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by Martin M. Shapiro*

Although the matter I am about to take up might normally be relegated to a footnote, it is so important that I prefer to present it in the text as an introduction. Alec Stone is a Ph.D. candidate at the University of Washington completing a dissertation on the Conseil Constitutionnel. During a year in which I was teaching in Paris we conferred a number of times about the dissertation and, subsequent to the return of both of us to the States, I have become a sort of unofficial dissertation advisor. The basic theme presented here, that the Conseil is more like a third, specialized, legislative chamber than like a court, arose during our discussions in Paris and is central to the dissertation. Moreover, what little I know of the Conseil is derived largely from Stone's work. If there is need to assign priorities, the priority is clearly his. He is, of course, in no way responsible for the particular arguments, interpretations or errors contained in what follows.

Comparative analysis may sometimes be essentially "scientific." An hypothesis may be proposed and then tested against various bodies of data from assorted cultures or nations. For instance, in some earlier work I have proposed the hypothesis that appeal is not essentially a mechanism for assuring the individual rights of losing parties at trial, but a mechanism of hierarchical control of central regimes over their local governing agents.¹ The testable form of this hypothesis is that appeal will be present in all hierarchical regimes whether or not those regimes profess any regard for individual rights, and will be absent in non-hierarchical regimes whether or not those regimes profess a regard for rights.² It is then noted that in all of the world's major legal cultures except one (that of Islam), appellate institutions are prominent,

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² Id. at 45.
including both cultures that do and do not hold individual rights in high regard. Strongly hierarchical regimes are prevalent in all of these cultures, e.g. common law, civil law, socialist law, traditional Chinese law, but are largely absent in the historical world of Islam given the early demise of the central authority of the caliphate.\(^3\)

The crucial comparative analysis then deals with the Ottoman Empire, the one instance of a long-term successful hierarchical regime employing Islamic law.\(^4\) It is then discovered that in spite of superficial appearances to the contrary, appeal does exist in Ottoman law, flourishes when Ottoman hierarchical control is at its height and declines when the real power of the Porte over its regional governors declines. This variation in the strength of appellate institutions clearly does not vary with fluctuations in Ottoman concern for individual legal rights because it never had any such concerns. (There is, of course, one exception: the rights of the small number of tribal chiefs of the Turks which survived from the origins of the Empire as a tribal conquest of Anatolia. But this exception does not confound the analysis.) Thus comparative analysis does not falsify and tends to confirm the initial hypothesis.\(^5\)

Such comparative analysis is rare and invariably only very partially successful in law. More commonly, comparative legal analysis is little more than the construction of “useful” analogies, with considerable doubt about what the criteria of usefulness are as well as little understanding of how close similarities must be in order to justify the drawing of an analogy. One such analogy is often drawn today between the Conseil Constitutionnel (CC) and the United States Supreme Court (SC).\(^6\)

That analogy rests on the exercise of the power of judicial review, that is the power to nullify statutes enacted by the legislative body by declaring them in conflict with provisions of the constitution. Of course differences as well as similarities are acknowledged. Judicial review is old in America, new in France; it is not specifically authorized by the United

\(^3\) Id. at 194-222.

\(^4\) Modern Islamic nations are excepted because nearly all operate under “modernized” legal systems that combine Islamic and civil law elements and in which appeal comes in as a borrowing from the West.

\(^5\) See generally M.M. Shapiro, supra note 1.

\(^6\) See, e.g., Davis, The Law/Politics Distinction: The French Conseil Constitutionnel and the U.S. Supreme Court, 12 Am. J. Comp. L. 483 (1963); Haimbaugh, Was It France’s Marbury v. Madison?, 35 Ohio St. L.J. 910 (1974); Henkin, Revolutions and Constitutions, 49 La. L. Rev. 1023, 1047 (1989)(“French scholars rightly stress the differences between French constitutional review and that of the United States, but the idea of an independent constitutional monitor designed to make the Constitution the supreme law is clearly and admittedly, an American inspiration.”).
States Constitution, but is by the French. In America, it is more frequently exercised as part of central control over federal units than within the central government. France does not have federalism—all review is within the central government. Individual constitutional rights in the United States are explicitly incorporated into the Constitution by amendment; in France they have been incorporated by a judicial finding that the preamble to the Constitution has been incorporated into the judicially cognizable constitutional corpus. In the United States judicial enforcement of the Constitution is triggered by a lawsuit brought by an individual or by a governmental unit acting as if it were an individual. In France enforcement is triggered by the special action of specially designated holders of political authority.

It follows that in the United States the question of the constitutionality of a particular statute is resolved after the statute has been enacted and is resolved by the regular courts in the course of deciding regular, legal cases. Constitutional decisions of the Supreme Court are not distinguishable from constitutional decisions rendered by other state and federal courts except that the Supreme Court is the highest regular court on questions of federal constitutional law. Judicial review is part

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7 See U.S. Const. art. III.
8 Const. of 4 Oct. 1958, arts. 37, 41, and 61. Article 37 established the process of "delegalization," by which legislative texts adopted by Parliament or by the Government through parliamentary delegation are assessed by the Conseil to see if they "properly fall within the area of legislative competence reserved to Parliament by Article 34." Review under Article 41 arises when there is a dispute between the Parliament and the Government "in the course of the legislative process" which concerns "the scope of parliamentary authority under Article 34." Broader scrutiny is provided for in Article 61, which "requires the Conseil to make a determination of 'conformity to the Constitution' in respect of all organic laws, [and] the by-laws of the parliamentary assemblies . . ." Beardsley, Constitutional Review in France, 1975 Sup. Ct. Rev. 189, 217-18.
10 Henkin, supra note 6, at 1047. Review under Article 41 is triggered by a request for review by either the Government or the President of the Assembly. Article 61 review is initiated when the President of the Republic, the Prime Minister, or the President of one of the houses of Parliament "refer[s] ordinary legislation to the Conseil after adoption by Parliament and before promulgation . . ." Any sixty members of either house of Parliament can refer legislation to the CC for Article 61 review. Beardsley, supra note 8, at 218-19. See also Const. of 4 Oct. 1958, arts. 37, 41, 61. Functionally, review by the CC arises "usually at the behest of opposition members of parliament." Henkin, supra note 6, at 1047.
of the body of normal judicial technique, closely akin to normal statutory interpretation and conflict of laws decision-making.

In France the constitutionality of a statute is determined in general and in the abstract rather than in a particular fact context of its enforcement—it is decided before the statute has been promulgated, by a special body that has no other function than the decision of constitutional questions. It is a natural consequence then that, no matter how much the pretense is otherwise, it is not decided by normal jurisprudential techniques. Constitutional decision making is not done by the French courts and so it can hardly be argued that a juridical technique has been developed for it. Moreover, French constitutional interpretation can hardly be viewed as a sister to statutory interpretation, given that French courts (like their Anglo-American counterparts) interpret statutes in the particular context of their implementation in an instance that has engendered a lawsuit rather than in their general pre-implementation posture as does the CC. The CC is not simply the highest member of a general court system as is the SC, but a specialized constitutional organ entirely separated from both the regular and the administrative courts. Thus we are entitled to treat the CC as either like or unlike the SC and instead like something else.

When we seek to treat the CC as like the SC we immediately encounter the "mighty problem" of judicial review—that is, the question of whether review is compatible with democracy. The long American debate shows the fruitlessness of conducting such a debate in black and white terms with one side saying "democratic" and the other "undemocratic." In the quite different context of the European Community the very useful concept of "democratic deficit" has been evolved—a concept that acknowledges that some institutions are more democratic than others or raise greater problems of representativeness and responsibility than do others. The question of democracy is seen as a question of degree rather than as an absolute one.

For discussions of this idea, see generally C. Black, The People and the Court: Judicial Review in a Democracy (1960); M. Cappelletti, The Judicial Process in Comparative Perspective (P.J. Kollmer & J.M. Olson ed. 1989); J. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (1980); L. Hand, The Bill of Rights 73 (1958)("it certainly does not accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve."); Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193 (1960).

See Weiler, Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities, 61 Wash. L. Rev. 1103, 1117 (1986).
American judicial review is neither democratic nor undemocratic. It
does exhibit a considerable democratic deficit. Questions about the
democratic legitimacy of judicial review have been raised continuously
since its inception. It would be a great mistake to believe that they have
been fully resolved today. The Americans resolve their democratic def-
cit question only by agreeing that there should be some judicial review,
but not too much, and then conducting a never ending argument over
how much is too much. Americans accept review, but do not like the
deficit.13

Whoever wishes to make use of an analogy between the CC and the
SC must next examine in the context of the CC the SC’s deficit prob-
lem. The analogy involves another problem as well (or perhaps the
same problem stated differently). My colleague, Professor Jeremy Wal-
dron, is wont to point out the peculiarity of the American habit of treat-
ing constitutional questions as if they were not a sub-species of political
or ethical questions but instead as some sort of separate “legal”
questions.

Of course, by converting general moral political questions into a spe-
cial category of constitution questions and evolving a specialized polit-
cial institution to deal with such questions, the Americans have found a
way of maintaining a moral dimension in the day-to-day practice and
discourse of politics. A more negative gloss would run in terms of law-
ner or elite power. By constitutionalizing moral and political questions
and handing them over to judicial review, Americans allow judges and
other lawyers a disproportionate voice in American political discourse.
Currently the most enthusiastic proponents of American judicial review
seek to cure its democratic deficit by presenting it as a form of public,
moral discourse. When we look more closely, however, we find it is a
“public” discourse entirely dominated by lawyers and lawyers’ terms.

For those in France who wish to legitimate the judicial review of the
CC and at the same time argue that it is like the SC, a curious sequence
of arguments tend to arise. First, it is argued that CC review is accepta-
bable because the CC is like the SC. Enforcement of constitutional provi-
democratic deficit of judicial review has not gone unnoticed. See Cappelletti,
Repudiating Montesquieu? The Expansion and Legitimacy of “Constitutional Justice,”
35 Cath. U.L. Rev. 1, 30 n.91 (1985)(“The undeniable fact that judicial review in
America played a modest, at times even a negative role in the protection of civil liberties
until a very few decades ago, is often indicated as evidence of the democratic deficit of
the institution itself.”)(citing Railton, Judicial Review, Elites, and Liberal Democracy, in
XXV Nomos: Liberal Democracy, 153-80 (1983)).
13 It may be argued, of course, that Americans have learned to live with other deficits;
but it may be counter-argued that the size of those deficits too are matters of lively
political controversy.
sions that divide governmental power and protect individual rights by an independent court applying neutral principles of constitutional law has, in the instance of America and the SC, proven compatible with democracy under a written constitution. Both France and the United States enjoy democracy under a written constitution. Judicial review by the SC is an integral part of the American system. France has the CC. Given that the CC can be like the SC, judicial review by the CC is compatible with French democracy. Q.E.D.

If this first stage of the argument is sold successfully to the French people, then later, very gradually and very carefully, the second stage may be introduced. Now that the French people have accepted “American style” judicial review, it must be that the SC is not so neutral and independent as we have made it out to be. In fact, Americans debate endlessly about whether there are neutral principles of constitutional law and most concede that the SC runs some kind of democratic deficit. Nevertheless, given that judicial review by the SC is democratic enough for the Americans, a similar review by the CC ought to be democratic enough for the French as well. Put slightly differently, like the Americans, the French can accept that, in addition to normal political discourse, there shall be a special constitutional discourse dominated by constitutional lawyers. First the bright picture is presented of CC review as like the independent, objective, neutral constitutional judgment of the SC. Once this picture is accepted in France, it will be time to paint in the dark shadows of democratic deficit and lawyer power.

It may be possible to avoid this two-stage argument by choosing the alternative analogy of the CC to a third legislative chamber. From an American point of view the SC is not like a third legislative chamber in what is, for Anglo-American political culture, a crucial and determinative respect. Legislatures pass general laws on the basis of a generalized consideration of general social, economic, and political conditions. Courts resolve specific conflicts of the kind that can be framed as legal questions in the context of the interests of particular parties and the particular circumstances of a particular dispute. They make only such law as is necessary to the resolution of the legal dispute before them. This “cases and controversies” dimension is absolutely essential to Chief Justice Marshall’s rationale for judicial review in Marbury v. Madison and has been essential ever since in legitimating

15 Id. at 65-67.
16 5 U.S. (1 Cranch) 137 (1803).
review.\textsuperscript{17} It allows defenders of the Court to acknowledge that the SC does make law and, nevertheless, still defend review by pointing out that the Court only makes law when it is compelled by the particular case before it to do so. It does not initiate its law-making agenda but only responds to the legal needs of parties engaged in a genuine conflict, and that it makes only enough law to resolve that conflict. Put another way, the Court clothes itself in the grand legitimating mantle of the common law. Granted it makes some law, but it does \textit{not} make that law by \textit{legislative} techniques. Instead it makes constitutional law by the central, traditional, most revered \textit{judicial} technique, the technique of the common law; that is, case by case adjudication. For the necessarily incomplete, abstract, and uncertain stab at predicting the future of which all legislative law-making consists, the Supreme Court substitutes a very concrete, relatively complete, highly specific and detailed analysis of the legal dimensions of a set of events and conditions that have already occurred. This difference in law-making technique is what ultimately justifies judicial review in a system of separation of powers. It is what renders judicial review by the SC part of the judicial power which is separate from and a check on the legislative power. In short, it is the dimension of technique that makes the SC \textit{not} like a legislative body.

And it is precisely this question of technique which, \textit{from an American perspective}, makes the CC look like a third legislative chamber and \textit{not} like a court. For the CC does not seize particular cases and controversies between particular parties. It does not make only so much law as it is compelled to make to resolve a particular dispute before it. Instead the CC examines a bill as passed by the two legislative chambers but not yet promulgated or implemented.\textsuperscript{18} It does so not at the behest of or in the context of individual parties involved in a concrete and particularized dispute, but in precisely the same context as have the other two chambers. Like any wise legislature, the CC must ask and answer general questions about the general nature of the legislation proposed and thus must predict how the world in general and in a multitude of potential particulars will play itself out in the future when the proposed statute must be implemented. \textit{From a common lawyer's point of view}, the techniques of the CC are general and prospective rather than particular and retrospective and thus the CC is more like a legislature than a court.\textsuperscript{19}

\textsuperscript{17} L. Tribe, American Constitutional Law 20-23 (1978).
\textsuperscript{18} Beardsley, supra note 8, at 217-18. Once a law goes into effect, even if it has not been reviewed by the CC, its constitutionality cannot be challenged. Vroom, supra note 9, at 270.
\textsuperscript{19} R. David, French Law; Its Structure, Sources, and Methodology 29-30 (M. Kindred,
The dimensions of technique and procedure are naturally intertwined. Particularly since the amendments of 1974, the CC has come to routinely hear in what is now a clearly established Assembly-Senate-CC sequence nearly all major legislation. Draft bills simply flow from the first to the second to the third chamber. When they encounter difficulties in the second or third chamber, they return to the first. Upon revision by the first, they return to the second and third. All bills must proceed to the second, but only those for which a special procedure is invoked may proceed to the third. But today the special procedure is nearly always invoked. Defeat in the Senate may be overridden in the Assembly, while defeat in the third chamber theoretically may not be. But we have learned that, in practice, bills defeated in the third do ultimately become law after revision by the first two. To an outsider, by both technique and procedure the CC is acting like a third house. (The fact that the CC necessarily must adopt a generalized stance toward statutes, seeking their general meaning, does not differentiate it as sharply from civil law as from common law courts. The techniques of French constitutional law are not so different from those of other bodies of public, or indeed private, law as to totally destroy the analogy between the CC and the courts in the French mind.)

The difference in procedure between the CC and the courts, nevertheless, must remain highly significant to the French. Although a French court offers its statement of the law in general terms, that statement is offered in the context of a particular case. The court purports to offer only that depth and breadth of statutory interpretation that it is compelled to offer in order to resolve a particular legal dispute brought

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20 "The right to refer legislation to the Conseil under Article 61 was extended to any sixty members of either house of Parliament by constitutional amendment in 1974." Beardsley, supra note 8, at 218-19. The changes in 1974 were part of the "Giscard d'Estaing reforms of 1974." H.J. Abraham, supra note 19, at 313.

21 Sometimes the flow is Senate-Assembly-CC.

22 Vroom, supra note 9, at 273.

23 Id. at 318-19 (noting the increasing referral of legislation to the CC was "an efficient tactic for delaying substantive discussion of a question.").

24 A example of this process is the decision of December 29, 1983, wherein a law authorizing fiscal search warrants was found to be overly vague. The Conseil declared the offending portions "not in conformity with," rather than "contrary to," the Constitution and invited the legislature to revise the text, giving specific guidelines on the points to be corrected.

before it by two parties involved in a particular conflict. No matter what the form of the individual decisions of the courts, a considerable share of French law is made through the case-by-case methods comparable to those of common law. That law-making is justified and legitimized by French courts by their insistence that they only engage in that level of interpretation needed to resolve a bona fide legal dispute which is before them and which they have a legal obligation to decide. French courts do not speculate on the future application of French law to future, imagined conditions of French society. Like common law courts, they do their statutory interpretation in the context of existent disputes.\(^{25}\) The CC does not. It does its statutory interpretation entirely in the abstract and in anticipation of circumstances to come.\(^{26}\)

Granting the greater generalization and abstraction of all French legal discourse, the analogy between the CC and the French courts remains difficult to maintain. French courts hear cases. The CC does not.

From the French point of view, an analogy between the CC and a French court is relatively weak, perhaps sustainable in terms of technique, but almost certainly unsustainable in terms of procedure. Thus, the analogy between the CC and the SC is not so much a claim that the SC is like a court, the CC is like a court and so, under the normal rules of Aristotelian logic, the SC and the CC must be like one another. Rather, the likeness between the SC and the CC must be that both declare and apply constitutional law so as to invalidate statutes. But to say this is to return precisely to the democratic deficit problem and to say that the SC and the CC are alike in running up the democratic deficit that any non-elected body must incur when it invalidates legislation passed by elected bodies. If the magic of the SC is that it can still overcome that deficit by claiming to be a court, then the magic rests on the cases and controversies rule which is what allows the SC to claim it is a court. If the French seek to cure the democratic deficit of the CC by

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\(^{25}\) See Beardsley, supra note 8, at 246.

\(^{26}\) Two decisions of the CC are notable in their definition of its scope. The 14 September 1961, decision states: "[c]onsidering that the Constitution has strictly delimited the jurisdiction of the Constitutional Council; the Council can only be called upon to decide or render an opinion in the cases and under the circumstances fixed therein;" and the 6 November 1962 decision states "[c]onsidering that the jurisdiction of the Constitutional Council is strictly delimited by the Constitution and the provisions of the Organic Law of November 7, 1958[,] on the Constitutional Council; that the Council cannot be called upon to render a decision in cases other than those strictly provided for by these texts." H. de Vries, Civil Law and the Anglo-American Lawyer: A Case-Illustrated Introduction to Civil Law Institutions and Methods 107-11 (1976). See also Henkin, supra note 6, at 1046 ("The Conseil does not review a law after it is enacted in response to individual complaint and in the context of a particular case or controversy . . . .").
invoking an analogy to the SC, the analogy fails at just the key point. For the CC operates by the very opposite of the cases and controversies rule.

So the negative side of the argument for an analogy between the CC and a third legislative chamber is that the analogy between the CC and the SC fails at just the point at which it could justify the democratic deficit of the CC.

Yet there is a positive case for an analogy between the CC and a third legislative chamber. I wish to begin with a long excursion back to the American scene. Although it has been a matter of some debate, it is fairly well agreed that under the American separation of powers, each of the three great branches has both the power and the duty to make its own independent constitutional judgments. A president may veto proposed legislation on the grounds that he believes the legislation to be unconstitutional. Congress may certainly refuse to enact bills on that ground. Indeed, one of the standard arguments against judicial activism is that it debilitates Congress' own constitutional sensitivity. And one of the arguments for judicial activism is that without it Americans experience the "circular pass" in which Congress passes legislation without regard to constitutionality because it believes the SC will take care of constitutionality while the SC presumes the constitutionality of all legislation as a way of deferring to Congress' constitutional judgment supposedly exercised as a prerequisite to the statute's passage.

The American doctrinal uncertainty about the quality of congressional constitutional judgment is a product of a certain institutional awkwardness in congressional consideration of constitutional questions. American legislation passes through many stages. Typically it is first drafted outside of Congress, but then redrafted by committee staffs once officially introduced. There is further redrafting before the bill emerges from committee. Further amendment occurs when the bill comes from committee to the chamber floor. The process goes on twice, once in the House and once in the Senate. Where the two disagree, the two bills are "harmonized" by a conference committee. Arguments about the constitutionality of the bill may be introduced at any of these stages, but there is no special stage of exclusively or explicitly constitutional consideration. Constitutional arguments must be mixed into pragmatic, political and policy arguments by the same peo-

Some observers see Congress as making serious constitutional judgments about proposed legislation. Perhaps it does sometimes. So intermixed with every other motive, deal, and compromise are any constitutional judgments made by congressmen, individually and collectively, that normally it is quite impossible to prove whether or not Congress took constitutional questions seriously in the myriad of interlocking decisions and votes that led to final passage of a bill. Who knows whether the constitutional objections raised by a House committee hearing witness led that committee to amend a particular provision? Even if it did, who knows whether the final, somewhat different language of that provision written in the conference committee seeking to compromise House and Senate versions of the bill did or did not incorporate the constitutional point raised six months, and four or five votes, previously?

Let us suppose that Congress sought to cure its own institutional infirmity in the consideration of the constitutionality of its own legislative product by a daring innovation. Let us suppose it amended its own rules to establish a joint committee of the two houses to which every bill that had finally passed both houses would be submitted before being transmitted to the President for his signature. If such a committee found the proposed statute unconstitutional, it would be returned to the two houses. Only bills receiving the approval of the Joint Constitutional Committee could be transmitted to the President. Members of the Committee would be chosen in whatever ways members of other congressional committees are chosen, essentially by the party leadership and caucuses of Congress. There is no doubt that Congress could create such a fundamental alteration in the American politico-legal system without the need for constitutional amendment under its own internal rule-making authority granted to it by Article I of the Constitution.

Even if the new Committee's findings were as final as those of the Supreme Court, the Committee would suffer from very little democratic deficit. It would be exercising not independent powers, but the powers of the elected legislature itself. It would be selected essentially by the political parties in the legislature and in partisan proportions comparable to the proportions in the legislature itself. It would be

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28 See generally D. Morgan, supra note 27; see also L. Fisher, supra note 27, at 234.
29 U.S. Const. art. I, § 5, cl. 2.
composed of elected representatives. Its composition would change as
the election returns changed and so, presumably, would its constitu-
tional decisions. Thus it would run only whatever small constitutional
deficit resulted from its not being an exact microcosm of the Congress
as a whole. If the Supreme Court chose to defer to Congress' constitu-
tional judgments, as it has chosen to do since 1937 for instance in the
realm of economic legislation,\textsuperscript{30} then at least the Court would know
that it was deferring to a real legislative constitutional judgment rather
than the absence of one. If it chose not to defer, the congressional
constitutional committee would be an especially effective congressional
tool for anticipating Supreme Court constitutional judgments and
reworking legislation accordingly.

I do not know whether I am for or against such a committee, but I am
prepared to argue that it is more useful to see the CC as "like" such a
committee than "like" the Supreme Court. Unlike the SC and like such
a committee, the CC does look at legislation before rather than after its
promulgation.\textsuperscript{31} Like the Committee, its negative vote results in the
statute not being promulgated and instead returned to the legislature
to be rewritten.\textsuperscript{32} Like both such a committee, and the Supreme Court, the
CC's constitutional judgments are based on the subtle mixture of polit-
cal, policy and legal considerations that are the bases of all constitu-
tional judgments.\textsuperscript{33} And now comes the crucial point. Given the real
nature of all constitutional judgment, the CC runs a large constitutional
deficit like the SC if it is like the SC and a much smaller one if it is like
the proposed committee. So why not think of it as like the proposed
committee?

For it is not only its place in the sequence of legislation, its considera-
tion of constitutionality in general and in the abstract before passage,
that suggest such an analogy. The mode of selection and terms of
office of its members do as well. For that mode of selection is carefully
constructed formally to reflect the change and balance of electoral for-

\textsuperscript{30} In 1937, the Supreme Court handed down NLRB v. Jones & Laughlin Steel
Corporation, which held that Congress has the power to enact legislation for the
protection and advancement of commerce. 301 U.S. 1, 36-37 (1937). This case
reversed the Court's trend of invalidating economic statutes, which had emanated from
the repudiated doctrine of Lochner v. New York, 198 U.S. 45 (1905). See, e.g.,

\textsuperscript{31} See supra note 18 and accompanying text.

\textsuperscript{32} See supra note 24 and accompanying text.

\textsuperscript{33} See Henkin, supra note 6, at 1047 (noting the evolution of the CC from a body
which was intended to monitor the separation of powers into a tribunal of rights when
France entered "the Age of Rights," and underwent changes reflecting the new age).
tunes of the parties over time. Moreover, certain informal norms of selection have strengthened the analogy to my proposed committee. Membership on the CC has gone overwhelmingly to party faithful, often after long service in the assembly, and it has gone very frequently to persons who served as constitutional spokesmen for and advisers to their political parties before they took up service on the CC. In short, but for their having to leave their legislative seats, the CC members are overwhelmingly the same kinds of people that the American party leaders in the Senate and the House would choose for my proposed joint constitutional committee. Because they do leave their seats and no longer participate in non-constitutional legislative business, I slightly modify my analogy to say that the CC is not like a constitutional committee of the French legislature but like a third chamber of that legislature. And if my analogy is credible, the CC does not run the huge democratic deficit that a constitutional court does, but only that far smaller deficit that results from whatever discrepancy exists at any given moment between the partisan balance in the CC and that in the Assembly.

Of course the bottom line is that those who seek to legitimize the CC by invoking the court analogy in general and the SC analogy in particular are committing a grave tactical error. First, to say that the CC is like a court is to say that it is close to being an undemocratic gouvernment des juges, which is at odds with the whole French tradition of popular sovereignty. Second, to say the CC is like the SC in the context of seeking to legitimize the CC requires the proponents of that analogy either seriously to misrepresent the degree to which the SC is a constitutional law-finder rather than a law-maker or, alternatively, to saddle the CC with the whole democratic deficit problem that has made judicial review so controversial in the United States.

If, however, we say that the CC is like a third chamber, we finally arrive at the spirit of the French Revolution. For if the CC is like a third chamber of the legislature, then judicial review is not the gouvernment des juges so often reviled by the Revolutionary tradition, but instead an

34 The CC is comprised of nine members serving nine-year, staggered terms. Every three years the Presidents of France, the Assembly, and the Senate nominate one member. H.J. Abraham, supra note 19, at 311. The former Presidents of the Republic are also members of the Conseil. See infra note 40.
35 See Beardsley, supra note 8, at 217 n.129 (specifying the members of the CC and their backgrounds, and noting that “all of the members have had active political careers.”)(citations omitted).
36 H.J. Abraham, supra note 19, at 310 (stating that for the French, “a law is the expression of the sovereign will.”).
exercise of the people’s constitutional authority by the representatives of the people. Moreover, it is a French version of review that represents a considerable advance over review in the rest of the world, both in reducing its democratic deficit and in improving the capacity of the legislature to take constitutional questions seriously. More precisely, the French arrangement cures the institutional incapacity to make constitutional judgments about its own legislation exhibited by the American Congress.

In this regard, it must be noted that the functioning of the CC as a third chamber which reviews proposed legislation for constitutionality immediately after its passage by the first two actually improves the constitutional capacity of the Assembly itself and provides a special check upon it as well. Congress does sometimes seek to anticipate future SC constitutional objections to pending legislation.\textsuperscript{7} It also sometimes quickly responds to a SC finding of unconstitutionality by redrafting and repassing statutes struck down by the Court.\textsuperscript{8} Such activity is, however, sporadic and uncertain precisely because SC action is sporadic and uncertain. The Court may never review a particular statute, or may do so years from now, or may do so only for some minor provision of interest to a particular litigant. In such circumstances it is natural for Congress to adopt a wait-and-see attitude. Why worry about constitutional questions that may never arise?

In the Assembly, on the other hand, the majority may now reasonably anticipate that the minority will mount an immediate and comprehensive constitutional challenge in the CC to every major piece of legislation that is passed. It makes sense for the Assembly to debate constitutional questions seriously and to adopt statutory language that anticipates constitutional objections as much as possible. There have been complaints about the “constitutionalizing” of Assembly proceedings, but those complaints are gravely mistaken. What could be superior to the representatives of the people debating constitutional

\textsuperscript{7} An example of Congress anticipating the Supreme Court reactions to legislation can be found in the recent debate concerning the bill to enact The Flag Protection Act of 1989, H.R. 2978, 101st Cong., 1st Sess. (1989). In the House Conference Report accompanying this legislation, the Committee on the Judiciary writes that the bill is drafted specifically to conform to the Supreme Court’s opinion in Texas v. Johnson, 109 S.Ct. 2533 (1989). H.R. Rep. No. 231, 101st Cong., 1st Sess. 7-8 (1989). In addition, the added views contained in the House Report predict that the Supreme Court would declare a statute protecting the flag to be unconstitutional. Id. at 15-17.

\textsuperscript{8} L. Fisher, supra note 27, at 247 (“Statutory action is often necessary to permit the Court to review and possibly to overturn its previous holdings.”). See also Henschen & Sidlow, The Supreme Court and the Congressional Agenda-Setting Process, 5 J.L. & Pol. 685, 721 (1989).
questions publicly rather than leaving such questions entirely to a small elite of constitutional lawyers part of whose debate takes place in secret.\(^{39}\)

I conclude then that once we treat the CC as like a third legislative chamber rather than like a court, the democratic deficit of American judicial review drops away; it becomes unnecessary to first defend the CC by analogy to the SC before subsequently admitting that the SC is not what it is initially alleged to be; and instead French arrangements can be seen as a uniquely French improvement in the institutional capacity of legislatures, fully compatible with popular sovereignty. It remains then to ask what specific political practice would strengthen or weaken the third chamber analogy. Most of these practices are related to the appointment of CC members and some to CC procedures themselves. My suggestions here are very tentative and incomplete and require correction by those more familiar with French politics.

The tradition of appointment already established should be continued and celebrated rather than being treated as a subject for apology. The evolved practice is not, of course, rigorous or without exception. Nevertheless, typically those appointed have been persons firmly identified with the political party of the appointer, usually with a past career in the assembly, and service as a constitutional expert and/or spokesman for that party in the assembly.\(^{40}\)

This kind of appointment is ideal in terms of the third chamber analogy. It links the CC to the assembly by the clearest political tie that can exist in France, that of party. Moreover, party connection makes clear the democratic nature of the CC, for party is the crucial tie to the electorate. By choosing present or former assembly members, the situation of the CC as a kind of independent committee of the assembly is underlined. The appointment of constitutional experts makes clear that the CC is a specialized chamber, one that gives priority to constitutional over other dimensions of politics. In sum, the appointment of party constitutional spokesmen from the assembly to the CC makes clear that party positions on constitutional questions and party debates over constitutional questions, that is Assembly constitutional politics, are being maintained and pursued in another specialized place where they can be given a centrality that the Assembly itself cannot grant them and are

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\(^{39}\) I refer of course to the deliberations of the SC and CC.

\(^{40}\) See supra note 35 and accompanying text. Given this political background of the CC's members, it is not surprising that in addition to the nine appointed members, "all living former Presidents of the Republic" are also members of the Conseil. See Beardsley, supra note 8, at 216.
better separated from the more immediate pressures of assembly politics. Seen as a place where party disputes about constitutionality may be more systematically considered, the CC escapes the democratic deficit of the SC. Although its members are not elected and make public policy decisions of the greatest significance, they maintain their roots in the party politics and party electoral competition which are the central mechanisms of democracy in France.

Putting the matter slightly differently, the problem of democratic deficit arises for American judicial review because the American pretense that constitutional questions are technical legal questions with single, objective, neutral, correct answers is always confronted with the reality that such questions are actually public policy questions with a choice of legitimate answers that depends on the political philosophy and policy preferences of the judge. Why should such a choice be made in a democracy by a body of persons entirely separated from the electorate? If we see constitutional questions as essentially political questions, and the choices of constitutional interpretation that are inevitable as choices for the people, then the French arrangement avoids the American problem.

Each party makes clear its constitutional position through its spokespersons in the Assembly. Its constitutional positions, like all its positions, are subject to the democratic electoral process. And the constitutional positions of the parties are carried into the CC by the appointment process. The appointment arrangement for the CC insures that its party composition does not so closely mirror that of the Assembly that it becomes merely a rubber stamp rather than a place of true constitutional debate. Its party composition is, nonetheless, close enough to the recent electoral fortunes of the parties to maintain the electoral connection and render the CC a place where the parties responsible to the people decide constitutional questions. It should be added that the occasional appointment of a distinguished judge or law professor without lengthy prior assembly service may strengthen the CC's constitutional expertise without materially weakening its party ties especially if, as in the instance of many professors, their party affiliations and past participation in the formulation of party constitutional positions is clear.

41 See generally Frank, Mr. Justice Holmes and Non-Euclidean Legal Thinking, 17 Cornell L.Q. 568 (1932)(proposing the human elements of judicial decision-making as an alternative viewpoint to the assumption of judicial decision by neutral legal rules). For a discussion of the development of the legal realist movement and its impact, see J. Monahan & L. Walker, Social Science in Law 17-31 (1985).
Along with many French observers, I would propose one major change in CC practice: the publication of votes and of concurring and dissenting opinions. Current CC practice is an attempt to strengthen the court analogy and the grand pretense that is associated with courts in all legal systems— the pretense that courts handle purely legal questions to which there are single correct legal answers. It is precisely the confrontation of that pretense with reality that inspires the endless problematic of American judicial review. The French are in a position to escape the pretense. They may acknowledge early in the career of judicial review that reasonable persons of good faith and commitment to democratic values legitimately may and do arrive at differing answers to constitutional questions and that the people must ultimately decide between those differing answers. The CC may assist in overcoming the pretense and linking constitutional choice to popular mandates by openly presenting the alternative constitutional positions arrived at by its members. Then it will be seen that disagreement within the CC normally runs along party lines. It will also be seen that sometimes, even though CC members maintain the basic constitutional philosophies of their parties, they will vote against bills passed by Assembly coalitions in which their own party has participated. Votes of that sort will provide the crucial indicia of the third chamber role of the CC, that of rendering constitutional questions absolutely determinative rather than treating them, as any general legislative body like the Assembly must, as simply one element in a complex legislative judgment. With such votes CC members will not be saying “The Constitution above my party” as if the Constitution were a single revealed spiritual truth and they the high priest. Instead such votes will say “In this instance under the immediate pressures of legislative politics my party has deviated from or compromised its own constitutional principles. My duty as a CC member is to recall it to those principles.” Both the general adherence of CC members voting to party ties and their occasional deviations strengthen the legitimacy of the CC once it is recognized that constitutional questions are not technical questions with right answers but political questions of a particular sort that must be addressed in a particular way but under ultimately popular control. By presenting itself as engaged in legitimate debate on constitutional questions from the standpoints of various party constitutional philosophies but outside the day-to-day pressures of the Assembly, the CC can assure its place in French political life.

It may appear even more alarming to Americans than to the French to tie constitutional debate so closely to party politics. I have written in a number of other places of the desire of American constitutional
experts, nearly all of whom are Democrats, to disguise the fact that there is Democratic and Republican constitutional law and to present Democratic constitutional law as if it were a body of neutral, objective, correct non-partisan constitutional law.\textsuperscript{42} I believe the French have the opportunity to greatly alleviate the democratic deficit problem of judicial review by emphasizing rather than de-emphasizing the party dimension of constitutional law. By showing that the French parties have differing constitutional philosophies subject to electoral control and that the CC reflects those party philosophies and is thus subject to electoral control, the CC can be seen as a third chamber of the legislature where the parties debate their constitutional positions on a given bill free of the other immediate concerns that tend to partially devalue constitutional questions in the Assembly. The French can then see themselves as having arrived at a uniquely French solution to the "mighty problem" of judicial review, a solution fully in keeping with the Revolutionary tradition of popular sovereignty and rejection of gouvernement des juges.

\textsuperscript{42} See M.M. Shapiro, Law and Politics in the Supreme Court; New Approaches to Political Jurisprudence (1964); M.M. Shapiro, The Supreme Court’s "Return" to Economic Regulation, in 1 Studies in American Political Development (1986).