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MARBURY AND SIMMENTHAL: REFLECTIONS ON THE ADOPTION OF DECENTRALIZED JUDICIAL REVIEW BY THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITY

by Peter W. Schroth*

Judicial review is a topic that has fascinated Americans for at least 180 years. Our early, and still unusual, position that the courts in general have the authority to determine the constitutionality of laws has influenced constitutional thinking in most of the world. After consideration, however, most of the world has declined to accept our view. In evaluating this rejection of one of our most cherished institutions, we must distinguish the extent to which it corresponds to differences between their systems and ours that suggest or require different approaches to judicial review from the extent to which we and they are seeing the same problem differently. The former offers insights into the nature of our system and the fundamental choices involved in continuing, say, the common-law tradition as opposed to a shift toward the civil-law approach. The latter, however, more directly challenges us to justify or to alter our different solutions to similar problems.

The present essay focuses not so much on the general issue of judicial review as on the more specific question of which judges ought to participate in constitutional development. Since American lawyers usually do not seem to be aware even that this is a question, I begin with a general discussion of centralized review (in which a particular court, rather than judges in general, has the authority to decide constitutional questions) and decentralized review (the system used in the United States) (Part I). I turn next to a discussion of a 1978 decision of the Court of Justice of the European Community, *Italian Finance Administration v. Simmenthal S.p.A.*,¹ in which it was held that all judges

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of the member states must apply Community law\(^2\) directly, disregarding conflicting national laws. The case is of particular interest because the Italian Constitutional Court has forbidden precisely what the Court of Justice now requires\(^3\) (Part II). In response to the discussion of constitutional changes by judges provoked by the *Simmenthal* decision, and also because the connection to a brilliant new inter-disciplinary book\(^4\) is too fascinating to ignore, I pause to reject the extremes of positivism and determinism that they imply (Part III). Finally, I suggest that there should be a shift in our approach to the problem of judicial review on the basis of comparative study, namely that whether it should exist in the United States is no longer worthy of serious discussion; that the enduring question how it ought to be done can be seen from higher ground than how a court or an individual judge should behave; and that among the questions deserving further study in our own system are which judges should bear more or less of the responsibility for various aspects of constitutional change and what qualifications these particular judges should have for their task (Part IV). Lest I excite unfulfilled expectations, I hasten to add that this comment does little to answer this last class of questions; rather its function is to demonstrate that they are worthwhile lines of inquiry despite our neglect of them to date.

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2. “Community law” as the term is used here refers not only to the treaties but also to Community-level legislation, known as regulations and directives. Thus the Court of Justice's unwritten “supremacy clause” (see notes 96 & 99 infra and accompanying text) is roughly the functional equivalent of U.S. Const. art. 6, § 2.


I. CENTRALIZED AND DECENTRALIZED REVIEW

A. DECENTRALIZED REVIEW IN THE UNITED STATES

The theory of judicial review of legislation expounded by Chief Justice Marshall in *Marbury v. Madison* has become such a central part of our legal Weltanschauung that Americans have difficulty imagining how a constitution could have meaning without it:

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. . . . It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. . . .

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction.

5. 5 U.S. (1 Cranch) 49 (1803). In *Marbury*, the Court held an act of Congress unconstitutional, whereas in *Simmenthal* the statute in question was passed by the Italian parliament (the counterpart of a state legislature, if the European Community is the counterpart of our federation) rather than by the Council of the European Community (the counterpart, more or less, of Congress). In a sense, then, a case such as Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), might seem more analogous. As will become clear, however, my interest is not so much in the precise holding of either case as in the underlying approach to the role of judges. *Marbury* exemplifies, as well as any decision of the Marshall Court, the unarticulated presumption that what one court can do, all can do, except that higher courts can revise the decisions of lower courts. Indeed, the presumption was sometimes more or less expressed, as in the first and second sentences of the quotation in the text accompanying note 17 infra, but it is nevertheless *Marbury* that remains the leading case.

6. 5 U.S. at 70. Chief Justice Marshall continues, “But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.” *Id.* In summary, these are: 1) that the judicial power extends to “all Cases . . . arising under this Constitution, . . .” U.S. Const. art. III, § 2, “and if [the judges] can open it at all, what part of it are they forbidden to obey?” 5 U.S. at 70; 2) that laws and actions directly conflicting with clear provisions of the Constitution, such as duties on articles exported from states, U.S. Const. art. I, § 9, cl. 5, bills of attainder and ex post facto laws, U.S. Const. art. I, § 9, cl. 3, and conviction of treason on the testimony of fewer than two witnesses or confession out of court, U.S. Const. art. III, § 3, cannot be tolerated by the courts; 3) that judges must take an oath to support the Constitution, U.S. Const. art. VI, cl. 3; and 4) “that in declaring what shall be the supreme law of the land,” U.S. Const. art. VI, cl. 2, “the constitution itself is first mentioned; and not the laws of the United States generally but those only which shall be made in pursuance of the constitution, have that rank.” 5 U.S. at 72.

With respect, the first point is a combination of shameless question begging (whether testing statutes for constitutionality is “judicial” is the very question being considered) and an
This passage may be analyzed, however, as making two quite different points, demanding separate evaluation. The first is that some control of the constitutionality of legislation must exist outside the legislature itself if the constitution’s status as higher law is to be meaningful. The trend in Western countries is strongly toward increasing recognition of this point, although very few have carried it as far as has the United States.

The second point, with which this comment is primarily concerned, is that the determination of constitutionality is the responsibility of the judges, and specifically of every judge in every case in which the issue arises. This view has few adherents, and has led to even fewer invalidations of statutes by lower courts, outside the countries of the common law. Its claim to logical inevitability was destroyed by Hans Kelsen long ago:

empty rhetorical question. The second point avoids the real question, namely who is to interpret the Constitution, by citing only examples in which no interpretation is necessary. (But see, e.g., text following notes 27 & 28 infra.) The third point is all but dishonest if the question is whether judges or other officials should interpret the document, since the clause applies equally to all three branches: “The Senators and Representatives . . . , and the Members of the several State Legislatures, and all executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution . . . .” U.S. CONST. art. VI, cl. 3. (And ought we to note, in connection with the next point, that “judicial Officers” are mentioned last?) The fourth point begins with the extraordinarily weak argument that the Constitution mentions itself first in a list, and continues with the irrelevancy that laws passed by Congress prevail over other laws, such as state laws, only if made in pursuance of the Constitution. The issue, after all, is not conflicts between state and federal laws, but rather conflicts between federal laws and the Federal Constitution.

The preceding paragraph is only an indulgence that many other scholars (who, like me, tried to let on that they were smarter than the great Chief Justice) have allowed themselves. See, e.g., A. BICKEL, THE LEAST DANGEROUS BRANCH 1-14 (1962). Its point, however, is that Marshall’s real argument for judicial review of Congressional legislation is the one quoted in the text, not any of the makeweights that conclude the opinion. The key words in the quoted paragraphs, I think, are “in practice,” “in reality,” “practical and real.” Chief Justice Marshall is justly revered not for the sterile beauty of his logic, but rather for forging a strong, functional system out of whatever materials were available.

7. This is true even in countries that reject judicial review as a matter of principle. For example: “Before 1958, the legislature had in fact gained almost unlimited power. . . . Because the courts could not declare a statute passed by Parliament unconstitutional, constitutional limits on legislative power were purely formal.” R. DAVID, FRENCH LAW 25 (M. Kindred trans. 1972).

8. For general, comparative studies of judicial review, see M. CAPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD (1971) [hereinafter cited as CAPELLETTI]; MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART: LÄNDERBERICHTE UND RECHTSVERGLEICHUNG (1962) [hereinafter cited as VERFASSUNGSGERICHTSBARKEIT]. See also M. CAPELLETTI & D. TALLON (eds.), FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION (1973) [hereinafter cited as FUNDAMENTAL GUARANTEES].

9. See notes 24-25 infra and accompanying text.
Even if one would assume—which it is not all that clear that one may—that a norm contrary to the higher norm leads to no duty of obedience, this only leads to the difficult question: who is to examine and decide the conformity or nonconformity of the norm to be executed.

This problem usually appears in the literature only with regard to the question whether and to what extent a government official is under a duty to obey an unlawful order, and whether and to what extent he has the right to examine the legality of the order. The question must be stated much more generally, however, for a satisfactory solution to the specific application can be found only in the context of the general problem. The latter relates not only to government officials, but generally to all organs by which the laws are executed, and especially to the individual subject (although he is not an “organ” in the narrower sense), who, with respect to the norm he must observe, which is to say execute, is fundamentally in the same situation as the “organ.” In the same way the “organ,” with respect to the norm it must execute, which is to say observe, can be considered only as a subject. . . . Thus the problem exists not only with respect to the particular norm of orders given to government officials by their superiors, but rather with respect to every specific and general norm and at every level of execution: constitution, statute, regulation, administrative act and judicial decision, general and individual legal act.10

Not every citizen, however, can determine the validity of norms in a

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10. H. Kelsen, Allgemeine Staatslehre 287-88 (1925) [hereinafter cited as Kelsen] (my translation). The general issue is discussed at 287-301, with a careful distinction between the right to examine the legality of a norm [Prüfungsrecht] and the right to decide on its legality [Entscheidungsrecht]. See also note 11 infra. Most of this discussion is unfortunately omitted from H. Kelsen, General Theory of Law and State (A. Wedberg trans. 1945) [hereinafter cited as General Theory], but what does appear in the latter seems fully consistent with the 1925 version, if dramatically condensed. See, e.g., id. at 153-62. There are also a few passages that seem relevant to the general inquiry of this article:

If the legal order does not contain any explicit rule to the contrary, there is a presumption that every law-applying organ has this power of refusing to apply unconstitutional laws. Since the organs are entrusted with the task of applying “laws,” they naturally have to investigate whether a rule proposed for application really has the nature of a law. Only a restriction of this power is in need of explicit provision. Although the power of a law-applying organ to examine the constitutionality of laws to be applied to concrete cases, and to refuse the application of a law recognized by it as unconstitutional, can never be completely eliminated, it can be restricted in different degrees. The law-applying organ can, for instance, be entitled to investigate only whether the norm which has to be applied to a concrete case was actually passed by the legislative organ; or whether the norm has been created by a legislative or executive organ competent to issue general legal norms. If that is found to be the case, the law-applying organ may have no further right to dispute the constitutionality of the norm.

Id. at 268. See also Kelsen, Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution, 4 J. Politics 183 (1942). An interesting recent discussion built on this part of Kelsen’s thought appears in L. Prakke, Toetsing in het publiekrecht 73-82 and passim (1972).

In the last sentence of the quotation, “legal act” stands for Rechtsgeschäft, the equivalent of acte juridique, negozio giuridico, etc. This is one of those outrageously abstract terms so
way that binds others; indeed, it is an interesting philosophical question whether an individual citizen's determination binds even the one who makes it. It is commonplace that Marshall's point about the constitutional requirement of a judge's oath to support the constitution fails to distinguish judges from all other government officials; Kelsen only makes it look sillier by pointing out that everyone has a duty to support the constitution. Marshall should have discussed the advantages in letting judges make the binding determination, as opposed, for example, to the first branch to deal with a point, or to the branch most closely associated with the subject matter.

We continue to discuss whether judges are best suited to make the binding determination of the United States, but we are not in the dear to Legal Science, with no common-law equivalent. Kelsen's translator makes it "legal transaction (juristic act)," producing the following explanation:

The legal transaction is an act by which the individuals authorized by the legal order regulate certain relations legally. It is a law-creating act, for it produces legal duties and rights of the parties who enter the transaction. But at the same time it is an act of law-application, and thus it both creates and applies law. The parties make use of general norms which render legal transactions possible. By entering a legal transaction, they apply these general legal norms. By giving individuals the possibility of regulating their mutual relations through legal transactions, the legal order grants individuals a certain legal autonomy. It is in the law-creating function of the legal transaction that the so-called "private autonomy" of the parties manifests itself. By a legal transaction, individual and sometimes even general norms are created regulating the mutual behavior of the parties.

General Theory, supra, at 137. The concept is broad enough to include, for example, contracts, gifts, marriages and wills (but not torts). For further discussion, see M. Capelle-lotti, J. Merryman & J. Perillo, The Italian Legal System 177-79 (1967) [hereinafter cited as Italian Legal System]; H. Lehmann & H. Hübner, Allgemeiner Teil des Bürgerlichen Gesetzbuches 140-51 (16th ed. 1966).

11. For Kelsen, for example, this depends on the distinction between Prüfungsrecht and Entscheidungsrecht mentioned at the beginning of note 10 supra, and discussed at length by him in the source cited there. The point is sometimes telegraphed in the English version, however, as in General Theory, supra note 10, at 154:

Just as the existence of a fact to which a legal norm attaches certain consequences can be ascertained only by an organ in a certain procedure (both determined by the legal order), the question whether a lower norm corresponds to a higher norm can be decided only by an organ in a certain procedure (both determined by the legal order). The opinion of any other individual is legally irrelevant.

As Kelsen carefully admits, however, legal relevance is not the only relevance. In lieu of elaboration in a comment already overburdened with footnotes, I invoke the name of Thoreau.

12. 5 U.S. at 71.

13. See note 6 supra.

14. Subject of course, to the amendment procedure. See also part III infra, notes 84-107 infra and accompanying text.

15. For example, the whole premise of R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977) [hereinafter cited as Berger], is that judges have no business deviating from the Framers' intentions in any way. I take the book to be a scholarly demonstration that this premise is nonsense, since it leads logically to
habit of distinguishing from this the question whether all judges should share the power. This is easily explained: *Marbury v. Madison*, in which the point made no difference, was the only decision of the Marshall Court invalidating an act of Congress. The frequent issue, then as now, was the constitutionality of state laws, which were struck down in thirteen cases by the same Court.\(^6\) There it was necessary to decide where supremacy would reside, and the Court made a clearly reasoned claim:

It is . . . argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts . . . because state judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity . . . . [A]dmitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, (which we very cheerfully admit,) it does not aid the argument. It is manifest that the constitution has . . . presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. . . .

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States,

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upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable...

The need for uniformity is the strongest argument for a single, final authority, and much of the discussion of types of judicial review reduces to the question of the extent to which they will result in uniformity. In the United States the system only tends toward uniformity because most constitutional cases never reach the Supreme Court. For example, while orders of the lower federal courts are binding on the state courts in particular cases, neither the state courts nor the lower federal courts can bind the other for the future on questions of federal constitutional law.

B. Centralized Review in the Member States of the European Community

In the countries of the civil-law tradition, there are three standard objections to the American arguments for judicial review. First, the entire concept of stare decisis is usually rejected, and often vehemently. Second, the civil-law judges are not necessarily distinguished in “learning... and wisdom,” since judging is an occupation one be-

19. One method of achieving a tendency toward uniformity is to give a single court exclusive jurisdiction of constitutional issues. An alternative method is to require that prior decisions, even of other courts, be followed when the same issue recurs.
20. Precedent-justice is not only illogical but pernicious, because it interferes with the wiser conclusion of a later judge through the “prejudice” of the earlier judge and serves the comfort of the indolent judge. Its sway marks a lack of legal culture. (Precedent-justice rules where there is no scientific knowledge or theory to enrich and guide legal practice and legislation—it exists where legal practice teaches legal practice, as in England. Judges lacking independence favor it, since it is comfortable and saves effort, work and personal responsibility.) A mark of Rome's high legal culture is its systematic prohibition.

W. ENGELMANN, DIE WIEDERGEBURT DER RECHTSKULTUR IN ITALIEN 29 (1938), translated and quoted in J. DAWSON, THE ORACLES OF THE LAW 100 (1968). Dawson adds, “This statement is no doubt extreme and seems to us perverse; surely few modern Germans would subscribe to it.” Id. Ideas not far removed from it are commonplace in the civil-law tradition, however. For further discussion, see J. MERRYMAN & D. CLARK, COMPARATIVE LAW:
gins almost immediately after law school. Finally, there is a strong tradition in many countries, based on Montesquieu and the French Revolution, that a proper separation of powers forbids judges to interfere with the functions—such as enacting statutes—of the other branches of government.

As the American idea of a written constitution has come to be accepted by almost every country in the world, those that treat their constitutions as enforceable, and yet adhere to civil-law principles, have had to consider how the two can be reconciled. The American idea that every judge is a constitutional judge has been carefully examined, and occasionally adopted. By and large, however, the countries that have adopted the American system either are not really in the civil-law tradition, or adopted decentralized review and later abolished it. And
several of the countries considered to follow the American plan despite loose ties to the civil-law tradition can count few or no decisions actually holding statutes invalid.\textsuperscript{25}

It was Kelsen himself who provided the alternative, in proposals that were included in the Austrian Constitution of 1920.\textsuperscript{26} While ordinary judges were forbidden to question the validity of statutes, a special constitutional court could give an authoritative ruling. Unlike the American system, in which questions of constitutionality may be raised only in the course of ordinary litigation, and never abstractly, in Kelsen's constitution they could only be raised abstractly, by a special proceeding, and never in the course of ordinary litigation.

The French Constitution of 1958 provides for a limited system of constitutional review somewhat similar to the 1920 Austrian approach.\textsuperscript{27} Today in both France and Austria ordinary judges must ap-
ply even those laws they consider unconstitutional, and in both countries certain political organs may raise the question of constitutionality in a special court. The Austrian Constitution was modified in 1929 to allow the highest—but only the highest—civil, criminal, and administrative courts access to the Constitutional Court in actual cases. In France, however, even these highest judges must in theory apply statutes they consider unconstitutional, without so much as the right to refer the question to the Constitutional Council.

Later versions of centralized judicial review are found in the postwar Constitutions of Italy and the Federal Republic of Germany. The Italian Corte Costituzionale and the German Bundesverfassungsgericht...
richt, joined in the Federal Republic by the state constitutional courts, are the only courts authorized to rule on the constitutionality of statutes. Unlike Austria, both Italy and the Federal Republic authorize any judge to invoke the jurisdiction of the constitutional court whenever a ruling on constitutionality seems necessary to a pending case. The proceedings are stayed pending the result, which is then binding not only on the parties but *erga omnes*. The sort of abstract review, altogether divorced from any "case or controversy," that is available to certain organs in Austria and France is also available on a sharply limited basis in Italy, and quite broadly—in some cases even to individual citizens—in Germany.

Giving constitutional jurisdiction solely to a special court, rather than to all courts or even to the highest of the regular and administrative courts, allows judicial review to harmonize with a system in the civil-law tradition. The three standard objections to the American system of decentralized review are readily overcome by giving only this court, which never performs the functions of an ordinary court, the "non-judicial" powers to issue rulings binding in future cases and to interfere with the legislative and executive branches, and by choosing its members from the learned and politically-experienced rather than from the recent graduates or from the career civil servants. The result is two national courts in Europe whose constitutional case law is tending to show a striking resemblance to that of the United States Supreme Court. In the case of the Bundesverfassungsgericht, the introduction of dissenting opinions in 1971—an institution unique among continental courts—and the utter rejection of the crippling French style of one-sentence opinions have produced a body of case law that should be of the highest interest to American constitutional scholars.

The various approaches to judicial review of legislation in the nine member states of the European Community cannot be accurately described as stations along a single line, but the effort to do so is nevertheless instructive. If the criterion is the degree of centralization of whatever review exists, Italy is at one extreme with a single constitutional court, and the Federal Republic of Germany is similar with one constitutional court for each constitution (federal and state). Ireland

31. *See* text accompanying notes 19-22 *supra.*
33. When it joined the Community, Ireland amended its constitution by adding article 29, mentioning the Community expressly. Placing the treaties above even the constitution as norms to be applied by the judges was not such an extreme step as the similar provision in the Netherlands, however, since constitutional review was already granted to the two courts mentioned in the text. *See generally* Casey, *The Judicial Power Under Irish Constitutional*
assigns constitutional questions exclusively to two courts, the High Court and the Supreme Court. At the other extreme are Denmark and the United Kingdom, in which whatever power exists is shared by judges generally, except for the power of higher courts to review the decisions of lower courts.

Mention here of Britain, which, as asserted below, does have a sort of judicial review of legislation, raises the question of how the threshold determination whether any judicial review exists ought to be made. Systems, that is, in which there really is no judicial review give all judges the same non-power, and therefore might be considered a sort of limiting case of decentralization. Although closer observation might show that Belgium, Luxembourg and the Netherlands have some legal


34. When it joined the Community, Denmark amended its constitution to allow delegation of constitutional powers either by a five-sixths vote of the parliament or by a majority vote of the parliament followed by a referendum. The latter was used to enact the ratifying statute in 1972. See Warner, The Relationship Between European Community Law and the National Laws of Member States, 93 L.Q. Rev. 349, 360-61 (1977) [hereinafter cited as Warner]; Due & Gulmann, Constitutional Implications of the Danish Accession to the European Communities, 9 Com. Mkt. L. Rev. 256 (1972). On judicial review, see generally Castberg, Verfassungsgerichtsbarkeit in Norwegen und Dänemark, in Verfassungsgerichtsbarkeit, supra note 8, at 417.


37. Luxembourg amended its constitution upon joining the Community (article 37), but in a way that left the supremacy of treaties uncertain. The decisions of the Conseil d'Etat, however, leave no doubt that the treaties will be applied, even in case of a conflict with the constitution itself. See Dieudonné c. Administration des Contributions, Conseil d'Etat 28 juill. 1951, P.L.J. 15, 263; Bebr, supra note 27, at 218-19; P. Pescatore, L'Ordre Juridique des Communautés Européennes 247-48 (2d ed. 1973).

Although the Luxembourg courts do not pass on the constitutionality of statutes, some
subtle form of judicial review even while denying its existence, for our purposes their claims may be taken at face value.

Thus the only obviously complex case among the nine is post-1958 France. The new Constitutional Council, whose primary and perhaps only intended function in reviewing legislation was to prevent the Parliament from passing laws in fields reserved for regulation,39 claimed a somewhat broader role in the 1970’s.40 Its powers nevertheless remain sharply limited, in that it may rule only on the abstract question of the constitutionality of a statute prior to promulgation. Even this limited power is reconciled with the French theory of separation of powers only by emphasizing that the Constitutional Council is not a court, and never performs the judicial function of deciding a “case or controversy.”

The 1958 redistribution of law-making authority between the legislative and executive branches invites another level of discussion, however. Much of what is considered legislation in other countries, and indeed was considered legislation in France until 1958, is now called regulation in France.41 From a comparative point of view, perhaps it should be thought of as legislation whatever the French choose to call it. The Conseil d’Etat has long exercised a vigorous control over the constitutionality of acts of the executive and administration.42 In 1953, have suggested they should. E.g., P. MAJERUS, L’ETAT LUXEMBOURgeois 188-89 (1948). In describing the existing system, Judge Pescatore straddles the issue magnificently:

In the Grand Duchy of Luxembourg there is no constitutional jurisdiction. However, it should be understood that any court is competent to decide a point of constitutional law, if such a question arises in litigation before it and with which it is competent to deal. However, by virtue of an enduring tradition, the Luxembourg courts refrain from controlling the conformity of the ordinary laws with the Constitution if the constitutionality is in dispute. Thus the legislative [sic] has unrestricted sovereignty.


38. The Dutch have traditionally denied judges any power of constitutional review. See Decision of January 30, 1963, Hoge Raad, N.J. 1963, p. 587. By amendments to the Grondwet (articles 65, 66) an exception is made for international treaties, which the judiciary in general is to apply even in the face of conflicting constitutional provisions. See generally van Panhuys, The Netherlands Constitution and International Law, 47 AM. J. INT’L L. 537 (1953); BEBR, supra note 27, at 217-18.

The possibility of adopting judicial review of constitutionality has recently been thoroughly considered and rejected, with even the strongest proponents calling for centralized review. See L. PRAKKE, TOETSING IN HET PUBLIEKRECHT (1972).


41. FRENCH CONST. arts. 34, 37.

42. The principes généraux du droit are drawn in part from the constitution and earlier
this was somewhat decentralized by the creation of a nationwide network of lower administrative courts.\textsuperscript{43} In 1959, the Conseil d'Etat made it clear that it would treat all forms of regulation under the new constitution, including regulation in areas formerly reserved for legislation, as within its jurisdiction and subject to constitutional review.\textsuperscript{44} From this perspective, the reforms of the 1958 constitution may be seen as having greatly increased both the substantive breadth and the decentralization of French judicial review of legislation.

An alternative criterion is the extent to which judicial review affects results. Of course, it is ordinarily impossible to say what effect an unexercised power of review has on the legislature: that legislators will themselves accept the responsibility for assuring that the constitution is observed seems a priori as likely as that they will feel free to disregard it. The Danish courts have long asserted the power to disregard unconstitutional laws, but the Folketing, perhaps awed by this threat, has failed to pass laws that the courts could find no basis for upholding. Judicial review that \textit{always} results in a finding of constitutionality may seem meaningless to Americans, but it is not altogether so. In Belgium, for example, it is generally acknowledged that the parliament has acted unconstitutionally in some instances, and this is said to be preferable to judicial interference.\textsuperscript{45}

With the exception of Denmark, no country in the European Community admits the power of judges in general to examine the constitutionality of laws. Five of them nevertheless have recognizably influential judicial review of legislation. Judicial review is clearly most important in Germany and Italy, where it has been assigned to special courts, and within its domain the French Conseil d'Etat is fully as prestigious as the Bundesverfassungsgericht or the Corte costituzionale. The success in all three cases seems due in significant part to careful separation from the ordinary courts.

The other two are Ireland and Britain, where the common law tradition assigns a rank to judges incompatible with passive acceptance of unconstitutional statutes. In Britain, the judges continue to recite the doctrine of parliamentary omnipotence born in the seventeenth-century documents of constitutional rank. \textit{See generally} Batailler, supra note 39; L.N. Brown & J. Garner, \textit{French Administrative Law} 118-26 (2d ed. 1973) [hereinafter cited as Brown & Garner].

\textsuperscript{43} See Brown & Garner, note 42 supra, at 22-26.


\textsuperscript{45} See P. Wigny, \textit{Droit constitutionnel} 196 (1952).
struggle to control the crown. In practice, however, they find ways to prevent even Parliament from violating basic rights, notably through presumptions about legislative intent that turn out, in practice, to be irrebuttable.46

C. The European Court of Justice

The European Court of Justice was established at about the same time as the Corte costituzionale and the Bundesverfassungsgericht, originally as the court of the European Coal and Steel Community (ECSC)47 and since 1958 also as the court of the European Economic Community (EEC)48 and the European Atomic Energy Community (Euratom).49 In part, it was designed to operate on the same principle of centralized review as the Italian and German courts: a judge in any of the member states who considers an interpretation of Community law to be necessary to the decision of a pending case may stay the proceedings until the Court of Justice rules on the point.50 A court from which there is no further appeal must do so.51 Using the three treaties as its basic constitutional documents and speaking mainly in preliminary rulings requested by national judges, the Court of Justice has fashioned a body of case law that some have compared to that of the Marshall Court.52

Since the member states accept judicial review to widely varying extents in their national systems, they have had to face different sorts of problems in assimilating the supervision of the Court of Justice. But even if the principle of judicial review were accepted as fully as it is in

47. See articles 7, 31-45 of the Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 143.
50. Article 177 (2), EEC treaty; article 150 (2), Euratom Treaty.
51. Article 177 (3), EEC treaty; article 150 (3), Euratom Treaty.
the United States, the difficulties that would remain are suggested by
Reid v. Covert,53 in which the Supreme Court held that no interna-
tional treaty could validate an act of Congress contrary to the Bill of
Rights.4 The Italian and German constitutional courts have expressed
a similar unwillingness to allow treaties and the decisions of a supra-
national court to override their constitutional protection of fundamen-
tal rights.55

There is thus a more fundamental issue at stake, of which the ques-
tion of centralized or decentralized review is only a reflection. Can a
constitutional government set another system above itself and its con-
stitution? If so, how and to what extent, and has this happened in each
of the member states of the European Community? Even the answers
to these questions, furthermore, will not bring the theoretical and prac-
tical problems of conflicting European constitutions to an end, for both
the Community treaties and the European Convention on Human
Rights are asserted to have supra-constitutional status. This is one of
the bases for arguing that the Community should formally adhere to
the Convention, but until it does so, the second Simmenthal decision56
assures that conflict between Community law and the Convention is a
potential issue for every judge in every member state.57

II. THE SIMMENTHAL CASE

Simmenthal S.p.A., an Italian company, imported some beef from
France into Italy in 1973. Under a 1970 law continuing a much older
system, the Italian authorities charged a fee of some $700 for veterinary
and public health inspection of the imported beef. Simmenthal chal-
lenged the law in an Italian court, asserting that it was equivalent to a

53. 354 U.S. 1, 16-18 (1957). A stronger precedent was United States v. Wong Kim Ark,
169 U.S. 649 (1898), but doubt had been cast on its authority by overbroad reading of Mis-
54. This seems as good a place as any to indicate that I would now take a stronger posi-
tion on freedom of speech and association than I did in Schroth & Mueller, Racial Discrimi-
nation: The United States and the International Convention, 4 HUMAN RIGHTS 171 (1975). I
would now say that the United States lacks the constitutional power to ratify and enforce
such a treaty without a reservation of the sort discussed in that article.
55. Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide
C.M.L.R. 372 (Corte Cost.). See Schroth, Federalism and Automotive Pollution in Europe and
the United States, 56 J. URBAN L. 957, 1004-07 (1979) [hereinafter cited as Schroth];
Jekewitz, Verfassungsbeschwerden wegen Verstosses auch gegen Gemeinschaftsrecht?,
56. See note 1 supra.
57. Cf. Hunnings, Rival Constitutional Courts: A Comment on Case 106/77, 15 COM.
MKT. L. REV. 483, 484 (1978) [hereinafter cited as Hunnings].
quantitative restriction and therefore barred under Article 30 of the EEC treaty. The question was certified to the Court of Justice, which held in Simmenthal I that such laws violate the treaty.

The Italian judge accordingly ordered the Italian Finance Administration to repay the fee with interest, but the government continued to defend on the ground that under Italian law the Italian judge had no power to disregard the statute. The point was not, however, that Italian laws prevail over the treaty, but rather that only the Constitutional Court can declare an Italian statute void. This rule must be explored further before we return to Simmenthal II.

The Community treaties were ratified in Italy by ordinary statutes, and in 1964 the Constitutional Court took the position that they could have no higher rank than the act by which they became part of the Italian legal order, and therefore were displaced by any subsequent inconsistent statute. This was clearly too extravagant to maintain, and since 1973 the Italian Court has held that the treaties are based on article 11 of the constitution, and therefore outrank ordinary statutes. While this means that statutes inconsistent with Community law may be declared unconstitutional, it also permits the view that the guarantees of fundamental rights in the Italian constitution can override inconsistent Community law, at least within Italy.

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58. Article 30 provides: "Quantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between Member States."


60. See note 1 supra.


63. ITALIAN CONST. art. 11 reads as follows:

Italy renounces war as an instrument of offense against the liberty of other peoples and as a means of resolving international disputes; she will agree, on conditions of equality with other States, to the limitations of her sovereignty necessary to an organization for assuring peace and justice among nations; and will promote and favor international organizations constituted for this purpose. Query, of course, whether the European Community is fairly described as an "organization for assuring peace and justice among nations." See generally Sperduti, Sulle "Limitazioni di Sovranità" secondo l'Articolo 11 della Constituzione, 1978 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 473.


It is hardly necessary to add that by Article 11 of the Constitution limitations of sovereignty are allowed solely for the purpose of the ends indicated therein, and it
More importantly, since questions of conflicts between Community law and Italian statutes have constitutional rank, they fall within the Constitutional Court's monopoly on constitutional adjudication. In a series of rulings beginning in 1975, the Court forbade lower courts to disregard statutes that conflict with Community law, requiring them instead to refer such questions to it as constitutional questions. This has the obvious advantage of permitting a definitive ruling in a system otherwise without stare decisis, although problems of delay remain. But a 1976 order by the Italian Court made the delay much worse, holding that only the Court of Justice could determine whether a conflict existed between national and Community law, and that the Constitutional Court itself was not the sort of "court or tribunal" authorized to refer a question to the Court of Justice under the treaties. The result was the astonishing spectacle of a seven-step procedure for applying Community law in the face of inconsistent Italian statutes: 1) the ordinary judge finds the claim of the statute's inconsistency with Community law, and therefore unconstitutionality, "not manifestly unfounded," and refers it to the Constitutional Court; 2) the Constitutional Court finds that its decision requires an interpretation of a provision of Community law, which it is not authorized to undertake, and therefore remands the case to the lower court; 3) the lower court refers the question to the Court of Justice; 4) the Court of Justice holds the statute inconsistent with Community law, and informs the Italian judge of its conclusion; 5) the Italian judge reports this finding to the Constitutional Court; 6) the Constitutional Court holds the statute

should therefore be excluded that such limitations of sovereignty, concretely set out in the Rome Treaty, signed by countries whose systems are based on the principle of the rule of law and guarantee the essential liberties of citizens, can nevertheless give the organs of the EEC an unacceptable power to violate the fundamental principles of our constitutional order or the inalienable rights of man. And it is obvious that if ever Article 189 had to be given such an aberrant interpretation, in such a case the guarantee would always be assured that this Court would control the continuing compatibility of the Treaty with the above-mentioned fundamental principles.


65. See note 3 supra.
66. Advocate General Reischl told the Court of Justice that "the requisite proceedings are complicated and expensive and frequently take up to three or four years." [1978] E.C.R. at 653. A related point is that in Italy, as in the United States, a declaration of unconstitutionality is not completely retroactive with respect to other cases. See CAPPETTLETTI, supra note 8, at 88-96. This is the point of the Pretore's question (b), note 70 infra, which the Court of Justice found it unnecessary to answer, although it was discussed by both parties and by the Advocate General.

67. See note 3 supra.
68. Article 177, EEC treaty; article 150, Euratom treaty.
void, with *erga omnes* effect, and informs the lower court of its conclusion; and 7) the lower court can at last decide the case in accordance with Community law.\(^6\)

In 1977, the lower-court judge in the *Simmenthal* litigation, faced with this bizarre procedure, chose to attack it in the Court of Justice by certifying the following leading question:

(a) Since, in accordance with Article 189 of the EEC Treaty and the established case law of the Court of Justice of the European Communities, directly applicable Community provisions must, notwithstanding any internal rule or practice whatsoever of the Member-States, have full, complete and uniform effect in their legal systems in order to protect subjective legal rights created in favour of individuals, is the scope of the said provisions to be interpreted to the effect that any subsequent national measures which conflict with those provisions must be forthwith disregarded without waiting until those measures have been eliminated by action on the part of the national legislature concerned (repeal) or of other constitutional authorities (declaration that they are unconstitutional) especially, in the case of the latter alternative, where, since the national law continues to be fully effective pending such declaration, it is impossible to apply the Community provisions and, in consequence, to ensure that they are fully, completely and uniformly applied and to protect the legal rights created in favour of individuals?\(^7\)

The Court of Justice responded carefully but firmly:

[17] [I]n accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member-States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but—in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member-States—also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions. . . . [21] It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which

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\(^6\) See also Pappalardo, *supra* note 3, at 164-65.

\(^7\) [1978] E.C.R. at 632, [1978] 3 C.M.L.R. at 281. This was followed by an additional question:

(b) Arising out of the previous question, in circumstances where Community law recognises that the protection of subjective legal rights created as a result of “directly applicable” Community provisions may be suspended until any conflicting national measures are actually repealed by the competent national authorities, is such repeal in all cases to have a wholly retroactive effect so as to avoid any adverse effects on those subjective legal rights?

*Id.* at 632-33, [1978] 3 C.M.L.R. at 282.
the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule. . . . [24] The first question should therefore be answered to the effect that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.\textsuperscript{71}

In November 1978, however, the Tribunale of Milan found the question of another statute’s unconstitutionality for conflict with the EEC treaty “not manifestly unfounded,” and referred it to the Constitutional Court.\textsuperscript{72} By January 1980, the latter had not yet announced whether it would accept or defy the Community Court’s decision in \textit{Simmenthal II}.

The response to \textit{Simmenthal II} among commentators has been general approval outside Italy\textsuperscript{73}—although estimations of its importance vary widely—and mixed reviews, with many vehemently opposed to the decision, in Italy.\textsuperscript{74} For the most part, the non-Italian commentators see the issue as the effectiveness and supremacy within its sphere of Community law, while the Italians see it as decentralized versus centralized judicial review, and misguided outside interference in the

\textsuperscript{71} Id. at 643-44, [1978] 3 C.M.L.R. at 283-84. The second question (quoted in note 70 supra) therefore did not have to be answered. \textit{Id.} at 645, [1978] 3 C.M.L.R. at 284.


workings of the Italian legal system. Perhaps the most telling point is that Italy is also under fire from the Court of Justice for failing to remove from its books statutes inconsistent with Community law; merely refraining from applying the inconsistent laws, the Court of Justice holds, does not constitute compliance. Yet given Italy's hopelessly ineffective parliament, systematic repeal can hardly be expected, and Simmenthal II attacks the one really effective procedure, namely voiding by the Constitutional Court.

Italy presumably could respond with an abstract procedure for bringing statutes inconsistent with Community law to the attention of the Constitutional Court without staying or otherwise affecting ongoing litigation. In particular, this would be much easier in Italy, where some kinds of abstract questions are routinely presented to the Court, than in a country like the United States, where a case or controversy is required.

The decision of the Court of Justice has a more subtle level, however, based directly on earlier decisions of the German Constitutional Court and the Belgian and French Cours de cassation. All three courts succeeded in upholding the supremacy of Community law, despite their unwillingness to invalidate national statutes, by declaring that national and Community law "applied" to different areas. When Community law validly covers a point, that is, the apparently conflicting national law is not void or invalid; it simply does not "apply."

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76. Hunnings, supra note 57, at 487, adds:

The paradox is sharpened yet again by the fact that the Italian situation reflects that of the Community almost exactly: in the Community, too, the legislative process is slow and cumbersome, it is extremely difficult to repeal laws and the Court has taken on the main burden of developing the law. What is sauce for the Community gander is certainly not sauce for the national goose!

80. This distinction might also be compared to article 184, EEC treaty, and article 156, Euratom treaty. When the two-month period specified in article 173(3), EEC treaty, and article 146(3), Euratom treaty, has expired, a provision may no longer be declared void under article 174, EEC treaty, and article 147, Euratom treaty. However, it may at any time be declared inapplicable to a particular party under article 184, EEC treaty, or article 156, Euratom treaty.

A somewhat similar approach is used in Canada, e.g., Home Ins. Co. v. Lindal and Beat tie, [1934] 1 D.L.R. 497, 503:

The effect of this legislation by Parliament was to supersede existing provincial legislation, which was legislation in the same field; and thereafter, as long, at all events, as the
This approach is carefully and consistently followed in paragraphs [21] and [24] of Simmenthal II, although the point is masked in the English translation by the unfortunate use of “must . . . set aside” for “disapplicando” in paragraph [21].

This technique, it has been suggested, could be used in Britain as a way of complying with Community law while avoiding judicial review, and it is even possible to find cases there in which it has been used. Even more attention is paid to Community encroachments on national sovereignty in Britain than in Italy, as the long series of responses to Simmenthal II in the letters columns of the London Times demonstrated, and if such a solution could be made palatable it would be most welcome. That it cannot happen without a conscious choice, however, raises another level of problems, already suggested at the end of Part I.

III. CHANGING THE GRUNDNORM

The Constitution of the United States is ordinarily treated as our Grundnorm. Our awareness that something lies beyond the Constitution is shown by our fairly frequent references to the intent of the Framers and of the state ratifying conventions; indeed, a few would treat their intentions as immutable rules, at least until their successors are consulted by similar procedures. If we ask whence the conven-
tions derived their authority, we may construct an infinite regress, and for practical purposes some starting point must be taken as given.

One reason, a sufficient reason but not the only one, for selecting the Constitution as our working Grundnorm is focus: the text is the one thing we know the conventions all accepted.

Can the Grundnorm be changed, and if so, how? At one level, of course, the Constitution, like most written constitutions, contains an amendment procedure. Almost any provision can be changed or replaced by this procedure, and presumably it could be used to substitute a completely new document.

The only time in our history when we did substitute a new document, however, we did so without even going through the motions of the amendment procedure. In a sense, that is, the Articles of Confederation are still in effect, awaiting a change that can only be made by unanimous consent of the state legislatures. Our agreement that this

remain the sacred and unalterable form and rule of government for Carolina forever.”

As insurance, he futilely added that “all manner of comments and expositions on any part of these fundamental constitutions, or on any part of the common or statute laws of Carolina, are absolutely prohibited.” By contrast, the framers of the United States Constitution recognized the inevitability of change and the need for plasticity. They therefore provided for an orderly amendment procedure. They also provided for a Supreme Court whose duties—“the judicial power shall extend to all cases . . . arising under this Constitution, the Laws of the United States, and Treaties”—required it to engage in “all manner of comments and expositions.”

85. This point is not so trivial as it might appear. Consider that the electorate which chose the members of the state ratifying conventions consisted exclusively of males, whites only in most states, of a certain age, owning a certain amount of property, and so forth. Surely we would not let such a group speak for all today; how then can its act of almost 200 years ago bind us now?

86. Cf. Kelsen, supra note 10, at 98-99. Hofstadter’s version of roughly the same point is part of the “Little Harmonic Labyrinth,” HOFSTADTER, supra note 4, at 103-26, with a more (nearly) formal discussion at 127-52 and passim.

87. What about the last clause of U.S. CONST. art. V, which states that despite the provision for amendment, “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate”? Could that clause be amended? Should there be a clause forbidding amendment of that clause? This begins to sound like Hofstadter’s fantasies cited in note 86 supra. See also note 84 supra.


89. The second sentence of article XII reads:

And the Articles of this Confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States and be afterward confirmed by the legislatures of every state.

Madison, on the other hand, considered popular ratification essential. “The articles of Confed, themselves were defective in this respect, resting in many of the States on the Legislative sanction only. Hence in conflicts between acts of the States, and of Cong., especially where the former are of posterior date, and the decision is to be made by State tribunals, an uncertainty must necessarily prevail, or
is a senseless sense shows our acceptance of the underlying authority of
the specially-elected conventions to replace one constitution with an-
other.

This acceptance, however, may not be unanimous even today, and
was far from being so before the Civil War. Jefferson, for example,
insisted in his defense of free speech that the Constitution was only an
agreement among the states:

Resolved, That the several states composing the United States of
America, are not united on the principle of unlimited submission to their
general government; but that by compact, under the style and title of a
Constitution for the United States, and of amendments thereto, they con-
stituted a general government for special purposes, delegated to that gov-
ernment certain definite powers, reserving, each state to itself, the
residuary mass of right to their own self-government; and that whenso-
ever the general government assumes undelegated powers, its acts are un-
authoritative, void, and of no force: That to this compact each state
acceded as a State, and is an integral party, its co-states forming as to
itself, the other party.90

And Calhoun made the same point in his defense of the slave-based
Southern economy against tariffs favoring the industrial North:

The great and leading principle is, that the General Government ema-
nated from the people of the several States, forming distinct political com-
munities, and acting in their separate and sovereign capacity, and not
from all of the people forming one aggregate political community; that
the Constitution of the United States is, in fact, a compact, to which each
State is a party . . . .91

The Supreme Court, on the other hand, insisted that the Constitution
came from the people, not the states. Justice Story argued: “The Con-
stitution of the United States was ordained and established, not by the
states in their sovereign capacities, but emphatically, as the preamble of

90. The quotation is from the First Kentucky Resolution, reprinted in THE VIRGINIA RE-
PORT OF 1799-1800, TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIR-
91. 6 J. CALHOUN, THE WORKS OF JOHN C. CALHOUN 59, 60 (Crallé ed. 1859).
the constitution declares 'by the people of the United States'."\(^{92}\) And Chief Justice Marshall later put it this way:

"By the convention, by Congress, and by the state legislatures, the [Constitution] was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. . . . From these conventions the Constitution derives its whole authority. The government proceeds directly from the people. . . . The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.\(^{93}\)

But if we draw from this the principle that a shift in the working Grundnorm can always be made by returning to the people speaking through their representatives in conventions, we are immediately in difficulty. If the result of the Civil War is not merely a demonstration of the superiority of the Northern armies, but rather perhaps an example of the principle that once the people form a union only the people of the whole union, not those merely of some part, can dissolve it, what of Dorr's constitution in Rhode Island?\(^{94}\) More significantly for contemporary concerns in Europe and the United States, what of the judges' role in major shifts of the Grundnorm, as in the incorporation of the Bill of Rights into the fourteenth amendment, \(Reynolds v. Sims\),\(^{95}\) or the Court of Justice's insertion of a supremacy clause into the European Community treaties?\(^{96}\)

Reference to the people as the repository of sovereignty on which even the constitution is based is a difficult argument to make for the European Community treaties. The Court of Justice nevertheless of-

\(^{92}\) Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324 (1816).

\(^{93}\) McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403-04 (1819).

\(^{94}\) A convention held without authority of the existing government in 1841 drafted a "People's Constitution" which was ratified by a large majority. In 1842, an election was held under this constitution, the people choosing Thomas W. Dorr as governor. The old government refused to yield, however, and President Taylor supported it. The United States Supreme Court refused to get involved, inventing the excuse of "political questions." Luther v. Borden, 48 U.S. (7 How.) 1 (1849). \(See also, Ex parte Dorr, 44 U.S. (3 How.) 103 (1845).\)


ferred it in *van Gend & Loos*, asserting that the Community treaties' special status, distinct from ordinary international treaties, was "confirmed by the preamble . . . which refers not only to governments but to peoples."97 Probably the best that could be said for this is that referenda were held in some of the member states-to-be, and that their non-meaninglessness is suggested by Norway's failure to ratify after a majority voted against.98 But this approach is so obviously vulnerable even to the Italian Constitutional Court's former line that the treaties were ratified by ordinary statutes that the Court of Justice took only one year to move from the positivist argument of delegation from the people to a claim of Community supremacy based on the nature of things.99

The supremacy of the Community treaties over the Italian Constitution and the simultaneous supremacy of the constitution over the treaties is reminiscent of M.C. Escher's *Drawing Hands*, a 1948 lithograph in which the right hand draws the left while the left draws the right.100 Douglas R. Hofstadter has already noted the analogy in law:

But what happens when there is no higher court, and the Supreme Court itself gets all tangled up in legal troubles? This sort of snarl nearly happened in the Watergate era. The President threatened to obey only a "definitive ruling" of the Supreme Court—then claimed he had the right to decide what is "definitive." Now that threat never was made good; but if it had been, it would have touched off a monumental confrontation between two levels of government, each of which, in some ways, can validly claim to be "above" the other—and to whom is there recourse to decide which one is right? To say "Congress" is not to settle the matter, for Congress might command the President to obey the Supreme Court,

98. For Denmark, however, the point is a good one, since the referendum was an essential part of the procedure chosen for ratification, even though a non-referendum alternative was constitutionally permissible. See note 34 supra.
100. One of the many places this has been reproduced is Hofstadter, supra note 4, at 690. A larger and clearer reproduction appears as plate 69 in M.C. Escher, *The Graphic Work of M.C. Escher* (J. Brigham trans. rev. ed. 1967), where it is described by the artist as follows:
A piece of paper is fixed to a base with drawing pins. A right hand is busy sketching a shirt-cuff upon this drawing paper. At this point its work is incomplete but a little further to the right it has already drawn a left hand emerging from a sleeve in such detail that this hand has come right up out of the flat surface, and in its turn it is sketching the cuff from which the right hand is emerging, as though it were a living member.

*Id.* at 15.
yet the President might still refuse, claiming that he has the legal right to disobey the Supreme Court (and Congress!) under certain circumstances. This would create a new court case, and would throw the whole system into disarray, because it would be so unexpected, so Tangled—so Strange!

The irony is that once you hit your head against the ceiling like this, where you are prevented from jumping out of the system to a yet higher authority, the only recourse is to forces which seem less well defined by rules, but which are the only source of higher-level rules, which in this case means the general reaction of society. It is well to remember that in a society like ours, the legal system is, in a sense, a polite gesture granted collectively by millions of people—and it can be overridden just as easily as a river can overflow its banks. Then a seeming anarchy takes over; but anarchy has its own kinds of rules, no less than does civilized society: it is just that they operate from the bottom up, not from the top down.¹⁰¹

At first glance, this resembles the point already made about the deeper Grundnorm, and the first level of analysis seems unexceptionable. This is Marbury too, of course, and there the Supreme Court cleverly avoided a confrontation. President Nixon backed down, leaving the Supreme Court supreme,¹⁰² and probably the Italian Constitutional Court will do the same.¹⁰³

On closer inspection, however, Hofstadter's political world mirrors reality about as faithfully as Escher's physical world. The world of American politics is not merely the sum of the individual actions of millions of people, and the next level of response when the pre-established rules offer no obvious solution to a conflict is not usually anarchy. Hofstadter's religious reductionism-determinism may be the most functional adaptation for a computer scientist with an interest in artificial intelligence, though at least for me his own book casts some doubt on the point.¹⁰⁴ It leads him astray, however, on questions of law and government, for courts and judges (and presidents) do not behave like atomic particles, at least in any way open to human observation. Hofstadter here violates his own rule about not generalizing the conclusions of mathematics, based on rigorous definitions, to fields with less

¹⁰¹. Id. at 692-693. “Tangled” and “Strange” are terms of art, defined as follows at 10: “The ‘Strange Loop’ phenomenon occurs whenever, by moving upwards (or downwards) through the levels of some hierarchical system, we unexpectedly find ourselves right back where we started. . . . Sometimes I use the term Tangled Hierarchy to describe a system in which a Strange Loop occurs.”


¹⁰³. See note 72 supra and accompanying text.

¹⁰⁴. See “Prelude . . .” HOFSTADTER, supra note 4, at 275-84; “. . . Ant Fugue,” id. at 311-36.
Stated otherwise, human institutions do not hold still long enough to be destroyed by Gödel's proof. If "strange loops" occur in government, they do not survive, because human institutions perceive them as states of disequilibrium, requiring further proceedings. In conflict of laws, courts simply accept the renvoi; in the less-civilized world of politics the more powerful of two claimants to supremacy forces the other to yield. At a deeper level, whether or not there is a Political Question That Cannot Be Resolved in Political System \( \times \) is not the important issue; we all live with the possibility of a nuclear holocaust. The important issue is how to make a political system serve society's needs and desires in the real world, a question both less impregnable and vastly more complex.

IV. SPECIALIZED JUDGES AND GENERALIZED JUDGES

The more practical basic question raised by Marbury and Simmenthal II is the role of judges in developing the law. Opponents of judicial activism generally turn out to be opponents of the policies of particular judges rather than opponents of activism in all contexts; the corresponding comment could be made about proponents. I will not claim to be an exception; on the contrary, I think a version of result orientation is preferable to a choice either for or against activism regardless of the results. The difference between the Warren Court's "activism" and that of some of its predecessors is that most of the laws and practices attacked in the 1950's and 1960's were the unjust vestiges of an earlier, less enlightened era, rather than needed, modern reform measures.

105. Hofstadter, supra note 4, at 696.

106. Alternatively, without denying the relevance of Gödel it could be argued that at least part of the legal system's justification comes from outside the legal system. Cf. E. Nagel & J. Newman, Gödel's Proof 98-102 (1958).

107. The reference is to the "Contracrostipunctus," Hofstadter, supra note 4, at 75-81.

108. Raoul Berger, however, asserts his own purity in Berger, supra note 15, at 4. Indeed, his very title seems to be a pointed reference to L. Boudin, Government by Judiciary (1932).


Unlike the aim of the Court in the Lochner era—to spin out the theorems of a moral and economic geometry from postulates rooted in the unalterable nature of the world—the aim I would urge upon the judiciary is considerably more modest: to participate, with sensitivity to its own role and its limits, in the ongoing social process of structuring the roles of others in accord with the contemporary significance of our collective past, called the Constitution. One can only hope that the legal profession, which put substantive due process on the misdirected track it rode for nearly fifty years before derailing at the West Coast Hotel in 1937, is now sufficiently independent of any particular
In particular, I do not think that a question of such practical significance as the proper judicial role should be decided on the basis of abstract logic, or of the imagined intentions of the great men of earlier centuries. Neither should we deprive ourselves of a level of response by choosing activism or restraint case by case. Rather the sort of comparative study reflected in this comment strongly suggests that responsibility for constitutional development should be allocated according to our perception of the qualifications and abilities of the candidates. In limiting constitutional review to specially qualified judges, that is, the Germans and Italians are at least asking the right question. If the Pretore of Susa, who posed the questions in Simmenthal II, is typical of lower-court judges in Europe, then perhaps the Court of Justice has hit on the right answer even without addressing the question.

On the other hand, the decision does not so much empower lower court judges—since there is no stare decisis in most member states—as reduce the power of the Court of Justice’s national rivals, especially the Constitutional Courts of Italy and West Germany. By the standard of demonstrated ability the Court of Justice is certainly worthy, but it is not so clear that the Constitutional Courts are not. The real point is that the issue is not being discussed in terms either of the judges’ existing qualifications vel non or of means for assuring that those who perform this role are well qualified.

In certain ways, the civil-law tradition’s greater division of judicial labor represents a more advanced step toward solution of modern problems than our own. Litigation, in Europe as in the United States, is increasingly concerned with constitutional and legislative policy, public rights and control of expanding bureaucracies. In the civil-law countries, these are considered matters quite separate from the private disputes handled by ordinary courts. From another perspective, modern complex litigation of public-law issues requires a more active judge than has been traditional in the common law. An argument could perhaps be constructed that the ordinary judges of the civil-law tradition are better qualified, by training and experience, for this active role than their American counterparts.

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10. Could it be that the rule of stare decisis tends to accomplish this by binding ordinary judges while leaving those who are especially creative—say, Benjamin Cardozo—unrestrained?

11. This may be the point intended by Chayes, The Role of the Judge in Public Law
Whether or not different competences are called for in public and private, in ordinary and constitutional, in national and supra-national, or in simple and complex litigation, and whether or not it is difficult or even unwise to combine these competences in the same judge, at least the question is the right one: how can we best assure that these matters will tend to be handled in the most appropriate and effective manner? By taking judges out of the picture entirely? By assigning certain kinds of cases only to specially qualified judges? By providing training in these areas also as part of the common education of judges?

An increasingly complex legal world, at all levels, makes it clear at least that simple-minded ideas of separation of powers, in the manner of Montesquieu, are useless. The modern problem of government is not so much runaway executives, legislatures or judges as runaway administrators. Abolishing the administrative branch is not a realistic option; nor is placing it under the strict control of another branch. The task, rather, is to guide it, to structure its endeavors, to restrict its excesses.

While the problem of administration grows, the classical problem of coordinating legislative bodies in a federal system has never faded away. The point here is that there is no need to presume that judicial review whose purpose is control of the bureaucracy and judicial review whose purpose is coordination of several legislatures need to be assigned to the same courts, although they are in such systems as the United States and European Community. Indeed, our experience in the United States is that the Supreme Court is much more at home in constitutional law than in some other fields, while some of the lower courts are better than the Supreme Court in other areas. At least the current Supreme Court shows a distressing ineptitude for some areas of administrative law, for example, as contrasted with the District of Columbia Circuit.112 This may be due to the latter's vastly greater experience with the problem area, but the conclusion that more specialized courts are needed is probably not justified.113 In particular, there are

Litigation, 89 Harv. L. Rev. 1281, 1298 (1976): "We may not yet have reached the investigative judge of the continental systems, [citing Kaplan, von Mehren & Schaefer, Phases of German Civil Procedure, 71 Harv. L. Rev. 1193, 1443 (1958)] but we have left the passive arbiter of the traditional [common-law] model a long way behind." See generally Federal Judicial Center, Manual for Complex Litigation (3d ed. 1973); Fundamental Guarantees, supra note 8, at 720-21.


real advantages to the use of judges who are entirely innocent of the particular issue, but expert decisionmakers.114

In a decentralized system such as that of the United States, the question is even more acute. Clearly if all judges are entrusted with constitutional questions, all judges ought to be capable of understanding and dealing with such questions. We are speaking, therefore, of matters of degree: judges whose work emphasizes a particular area ought to be particularly qualified for it, but no American judge can properly be incompetent in areas like constitutional policy.

The judges may also be compared with the legislatures as agents of reform and control. There is no doubt that in Italy and at the Community level the judges are much better qualified and more effective than the legislative bodies, playing a leading role almost by default. At the national level, unlike the Community level, the system has the luxury of differentiating various types of judges sufficiently to make the advantage even greater. This remains true despite Simmenthal II, and indeed one way of seeing that case might be as transferring issues of Community law to the courts that handle day-to-day business, where they will be understood and developed in a more practical way. If the decision is seen that way, the result may be comparable to the shift of aspects of administrative law from the Supreme Court toward the District of Columbia Circuit that I and others have called desirable.115

On the other hand, European Community law is to some extent constitutional law,116 and it is therefore important to consider the qualifications of the judges to whom it is assigned for constitutional decisionmaking. In the United States, we rarely discuss the qualifications for constitutional decision-making of judges other than Supreme Court Justices. But even our discussion of Supreme Court appointments too often fails to reach the real issues.

The natural inclination of Presidents to appoint justices of their own political philosophies—or at least to attempt to do so117—is not altogether a bad thing. It does make it more likely that the nominees are persons who have thought about political and policy questions, and it gives some influence, albeit indirect, to trends in the thinking of the

115. See note 112 supra.
117. The point is not only that a President Nixon may have failed to win Senate confirmation for Judges Haynsworth and Carswell, but that a President Eisenhower may have been surprised at the political philosophy of Chief Justice Warren.
national electoral majority. Once we recognize, however, that not only these but other factors are significant to the functioning of the Court, and of the lower courts, as constitutional policy-making bodies, perhaps we should consider institutionalizing some of them. The process employed over the last 190 years gives great weight to political and philosophical agreement with the President, geography and, more recently, religion and perhaps race; Presidents Eisenhower, Nixon and Ford considered prior judicial experience important. Except for judicial experience, which is almost irrelevant, these are secondary matters. My own view is close to that of Judge Learned Hand:

"I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon, and Carlyle, with Homer, Dante, Shakespeare, and Milton, with Machiavelli, Montaigne, and Rabelais, with Plato, Bacon, Hume, and Kant as with books that have been specifically written on the subject. . . . They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined."

So it is a question of legal education, and of the relationship between legal education and liberal education, between education in law school and education that continues through life. Lawyers in America are an elite to which we grant enormous power in diverse aspects of society, a power we can ill afford to confer on over-specialized technicians.

Nor, however, can we afford to forego the advantages of relative specialization, including the difference between the role of the judicial branch in constitutional policy-making and the roles of other branches, and the difference between the role of the Supreme Court and those of other courts. The judicial contribution, speaking generally, is the less concerned with daily politics (though not altogether unconcerned) and the more concerned with permanent values (though few if any of the values are really eternal).

Judicial review is not essential to democracy. The point that legislators who know they have to take on themselves the final responsibility will tend to act more responsibly has some validity, even if it is not wholly convincing. Possibly some of the small countries can continue to decline the advantages and consequent costs of judicial review: an-

other way of structuring the results of the inquiry at the end of Part I is to note that the four largest member states have the most judicial review, and the United States, bigger than any of them, has the most of all. But the more advanced issue is the manner of sharing judicial review so as to maximize its constructive influence on the various branches while minimizing or avoiding harmful effects.

It is probably unnecessary, and perhaps futile, to discuss the proper allocation of responsibility in such global terms. Perceived deficiencies of an on-going system can be corrected by limited reforms, which are much less likely to bring with them unforeseen serious adverse consequences. At least the nature of the problem must be understood, however, or even the small reforms may do more harm than good. It was understood in Marbury, a case which, despite its trivial controversy and timid non-holding, became a world-renowned classic. If it was understood in Simmenthal II, it was never expressed, and I suppose that the decision will be remembered for the small contribution to an already developed theory of the supremacy of Community law that appears in the Court's opinion, rather than for the important and subtle issue of judicial roles that lies just beneath the surface.