited Oct. 6, 2018); *Oceans and the Law of the Sea*, UNITED NATIONS, <http://www.un.org/en/sections/issues-depth/oceans-and-law-sea/> (last visited Oct. 6, 2018) (referring to General Assembly declaration that "all resources of the seabed beyond the limits of national jurisdiction are the common heritage of mankind"). See generally *The United Nations Convention on the Law of the Sea (A Historical Perspective)* (1998), UNITED NATIONS DIVISION FOR OCEAN AFF. & L. OF THE SEA, http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#The%20United%20Nations.

¹³⁴ *States Parties*, INT'L TRIBUNAL FOR THE L. OF THE SEA, <https://www.itlos.org/en/the-tribunal/states-parties/> (last visited Oct. 6, 2018).

¹³⁵ *Members*, INT'L TRIBUNAL FOR THE L. OF THE SEA, <https://www.itlos.org/the-tribunal/members/> (last visited Oct. 6, 2018).

¹³⁶ *Chambers*, INT'L TRIBUNAL FOR THE L. OF THE SEA, <https://www.itlos.org/the-tribunal/chambers/> (last visited Oct. 6, 2018).

tribunal may issue advisory opinions in certain matters.¹³⁷

f. Inter-American Court of Human Rights

The Organization of American States (OAS) has a long history dating to the late 1800s.¹³⁸ Among its many other functions, OAS oversees enforcement of the American Convention on Human Rights,¹³⁹ which was adopted by OAS in 1969¹⁴⁰ and entered into force in 1978.¹⁴¹ Members of the OAS currently include all thirty-five independent nations of the Americas, including the United States.¹⁴² Of those, twenty-five nations have either ratified or complied with the Convention, and twenty have accepted compulsory jurisdiction.¹⁴³ However, two of the ratifying nations have since denounced the Convention.¹⁴⁴

Two principal organs of the OAS divide responsibilities for enforcing the Convention.¹⁴⁵ The Inter-American Commission on Human Rights (IACHR), established by OAS in 1959, addresses individual petitions alleging human rights violations in the Americas.¹⁴⁶ The Inter-American Court of Human Rights (I/A CourtHR) was created in 1978 when the Convention took effect.¹⁴⁷ It is an independent body responsible for interpreting and applying the American Convention on Human Rights.¹⁴⁸

137 *Jurisdiction*, INT'L TRIBUNAL FOR THE L. OF THE SEA, <https://www.itlos.org/en/jurisdiction/> (last visited Sept. 2, 2018).

138 *Our History*, OAS, http://www.oas.org/en/about/our_history.asp (last visited Nov. 3, 2018).

139 American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 17955 [hereinafter American Convention].

140 *What is the IACHR?*, OAS, <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Nov. 3, 2018).

141 *Id.*; see also Lynda E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges*, 14 HUM. RTS. Q. 171, 171 & n.2 (1992).

142 *Member States*, OAS, http://www.oas.org/en/member_states/default.asp (last visited Nov. 3, 2018).

143 INTER-AMERICAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2017 14 (2018) [hereinafter IACHR ANNUAL REPORT 2017], <http://www.corteidh.or.cr/tablas/informe2017/ingles.pdf>.

144 *I/A Court History*, INTER-AMERICAN CT. OF HUM. RTS., <http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh> (last visited Nov. 3, 2018). Venezuela denounced the Convention in 2012, and Trinidad and Tobago did the same in 1998. *Id.*; see IACHR ANNUAL REPORT 2017, *supra* note 143, at 14.

145 Frost, *supra* note 141, at 171; *About the OAS: Our Structure*, OAS, http://www.oas.org/en/about/our_structure.asp (last visited Nov. 3, 2018).

146 *What is the IACHR?*, OAS, <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Nov. 3, 2018);

147 Frost, *supra* note 141, at 172; *Basic Documents in the Inter-American System: Introduction*, OAS, <http://www.oas.org/en/iachr/mandate/Basics/intro.asp> (last visited Nov. 3, 2018).

148 American Convention, *supra* note 139, art. 62(3) (“The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction”); *Other Autonomous and/or Decentralized Organs, Agencies, Entities, and Dependencies*, OAS, http://www.oas.org/en/about/other_organs.asp (last visited Nov. 3, 2018).

The Statute of the I/A CourtHR was adopted in 1979 and the Rules of Procedure in 1980.¹⁴⁹ Both the Convention and the Statute include broad provisions governing the I/A CourtHR, while operational details are set out in its Rules of Procedure.¹⁵⁰

As noted above, the IACHR addresses petitions filed by individuals alleging violations of the Convention by OAS member states.¹⁵¹ Cases that the IACHR cannot resolve may be referred to the I/A CourtHR, but individuals do not have standing to file petitions directly with the I/A CourtHR.¹⁵²

The tribunal's seven members are elected to six-year terms, renewable only once.¹⁵³ The members convene to hear and decide cases alleging human rights violations, with all seven members participating in each decision.¹⁵⁴ The I/A CourtHR exercises jurisdiction not only over disputes referred by the IACHR for its consideration, but also cases filed directly by member states to the Convention.¹⁵⁵ The I/A CourtHR also has unusually broad authority to issue advisory opinions.¹⁵⁶ In fact, its advisory jurisdiction extends to all thirty-five OAS member nations, not just those that have ratified the Convention or that voluntarily comply.¹⁵⁷

g. African Court on Human and People's Rights

The court came into existence in January 2004 with the fifteenth African nation's ratification of the protocol to the African Charter for establishing an African court of human rights.¹⁵⁸ The court's first decision was rendered in 2009.¹⁵⁹ As of 2017, thirty African nations had ratified the

149 Frost, *supra* note 141, at 172.

150 *Id.* (citing Thomas Buergenthal, *Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231, 231 (1982)); see INTER-AMERICAN COURT OF HUMAN RIGHTS, RULES OF PROCEDURE, http://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf (last visited Nov. 3, 2018).

151 *I/A Court History*, *supra* note 144.

152 Frost, *supra* note 141, at 172.

153 IACHR ANNUAL REPORT 2017, *supra* note 143, at 13.

154 Frost, *supra* note 141, at 173-74.

155 *Id.* at 173; see American Convention, *supra* note 139, art. 48.

156 Frost, *supra* note 141, at 173-75; see American Convention, *supra* note 139, art. 64.

157 Frost, *supra* note 141, at 174-75.

158 *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, AFRICAN UNION (June 27, 2014), <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

159 INT'L FED'N FOR HUMAN RIGHTS, PRACTICAL GUIDE: THE AFRICAN COURT ON HUMAN AND PEOPLE'S RIGHTS 5 (2010), https://www.fidh.org/IMG/pdf/african_court_guide.pdf.

protocol.¹⁶⁰ The court's jurisdiction includes interpreting the African Charter of Human Rights and related instruments, which are binding on member nations.¹⁶¹

h. International Criminal Tribunal for the former Yugoslavia (ICTY)

This court was established by the United Nations Security Council in 1993 at The Hague, Netherlands, to address and remediate war crimes that arose during the conflicts in the Balkan region, especially Croatia, Bosnia, and Herzegovina during the 1990s.¹⁶² Its mandate terminated on December 31, 2017.¹⁶³

One of the tribunal's divisions, the Chambers, was composed of judges who presided over trials prosecuting individuals charged with perpetrating war crimes. The Chambers had three trial divisions and one appellate division. Each trial chamber was composed of three permanent judges and up to six *ad litem* judges. The Appeals Chamber comprised seven permanent judges, five from the ICTY and two others from the International Criminal Tribunal for Rwanda (ICTR). Collectively, the Appeals Chamber served as the appellate tribunal for both the ICTY and the ICTR.¹⁶⁴ Panels of five judges from the Appeals Chamber heard and decided appeals.¹⁶⁵

i. International Criminal Tribunal for Rwanda (ICTR)

The ICTR, like the ICTY, was established by the United Nations to prosecute and remediate war crimes arising from mass genocide and other humanitarian atrocities committed in Rwanda in 1994.¹⁶⁶ Its mandate

160 AFRICAN UNION, LIST OF COUNTRIES WHICH HAVE SIGNED, RATIFIED/ACCEDED TO THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS ON THE ESTABLISHMENT OF AN AFRICAN COURT ON HUMAN AND PEOPLE'S RIGHTS (Jan. 16, 2017), http://en.african-court.org/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-jan_2017.pdf.

161 *Background to the African Court*, COALITION FOR AN EFFECTIVE AFRICAN CT. ON HUM. & PEOPLE'S RIGHTS., http://www.africancourtcoalition.org/index.php?option=com_content&view=category&layout=blog&id=16&Itemid=22&lang=en (last visited Sept. 2, 2018).

162 *About the ICTY*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about> (last visited Sept. 2, 2018).

163 UNITED NATIONS INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/content/frontpage-intro-block> (last visited Sept. 2, 2018).

164 *Chambers*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/sid/141> (last visited Sept. 2, 2018).

165 *Id.*

166 *International Criminal Tribunal for Rwanda*, U.S. DEP'T OF STATE,

ended effective June 30, 2012.¹⁶⁷ As noted above, appeals were decided by the ICTY's Appeals Chamber.¹⁶⁸

B. Global Variations in Opinion-Issuing Practices, Voting Records, and Anonymity

The ongoing scholarly and juridical debates about the relative propriety of unanimous or separate judicial opinions generally focus on the advantages and disadvantages of a specific jurisdiction's opinion-issuing practices.¹⁶⁹ Proponents of individual judges' authority to write independently enumerate various reasons in favor of that practice, while proponents of unanimity and consensus emphasize countervailing risks of issuing separate opinions.¹⁷⁰ The relevant literature to date, however, has developed neither a comprehensive theoretical framework nor even a consistent vocabulary for evaluating the competing underlying values and policy preferences.¹⁷¹ And the variations in global norms governing how courts communicate their decisions to litigants, other constituencies, and the public depend largely on the fundamental values and cultural traditions unique to each legal system.

On the other hand, meaningful empirical research on the reasons for variations in dissenting rates within a single jurisdiction requires us to identify objectively measurable independent variables, such as judicial qualifications and experience, judicial selection procedures, judicial term length (and renewability), and even individual judges' political or ideological preferences. But objectively measurable independent variables useful for empirical analysis do not necessarily reflect the shared values and traditions of a legal system as a whole. Understanding the reasons for global variations in opinion-issuing practices must begin by identifying the values and policy preferences that drive each jurisdiction's normative choices about how appellate and constitutional tribunals communicate

<https://www.state.gov/j/gcj/ict/> (last visited Sept. 12, 2018); see also *Legacy Website of the International Criminal Tribunal for Rwanda*, UNITED NATIONS RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <http://unictr.irmct.org/en> (last visited Sept. 12, 2018).

¹⁶⁷ *International Criminal Tribunal for Rwanda*, *supra* note 166.

¹⁶⁸ *Supra* note 164 and accompanying text.

¹⁶⁹ See, e.g., RAFFAELLI, *supra* note 16, at 9-16; Anand, *supra* note 97, at 789-794, 800-804; Henderson, *supra* note 16, at 334-43; Simpson, Jr., *supra* note 48, at 211-17.

¹⁷⁰ See, e.g., RAFFAELLI, *supra* note 16, at 9-16.

¹⁷¹ Dunoff and Pollack's Judicial Trilemma model begins to identify some of those underlying values, but as explained elsewhere in this article, the descriptive framework they propose is underconceptualized. See *infra* notes 539-47 and accompanying text.

their decisions.¹⁷²

I. National Constitutional Courts

Of the eighteen European Union member states with constitutional courts, most currently grant judges express authority to issue separate opinions along with the collective judgment or opinion of the court.¹⁷³ Within this group, most variations in transparency norms relate to whether judges are identified by name as concurring or dissenting in the court's judgment; whether separate opinions may be issued anonymously; whether, if issued, they must include reasoning for departing from the court's opinion; whether individual judges may silently acquiesce in the

¹⁷² The somewhat daunting term “normative” is well worn, if not overused, in contemporary legal scholarship. See Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6, 8 (2016) (“Legal scholarship, in short, is on the horns of a ‘normativity’ dilemma. To some critics, legal scholarship isn’t scholarship, because it’s too normative, while to another camp, it may be scholarship, but it isn’t legal because it’s not normative enough. For every critique, both inside and outside the academy, one can find its opposite, also forcefully voiced.”); cf. Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J. L. & HUMAN. 79, 80 (1992) (critiquing “sub-standard interdisciplinary work whose most striking feature is . . . ‘intellectual voyeurism’: superficial and ill-informed treatment of serious ideas . . . in a pretentious way . . . [by which the] promising scholarly endeavor of interdisciplinary research becomes a forum for posturing and the misuse of knowledge”).

In social science terminology, “norms” are simply rules of conduct shared by a cohesive social group. There is nothing mysterious about normative analysis. It simply means the study of rules – in legal scholarship, typically *legal* rules. Generally legal scholarship that assumes a “normative” position advocates what legal rules *should or should not be*. But that kind of analysis is in fact *value-laden*. Norms are simply the rules themselves. Shared *values* drive normative outcomes. Norms are simply rules, which can be studied analytically and empirically. Shared values *influence* normative outcomes, and they can be postulated and even theorized. But values themselves cannot be measured or quantified. See, e.g., Davide Fassio, *How to Distinguish Norms from Values*, 5 PHENOMENOLOGY & MIND 196, 199-200 (2013) (“Gradability is a distinctive feature of values. Things can be more or less good, interesting or ugly. This is not the case for norms: there are no more or less permitted, forbidden or obligatory actions. . . . [V]alues, but not norms, admit degrees”). As Fassio explains, norms can be prioritized *relative to one another*, but that does not alter their inherently binary nature. Norms are what they are: one either complies with a norm or one does not. See *id.*

¹⁷³ KELEMEN, *supra* note 74, at 10 (“[T]he overwhelming majority of European constitutional courts provide for the publication of dissent.”); see *id.* at 79 (“[I]n the last half-century there has been a clear trend to allow a special category of judges, constitutional judges, to write separately”); *id.* at 182 (“In Europe, . . . there is a clear trend to allow judges, especially constitutional judges, to write separately.”); see also RAFFAELLI, *supra* note 16, at 30 tbl. 1 (listing European constitutional courts and categorizing dissenting practices of each); Bricker, *supra* note 5, at 173 (“In twenty-one of the twenty-eight current EU member states, dissenting opinions are permitted on at least some courts in the judicial system, though many grant this power only to high court judges [M]ost judges on the constitutional courts are now able to express public dissent from the majority opinion”). But see Chris Hanretty, *Dissent in Iberia: The Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals*, 51 EUR. J. POL. RES. 671, 671-72, 689 n.1 (2012) (“Most Kelsenian constitutional courts in Western Europe are prohibited from issuing dissenting opinions” (citing materials relating to France and Italy as well as a “general summary” in Laffranque, *supra* note 36)). Hanretty reasoned that specialized constitutional courts in Western Europe are “more political than other West European courts” that lack constitutional review power or that exercise it in conjunction with a general appellate caseload. *Id.* at 673.

judgment; whether a judge may add an unsigned dissent or concurrence without articulating reasons for departing from the court's judgment; and whether voting records are disclosed in full, in part, or not at all.¹⁷⁴

Austria Constitutional Court. The Austrian Constitution initially provided for constitutional judicial review by a specialized court beginning in 1920.¹⁷⁵ It was the first specialized constitutional court ever established, and it enjoys a worldwide reputation as a pioneer of constitutional judicial review.¹⁷⁶

The constitution defines the composition of the court as including a President, a Vice-President, twelve other members, and six substitute members.¹⁷⁷ All members are appointed by the Federal President, half on the recommendation of the Federal Government and the other half on the recommendation of the Federal Council and the National Council.¹⁷⁸ No term limits apply, except that each justice's term of office expires on December 31 of the year in which the incumbent reaches age seventy.¹⁷⁹

¹⁷⁴ See *infra* Tbl. 1A.

¹⁷⁵ J.A.C. Grant, *Judicial Review of Legislation under the Austrian Constitution of 1920*, 28 AM. POL. SCI. REV. 670, 670-71 (1934). The Austrian Constitutional Court has long been considered the prototype of the Kelsenian theory of judicial review. See Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT'L J. CONST. L. 44, 44 (2007) ("The centralized Kelsenian system of judicial review is built on two basic assumptions. It concentrates the power of constitutional review within a single judicial body, typically called a constitutional court, and it situates that court outside the traditional structure of the judicial branch."); Hanretty, *supra* note 173, at 671 ("[I]t was the recognition of this political role of courts that led Kelsen . . . to suggest concentrating constitutional review in specialised courts; and it was Kelsen's intellectual leadership that led to the widespread adoption of this model in Western Europe and a number of former European colonies."); John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1672 (2004) (crediting "Hans Kelsen, the first Chief Justice and designer of the Austrian Court," as the "spiritual godfather" of European constitutional adjudication); see, e.g., Grant, *supra*, at 670-71 (citing Hans Kelsen, *La garantie juridictionnelle de la constitution*, in ANNUAIRE DE L'INSTITUT INTERNATIONAL DE DROIT PUBLIC 52, 53 (1929)); Sara Lagi, *Hans Kelsen and the Austrian Constitutional Court (1918-1929)*, 9 CO-HERENCIA 273 (2012), http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S1794-58872012000100010&lng=en&tlng=es. See generally Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183 (1942). Beyond the European continent, the Kelsenian model of constitutional judicial review has also taken root in Latin American nations. Garlicki, *supra*, at 45.

¹⁷⁶ VERFASSUNGSGERICHTSHOF ÖSTERREICH, THE CONSTITUTIONAL COURT 21, https://www.vfgh.gv.at/downloads/VfGH_Broschuere_E.pdf (last visited Sept. 4, 2018). See generally Ronald Faber, *The Austrian Constitutional Court – An Overview*, 1 VIENNA J. INT'L CONST. L. 49 (2008), www.osce.org/odihr/37171?.

¹⁷⁷ Bundes-Verfassungsgesetz [B-VG] [Constitution] StGBI No. 140/1920, art. 147, ¶ 1 (Austria).

¹⁷⁸ *Id.* art. 147 ¶ 2.

¹⁷⁹ *Id.* art. 147 ¶ 6. The Austrian Constitutional Court Act of 1953 provides that a court member (or substitute member) may be removed upon a finding, by an affirmative vote of two-thirds of the

The constitution assigns more detailed procedures of the court to statutory enactments, as well as standing orders issued by the constitutional court itself.¹⁸⁰

The Austrian Court's quorum requirements depend on the nature of the proceeding.¹⁸¹ In general, a quorum exists if the chair and eight other justices are present.¹⁸² For specific kinds of matters, the chair and four other justices are sufficient to meet the quorum requirement, but even then any member may request review by eight justices.¹⁸³ Generally, issues are resolved by majority vote, excluding the chairman, unless the vote is divided equally.¹⁸⁴ However, when dismissing a limited range of matters pursuant to specific provisions of the federal constitutional law, the panel's decision must be unanimous.¹⁸⁵

The constitutional court strictly honors the norm of secret deliberations.¹⁸⁶ The court's organic act expressly requires that neither deliberations nor votes are to be made public.¹⁸⁷ Dissenting judges may have their views and reasoning for disagreement recorded, but they are kept secret in private registers and are open only to higher ordinary courts and fellow Constitutional Court justices.¹⁸⁸

Belgium Constitutional Court. Constitutional amendments adopted in 2007 formally established the Belgium court with specific jurisdiction to review statutes and rules for constitutionality and to prevent certain types of conflicts among laws. The constitution provides that the court's "composition, competences and functioning" are to be determined by

court's justices, that the justice has become constitutionally unqualified to serve; that the justice's conduct "prove[s] unworthy of the respect and confidence required by such office or . . . grossly disregard[s] the obligation of official secrecy"; or that the justice becomes mentally or physically "incapacitated to comply with the duties of the office." VERFASSUNGSGERICHTSHOFGESETZ 1953 [VF GG] [CONSTITUTIONAL COURT ACT OF 1953] BUNDESGESETZBLATT [BGBl] No. 85/1953 art. 10(1), https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1953_85/ERV_1953_85.pdf.

180 BUNDES-VERFASSUNGSGESETZ [B-VG] STGBL No. 140/1920, arts. 147 ¶ 6, 148 (Austria); see VERFASSUNGSGERICHTSHOFGESETZ 1953 [VF GG] [CONSTITUTIONAL COURT ACT OF 1953] BUNDESGESETZBLATT [BGBl] No. 85/1953 (implementing art. 148), *supra* note 179.

181 See KELEMEN, *supra* note 74, at 22 n.33.

182 Verfassungsgesichtshofgesetz 1953 [VF GG] [Constitutional Court Act of 1953] Bundesgesetzblatt [BGBl] No. 85/1953, pt. 1, § 7(1).

183 See *id.* § 7(2).

184 See *id.* § 31.

185 *Id.*; see *id.* § 19(3) subpara. (1).

186 RAFFAELLI, *supra* note 16, at 20.

187 Verfassungsgesichtshofgesetz 1953 [VF GG] [Constitutional Court Act of 1953] Bundesgesetzblatt [BGBl] No. 85/1953, pt. 1, § 30(1) ("The deliberations and the vote are not public.").

188 RAFFAELLI, *supra* note 16, at 20 (footnote and citation omitted); cf. Bricker, *supra* note 5, at 178 ("France, Italy, Belgium, and Austria . . . do not permit dissent in their constitutional courts.").

law,¹⁸⁹ as provided by the Belgian Constitutional Court Act.¹⁹⁰

The organic statute provides for twelve judges, of which six are to be Dutch-speaking and six French-speaking.¹⁹¹ A judge is appointed for life¹⁹² by the King of Belgium from two nominees submitted by either of the two legislative chambers, which alternate in submitting nominees by a two-thirds majority vote.¹⁹³ To qualify, a judge must satisfy detailed criteria apparently designed to result in balanced representation on the court with respect to qualifications, professional experience, and gender.¹⁹⁴

The two six-member language groups elect two presidents, one representing each language, who serve alternating one-year terms.¹⁹⁵ The court sits in panels of seven judges, three representing each language group plus the president, or in the president's absence, the most senior judge representing the president's linguistic group.¹⁹⁶ Cases may be submitted for consideration by the full court by either president and must be submitted to the full court upon request by at least two members of the panel.¹⁹⁷ If a tie vote occurs in full session, the president's vote breaks the tie.¹⁹⁸

Deliberations are conducted in secret,¹⁹⁹ and decisions are made by majority vote.²⁰⁰ Judgments must include the "operative part" and a statement of the reasons for the decision, and must include the names of those judges who deliberated in reaching the judgment.²⁰¹ But only the president and registrar must sign the court's judgments.²⁰² While the court's organic act does not expressly address whether separate opinions

189 1994 CONST. art. 142 (Belg.), translated at *Basic Texts: The Constitution*, CONST. CT., <http://www.const-court.be/en/common/home.html>.

190 Loi spéciale du 6 janvier 1989 sur la Court d'arbitrage [Special Act of 6 January 1989 on the Constitutional Court], MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Jan. 7, 1989, <http://www.const-court.be/en/common/home.html>.

191 *Id.* art. 31.

192 Judges are subject to removal or suspension from office only on a judgment of the constitutional court that they "have infringed the dignity of their office or have fallen short of the obligations of their position." *Id.* art. 49.

193 *See id.* art. 32.

194 *Id.* art. 34.

195 *Id.* arts. 33, 54.

196 *Id.* art. 55. Panels must also reflect a balance in qualifications and professional experience.

Id.

197 *Id.* art. 56.

198 *Id.*

199 *Id.* art. 108.

200 *Id.* art. 55.

201 *Id.* art. 111.

202 *Id.* art. 112.

are permissible, the Constitutional Court does not issue them.²⁰³

Bulgaria Constitutional Court. The 1991 Bulgarian Constitution established a specialized constitutional court, which is among the most transparent of all collegial courts.²⁰⁴ The court is independent not only from the executive and legislative branches but also from the judiciary; its operations are governed exclusively by the constitution and the Constitutional Court Act.²⁰⁵ The court is expressly charged with “guarantee[ing] the supremacy of the Constitution,”²⁰⁶ and its jurisdictional scope is governed exclusively by the constitution.²⁰⁷

The court has twelve justices.²⁰⁸ Of these, four are appointed by the Bulgaria National Assembly; four by the President; and four by Bulgaria’s two highest courts, the General Assembly of justices on the Supreme Court of Appeals and the Supreme Administrative Court.²⁰⁹ Justices are appointed to nine-year, nonrenewable terms.²¹⁰

Decisions of the court are reached by majority vote,²¹¹ and they must

203 See KELEMEN, *supra* note 74, at 21 (suggesting the lack of dissenting opinions may be attributable to the constitutional court’s historical and political background, as well as “the strong influence of the French legal tradition in Belgian law”); Bricker, *supra* note 5, at 178.

204 KONSTITUTSIA NA REPUBLIKA BALGARIA [CONSTITUTION] July 13, 1991 ch. VIII, arts. 147-52, (Bulg.), <http://www.constcourt.bg/en/LegalBasis>. See generally *Composition*, CONST. CT. OF THE REPUBLIC OF BULG., <http://www.constcourt.bg/en/Home/AboutCourt> (last visited Sept. 4, 2018).

205 Bulgaria Constitutional Court Act art. 1(2), State Gazette [S.G.] No. 67/16.08.1991, translated at *Legislation*, CONST. CT. OF THE REPUBLIC OF BULG., <http://www.constcourt.bg/en/LegalBasis>.

206 *Id.* art. 1(1).

207 KONSTITUTSIA NA REPUBLIKA BALGARIA, July 13, 1991 ch. VIII, art. 149; see also Bulgaria Constitutional Court Act arts. 12, 13. Among other responsibilities, the court’s duties include issuing binding interpretations of the constitution, determining the constitutionality of legislative enactments and presidential acts, determining whether any treaty to which Bulgaria is a signatory is consistent with the constitution as it stood before ratification of the treaty, and deciding whether Bulgaria’s domestic law is consistent with international law and with any treaty to which Bulgaria is a party. KONSTITUTSIA NA REPUBLIKA BALGARIA, July 13, 1991 ch. VIII, art. 149(1), (2), (4).

208 KONSTITUTSIA NA REPUBLIKA BALGARIA, July 13, 1991 ch. VIII, art. 147(1); Bulgaria Constitutional Court Act art. 4(1).

209 KONSTITUTSIA NA REPUBLIKA BALGARIA, July 13, 1991 ch. VIII, art. 147(2); see Bulgaria Constitutional Court Act art. 4(1).

210 Bulgaria Constitutional Court Act art. 4(2). Justices are subject to removal upon conviction of an intentional offense carrying a penalty of deprivation of liberty, upon expiration of the nine-year term, upon death or voluntary resignation, upon a determination that the judge is actually unable to discharge the duties of the office for one year or more, or if the judge accepts another public office deemed incompatible with serving on the court. KONSTITUTSIA NA REPUBLIKA BALGARIA [CONSTITUTION] July 13, 1991 ch. VIII, art. 148(1); see also Bulgaria Constitutional Court Act art. 11.

211 KONSTITUTSIA NA REPUBLIKA BALGARIA, July 13, 1991 ch. VIII, art. 151(1); see Bulgaria Constitutional Court Act art. 15(2). No judge may abstain from voting in any matter. *Id.* art. 15(3). In limited circumstances, the court’s rules provide for decisions to be made by a two-thirds majority. Regulations on the Organization of the Activities of the Constitutional Court, State Gazette [SG] No. 106/20.12.1991, as amended Jan. 26, 2001, art. 31(2) (Bulg.) [hereinafter Regulations], translated at REFWORLD, <https://www.refworld.org/docid/44ae60524.html>.

be published within fifteen days after issuance.²¹² In very limited instances, the justices must vote by secret ballot.²¹³

Details concerning the court's organization and procedures are otherwise determined by the Constitutional Court Act, which requires the court to adopt rules governing its organization and functions.²¹⁴ Those rules require justices to "observe the confidentiality of Court sessions in deciding cases."²¹⁵ Decisions must include, among other things, the justices' names, the court's ruling with supporting reasons, and the signatures of all justices who participated.²¹⁶ The rules provide expressly for dissenting opinions.²¹⁷ Specifically, they require the chairman to announce the disposition of a case, including the names of justices who signed with a dissenting opinion. The rapporteur²¹⁸ must also read the reasons for the decision.²¹⁹ While deliberations are confidential, decisions are rendered by open vote except those the constitution requires to be rendered by secret ballot.²²⁰ The court's decisions, together with the reasoning and including any dissenting opinions, must be published within fifteen days after their adoption.²²¹

Croatia Constitutional Court. The constitutional court of the Republic of Croatia was designed after Germany's constitutional court.²²²

212 KONSTITUTSIA NA REPUBLIKA BALGARIA, July 13, 1991 ch. VIII, art. 151(2); Bulgaria Constitutional Court Act, Transitional and Concluding Provisions § 1.

213 See Bulgaria Constitutional Court Act art. 24(3) (impeachment of president or vice-president); art. 5(1) (decision to revoke immunity of a fellow justice); see also KONSTITUTSIA NA REPUBLIKA BALGARIA, July 13, 1991 ch. VIII, arts. 148(2), 149(1) item 8.

214 KONSTITUTSIA NA REPUBLIKA BALGARIA, July 13, 1991 ch. VIII, art. 152; see Regulations, *supra* note 211.

215 Regulations, *supra* note 211, art. 7(4).

216 *Id.* art. 23. If a participating justice cannot sign, the chairman must "elucidate the reason." *Id.* art. 23(3).

217 *Id.* art. 32(3). "The justices who do not agree with an adopted decision or with a resolution with which a motion is denied review may sign them with a dissenting opinion and must set out their opinion in writing." *Id.* The only exception is a case that requires a decision by secret ballot. *Id.* art. 32(4). A justice who disagrees with the majority decision "may state in writing and attach his opinion to an act of the Constitutional Court." *Id.* art. 32(5); see also RAFFAELLI, *supra* note 16, at 20-21.

218 "Rapporteur" is a French term that literally translates to "reporter" in English. Many European courts, especially those following the civil law tradition, use the term to refer to the judge who is selected to "report" the court's judgment, generally in writing. The counterpart in United States multi-member courts is the judge or justice designated to write the court's principal opinion.

219 Regulations, *supra* note 211, art. 28.

220 *Id.* art. 32(1), (2).

221 *Id.* art. 33(1).

222 Laffranque, *supra* note 36, at 165. See generally *History and Development of Croatian Constitutional Judicature*, CONST. CT. OF THE REPUBLIC OF CROATIA, <https://www.usud.hr/en/history-and-development-croatian-constitutional-judicature#5> (last visited Sept. 10, 2018).

Constitutional review was known to Croatia beginning in 1963 under Soviet rule.²²³ The modern court was established in 1990 under the present constitution, which provides for eleven justices elected by parliament to eight-year terms (renewable once), subject to more specific provisions in the court's rules of procedure.²²⁴ According to the court's organic statute, decisions generally are to be made by majority vote, and the court's judgment must include reasons for the decision.²²⁵

The statute expressly provides that any judge of the constitutional court who disagrees with the judgment "is due to give the reasons for it in writing."²²⁶ If a judge votes contrary to the majority decision, the dissenting judge may give the reasons for the separate opinion in writing, which will be published at the author's request.²²⁷ A judge may not abstain from voting unless disqualified by virtue of having participated in enacting the law, regulation, or other act in question in the case before the court.²²⁸ The statute expressly requires that the constitutional court's work is open to the public.²²⁹

Decisions on constitutional matters are decided by six-judge panels.²³⁰ The court's rules of procedure provide in detail for the announcement, issuance, and publication of dissenting opinions.²³¹ Decisions must include the names of all judges participating in the decision, listed in alphabetical order.²³²

Czech Republic Constitutional Court. The Czech Republic, consistent

223 History and Development of Croatian Constitutional Judicature, *supra* note 222.

224 *Id.* (Constitutional Judicature in the Republic of Croatia after 1990).

225 Consolidated Constitutional Act on the Constitutional Court of the Republic of Croatia of May 3, 2002, NARODNE NOVINE [Official Gazette of Croatia] No. 49/02, art. 27(1), (3) [hereinafter Constitutional Act], translated at *Legal Basis: The Constitutional Act*, CONST. CT. OF THE REPUBLIC OF CROATIA, https://www.usud.hr/sites/default/files/dokumenti/The_Constitutional_Act_on_the_Constitutional_Court_of_the_Republic_of_Croatia_consolidated_text_Official_Gazette_No_49-02.pdf; see Rules of Procedure of the Constitutional Court of the Republic of Croatia art. 45(1) [hereinafter Rules of Procedure], translated at *Legal Basis: Rules of Procedure*, CONST. CT. OF THE REPUBLIC OF CROATIA, https://www.usud.hr/sites/default/files/dokumenti/Editorially_revised_and_consolidated_text_of_the_Rules_of_Procedure_of_the_Constitutional_Court_of_the_Republic_of_Croatia.pdf (last visited Sept. 10, 2018).

226 Constitutional Act, *supra* note 225, art. 27(4).

227 *Id.* art. 27(5); see Rules of Procedure, *supra* note 225, arts. 51(2), 52(1) (providing that a judge who disagrees with the court's opinion has the right to request publication of the reasons for dissenting).

228 Constitutional Act, *supra* note 225, art. 27(5); see Rules of Procedure, *supra* note 225, art. 53(1).

229 Constitutional Act, *supra* note 225, art. 3.

230 Rules of Procedure, *supra* note 225, art. 25.

231 *Id.* arts. 50-53.

232 *Id.* art. 55(3).

with its constitution,²³³ enacted a statute establishing its constitutional court in 1993,²³⁴ soon after former Czechoslovakia was divided into the sovereign nations of Czech Republic and Slovakia.²³⁵ The court's jurisdiction is relatively expansive.²³⁶ The constitution provides for fifteen justices appointed for ten-year terms.²³⁷ Justices are appointed by the republic's president²³⁸ with the consent of the senate.²³⁹

For some kinds of matters, the court sits as a whole in full session ("Plenum") with a quorum requirement of ten justices.²⁴⁰ To decide matters not within the jurisdiction of the full court, the court sits in four three-member panels.²⁴¹ In Plenum cases, decisions are made by majority or supermajority vote, depending on the nature of the issue.²⁴² A decision by a panel requires the presence of all three justices and is generally made by majority vote.²⁴³ However, certain kinds of panel decisions rejecting petitions must be unanimous.²⁴⁴

If a judge disagrees with the decision or the reasoning of the court, whether sitting in full session or in panels, the organic statute grants the right to include a separate opinion in the record, appended to the court's decision and identifying the dissenter by name.²⁴⁵ The court publishes

233 Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic] art. 83 (Czech) ("The Constitutional Court is the judicial body responsible for the protection of constitutionality."), translated at *About the Court: Legal Basis*, CONST. CT. OF THE CZECH REPUBLIC, https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Ustava_EN_ve_zneni_zak_c_98-2013.pdf (last visited Sept. 4, 2018).

234 Zákon o Ústavním soudu [Constitutional Court Act], Zákon č. 182/1993 Sb., translated at *About the Court: Legal Basis*, CONST. CT. OF THE CZECH REPUBLIC, https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/ZUS_EN_verze_2018.pdf (last visited Sept. 4, 2018).

235 RAFFAELI, *supra* note 16, at 21; see *History*, CONST. CT. OF THE CZECH REPUBLIC, <https://www.usoud.cz/en/history/> (last visited Sept. 4, 2018).

236 See Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 87 (Czech) (enumerating issues and disputes within the court's jurisdiction).

237 *Id.* art. 84(1).

238 *Id.* arts. 62(e), 84(2).

239 *Id.* art. 84(2); cf. Zákon o Ústavním soudu [Constitutional Court Act], Zákon č. 182/1993 Sb., § 6 (providing that the President must "seek the consent of the Senate," which is deemed granted under specified circumstances).

240 Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], § 11 (Czech).

241 *Id.* § 15.

242 *Id.* § 13.

243 *Id.* § 19(2).

244 *Id.*; see *id.* § 43(2).

245 RAFFAELI, *supra* note 16, at 21; see Zákon o Ústavním soudu [Constitutional Court Act], Zákon č. 182/1993 Sb., § 14 ("A Justice who disagrees with the decision of the Plenum or with its reasoning, has the right to have their dissenting opinion noted in the record of discussions and

separate opinions in its own reporter, but they are not included in the Czech Republic's *Collection of Laws*; that publication includes only a brief notation at the foot of the court's judgment reporting the existence of a dissenting opinion.²⁴⁶ All judgments must include reasons for the decision.²⁴⁷

France Constitutional Council. The Constitution of 1958 established a special constitutional council with limited powers of constitutional review.²⁴⁸ The council has nine members, each appointed to nine-year, nonrenewable terms.²⁴⁹ The nine members' terms are staggered so that one third of the council membership is replaced every three years.²⁵⁰ The French president appoints the council's presiding member from among the nine appointed members.²⁵¹

Organizational, procedural, and operational details are set out in the council's organic statute.²⁵² The council considers matters in full session with a minimum of seven members participating.²⁵³ The implementing statute requires that the council's decisions must include reasons, and they must be published.²⁵⁴ However, they do not reflect members' votes.²⁵⁵

France forbids any of its judges to issue dissenting opinions, including

appended to the decision with his name stated."); *id.* § 22 (similar provision for disagreements with panel decisions).

246 RAFFAELLI, *supra* note 16, at 21.

247 Zákon o Ústavním soudu [Constitutional Court Act], Zákon č. 182/1993 Sb., § 54(2).

248 *See* 1958 Const. tit. VII, arts. 58-61-1 (Fr.) (enumerating constitutional council functions); Garlicki, *supra* note 175, at 45 n.3.

France is the only European country in which constitutional adjudication takes the form, almost exclusively, of a preventive review. Except for the disputes related to the distribution of lawmaking competences between the parliament and the cabinet (FR. CONST. art. 37, sec. 2), the Conseil Constitutionnel only has jurisdiction to review a statute before it has been promulgated.

Id.; *see also* Nadelmann (1959), *supra* note 84, at 423-24 (noting "the advent of the monocratic Constitution of 1958" and speculating about its potential impact on French government's balance of powers).

249 1958 Const. tit. VII, art. 56 (Fr.). Council members are subject to removal prior to the end of the nine-year term if they carry out activities or assume another office deemed incompatible with their official duties, or if they become "permanently incapacitated from performing their duties." Ordonnance 58-1067 du 7 novembre 1958 portant loi organique sur le Conseil constitutionnel [Ordinance 58-1067 of Nov. 7, 1958 Bearing on the Organic Law on the Constitutional Council], tit. 1, arts. 10, 11, THE CONST. COUNCIL, <https://www.conseil-constitutionnel.fr/fondements-textuels/ordonnance-n-58-1067-du-7-novembre-1958-portant-loi-organique-sur-le-conseil-constitutionnel>.

250 *Id.* tit. VII, art. 56. The President of the French Republic, the President of the National Assembly, and the President of the Senate each appoint three members to the council. *Id.*

251 *Id.*; Ordonnance 58-1067, *supra* note 249, tit. 1, art. 1, ¶ 2.

252 1958 Const. tit. VI, art. 63 (Fr.); *see* Ordonnance 58-1067, *supra* note 249.

253 Ordonnance 58-1067, *supra* note 249, art. 14 (excepting cases of "force majeure duly recorded in the minutes").

254 *Id.* arts. 23-11, 26-1.

255 RAFFAELLI, *supra* note 16, at 18.

members of the constitutional council,²⁵⁶ on the reasoning that individual judicial dissent contradicts the “principle of deliberative secrecy.”²⁵⁷ Members of the constitutional council, like other French judges since 1849,²⁵⁸ take a traditional oath “to maintain the secrecy of deliberations and of votes.”²⁵⁹ The strong norm of secrecy may be attributable in part to the political nature of judicial appointments, together with judges’ duty to remain independent and impartial.²⁶⁰

Germany Constitutional Court. The constitutional court in Germany, known as the Bundesverfassungsgericht, was first established in 1951 with the enactment of the Federal Constitutional Court Act.²⁶¹ The court exercises both abstract and concrete constitutional review.²⁶² The sixteen-member court sits in two subdivisions known as “senates,” which have “precisely defined competencies” as determined by the Constitutional Court Act and by the plenary court sitting as a whole.²⁶³ Each senate has eight justices²⁶⁴ and is further subdivided into “chambers” of three justices

256 Bricker, *supra* note 5, at 178.

257 François Luchaire, *Is the Adoption of Dissenting Opinions in France Desirable?*, 8 CAHIERS DU CONSEIL CONSTITUTIONNEL 111 (2000) (Hunter Smith trans.); see Nadelmann (1959), *supra* note 84, at 422-24 (describing the rather colorful and varied history of the norm of secrecy in French courts).

258 Nadelmann (1959), *supra* note 84, at 423 (citing Law of Aug. 18, 1849, on Court Organization, art. 3(2)).

259 Luchaire, *supra* note 257, at 111; see Marcel Waline, *The Constitutional Council of the French Republic*, 12 AM. J. COMP. L. 483, 487 (1963) (noting the political nature of the appointment process for council members).

260 See Waline, *supra* note 259, at 487-88 (describing the strong influence of the required oath of secrecy with respect to council deliberations, which effectively precludes separate opinions).

261 Bundesverfassungsgerichtsgesetz [BVerfGG] [Act on the Federal Constitutional Court] Mar. 12, 1951, BUNDESGESETZBLATT, Teil I [BGBl I] at 1473, last amended by Gesetz [G], Oct. 8, 2017, BGBl I at 3546, art. 2 (Ger.) [hereinafter Federal Constitutional Court Act], https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=10; see *Milestones in the History of the Federal Constitutional Court*, BUNDESVERFASSUNGSGERICHT, https://www.bundesverfassungsgericht.de/EN/Das-Gericht/Zeitstrahl/zeitstrahl_node.html (last visited Sept. 3, 2018); see also *Video 2: History*, BUNDESVERFASSUNGSGERICHT, https://www.bundesverfassungsgericht.de/EN/Service/Infothek/Filme/Modul_2/modul2_node.html (short video explaining history and evolution of the German Constitutional Court) (last visited Sept. 3, 2018).

262 Peter E. Quint, *Leading a Constitutional Court: Perspectives from the Federal Republic of Germany*, 154 U. PA. L. REV. 1853, 1854 (2006) (giving broad overview of the court’s history and functions).

263 *Court and Constitutional Organ*, BUNDESVERFASSUNGSGERICHT, https://www.bundesverfassungsgericht.de/EN/Das-Gericht/Gericht-und-Verfassungsorgan/gericht-und-verfassungsorgan_node.html (last visited Sept. 3, 2018).

264 *Structure*, BUNDESVERFASSUNGSGERICHT, https://www.bundesverfassungsgericht.de/EN/Das-Gericht/Organisation/organisation_node.html (last

each.²⁶⁵ Occasionally cases are considered by the full “plenary court,” which is mandatory if the two senates reach conflicting decisions on a specific legal matter.²⁶⁶

Justices are elected to twelve-year, nonrenewable terms²⁶⁷ — half by the Bundestag, the German Parliament’s lower house; and half by the Bundesrat, the upper house.²⁶⁸ The relatively long but nonrenewable terms are designed to ensure judicial independence.²⁶⁹ Every justice who participates in a decision is listed by name in the judgment’s caption.²⁷⁰

West Germany was the first continental nation to grant any of its courts express authority to issue dissenting opinions.²⁷¹ In 1970, two decades after it was organized, the German Parliament amended the organic statute to authorize judges to issue concurring or dissenting opinions,²⁷² but only when a judgment is issued by one of the two senates or the plenary

visited Sept. 3, 2018); *see also* *Video 1: Organisation and Daily Work*, BUNDESVERFASSUNGSGERICHT, https://www.bundesverfassungsgericht.de/EN/Service/Infothek/Filme/Modul_1/modull_node.html (last visited Nov. 3, 2018).

²⁶⁵ *Structure*, *supra* note 264. Designed to manage the court’s high caseload, three-justice panels consider cases deemed to have “no general constitutional significance,” which comprise the great majority (ninety-nine percent) of the court’s work. *Court and Constitutional Organ*, *supra* note 263; Quint, *supra* note 262, at 1862. The three-member panels effectively serve as screening committees. *Id.* at 1862-63. Decisions of each three-justice chamber must be unanimous. *Id.* at 1862.

²⁶⁶ *Court and Constitutional Organ*, *supra* note 263.

²⁶⁷ Quint, *supra* note 262, at 1856 (citing Federal Constitutional Court Act § 4(1)). The controlling statute provides in part,

- (1) The term of office of the Justices shall be twelve years, though it shall not extend beyond retirement age.
- (2) Immediate or subsequent re-election of Justices shall not be possible.
- (3) Justices shall retire at the end of the month in which they reach the age of sixty-eight.

Federal Constitutional Court Act § 4(1)-(3).

²⁶⁸ *Justices*, *supra* note 264.

²⁶⁹ *See id.*

²⁷⁰ Geschäftsordnung des Bundesverfassungsgerichts [BVerfGG] [Rules of Procedure of the Federal Constitutional Court], Nov. 19, 2014, BUNDESGESETZBLATT, Teil 1 [BGBl] at 286, §§ 28(1), 31(4) (Ger.) [hereinafter Rules of Procedure of the Federal Constitutional Court], https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/GO_BVerfG.pdf?__blob=publicationFile&v=6.

²⁷¹ Bricker, *supra* note 5, at 173.

²⁷² Federal Constitutional Court Act § 30(2).

- (2) If a Justice expressed a differing view on the decision or its reasoning during the deliberations, he or she may set forth this view in a separate opinion; the separate opinion shall be annexed to the decision. The Senates may disclose the distribution of votes in their decisions. Further details shall be set out in the Rules of Procedure.

Id.; *see also* Rules of Procedure of the Federal Constitutional Court § 55 (setting out further details); Grimm, *supra* note 11, at I-2. The first separate opinion was filed in January 1971. *History*, BUNDESVERFASSUNGSGERICHT, https://www.bundesverfassungsgericht.de/EN/Das-Gericht/Zeitstrahl/zeitstrahl_node.html (last visited Sept. 3, 2018). Judgments issued by three-justice chambers, however, must be issued unanimously. Federal Constitutional Court Act § 93d(3) (“Decisions of the Chamber shall be adopted by unanimous vote.”); Quint, *supra* note 262, at 1862-63.

court.²⁷³ However, the judges' individual votes are not disclosed, except to the extent individual judges elect to sign separate opinions.²⁷⁴

While judges on the constitutional court have had authority to issue dissenting opinions for decades, they sometimes decline to do so even if they disagree with the majority decision.²⁷⁵ The senate or plenary court has discretion whether to announce the number of votes for and against the court's judgment.²⁷⁶ One scholar noted that during the twelve years prior to 2012, only thirty-seven "explicit dissenting opinions [were] issued under the names of particular judges," none of them in plenary session.²⁷⁷

In any event, each judgment issued by the court must list all participating justices by name.²⁷⁸

Hungary Constitutional Court. The specialized Hungarian constitutional court, established in 1990, generally follows the German organizational model.²⁷⁹ The court's organic statute expressly allows justices to author separate opinions.²⁸⁰ If so, they are published along with the court's judgment.²⁸¹ The court's justices regularly exercise their authority to file separate opinions.²⁸²

The court's procedural rules²⁸³ sets out in detail the contents, form, and means of disseminating decisions. In addition to the court's holding and

273 See KELEMEN, *supra* note 74, at 20; Quint, *supra* note 262, at 1862-63.

274 WITTIG, *supra* note 74, at 4 ("[I]n Germany the judges do not reveal their individual votes. Thus, the only individualized information available are separate opinions as they are signed [sic] by their author[s].").

275 See Grimm, *supra* note 11, at I-2.

276 *Id.* at I-3

277 Hanretty, *supra* note 173, at 689 & n.2; see also WITTIG, *supra* note 74 (analysis of separate opinions issued by Germany's constitutional court).

278 Rules of Procedure of the Federal Constitutional Court § 28(1).

279 RAFFAELLI, *supra* note 16, at 26.

280 2011 évi CLI. törvény az Alkotmánybíróságról (Act CLI of 2011 on the Constitutional Court) § 66, translated at *Act on the CC*, THE CONST. CT. OF HUNG., <https://hunconcourt.hu/act-on-the-cc/> (last visited Sept. 5, 2018).

(2) If a Member of the Constitutional Court who opposed the decision in the course of the voting does not agree with the decision of the Constitutional Court, he or she shall have the right to attach his or her dissenting opinion – along with a written reasoning – to the decision.

(3) A Member of the Constitutional Court who agrees with the merits of the decision shall have the right to attach his or her reasons in the form of a concurring opinion if they differ from those of the majority.

Id. Opinions may be filed individually, or a justice may join another justice's separate opinion. RAFFAELLI, *supra* note 16, at 26.

281 RAFFAELLI, *supra* note 16, at 26; see *The Constitutional Court's Rules of Procedure*, THE CONST. CT. OF HUNG. (May 22, 2017), <https://hunconcourt.hu/rules-of-procedure/> (§ 61(4)).

282 RAFFAELLI, *supra* note 16, at 26.

283 *The Constitutional Court's Rules of Procedure*, *supra* note 281, §§ 58-61.

reasoning, decisions must include, for example, whether the decision was made by the plenary session or by panel; whether any dissenting or concurring opinions were filed and if so, the names of the justices issuing them; the court's reasoning for the decision; and the names and signatures of judges who participated in deciding the matter.²⁸⁴ The separate opinion must include reasons for disagreeing with the court's decision,²⁸⁵ and arguments or points addressed in separate opinions must have been raised during the court's deliberations to give all participants the opportunity to consider them.²⁸⁶

Italy Constitutional Court. Italy's *Corte Costituzionale*, established in 1956,²⁸⁷ has fifteen justices who each serve nine-year, nonrenewable terms.²⁸⁸ Like France, Italy strongly adheres to the legal principle of maintaining the secrecy of judicial deliberations²⁸⁹ – so much so that in certain criminal cases a violation of that norm amounts to a criminal offense.²⁹⁰

Judges on Italy courts are not permitted to publish separate opinions.²⁹¹

284 *Id.* §§ 58, 60(3).

285 *Id.* § 59(4), (5); *id.* § 60(3). No separate opinion, however, can be longer than the majority decision. *Id.* § 59(4).

286 *Id.* § 59(3).

287 Giovanni Boggetti, *Political Role of the Italian Constitutional Court*, 49 NOTRE DAME L. REV. 981, 981 (1974). Amendments to Italy's constitution in 1948 provided for constitutional judicial review, but the court's organization and functions were delayed several years until the relevant organic statutes were in place. ITALIAN CONSTITUTIONAL COURT 17 (Claire Tame trans., 2017), https://www.cortecostituzionale.it/documenti/download/pdf/The_Italian_Constitutional_Court.pdf (last visited Sept. 5, 2018) (“Thus, seven years after the Constitution came into force, the Court was finally able to function.”).

288 Arts. 134-37 Costituzione [Cost.] [Constitution] (It.). See generally ITALIAN CONSTITUTIONAL COURT, *supra* note 287.

289 Italian Constitutional Court, *supra* note 287, at 49.

To date, [separate opinions have] not been permitted in Italy, where the traditional ideal of a unified and impersonal judicial opinion still prevails – even if in practice the Court's opinions are the product of a collaborative decision-making process in which not all judges necessarily agree with the majority view. Moreover, strict secrecy surrounds the Court's deliberations, including differences of opinion that are voiced by judges, proposals made but rejected, and legal arguments not contained in the final opinion. . . . Officially, one cannot know whether a decision was made unanimously or by majority vote, by how great a majority, or how individual judges voted. For some time there has been discussion, in both academic and legislative circles, and within the Court itself, about whether or not it would be appropriate to introduce the practice of publishing dissenting opinions, and of ways in which this could be done. There is disagreement about the wisdom of such an innovation.

Id.

290 RAFFAELLI, *supra* note 16, at 18 (citing Codice di procedura civile [C.p.c.] [Civil Procedure Code] art. 276 (It.); Codice di procedura penale [C.p.p.] [Criminal Procedure Code] art. 125(4) (It.)); see C.p.p. art. 684 (criminalizing publication of “acts or documents” of criminal proceedings if forbidden by law); *id.* art. 685 (criminalizing publication of names and votes of judges who deliberate in criminal proceedings).

291 Bricker, *supra* note 5, at 178.

Since 1988, when statutory amendments were enacted that eliminated judges' civil liability for breaching secrecy norms, a judge may request the filing of a dissenting opinion with supporting reasons. However, any dissenting opinion is recorded under seal and is not published or otherwise disclosed.²⁹²

For years, however, the Italy Constitutional Court and legal scholars have studied and debated the pros and cons of allowing judges to publish separate opinions, but the issue remains controversial.²⁹³

Latvia Constitutional Court. The court was established in 1996²⁹⁴ with the authority to review legislation for conformity with the constitution.²⁹⁵ Its seven judges are appointed to ten-year terms,²⁹⁶ except that a judge's term ends upon reaching the age of seventy years.²⁹⁷

The constitution enumerates several matters that require a decision by the full court with a minimum quorum of five judges, but other matters may be decided by three-judge panels.²⁹⁸ Decisions are made by majority vote.²⁹⁹ Any judge who votes against the decision of the court must express the reasons for the dissent in a written opinion, which is appended to the court's judgment.³⁰⁰ The organic law enumerates the necessary contents of each judgment, including the composition of the court and the reasoning on which the court's judgment is grounded.³⁰¹ All judgments are published.³⁰²

The court's rules of procedure otherwise define the court's structure

292 RAFFAELLI, *supra* note 16, at 18-19 & n.53 (citing authorities); see Michele Graziadei & Ugo Mattei, *Judicial Responsibility in Italy: A New Statute*, 38 AM. J. COMP. L. 103, 121-26 (1990) (describing "the problem of making public the dissenting views of judges" and how the 1988 statute, as later interpreted by the constitutional court, addressed the issue).

293 RAFFAELLI, *supra* note 16, at 18; see ITALIAN CONSTITUTIONAL COURT, *supra* note 287, at 49.

294 *History of the Court*, CONST. CT. OF THE REPUBLIC OF LAT., <http://www.satv.tiesa.gov.lv/en/history/history-of-the-court/> (last visited Sept. 5, 2018).

295 CONSTITUTION OF THE REPUBLIC OF LATVIA June 19, 2014, art. 85, *translated at Legal Basis*, CONST. CT. OF THE REPUBLIC OF LAT. (Feb. 4, 2016), <http://www.satv.tiesa.gov.lv/en/2016/02/04/the-constitution-of-the-republic-of-latvia/>.

296 Constitutional Court Law § 7(1), *translated at Legal Basis*, CONST. CT. OF THE REPUBLIC OF LAT. (Feb. 4, 2016), <http://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/>; *Justices*, CONST. CT. OF THE REPUBLIC OF LAT., <http://www.satv.tiesa.gov.lv/en/structure/justices-of-the-constitutional-court/> (last visited Sept. 5, 2018).

297 *Justices*, *supra* note 296.

298 Constitutional Court Law § 25.

299 *Id.* § 30(2).

300 *Id.* § 30(6).

301 *Id.* § 31.

302 *Id.* § 33.

and organization.³⁰³ Dissenting opinions must be in writing and signed by the author.³⁰⁴ All justices, however, must “keep the secret of the deliberations room.”³⁰⁵ If no dissenting opinion is expressed during deliberations, the judgment must make note of that fact.³⁰⁶

Lithuania Constitutional Court. When the constitutional court was initially established in Lithuania in 1993,³⁰⁷ the organic law prohibited publication of either the judges’ votes or any views expressed during deliberations.³⁰⁸ But in 2008, the organic statute governing the Lithuania constitutional court was amended to expressly allow its judges to publish separate opinions.³⁰⁹

The court’s rules, as most recently amended, implement the organic statute by providing detailed procedures regarding dissenting or concurring opinions.³¹⁰ Specifically, an individual judge’s opinion must be prepared as a separate document including the name and signature of the author, the judge’s opinion, and supporting arguments.³¹¹

The rules clearly provide that the contents of a separate opinion cannot compromise the statutory norm of secret deliberations that prohibits

303 *Id.* § 14; see Rules of Procedure of the Constitutional Court (2016), translated at *Legal Basis*, CONST. CT. OF THE REPUBLIC OF LAT. (Feb. 4, 2016), <http://www.satv.tiesa.gov.lv/en/2016/02/04/hello-world/> (last visited Sept. 5, 2018).

304 RAFFAELLI, *supra* note 16, at 18; see Rules of Procedure of the Constitutional Court § 145.

305 Rules of Procedure of the Constitutional Court § 140.

306 *Id.* § 144.

307 See LIETUVOS RESPUBLIKOS KONSTITUCIJA [CONSTITUTION] Oct. 25, 1992 (Lith.), translated at *About the Court: Legal Information*, THE CONST. CT. OF THE REPUBLIC OF LITH., <http://www.lrkt.lt/lt/apie-teisma/teisine-informacija/konstitucija/125> (last visited Sept. 5, 2018).

308 RAFFAELLI, *supra* note 16, at 25 (citing V. Staugaityte, *Dissenting Opinion in the Constitutional Justice: Collegiality of the Courts vs Personal Independence of the Judge*, 9 JURISPRUDENCIJA 125 (2008)).

309 *Id.*; Kelemen, *supra* note 5, at 1350; see Lietuvos Respublikos Konstitucinio Teismo įstatymas [Law on the Constitutional Court of the Republic of Lithuania], Feb. 6, 1993, LIETUVOS AIDA Nr. 24, art. 55 [hereinafter Law on the Constitutional Court], translated at *About the Court: Legal Information*, THE CONST. CT. OF THE REPUBLIC OF LITH., <http://www.lrkt.lt/lt/apie-teisma/teisine-informacija/konstitucinio-teismo-istatymas/126> (last visited Sept. 5, 2018).

A judge of the Constitutional Court having a different opinion on an act adopted by the Constitutional Court shall have the right . . . to set out . . . in a reasoned opinion his or her dissenting opinion. . . . A separate opinion of the judge is published on the Constitutional Court's website, attached to the case, and is notified to the persons participating in the case and mass media.

Law on the Constitutional Court art. 55.

310 Lietuvos Respublikos Konstitucinio Teismo reglamentas [Rules of the Constitutional Court of the Republic of Lithuania] (as amended 2015), arts. 144-52 [hereinafter Rules of the Constitutional Court of the Republic of Lithuania], translated at *About the Court: Legal Information*, THE CONST. CT. OF THE REPUBLIC OF LITH., <http://www.lrkt.lt/en/about-the-court/legal-information/the-rules-of-the-constitutional-court/194> (last visited Nov. 3, 2018).

311 *Id.* art. 146. A dissenting opinion must clearly identify the parts of the court’s decision with which the judge disagrees. *Id.* art. 147. However, a judge may publish a separate opinion taking issue with only the reasoning of the court’s decision. See *id.* art. 148.

participating judges or employees from disclosing the votes or opinions of other judges.³¹²

Luxembourg Constitutional Court. The nation's constitutional court was established in 1997, soon after the constitution was amended in 1996 to provide for judicial review.³¹³ The court has nine members, each appointed by the grand duke of Luxembourg, from three nominees submitted by the joint general assembly.³¹⁴

Although recent in origin, the court honors the traditional principle of secrecy as to both deliberations and judicial votes. Specifically, the court's 1997 organic law requires judicial deliberations to remain secret, and the principle of secrecy has been interpreted to extend to judges' individual opinions, which are not published.³¹⁵ The court's decisions are reached by majority vote.³¹⁶

Malta Constitutional Court. Malta is somewhat unique. Although Malta's constitutional court was established in 1964 with five justices, since 1974 it is composed of only three justices.³¹⁷ Justices are appointed by Malta's president with the advice of the Prime Minister.³¹⁸ While appointees have no specified terms of office, retirement is mandatory upon reaching age sixty-five.³¹⁹ Judges cannot be removed from office except upon a finding of "proved inability to perform the functions of [the] office (whether arising from infirmity of body or mind or any other cause) or

312 See Law on the Constitutional Court art. 53; Rules of the Constitutional Court of the Republic of Lithuania art. 150 ("Upon writing the dissenting opinion, the judge may not violate the requirements of the secrecy of the room set forth in Article 53 of the Law on the Constitutional Court.") Specifically, the separate opinion cannot reveal other judges' opinions expressed during deliberations, the votes of other judges, or the "form of vote" by which the decision was made. Rules of the Constitutional Court of the Republic of Lithuania art. 150; see Law on the Constitutional Court art. 53 ("Neither the Constitutional Court judges nor the staff member who participated in the hearing have the right to publish opinions expressed in the meeting room or votes cast.").

313 RAFFAELLI, *supra* note 16, at 19.

314 Loi du 27 juillet 1997 portant organisation de la Cour Constitutionnelle [Law of 27 July 1997 on the Organization of the Constitutional Court] JOURNAL OFFICIEL DU GRAND-DUCHÉ DE LUXEMBOURG [J.O.] A58, art. 12, [hereinafter Law of 27 July 1997], <http://data.legilux.public.lu/eli/etat/leg/loi/1997/07/27/n6/jo>.

315 RAFFAELLI, *supra* note 16, at 19; see Law of 27 July 1997 on the Organization of the Constitutional Court, art. 12 ("The deliberations of the Court are secret.").

316 Law of 27 July 1997 art. 12.

317 *Constitutional Court*, THE JUDICIARY-MALTA, <http://judiciarymalta.gov.mt/constitutional-court> (last visited Sept. 3, 2018).

318 CONST. OF MALTA, Sept. 21, 1964, art. 96, *translated at* LAWS OF MALTA, <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566&l=1> (last visited Sept. 3, 2018).

319 *Id.* art. 97(1).

proved misbehaviour.”³²⁰

Although Malta generally follows the common law tradition, judges on any of its collegial courts, including the constitutional court, are by statute denied authority to publish separate opinions.³²¹ Voting records and deliberations are also kept secret.³²²

Poland Constitutional Tribunal. While the Polish constitutional court was established by constitutional amendment in 1982,³²³ its decisions have had binding effect only since 1997.³²⁴ The court is composed of fifteen justices, each appointed to a nine-year, nonrenewable term.³²⁵ The constitution provides that the court’s decisions are to be reached by majority vote.³²⁶

The court’s organic statute expressly authorizes judges to issue separate opinions.³²⁷ Although a judgment requires the signatures of all participating judges, any dissenting judge may express a separate individual opinion. The reasoning for the separate opinion must be explained in writing, and any dissenting vote is reflected in the court’s judgment. A judge may also issue a concurring opinion that differs only with the court’s reasoning.³²⁸

Portugal Constitutional Court. Portugal established a special constitutional court,³²⁹ known as the Tribunal Constitucionale in 1982, generally adopting the model of the German constitutional court.³³⁰

320 *Id.* art. 97(2).

321 RAFFAELLI, *supra* note 16, at 19 & n.59 (citing MALTA CODE OF ORG. & CIV. PROC. art. 217). The code provides, “In a court consisting of more than one member, the decision of the majority shall form the judgment which shall be delivered as the judgment of the whole court.” MALTA CODE OF ORG. & CIV. PROC. art. 217, *translated at Legislation, LAWS OF MALTA*, <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8577&l=1> (last visited Sept. 3, 2018).

322 RAFFAELLI, *supra* note 16, at 19.

323 *Id.* at 26.

324 *See* KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, art. 190(1) (Pol.), *translated at About the Tribunal, TRYBUNAŁ KONSTYTUCYJNY*, <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/> (last visited Sept. 5, 2018).

325 *Id.* art. 194(1).

326 *Id.* art. 190(5).

327 RAFFAELLI, *supra* note 16, at 26 (citing Constitutional Tribunal Act of 1 August 1997).

328 *Id.* (citing Constitutional Tribunal Act art. 68). The court’s website currently does not post English translations of either its organic statute or its regulations.

329 CONST. OF THE PORTUGUESE REPUBLIC, as amended July 24, 2005, arts. 221-24, *translated at Constitution of the Portuguese Republic, TRIBUNAL CONSTITUCIONAL PORTUGAL*, <http://www.tribunalconstitucional.pt/tc/conteudo/files/constitucaoingles.pdf> (last visited Sept. 5, 2018); *see* Sofia Amaral-Garcia, Nuno M. Garoupa & Veronica Grembi, *Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal*, 6 J. EMPIRICAL LEGAL STUD. 381, 385 (2009).

330 Hanretty, *supra* note 173, at 673-74; *see* TRIBUNAL CONSTITUCIONAL PORTUGAL, <http://www.tribunalconstitucional.pt/tc/en/home.html> (last visited Sept. 5, 2018). *See generally* CONSTITUTIONAL COURT OF PORT., CONSTITUTIONAL COURT OF PORTUGAL (2012) (e-book),

However, the Portugal court's constitutional review power, while broad, is not exclusive; other courts exercise "decentralized" or diffuse judicial review of constitutional issues.³³¹ The Portugal constitution provides for appointment of thirteen justices; ten are appointed by the legislative body, and the other three are chosen by the ten legislatively appointed justices.³³² Six justices must be selected from among judges of the nation's other courts, with the other six selected from among "jurists."³³³ Justices are appointed to nine-year, nonrenewable terms.³³⁴ While holding office, justices may not publicly engage in any political activity.³³⁵

The constitution enumerates the court's broad powers, which include both abstract and concrete constitutional review.³³⁶ Other powers may be assigned by statute.³³⁷ When considering abstract constitutional issues, all justices must participate in full session; otherwise smaller four-member panels known as "sections" may consider and decide matters before the court.³³⁸ Other organizational and procedural details are specified by the court's organic statute.³³⁹

http://www.tribunalconstitucional.pt/tc/content/files/tc_ebook_30anos_en/files/assets/basic-html/index.html#1 (last visited Sept. 5, 2018); *Brief History of the Constitutional Court*, TRIBUNAL CONSTITUCIONAL PORTUGAL, <http://www.tribunalconstitucional.pt/tc/en/tribunal-historiaen.html>.

331 Amaral-Garcia et al., *supra* note 329, at 385. "Decentralized constitutional review is exercised by regular [Portuguese] courts in concrete and specific cases. Decisions concerning the concrete unconstitutionality of laws in the context of a specific case are subject to appeal to the constitutional court. Those are the majority of the cases heard by the constitutional court." *Id.* at 385 n.16.

332 *See* CONST. OF THE PORTUGUESE REPUBLIC art. 222(1); Amaral-Garcia et al., *supra* note 329, at 386.

333 CONST. OF THE PORTUGUESE REPUBLIC art. 222(2); *see* Law of the Constitutional Court, No. 28/82, Nov. 15, 1982, art. 13, *translated at Law of the Constitutional Court*, TRIBUNAL CONSTITUCIONAL PORTUGAL, <http://www.tribunalconstitucional.pt/tc/content/files/en/lawoftheconstitutionalcourt.pdf> (last visited Sept. 5, 1982) (eligibility requires either judicial experience or Portuguese legal education).

334 CONST. OF THE PORTUGUESE REPUBLIC art. 222(3); Law of the Constitutional Court, No. 28/82, art. 21(1), (2). Justices must retire at the end of the term in which they reach age seventy. Law of the Constitutional Court, No. 28/82, art. 21(3). They may not be removed from office during their terms except in cases of death or permanent physical incapacity, renunciation of office, acceptance of a position or commission of an act incompatible with official judicial duties, or dismissal based on a "disciplinary or criminal procedure." *Id.* arts. 22, 23(1).

335 *Id.* art. 28.

336 CONST. OF THE PORTUGUESE REPUBLIC art. 223(1); *see id.* arts. 277-83 (defining constitutional review authority).

337 *Id.* art. 223(1)-(3).

338 *Id.* art. 224(2); Law of the Constitutional Court, No. 28/82, arts. 40(1), 41. Sections are unspecialized. *Id.* art. 41(1). For decisions either in full session or sections, a majority of the members must participate to qualify as a quorum. *Id.* art. 42(1).

339 *Id.* art. 224(1), (3); *see* Law of the Constitutional Court, No. 28/82.

Decisions, whether in full session or by sections, are made by majority vote of the justices present.³⁴⁰ All participating justices have the right to “table their reasons for a dissenting vote.”³⁴¹ As a practical matter, the court interprets this requirement to mean that if “one or more justices disagree with a majority decision, or when they agree with one, but on grounds other than those set out in the ruling, they can respectively attach a dissenting or a concurring opinion to the text of the decision, setting out and justifying their position.”³⁴² Even if a justice declines to give reasons for not joining a majority decision, the court makes note of those justices who vote in the minority, known as *voto vencido*.³⁴³ The court’s governing statute provides for publication of all decisions, including dissenting opinions.³⁴⁴

Romania Constitutional Court. Romania’s 1991 constitution established a separate constitutional court that began operations in 1992.³⁴⁵ The court has nine judges, each appointed to a nine-year, nonrenewable term.³⁴⁶ As a general rule, matters are considered in full plenary session, and the court’s decisions are reached by majority vote.³⁴⁷

In its early years, the court’s procedures followed the traditional models of Italy and France, and no separate opinions were permitted. Over time, however, they have gradually been introduced.³⁴⁸ Under current practice, consistent with the court’s organic statute,³⁴⁹ constitutional court judges may issue either dissenting or concurring opinions, and when filed they are published along with the court’s decision.³⁵⁰ The court’s published decisions list all participating judges, and dissenting opinions

340 Law of the Constitutional Court, No. 28/82, art. 42(2).

341 *Id.* art. 42(4); RAFFAELLI, *supra* note 16, at 27.

342 CONSTITUTIONAL COURT OF PORT., *supra* note 330, at 11.

343 Hanretty, *supra* note 173, at 675; see RAFFAELLI, *supra* note 16, at 27 n.104; see also Nadelmann (1959), *supra* note 84, at 421 (“Portugal judges have had for a long time the right to add to their signature the word *vencido*, and this right is used regularly.”).

344 Law of the Constitutional Court, No. 28/82, arts. 3, 115.

345 *Short History*, CONST. CT. OF ROM., <https://www.ccr.ro/en/Scurt-istoric> (last visited Sept. 5, 2018).

346 *Organisation of the Constitutional Court*, CONST. CT. OF ROM., <https://www.ccr.ro/Structura-Curtii-Constitutionale> (last visited Sept. 5, 2018).

347 Law No. 47/1992 on the Organisation and Operation of the Constitutional Court, OFFICIAL GAZETTE OF ROMANIA, Dec. 3 2010, pt. 1 no. 807, art. 6 [hereinafter Law No. 47/1992 on the Organisation and Operation of the Constitutional Court], *translated at Law No. 47/1992*, CONST. CT. OF ROM., <https://www.ccr.ro/Legea-nr-471992> (last visited Sept. 5, 2018).

348 RAFFAELLI, *supra* note 16, at 27.

349 Law No. 47/1992 on the Organisation and Operation of the Constitutional Court art. 59(3) (“Judges who have given a negative vote may formulate a separate opinion. With regard to the reasoning of the decision, it is also possible to write a concurring opinion. The separate (dissenting) and, as the case may be, concurring opinion shall be published . . . together with the decision.”).

350 RAFFAELLI, *supra* note 16, at 27 (citing Law No. 47/1992 on the Organisation and Operation of the Constitutional Court art. 59).

are identified by the name of the author.³⁵¹

Slovakia Constitutional Court. The Slovakian Constitutional Court, founded in 1992,³⁵² originally honed to the tradition of secret deliberations, and therefore judges had no authority to issue separate opinions.³⁵³ However, dissenting judges could register their disagreement in the voting record, which was kept sealed from public view.³⁵⁴

As amended, the court's organic act³⁵⁵ allows a judge who disagrees with the court's decision to have the dissenting vote noted in the voting record and the opinion published.³⁵⁶

Slovenia Constitutional Court. The court was initially established by the Slovenian constitution in 1991.³⁵⁷ The court's nine judges³⁵⁸ generally reach decisions by majority vote.³⁵⁹ Slovenian constitutional court judges have a statutory right to issue separate decisions either dissenting or concurring in a judgment.³⁶⁰

The court's rules of procedure provide in detail for the contents of court decisions, the circulation and issuance of separate opinions, and the publication of decisions.³⁶¹ Specifically, the decision must include the composition of the court that reached the decision,³⁶² including "the results of the vote and the names of the Constitutional Court judges who voted

351 See, e.g., Decision No. 63 of Feb. 8, 2017, OFFICIAL GAZETTE OF ROMANIA, Feb. 27 2017, pt. 1 no. 145, https://www.ccr.ro/files/products/Decision_63_2017_ENG.pdf.

352 CONST. CT. OF THE SLOVAK REPUBLIC, <https://www.ustavnysud.sk/en/o-ustavnom-sude-slovenskej-republiky> (last visited Sept. 5, 2018).

353 RAFFAELLI, *supra* note 16, at 28.

354 *Id.*

355 *Id.* (citing Act on the Organisation of the Constitutional Court § 32).

356 *Id.*

357 CONST. OF THE REPUBLIC OF SLOVENIA, Dec. 23, 1991, arts. 160-71, *translated at Legal Basis: Constitution*, REPUBLIC OF SLOVN. CONST. CT., <http://www.us-rs.si/media/constitution.-.2016.-precisceni.dokument.dodan.70a.clen.pdf> (last visited Sept. 5, 2018).

358 *Id.* art. 163. Judges are nominated by the president and elected by the national assembly as provided by law. *Id.*

359 *Id.* art. 162 ("unless otherwise provided for individual cases by the Constitution or law").

360 Constitutional Court Act, OFFICIAL GAZETTE RS, No. 64/07, art. 40(3), *translated at Legal Basis: Statutes*, REPUBLIC OF SLOVN. CONST. CT., <http://www.us-rs.si/media/constitutional.court.act.full.text.pdf> (last visited Sept. 5, 2018) ("A judge who does not agree with a decision or with the reasoning of a decision may declare that he will write a separate opinion, which must be submitted within the period of time determined by the Rules of Procedure of the Constitutional Court.").

361 Rules of Procedure of the Constitutional Court of the Republic of Slovenia, OFFICIAL GAZETTE RS, Nos. 86/07, 54/10 & 56/11, arts. 66-69, *translated at Legal Basis: The Rules of Procedure*, REPUBLIC OF SLOVN. CONST. CT., http://www.us-rs.si/media/the_rules.of.procedure_.pdf (last visited Sept. 5, 2018).

362 *Id.* art. 66(1).

against the decision, the names of the Constitutional Court judges who submitted separate opinions, and the names of the Constitutional Court judges who were disqualified from deciding.”³⁶³

Spain Constitutional Court. Spain established its constitutional court in 1975, following the general structure and organization of the German federal constitutional court.³⁶⁴ The court has twelve justices appointed to nine-year, nonrenewable terms.³⁶⁵ Four are nominated by a two-thirds vote of each chamber of the Spanish Parliament (for a total of eight), two by the General Council of the Judiciary (itself a politically appointed body), and two by the executive branch of government.³⁶⁶ The twelve justices are subdivided into two panels of six justices each for purposes of deciding the great majority of matters before the court.³⁶⁷

Like the Portugal constitutional court, Spain’s court exercises both abstract and concrete constitutional review authority.³⁶⁸ The organic law governing the court’s organization expressly provides that individual justices may issue dissenting or concurring opinions, on issues that arose during the court’s deliberations in the case.³⁶⁹ Over the years, constitutional court justices have steadily increased the frequency of filing dissenting opinions.³⁷⁰ According to one scholar, however, “[t]he issue of dissenting opinions is considered to be an open wound within the Court.”³⁷¹

363 *Id.* art. 66(7).

364 Grimm, *supra* note 11, at I-2; *cf.* Hanretty, *supra* note 173, at 673-74 (asserting that Spain’s court was established in 1978, but without citing authority).

365 *See* Hanretty, *supra* note 173, at 674.

366 *See id.*

367 Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional art. 7(1) (B.O.E. 1979, 239) [hereinafter Organic Law 2/1979 on the Constitutional Court], *translated at The Court: Legislation, CONST. CT. OF SPAIN*, <https://www.tribunalconstitucional.es/es/tribunal/normativa/Normativa/LOTC-en.pdf> (last visited Sept. 4, 2018); Enrique Guillen Lopez, *Judicial Review in Spain: The Constitutional Court*, 41 *LOY. L.A. L. REV.* 529, 538 (2008).

368 Hanretty, *supra* note 173, at 674.

369 *Id.* at 675; *see* Organic Law 2/1979 on the Constitutional Court art. 90(2).

The President and the Judges of the Court may express their disagreement in the form of a dissenting opinion, in the case it was maintained in the course of the deliberations, concerning either the judgement or its grounds. Dissenting opinions shall be included in the ruling and, in the case of judgements, reasoned orders . . . or declarations, shall be published with them

Id. The court’s Rules of Organization and Personnel no doubt provide more details, but they are not available in English. *See* Reglamento de Organización y Personal del Tribunal Constitucional (B.O.E. 1990, 185), *available at The Court: Legislation, CONST. CT. OF SPAIN*, <http://www.tribunalconstitucional.es/en/tribunal/normativa/Normativa/ROPTC-consol.pdf> (last visited Sept. 5, 2018).

370 RAFFAELLI, *supra* note 16, at 24 & n.91.

371 Lopez, *supra* note 367, at 539. Lopez explains,

The argument for their inclusion in final judgments was that these dissenting votes could increase the opportunity for future adaptation of constitutional doctrine, improving doctrinal

Notably, the website of Spain's Constitutional Court specifically includes a section titled "Norms on transparency."³⁷² Among them is a Spanish statute, enacted in 2013, that generally provides for transparency in government information.³⁷³ In addition, the website posts copies of the court's judgments in chronological order.³⁷⁴ They include the full text of separate opinions ("*votos particular*") along with the names of each judicial author.³⁷⁵

Table 1A provides relevant comparative information for selected national constitutional courts.

coherence, internal consistency, and doctrinal evolution. The practice has shown that such hope was not groundless, but it is important to point out that it has created disputes within the Constitutional Court.

Id. at 539-40 (internal footnote omitted).

372 *Norms on Transparency*, CONST. CT. OF SPAIN, <https://www.tribunalconstitucional.es/en/transparencia/Paginas/default.aspx> (last visited Sept. 4, 2018).

373 Ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno (B.O.E. 2013, 295), *translated at* Law 19/2013 Dated December 9th, on Transparency, Access to Public Information, and Good Governance, CONST. CT. OF SPAIN, <http://www.tribunalconstitucional.es/es/transparencia/normativa/Documents/Transparencia-Ley%2019-2013-original%20ingl%C3%A9s.pdf> (last visited Sept. 4, 2018).

374 *Rendered Judgements*, CONST. CT. OF SPAIN, https://www.tribunalconstitucional.es/en/transparencia/informacion-publica/Paginas/03_Resoluciones%20dictadas.aspx (last visited Sept. 4, 2018); *see also Cronological [sic] List of Judgments*, CONST. CT. OF SPAIN, <https://www.tribunalconstitucional.es/en/jurisprudencia/Paginas/Sentencias.aspx> (last visited Sept. 4, 2018).

375 *See id.*; *see also* Hanretty, *supra* note 173, at 675 (defining the Spanish term *voto particular*).

TABLE 1A – TRANSPARENCY NORMS
Selected National Constitutional Courts

Court	Year Established	Dissents Y or N	Concurrences Y or N	Number of Votes Disclosed For or Against Judgment	Judges Identified with Votes by Name	“Silent Acquiescence” Permitted
Austria	1920	Y Dissents and reasons recorded only in secret register	N	N By statute, votes are not public.	N	Y In limited cases, judgments must be unanimous
Belgium	2007	N	N	N	N Participating judges listed by name	Y
Bulgaria	1991	Y Except matters the constitution requires to be made by secret ballot	Y Except matters the constitution requires to be made by secret ballot	Y Except matters decided by secret ballot	Y Except matters decided by secret ballot	N Abstention is prohibited; a dissenting justice must include reasons.
Croatia	1990	Y Except matters requiring a unanimous panel vote	Y Except matters requiring a unanimous panel vote	Y Dissents may be appended and are recorded with the judgment	Y Participating justices are listed by name; dissenters give written reasons	N Abstention prohibited; dissenting justice must include reasons.

Court	Year Established	Dissents Y or N	Concurrences Y or N	Number of Votes Disclosed For or Against Judgment	Judges Identified with Votes by Name	“Silent Acquiescence” Permitted
Czech Republic	1993	Y Except matters requiring a unanimous panel vote	Y Except matters requiring a unanimous panel vote	Y Dissents may be appended and are recorded with the judgment	Y Separate opinions include author's name	Y
France	1958	N	N	N Oath of secrecy as to deliberations is interpreted to bar publicizing votes	N	Y No dissents permitted
Germany	1951	Y Except judgments by 3-justice chambers	Y Except judgments by 3-justice chambers	Discretionary Decided by one of the court's two senates or the plenary court	N Participating justices listed by name, but not votes	Y Judgments by 3-justice chambers must be unanimous
Hungary	1990	Y	Y	Y	Y	Y
Italy	1956	Y Any dissent filed remains under seal	N	N	N	Y
Latvia	1996	Y	N Judges must vote for or against court	Y	Y	N Judges voting against must give reasons in written

			judgment			opinion
Court	Year Established	Dissents Y or N	Concurrences Y or N	Number of Votes Disclosed For or Against Judgment	Judges Identified with Votes by Name	“Silent Acquiescence” Permitted
Lithuania	1993	Y	Y	N	In part Only if filing separate opinion	Y
Luxembourg	1997	N	N	N	N	Y No dissents permitted
Malta	1964	N	N	N	N	Y Judgments must be unanimous
Poland	1982	Y	Y	Unclear	Unclear	Y
Portugal	1982	Y	Y	Y	In part Names recorded for justices voting with minority	Y
Romania	1992	Y	Y	Y	Y	Y
Slovenia	1991	Y	Y	Y	Y	Y
Spain	1975	Y	Y	Y	Y	Y

2. National Cassation Courts

As briefly explained above, most countries on the European continent that have established specialized constitutional courts have also retained

their predecessor appellate courts, which traditionally resolved cases raising no constitutional questions.³⁷⁶ Many of these pre-existing courts continue to reflect the civil law tradition of secrecy in judicial deliberations.³⁷⁷ Therefore, judges on several cassation courts lack authority to issue separate opinions,³⁷⁸ on the theory that doing so would compromise the longstanding principle of secret deliberations. However, as the practice of issuing separate opinions has become more and more common among judges of constitutional courts, some nations have extended that option to judges on ordinary courts as well.³⁷⁹

A few European nations have never recognized the principle of judicial review of legislation against constitutional challenges.³⁸⁰ The Netherlands is an important example.³⁸¹ Its constitution expressly forbids its courts from engaging in constitutional judicial review.³⁸² In effect, the jurisdiction of the Netherlands Supreme Court (*Hoge Raad*) is constitutionally limited to cassation matters, although parliament may assign the court other duties by statute.³⁸³ Given its relatively limited authority, the court has more in common with courts of cassation than with national supreme courts of diffuse jurisdiction. For that reason, the Netherlands high court is included in this group.

Spain has a unique heritage that warrants special mention. Spain's longstanding tradition of judicial dissent traces its history to the late fifteenth century, when an ordinance expressly permitted judges to write

376 See *supra* text accompanying notes 102-03.

377 See KELEMEN, *supra* note 74, at 78-80 (explaining the traditional "secrecy rule" on the European continent and identifying several historical exceptions); see also Katalin Kelemen, *The Road from Common Law to East-Central Europe: The Case of the Dissenting Opinion*, in LEGAL AND POLITICAL THEORY IN THE POST-NATIONAL AGE 118, 123 (P. Cserne & M. Könczöl eds., 2011) (suggesting that the principle of secrecy in the civil law tradition is somewhat of a myth).

378 KELEMEN, *supra* note 74, at 83 ("The majority of ordinary [court] judges are not allowed to disclose their disagreement.").

379 *Id.* at 79.

380 RAFFAELLI, *supra* note 16, at 19 & n.60.

381 *Id.*

382 Gw. [Constitution] art. 120 (Neth.) ("The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts."), translated in MINISTRY OF THE INTERIOR & KINGDOM RELATIONS, THE CONSTITUTION OF THE KINGDOM OF THE NETHERLANDS 2008, <https://www.government.nl/binaries/government/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008/the-constitution-of-the-kingdom-of-the-netherlands-2008.pdf>.

383 See *id.* art. 118(2) ("In the cases and within the limits laid down by Act of Parliament, the Supreme Court shall be responsible for annulling court judgments which infringe the law (cassation)."); *id.* art. 118(3) ("Additional duties may be assigned to the Supreme Court by Act of Parliament.").

separate opinions.³⁸⁴ However, dissenting opinions were not published with the court's judgment but instead were recorded in a separate book.³⁸⁵ If appealed, any dissenting opinion in the case was accessible only to the parties and to the appeals court.³⁸⁶ These dissenting opinions were said to have been "reserved for appeal" and were known as *votos reservados*.³⁸⁷ The practice was codified in Spanish law in the early 1880s.³⁸⁸

Since 1985, judges of Spain's ordinary high court, as well as judges of the constitutional court, have been authorized by law to issue dissenting opinions, which are published together with the courts' judgments.³⁸⁹ These separate judicial opinions, known as *votos particulares*, have replaced *votos reservados*.³⁹⁰

Table 1B compiles relevant information for selected national cassation courts.³⁹¹

384 KELEMEN, *supra* note 74, at 80.

385 *Id.*

386 *Id.*

387 *Id.* at 81.

388 *Id.* at 81 & n.15.

389 *Id.* at 81 (citation omitted).

390 *Id.*

391 Unless otherwise specified, the data in Table 1B are drawn from KELEMEN, *supra* note 74; RAFFAELLI, *supra* note 16; Alder, *supra* note 38; Kelemen, *supra* note 5; Nadelmann (1959), *supra* note 84.

TABLE 1B – TRANSPARENCY NORMS

Selected National Cassation Courts

Court	Dissents or Concurrences Permitted Y or N
Austria	N
Belgium	N
Bulgaria	Y
Croatia ³⁹²	Y
Czech Republic ³⁹³	In part
France	N
Germany	N
Hungary	Y
Italy	N
Latvia	N
Lithuania	Y
Luxembourg	N
Malta	N
Netherlands	N
Poland	Y
Portugal	Y
Romania	Y
Slovakia	Y
Slovenia	N
Spain	Y

³⁹² *The Independence of the Judiciary*, SUP. CT. OF THE REPUBLIC OF CROATIA, <http://www.vsrh.hr/EasyWeb.asp?pcpid=765> (last visited Sept. 10, 2018) (explaining that all members of each chamber have the right to issue dissenting opinions, including the president of the chamber).

³⁹³ In the Czech Republic, only judges of ordinary administrative courts may issue separate opinions. KELEMEN, *supra* note 74, at 82.

3. National Supreme Courts - Diffuse Jurisdiction

Many nations' supreme courts exercise general jurisdiction over all issues, much like the United States Supreme Court. The following courts illustrate this category. In brief, apex courts in common law jurisdictions (or those nations that were formerly part of the British Commonwealth) typically permit judges to issue separate opinions.³⁹⁴ On the other hand, collegial courts in nations following the civil law tradition tend to subscribe to the principle of maintaining the secrecy of judicial deliberations. Under that principle, the opinion of the multi-member court is anonymous, and the disclosure of dissenting viewpoints is viewed as a threat to institutional consensus.³⁹⁵

While the above paragraph describes the general trend, practices do vary, and the extent to which formal norms govern opinion-issuing practices varies as well. The list of nations represented here is abbreviated in the interest of space. However, the variations reflected by these selected apex courts underscore the variety of relevant norms, traditions, and values around the world with respect to issuing judicial opinions.

Australia. For the last century, the High Court of Australia has followed a long tradition of issuing dissenting opinions.³⁹⁶ As early as 1904, judges of the High Court published separate opinions, even when the decision itself was unanimous.³⁹⁷ By the mid-1950s, the High Court judges decided virtually all major cases by issuing seriatim opinions.³⁹⁸

Canada. Canadian courts can and do issue dissenting opinions, which have been influential in developing the law.³⁹⁹ Canadian Supreme Court justices recognize that “dissenting opinions have the potential to destabilize judicial institutions if judges completely ignore certain

394 Jill Cottrell & Yash Ghai, *Concurring and Dissenting in the Hong Kong Court of Final Appeal*, in HONG KONG'S COURT OF FINAL APPEAL: THE DEVELOPMENT OF THE LAW IN CHINA'S HONG KONG 283, 287 (Simon N. M. Young & Yash Ghai eds., 2013) (“Multiple judgments are the norm in most common law jurisdictions . . .”); Laffranque, *supra* note 36, at 165.

395 *E.g.*, Laffranque, *supra* note 36, at 164.

396 Lynch, *supra* note 55, at 767 (referring to “[t]he tradition of individual expression found in Australian courts [as] an unquestioned and largely unexamined part of [Australia’s] inheritance from the English legal system”); McWhinney, *supra* note 84, at 602-04.

397 McWhinney, *supra* note 84, at 602-03.

398 *Id.* at 603-04; *e.g.*, Aust. Communist Party v. Commonwealth, 83 C.L.R. 1 (1951).

399 *See* L’Heureux-Dube, *supra* note 1, at 499-504 (reviewing the Canadian tradition of dissenting opinions). Notably, dissenting opinions issued by the Canada Supreme Court have been influential in shaping the law of developing nations. *See id.* at 512 (noting that dissents have been cited by majority decisions of the Constitutional Court of South Africa).

necessary constraints . . . designed to ensure the efficient and effective functioning of the courts.”⁴⁰⁰ Nevertheless, they issue separate opinions in approximately thirty percent of the court’s cases.⁴⁰¹

In the mid-1950s, serious consideration was given to a proposal under which the Canadian Supreme Court would issue a single unanimous opinion, consistent with the practice at the time of the Judicial Committee of the Privy Council.⁴⁰² The proposal apparently went nowhere.

China. Multi-member courts in China do not publish separate opinions authored by individual judges.⁴⁰³

Denmark. The Denmark Supreme Court has noted dissenting votes in the judgment since 1937.⁴⁰⁴ Since 1958, the names of dissenting opinions have been included.⁴⁰⁵

Estonia. Estonia joined the European Union on May 1, 2004. Under the Estonia Constitution, the Supreme Court has discretionary review over all appeals, including constitutional issues.⁴⁰⁶ The court has nineteen members organized into four chambers: Civil, Criminal, Administrative Law, and Constitutional Review.⁴⁰⁷

Although Estonia generally follows the legal traditions of continental Europe, judges may issue separate dissenting opinions, which are published along with the court’s judgments.⁴⁰⁸ Estonian judges view the right to issue a dissenting opinion expressing the judge’s own reasoning as equivalent to the constitutionally protected freedom of conscience.⁴⁰⁹

400 *Id.* at 504.

401 *See id.* at 516 (“[O]ver the past ten years, approximately 70 per cent of the Supreme Court of Canada’s judgments have been unanimous.”).

402 *See* McWhinney, *supra* note 84, at 595-96 (assessing the merits of the proposal from a comparative perspective); *see also* Andrew Lynch, *Is Judicial Dissent Constitutionally Protected?*, 4 MACQUARIE L.J. 81, 87 (2004) (citing Maxwell Bruce, *The 1953 Mid-Winter Meeting of Council*, 31 CANADIAN B. REV. 178, 182 (1953)).

403 Cottrell & Ghai, *supra* note 394, at 288. *See generally* Yulin Fu, *The Chinese Supreme People’s Court in Transition*, in SUPREME COURTS IN TRANSITION IN CHINA AND THE WEST: ADJUDICATION AT THE SERVICE OF PUBLIC GOALS 13 (Cornelius Hendrik (Remco) van Rhee & Yulin Fu eds., 2017).

404 Nadelmann (1959), *supra* note 84, at 418.

405 *Id.*

406 THE SUPREME COURT OF ESTONIA 5-7 (2013), https://issuu.com/riigikohus/docs/riigikohus_broz_h_eng_veeb.

407 *Id.* at 12-13.

408 Laffranque, *supra* note 110, at 16; *see also* Chris Hanretty, *Judicial Disagreement Need Not Be Political: Dissent on the Estonian Supreme Court*, 67 J. EUR.-ASIA STUD. 970 (2015), <https://www.tandfonline.com/doi/full/10.1080/09668136.2015.1054260?needAccess=true> (explaining that “judges on the [Estonian Supreme C]ourt enjoy high *de jure* independence, dissent frequently, and are integrated in the normal judicial hierarchy”; dissenting opinions reflect “disagreement about the proper scope of constitutional redress”). Dissenting opinions were issued by Estonian judges before World War II, and even during Soviet control. Laffranque, *supra* note 110, at 15.

409 Laffranque, *supra* note 36, at 169; *see* CONST. OF THE REPUBLIC OF ESTONIA, June 28, 1992, art. 40, ¶ 1 (“Everyone has freedom of conscience, religion and thought.”). For more details on the

Finland. Like its fellow Scandinavian nations, Finnish judges may issue dissenting opinions and their reasons.⁴¹⁰

Greece. Greece is unique in that its constitution expressly *requires* the publication of dissenting opinions, subject to statutes governing their publication.⁴¹¹ Applicable statutes, however, provide that dissents are issued anonymously, without identifying the author by name.⁴¹²

India. A former Commonwealth nation, India abandoned appeals to the Judicial Committee of the Privy Council in 1949 and adopted its own constitution in 1950.⁴¹³ Soon after, the India Supreme Court issued an opinion addressing how it would interpret the new constitution. While the majority opinion delineated a positivist approach, a strong dissent argued in favor of a purposive, policy-based approach.⁴¹⁴ The court has consistently followed the practice of issuing dissenting and concurring opinions.⁴¹⁵

Ireland. The Republic of Ireland, which shares a common law tradition with the rest of Great Britain, seceded from the United Kingdom in 1923. Today it is part of the European Union. Ireland's Supreme Court has general jurisdiction, including two kinds of constitutional review authority. The first is abstract review of pending legislation upon referral by the President. If the President refers legislation to the Court for constitutional review, the Court must issue a decision within sixty days.

The Ireland Constitution expressly prohibits the Supreme Court from publishing separate opinions when the President requests an opinion on the constitutional validity of a pending bill.⁴¹⁶

operations of the Estonian apex court, see Julia Laffranque, *The Judicial System of Estonia and European Union Law*, 33 INT'L J. LEGAL INFO. 224, 227-30 (2005), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1016&context=ijli>.

410 KELEMEN, *supra* note 74, at 4 (referring to “[t]he Nordic legal tradition of publishing dissent”; explaining that Finnish and Scandinavian courts qualify as Nordic courts with “a long history of publication of judicial dissent”); Nadelmann (1959), *supra* note 84, at 418.

411 RAFFAELLI, *supra* note 16, at 23-24; Cottrell & Ghai, *supra* note 394, at 288 (citing 1975 SYNTAGMA [SYN.] [CONSTITUTION] art. 93(2) (Greece)). The relevant constitutional provision provides,

Every court judgment must be specifically and thoroughly reasoned and must be pronounced in a public sitting. *Publication of the dissenting opinion shall be compulsory.* Law shall specify matters concerning the entry of any dissenting opinion into the minutes as well as the conditions and prerequisites for the publicity thereof.

SYN. art. 93, ¶ 3 (emphasis added).

412 RAFFAELLI, *supra* note 16, at 23-24 (citing Greece Law no. 184/1975, art. 35(1)).

413 McWhinney, *supra* note 84, at 608.

414 *Id.* at 608-09; see Gopalan v. State of Madras, 13 SUP. CT. J. 174 (1950).

415 See McWhinney, *supra* note 84, at 609.

416 See RAFFAELLI, *supra* note 16, at 23 (citing Constitution of Ireland 1937 arts. 26, 34); Alder,

Japan. Until 1947, Japan courts did not recognize dissenting or concurring opinions.⁴¹⁷ Since then, judges of the Japan Supreme Court have regularly exercised their authority to issue separate opinions.⁴¹⁸ The statute governing court organization provides that for any Supreme Court decision rendered in written form, each judge is required to express an opinion.⁴¹⁹

New Zealand. The Supreme Court considers cases in panels of five justices. The Supreme Court Act of 2003 requires decisions to be rendered by a majority vote of the panel.⁴²⁰ The act expressly requires only that decisions must be reached by majority vote.⁴²¹ While no express authority

supra note 38, at 244, 245 (citing Constitution of Ireland 1937 art. 34(5)). Article 26(2)(2) of the Constitution pertains to any legislation referred by the President to the Supreme Court to determine whether all or any part is “repugnant” to the Constitution. It provides,

The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and shall be pronounced by such one of those judges as the Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed.

Constitution of Ireland 1937 art. 26(2)(2°) (as amended Feb. 2015). The Supreme Court of Ireland has interpreted this constitutional provision to apply only to statutes enacted after the original Ireland Constitution took effect in 1937, and not to older statutes. RAFFAELLI, *supra* note 16, at 23 n.82 (citing A.K. Koekoek, *Ireland*, in CONSTITUTIONAL LAW OF 15 EU MEMBER STATES 417, 465 (L. Prakke & C. Kortmann eds., 2004)). For a historical perspective on Ireland’s varied dissenting practices, see McWhinney, *supra* note 84, at 607-08 (describing Ireland Supreme Court’s early practice of issuing a single opinion in constitutional cases with no recorded dissents, with one significant exception).

Before a constitutional referendum took effect in late 2013, the Ireland Constitution also expressly prohibited dissenting opinions in ordinary appeals raising constitutional issues. *See* Constitution of Ireland 1937 art. 34(4)(5°) (as amended Aug. 15, 2012 and rescinded 2013).

The decision of the Supreme Court on a question as to the validity of a law having regard to the provisions of this Constitution shall be pronounced by such one of the judges of that Court as that Court shall direct, and no other opinion on such question, whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed.

Id. art. 34(4)(5°); *see* Cottrell & Ghai, *supra* note 394, at 287 & n.34. *See generally* Nóra Ní Loinsigh, *Judicial Dissent in Ireland: Theory, Practice and the Constraints of the Single Opinion Rule*, 51 IRISH JURIST 123, 133-48 (2014) (discussing the influence of the former rule under Article 34 and predicting the impact of the surviving rule under Article 26).

417 Kotaro Tanaka, *Dissenting and Concurring Opinions* (1963) (unpublished paper from Int’l Seminar on Const. Rev., N.Y.U. Sch. of L. (Nov. 28-Dec. 2, 1960)) (available on HeinOnline) (citing Japanese Court Organization Law of 1890). For a brief but recent overview of the Japanese court system and its historical development as an amalgam of civil law and common law practices, *see* Richard M. Lorenzo, *The Judicial System of Japan*, 6 CASE W. RES. J. INT’L L. 294 (2015).

418 Tanaka, *supra* note 417; *see* Cottrell & Ghai, *supra* note 394, at 288 (citing HIROSHI ITOH, *THE JAPANESE SUPREME COURT: CONSTITUTIONAL POLICIES* 93 (1989)); Nadelmann (1959), *supra* note 84, at 422.

419 Nadelmann (1959), *supra* note 84, at 422 (citing Japan Law of 1947 on Court Organization); *see* Court Act, Act No. 59 of 1947, art. 11, <http://www.cas.go.jp/jp/seisaku/hourei/data/CACT.pdf> (Japan) (last visited Sept. 10, 2018) (“The opinion of each Justice shall be expressed in written judgment.”).

420 Shiels, *supra* note 74, at 14 (citing Supreme Court Act 2003, § 31).

421 *Id.* at 18 (citing Supreme Court Act of 2003, § 31).

supports the practice, New Zealand Supreme Court justices regularly issue separate written opinions, all of which are published.⁴²²

Nigeria. The Nigerian Constitution provides that each appellate court justice “shall express and deliver [an individual] opinion in writing or may state in writing that he adopts the opinion of any other justice who delivers a written opinion.”⁴²³ Thus “composite” judgments are prohibited.⁴²⁴

Norway. Norway was the first nation to develop the concept of constitutional review after the United States Supreme Court did so in 1803.⁴²⁵ The Norway Supreme Court has a long tradition of recognizing judges’ authority to issue separate opinions,⁴²⁶ following the English practice.⁴²⁷

Philippines. The Philippine Republic enacted an express provision in its Judiciary Act permitting judges to publish dissenting opinions upon request.⁴²⁸

South Africa. The South Africa High Court considers both constitutional issues and other kinds of issues on appeal. Today, consistent with a long history as a former member of the British Commonwealth, the court’s judges issue separate opinions.⁴²⁹

Sweden. The Sweden Supreme Court follows the practice of Norway, allowing judges to issue separate opinions.⁴³⁰

Switzerland. The Federal Supreme Judicial Court allows judges to issue dissenting opinions, which are published along with the opinion of the

422 *Id.* at 27 (reporting that forty-four percent of the 209 decisions rendered between 2004 and 2013 included separate opinions, with the balance issued unanimously).

423 Cottrell & Ghai, *supra* note 394, at 287-88 (quoting NIGERIA CONST. art. 294(2)); *see* CONSTITUTION OF NIGERIA (1999), art. 294(2).

424 Cottrell & Ghai, *supra* note 394, at 287-88.

425 Bentsen, *supra* note 3, at 195. According to one scholar, dissenting opinions were introduced in Norway as early as 1864. Laffranque, *supra* note 36, at 165. However, the long tradition of judicial review was not codified until 2015, when the Norway Constitution was amended. Bentsen, *supra* note 3, at 195 (citing CONST. OF THE KINGDOM OF NORWAY, May 17, 1814, § 89 (“In cases brought before the Courts, the Courts have the power and the duty to review whether Laws and other decisions made by the authorities of the State are contrary to the Constitution.”)).

426 Bentsen, *supra* note 3, at 190 (noting that the Norway Supreme Court’s dissent rate increased dramatically from 1990 (eight percent) to 1999 (twenty-nine percent); *id.* at 196 (analyzing the high court’s dissenting rates over a three-decade timeframe).

427 Cottrell & Ghai, *supra* note 394, at 288.

428 Nadelmann (1959), *supra* note 84, at 422 (citing The Judiciary Act of 1948, Rep. Act No. 296, § 21 (1956) (Phil.)).

429 WITTIG, *supra* note 74, at 61; *see* McWhinney, *supra* note 84, at 605-07.

430 Laffranque, *supra* note 36, at 165.

court.⁴³¹ However, Swiss judges typically do not exercise the authority to issue separate opinions.⁴³² At one time, dissenting opinions could be delivered orally, but not in writing; for that reason, dissents were not recorded with published judgments.⁴³³

United Kingdom Supreme Court. Established as an independent institution in 2009, the Court allows judges to issue separate opinions. The Judicial Committee of the Privy Council (JCPC) remains in existence, with jurisdiction largely limited to appeals from British Colonies and Commonwealth countries outside the United Kingdom.⁴³⁴ Justices of the Supreme Court also serve as members of the JCPC.

Historically, the JCPC issued a single opinion in the form of advice to the King, consistent with the principle once known as Unity of Judgment.⁴³⁵ But from 1878 until 1966, the Judicial Committee was expressly denied authority to issue dissenting opinions.⁴³⁶ Beginning in 1966, the Committee issued an Order-in-Council allowing dissenting

431 Alder, *supra* note 38, at 237.

432 Andreas Lienhard, et al., *The Federal Supreme Court of Switzerland: Judicial Balancing of Federalism Without Judicial Review*, in COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS? 404, 415 (Nicholas Aroney & John Kincaid eds., 2017) (“The formal written judgments of the courts usually do not include dissenting opinions . . .”). However, some academics favor the practice of issuing dissenting opinions, at least by the Swiss Federal Supreme Court. *Id.* at 415 n.46.

433 Laffranque, *supra* note 36, at 165; Nadelmann (1959), *supra* note 84, at 416 (explaining that “the old Germanic tradition of deliberating and voting in public has been preserved in various Swiss Cantons”) (citing numerous sources in the German language); Nadelmann (1964), *supra* note 84, at 270 (noting that publication of dissents is allowed in “some parts of Switzerland”).

434 See *supra* note 92 and accompanying text.

435 B.A. WORTLEY, JURISPRUDENCE 74 (1967); McWhinney, *supra* note 84, at 599; Charlotte Smith, *An Introduction to the Judicial Committee of the Privy Council*, PRIVY COUNCIL PAPERS, <http://privycouncilpapers.exeter.ac.uk/the-judicial-committee/> (last visited Sept. 12, 2018); see *supra* notes 93-94 and accompanying text. The rationale was that the Privy Council judges merely advised the Crown on the outcome of an appeal, and therefore the advice (and the King’s order) required unanimity. WORTLEY, *supra*, at 74; McWhinney, *supra* note 84, at 599-601.

The Judicial Committee’s settled practice was that a single judgment was delivered by the panel, and that its deliberations were guarded by the privy councillor’s oath of secrecy. No councillor was permitted to publish his dissent, or to make known any information relating to the opinions of individual councillors. Rules to this effect were set out in an Order of Council dating from 26 February 1627, the effect of which was stated to have been preserved by . . . the Judicial Committee Act 1833.

Charlotte Smith, *Ridsdale v Clifton: Representations of the Judicial Committee of the Privy Council in Ecclesiastical Appeals*, 19 KING’S L.J. 551, 569 (2008) (adding that the Committee underscored the unity norm in a 1878 order clarifying that the privy councillor’s oath of secrecy applied to councillors sitting in a judicial capacity); see also Allen Mendenhall, *The Corrective Careers of Concurrences and Dissents*, 8 FAULKNER L. REV. 49, 53 (2016) (explaining rationale for Privy Council’s paramount “appearance of unanimity”).

436 P.A. HOWELL, THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL 1833-1876: ITS ORIGINS, STRUCTURE AND DEVELOPMENT 201 & n.398 (2008) (citing PC 2/289); JUDICIAL COMM. OF THE PRIVY COUNCIL, ORDER IN COUNCIL (1878) (prohibiting disclosure of any difference of opinion among members of the Privy Council).

members to jointly issue a single opinion expressing their views.⁴³⁷ Its current practice recognizes judicial authority to issue both concurring and dissenting opinions in cases within its relatively narrow jurisdiction.⁴³⁸

Table 2 provides comparative information for selected national supreme courts with jurisdiction to consider both constitutional and other legal issues.

437 On March 4, 1966, the JCPC issued a statutory instrument that expressly permitted its judges to issue a single dissenting opinion. HOWELL, *supra* note 436, at 201 n.398; *see* DAVID B. SWINFEN, *IMPERIAL APPEAL: THE DEBATE ON THE APPEAL TO THE PRIVACY COUNCIL 1833-1986*, at 25 n.57 (1987) (citing *STATUTORY INSTRUMENTS* pt. 1, at 1100 (1966)); *id.* at 222 (citing Judicial Committee (Dissenting Opinions) Order in Council (March 4, 1966)); WORTLEY, *supra* note 435, at 74 n.3 (citing Judicial Committee (Dissenting Opinions) Order of 4 March 1966); *see supra* note 93 and accompanying text. According to one English jurist, “[i]t was from Australia that real agitation emerged in relation to the single judgment issue, and the pressure eventually became too much.” Lord Neuberger of Abbotsbury, *supra* note 93, at 41; *see also* Cottrell & Ghai, *supra* note 394, at 286 (“Australian judges who sat on the [Judicial Committee of the Privy Council] chafed against [the single-judgment rule]”).

438 Lord Neuberger of Abbotsbury, *supra* note 93, at 41; *see* Thomas Roe, *Dissenting Judgments* 8 (June 2, 2015) (unpublished manuscript), <https://www.3harecourt.com/assets/asset-store/file/Thomas%20Roe%20dissenting%20judgments.pdf>.

TABLE 2 – TRANSPARENCY NORMS

Selected National Supreme Courts with Diffuse (General) Jurisdiction

Court	Dissents or Concurrences Permitted Y or N	Dissents or Concurrences Mandated Y or N
Australia	Y	N
Canada	Y	N
China	N	N
Denmark	Y	N
Estonia	Y	N
Finland	Y	N
Greece	Y	Y If issued, publication is constitutionally mandated, but they are anonymous by statute
India	Y	N
Ireland	Y Except some constitutional matters, in which separate opinions are prohibited	N
Japan	Y	N
New Zealand	Y	N
Nigeria	Mandatory	Y Each justice is constitutionally required to issue separate written opinions
Norway	Y	N
Phillippines	Y	N
South Africa	Y	N
Sweden	Y	N
Switzerland	Y	N
United Kingdom	Y	N
United States	Y	N

4. *Supranational and International Tribunals.*

Court of Justice of European Union (CJEU). Unlike other international courts, judges of the European Court of Justice do not issue dissenting opinions.⁴³⁹ Neither the court's statute nor its rules of procedure expressly address the issue.⁴⁴⁰ However, in practice the court has interpreted the statutory requirement of secret deliberations⁴⁴¹ to preclude any public record reflecting individual judges' votes. The court's rules of procedure require every judge who participated in deliberations to sign the judgment.⁴⁴²

In 2012, the European Parliament's Committee on Legal Affairs requested a study of dissenting practices in national courts of member states, in part in response to calls from numerous scholars urging the court to reconsider its longstanding practice of maintaining "secrecy of individual opinions."⁴⁴³ The study, published in 2012, made no recommendations on whether the court should alter its longstanding practice of issuing unanimous opinions without dissent.⁴⁴⁴ In practice, the court's judges continue to speak with one voice in issuing judgments.⁴⁴⁵

439 Laffranque, *supra* note 110, at 16. As Laffranque explains, the six founding member nations of the European Union all followed the continental tradition at the time of establishing the Court's predecessor. *Id.* (listing the six founding nations). One scholar has gone so far as to suggest that the Court's judges "do not want" the authority to issue dissenting opinions. Grimm, *supra* note 11, at I-2.

440 See Statute of the Court of Justice of the European Union 2010 O.J. (C 83); Rules of Procedure of the Court of Justice 2012 O.J. (L 265) art. 87.

441 See Statute of the Court of Justice of the European Union 2010 O.J. (C 83) art. 35 ("The deliberations of the Court of Justice shall be and shall remain secret."). The statute requires judgments to list the names of judges who participated in deliberations, but requires only the court's president and registrar to sign each judgment. *Id.* arts. 36, 37. The rules of procedure, however, require each judge who took part in deliberations to sign the judgment, which implies that a participating judge does not have the option to file a separate opinion. See Rules of Procedure of the Court of Justice 2012 O.J. (L 265) art. 88(2).

442 Rules of Procedure of the Court of Justice 2012 O.J. (L 265) art. 88(2).

443 RAFFAELLI, *supra* note 16, at 6, 39 (summarizing scholarly commentary); *id.* at 33 ("The recent scholarly discussion over the style of the CJEU's judgments has added new fuel to the pre-existing debate over individual opinions. While many scholars favour . . . the introduction of separate opinions, most voices against it come from the CJEU judges and former judges . . . , who fear mainly for the Court's collegiality and authority."); *id.* at 34-38; HENRY G. SHERMERS & DENIS F. WAELBROEK, JUDICIAL PROTECTION IN THE EUROPEAN UNION § 1479 (6th ed. 2001).

444 RAFFAELLI, *supra* note 16, at 39.

445 "Decisions of the Court of Justice are taken by majority and no record is made public of any dissenting opinions." *Court of Justice: Presentation*, CT. OF JUST. OF THE EUR. UNION, https://curia.europa.eu/jcms/jcms/Jo2_7024/en/#procedures (last visited Nov. 3, 2018). Full opinions issued by the court since 2012 are available online in multiple language translations. *Case-law*, CT. OF JUST. OF THE EUR. UNION, https://curia.europa.eu/jcms/jcms/P_106320?rec=RG&jur=C (last visited Nov. 3, 2018).

International Court of Justice (ICJ) (known as “The Hague”). ICJ judges have authority to issue either concurring or dissenting opinions.⁴⁴⁶ The Court’s organic statute⁴⁴⁷ sets out the rule concisely: “If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.”⁴⁴⁸ While the statute itself does not address the issue, the rule has been interpreted permissively so as not to obligate a judge who disagrees with the majority to file either a concurring or a dissenting opinion.⁴⁴⁹ A judge who does so is identified by name, but a judge who elects not to file a separate opinion need not be identified as disagreeing with the judgment or its rationale.⁴⁵⁰

Deliberations, however, occur in private and must “remain secret.”⁴⁵¹ The court’s statute also provides that decisions are to be made by majority vote, and the court’s president or other presiding panel member casts the deciding vote in the event of a tie.⁴⁵² Judgments must explain the reasons for the court’s decision (presumably in writing).⁴⁵³ Although the judgment must bear the names of all *participating* judges,⁴⁵⁴ only the president and the registrar must sign it, and the names of dissenting judges need not be recorded if they elect not to add a dissenting opinion.⁴⁵⁵

The ICJ’s Rules of Court, as amended most recently in 2005, provide more details.⁴⁵⁶ The judgment must contain specific information, including the names of all judges who participated in the decision, and the number *and the names* of the judges who made up the majority.⁴⁵⁷ The current rule

446 SHERMERS & WAELBROEK, *supra* note 443, § 1478, at 736; see Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031 [the Charter], 1055 [ICJ Statute], T.S. No. 993 [I.C.J. Statute at 25], art. 57 [hereinafter Statute of the International Court of Justice].

447 Statute of the International Court of Justice, *supra* note 446.

448 *Id.* art. 57. “Separate opinion” includes concurring opinions as well as dissents. Anand, *supra* note 97, at 799-800 & n.61.

449 Anand, *supra* note 97, at 800.

450 *See id.* (criticizing the rule, arguing that “publicity and openness have been recognized as essential for the authority and prestige of the Court and its decisions,” and quoting Jeremy Bentham’s observation, “It is through publicity alone that justice becomes the mother of security.” (citing Nadelmann (1959), *supra* note 84, at 430)).

451 Statute of the International Court of Justice art. 54(3).

452 *Id.* art. 55.

453 *Id.* art 56(1).

454 *Id.* art. 56(2).

455 The fascinating historical account explaining how the court’s rules evolved, including the strong opposition to the rule allowing separate opinions by some member states, has been documented in Anand, *supra* note 97. For example, Anand explained that in the early twentieth century, silent acquiescence and “secret dissents” became matters of some controversy that led to suggested amendments to Article 57. Anand, *supra* note 97, at 797.

456 Rules of Court, art. 95 (Apr. 14, 1978), <http://www.icj-cij.org/en/rules> (last visited Aug. 31, 2018).

457 *Id.* art. 95(1).

makes clear that a judge is permitted, but not required, to attach a separate concurring or dissenting opinion, and “a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration.”⁴⁵⁸ It thus appears that the court’s current rules, like the statute, allow a judge to “silently acquiesce,” but doing so means that the judge is identified publicly by name as having voted with the majority.⁴⁵⁹

European Court of Human Rights (ECtHR). The European Convention on Human Rights expressly permits any judge of the court to “deliver” a separate concurring or dissenting opinion if all or part of the judgment does not represent the judges’ unanimous views.⁴⁶⁰

Decisions of the court must include reasons and a statement whether the judgment was unanimous or rendered by a majority.⁴⁶¹ Other rules enumerate the contents of each written judgment, consistent with the relevant articles of the Convention.⁴⁶² Each judgment must identify by name judges who were members of the panel deciding the case,⁴⁶³ as well as the *number* (but not the names) of judges making up the majority.⁴⁶⁴ In addition, the judgment must include, for any judge who participated in considering the case, a separate opinion, whether concurring or dissenting in the judgment.⁴⁶⁵ A judge may instead elect to make “a bare statement of dissent.”⁴⁶⁶ No judge has a duty to issue a separate opinion, so a judge may “silently acquiesce” in the judgment.⁴⁶⁷ But if a judge’s rationale differs from the majority decision, a bare statement of concurrence is not expressly permitted by the court’s rules.⁴⁶⁸ As a general rule, judges who

458 *Id.* art. 95(2).

459 The same rules apply to advisory opinions. *Id.* art. 107.

460 Lech Garlicki, *Note on Dissent in the European Court of Human Rights*, in GLOBAL CONSTITUTIONALISM: JUDICIAL DISSENT, *supra* note 11, at I-8; Grimm, *supra* note 11, at I-2.

461 European Court of Human Rights, Rules of Court, R. 56(1) (Aug. 1, 2018), https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf. Decisions are published in the official reporter in either English or French, both considered “official” languages of the Court. *Id.* R. 57, 78. But the court’s registrar has discretion to publish the decisions “in an appropriate form.” *Id.* R. 78. The registrar publishes “selected judgments and decisions” as well as any other document that the court’s president “considers it useful to publish.” *Id.*

462 See European Convention on Human Rights arts. 28, 42, 44.

463 European Court of Human Rights, Rules of Court R. 74(1)(a).

464 *Id.* R. 74(1)(k).

465 *Id.* R. 74(2).

466 *Id.*

467 Garlicki, *supra* note 460, at I-8.

468 See European Court of Human Rights, Rules of Court R. 74(2) (“Any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent.”).

issue separate opinions, whether dissenting or concurring, articulate the reasons for disagreeing with the judgment or the different reasoning that led a concurring judge to reach the same conclusion.⁴⁶⁹

The judgment includes the number of votes in favor of each point addressed in the dispositive judgment, but the vote tallies are anonymous.⁴⁷⁰ Announcing the number of votes for and against *each dispositive point* in the judgment offers significant transparency into the panel's overall rationale, but nevertheless allows a judge to record an anonymous vote on subparts of the judgment with which the judge does not agree while protecting the judicial privilege of agreeing publicly with the judgment as a whole.

A current member of the court has reported that separate opinions are quite common, particularly when the seventeen-member Grand Chamber issues judgments.⁴⁷¹

Inter-American Court of Human Rights. The court's statute governs its operations but delegates authority to the court itself to adopt rules of procedure.⁴⁷² The statute provides for decisions by majority vote, with the court's president casting the tie-breaking vote if necessary.⁴⁷³ Hearings are conducted in public, but the statute provides for private deliberations, which generally must remain secret.⁴⁷⁴ The statute also provides that the court's "decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the [c]ourt may deem appropriate."⁴⁷⁵

The court's rules provide considerable detail about its procedures.⁴⁷⁶ They require each judgment to include the names of the presiding judges and each judge who participated in rendering the decision, as well as the "result of the voting."⁴⁷⁷ Any participating judge is entitled to add a "separate reasoned opinion to the judgment, concurring or dissenting,"

469 As scholars have noted, the court's traditional practice "is very much that those dissenting will file an opinion setting out the reasons for their dissent. Equally, many judges clearly take the view that differences in reasoning which lead to the same conclusion as that of the Court in its judgment should also be articulated." Robin C. A. White & Iris Boussiakou, *Separate Opinions in the European Court of Human Rights*, 9 HUMAN RIGHTS L. REV. 37, 39 (2009).

470 Garlicki, *supra* note 460, at I-8.

471 *Id.* at I-9.

472 Statute of the I/A Court ch. V, art. 25, Oct. 1979, OAS Res. No. 448, <http://www.corteidh.or.cr/corte/estatuto.cfm?lang=en> (last visited Aug. 31, 2018).

473 *Id.* art. 23.

474 *Id.* art. 24(1), (2).

475 *Id.* art. 24(3).

476 See INTER-AMERICAN CT. OF HUM. RTS., RULES OF PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (Nov. 24, 2009), http://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf (last visited Aug. 31, 2018).

477 *Id.* art. 65(1)(a), (i).

which must be circulated to the other judges for consideration before the judgment is released. The rules specifically require that separate opinions “shall only refer to the issues covered in the judgment.”⁴⁷⁸

African Court on Human and People’s Rights. The court’s rules⁴⁷⁹ provide that any judge who has participated in the court’s deliberations, including deliberations on advisory opinions within its jurisdiction,⁴⁸⁰ may issue a separate concurring or dissenting opinion.⁴⁸¹

The rules provide specifically for deliberation procedures and the contents and form of the court’s judgments. Deliberations are confidential.⁴⁸² Decisions are rendered by a majority of the panel of judges who participated in the hearing, and in the event of a tie, the presiding judge casts the tie-breaking vote.⁴⁸³ Judgments must include a statement of the court’s reasons; must identify the names of the judges who participated in deliberations; and must be signed by the judges, certified by the presiding judge, and read in open court after notice to the parties.⁴⁸⁴ The rules explicitly enumerate the contents of the judgment, which must include the number of judges who made up the majority.⁴⁸⁵ Final judgments are published by the court’s registrar.⁴⁸⁶

Under specified circumstances, the court may be asked to issue an advisory opinion. If so, the opinion must be “accompanied by reasons, and any judge who has participated in the hearing of an advisory request shall be entitled to deliver a separate or dissenting opinion.”⁴⁸⁷

International Criminal Court (ICC). The Rome Statute⁴⁸⁸ sets out the procedures for appeal.⁴⁸⁹ The statute requires the judgment to be decided

478 *Id.* art. 65(2).

479 AFRICAN CT. ON HUM. & PEOPLE’S RTS., RULES OF COURT (2010), http://en.african-court.org/images/Protocol-Host%20Agrtmt/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final_English_7_sept_1_.pdf (last visited Aug. 31, 2018).

480 *Id.* R. 26(1)(b) (authorizing the Court to “render an advisory opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject of the opinion is not related to a matter being examined by the Commission”).

481 *Id.* R. 60(5) (“Any Member of the Court who heard the case may deliver a separate or dissenting opinion.”).

482 *Id.* R. 60(1).

483 *Id.* R. 60(2), (3), (4).

484 *Id.* R. 61(1), (2), (3).

485 *Id.* R. 62(j).

486 *Id.* R. 65; *see id.* R. 25(2)(i).

487 *Id.* R. 73(2).

488 Rome Statute of the International Criminal Court, *supra* note 129.

489 *Id.* art. 83.

by a majority of the participating judges, and it must include reasons for the decision.⁴⁹⁰ “When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.”⁴⁹¹ The court’s detailed procedural and evidentiary rules cross-refer to this article in lieu of enumerating the contents of a judgment.⁴⁹²

International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The same Appellate Chamber heard and decided appeals for both the ICTY and the ICTR. Both war crimes tribunals were established by the United Nations (UN) Security Council, with operations subject to the UN Rules of Procedure and Evidence under the Mechanism for International Criminal Tribunals.⁴⁹³ Those rules specifically provide that judgments shall be rendered in a “reasoned opinion in writing, to which separate or dissenting opinions may be appended.”⁴⁹⁴

International Tribunal for the Law of the Sea. The statute governing the tribunal generally provides that it may issue its own rules governing its functions, in particular rules of procedure.⁴⁹⁵ But the statute specifically sets out the required contents of each judgment.⁴⁹⁶ It must include a statement of reasons supporting the judgment and a list of judges by name who participated in the decision.⁴⁹⁷ The statute provides for majority voting.⁴⁹⁸

The tribunal’s rules provide more details that ensure remarkable

490 *Id.* art. 83(4).

491 *Id.*

492 INT’L CRIMINAL COURT, RULES OF PROCEDURE AND EVIDENCE (2d ed. 2013), <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>.

493 UNITED NATIONS MECHANISM FOR INT’L CRIMINAL TRIBUNALS, RULES OF PROCEDURE AND EVIDENCE (2016), <http://www.unmict.org/sites/default/files/documents/160926-rules-rev2-en.pdf>.

494 *Id.* R. 144(B).

495 Statute of the International Tribunal for the Law of the Sea art. 16, Dec. 10, 1982, 1833 U.N.T.S. 561.

496 *Id.* art. 30.

Article 30 - Judgment

1. The judgment shall state the reasons on which it is based.

2. It shall contain the names of the members of the Tribunal who have taken part in the decision.

3. If the judgment does not represent in whole or in part the unanimous opinion of the members of the Tribunal, any member shall be entitled to deliver a separate opinion.

4. The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the parties to the dispute.

Id.

497 *Id.* art. 30(1), (2).

498 *Id.* art. 29(1). The tribunal’s president or designee casts the tie-breaking vote if necessary. *Id.* art. 29(2).

transparency by requiring the judgment to identify each participating judge's decision and rationale.⁴⁹⁹ The judgment must include not only the names of judges who participated in the judgment, but also the number and names of judges who formed the majority on each "operative provision" of the judgment, as well as the number and names of judges who voted in the minority on each one.⁵⁰⁰ Any judge may add a separate opinion either concurring or dissenting in the judgment. And a judge may choose to include a concurring or dissenting declaration with the tribunal's judgment without stating reasons.⁵⁰¹ The same rules apply to advisory opinions.⁵⁰²

The tribunal's website includes a resolution setting out the procedures by which the judges deliberate on cases, a unique disclosure that reveals how the judges consider the issues and try to reach consensus.⁵⁰³

Table 3 compiles the available comparative information relating to relevant transparency norms for the selected courts, whose functions are generally described in Part III.

499 INT'L TRIBUNAL FOR THE LAW OF THE SEA, RULES OF THE TRIBUNAL (2009), [hereinafter RULES OF THE TRIBUNAL], https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf.

500 *Id.* art. 125(1)(b), (l).

501 *Id.* art. 125(2).

502 *Id.* art. 135.

503 Int'l Tribunal for the Law of the Sea, Resolution on the Internal Judicial Practice of the Tribunal (2005), https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos.10.E.27.04.05.pdf.

TABLE 3 – TRANSPARENCY NORMS
Selected International and Supranational Tribunals

Court	Dissents Y or N	Concurren- ces Y or N	Number of Votes Disclosed for or against Judgment	Judges Identified by Name with Final Votes	“Silent Acquies- cence” Permitted
European Union Court of Justice	N Permitted by statute but not issued in practice.	N Permitted by statute but not issued in practice.	Y Majority vote Panels must consist of an odd number of judges; all must sign	Y All partici- pating judges must sign the judgment	Y All participants must sign and thus acquiesce
International Court of Justice	Y A judge may file a separate declaration without reasons	Y A judge may file a separate declaration without reasons	Y Majority vote Judgment must explain reasons and list all participating judges by name and those voting in favor.	Y	Y
European Court of Human Rights	Y Including “bare statement of dissent”	Y Concurring opinion must state reasons	Y Majority vote Judgment must state whether vote is unanimous or by majority and must list participating judges by name. Vote tallies reported for and against each dispositive issue.	N (Unless a judge files a separate opinion)	Y

Court	Dissents Y or N	Concurren- ces Y or N	Number of Votes Disclosed for or against Judgment	Judges Identified by Name with Final Votes	“Silent Acquies- cence” Permitted
Inter- American Court of Human Rights	Y Dissenting opinion must state reasons and may address only issues covered in the judgment.	Y Concurring opinion must state reasons and may address only issues covered in the judgment.	Y Majority vote Judgment must include names of judges who participate and results of voting, but need not identify judges who voted with the majority. Separate opinions are circulated to other judges before the judgment is issued.	N (Unless a judge files a separate opinion)	Y
African Court on Human and People’s Rights	Y (including advisory opinions)	Y (including advisory opinions)	Y Majority vote Judgment must include reasons and must identify judges by name who participate in deliberations, and the number of votes for the judgment.	N (Unless a judge files a separate opinion)	Y
International Criminal Court	Y Only issues of law	Y Only issues of law	N Majority vote Judgment must include reasons and views of minority	Unclear	Y

Court	Dissents Y or N	Concurrences Y or N	Number of Votes Disclosed for or against Judgment	Judges Identified by Name with Final Votes	“Silent Acquies- cence” Permitted
International Courts for Yugoslavia & Rwanda	Y (presumably must include reasons)	Y (presumably must include reasons)	Unclear Judgment must include statement of reasons	Unclear	Unclear
International Tribunal for the Law of the Sea	Y (including advisory opinions) A judge may file a separate declaration without reasons	Y (including advisory opinions) A judge may file a separate declaration without reasons	Y Majority vote Judgment must include names of all participating judges, the number of votes and names of judges forming majority, and the number of votes and names of judges who voted for and against each of the judgment’s operative provisions (or, for advisory opinions, each issue presented for decision).	Y	N Every judge’s vote on each operative provision or issue presented is identified by name in the judgment or advisory opinion.

5. *Consultative Council of European Judges (CCJE)*

The CCJE is not a court, but rather a consultative body for the Council of Europe and European Union member nations on issues that relate to

judicial independence, impartiality, and competence.⁵⁰⁴ Established in 2000, it is composed entirely of judges.⁵⁰⁵

In 2008, the CCJE issued a comprehensive opinion including a number of recommendations to ensure the quality of judicial decisions. While the opinion justifiably takes no position on whether a court should permit or preclude separate opinions, it does address their value, content, and dissemination.⁵⁰⁶ In particular, the Council's recommendations provide that "[d]issenting opinions should be duly reasoned"⁵⁰⁷ and should be published along with the court's judgment.⁵⁰⁸ The Council also calls for individual judicial discretion to express "complete or partial disagreement" with the majority decision and the reasons for disagreement, or to express the opinion that the judgment should have rested on alternative grounds.⁵⁰⁹

C. European Parliament Study of Dissenting Practices: EU Member States' Constitutional and Supreme Courts

In 2012, the European Parliament took action in response to repeated calls for reforming the opinion-issuing practices of the Court of Justice of the European Union.⁵¹⁰ Its Committee on Legal Affairs requested a study

⁵⁰⁴ *Background and Mission*, COUNCIL OF EUR. CONSULTATIVE COUNCIL OF EUR. JUDGES, <https://www.coe.int/en/web/ccje/background-and-mission> (last visited Aug. 31, 2018).

⁵⁰⁵ *Id.*; COUNCIL OF EUR. CONSULTATIVE COUNCIL OF EUR. JUDGES, <https://www.coe.int/en/web/ccje/home> (last visited Aug. 31, 2018).

⁵⁰⁶ See Consultative Council of European Judges (CCJE), Opinion no.11 (2008) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions, CCJE(2008)5 (Dec. 18, 2008), <http://www.courtexcellence.com/resources/~media/microsites/files/icce/ccje.ashx/>.

⁵¹ In some countries judges can give a concurring or dissenting opinion. In these cases the dissenting opinion should be published with the majority's opinion. Judges thus express their complete or partial disagreement with the decision taken by the majority of judges who gave the decision and the reasons for their disagreement, or maintain that the decision given by the court can or should be based on grounds other than those adopted. This can contribute to improve the content of the decision and can assist both in understanding the decision and the evolution of the law.

⁵² Dissenting opinions should be duly reasoned, reflecting the judge's considered appreciation of the facts and law.

Id. ¶¶ 51-52.

⁵⁰⁷ *Id.* ¶ 52.

⁵⁰⁸ *Id.* ¶ 51.

⁵⁰⁹ See *id.*

⁵¹⁰ *E.g.*, Perju, *supra* note 80, at 308-09 (calling for change to allow Court of Justice to begin issuing separate opinions to "politiciz[e] its judicial style"); Rasmussen & Rasmussen, *supra* note 109, at 1376 ("It is arguable that only a root-and-branch reform will have any chance of uprooting the [Court's] ills and ailments, the bad habits and preposterous self-satisfaction . . ."). The European Parliament's report observed that "some scholars have argued that separate opinions could actually

of opinion-issuing practices of the highest courts of its member states. The report details arguments in favor and against the practice of issuing dissenting opinions,⁵¹¹ cites many of the applicable statutes and rules governing those practices among the courts of European Union member states,⁵¹² and considers the European Union Court of Justice's longstanding practice of issuing consensus judgments without appending separate opinions authored by individual judges.⁵¹³ The comprehensive research report and its conclusions represent a substantial contribution to the relevant literature on global courts' opinion-issuing practices. Both have received far too little scholarly attention,⁵¹⁴ especially considering the ongoing global interest in dissenting opinion practices.

IV. POLICY-BASED VALUE JUSTIFICATIONS FOR TRANSPARENCY NORMS

As scholars have observed, the scholarly literature on the advantages and disadvantages of separate judicial opinions is rich, especially in the United States.⁵¹⁵ But as some have noted, little in the way of comparative work has been published,⁵¹⁶ and many of the excellent works still available in print or digital format are outdated.⁵¹⁷ Importantly, Professor Katalin Kelemen's recently published treatise⁵¹⁸ begins to fill that gap, but even that work is limited to an analysis of European constitutional courts, a small group of eighteen courts that primarily share a relatively recent twentieth-century history.⁵¹⁹ In large part, national constitutional courts in Europe are an indirect outgrowth of the various twentieth-century treaties

serve the Court's purposes, in particular given its need to engage in a constant dialogue with national courts. Others claim that dialogue can better be improved through different, already existing, means, and that the introduction of separate opinions might threaten the Court's collegiality and its authority vis-à-vis national tribunals." RAFFAELLI, *supra* note 16, at 6.

⁵¹¹ *Id.* at 9-16.

⁵¹² *Id.* at 17-30.

⁵¹³ *Id.* at 31-39. As noted above, the court's statute does not bar separate opinions, and in fact suggests that minority votes will occur by requiring decision panels composed of an odd number of judges. But the court's rules of procedure require all judges who participate in deliberations to sign the judgment, whether or not they agree with the judgment or its reasoning. The court's procedural rules effectively mandate silent acquiescence, as reflected in Table 3. *See supra* notes 440-42 and accompanying text.

⁵¹⁴ *But cf.* KELEMEN, *supra* note 74, at 15-16 n.44 (citing the study and acknowledging Raffaelli as the author).

⁵¹⁵ *E.g.*, Kelemen, *supra* note 5, at 1345.

⁵¹⁶ KELEMEN, *supra* note 74, at 2, 7-9.

⁵¹⁷ *See, e.g.*, McWHINNEY, *supra* note 36; Nadelmann (1959), *supra* note 84.

⁵¹⁸ KELEMEN, *supra* note 74.

⁵¹⁹ *See also* Bricker, *supra* note 5. Bricker's article is another recent contribution to the field but is similarly limited in scope to an analysis of European constitutional courts.

establishing the European Union and its predecessors.⁵²⁰ For that reason, European constitutional courts have many characteristics in common, including norms that generally allow for publication of separate opinions.⁵²¹

The global interest and scholarly commentary on judicial opinion-issuing practices have led a few scholars to advance theoretical constructs in an effort to better conceptualize the interrelated values, norms, and factors that influence relevant institutional choices about communicating the results of judicial deliberations. This section provides a preliminary overview of a recent descriptive model and what it may offer as a basis for further comparative research.

A. The “Judicial Trilemma”: Judicial Independence, Accountability, and Transparency

Professors Dunoff and Pollack have recently advanced a novel theoretical framework in an effort to explain the design and operation of international courts, including the means they use to communicate and disseminate judgments and the rationale for decisions.⁵²²

Among the authors’ underlying assumptions in formulating the model is that three sometimes competing values are central to judicial deliberations and decision-making: judicial independence, judicial accountability, and judicial transparency.⁵²³ They construe the concept of judicial transparency rather narrowly, focusing on “a more limited and precise aspect of transparency, namely the [public’s] ability to identify *a particular judge’s position or vote* on a particular issue before the court, or what we might call judicial *identifiability*.”⁵²⁴ Whether or not an individual judge has the freedom to issue a separate opinion identifying that judge by name as departing from the court’s judgment is a major criterion of the

520 See KELEMEN, *supra* note 74, at 14 (noting that their relatively youthful age is “an important distinguishing feature of constitutional courts”); see also Finn Laursen, *The Founding Treaties of the European Union and their Reform*, in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (Aug. 2016), <http://politics.oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-151?print=pdf>.

521 See KELEMEN, *supra* note 74, at 10-15 (discussing features European constitutional courts share, which distinguish them as a group from national “supreme courts”); Kelemen, *supra* note 5, at 1352-57 (same).

522 Dunoff & Pollack, *supra* note 75, at 231.

523 *Id.* at 232-36.

524 *Id.* at 236 (first emphasis added; second emphasis in original).

authors' notion of transparency,⁵²⁵ on which they argue that "international courts display enormous variation."⁵²⁶

The authors may be overstating the point. Other than the Court of Justice of the European Union (CJEU), international courts do issue separate opinions, although in some cases the author remains anonymous.⁵²⁷ While the CJEU has interpreted its statutory requirement of secret deliberations to construct an internal norm of consensus, nothing in the court's organic statute expressly or implicitly prohibits judges from issuing dissenting opinions.⁵²⁸

The Dunoff-Pollack Judicial Trilemma model theorizes that three central judicial values—*independence*,⁵²⁹ *accountability*, and *transparency*—are inherently in tension, and that no international tribunal can operate in a way that maximizes all three. Represented graphically:⁵³⁰

525 *See id.* at 236-37. In fact, Dunoff and Pollack indirectly acknowledge that their theoretical model was driven by their earlier analysis of the various practices of international tribunals in issuing separate opinions along with the courts' judgments.

[D]issenting opinions also provide a pathway into understanding the logic that drives the Judicial Trilemma. . . . [I]ndividually signed public opinions may substantially threaten the reelection prospects of judges who lack life tenure. Given this tension, many judicial systems have struggled to find the appropriate relationship between permitting the issuance of separate, often unpopular opinions, on the one hand, and the nature and structure of judicial terms and appointment procedures, on the other.

Id. at 234.

526 *Id.* at 263.

527 RAFFAELLI, *supra* note 16, at 31-33; *see* Tbl. 3, *supra*.

528 *See* Statute of the Court of Justice of the European Union 2010 O.J. (C 83). Articles 36 and 37 provide only that "[j]udgments shall state the reasons on which they are based[,] shall contain the names of the Judges who took part in the deliberations[,] shall be signed by the President and the Registrar[, and] shall be read in open court." *Id.* arts. 36, 37. The Court's Rules of Procedure specify the contents of each judgment. Rules of Procedure of the Court of Justice 2012 O.J. (L 265) art. 87. They include "the names of the President and of the Judges who took part in the deliberations," *id.* art. 87(d), and "the grounds for the decision," *id.* art. 87(m). Each judgment must be "delivered in open court," *id.* art. 88(1), and must be "signed by the President, by the Judges who took part in the deliberations and by the Registrar, [and] sealed and deposited at the Registry," *id.* art. 88(2).

529 On the critical role judicial independence plays in international tribunals, see Theodor Meron, *Editorial Comment: Judicial Independence and Impartiality in International Criminal*

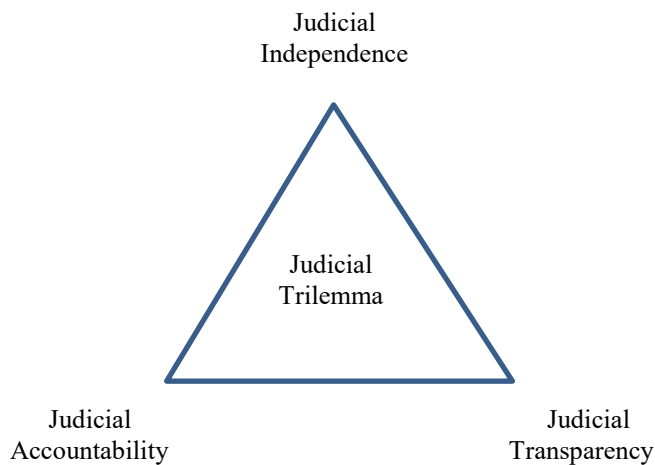


Fig. 1 - Dunoff & Pollack's "Judicial Trilemma" Model

The model predicts that international courts with high marks on judicial independence and accountability will reflect less transparency in their decision-making processes. Similarly, courts with high degrees of both accountability and transparency are less likely to enjoy a high degree of judicial independence. Finally, courts that exhibit high degrees of transparency in decision-making and strong independence can be predicted to score relatively low on measures of accountability.⁵³¹ As formulated by the authors, the model suggests that the likelihood of designing an international tribunal to maximize all three fundamental judicial values is

Tribunals, 99 AM. J. INT'L L. 359, 359-60 (2005).
530 Dunoff & Pollack, *supra* note 75, at 239.
531 *Id.* at 238-41.

very small and perhaps unrealistic, if not impossible.⁵³²

The authors have identified three international courts that they argue serve as more or less “ideal” examples of the model’s usefulness. They consider the Court of Justice for the European Union (CJEU), the only international tribunal that has never issued a separate judicial opinion, as scoring low on the transparency scale, apparently for that reason alone.⁵³³ But the CJEU, they argue, scores high on measures of accountability and independence, consistent with the trilemma model.⁵³⁴ The authors identify the International Court of Justice (ICJ) as exemplifying a high degree of accountability and high transparency, but arguably less independence when considering a variety of competing factors.⁵³⁵ And they hypothesize that the European Court of Human Rights (ECtHR), as currently configured, is the “ideal” example of a court with high measures on both transparency and independence, with concomitant low marks, as the model predicts, on judicial accountability.⁵³⁶ But the authors do not demonstrate how the model applies to other international tribunals. In particular, they neither acknowledge nor address the International Tribunal for the Law of the Sea (ITLOS), perhaps the most “transparent” of all international tribunals according to the authors’ narrow definition of that value.⁵³⁷

Dunoff and Pollack’s Judicial Trilemma model is thought-provoking and offers a useful beginning point for analyzing the institutional features of courts designed relatively recently (beginning in the early twentieth century) to address cross-national economic, political, and human rights objectives. But the model might not explain the operation of various national appellate and constitutional tribunals that form the bedrock of the global legal system. Other scholars, for example, while acknowledging the authors’ contribution to the field, have already noted certain weaknesses in

⁵³² See *id.* at 238.

⁵³³ *Id.* at 244 (“[T]he CJEU is a ‘low transparency’ court.”). To support this conclusion, the authors point to the organic statute’s *silence* on whether the court’s judgments must identify judges who voted with the majority on a particular issue. *Id.* They also note that the statute fails to expressly mention whether the judges may issue separate opinions. *Id.* at 245; *cf.* Rasmussen & Rasmussen, *supra* note 109, at 1374 (criticizing the “EU-court and EU-law’s ban against dissenting opinions, a ban that the vast majority of the Court’s members support and are adamant to keep on the books”).

⁵³⁴ Dunoff & Pollack, *supra* note 75, at 243-44.

⁵³⁵ See *id.* at 259 (“Thus, the ICJ reveals an ambiguous portrait of a third position vis-à-vis the Trilemma. [T]he ICJ is a high accountability, high transparency court. Some observers argue that [the ICJ] is low on judicial independence.”).

⁵³⁶ *Id.* The authors discuss at length the corollary features of the World Trade Organization (WTO), *id.* at 267-82, but they reach no firm conclusion on whether the Judicial Trilemma model has any direct predictive value, *id.* at 81-82. The WTO discussion does illustrate that all three judicial values have an interactive effect, which invites further scholarly research on the framework, its features, and its explanatory and predictive value. See *id.*

⁵³⁷ See *supra* notes 523-26 and accompanying text.

various aspects of the model.⁵³⁸

B. Refining and Generalizing the Judicial Trilemma Model to National and Subnational Courts

The Judicial Trilemma model, as presently configured, underconceptualizes the values central to judicial decision-making.⁵³⁹ First, Dunoff and Pollack assume that judicial independence is a unidimensional value. But an independent judiciary has two distinct aspects that to some degree reflect the tension inherent in decisions emanating from a multi-member court composed of judges whose votes weigh equally.⁵⁴⁰

In the United States and other countries that recognize the separation of powers among and between the judicial, legislative, and executive branches, judicial independence is understood to mean *institutional* independence: the ability to carry out the court's functions free from political interference from the other two branches.⁵⁴¹ In contrast, the

538 See Gráinne de Búrca, *Introduction to Symposium on Jeffrey L. Dunoff and Mark A. Pollack, "The Judicial Trilemma,"* 111 AM. J. INT'L L. UNBOUND 341 (2017); Mauricio Guim, *The Judicial Trilemma visits Latin American Judicial Politics,* 111 AM. J. INT'L L. UNBOUND 354 (2017); Gleider Hernández, *Systemic Judicial Authority: The "Fourth Corner" of "The Judicial Trilemma"?*, 111 AM. J. INT'L L. UNBOUND 349 (2017); Jennifer Hillman, *Independence at the Top of the Triangle: Best Resolution of the Judicial Trilemma?*, 111 AM. J. INT'L L. UNBOUND 364 (2017); Helen Keller & Severin Meier, *Independence and Impartiality in the Judicial Trilemma,* 111 AM. J. INT'L L. UNBOUND 344 (2017); Isabelle Van Damme, *The Application of "The Judicial Trilemma" to the WTO Dispute Settlement System,* 111 AM. J. INT'L L. UNBOUND 359 (2017). See generally *Symposium on Jeffrey L. Dunoff and Mark A. Pollack, supra* note 83.

539 John Alder has observed that competing values in a democratic legal system are inherently "incommensurable," or in American parlance, irreconcilable. Alder, *supra* note 38, at 223-24 ("[T]he notion that a democratic legal system, comprising as it does the interaction of innumerable competing wills and interests, can generate a rationally coherent scheme of values is inherently implausible.").

540 See RAFFAELLI, *supra* note 16, at 9, 11-12 (distinguishing external and internal aspects of judicial independence).

541 Federal and state courts in the United States represent legal *systems* that provide checks on the other two branches of government. The two parallel judicial systems also operate as checks on each other. In one respect, the constitutional supremacy of federal law constrains the authority of state courts. On the other hand, state courts have the authority to interpret state constitutions expansively to provide more protection for human rights than does the U.S. Constitution as interpreted by federal courts. Thus, state legal systems are not subsidiary to the federal system, but rather the two systems overlap; state courts exercise considerable authority beyond the substantive reach of federal courts. See

published scholarship analyzing the advantages and disadvantages of judicial dissent in other nations, as well as scholarly commentary theorizing the basis for global variations, generally confuses institutional independence with individual judicial autonomy.⁵⁴²

The two aspects of independence are distinct in important ways. Institutional judicial independence is arguably fostered by issuing consensus decisions “by the Court,” as U.S. Supreme Court Chief Justice John Marshall well understood in the early years of the nineteenth century. The Court’s legitimacy as a co-equal branch of the fledgling nation’s federal government depended on speaking with one voice.⁵⁴³ As a result, the Court became entrenched in the public’s mind as an essential government institution, more or less independent of Congress and the President.⁵⁴⁴ The practice of issuing consensus opinions “by the Court” was an essential step for the times in order to accomplish that mission.

While the United States borrowed many legal traditions from England, institutional judicial independence was certainly not one of them. At that time, England knew no independent judiciary: What we now know as appellate judicial functions were divided between the House of Lords, the upper chamber of Parliament; and the King’s Privy Council, the judicial

Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225 (2000). State courts, for example, have the final word on issues of state law within the constraints of the federal Constitution. *See id.* at 231; *see also*, e.g., *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1266–67 (9th Cir. 2017) (reasoning that on issues of state law, federal courts must ascertain and apply state law rather than prescribe different rules).

542 *See*, e.g., John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 965 (2002) (noting confusion among the terms “decisional independence,” “branch independence,” “procedural independence,” “administrative independence,” and “personal independence”); Alex Schwartz & Melanie Janelle Murchison, *Judicial Impartiality and Independence in Divided Societies: An Empirical Analysis of the Constitutional Court of Bosnia-Herzegovina*, 50 L. & SOC’Y REV. 821, 822 (2016) (acknowledging that “judicial impartiality and independence are often conflated”); Peter T. Zarella & Thomas A. Bishop, *Judicial Independence at a Crossroads*, 77 CONN. B.J. 21, 24 (2003) (distinguishing individual judges’ decisional independence from institutional independence).

543 “During any constitutional court’s infant years, a ban on dissents makes certain sense as a means of protecting its quest for authority and decisional legitimacy.” Rasmussen & Rasmussen, *supra* note 109, at 1380 (citing Arthur von Mehren, *The Judicial Process: A Comparative Analysis*, 5 AM. J. COMP. L. 197, 209 (1956)); *see* KELEMEN, *supra* note 74, at 15-16 & nn.44-46 (noting that some European constitutional courts barred dissenting opinions in the first decades after they were established but later allowed them after each court had become well established).

544 Even in the United States, the federal judiciary does not enjoy absolute independence from the other two branches. Congress has the constitutional power to delineate the jurisdiction of the Supreme Court, as well as other federal courts, with few exceptions. *See* U.S. CONST. art. III, §§ 1, 2.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned [in § 1], the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Id. § 2 (emphasis added). And of course, Congress holds the pursestrings on the federal treasury for all three government branches. *Id.* art. II, § 8.

advisors to the monarchy. And in England, as the Founding Fathers recognized, the Crown and Parliament have never been entirely separate branches of government.

The authority of individual judges to issue separate opinions is not a feature of institutional judicial independence; to the contrary, norms permitting separate opinions and dissenting votes reflect a high value placed on *individual* judicial independence, or perhaps more accurately individual autonomy, freedom of thought, and freedom of expression.⁵⁴⁵ The ability to explain one's own reasons for a dissenting vote on a collegial decision-making body reflects the values of individual autonomy and open government—both characteristically democratic values, but not necessarily values that strengthen the judiciary as an independent institution of government. More importantly, placing a high value on individual judicial independence on collegial courts implicates the rule of law, a value that virtually all democratic nations embrace.⁵⁴⁶

Second, the authors assign a high value to “judicial transparency” without fully defining what they mean. Other scholars have asserted that transparency and inter-branch dialog are both “vanguard values” with respect to the rule of law and “a polity’s democratic credentials.”⁵⁴⁷ But

545 Cf. RAFFAELLI, *supra* note 16, at 10 (suggesting that dissenting opinions might be motivated by individual judges’ desire for publicity, risking the “individualization of justice that would damage the authority of courts”).

546 See Robert S. Summers, *Principles of the Rule of Law*, NOTRE DAME L. REV. 1691, 1693 (1999) (enumerating second-order principles of the rule of law, including “that all forms of law be appropriately clear and determinate in meaning”); see also POPKIN, *supra* note 28, at 126 (“Multiple [individual] judicial opinions [in a single case] that grapple with legal issues are the judicial analogue to a deliberative democratic legislative process, which might not only help judges reach a sound result but also project an image of accountable judging and participation by interested audiences.”) (citing Frank L. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4 (1986)); Brennan, *supra* note 1, at 437 (“We are a free and vital people because we not only allow, we encourage debate, and because we do not shut down communication as soon as a decision is reached.”); William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 JUDICATURE 104, 106 (1948) (“When judges do not agree, it is a sign that they are dealing with problems on which society itself is divided. [Dissent] is the democratic way to express dissident views. Judges are to be honored rather than criticized for following that tradition”). But see Shiels, *supra* note 74, at 16 (noting that multiple opinions issued in a single case “can create a difficult, and sometimes impossible, task of deciding what the law is for the future - what old-fashioned lawyers and Latin scholars would call the *ratio decidendi* - the reasons for the decision”).

547 Rasmussen & Rasmussen, *supra* note 109, at 1374; *id.* at 1377-78. The authors go so far as to assert that

a “yes” to banning dissents implies a “no” to government openness, transparency, and dialogue between the governors and the governed to which it lends credibility. It implies to absolutely forget that the latter gave the courts their mandate in the first place. A ban on dissents and the flowerbeds of additional secrecy-mongering that often are its companion-in-

publication of separate judicial opinions is not the only measure of a tribunal's transparency. A court can exhibit transparency in many different ways, not just by allowing individual judges to author and publish separate opinions. Norms contribute to enhanced transparency, for example, by requiring written opinions to fully explain the rationale for the court's judgment; by requiring the court to publicize the number of judicial votes cast for and against the judgment; and by ensuring that the public has opportunities to intervene, access court records and briefs, or even observe court proceedings.

C. *Magna Carta of Judges*

The Consultative Council of European Judges, established by the Council of Europe in 2000, adopted the so-called *Magna Carta of Judges* on November 17, 2010.⁵⁴⁸ The document represents a synthesis of the Council's advisory opinions issued in its first decade pertaining to issues concerning judges, specifically independence, impartiality, and competence.⁵⁴⁹ It was prepared in response to rivalries that arose among political actors and judges representing member states of the European Union.⁵⁵⁰

The "fundamental principles" enumerated in the *Magna Carta* expressly apply to "judges of all European and international courts."⁵⁵¹ They emphasize judicial independence and impartiality as "essential prerequisites" to effectuate justice.⁵⁵² To guarantee judicial independence, each member state of the European Union is directed to establish a Council for the Judiciary or comparable entity with authority to address issues of judicial status and the organization and functioning of courts.⁵⁵³ Ultimately, the principles espouse the values of judicial transparency and accessibility.⁵⁵⁴

arms always exert a vicious effect on the conduct of any government . . . that . . . run squarely counter to modern (Western) democracies' ambition and obligation to deliver on all three openness-variants. . . . [The CJEU's] policies of aloofness, self-absorption, and secrecy-mongering remained the unscathed name of the game.

Id. at 1375.

⁵⁴⁸ Consultative Council of European Judges, *Magna Carta of Judges (Fundamental Principles)* (Nov. 17, 2010), <https://rm.coe.int/16807482c6> [hereinafter *Magna Carta of Judges*].

⁵⁴⁹ See MAK, *supra* note 3, at 91.

⁵⁵⁰ *Id.*

⁵⁵¹ *Magna Carta of Judges*, *supra* note 548, ¶ 23.

⁵⁵² *Id.* ¶ 2.

⁵⁵³ *Id.* ¶ 13.

⁵⁵⁴ *Id.* ¶¶ 14-17.

Access to justice and transparency

14. Justice shall be transparent and information shall be published on the operation of the

D. Legal Constraints on How Courts Communicate Decisions

Much of the scholarship to date addressing whether and how global courts issue separate judicial opinions has neglected to comprehensively address variations in the external legal constraints governing judicial decision-making and decision-issuing practices. In the United States, the now-entrenched practice of publishing the Supreme Court's separate opinions along with each justice's vote is a direct outgrowth of the Court's own choices. Scholarly debate over the merits of separate judicial opinions has focused almost exclusively on judges' individual decisions whether to dissent or not to dissent, with occasional references to the Chief Justices' preferences or leadership style.⁵⁵⁵

For example, under the leadership of Chief Justice John Marshall, the Court generally issued a single opinion "of the Court," often but not always authored by the Chief Justice himself. Chief Justice Stone, however, approached the issue differently; he did not believe his role was to discourage individual justices from issuing separate opinions. Over the last two centuries, the Court's opinion-issuing practices have changed significantly, but the Court itself has initiated those changes.⁵⁵⁶ No formal

judicial system.

15. Judges shall take steps to ensure access to swift, efficient and affordable dispute resolution; they shall contribute to the promotion of alternative dispute resolution methods.

16. Court documents and judicial decisions shall be drafted in an accessible, simple and clear language. Judges shall issue reasoned decisions, pronounced in public within a reasonable time, based on fair and public hearing. Judges shall use appropriate case management methods.

17. The enforcement of court orders is an essential component of the right to a fair trial and also a guarantee of the efficiency of justice.

Id.

⁵⁵⁵ See, e.g., Bentsen, *supra* note 3, at 192 (noting consensus in the literature that a court's dissent rates over time are directly influenced by the chief justice); McWhinney, *supra* note 84, at 617-18 (noting the influence of the chief justice on the Court's opinion-issuing practices). For example, Chief Justice Taft discouraged dissenting opinions. See Kevin J. Burns, *Chief Justice as Chief Executive: Taft's Judicial Statesmanship*, 43 J. SUP. CT. HIST. 47, 57-58 (Mar. 2018). Chief Justice Hughes encouraged consensus and sought "to secure as great a degree of unanimity as was possible without compromising the integrity of the majority opinion." McWhinney, *supra* note 84, at 618. Chief Justice Earl Warren is widely credited with having persuaded the other justices to reach a unanimous decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See, e.g., PAMELA C. CORLEY ET AL., *THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT* 8 (2013); Joel K. Goldstein, *Leading the Court: Studies in Influence as Chief Justice*, 40 STETSON L. REV. 717, 728-29 (2011).

⁵⁵⁶ Article III of the United States Constitution has never been amended. The most significant statutory change in the life of the Supreme Court occurred in 1925 with the enactment of the Judiciary Act, then known as the "Judge's Bill," which gave the Court considerable control over its own docket.

statutes, court rules, or internal operating procedures (as far as the public knows) dictate the Court's opinion-issuing practices, its disclosure of justices' votes, or even whether a justice may "silently acquiesce" in the Court's judgment while declining to explain why.

Contrast the United States federal courts' experience with the explicit legal constraints regularly imposed on European national, supranational, and international courts, in particular with respect to the secrecy of deliberations, the content of judgments, and the dissemination of judicial opinions. In the Republic of Ireland, the Supreme Court is expressly prohibited by law from issuing separate opinions in cases involving *a priori*, abstract constitutional review.⁵⁵⁷ In Greece, on the other hand, publication of dissenting opinions is *constitutionally* mandated, although internal court rules provide that separate opinions are recorded anonymously.⁵⁵⁸ In many nations, constitutional provisions on judicial decision-making and opinion dissemination are supplemented by statutes and formal court rules. In others, relevant constitutional provisions may not speak to the issue, but statutes and rules do. The various treaties and statutes establishing international tribunals commonly speak directly to issues relating to the secrecy of deliberations as well as opinion-issuing practices, although with varying degrees of specificity.⁵⁵⁹

Any consideration of institutional judicial independence as a factor in predicting court behavior, or even *ex ante* institutional design, must certainly take into account the widely varying external legal constraints on judicial opinion-issuing practices.⁵⁶⁰ Constitutional and statutory norms reflect not only a polity's choices among values, including second-order principles relating to the rule of law,⁵⁶¹ but also the legal system's customs and traditions. Disregarding those formal and informal constraints and their influence on institutional judicial choices⁵⁶² diminishes the scholarly

Even that statutory change was initiated by the Court itself, although Congress has amended it since to narrow even further the Court's original and mandatory jurisdiction. *See* 28 U.S.C. §§ 1251-60 (2018).

557 *Supra* note 416 and accompanying text.

558 *Supra* note 411 and accompanying text.

559 *See supra* notes 442-503 and accompanying text.

560 Alder opposes confining judicial dissents by "external criteria, which are themselves controversial" and instead believes that an individual judge should decide whether or not to dissent "as part of his or her burden of judgment." Alder, *supra* note 38, at 245. Popkin's treatise on the evolution of the judicial opinion in the United States acknowledges the possibility that a court's "operational rules" may influence whether judges opt to issue separate opinions. POPKIN, *supra* note 28, at 129-30. But few if any formal norms exist for the judicial opinion-issuing practices of federal courts in the United States. *See, e.g.*, Lynch, *supra* note 402, at 84 (noting "the absence of any definitive source for a right to dissent in the United States Supreme Court"). *But cf.* Radin, *supra* note 35 (reviewing the history of formal norms constraining state courts' judicial-opinion issuing practices).

561 *See* Summers, *supra* note 546, at 1693.

562 *See* Lynch, *supra* note 402, at 86 ("A requirement of unanimity may be imposed upon the

debate on practices that best support overarching principles that advance the rule of law.

E. Judicial Transparency as a Continuum

Several scholars have identified transparency in general as an important judicial value, and the Consultative Council of European Judges (CCJE) agrees.⁵⁶³ By transparency, most mean external or institutional transparency—the degree of public access to the court’s decision-making process.⁵⁶⁴ Some commentators, including Professors Dunoff and Pollack, have defined it more narrowly, focusing primarily on the practice of issuing separate opinions by individual judges.

As others have noted, the authority of a court’s judges to issue separate opinions must be distinguished from the actual practice of doing so.⁵⁶⁵ Even if a court’s judges are authorized to issue separate written opinions, most jurisdictions allow the court as a whole or an individual judge to elect not to exercise that authority.⁵⁶⁶ Variations exist even here. For example, some courts’ organic statutes allow an individual judge to issue a separate opinion if the court’s judgment does not represent the unanimous decision of participating judges, while disallowing publication of a judge’s dissenting vote without expressing reasons for disagreeing with the court’s opinion. Others allow judges to issue dissenting opinions, usually but not always including dissenting votes without an accompanying explanation, but do not permit the reporter or registrar to identify the individual judicial author by name.

If the primary value of separate opinions is to help develop and improve the law, publishing them would appear to advance those goals whether or not the author is identified by name. Further, scholars have

judges of a court from an internal or external source.”).

⁵⁶³ See *supra* notes 506-09 and accompanying text.

⁵⁶⁴ See *supra* notes 540-46 and accompanying text (distinguishing between institutional judicial independence and individual judicial autonomy).

⁵⁶⁵ E.g., KELEMEN, *supra* note 74, at 22; Grimm, *supra* note 11, at I-2 (“In some countries the judges of constitutional courts obtained the right to file separate opinions. This does not mean that the courts decided to publish dissenting opinions.”).

⁵⁶⁶ See, e.g., Grimm, *supra* note 11, at I-3 (“The judges’ motives to file or not to file a separate opinion if they did not . . . fully [agree] with [the court’s] opinion are so manifold that any attempt to summarize them would be in vain.”); see also KELEMEN, *supra* note 74, at 22 & n.35 (citing Hungarian Constitutional Court’s practice prior to 2012, when the Constitutional Court Act was amended to require unanimous decisions by three-member judicial panels; before then, individual judges could issue separate opinions but in practice never did).

observed that identifying the author of a separate opinion creates incentives for individual judges to be more concerned with their individual reputations for consistency and credibility rather than the public legitimacy of the court as an institution.⁵⁶⁷

Judicial transparency is by no means a dichotomous variable. Rather, institutional transparency must be considered as a continuum or spectrum, with a constellation of representative features.⁵⁶⁸ At the extreme, complete transparency in judicial decision-making would entail public access to judicial *deliberations*—perhaps even live-streaming them for maximum public access—as well as identifying each individual judge by name on every dispositive issue addressed in the judgment.⁵⁶⁹ Deliberations would be open to the public, much like legislative committee hearings and floor debates already are in many democratic nations, including the United States. Each judge would be required to file a separate written opinion reflecting her vote on each disputed issue and explaining the reasons for each of those votes. And of course, each judge’s separate opinion would be published, identifying the author by name. The opinions might even be publicized on the internet and translated into several languages for easy access by global readers.

At the opposite extreme of the transparency spectrum are judicial tribunals whose deliberations are secret and remain so, even after judgment is formally rendered.⁵⁷⁰ Judges subscribe to an oath of secrecy, subject to criminal penalties for violating the secrecy norm. Secrecy at its most extreme would entail judgments as binary decisions, releasing only the ultimate result (who wins and who loses; affirm or reverse), with no public voting record, no written opinion explaining the court’s rationale, and no record by which an individual judge can be identified as agreeing

⁵⁶⁷ This outcome is especially apparent in jurisdictions like the United States that appoint Supreme Court justices for lengthy (or even life) terms subject to “good behaviour.” U.S. CONST. art. III, § 1.

⁵⁶⁸ See Kelemen, *supra* note 5, at 1363 (outlining degrees of transparency in the final stage of issuing a judicial opinion).

The first degree is to allow judges to publish their dissent. The rule is that they cannot simply state their disagreement but also have to give reasons for it, even if just in the form of joining another judge’s separate opinion. The second degree of transparency is the possibility of additionally revealing the number of the votes in favor and against the decision. . . . Finally, the third degree of transparency is represented by the American (and English) practice in which the vote of every judge is public, whether or not they choose to write their own dissent.

Id.

⁵⁶⁹ See RULES OF THE TRIBUNAL art. 125(1)(b), (l); *supra* notes 499-500 and accompanying text.

⁵⁷⁰ See, e.g., Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CAL. L. REV. 991, 1029, 1040 (2018) (discussing “the FISA court, where adjudication proceeds in secret and generally without any representation from adverse parties” and raising concerns about the implications for “transparency and public access norms”).

with or opposing the final outcome. Not even oral pronouncement of individual judges' opinions or votes would be permitted, or that the decision was unanimous—that would reveal too much about the court's internal deliberations. The judges' votes in the matter would be recorded only in a secret book kept under lock and key, never to be revealed except perhaps to scholarly historians centuries hence.⁵⁷¹

Of course, no known judicial tribunal—at least in modern times—reflects either of these extremes. Nevertheless, bookending the hypothetical spectrum of transparency can help scholars identify the true values underlying institutional preferences about how deliberations occur, and how the judgments of a multi-member court should be disseminated to the public.

No scholar to date has seriously challenged the nearly universal norm of secrecy with respect to judicial deliberations, and even the most vociferous critics of bans on dissenting opinions support that principle.⁵⁷² Even the United States Supreme Court, which most scholars credit as placing a high value on judicial transparency, tacitly subscribes to the secrecy norm regarding its internal deliberations. While each justice's vote is now a matter of public record after the judgment is released to the public, even that was not a foregone conclusion before 1947, when the official reports first identified each of the nine justices by name as either joining the majority opinion, authoring a separate opinion, or joining another justice's separate opinion.⁵⁷³

While most scholars attribute the practice of issuing seriatim decisions to English tradition, the most salient but often overlooked feature of global judicial decision-making since the seventeenth century is in fact majority voting, not whether an individual judge who votes with the minority is permitted to write separately.⁵⁷⁴ Even that apparently universal norm has recently come under renewed scholarly scrutiny.⁵⁷⁵

571 For example, Spain's courts historically maintained a record of dissenting votes in a separate, secret register. KELEMEN, *supra* note 74, at 79; Nadelmann (1959), *supra* note 84, at 420-21; RAFFAELLI, *supra* note 16, at 24.

572 *E.g.*, Rasmussen & Rasmussen, *supra* note 109, at 1378 (“[T]his quest for openness of course admits that the secrecy of judicial deliberations is sacred. They should never be opened to non-insiders' curiosities.”).

573 *See* White, *supra* note 57, at 1503-04.

574 Alder, *supra* note 38, at 233 (citing *Grindley v. Baker*, 1 Bos and Pul 229, 238 (1798)); *see* Young, *supra* note 14, at 105 (addressing the evolution of majority decision-making as the price for final adjudication).

575 *E.g.*, Waldron, *supra* note 52 (questioning the validity of reaching judicial decisions by a bare majority); *see also* Th. Baty, *The History of Majority Rule*, 430 Q. REV. 1, 2 (Jan. 1912)

Publicizing individual judges' voting records is another feature of judicial transparency that American scholars take for granted. But some nations prohibit judges from disclosing their votes in a case, and some allow publication of separate opinions only anonymously. Until fairly recently, for example, only one dissenting opinion could be issued in conjunction with an opinion of the Judicial Committee of the Privy Council, and only then without disclosing the name of the author or the other justices joining the minority opinion.⁵⁷⁶

F. Judicial Accountability as a Continuum

Dunoff and Pollack acknowledge that the degree of judicial accountability falls on a continuum.⁵⁷⁷ In the United States, federal judges are appointed for life, subject to "good behaviour."⁵⁷⁸ Federal judicial nominees who successfully run the gauntlet of the Senate confirmation process are not thereafter subject to political pressure. United States scholars who strongly favor the judicial practice of issuing separate opinions generally take this uniquely American feature for granted.⁵⁷⁹

In stark contrast, most judges on international and supranational courts serve limited terms, which may or may not be renewable.⁵⁸⁰ For example, judicial members of the Court of Justice of the European Union serve six-year terms that may be renewed only once.⁵⁸¹ Some national courts appoint judges for indefinite terms, but very few enjoy appointments for life subject to good behavior.⁵⁸² And many state appellate courts in the

(distinguishing majority decisions from majority rule; "[t]he origin of majority decisions . . . must be concealed in the mists of dawning history"). Baty questioned, however, the "acceptance of majority decisions as universally valid in matters of government." *Id.*

⁵⁷⁶ Alder, *supra* note 38, at 235. Alder refers to this compromise position as "[p]ossibly the worst of both worlds." *Id.* The practice has changed in recent years. *See supra* note 93 and accompanying text (explaining that the JCPC regularly issues both dissenting and concurring opinions, apparently without limitation).

⁵⁷⁷ Dunoff & Pollack, *supra* note 75, at 235 (referring to the "continuum of judicial accountability").

⁵⁷⁸ U.S. CONST. art. III, § 1.

⁵⁷⁹ *See, e.g.,* Henderson, *supra* note 16, at 287 (suggesting that "dissent and unanimity norms are merely tools used to increase the power of the Court and law," without acknowledging that those norms are almost totally within the Court's own power with virtually no external constraints or political accountability). But the point is not lost on international scholars. *E.g.,* Rasmussen & Rasmussen, *supra* note 109, at 1384 ("[A]ll imaginable links of answerability are missing from US judges' work.").

⁵⁸⁰ Dunoff & Pollack, *supra* note 75, at 234.

⁵⁸¹ *See id.* at 244; *Presentation, CT. OF JUST. OF THE EUR. UNION*, https://curia.europa.eu/jcms/jcms/Jo2_7024/en/ (last visited Apr. 29, 2018).

⁵⁸² Several nations even impose mandatory retirement when a judge reaches a specified age. *See, e.g., Resource Centre: What do Judges Do?*, CANADIAN JUDICIAL COUNCIL, https://www.cjc-ccm.gc.ca/english/resource_en.asp?selMenu=resource_judges_en.asp (last visited Aug. 31, 2018); *see*

United States are elected to the office for relatively short terms, often six years.⁵⁸³

V. “DEMOCRATIZING” JUDICIAL INSTITUTIONS AT THE RISK OF
“INDIVIDUALIZING” THE RULE OF LAW

[T]he practice of dissent follows the development of democracy . . .
. [T]he majority of dissents in courts of last resort raise legitimate
disagreement about fundamental incommensurable values. . . . In
the case of a highest appellate court the dissent is a mechanism for .
. . . providing a public acknowledgment of democratic choice.

John Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, 20
OXFORD J. LEGAL STUDIES 221, 221, 245 (2000).

Scholars have repeatedly argued that allowing individual judges to publish separate opinions enhances judicial independence and autonomy.⁵⁸⁴ The tacit assumptions underlying the preference for individual expression reflect contemporary democratic values,⁵⁸⁵ in contrast to the traditional view of high courts as “oracles of law.”⁵⁸⁶ The tension between these two perspectives brings us full circle. As an institution of modern liberal democracy, should a collegial court speak

also Constitution Act, 1867, Pt. VII, § 99(2), 30 & 31 Vict., c 3 (U.K.), reprinted in R.S.C. 1985, app II, no 5 (Can.).

⁵⁸³ See *Methods of Judicial Selection*, NAT’L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/methods/index.cfm?state= (last visited Aug. 31, 2018) (listing state-by-state details regarding judicial selection, including terms of office for elected judges).

⁵⁸⁴ See, e.g., Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J.L. & HUMAN. 507, 525–26 (2012) (summarizing traditional arguments on both sides).

⁵⁸⁵ POPKIN, *supra* note 28, at 126 (suggesting that multiple judicial opinions reflect democratic values of diversity and deliberation); RAFFAELLI, *supra* note 16, at 14–15 (addressing transparency as a democratic value, reflected by court judgments issued “in the name of the people,” as opposed to formal institutional authority); Barbara J. Falk, *The History, Paradoxes, and Utility of Dissent: From State to Global Action*, in *DISSENT! REFRACTED: HISTORIES, AESTHETICS AND CULTURES OF DISSENT* 23, 44 (Ben Dorfman ed., 2016) (“Dissent can be thought of as the highest form of political participation.”); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1759–60 (2005) (asserting that “one of the main goals of dissent [is] improving the quality of democratic decisionmaking” and that to be effective, dissent must be “visible”); Kelemen, *supra* note 5, at 1361 (analyzing courts’ democratic legitimacy as a function of judicial independence and transparency, values that are often in tension).

⁵⁸⁶ E.g., ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY* 25 (1989) (referring to Blackstone’s conception of common law judges as “living oracles” of the law).

with one voice? Or do consensus-driven opinions “of the court,” without revealing internal dissension, suggest anti-democratic values? If modern democratic values emphasize transparency and individual judges’ autonomy over judicial legitimacy, clarity of the law, and institutional independence, what are the consequences for the role of global courts and the rule of law?⁵⁸⁷

All these topics warrant further scholarly attention.⁵⁸⁸ The global community of courts is rapidly changing.⁵⁸⁹ Much of the published scholarship about global courts’ internal deliberations, decision-making processes, and external communication strategies is strikingly outdated.⁵⁹⁰ In some cases, contemporary scholars have simply repeated assumptions and conclusions from earlier scholarly works without independent analysis and without confirming the accuracy of the assertions against current information.⁵⁹¹

Among other topics, scholars should test the utility of Dunoff and Pollack’s provocative Judicial Trilemma model by applying it to both federal and state appellate courts in the United States as well as European and other national courts. In addition, more comprehensive work remains to be done to refine the variables influencing institutional decisions on how courts can best communicate the outcomes of judicial deliberations. The various sources of law and other formal norms that constrain judicial opinion practices remain obscure for some parts of the world, although that too is changing rapidly.⁵⁹² And language barriers continue to limit in-depth comparative analysis of many salient features of global courts and their decision-making processes.⁵⁹³ We have much yet to learn, and much

587 Kelemen, *supra* note 5, at 1351, 1357 (identifying distinctive features of constitutional courts that implicate the practice of issuing separate opinions); *see also* William H. Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A. J. 361, 363 (1973) (acknowledging that “the nature of constitutional adjudication invites, . . . if it does not require, more separate opinions than does adjudication of issues of law in other areas. . . . [S]ome increase in separate opinions is a natural and warranted result of the increase in constitutional decisions.”).

588 *See* KELEMEN, *supra* note 74, at 2, 7-9 (noting the dearth of relevant legal scholarship in Europe and enumerating several obstacles to researching judicial decision-making processes, including the norm of secret deliberations).

589 *See generally, e.g.*, Carl Baudenbacher, *Foreword: Globalization of the Judiciary*, 38 TEX. INT’L L.J. 397 (2003) (introducing a volume of international symposium articles addressing global courts, including the role of U.S. state courts in developing international law).

590 *See, e.g.*, McWHINNEY, *supra* note 36; Dumbauld, *supra* note 36; McWhinney, *supra* note 84; Nadelmann (1959).

591 *See, e.g.*, Henderson, *supra* note 16, at 292 n.32 (inaccurately asserting, without citing authority, that “[i]n France and Germany, all opinions carry the same discursive impact because disagreement is not published,” without acknowledging that the German Constitutional Court had been publishing dissenting opinions since 1970).

592 *See, e.g.*, *Conference: Law Via the Internet 2018: Knowledge of the Law in the Big Data Age* (Oct. 11-12, 2018), <http://vi2018.ittig.cnr.it/>.

593 *See* KELEMEN, *supra* note 74, at 8 (noting that “a comprehensive study of European

yet to share with one another about the inner workings of our courts and legal systems.

Finally, more scholarly work needs to be done to refine the fundamental values that inform decisions about the structure and operations of global court systems.⁵⁹⁴ Much of the existing literature on the value of dissenting and concurring opinions enumerates their advantages and disadvantages,⁵⁹⁵ without much analysis or insight into the complex set of values and other factors that influence relevant norms and practices, both internal and external, that govern the practices of collegial courts in each jurisdiction.⁵⁹⁶ Each of those factors can be expected to have interactive effects.⁵⁹⁷ Finally, future research should focus on identifying suitable measures (both statistically valid and reliable) for each of the values and contextual factors that motivate relevant norms to enable meaningful empirical and comparative analysis.

VI. CONCLUSION

Developments over the last two decades have debunked the traditional understanding that separate opinions are idiosyncratic of courts in nations following the common law tradition.⁵⁹⁸ History reflects that the judicial opinion-issuing practices have long since evolved, adapting to the increasing globalization of legal systems. And recent research confirms that most international and supranational tribunals, even those headquartered in continental Europe, expressly permit individual judges to issue separate opinions, although in some courts various internal norms and customs operate to discourage the practice.⁵⁹⁹ In addition, the majority of European national constitutional courts now permit individual judges to publish separate opinions, and judicial members of many “ordinary”

constitutional courts runs into linguistic difficulties,” especially in studying a decision-making processes).

⁵⁹⁴ See generally *id.* at 18-29 (comprehensively addressing internal court structure as an influential factor in opinion-issuing practices).

⁵⁹⁵ E.g., POPKIN, *supra* note 28, at 122-26.

⁵⁹⁶ E.g., Henderson, *supra* note 16, at 344 (opining that “[i]n this day and age, narrowness and minimalism go hand in hand with consensus, while breadth and judicial power go hand in hand with dissent”).

⁵⁹⁷ See, e.g., KELEMEN, *supra* note 74, at 158 (noting the “interconnectedness” of relevant “principles and concepts, such as transparency, judicial independence, legitimacy and authority”).

⁵⁹⁸ See RAFFAELLI, *supra* note 16, at 7, 8, 39.

⁵⁹⁹ *Id.* at 15; Bricker, *supra* note 5, at 170; see Tbl. 3, *supra*.

supreme courts may do so as well.⁶⁰⁰ Indeed, “the times they are a-changin’.”⁶⁰¹

The United States Supreme Court is known globally for its justices’ regular practice of issuing separate opinions, and some international scholars hold up the Court as a shining example of the common law tradition of transparency.⁶⁰² Yet even in the United States, few if any formal norms govern the Supreme Court’s opinion-issuing practices, which have also evolved quite significantly, if incrementally, over time. For example, the individual justices’ votes in a case were not published in the Court’s official reporter until relatively recently. And “silent acquiescence” in the outcome of deliberations is still possible simply by registering a concurrence or a dissent, unaccompanied by a written opinion explaining the rationale for the justice’s disagreement with the Court’s opinion. Without any formal constraints whatsoever, a time might come when a bare majority of the Court could choose secrecy over transparency in the blink of an eye. Yet the many United States scholars who have long championed the dissenting opinion, and who urge that tradition on other sovereigns (often without considering local values and legal traditions), generally overlook the absence of formal norms that protect United States federal courts’ judicial opinion-issuing practices against change.⁶⁰³

A few scholars have advanced preliminary theories that seek to explain institutional variations in opinion-issuing practices, but those theories are narrow in scope and warrant considerably more testing and refinement. For one, the Judicial Trilemma theory recently posited by Dunoff and Pollack rests on the assumption that judicial independence, accountability,

600 Bricker, *supra* note 5, at 170; see Tbls. 1A, 1B & 2, *supra*.

601 With respectful apologies to Bob Dylan. BOB DYLAN, *The Times They Are a-Changin’, on THE TIMES THEY ARE A-CHANGIN’* (Columbia Records 1964). Indeed, “[t]imes have changed. Many European judges, and most constitutional judges, have over the past twenty-five years been provided the opportunity to dissent from their colleagues.” Bricker, *supra* note 5, at 186.

602 See, e.g., MITCHEL DE S.-O.-L’E. LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY* 5 (2004) (identifying the U.S. Supreme Court has having become “the symbol of modern, Common Law judging”); McWhinney, *supra* note 84, at 625 (noting that “constitutional law adjudication in the United States is profoundly educational in nature . . . for the public at large”). *But see* LEE EPSTEIN, WILLIAM M LANDES & RICHARD A POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 1 (2013) (“[J]udges in our system are permitted to be, and most are, quite secretive.”); Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. ST. U. L. REV. 787 (2016) (contending that the Court is highly secretive and disdains transparency); cf. Nancy S. Marder, *The Supreme Court’s Transparency: Myth or Reality?*, 32 GA. ST. U. L. REV. 849, 852, 901 (2016) (rebutting Segall’s arguments that the Court is secretive and suggesting “small steps” the Court could take to enhance transparency).

603 See, e.g., Lynch, *supra* note 402, at 87 (“If we value judicial dissent, then it is necessary to know to what extent it is able to resist attack, and that requires being definite about what supports the practice and protects it as a judicial right.”).

and transparency (as narrowly conceptualized by the authors), are fundamental values shared by all international tribunals.⁶⁰⁴ Yet other values surely play a central role in addition to these, including optimizing certainty and clarity of the law,⁶⁰⁵ protecting the court's institutional legitimacy,⁶⁰⁶ preserving collegiality,⁶⁰⁷ and reinforcing political loyalty to international judges' appointing bodies.⁶⁰⁸ Moreover, it is unclear whether judicial independence, accountability, and transparency, values Dunoff and Pollack implicitly assume carry equal weight, are mutually exclusive or whether they each interact with one another in more complex ways. Finally, the model does not recognize the likely influence of other variables on judicial opinion-issuing practices, including the method of judicial selection,⁶⁰⁹ judicial panel size and structure,⁶¹⁰ court leadership,⁶¹¹ term lengths and limits, and individual judges' educational and professional qualifications,⁶¹² among many others.

604 See Dunoff & Pollack, *supra* note 75, at 233-38. However, the co-authors do not attempt to apply the model to any international tribunals beyond the four they selected to illustrate its predictive value.

605 KELEMEN, *supra* note 74, at 168 ("The principle of legal certainty is a kind of dogma and a fundamental goal."); *id.* at 169 (referring to legal certainty as "a fundamental value"); see Alder, *supra* note 38, at 242-43. Alder considers the value of legal certainty, while not absolute, as the "strongest argument against dissent." *Id.* at 245.

606 Kelemen, *supra* note 5, at 1357-58; see Alder, *supra* note 38, at 242 ("The appearance of unanimity is thought by many to buttress the authority of and confidence in the law."). Alder observed that strong opposition to judicial dissents is characteristic of "settings where confidence in the political settlement or in the judicial process has been relatively low or uncertain." *Id.* at 244; see also KELEMEN, *supra* note 74, at 15 ("[W]hen the court's authority and legitimacy are still weak, the publication of seemingly unanimous opinions can serve to protect the newly established court.").

607 Kelemen, *supra* note 5, at 1364; see Alder, *supra* note 38, at 243.

608 Alder, *supra* note 38, at 227-33 (identifying four categories of "incommensurable disagreement" that often arise in appellate courts in various permutations: (1) disagreements over ethical or political values, *id.* at 227-28; (2) disagreements about preferred modes of reasoning, such as rule-of-law based formalism on the one hand and outcome-oriented reasoning on the other, *id.* at 228-31; (3) disagreements about whether to resolve legal disputes based on abstract, *a priori* principles by applying a more concrete, pragmatic, "consequentialist" approach," *id.* at 231-32; and (4) disagreements based on subjective differences in weighing consequences and factual inferences, *id.* at 232.

609 See Ruth Mackenzie, et al., *Selecting International Judges: Principles, Process, and Politics* (2010) (detailing judicial selection processes for ICC and ICJ judges).

610 See KELEMEN, *supra* note 74, at 18 (explaining that most European constitutional courts, unlike the United States Supreme Court, generally decide cases not en banc, but rather in panels of three to five (or more) judges, similar to the practice of supreme courts in nations following the civil law tradition).

611 See Bentsen, *supra* note 3, at 208-09 (identifying court leadership and composition as influential factors in the rate of dissent).

612 *E.g.*, *id.* at 209 (finding, based on empirical analysis, that appointment of judges with academic backgrounds to Norway Supreme Court significantly correlates with increased rates of

A predictive model has little value unless it can be generalized beyond a small group of international and supranational courts. While theoretical models hold promise, more scholarly work is warranted to better conceptualize the competing “judicial values” that influence the practices of national and subnational multi-member courts. Scholarly research is also needed to identify the reasons for individual judicial choices about disclosing votes and publishing separate opinions.

The remarkable contemporary global interest in the opinion-issuing practices of national, supranational, and international tribunals reflects our expanding vision of the rule of law and each sovereign’s role in that new world order. In our increasingly global, interconnected legal community, should judicial tribunals speak with one institutional voice? Or should a cacophony of individual judges communicate judgments, each writing *seriatim*?⁶¹³ Perhaps the right balance something in between. The polarized views of many scholars who advocate for and against separate opinions disregard legitimate differences in the underlying norms and values that inform judicial practices. There is no clear, “one-size-fits-all” answer.⁶¹⁴ As others have concluded, much more comparative scholarly work remains to be done.⁶¹⁵ But as this article demonstrates, the global trend is clearly in favor of “democratizing” justice⁶¹⁶ by defrocking the

dissent). One scholar has observed “a pattern that many Judges give more and more dissenting or separate judgments as their careers progress.” Shiels, *supra* note 74, at 19.

613 See, e.g., L’Heureux-Dube, *supra* note 1, at 516 (“In this polyphonic world, it is important to recognize the value of all potential sources of new melodies.”); see also Flanders, *supra* note 44, at 423.

The substance of appellate judging – providing the best possible judicial responses to the legal problems posed by the cases and controversies that are appealed to courts of last resort – must never be sacrificed to appease the unslakable gods of collegiality and civility, whatever blandishments their professed votaries may offer to extinguish the fires of dissension.

Id. But cf. Carpenter, *supra* note 35, at 291 (positing that not all dissenting opinions warrant publication in the court’s official reports); McIntyre, *supra* note 36, at 443 (explaining that dissenting viewpoints are inevitable, but the *publication* of dissenting opinions, in one respect a mechanism of judicial accountability, needs justification).

614 Cf. Henderson, *supra* note 16, at 285 (expressing strong support for the United States practice of publicizing dissents, while conceding that “there is no simple answer to the question of how courts should decide cases or deliver opinions.”).

615 E.g., KELEMEN, *supra* note 74, at 2, 7-9; McIntyre, *supra* note 36, at 432 (addressing the contemporary debate in Australia about the potential threat to judicial independence as a result of internal pressure from within courts to reach consensus in single judgments).

At its heart, the controversy reflects different conceptions of how judges should undertake their role and about the precise objectives judges should pursue. The issues of dissent and collective decision-making become a window into a deeper conflict about the nature, form and limits of the judicial role. These issues are too rarely the subject of direct consideration.

Id. (citing, as the provocateur of the debate, J.D. Heydon, *Threats to Judicial Independence: The Enemy Within*, 129 L.Q. REV. 205 (2013)); see also Alarie & Green, *supra* note 4, at 33-34.

616 POPKIN, *supra* note 28, at 126; RAFFAELLI, *supra* note 16, at 38 (surmising that initiating publication of dissenting opinions by the Court of Justice of the European Union might “contribute to

myth of judicial consensus and unanimity.⁶¹⁷

the process of democratization of the European Union”); see Jacobson, *supra* note 1, at 1632 (“Dissent democratizes law, throws open the doors of law, to those who are its clients.”); Nadelmann (1964), *supra* note 84, at 276 (“The right to the open dissent has been linked with the defense of democracy”); Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L. J. 2235, 2246 (1996) (asserting that publishing dissents enhances a court’s “political legitimacy consisten[t] with democratic rule,” by demonstrating its engagement in a “deliberative process,” particularly given that the court “reaches its decisions in secrecy”).

617 See Brennan, *supra* note 1, at 435 (“Courts *derive* legal principles, and have a duty to explain *why* and *how* a given rule has come to be. This requirement serves a function within the judicial process similar to that served by the electoral process with regard to the political branches of government.”); see also Hans Christian Andersen, *Keiserens Nye Klæder* (*The Emperor’s New Clothes*), ANDERSEN’S FAIRY TALES, https://www.andersenstories.com/da/andersen_fortaellinger/kejsereens_nye_klaeder.