

A COMMON LAW PERSPECTIVE ON  
THE SUPREME COURT AND ITS FUNCTIONS

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The University of Warsaw is to be commended for focusing attention on the role of a supreme court, for that can be a critical component of a court system and, more generally, critical also to the fair functioning of a democratic government (and to others, no doubt). It makes sense to start out such a conference considering the roles a Supreme Court can play in a judicial system, and also to approach that question with an eye to the somewhat divergent attitudes toward the judicial role of common law and civil law systems. Those differences may mean a lot for the role of such a court and for the organization of the Court, a topic to be taken up by the next panel. I hope I will not trespass too much on topics to be addressed by others in my presentation.

I will argue that questions of design and function -- while important -- probably are not more important than more elusive questions about institutional status and evolution, something one could refer to as "legal culture." So we must approach our analysis with considerable humility. Particularly here in the countries of the former Warsaw Pact, where constitutional and democratic institutions have taken root over the last quarter century, it is important to appreciate the permutations of that sort of development.

I am here as the representative of the common law approach to the function of a Supreme Court, and will begin by cautioning that in some ways the common law v. civil divide is not entirely informative in regard to procedure, but that it is highly important in terms of the role of judges in "declaring" law. I will also speak mainly about the Supreme Court of my country, for it is a distinctive institution. That said, the U.S. situation offers an example of functions a court may have that differs from the function of courts in many other judicial systems, and those differences can importantly be said to relate to its role in a common law system. At the same time, I will regard such questions as whether the Supreme Court should have the power of judicial review of legislation as somewhat background. In the U.S., as is well known, we have had such review since *Marbury v. Madison*,<sup>1</sup> but that 1805 decision did not immediately place a stamp on our Court that remained unchanged for the ensuing 200 years.

I. DIVIDING THE WORLD INTO

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<sup>1</sup> 5 U.S. 137 (1803).

"COMMON LAW" AND "CIVIL LAW" SPHERES

Below I will emphasize that a common law tradition says a lot about the function of a Supreme Court as it says a lot about the function of courts in general. But as I've emphasized before,<sup>2</sup> that divide does not stand up to close scrutiny as a compelling clue to procedural arrangements. So I start with a caution -- not all common law countries are alike in terms of the function of their Supreme Court -- but end up affirming that there seems a significant divide in terms of the role of judges in making law, which can be at its most important in relation to the functioning of the supreme court in such a system.

One approach to the function of a supreme court is to recognize a different division among national judicial systems. Many report that there are two main prototypes -- the U.S. version with diffused constitutional review, and the centralized constitutional court with an "abstract" authority to pronounce on constitutional matters but no other role in the judicial system. That oracular alternative vision of a Supreme Court is most associated with Hans Kelsen,<sup>3</sup> and that vision has been cited as the model used by many European constitutional courts, not just Austria's. The distinction remains an organizing technique for scholars.<sup>4</sup> To some measure, it may correspond to the common law/civil law divide.

But neither the common law camp nor the civil law camp is monolithic. The U.S. has had a Supreme Court almost from the outset. The U.K., on the other hand, has formally had such a court only since 2005, less than a decade, and at least some notable observers were quite cool to its creation.<sup>5</sup> And the U.K. court is not equipped with the powers the U.S. Supreme Court announced in *Marbury* because it cannot invalidate an Act of

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<sup>2</sup> See Richard Marcus, *Exceptionalism and Convergence: Form versus Content and Categorical Views of Procedure*, in *Common Law, Civil Law, and the Future of Categories* (Janet Walker & Oscar G. Chase, eds. 2010), at 521.

<sup>3</sup> See generally Mauro Cappelletti, *Judicial Review in the Contemporary World* (1971).

<sup>4</sup> See, e.g., Anna Gamper & Franciso Palermo, *The Constitutional Court of Austria: Modern Profiles of an Archetype of Constitutional Review in Comparative Perspective*, in *Constitutional Courts: A Comparative Study* (Andrew Harding & Peter Leyland, eds, 2009), at 31.

<sup>5</sup> See, e.g., Neil Andrews, *The United Kingdom's Supreme Court: Three Skeptical Reflections Concerning the New Court*, 2011 *Utah L. Rev.* 9.

Parliament.<sup>6</sup> Australia, on the other hand, has had a Supreme Court since the beginning of the 20th century, although not in a system with separation of powers comparable to the U.S. version.<sup>7</sup> But the Australian court does function in a legal setup that involves somewhat independent judiciaries of various Australian states, more akin to the U.S. situation. In short, being a "common law" jurisdiction does not magically answer important questions addressed in this conference.

The "civil law" jurisdictions seem, from a distance, not to be entirely uniform either. Some, such as Austria, evidently adopted the pristine version of a constitutional court of the sort Professor Kelsen advocated. Speaking in the civil law context, however, scholars have observed that "French constitutional review is quite unique."<sup>8</sup> The distinctive French court has as many as 60 members, including some without professional training and also including all former presidents of the Republic.<sup>9</sup> Moreover, this court "is not situated at the summit of a hierarchy of judicial or administrative courts. In that sense it is not a supreme court in the meaning of the Supreme Court of the US."<sup>10</sup>

But another difference needs mention here. In many civil law jurisdictions, it seems that the customary path to judicial office, and to rising in the judiciary, is a careerist one separate from the path of the practicing bar. The route to promotion involves satisfying and hopefully impressing those in higher positions in the judicial hierarchy. American lawyers come to the bench in a very different way: "Because American judges sit on courts of widely varying types and come from a variety of backgrounds and experiences, it is difficult to generalize about them. Two generalizations, however, are possible. First, judges in the United States initially come to the bench from other lines of legal work and after a substantial number of years of professional experience. Second, once on the bench they do not, generally, follow a promotional pattern

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<sup>6</sup> Id. at 10 ("The Supreme Court lacks the power to invalidate an Act of Parliament.").

<sup>7</sup> See Tracey Stevens & George Williams, A Supreme Court for the United Kingdom? A View from the High Court of Australia, 24 Legal Studies 188 (2004).

<sup>8</sup> Marie-Claire Ponthoreau & Fabrice Hourquebie, The French Conseil Constitutionnel: An Evolving Form of Constitutional Justice, in Harding & Leyland, *supra* note 4, at 81, 82.

<sup>9</sup> Id. at 86-87.

<sup>10</sup> Id. at 95.

through the ranks of the judiciary. In these respects, American judges differ from judges in the common-law and civil-law systems in other parts of the world."<sup>11</sup>

Again, the U.S. experience is distinct from that of common law systems elsewhere and civil law systems. In this instance, that distinctiveness might erode the power over American judges wielded by any appellate court, including a Supreme Court. Indeed, Professor Dalton suggested 30 years ago that the typical American trial court judge might not care much about whether she was affirmed or reversed.<sup>12</sup>

But an overarching distinction between the common law and the civil law versions of the judicial role seems to outweigh all the messiness of the distinction noted above. In civil law systems, "the role and function of the judiciary . . . were rigidly circumscribed. The judge's role was a subservient and bureaucratic one: he was required to verify the existence and applicability of statutory norms to a case at hand. . . . To recognize a judge-made law in this system was to diagnose pathology."<sup>13</sup>

This is a key point Professor Cappelletti emphasized in his analysis of diverging attitudes toward judicial review, tracing the civil law view to the French Revolution. He pointed to "the revolutionary legislators' profound distrust of the judges," which led to an effort "to prevent the judicial organs from interfering in the legislative sphere and to ensure that they apply only the letter of the law. This was a phase in the development of the concept which soon resulted in the great French codification, and concept that the entire body of law could and should be contained in written instruments."<sup>14</sup>

Things were markedly different in England, Professor Cappelletti explained, because "the English judiciary . . . generally enjoyed the respect of all as a protector of

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<sup>11</sup> Daniel Meador, *American Courts* 49 (2000).

<sup>12</sup> Harlon Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 *Yale L.J.* 62 (1985). See generally, R.L. Marcus, *Appellate Review in the Reactive Model: The Example of the American Federal Courts*, in *Nobody's Perfect: Comparative Essays in Appeals and Other Means of Recourse Against Judicial Decisions in Civil Matters* (A. Uzelac & C.H. van Rhee, eds., 2014) at 105.

<sup>13</sup> Alec Stone, *Abstract Constitutional Review and Policy Making*, in *Comparative Judicial Review and Public Policy* (Donald W. Jackson & C. Neal Tate, eds., 1992) at 41, 42.

<sup>14</sup> Cappelletti, *supra* note 3, at 13.

individuals," with the result that "the English legal tradition had often tended to assign a subordinate role to the legislative function of King and Parliament, holding that the law was not created but ascertained or declared. Common law was fundamental law, and, although it could be complemented by the legislator, it could not be violated by him."<sup>15</sup> As we shall see in Part III, this difference means that being a court in a common law system carries with it much broader authority. A supreme court in such a system is, as a result, much more supreme.

## II. THE DISTINCTIVE HISTORY OF THE U.S. SUPREME COURT AND THE U.S. FEDERAL SYSTEM

It may be true, as Lord Bingham of Cornhill said in 2002, that the U.S. Supreme Court is "the world's best-known supreme court."<sup>16</sup> But that does not mean it was inevitable it would attain that status from the outset, or that the basic structure set up at the outset made the current reality likely. Although some 21st century scholars have concluded that "a constitutional court's success or failure depends as much on legal design as on the political culture in which a court operates,"<sup>17</sup> the American experience provides considerable reason to credit political culture for the present eminence of the American court. As a starting point, it is worth emphasizing again that this does not seem a particularly common law -- as opposed to distinctively American -- circumstance: "[T]he U.K. Supreme Court will never mirror the U.S. Supreme Court, because the new U.K. Supreme Court is designed to create a more muted and less recognizable court identity than that of the U.S. Supreme Court."<sup>18</sup>

Making predictions early on about how courts will turn out is risky, as a 2011 book by Professor Crowe, a political scientist, on the evolution of the U.S. Court emphasizes. Thus, he begins with the "sorry scene" when the U.S. Supreme Court first convened in New York City in 1790; only four of the six justices even bothered to show up, and the Court had no cases to

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<sup>15</sup> Id. at 36-37.

<sup>16</sup> Lord Bingham of Cornhill, A New Supreme Court for the United Kingdom, The Constitution Unit 12-13 (May 1, 2002), quoted in Monica Fennell, Emergent Identity" A Comparative Analysis of the New Supreme Court of the United Kingdom and the Supreme Court of the United States, 22 Temple Int'l & Comp. L.J. 279, 297 (2008).

<sup>17</sup> Kasia Lach & Wojciech Sadurski, Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity, in Harding & Leyland, supra note 4, at 52, 57.

<sup>18</sup> Fennell, supra note 15, at 305.

decide.<sup>19</sup> "With several distinguished men having refused appointment and the docket languishing without any substantial business, the Court of the late eighteenth century was a feeble institution."<sup>20</sup> Perhaps mighty oaks will grow from tiny acorns, but there is no guarantee that will happen.

This reality might not entirely have surprised the Framers of the U.S. Constitution, who were decidedly ambivalent, or perhaps a better word is divided, on the proper role for the federal judiciary in general. Although the U.S. Constitution did create a Supreme Court, it did not create any other federal courts, leaving that to Congress. That ambivalent feature of the judiciary article of the Constitution resulted from a profound disagreement between the Jeffersonians, who favored state governments, and the Federalists, who emphasized national governmental powers. The Jeffersonians resisted the idea of a cadre of federal judges across the land who owed primary allegiance to the national government and not the state in which they sat. The first Congress nonetheless created a lower federal court system and gave the Supreme Court authority to review the decisions of those federal courts as well as the decisions of state courts when those decisions involved issues of federal law. The seeds for federal judicial power were therefore planted early.

The early debate between the Federalists and the Jeffersonians reflected a divide that has not vanished, and also bears on the structure of the American court system, or better perhaps to say systems (including the state courts). At first, there was little federal statutory law, but much judge-made common law. That law was shaped by state courts and, after their creation, also by federal courts. But the U.S. Supreme Court never had authority review that common law decisions of state supreme courts unless there was a claim the state court decision violated some provision of federal law. But when federal courts made common law decisions, as we shall see, they felt free until the 1930s to disregard state court decisions.

Over the last 200 years the prominence of American federal law has increased dramatically. Indeed, 50 years ago it seemed that the balance of law-making power had shifted so far that Jeffersonian localism was dead. But in reality localism has not died, and it has enjoyed something of a resurgence in recent decades. As a result, in the U.S. there is not just one Supreme Court. Instead, each of the 50 states has a supreme court that is the supreme arbiter of the law of that state.

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<sup>19</sup> Justin Crowe, *Building the Judiciary* 1 (2011).

<sup>20</sup> *Id.* at 2.

This circumstance is surely not an inevitable feature of a common law system. Indeed, it may not be true of many others. It is surely not true of England and Wales,<sup>21</sup> and in Canada the national supreme court is the ultimate arbiter of most legal questions, not the provincial courts.<sup>22</sup> At the same time, there may be civil law systems in countries that emphasize localism -- Switzerland comes to mind as a possible example.

But those seeds depended on more than the structural question whether to have a Supreme Court and whether to have lower federal courts. The American political soil may have been particularly susceptible to growing independent and powerful judicial institutions. As de Tocqueville observed in the 1830s: "I do not think that, until now, any nation in the world has constituted judicial power in the same manner as the Americans."<sup>23</sup> In such a system of government, judges are likely to wield substantial power.

That power links up with the common law system because judges are not entirely beholden to the legislature to make law, and it empowers appellate courts in general and Supreme Courts in particular because the common law notion of precedent makes their decisions farther reaching than a civil law court's ruling on a single case. But another factor is the selection process that produces judges with significant backgrounds and only a weak sense of belonging to a bureaucratic judicial institution. Professor Kagan has graphically described this distinctive feature: "Compared to most national judiciaries, American judges are less constrained by legal formalisms; they are more policy-oriented, more attentive to the equities (and inequities) of the particular situation. In the decentralized American legal system, if one judge closes the door on a novel legal argument, claimants can often find a more receptive judge in another

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<sup>21</sup> Consider the views offered in 2006 by *The Economist*: "Power in Britain has long been more centralized than in America or other European countries, but it has become more so in the past 50 years." *A Funny Thing Happened on the Way to the Council*, *The Economist*, Feb. 25, 2006, at 60.

<sup>22</sup> See Peter W. Hogg, *Constitutional Law in Canada* (4th ed. 229-33 2002). See also *infra* text at note 62 for a contrast between the Canadian and U.S. approach to common law powers of the federal supreme court and lower federal courts.

<sup>23</sup> Alexis de Tocqueville, *Democracy in America* 93 (Harvey C. Mansfield & Delba Winthrop translation, U. Chi. Press 2000, originally published in 1835).

court."<sup>24</sup>

This feature may also tend to weaken the appellate courts' (and therefore Supreme Court's) control over judicial actions by lower courts. At least in the U.S., that limitation on the authority of higher courts is fortified by stringent limitations on timing of appellate review and scope of appellate review. Different from most civil law countries, in the U.S. appellate review is allowed only after a "final judgment" has been entered in the trial court,<sup>25</sup> and even then is limited to the record made in the trial court. In Continental systems, opening the record to new arguments and even new evidence on appeal is the norm, but not in America. So appellate courts are circumscribed in their ability to control what lower courts do, and are less "supreme" as a result. Most American cases never reach a posture (final judgment) in which an appeal can be taken, and for those cases appellate courts in general -- and Supreme Courts in particular -- are ordinarily not able to wield any power.<sup>26</sup> If structural features are emphasized in relation to the power of appellate courts, these must be considered among the most important.

This distinctiveness of the appellate function bears also on the question of remedies available in the U.S. Supreme Court in particular, and American appellate courts more generally. These courts are part of the overall U.S. court system, and their authority is limited to appellate review of decisions by lower courts. As a consequence, these remedies are, in general, to affirm or reverse what the lower court has done in the case, basing these decisions on the record and arguments made in the lower court. The Supreme Court does not itself choose or implement the remedy.

It appears that supreme courts elsewhere would wield broader powers and deploy additional remedies. More than 30 years ago, the Supreme Court of India decided that "public interest litigation in India [would be] primarily judge-led and even to some extent judge-induced; the product of juristic and judicial activism of our Supreme Court."<sup>27</sup> Recent newspaper reports in

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<sup>24</sup> Robert Kagan, *Adversarial Legalism: The American Way of Law* 16 (2001).

<sup>25</sup> See, e.g., 28 U.S.C. § 1291.

<sup>26</sup> In exceptional circumstances, it may be possible for an appellate court to intervene in a case using a writ of mandamus, but this is quite exceptional. See *infra* text accompanying note 106.

<sup>27</sup> P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 *Colum. J. Transnat. L.* 561, 561 (1985). The

the U.S. say, for example, that India's Supreme Court ordered in 1998 that all public transport in Delhi be switched to compressed natural gas,<sup>28</sup> and that in 2014 it ordered an investigation into charges that village elders in West Bengal ordered a gang rape of a 20-year-old woman as "punishment" for a the victim's romantic relationship with a man from another community.<sup>29</sup> Similarly, in Bangladesh the High Court responded to a petition by "activists and lawyers" by ordering an investigation into a clothing factory fire that killed 112 employees.<sup>30</sup>

These are simply not the sorts of things that American courts, including supreme courts, would do. The U.S. federal courts, for example, may only decide "cases or controversies" involving adversary parties who assert "legal" rights to judicial relief. This contrasts with "abstract" review done by a constitutional court in the Kelsen mode; as the leading treatise on the U.S. federal courts explains, "[t]he courts of the United States do not sit to decide questions of law presented in a vacuum, but only those question that arise in a 'case or controversy.'"<sup>31</sup> "Unconstitutional statutes there may be, but unless they are involved in a case properly susceptible of judicial determination, the courts have no power to pronounce that they are unconstitutional."<sup>32</sup> Instead, the federal courts will only decide cases presented by litigants with "standing to

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author was then a justice of the Supreme Court of India, and about to become chief justice.

<sup>28</sup> Gardner Harris, *Beijing's Bad Air Would Be A Step Up for Smoggy Delhi*, N.Y. Times, Jan. 26, 2014, at 6 ("In 1998, India's Supreme Court ordered that Delhi's taxis, three-wheelers and buses be converted to compressed natural gas, but the resulting improvements in air quality were short-lived as cars flooded the roads.").

<sup>29</sup> High Court Orders Inquiry of Gang Rape, S.F. Chron., Jan. 25, 2014, at A4.

<sup>30</sup> Julfikar Ali Manik & Ellen Barry, *Months After Deadly Fire, Owners of Bangladesh Factory Surrender to Court*, N.Y. Times, Feb. 10, 2014, at A8. See also Syed Shoaib Hasan, *Top Court Confronts Military on Missing Persons*, N.Y. Times, April 23, 2014, at A9 (reporting that "[t]he Supreme Court is moving to prosecute military officials in civil courts for failing to produce missing persons").

<sup>31</sup> Charles A. Wright & Mary K, Kane, *Law of Federal Courts* 61 (7th ed. 2011).

<sup>32</sup> *Id.* at 62.

sue."<sup>33</sup>

In American federal-court litigation, then, the initiative rests with the parties, not with the court, and only when a case is presented by genuine adversaries with legal rights at stake may the court decide. But the breadth of judicial remedies in American litigated cases -- often called "public law" cases<sup>34</sup> -- probably outstrips what courts can do in most civil law systems, perhaps also common law jurisdictions. American judicial remedies in such cases may command the other branches of government to do or stop doing something even though the political actors in those other branches of government strongly want to pursue their chosen course. Particularly tensions can result when a federal court enters such an order against a state government. Those remedies are usually not directly granted or administered by supreme courts, and although lower court decisions granting such remedies are subject to appellate review that review is often under an "abuse of discretion" standard that accords substantial latitude to the lower courts.

But it can hardly be said that American courts shy from employing forceful remedies. Perhaps the most striking recent example of such "public law" remedies is the U.S. district court order that the State of California reduce its prison population because the level of crowding violated the Eighth Amendment's prohibition on "cruel and unusual punishment."<sup>35</sup> The district court's injunction emerged from years of litigation about overcrowding, and directed that the prison population be reduced by release of prisoners before their sentences were fully served, perhaps as many as 46,000 prisoners. Professor Issacharoff has called this case "the most significant class action litigation of the past decade."<sup>36</sup> Justice Scalia, dissenting in the Supreme Court, called it "perhaps the most radical injunction issued by a court in our Nation's history," an order that "ignores bedrock limitations on the power of Article III judges, and takes federal courts widely beyond their institutional capacity."<sup>37</sup> He also deplored "the inevitable murders, robberies, and rapes to be

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<sup>33</sup> See *id.* § 13.

<sup>34</sup> The classic study of this subject is Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281 (1976).

<sup>35</sup> *Brown v. Plata*, 131 S.Ct. 1910 (2011).

<sup>36</sup> Samuel Issacharoff, *Class Actions and State Authority*, 44 *Loyola U. Chi. L. Rev.* 369, 375 (2012).

<sup>37</sup> 131 S.Ct. at 1950-51 (Scalia, J., dissenting).

committed by the released inmates."<sup>38</sup> The majority, meanwhile, concluded its opinion with an admonition to the district court to consider revising its order and to give weight to any concerns about public safety.<sup>39</sup> But when the district court did not change the injunction, the Supreme Court did not take up the case again, prompting Justice Scalia to taunt the majority with the argument that "[t]he [Court's] bluff [regarding revision of the injunction that was subject to an abuse of discretion standard on appeal] has been called, and the Court has nary a pair to lay on the table."<sup>40</sup> This case may illustrate both the aggressiveness of American federal courts and the limited authority the Supreme Court has to rein them in. Perhaps the Supreme Court is not so "supreme" after all.

Though the case or controversy limitation distinguishes the American federal courts from the Kelsen model, it cannot be said to be integral to all common law systems. By the late 18th century the power of English judges to give advisory opinions was well recognized.<sup>41</sup> The Supreme Court of Canada similarly may take advisory jurisdiction.<sup>42</sup> At least some American states do allow their supreme courts to provide Kelsen-style advance review of proposed legislation.<sup>43</sup> The Supreme Court of India treats informal communications from citizens as sufficient to invoke its "epistolary jurisdiction," and then eschews the adversary method in handling such cases, sometimes appointing scholars or others to investigate underlying circumstances and report back to the court.<sup>44</sup> And it seems that the Indian court is at least as aggressive as American courts in using "public law" remedies without worrying about "standing to sue."

So the U.S. arrangement is distinctive in ways that could enable and hobble the Supreme Court. It could be hobbled by the

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<sup>38</sup> Id. at 1957.

<sup>39</sup> Id. at 1946.

<sup>40</sup> *Brown v. Plata*, 134 S.Ct. 1, 1 (Scalia, J., dissenting from delay of application for a stay of enforcement of district court order).

<sup>41</sup> Wright & Kane, *supra* note 31, at 66.

<sup>42</sup> Hogg, *supra* note 22, at 239-41.

<sup>43</sup> Michael C. Dorf, *Abstract and Concrete Review*, in *Global Perspectives on Constitutional Law* (V. Amar & M. Tushnet, eds., 2009), at 3, 4 (reporting that Massachusetts permits review of the constitutionality of proposed legislation).

<sup>44</sup> Bhagwati, *supra* note 27, at 572-74.

case or controversy requirement if no litigation between parties with legal rights at stake arose. It could be hobbled by inability to intervene in proceedings in lower courts in most cases, or in time to make a difference. It could be empowered because so much can depend on what courts can order or reorder in American society. The American experience need not be everyone's experience, and might come closer to being unique.

One final point should be made before turning to specific heads of this paper. That is to emphasize how long this American institution took to build. Professor Crowe's recent work emphasizes the gradual and long process by which the weakling U.S. Supreme Court of the 18th century became the potent Supreme Court of the 21st century. Very few governments have lasted nearly as long as the Court (and the U.S. government) has lasted. In Europe, for example, the only others of similar or greater age are the U.K. and Switzerland. And the U.K. is now confronting the possibility of secession by Scotland. Professor Crowe's point about the two centuries it took to build the American Supreme Court is that at many points along the way that process depended on political judgments made by the political branches.<sup>45</sup> Some or most of those might have gone another way, and if they had the U.S. Court would likely have a different profile.

In sum, the U.S. is distinctive and instructive because (a) it has a common law system, in (b) a federal state (including 50 "mini" state supreme courts authorized to pronounce common law rules), with (c) broad authority to interpret federal legislation, and (d) authority also to design and refine the procedure used in the federal courts. One more distinction should be mentioned -- our Supreme Court is not subject to review by any outside body. In the EU, the presence of the European Court of Justice and the European Court of Human Rights presents

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<sup>45</sup> Professor Crowe examines a variety of episodes in the two centuries it took to bring American judicial institutions to their present eminence. For those who are interested, here is a short summary: The first episode is the adoption of the First Judiciary Act in 1789 (chp. 2); the second is the reorganization of the federal judiciary during the first half of the 19th century (chp. 3); the third is the empowerment of the judiciary by the Compromise of 1850, which admitted California to the union as a free state and began the period leading up the American Civil War (chp. 4); the fourth is the restructuring of the federal judiciary between 1877 and 1913 (chp. 5); the fifth was what he calls the bureaucratization of the judiciary between 1914 and 1939 (chp. 6); and the sixth was the increased specialization of the judicial branch between 1939 and 2000 (chp. 7).

a very different situation.<sup>46</sup> In the U.S., the Supreme Court occasionally invokes or refers to non-American legal principles, sufficiently frequently to prompt apoplectic objections from some members of Congress.<sup>47</sup> But nothing can make the U.S. Supreme Court accept those "unAmerican" legal pronouncements, whether or not Congress can forbid consideration of them.

### III. JUDICIAL SUPREMACY IN A COMMON LAW SYSTEM

Being a Supreme Court is different in a common law system. As noted above,<sup>48</sup> the civil law limits on judicial action have been traced to the French Revolution. That distinction evidently endures; in France now, one begins with "the sacred character of statute law."<sup>49</sup> Surely a legislature would appreciate having its statutes regarded as sacred. Surely a court system attuned to regard statutes as sacred would be reluctant to stray far from their literal commands. And perhaps surely, it would be attractive to such a court system to declare that judicial decisions were simply resolutions of disputes about how the sacred statutes apply, and therefore not precedent for later judicial decisions, which should look only to the sacred statutes.

A common law system is different. Indeed, one could say that the very idea of a common law system is at odds with legislative supremacy. Where exactly did the royal judges in England who created the common law find it? Surely not in Acts of Parliament. Instead, they looked to precedent, which obviously contained the work product of earlier generations of judges. But as one follows this development back up the line, one is left with a troubling initial question -- what is the ultimate source of all this law? Is it simply the creation of the judges? That is when one is tempted toward embracing some version of "natural law," somewhat like saying that God created the law, and judges are in a sense the priests who have the skill and training to discern that law.

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<sup>46</sup> For a thoughtful analysis of some of these issues, see Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Federalism*, 44 *Am. J. Comp. Law* 421 (1996).

<sup>47</sup> For a contrast, see Andrea Lollini, *The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law*, 8 *Utrecht L. Rev.* 55 (2012) (exploring the use by supreme courts, particularly the one in South Africa, of legal principles from other countries).

<sup>48</sup> See *supra* text at note 14.

<sup>49</sup> Ponthoreau & Hourquebie, *supra* note 8, at 82.

This is not just an American phenomenon. Thus, a Justice of the Supreme Court of India explained the "activist" bent of that court in terms that would be anathema to the makers of the French Revolution: "There is a myth strongly nurtured in the Anglo-Saxon tradition and propagated by many jurists that judges do not make law, that they merely interpret law. Law is there, existing and immanent, and judges merely find it. The lawmaking function does not belong to them -- it belongs to the legislature -- and judges merely reflect what the legislature has said. This is the proclaimed theory of the judicial function, but I am afraid that it hides the real nature of the judicial process. It has been deliberately constructed in order to insulate judges against vulnerability to public criticism, and to preserve their image of neutrality, which is regarded as necessary for enhancing their credibility. It also helps judges escape accountability for what they decide, because they can always plead helplessness (even if the law they declare is unjust) by saying that it is the law made by the legislature and that they have no choice but to give effect to it."<sup>50</sup>

In such a system, being a Supreme Court means being quite supreme. For a wide variety of important subjects, judges themselves devise, develop, and refine the legal rules that determine the rights of other citizens. In France, this process may have led to revolution, but in England it did not. Instead, it was imported into America, where local courts followed the English common law tradition, and often also followed English common law cases on questions like rules of contract law. After the American Revolution, a number of American statutes, by statute, "received" English common law as the law of the state.

That reception of English common law left open the question what that law became after it was "received." Could it be changed? The English judges did not stop refining and improving their common law at the time of the American Revolution, or when given states decided to "receive" it as their own. Should American states be locked into English common law that had been rejected by the courts of England? The question answers itself, whether or not there was a formal "reception" of English common

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<sup>50</sup> Bhagwati, *supra* note 27, at 562-63. He also quotes Lord Reid, and English judge, as follows: "There was a time when it was thought almost indecent to suggest that Judges make law -- they only declare it. Those with a taste for fairy tales deem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more." *Id.* at 563 (quoting Reid, *The Judge as Lawmaker*, 12 *J.S.P.T.L.* 22 (1972)).

law in a particular American state.

The answer was that the courts of the state could interpret and improve the state common law, just as the English courts could interpret and improve the English common law. That task was one of the things that were on the minds of the Framers of the U.S. Constitution when they debated creating lower federal courts. At least some were concerned that having a phalanx of federal judges acting in the common law manner would raise the risk that state interests, and perhaps even state court decisions about issues of common law, would not be recognized in federal court. Seemingly to assuage this concern, when it created the lower federal courts in 1789 Congress included in the First Judiciary Act a provision commonly known as the Rules of Decision Act, which directs federal judges to apply "the laws of the several states" in cases before them.<sup>51</sup>

The problem then was whether this statute applied to "state" common law -- the decisions of state courts. In 1842, the U.S. Supreme Court ruled that this statute<sup>52</sup> did not apply to state court decisions: "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are, and not themselves laws."<sup>53</sup> This decision meant that federal judges were free to act as common law judges and continue to develop rules of common law in the traditional manner of the judicial priesthood. That law would not be "federal" law (which the U.S. Constitution declares is the supreme law of the land), so the U.S. Supreme Court would not be supreme in declaring general common law. But it would be free of any outside constraint in doing so.

In the view of many, this freedom for federal judges to shape common law principles produced undesirable results in the

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<sup>51</sup> See 28 U.S.C. § 1652: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

<sup>52</sup> Note that this is an example of statutory construction, a topic covered in Part IV. The Justices of the Supreme Court in 1842 assumed that the members of Congress who enacted the statutory provision in issue -- a part of the First Judiciary Act of 1789 -- shared their vision of the judicial role. But as noted later in text, that vision was fading, as a "positivist" interpretation of law emerged in the 19th century and supplanted a "natural law" notion that law did somehow suffuse the atmosphere.

<sup>53</sup> Swift v. Tyson, 41 U.S. 1, 12 (1842).

late 19th and early 20th centuries.<sup>54</sup> American Progressives found that federal judges too often interpreted this common law in ways that favored business interests over the interests of consumers and others.<sup>55</sup> State court judges might modernize their states' common law to take account of the challenges of an industrializing society, but their efforts might be frustrated were litigants able to get their cases into federal court, where federal judges' hidebound version of "common law" applied. Strong objections to this behavior included Justice Holmes critique that it seemed to rest on the assumption that there was "a transcendental body of law outside any particular State but obligatory within it unless and until changed by statute."<sup>56</sup> This contretemps emphasizes, however, the great importance of common law judges who are not bound to respect the legislature's word as sacred.

These circumstances fostered a 19th century movement in the U.S. to "codify" all of common law that began around the same time the French were codifying all their law,<sup>57</sup> seeking to supplant the entirety of common law with statutory codes.<sup>58</sup> One important goal of this effort was rein in American common law judges. Those judges often took a very strict attitude toward legislation, regarding it as an unwelcome "intrusion" into the common law.<sup>59</sup> The codification effort continued through the 19th century; California, for example, "codified" its law in 1872.

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<sup>54</sup> In terms of the issues addressed in Part VI on constitutional interpretation, it is worth noting that during this same period the Supreme Court interpreted the Due Process clause of the Constitution as constricting the authority of the state legislatures to enact some kinds of protective legislation. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (invalidating state statute that set limit of ten hours per day for women to work).

<sup>55</sup> For a careful examination of this development, see Edward Purcell, *Brandeis and the Progressive Constitution* (2000) (describing the growing disenchantment of progressive Americans with the tenor and content of federal court decisions on issues of "common law").

<sup>56</sup> *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

<sup>57</sup> See *supra* text accompanying note 14.

<sup>58</sup> See Morton J. Horwitz, *The Transformation of American Law 1780-1860*, pp. 16-30 (1977).

<sup>59</sup> See *id.* at 253-66.

But the common law authority of state court judges did not vanish; even in California the "codified" common law is applied in terms of myriad judicial interpretations, and those interpretations built originally on prior common law precedents. Indeed, the codification legislation itself was build on a foundation of common law precedents.

With regard to the common law powers of federal judges, however, the watershed came in 1938, when the U.S. Supreme Court decided in the famous case *Erie Railroad Co. v. Tompkins*<sup>60</sup> that it had been wrong in 1842 to hold that the Rules of Decision Act excused federal judges from following and applying decisions of state courts. Indeed, it held that this judicial behavior violated the U.S. Constitution: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."<sup>61</sup>

Even a common law country with a federal form of government might reject this attitude. Thus, Canada permits its federal supreme court to decide common law questions from throughout the nation, and a leading Canadian scholar had endorsed its refusal to follow the route of the U.S. Supreme Court: "Albert Abel argued that the Supreme Court of Canada should follow the lead of the Supreme Court of the United States and adopt a rule of restraint in provincial law cases like the rule in *Erie Railroad Co. v. Tompkins*. He argues that such a rule would make the law more responsive to the differing needs and sentiments of the provinces. . . . [W]ith respect to the nine common law provinces it is easy to agree with Gibson that 'such a change would result in many more interprovincial legal discrepancies than could be attributed to cultural differences.' It must be remembered that whenever a province does desire a different regime of law, it is free to enact a statute. In my opinion, the uniformity of the common law throughout Canada, while undoubtedly at variance with the ideal model of federalism, does not really impair provincial autonomy in any practical way. Moreover, the rule of uniformity makes Canada's laws much less complicated than those of the United States, and it allows the highest court (with presumably the best judges) to apply its talents to the development of all

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<sup>60</sup> 304 U.S. 64 (1938).

<sup>61</sup> *Id.* at 78.

Canada's laws, both provincial and federal."<sup>62</sup> So the Supreme Court of Canada is really supreme as to common law.

Since 1938, however, the U.S. Supreme Court and the lower federal courts have had no authority to develop rules of law to govern the multitude of everyday matters addressed by the common law. True, as attitudes on federal power evolved Congress was found to have broader powers to legislate on matters that had been governed by common law, and under the Constitution's Supremacy Clause that legislation might displace the common law. But federal judges -- as common law deciders -- could not make similar decisions.<sup>63</sup>

State courts could make such decisions, however. Accordingly in the U.S. we have not one Supreme Court, but 50 -- one for each state.<sup>64</sup> Note that in its 1938 decision the U.S. Supreme Court recognized the possibility that "the law of the state shall be declared by its legislature in a statute or by its highest court in a decision."<sup>65</sup> Subject to state law, those state courts have "supreme" authority over the content of state common law. The U.S. Supreme Court can alter their decisions based on that law only by concluding that some federal constitutional or statutory reason exists for rejecting that decision.

#### IV. STATUTORY SUPREMACY

Perhaps American courts might be more like the French when it comes to statutes, however. Being a "supreme" court would not be so supreme then. But having a two-party political system and a bi-cameral legislature, plus a President with veto power, limits this constraint on the courts. As Professor Crowe noted in his study of the growth of judicial power in the U.S., one strategy Congress might employ to reach a compromise would be

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<sup>62</sup> Hogg, *supra* note 22, at 231-32.

<sup>63</sup> See Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1 (1985) (arguing that the only branch of the federal government that is restrained under this constitutional doctrine is the judiciary, since both Congress and the Executive have broad powers to affect legal rules across the country).

<sup>64</sup> Technically there are also similar judicial bodies to make decisions on local law in the District of Columbia, the Commonwealth of Puerto Rico and also the Virgin Islands and Guam. And one state -- Louisiana -- originated as a civil law jurisdiction, so it presents a singular profile.

<sup>65</sup> See *supra* text at note 61.

"drafting vague statutes in need of judicial interpretation."<sup>66</sup> Even if French judges can treat their statutes as "scripture,"<sup>67</sup> American judges sometimes cannot. More generally, it has seemed that the Supreme Court and lower federal courts have interpreted statutes broadly or narrowly as they have found more suitable, rather than solely when Congress has left the question to them.

Indeed, interpretation of statutes may shift over time. A prime example is another provision in the First Judiciary Act of 1789, known as the Alien Tort Claims Act, which says in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>68</sup> It should be clear that this statute invoked uncertain language -- what is "the law of nations"? Perhaps due to that uncertainty, it sat on the books but was not used in the courts for about 190 years, until the U.S. Court of Appeals for the Second Circuit ruled in 1980 that it could be used for modern human rights claims.<sup>69</sup> This possibility produced tremendous excitement in the academic community<sup>70</sup> and eventually led to two Supreme Court decisions limiting the application of the Act.<sup>71</sup> These decisions produced predications that human rights litigation would gravitate to the state courts, because the Supreme Court's interpretation of the statute would bind all the federal courts.

Supreme Court interpretations of statutes are vulnerable to "reversal" by Congress. One prominent example occurred after the U.S. Supreme Court made several rulings in its 1989-90 Term that many viewed as unduly restrictive in cases brought under Title

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<sup>66</sup> Crowe, *supra* note 19, at 12.

<sup>67</sup> See *supra* text accompanying note 49 (referring to the "sacred character of statute law" in France).

<sup>68</sup> 28 U.S.C. §1350.

<sup>69</sup> *Filartiga v. Pena-Irala*, 630 F.3d 876 (2d Cir. 1980).

<sup>70</sup> See Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 *Notre Dame L. Rev.* 1467, 1468 n.3 (2014) (reporting that more than 4,000 law review articles have cited the statute since 1980). The Stephens article provides a very thorough overview of this litigation experience.

<sup>71</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (upholding judicial power in appropriate circumstances); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (applying a presumption against extraterritoriality to actions under the statute).

VII of the 1964 Civil Rights Act,<sup>72</sup> the basic law against employment discrimination. In 1990, Congress, dominated by the Democratic Party, passed a Civil Rights Act of 1990, containing strong pro-plaintiff provisions for Title VII cases. President George H.W. Bush, a Republican, vetoed the bill. The following year, Congress came back and adopted less aggressive legislation, which President Bush signed into law.<sup>73</sup>

But as the veto of the 1990 Civil Rights Act suggests, making changes by legislation is a "sticky" and difficult process. As Professor Farhang has pointed out in his recent analysis of American reliance on statutes that permit private enforcement of public norms, one of the reasons legislatures might favor such statutes is they would want to protect their legislative choices (favoring enforcement) from the results of later elections (that might produce majorities with different attitudes or Executive actors who have different priorities).<sup>74</sup> Judges' decisions can play a very prominent role in the application of statutes. Early experiences under the Title VII legislation, for example, made supporters of the legislation glad they chose to authorize private enforcement because federal judges took an expansive view of its provisions even after the election in 1968 of President Nixon, who had a less enthusiastic attitude toward anti-discrimination efforts.<sup>75</sup> The basic message is that the federal courts have become arbiters of statutory law to a significant extent, and the U.S. Supreme Court is the supreme arbiter in that mode.

For the last 20 years, the American government has more often been in "sticky" mode than in "fast track" mode. Unlike the U.K., it has three genuine branches, and they are genuinely independent of each other. Considering Congress and the Legislature, divided government has been the norm more than single-party domination. As a result, legislative stasis has also been a norm, perhaps never more so than since 2010. Under these circumstances, it has been suggested that the Supreme Court has even more latitude than normally for interpreting federal

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<sup>72</sup> The decisions were *Patterson v. McLean Credit Union*, 491 U.S. 164 (1990); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1990); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1990); *Martin v. Wilks*, 490 US. 755 (1990).

<sup>73</sup> Pub. L. No. 102-166, 1205 Stat. 1071-1100 (codified in scattered sections of 42 U.S.C.). For analysis of the legislation, see Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 *Stetson L. Rev.* 53 (1993).

<sup>74</sup> See Sean Farhang, *The Litigation State* chp. 2 (2011).

<sup>75</sup> See *id.* at 129-31.

statutory law in ways it finds congenial.

A prime example of that sort of activity has been judicial creation of private rights to sue for violation of statutory or regulatory norm. Congress can surely create a private right to sue when it wants to bolster enforcement with private initiative. For example, in 1890 it passed the Sherman Antitrust Act,<sup>76</sup> forbidding contracts or conspiracies in restraint of trade. This initial legislative effort had some unfortunate flaws, so in 1914 Congress passed the Clayton Antitrust Act to correct flaws in the original legislation and also add a private right permitting those injured by antitrust violations to sue for treble damages.<sup>77</sup>

One might infer from the antitrust act experience that Congress would specify whether there should be a private right of action. But in several instances the Supreme Court took up the cudgel even though Congress did not so authorize. The most prominent example is the Securities Exchange Act of 1934, which created the Securities Exchange Commission (SEC) and authorized it to promulgate regulations and enforce the antifraud provisions of the Act. This Act, along with other legislation, was designed to deal with the activities that led to the stock market crash in 1929 and ensuing depression of the 1930s. But Congress did not authorize private suits by those claiming injury due to violations of the Act. The SEC promulgated rules, including Rule 10b-5 forbidding false statement in connection with the sale of a security. The lower courts began to entertain private actions brought by those who claimed to be victims of such fraud.

In 1964, the Supreme Court endorsed the creation of a private right to sue by the courts, reasoning that it was "a necessary supplement to [SEC] action. As in anti-trust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the [antifraud] requirements."<sup>78</sup> If one measures success by impact, this court-enabled effort was a great success, particularly when combined with the broadened class-action procedures introduced by amendments to the Federal Rules of Civil Procedure in 1966. By 2006, it was said that securities fraud class actions had become "the 800-pound gorilla that dominates and overshadows other forms of class actions."<sup>79</sup>

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<sup>76</sup> 15 U.S.C. § 1.

<sup>77</sup> 15 U.S.C. § 15.

<sup>78</sup> J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

<sup>79</sup> John Coffee, Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev.

Many did not like this 800-pound gorilla, and claimed that it had set loose predatory litigation in which the merits of the claims did not matter because defendants had to settle for considerable amounts due to high litigation costs and the risks of putting a "bet the company" case before a lay jury.<sup>80</sup> Particularly strong objections to securities class actions came from high tech companies in Silicon Valley, and Congress responded in 1995 by passing the Private Securities Litigation Reform Act, which imposed high pleading requirements and a discovery stay on such suits. President Clinton vetoed the bill, but Congress almost immediately re-passed it over his veto. On one level, of course, this legislation confirmed (some 30 years after the fact) that the Court had been right in implying a private right to sue. At least Congress did not entirely forbid such private actions. Recall that Congress can "overrule" the Court on such matters. But Congress clearly did also want to curtail such litigation.

Nonetheless, when in 2007 the Supreme Court came to interpret the pleading requirements of the new legislation it chose a standard the dissenting Justices thought too lax, beginning its opinion by citing its 1964 decision authorizing private suits and observing that "[t]his Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission."<sup>81</sup> One might object that this insistence on its own support of private suits in seeming opposition to efforts by Congress to curtail those suits is a bit of effrontery, but it well captures the reality that the U.S. Supreme Court considers itself to have considerable latitude in interpreting statutes adopted by Congress to fit its mold.<sup>82</sup>

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1539, 1539 (2006).

<sup>80</sup> See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 *Stan. L. Rev.* 497 (1991); compare Joel Seligman, *The Merits Do Matter*, 108 *Harv. L. Rev.* 438 (1994). For a more recent examination of related issues, see Thomas Baker & Sean Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 *U. Pa. L. Rev.* 755 (2008) (finding that "merits" issues seem to have some effect on settlement amounts, but that the amount and provisions of directors' insurance do also).

<sup>81</sup> *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 552 U.S. 308, 313 (2007).

<sup>82</sup> It should be noted, however, that the Supreme Court long ago adopted a more restrained attitude toward implying private

## V. PROCEDURAL SUPREMACY

A very different sort of supremacy has to do with procedure. One could regard procedure as inherently a matter for courts to develop and therefore insulated against intrusion from other arms of government. There is some support in American scholarship for this view.<sup>83</sup> But the historical reality was quite different for the American federal courts. From their creation in 1789 until the 1930s, statutes directed federal courts to apply the same procedure as state courts.<sup>84</sup> In the early 20th century, a broad movement arose to authorize a set of nationwide procedure rules for the federal courts. For a variety of reasons, this legislation was stymied in Congress for a quarter century, but it was finally passed in 1934.<sup>85</sup> The Federal Rules of Civil Procedure followed in 1938. Thereafter, most states adopted procedure codes modeled on the Federal Rules.<sup>86</sup>

This sequence is not the only one found in common law countries. In the U.K., by way of contrast, procedure had been a common law matter from time immemorial until the early 19th century. By then, objections to common law procedure had mounted to such a pitch that the judges decided to adopt procedure rules -- the infamous Rules at Hilary Term, which were the first court-adopted procedure rules<sup>87</sup> and were condemned as a complete

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rights to sue.

<sup>83</sup> "There are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase judicial power." A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem of Constitutional Revision*, 107 U. Pa. L. Rev. 1, 30 (1958); see also Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did not Write Into the Federal Rules of Evidence*, 57 Tex. L. Rev. 167, 193 (1979) (arguing that judicial supremacy extends to "rulemaking that is indispensable to courts' functioning").

<sup>84</sup> See Process Act of 1792, 1 Stat. 275, 276; Conformity Act of 1872, 17 Stat. 196, 197.

<sup>85</sup> See Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982).

<sup>86</sup> See John Oakley & Arthur Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367 (1986).

<sup>87</sup> *Roffery v. Smith*, 172 Eng. Rep. 1409, 1409-10 (1834) (noting that the Rules of Hilary Term were the first rules of

failure by Bentham and many others. An early 20th century view from the U.S. was that "it became perfectly clear [in England] that delegation of the control of procedural technique to the legal profession was a policy which was socially unsound," so that "legal procedure was brought under public, not professional regulation."<sup>88</sup> In 1873-75, Parliament passed Judiciary Acts to regulate procedure, but thereafter rules committees developed revisions. In 1994, the Lord Chancellor appointed Lord Woolf to review and propose changes to the rules, and Lord Woolf proposed the adoption of the Civil Procedure Act 1997, which Parliament adopted.<sup>89</sup> That Act creates a committee structure somewhat like the Rules Enabling Act in the U.S.

In the U.S., the Federal Rules were drafted for, and promulgated by, the U.S. Supreme Court. Although Congress could prevent them from going into effect, that would require affirmative action by Congress and the signature of the President.<sup>90</sup> In 1993, one Senator prevented passage of such legislation to alter a rule-amendment package approved by the Supreme court after the House of Representatives had passed it and the President had indicated he would sign it.<sup>91</sup> From the perspective of the Court, therefore, a similar form of "stickiness" might prevent changes to the rules it adopted.

This authority over the rules of procedure can be exceptionally important, perhaps eclipsing even the importance of state-court supremacy in matters of common law. A prime example arose in the 1990s, when American courts were overwhelmed by suits claiming injury due to exposure to asbestos. After the Judicial Panel on Multidistrict Litigation combined all federal-court personal injury cases into a single proceeding before a single federal judge in Philadelphia, a group of defendants

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court to have the force of law).

<sup>88</sup> Edson Sunderland, *The English Struggle for Procedural Reform*, 39 *Harv. L. Rev.* 725, 728-29 (1926).

<sup>89</sup> For the Civil Procedure Act 1997, see: [www.legislation.gov.uk/ukpga/1997/12/contents](http://www.legislation.gov.uk/ukpga/1997/12/contents) (last visited 7 May 2014).

<sup>90</sup> See 28 U.S.C. § 2074(a).

<sup>91</sup> See Paul Carrington & Derek Aponovich, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Torts Settlements Negotiated Under Rule 23*, 39 *Az. L. Rev.* 461, 485 (1997) (describing how one senator's refusal to consent to suspending the Senate's rules prevented passage of legislation that would have changed the amendment package adopted by the Supreme Court in 1993).

reached a proposed settlement with a group of plaintiff lawyers that used a "settlement class action" to substitute a claims process for individual litigation and, it was hoped, reduce the very high transaction costs associated with this form of litigation. That solution was attractive to many.

But as I noted at the time<sup>92</sup> the class action rule did not supply the federal courts with the authority to supplant applicable state law. As noted above,<sup>93</sup> the Supreme Court ruled in 1938 that federal judges did not have authority to make rules of common law, and instead had to accept and apply rules made by state-court judges. That is why American has 51 supreme courts, not just one. Yet federal judges reviewing settlements of class actions were substituting the very detailed deals worked out by those who negotiated the proposed settlement.

In 1997<sup>94</sup> and 1999,<sup>95</sup> the Supreme Court ruled that these efforts to use procedure to resolve the complications of asbestos litigation could not stand, emphasizing the limitations imposed by the Rules Enabling Act on modifying substantive legal rights by use of procedural devices. As the Court explained, "the federal courts -- lacking authority to replace state tort systems with a national toxic tort compensation regime -- endeavored to work with the procedural tools available to improve management of federal asbestos litigation."<sup>96</sup>

As the Supreme Court saw it, the class-action settlement approved by the district court was "[a]n exhaustive document exceeding 100 page, [which] presents in detail an administrative mechanism and a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements."<sup>97</sup> But the court found that the text of the federal class-action rule "limits judicial inventiveness" and could not be stretched to justify this arrangement.<sup>98</sup> Concluding, the Court remarked ruefully that "[t]he argument is sensibly made that a nationwide administrative claims processing regime would provide the most

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<sup>92</sup> See Richard Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 *Cornell L. Rev.* 858, 872-82 (1995).

<sup>93</sup> See *supra* text accompanying notes 60-61.

<sup>94</sup> *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

<sup>95</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

<sup>96</sup> *Amchem*, 521 U.S. at 599.

<sup>97</sup> *Id.* at 603.

<sup>98</sup> *Id.* at 620.

secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution."<sup>99</sup> The Supreme Court would not be as adventuresome as the district court had been, although Congress might not have done anything had the Court permitted this use of the class-action procedure.

Other recent developments underscore the importance of procedural supremacy in dealing with mass torts, however. Although the Supreme Court stymied broad use of class actions to resolve mass tort cases,<sup>100</sup> the lower courts looked elsewhere within their procedural quivers and found new procedural arrows to use to slay the dragon of mass tort litigation. As barriers to using class action mounted, American lawyers and judges turned more often to the "multidistrict" procedure authorized by federal statute.<sup>101</sup> The most striking example is the resolution of litigation concerning the pharmaceutical product Vioxx. The U.S. Judicial Panel on Multidistrict Litigation transferred the claims of over 4,000 plaintiffs to a single federal judge in New Orleans and that judge invited state court judges from California and New Jersey to collaborate in fostering a settlement of all the cases. Eventually, this judicial collaboration resulted in a mass settlement for \$4.85 billion. Employing what he regarded as "equitable authority" to manage this "quasi class action," the judge then capped the attorney fees the plaintiff lawyers could claim (even though many had contracts calling for higher fees) and directed that some of that money should be used to pay the court-appointed lead counsel for the plaintiffs instead of going to the lawyer who had the contract with the given plaintiff.<sup>102</sup> Although the "quasi class action" notion is nowhere spelled out in a rule or statute, other judges had used the same idea.<sup>103</sup> To date, no appellate courts have addressed the question whether this sort of innovation is permitted. But it stands as another example of the great authority federal courts can manage using procedure creatively.

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<sup>99</sup> Id. at 628-29.

<sup>100</sup> See supra text accompanying notes 94-99.

<sup>101</sup> 28 U.S.C. §1407. For discussion, see Edward Sherman, *The MDL Model For Resolving Complex Litigation If A Class Action is Not Possible*, 82 Tul. L. Rev. (2008).

<sup>102</sup> See *In re Vioxx Products Liability Litigation*, 574 F.Supp.2d 606 (E.D. La. 2008).

<sup>103</sup> See, e.g., *In re Guidant*, 2008 WL 682174 (D. Minn., March 7, 2008); *In re Zyprexa Products Liability Litigation*, 424 F.Supp.2d 488 (E.D.N.Y. 2006).

These efforts to make aggressive and creative use of procedure underscore the importance of procedure, which is administered by and under the direction of the Supreme Court. Indeed, the Court finds itself in the curious position of being both a legislature and a judicial body in regard to federal rules of procedure when the interpretation of those rules is before it in a litigated case. In the view of at least one professor who is now a federal appellate judge, this role in rulemaking gives the Court even more latitude in interpreting rules than statutes,<sup>104</sup> although there is dissent from this view.<sup>105</sup> So this is another way in which the U.S. Supreme Court is a peculiarly supreme body.

The Court's ability to control the lower courts' handling of cases before them provides a further avenue for it to exercise its supremacy. To take a recent and prominent example, in the federal-court litigation challenging Proposition 8, the California ballot measure invalidating same-sex marriage, the district judge in San Francisco used a new local rule to arrange for the trial to be broadcast to a number of other federal courts where people could watch it unfold. Proponents of Proposition 8, who had been allowed to "intervene" in the federal case to defend California law, objected to broadcast of the trial, asserting that various of their witnesses had been threatened. They objected that the local district court had not strictly complied with the procedures for adopting local rules like the one used to support broadcast of the trial. The Supreme Court actually took the case on short notice, using its "supervisory authority to invalidate local rules that were promulgated in violation of Act

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<sup>104</sup> See Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 *Hast. L.J.* 1039, 1093 (1993): "[T]he Court's imprimatur is placed on the Rules; the court has an opportunity to reject whatever Rules it believes are inappropriate and to provide further clarification, detail, or changes of any kind in the proposed Rules. Given these substantial, although largely unexercised, powers of the Court in the promulgation process, a more activist role in the interpretative stage, one that considers purpose and policy, is appropriate. Congress has explicitly delegated to the Court rulemaking power, and it is not inconsistent to imply the Court has greater power to interpret Rules than it does to interpret statutes."

<sup>105</sup> See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 *U. Pa. L. Rev.* 1099 (2002) (arguing that the fact Congress delegated the power to promulgate rules to the Supreme Court does not give it greater latitude to interpret those rules as it sees fit).

of Congress."<sup>106</sup> By a 5-4 vote, it forbade broadcast of the trial. A network then undertook to obtain verbatim transcripts of the trial and have actors do a reading for its audience, so the interested public could observe a simulated version of the real trial.

In sum, the procedural authority of the U.S. Supreme Court is too often overlooked, but it is a supreme authority that can only be changed by Congress, or by the rules process over which the Court has the final word. And in cases like the same-sex marriage litigation broadcast, it cannot be changed by anything.

## VI. CONSTITUTIONAL AUTHORITY

It may seem odd to leave constitutional adjudication until last, but the point of this paper is that the supremacy of the U.S. Supreme Court depends on much more than that. Needless to say, the U.S. Supreme Court is the ultimate arbiter of the meaning of the U.S. Constitution. Acting under the "case or controversy" requirement of the Constitution, it cannot -- as can constitutional courts in some other countries -- offer advance or abstract evaluations of the constitutionality of proposed legislation. Even with legislation that has been adopted, it can act only in the context of a concrete case brought by litigants with "standing" to raise the issue of constitutionality.

But within those constraints, the Court is supreme. If legislation to change the Court's rulings is a "sticky" prospect, constitutional change is almost frozen. In the 220+ years since the first ten amendments to the Constitution were adopted in 1791, there have been only 17 more, and the last one was adopted in 1992.<sup>107</sup> Under the Supremacy Clause, the state courts must follow the Supreme Court's interpretation of the Constitution, and are subject or reversal by the Court if they don't.

The lower courts are equally empowered to pass on the constitutionality of legislation and the actions of public officers. That is part of the reason the independence and creativity of American judges noted by Professor Kagan<sup>108</sup> is so important. Applying the Constitution is an everyday task for judges all around the nation. Every work day, judges all across America -- in federal and state court -- are called upon to rule whether searches and seizures violate the Fourth Amendment of the

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<sup>106</sup> Hollingsworth v. Perry, 130 S.Ct. 705, 713 (2010).

<sup>107</sup> The 27th amendment, finally ratified in 1992, was originally submitted for ratification in 1789 but ratification took over 200 years. This is not an easy process.

<sup>108</sup> See supra text accompanying note 24.

U.S. Constitution. Holding that legislation is unconstitutional is much rarer, but within the authority (and duty) of every court in the land.

The Supreme Court is not required to take up constitutional issues at the behest of other governmental actors, however. Although constitutional courts in other countries are evidently mandated to act when presented with such questions by other branches of government or by other courts, there is no such commandment for the U.S. Supreme Court presently.<sup>109</sup> Control over its docket may be essential to protect a supreme court against a deluge of cases,<sup>110</sup> and it may enable the court to accept or reject cases in a strategic manner. Part of that strategy involves a supreme court's recognition that its main job is rule articulation, not error correction. The U.S. Supreme Court has recognized that "[i]t is axiomatic that this Court cannot devote itself to error correction."<sup>111</sup> From some perspectives, the Court may even seem to "duck" important issues. For example, after the U.S. District Court in San Francisco found California Proposition 8 unconstitutional,<sup>112</sup> the Supreme Court ruled that the "intervenor" did not have "standing" to pursue an appeal of that ruling, with the result that the district court ruling the California law was invalid therefore stood,<sup>113</sup> but the Supreme Court did not have to decide the underlying constitutional issue.<sup>114</sup>

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<sup>109</sup> Into the 20th century, the Court had some "mandatory" docket, and a small number of cases -- such as litigation between states -- still qualifies. But this effect on its docket is minuscule, and does not raise matters of constitutional import as discussed in text.

<sup>110</sup> See Michael C. Dorf, Abstract and Concrete Review, in *Global Perspectives on Constitutional Law* (V. Amar & M. Tushnet, eds., 2009), at 1, 13 ("In Germany, where anyone can, in principle, bring a constitutional complaint to the Constitutional Court, the success rate of such complaints is 2.5 percent, and the Court has accordingly adopted screening procedures to deny full consideration to most complaints.").

<sup>111</sup> *Calderon v. Thompson*, 523 U.S. 538, 569 (1998).

<sup>112</sup> See *supra* text accompanying note 106, for discussion of the Supreme Court's order that the trial of the case not be broadcast.

<sup>113</sup> *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).

<sup>114</sup> But in the companion case, *United States v. Windsor*, 133 S.Ct. 2675 (2013), the Court found that litigants in a similar situation to the proponents of Proposition 8 did have standing to

Indeed, it has been argued that the Supreme Court's ability to defer decision actually contributes to its decision-making. Thus, when it was proposed in the 1970s and 1980s that a new National Court of Appeals be created to resolve conflicting decisions among the federal appellate courts, one argument was that allowing the lower courts to explore divergent interpretations of the law will ultimately assist the Court because those decisions will fully air issues before the Court has to decide them.<sup>115</sup> In 1983, for example, Justice Stevens issued an opinion in regard to the Court's denial of certiorari in case, explaining that "I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date."<sup>116</sup> The new court of appeals was also opposed on the ground that it would undermine the Supreme court's sense of responsibility.<sup>117</sup> That responsibility results from and reaffirms the Court's supremacy; interpreting the Constitution is the most important aspect of that supremacy, but hardly the only one.

#### VII. CONCLUSION -- DECIDING WHICH SYSTEM IS BEST

No one system is "best" for all countries. The system that is best for a given nation is dependent on too many variables to support such a sweeping conclusion. Although it may be that the specialized constitutional courts recently introduced in a number of civil law countries succeed or fail as much due to their design as to "political culture,"<sup>118</sup> the U.S. experience suggests otherwise. The technical arrangements for the U.S. Supreme Court were set out in the Constitution in 1789, and have remained

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litigate whether a federal statute entitled the Defense of Marriage Act was constitutional, and the court ruled that it was not. Since then, there have been many decisions in lower courts invalidating other legislation based on the decision in the Windsor case. See Erik Eckholm, Wave of Appeals Expected to Turn the Tide on Same-Sex Marriage Bans, N.Y Times, March 23, 2014, at 18.

<sup>115</sup> See Arthur Hellman, Caseload, Conflicts, and Decisional Capacity: Does the Supreme court Need Help?, 67 *Judicature* 28, 37 (1983) (referring to conflicts among the lower courts as "the judicial system's analogue to the adversary process").

<sup>116</sup> *McCray v. New York*, 461 U.S. 961, 961 (1983).

<sup>117</sup> See William Brennan, The National Court of Appeals: Another Dissent, 40 *U. Chi. L. Rev.* 473, 480-85 (1973).

<sup>118</sup> See *supra* text accompanying note 17.

relatively constant since then.<sup>119</sup> As Professor Crowe has shown, however, the prominence of the U.S. Supreme Court has increased enormously since the 18th century.<sup>120</sup> Other scholars have recently suggested that "[t]here is a sense in which constitutions and the courts may seem to mature like a fine claret."<sup>121</sup> The American experience partly supports that view. The supreme or constitutional courts established in many countries in the late 20th century can hardly have hit maturity in two decades compared to the American Court, which was founded in the 18th century and developed gradually over the ensuing two centuries.

As we have seen, the supremacy of the U.S. Supreme Court (and perhaps a number of other supreme courts in common law systems) can depend on many attributes. Arguably, the most important is the latitude afforded judges in common law systems to "make law," which stands in stark contrast to the supposed narrowness of the judicial function in many civil law countries.<sup>122</sup> In a related sense, the supremacy the courts have in interpreting statutes stands as something as a counterweight to the legislature's power to enact them (and to change judicial outcomes by further enactment).<sup>123</sup> And in the U.S., the authority of the judiciary over procedure can matter at least as much as its supremacy on other matters.<sup>124</sup> So although the supreme court's supremacy in regard to the meaning of the constitution is surely extremely important,<sup>125</sup> it is only one among a variety of supremacies our Supreme Court exhibits.

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<sup>119</sup> True, Congress has changed the number of justices on occasion. On one occasion -- the notorious "court-packing scheme" of President Franklin Roosevelt in 1937 -- an effort to do that to achieve short-term political advantage backfired. And the country has grown hugely since the 18th century, both in land mass and population. But the basic arrangements are not really significantly different.

<sup>120</sup> See Crowe, *supra* note 19.

<sup>121</sup> Andrew Harding, Peter Leyland & Tania Groppi, *Constitutional Courts: Forms, Functions and Practice in Comparative Perspective*, in Harding & Leyland, *supra* note 4, at 1, 25.

<sup>122</sup> See Part III.

<sup>123</sup> See Part IV.

<sup>124</sup> See Part V.

<sup>125</sup> See Part VI.

Even though it is not possible to proclaim any system "best," it is very useful to appreciate the consequences of features of any system that those within it may take for granted. That is a prime value of comparative studies, like the ones on display in this conference. The starting point is, as the organizers foretold, the common law/civil law distinction. But that starting point is mainly important with regard to the judicial "law making" permitted in common law systems, which can make supreme courts nearly as supreme with regard to a range of legal issues as they are with respect to constitutional interpretation. Whether this is good or bad, I leave to others with the hope that this introduction has identified at least some of the issues.