

**FUNCTIONAL EQUIVALENCE DESPITE  
FORMAL DIFFERENCES?  
COMPARING CASE SELECTION MECHANISMS IN THE  
SUPREME COURT OF THE UNITED STATES AND THE  
CONSTITUTIONAL COURT OF ITALY**

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ABSTRACT

*A legal system's apex court wields immense authority by issuing final judgments from which there is no further appeal. The Supreme Court of the United States and the Constitutional Court of Italy are both apex courts and, when working through and ultimately deciding cases, affect their countries' legal and social consciousness in tangible and potentially long-lasting ways. Though the form of these apex courts' constitution, composition, and jurisdiction differs significantly, both courts utilize case selection mechanisms that functionally achieve similar results and goals. This article compares and analyzes these courts' case selection mechanisms in their proper context and scope, noting the ramifications that these case selection mechanisms might have on the apex courts' respective legal systems. This article ultimately concludes that when comparing how these apex courts choose*

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*cases, it is proper to adopt a via media approach, one that ultimately considers both the formal differences and functional similarities of these apex courts' case selection mechanisms.*

## TABLE OF CONTENTS

INTRODUCTION .....	200
I. BACKGROUND AND HISTORICAL DEVELOPMENT .....	202
A. <i>Preliminary Comparisons</i> .....	202
B. <i>Constitutional Foundations of Jurisdiction</i> .....	207
1. <i>Supreme Court of the United States</i> .....	207
2. <i>Constitutional Court of Italy</i> .....	210
C. <i>Statutes Further Effectuate and Shape Jurisdiction</i> .....	213
1. <i>Supreme Court of the United States</i> .....	215
2. <i>Constitutional Court of Italy</i> .....	221
II. CASE SELECTION MECHANISMS .....	224
A. <i>Supreme Court of the United States</i> .....	224
B. <i>Constitutional Court of Italy</i> .....	228
III. COMPARING THE APEX COURTS' CASE SELECTION MECHANISMS .....	233
CONCLUSION .....	235

## INTRODUCTION

A legal system's apex court wields immense authority by issuing final judgments from which there is no further appeal.<sup>1</sup> The Supreme Court of the United States and the Constitutional Court of Italy are both apex courts whose procedures and decisions affect their countries' legal and social consciousness in tangible and potentially long-lasting ways.<sup>2</sup> But in any legal system, given courts' finite time and

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1. An "apex court" is the highest court in a legal system. This status means that the apex court, by adjudicating a particular case, makes the final determination for that case and, by virtue of the doctrine of precedent, binds the lower courts to follow the apex court's decision for future cases of a similar factual and legal background. Justice Robert Jackson famously commented on the finality of the Supreme Court of the United States in his concurring opinion in *Brown v. Allen*: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

2. See, e.g., Kevin Breuninger, *Supreme Court says leaked abortion draft is authentic; Roberts orders investigation into leak*, CNBC (May 3, 2022, 11:25 AM),

resources, a tension can exist between thoroughly adjudicating the merits of a case and resolving matters efficiently and succinctly.<sup>3</sup> In addressing this tension, apex courts use narrow case selection mechanisms to reduce their caseloads and maintain efficient dockets.<sup>4</sup> This article compares the case selection mechanisms of the Supreme Court of the United States with those utilized by the Constitutional Court of Italy. The purpose of this article is to investigate the apex courts' formal differences arising from their diverse historical and legal backgrounds as well as the functional similarities in the courts' case selection outcomes.

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<https://www.cnn.com/2022/05/03/supreme-court-says-leaked-abortion-draft-is-authentic-roberts-orders-investigation-into-leak.html> (the Roberts Court reeling after a *Dobbs* draft overturning *Roe* and *Casey* was leaked to Politico); Oriana Gonzalez, *Supreme Court says Boston violated First Amendment in Christian flag case*, AXIOS (May 2, 2022), <https://www.axios.com/2022/05/02/supreme-court-boston-religious-freedom-violation> (Supreme Court ruled in *Shurtleff* that Boston violated the First Amendment when it prevented a local organization from flying a Christian flag at City Hall); *L'assegno per il nucleo familiare spetta anche ai cittadini extracomunitari* [The family allowance is due also to non-EU citizens], IPSOA (Mar. 11, 2022), <https://www.ipsoa.it/documents/lavoro-e-previdenza/rapporto-di-lavoro/quotidiano/2022/03/12/assegno-nucleo-familiare-spetta-cittadini-extracomunitari> (la Corte costituzionale dichiarando che “i cittadini non europei, soggiornanti di lungo periodo e con permesso unico di lavoro, non possono essere trattati in modo diverso dai cittadini italiani nell’accedere al beneficio dell’assegno per il nucleo familiare (ANF), anche se alcuni componenti della famiglia risiedono temporaneamente nel paese di origine” [the Constitutional Court declaring that “non-European citizens, long-term residents and with a single work permit, cannot be treated differently from Italian citizens in accessing the benefit of the Family Unit Allowance (ANF), even if some members of the family reside temporarily in the country of origin”]) (It.); *Bonus bebè e assegno di maternità anche agli stranieri extracomunitari* [Baby bonus and maternity allowance also for non-EU foreigners], IPSOA (Mar. 4, 2022), <https://www.ipsoa.it/documents/lavoro-e-previdenza/rapporto-di-lavoro/quotidiano/2022/03/05/bonus-bebe-assegno-maternita-stranieri-extracomunitari> (la Corte costituzionale dichiarando che “le disposizioni che escludono da alcune provvidenze (bonus bebè e assegno di maternità) gli stranieri extracomunitari non titolari del permesso per soggiornanti Ue di lungo periodo sono incostituzionali” [the Constitutional Court declaring that “the provisions that exclude from certain welfare benefits (baby bonus and maternity allowance) non-EU foreigners who do not hold a long-term EU residence permit are unconstitutional]) (It.).

3. Brian Ostrom & Roger Hanson, *Achieving High Performance: A Framework for Courts* 13 (Nat’l Ctr. for State Cts., Working Paper, Paper No. 1874, 2010).

4. *Id.* at 13–14.

Part I examines the legal and historical development of both the Supreme Court of the United States and the Constitutional Court of Italy. Special attention is given to the constitutional and statutory foundations of the apex courts. Part II analyzes the case selection mechanisms that the apex courts use to reduce their caseloads. Although the Supreme Court of the United States has the power of discretionary review while the Constitutional Court of Italy has mandatory jurisdiction over its cases, strategic use of case selection mechanisms could allow the Constitutional Court to produce a shorter docket similar in size to the Supreme Court's. Part III compares these case selection mechanisms directly, and recognizes that both apex courts face the paradox of simultaneous discretion and lack of control. This article concludes that when people compare how these apex courts choose cases, they should adopt a *via media*<sup>5</sup> comparison approach, one that ultimately considers *both* the formal differences and functional similarities of these apex courts' case selection mechanisms.

## I. BACKGROUND AND HISTORICAL DEVELOPMENT

### A. Preliminary Comparisons

The Supreme Court of the United States and the Constitutional Court of Italy are both apex courts. Judgments rendered by these courts are final and cannot be appealed to another, higher tribunal.<sup>6</sup> The constitutional systems in which these courts are situated, however, are formally different. First, the *type* of legal system differs be-

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5. The *via media* principle literally means "the middle way" or "the middle road." This principle advocates for moderation, holding that the best course of action is usually the one in the middle, between two extremes. See, e.g., Melina Hughes & Virginia Fitzsimons, *Lessons from Aristotle: All Things in Moderation*, 46 NURSING 50, 50 (2016) ("*Eudaimonia* is what [Aristotle] called this fully realized existence. *Eudaimonia* can be achieved through the principle of the mean: moderation in all things."). St. Thomas Aquinas built on this Aristotelian principle of moderation in his *Summa Theologiae*. See THOMAS AQUINAS, *SUMMA THEOLOGIAE OF ST. THOMAS AQUINAS* 55-67 (2nd ed. 1920), <https://www.newadvent.org/summa/2.htm> (questions discussing the nature and types of virtue).

6. See Jean-François Gaudreault-DesBiens, *The Role of Apex Courts in Federal Systems: Beyond the Law/Politics Dichotomy*, JUS POLITICUM, <http://juspoliticum.com/article/The-Role-of-Apex-Courts-in-Federal-Systems-Beyond-the-Law-Politics-Dichotomy-1122.html> (last visited Nov. 29, 2022) (an analysis of the effects of apex courts' rulings in federalism disputes).

tween the United States and Italy.<sup>7</sup> The United States inherited a common law tradition from Great Britain,<sup>8</sup> whereas Italy operates as a civil law system.<sup>9</sup> Moreover, regarding vertical separation of powers, the United States adopted a federal system,<sup>10</sup> whereas Italy chose a unitary system.<sup>11</sup>

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7. See *What Is the Difference Between Common Law and Civil Law?*, WASH. UNIV. SCH. OF L. (Jan. 28, 2014), <https://onlinelaw.wustl.edu/blog/common-law-vs-civil-law/> (“The main difference between the two systems is that in common law countries, case law—in the form of published judicial opinions—is of primary importance, whereas in civil law systems, codified statutes predominate.”). It is important to note, however, that as systems adopted features from different legal traditions over time, the categorical distinctions between civil and common law systems became blurred: “But these divisions are not as clear-cut as they might seem. In fact, many countries use a mix of features from common and civil law systems.” *Id.*; see also *Key Features of Common Law or Civil Law Systems*, WORLD BANK (Mar. 2, 2022), <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law> (juxtaposing common law and civil law traditions in their written constitutions, judicial precedents, and contract law).

8. See generally Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6 (1910); Maurice Sheldon Amos, *The Common Law and the Civil Law in the British Commonwealth of Nations*, 50 HARV. L. REV. 1249 (1937) (a discussion of the common law as it existed in British Commonwealth countries). But see Christian R. Burset, *Why Didn't the Common Law Follow the Flag?*, 105 VA. L. REV. 483 (2019) (proposing an alternative theory for why British officials aimed to preserve British common law in the American colonies, namely, to influence their developmental trajectories).

9. See NICOLA CANESTRINI, *The Italian Legal System*, CANESTRINI LEX (June 11, 2011), <https://canestrinilex.com/en/readings/the-italian-legal-system/> (“The Italian legal system is that of a civil law State, governed by codified law. Italy’s system of government is that of a parliamentary republic.”). See also PIETRO PERLINGIERI, *MANUALE DI DIRITTO CIVILE [CIVIL LAW MANUAL]* (A. Alpini et al. eds., 8th ed. 2017) (It.).

10. See generally ANTHONY J. BELLIA JR., *FEDERALISM* (2d ed. 2017).

11. The Republic of Italy, though unitary in its overall structure, has nevertheless opted to decentralize over time by dividing into smaller political structures. See *Italy Introduction*, EUR. COMM. ON THE REGIONS, <https://portal.cor.europa.eu/divisionpowers/Pages/Italy-Introduction.aspx> (last visited Nov. 26, 2022) (“The country is organized in Regions (*regioni*), Provinces (*province*), Municipalities (*comuni*) and metropolitan cities (*città metropolitane*).”). For example, Article 131 of the Italian Constitution establishes the twenty administrative regions of the Italian Republic. PERLINGIERI, *supra* note 9.

The composition of the apex courts and the appointment of the courts' judges also differ. The Supreme Court of the United States has nine justices<sup>12</sup> with lifetime tenure,<sup>13</sup> each of whom is nominated by the President and confirmed by the Senate.<sup>14</sup> The United States Constitution

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12. The United States Supreme Court has not always had nine justices. In fact, Article III of the United States Constitution does not require a specific number of Supreme Court justices. U.S. CONST. art. III. It is within Congress's domain to set the number of justices. See Dave Roos, *Why Do 9 Justices Serve on the Supreme Court?*, HISTORY (Sept. 24, 2020), <https://www.history.com/news/supreme-court-justices-number-constitution> ("It's Congress, not the Constitution, that decides the size of the Supreme Court, which it did for the first time under the Judiciary Act of 1789."); see also *id.* ("Only since 1869 have there consistently been nine justices appointed to the Supreme Court. Before that, Congress routinely changed the number of justices to achieve its own partisan political goals"). The Judiciary Act of 1789 first set the number of justices at six, comprised of one Chief Justice of the United States and five Associate Justices. Judiciary Act of 1789, 1 Stat. 73 (1789), *invalidated by* *Marbury v. Madison*, 5 U.S. 137 (1803). The number of justices fluctuated for several decades until Congress passed the Judiciary Act of 1869, which established nine justices for the Supreme Court. Judiciary Act of 1869, 16 Stat. 44 (1869), *invalidated by* Jud. Code of 1911, Pub. L. No. 61-475, 36 Stat. 1087. The number of Supreme Court justices remains nine today.

13. Article III of the United States Constitution provides lifetime tenure and salary protections to federal judges: "The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." U.S. CONST. art. III, § 1. Holding judicial office "during good behaviour" means that, all things being equal, federal judges may only be removed from office after being impeached by the House of Representatives and convicted by the Senate. See U.S. CONST. art. I, § 2 ("The House of Representatives . . . shall have the sole power of impeachment."); U.S. CONST. art. I, § 3 ("The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. . . . And no person shall be convicted without the concurrence of two thirds of the members present."). This limited opportunity for removal is often criticized by those who prefer to impose term limits upon federal judges. See, e.g., Wallace B. Jefferson & Ruth V. McGregor, Opinion, *Supreme Court Justices Shouldn't Get Lifetime Appointments. It's Time to Impose Term Limits.*, NBC NEWS (July 15, 2021, 7:11 AM), <https://www.nbcnews.com/think/opinion/supreme-court-justices-shouldn-t-get-lifetime-appointments-it-s-cnca1273882>.

14. "[The President] shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court . . ." U.S. CONST. art. II, § 2. See *Supreme Court Nominations (1789-Present)*, UNITED STATES SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (last visited Dec. 16, 2022), for more information on the history of Supreme Court justice nominations. Due to the justices' lifetime tenures, they often exert significant influence over the political land-

does not specify any set of express qualifications for those individuals to be nominated and confirmed as justices.<sup>15</sup> The Chief Justice of the United States<sup>16</sup> is nominated and confirmed through the same procedures as the Associate Justices.<sup>17</sup>

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scape of the United States. Thus, the federal political branches must make a prediction about how they expect a justice will decide cases if he or she passes the confirmation process. Sometimes these predictions are largely accurate; other times the justice may deviate from the anticipated political alignment. In either event, the United States Supreme Court justices demonstrate a large degree of independence from the political branches in their decision-making:

Once on the Court, justices have demonstrated, by and large, great independence from the other branches of government. Moreover, in many cases a justice has disappointed the expectations of the President who nominated him or her. One notorious case is that of Justice William Brennan, nominated in 1956 by President Eisenhower and serving with great distinction until his retirement, in 1990 as the most prominent member of the Court's liberal wing.

NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 189 (3d ed. 2016).

15. See *About the Court, FAQs - General Information*, SUP. CT. OF THE U.S., [https://www.supremecourt.gov/about/faq\\_general.aspx](https://www.supremecourt.gov/about/faq_general.aspx) (last visited Nov. 26, 2022) [hereinafter *About the Court*] (“The Constitution does not specify qualifications for Justices such as age, education, profession, or native-born citizenship. A Justice does not have to be a lawyer or a law school graduate, but all Justices have been trained in the law.”).

16. See *Chief Justice John G. Roberts, Jr.*, THE WHITE HOUSE ARCHIVES OF PRESIDENT GEORGE W. BUSH, <https://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/roberts.html> (last visited Nov. 26, 2022) (“On September 29, 2005, then-Judge Roberts was confirmed by the U.S. Senate and, after remarks by President George W. Bush, was sworn-in as the 17th Chief Justice of the United States by Associate Supreme Court Justice John Paul Stevens, in the East Room of the White House.”).

17. *About the Court*, *supra* note 15 (“Like the Associate Justices, the Chief Justice is appointed by the President and confirmed by the Senate.”). Though not a requirement to become Chief Justice, it is possible for an Associate Justice already serving on the Supreme Court to become Chief Justice later. Five of the seventeen Chief Justices of the United States had served as Associate Justices prior to becoming Chief Justice. For example, Edward Douglas White (Associate Justice 1894-1910, Chief Justice 1910-1921), Harlan Fiske Stone (Associate Justice 1925-1941, Chief Justice 1941-1946), and William H. Rehnquist (Associate Justice 1972-1986, Chief Justice 1986-2005) were members of the Supreme Court when they were elevated to Chief Justice. *Id.* Moreover, John Rutledge (Associate Justice 1789-1791, Chief Justice 1795) and Charles Evans Hughes (Associate Justice 1910-1916, Chief Justice 1930-1941) had a break in between their periods of service on the Court. *Id.*

In contrast, the Italian Constitution designates fifteen judges to the Constitutional Court of Italy.<sup>18</sup> Each judge is appointed for one nine-year term.<sup>19</sup> Unlike in the United States where the President nominates and the Senate confirms, the Italian Constitution requires that five of the fifteen judges must be named by the President of the Republic; five must be named by Parliament sitting in joint session; and five must be named by the ordinary and administrative supreme courts.<sup>20</sup> The Italian Constitution also enumerates express qualifications for the Constitutional Court nominees.<sup>21</sup> Finally, the Italian Con-

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18. Art. 135 COSTITUZIONE [COST.] (It.). (“La Corte costituzionale è composta di quindici giudici . . .”). Throughout this article, the Italian provisions of the Constitution will be supplemented with their official English translations. For instance, in English, Article 135 of the Italian Constitution provides: “The Constitutional Court shall be composed of fifteen judges . . .” CONSTITUTION OF THE ITALIAN REPUBLIC, SENATO DELLA REPUBBLICA, [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (last visited Nov. 26, 2022) [hereinafter *Senato Della Repubblica*].

19. Art. 135 COSTITUZIONE [COST.] (It.). (“I giudici della Corte costituzionale sono nominati per nove anni, decorrenti per ciascuno di essi dal giorno del giuramento, e non possono essere nuovamente nominati” [“Judges of the Constitutional Court shall be appointed for nine years, beginning in each case from the day of their swearing in, and they may not be reappointed.”]).

20. Article 135 of the Italian Constitution provides:

La Corte costituzionale è composta di quindici giudici nominati per un *terzo* dal Presidente della Repubblica, per un *terzo* dal Parlamento in seduta comune e per un *terzo* dalle supreme magistrature ordinaria ed amministrative.

Art. 135 COSTITUZIONE [COST.] (It.) (emphasis added). In English, this provision of Article 135 states: “The Constitutional Court shall be composed of fifteen judges, a third nominated by the President of the Republic, a third by Parliament in joint sitting and a third by the ordinary and administrative supreme Courts.” The Constitutional Court’s composition is adopted from various legal models: “[T]he Italian system can be considered an intermediate model between, for example, the German one, where the *Bundesverfassungsgerichtshof* is entirely elected by Parliament, and the American one, where the Justices of the U.S Supreme Court are nominated by the President of the United States and confirmed by the Senate.” PAOLO G. CAROZZA ET AL., ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT 43 (2016).

21. Article 135 of the Italian Constitution further provides:

I giudici della Corte costituzionale sono scelti fra i magistrati anche a riposo delle giurisdizioni superiori ordinaria ed amministrative, i professori ordinari di università in materie giuridiche e gli avvocati dopo venti anni di esercizio.



stitution provides that the sitting members of the Constitutional Court vote to elect a President of the Constitutional Court for a three-year presidential term.<sup>22</sup>

## *B. Constitutional Foundations of Jurisdiction*

Both the Supreme Court of the United States and the Constitutional Court of Italy find their origin in their respective countries' constitutions. However, both countries' legislatures exercise the power to control the jurisdictional scope of these courts through enacted statutory frameworks.

### *1. Supreme Court of the United States*

Article III, Section 1 of the United States Constitution provides, in pertinent part, that “[t]he judicial Power of the United States, *shall be vested* in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>23</sup> These first words of Article III “create a federal judicial system” in the United States.<sup>24</sup> The terms “judicial power” and “jurisdiction” are often used inter-

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Art. 135 COSTITUZIONE [COST.] (It.). In English, this provision of Article 135 states: “The judges of the Constitutional Courts shall be chosen from among judges, including those retired, of the ordinary and administrative higher Courts, university professors of law and lawyers with at least twenty years practice.”

22. Article 135 of the Italian Constitution further provides: “La Corte elegge tra i suoi componenti, secondo le norme stabilite dalla legge, il Presidente, che rimane in carica per un triennio, ed è rieleggibile, fermi in ogni caso i termini di scadenza dall’ufficio di giudice.” *Id.* In English, this provision of Article 135 states: “The Court shall elect from among its members, in accordance with the rules established by law, a President, who shall remain in office for three years and may be re-elected, respecting in all cases the expiry term for constitutional judges.”

23. U.S. CONST. art. III, § 1 (emphasis added).

24. ERWIN CHERMERINSKY, FEDERAL JURISDICTION 2 (6th ed. 2012). Chemerinsky explains that at the time of the federal convention, “Federal courts were desired to effectively implement the powers of the national government; there was fear that state courts might not fully enforce and implement federal policies, especially where there was a conflict between federal and state interests.” *Id.* (citing RICHARD H. FALLON ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 6 n.30 (4th ed. 1996)).

changeably.<sup>25</sup> “Jurisdiction” is “defined as the power to hear and determine the subject matter in controversy between parties to a suit or as the ‘power to entertain the suit, consider the merits and render a binding decision thereon.’”<sup>26</sup> The text of Article III distinguishes between “shall” and “may” with regard to establishing the Supreme Court and lower federal courts. Article III states that the federal judicial power “*shall* be vested in one supreme Court,” while Congress “*may* from time to time ordain and establish” lower federal courts.<sup>27</sup> Often called the “Madisonian Compromise,” the Constitution itself established the Supreme Court but vested Congress with discretion whether to establish lower federal courts.<sup>28</sup> The first Congress chose to establish a lower federal court system in the Judiciary Act of 1789.<sup>29</sup>

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25. *Judicial Power Under the Constitution*, FIND LAW, <https://constitution.findlaw.com/article3/annotation01.html> (July 15, 2022).

26. *Judicial Vesting Clause: Doctrine and Practice*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S1-1-1-1/ALDE\\_00001175/](https://constitution.congress.gov/browse/essay/artIII-S1-1-1-1/ALDE_00001175/) (last visited Nov. 25, 2022) (quoting *General Investment Co. v. New York Central R.R.*, 271 U.S. 228, 230 (1926)).

27. U.S. CONST. art. III, § 1 (emphasis added); *see also* HOWARD P. FINK ET AL., *FEDERAL COURTS IN THE 21ST CENTURY: CASES AND MATERIALS 2* (1996) (“Article III implies that the people of the United States may find themselves living in a system with two sets of courts. Congress *may* create a system of federal courts, although perhaps the Constitution does not require it to do so . . .”).

28. *See* MICHAEL L. WELLS ET AL., *CASES AND MATERIALS ON FEDERAL COURTS* 932 (2d ed. 2011) (“Under the ‘Madisonian Compromise,’ the issue whether to create ‘inferior’ federal courts would be left up to Congress. In this way the states, through representatives elected by the people and senators elected (at that time) by state legislatures, would determine the extent of federal judicial power.”).

29. Act of Sept. 24, 1789, 1 Stat. 73 (1789) (providing judicial courts for the United States). Richard H. Fallon, Jr. notes that there are “at least two dimensions” to contemporary interest in the Judiciary Act of 1789:

First, the 1789 Act reflects the beginning of an organic development. It is impossible to understand the current judicial structure without a basic awareness of the foundations from which it evolved. Second, the first Judiciary Act is widely viewed as an indicator of the original understanding of Article III and, in particular, of Congress’ constitutional obligations concerning the vesting of federal jurisdiction.

FALLON, ET AL., *supra* note 24, at 21 (citing FELIX FRANKFURTER & JAMES MCCAULEY LANDIS, *BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1928)).

Article III, Section 2 provides nine categories of cases and controversies over which the federal courts can exercise subject-matter jurisdiction.<sup>30</sup> For three of these categories—cases affecting ambassadors, other public ministers and consuls, and where a state is a party—the Constitution specifies that the Supreme Court shall have original jurisdiction.<sup>31</sup> “Original Jurisdiction means that the Supreme Court is the first, and only, Court to hear a case.”<sup>32</sup> In all other matters, the Constitution grants the Supreme Court appellate jurisdiction subject to Congressional regulation.<sup>33</sup> By limiting federal jurisdiction to these nine categories, the Framers envisioned federal courts to differ from

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30. Article III, Section 2, Clause 1 of the United States Constitution provides: The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. CONST. art. III, § 2, cl. 1; see FALLON ET AL., *supra* note 24, at 22–23 for helpful commentary on each of these jurisdictional categories.

31. “In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction.” U.S. CONST. art. III, § 2, cl. 2. Chemerinsky notes that “[u]nder contemporary practice, the Supreme Court’s original jurisdiction is limited to disputes between two or more states,” given that the Supreme Court “has held that Congress can give the lower federal courts *concurrent* jurisdiction even over those matters where the Constitution specifies” original jurisdiction. CHEMERINSKY, *supra* note 24, at 7 (citing *Ames v. Kansas ex rel. Johnson*, 111 U.S. 449, 464 (1884)).

32. *Supreme Court Procedures*, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited Nov. 26, 2022).

33. “In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 2. Fink describes this jurisdictional grant as “comprehensive appellate jurisdiction.” FINK ET AL., *supra* note 27, at 5.

state courts. Accordingly, federal courts only possess *limited* jurisdiction, whereas state courts possess general jurisdiction.<sup>34</sup>

## 2. *Constitutional Court of Italy*

Whereas the United States Constitution was passed in 1787 and ratified in 1788,<sup>35</sup> the Constitution of the Italian Republic has only existed since 1948.<sup>36</sup> The Albertine Statute established in 1848 first provided Italy's constitutional foundation.<sup>37</sup> But following the demise

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34. See WELLS ET AL., *supra* note 28, at 932 (explaining that the Framers agreed that “unlike the state courts, the federal courts should *not* be courts of general jurisdiction. The scope of their jurisdiction should be limited by the Constitution to matters in which, for one reason or another, there was a significant federal interest.”). See generally Richard H. Fallon, Jr., *The Ideologies of Federal Court Law*, 74 VA. L. REV. 1141 (1988).

35. See *The Constitution*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/> (last visited Nov. 20, 2022) (“On September 17, 1787, 39 of the 55 delegates signed the new document, with many of those who refused to sign objecting to the lack of a bill of rights.”); see also *The Day the Constitution Was Ratified*, NAT’L CONST. CTR. (June 21, 2022), <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified> (“On June 21, 1788, the Constitution became the official framework of the government of the United States of America when New Hampshire became the ninth of 13 states to ratify it.”).

36. The Italian Constitution specifies that it was signed at Rome on December 27, 1947, but did not immediately come into force. On the contrary, Transitional Provision XVIII provides:

La presente Costituzione è promulgata dal Capo provvisorio dello Stato entro cinque giorni dalla sua approvazione da parte dell’Assemblea Costituente, ed entra in vigore il 1° gennaio 1948.

Disposizione Transitoria e Finale XVIII COSTITUZIONE [COST.] (It.). In English, the Transitional Provision XVIII states: “This Constitution shall be promulgated by the provisional Head of State within five days of its approval by the Constituent Assembly and shall come into force on 1 January 1948.” SENATO DELLA REPUBBLICA, *supra* note 18, at 43. The Constitution’s main signer was Enrico de Nicola (1877-1959), who served as provisional Head of State until the Constitution came into force. *Enrico de Nicola*, I PRESIDENTI DELLA REPUBBLICA (last visited Dec. 16, 2022), <https://presidenti.quirinale.it/page/1/den-biografia.html>. He then became the first President of the Italian Republic. *Id.*

37. For an insightful history of the Albertine Statute, see CAROZZA ET AL., *supra* note 20, at 3–10. Carozza comments specifically the scope of the *Statuto Albertino*:

of Italian fascism and the end of the Second World War, the Italian people were given the opportunity to vote by referendum to remain a monarchy or establish a new republic.<sup>38</sup> The people voted for a republic, and the newly enacted constitutional text provided for the creation of a Constitutional Court.<sup>39</sup> Article 134 of the Italian Constitution provides:

The Constitutional Court shall pass judgment on:

- controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions;

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The Albertine Statute consisted of 84 articles. Inspired by the French constitutional text of 1830 and that of the Kingdom of Belgium of 1831, it follows the general structure of liberal European constitutions. It is primarily devoted to establishing the rights and duties of citizens and to setting forth the powers of the respective governing institutions (the King, the Senate and Chamber of Deputies, the Ministers, and the Judiciary).

*Id.* at 4. Notably, however, the *Statuto Albertino* did not “recognize any power of judicial review of legislation, nor was there any subsequent movement toward developing such a power notwithstanding the Statute’s status as ‘fundamental, perpetual, and irrevocable law.’” *Id.* at 4–5.

38. Carozza explains the transitional period Italy experienced between the end of fascism and the establishment of a new republican government:

With the fall of Fascism in July 1943 and the collapse of the regime’s institutions, Italy entered into a transitional period. When the war finally ended in the Spring of 1945 with the liberation of all Italian territory, the antifascist parties and the King agreed on a pact: on the one hand, the King did not abdicate, but instead agreed to withdraw to a strictly private life and to name his son as the caretaker, or *Luogotenente*, of the Kingdom (literally, the “Lieutenant,” thus not giving him the title of King); on the other hand, the Italian people would be given an opportunity, by referendum, to choose between a monarchy and a republic, and to elect a Constituent Assembly to draw up a new constitutional document.

*Id.* at 11.

39. The Italian Constitution begins with Articles 1–12 where it enumerates fundamental principles as a foundation for the entire document. Then, two Parts follow the fundamental principles section: Part I concerns the rights and duties of citizens (encompassing Titles I–IV), and Part II outlines the organization of the republic (spanning Titles I–VI). In Part II, Title IV, titled “Garanzie costituzionali” (constitutional guarantees), Section 1 concerns the establishment of the Constitutional Court in Articles 134–137, treated in broad generalities. Art. 1–12, 134–137 COSTITUZIONE [COST.] (It.).

- conflicts arising from allocation of the powers of the State and between those powers allocated to the State and Regions or between Regions;
- charges brought against the President of the Republic, according to the provisions of the Constitution.<sup>40</sup>

Article 135 provides for the composition of the Constitutional Court.<sup>41</sup> The President of the Republic, a joint sitting of Parliament, and the ordinary and administrative supreme Courts may each name five of the fifteen judges.<sup>42</sup> Article 135 also describes the qualifications and term limits for judges.<sup>43</sup> Article 136 states the effect of the Constitutional Court declaring a law constitutionally illegitimate: “When the Court declares the constitutional illegitimacy of a law or enactment having force of law, the law ceases to have effect the day following the publication of the decision.”<sup>44</sup> In the last Article of Title

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40. The original Italian provision of Article 134 provides as follows:

La Corte costituzionale giudica:

- sulle controversie relative alla legittimità costituzionale delle leggi e degli atti, aventi forza di legge, dello Stato e delle Regioni;
- sui conflitti di attribuzione tra i poteri dello Stato e su quelli tra lo Stato e le Regioni, e tra le Regioni;
- sulle accuse promosse contro il Presidente della Repubblica, a norma della Costituzione.

Art. 134 COSTITUZIONE [COST.] (It.).

41. “La Corte costituzionale è composta di quindici giudici nominati per un terzo dal Presidente della Repubblica, per un terzo dal Parlamento in seduta comune e per un terzo dalle supreme magistrature ordinaria ed amministrative.” Art. 135 COSTITUZIONE [COST.] (It.).

42. *Id.*

43. For the text of these provisions in Article 135, see *supra* notes 18–22.

44. Article 136 in the original Italian provides as follows: “Quando la Corte dichiara l’illegittimità costituzionale di una norma di legge o di atto avente forza di legge, la norma cessa di avere efficacia dal giorno successivo alla pubblicazione della decisione.” Art. 136 COSTITUZIONE [COST.] (It.). Paolo Carozza rightfully observes that the wording of Article 136 was drafted with “considerable ambiguity,” necessitating further clarification in subsequent statutory enactments. CAROZZA ET AL., *supra* note 20, at 18. Less important for the purposes of this article, Article 136 also provides for a procedural specification: “[t]he decision of the Court shall be published and communicated to Parliament and the Regional Councils concerned, so that, wherever they deem it necessary, they shall act in conformity with constitutional procedures.” SENATO DELLA REPUBBLICA, *supra* note 18, at 38; Art. 136 COS-

VI, Article 137, Section 1, of the Constitutional Court provides for subsequent legislative enactments to determine the remaining features of the Constitutional Court, distinguishing between constitutional laws and ordinary laws:

A constitutional law shall establish the conditions, forms, terms for proposing judgments on constitutional legitimacy, and guarantees on the independence of constitutional judges. Ordinary laws shall establish the other provisions necessary for the constitution and the functioning of the Court.<sup>45</sup>

Article 137 also establishes that the Constitutional Court's decisions are final and unappealable: "No appeals are allowed against the decision of the Constitutional Court."<sup>46</sup> By design, Articles 134 through 137 established the Constitutional Court but deferred to the legislature to make it effective. Thus, the "novelty of the Constitutional Court within the Italian legal order at this point was still only on paper, with the potential to be realized only with the adoption of further constitutional and ordinary statutes."<sup>47</sup>

### *C. Statutes Further Effectuate and Shape Jurisdiction*

The jurisdictions of both the Supreme Court of the United States and the Constitutional Court of Italy have been subject to statutory enactments by the legislative branch of their respective systems. However, this democratic authority over the apex courts' jurisdiction should not be seen as radical. Rather, both systems are moderate when considering the full spectrum of options concerning how to hold a judicial

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TITUZIONE [COST.] (It.) ("La decisione della Corte è pubblicata e comunicata alle Camere ed ai Consigli regionali interessati, affinché, ove lo ritengano necessario, provvedano nelle forme costituzionali.").

45. Article 137 in the original Italian provides as follows:

Una legge costituzionale stabilisce le condizioni, le forme, i termini di proponibilità dei giudizi di legittimità costituzionale, e le garanzie di indipendenza dei giudici della Corte.

Con legge ordinaria sono stabilite le altre norme necessarie per la costituzione e il funzionamento della Corte.

Art. 137 COSTITUZIONE [COST.] (It.).

46. *Id.* ("Contro le decisioni della Corte costituzionale non è ammessa alcuna impugnazione.").

47. CAROZZA ET AL., *supra* note 20, at 19.

system democratically accountable.<sup>48</sup> For instance, on one extreme would lie a system that subordinates its apex court to direct elections, which would then provide a strong check on judicial independence. In such a system, the general populace would directly elect the apex court's judges. This system would boast a zenith of judicial accountability but concede a nadir of judicial independence. On the opposite extreme would be a system that chooses its apex court's judges solely from unelected prior positions, and the selectors are themselves unelected. An example of this setup could be requiring certain economic or social status to be eligible for an elite judicial position. Then only those members would select the judges. Contrary to the prior system, this system would feature a zenith of judicial independence but admit a nadir of judicial accountability. The American and Italian systems constitute moderate positions to be placed on the spectrum between these potential extremes.

As a matter of political philosophy, formulating a legal system that permits the legislative branch to shape the apex court's jurisdiction presents advantages and disadvantages that can be observed empirically and identified descriptively. Evaluating a system *normatively*, however, often depends on how effectively the system balances judicial independence against accountability. Both the American and Italian systems weigh these competing values by having democratically elected representatives appoint their apex court's members: in the United States, the Supreme Court's justices are nominated by the President and confirmed by the Senate,<sup>49</sup> and in Italy, a third of the Constitutional Court's judges are named by the President, a third by Parliament, and a third by ordinary supreme courts.<sup>50</sup> These balanced

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48. See generally Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153 (2003), for an apt reflection on judicial independence versus judicial accountability, and the range of options for reformers. See generally David Pimentel, *Balancing Judicial Independence and Accountability in a Transitional State: The Case of Thailand*, 33 PACIFIC BASIN L.J. 156 (2016), or a comparative perspective in Asia.

49. See *supra* notes 12–14 and accompanying text.

50. See *supra* notes 18–20 and accompanying text. In Italy, the only Constitutional Court judges not appointed by democratically elected representatives are those named by the ordinary supreme courts. See Art. 135 COSTITUZIONE [COST.] (It.). But these appointments only constitute five of the total fifteen judges (i.e., one-third



models present a moderate, *via media* position between possible extreme systems. Such an arrangement endorses a democratic model where the voice of the People, *through* their elected representatives, can influence the scope of the Constitutional Court's power.<sup>51</sup> At the same time, avoiding direct elections prevents a situation in which the apex courts' members feel beholden to the current political zeitgeist that occasioned their election. It is in this context of a *via media* option between judicial independence and accountability that legislative control over the Supreme Court of the United States and the Constitutional Court of Italy must now be considered.

### 1. *Supreme Court of the United States*

Richard Fallon<sup>52</sup> observed that “[t]he judiciary article of the Constitution was not self-executing, and the first Congress therefore faced the task of structuring a court system and, within limits established by the Constitution, of defining its jurisdiction.”<sup>53</sup> Thus, in the Judiciary Act of 1789,<sup>54</sup> the first Congress established that the Supreme Court “shall consist of a chief justice and five associate justices, any four of whom shall be a quorum, and shall hold annually at the seat of government two sessions, the one commencing the first Monday of Feb-

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of the Court), so the comparison to the United States, although not identical, remains strong.

51. This check on judicial power might even seem necessary in countries like the United States and Italy whose apex courts consist of members unelected by the general populace. Though the political actors who appoint the constitutional court judges are mostly elected themselves, such an arrangement still remains one step removed from a directly elected constitutional court.

52. Richard H. Fallon, Jr. currently serves as the Story Professor of Law at Harvard Law School. See Richard H. Fallon, Jr., HARVARD LAW SCHOOL, <https://hls.harvard.edu/faculty/richard-h-fallon/>. Fallon has “written extensively about Constitutional Law and Federal Courts Law.” *Id.*

53. FALLON ET AL., *supra* note 24, at 20.

54. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (establishing the federal judiciary). For a fuller historical perspective on the Judiciary Act of 1789, which is beyond the scope of this Article, see, for example, ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789 (Maeva Marcus ed., 1992); Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421 (1989); and Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990).

ruary, and the other the first Monday of August.”<sup>55</sup> That same Act founded the lower federal courts over which the Supreme Court would exercise ultimate appellate jurisdiction.<sup>56</sup>

Over the next two centuries, Congress would further exercise its authority to define federal court jurisdiction.<sup>57</sup> It is beyond the scope of this article to give an exhaustive list of these congressional enactments.<sup>58</sup> Instead, for purposes of analyzing how the Supreme Court selects cases under its discretionary appellate jurisdiction, it is important to examine the relevance of three congressional acts enacted around the turn of the twentieth century. First, the Judiciary Act of 1891, also known as the Evarts Act,<sup>59</sup> is famous for creating the feder-

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55. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73.

56. *Id.* at §§ 2–5. Chief Justice Marshall later wrote of the Supreme Court’s responsibility to exercise jurisdiction over lower court cases: “It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution.” *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

57. Chemerinsky comments on one type of congressional enactment, the so-called “jurisdiction stripping” bill, and the apparent motive behind most such bills that Congress might propose against federal court jurisdiction in some area:

The obvious purpose of most jurisdiction stripping bills is to *achieve a change in the substantive law by a procedural device*. . . . Unable to directly overrule the Supreme Court, opponents of these decisions believe that they might achieve a substantive change in the law by limiting federal court jurisdiction. Without lower federal courts or the Supreme Court to protect particular rights, the litigation would be entirely in state courts with no review in the federal judicial system.

CHEMERINSKY, *supra* note 24, at 182 (emphasis added).

58. Richard Fallon provides a helpful summary of materials cataloging the historical developments of congressional authority over federal court jurisdiction:

Still perhaps the most valuable source on the sequence of federal judiciary acts is FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928). For a useful summary, see Bator, *Judicial System, Federal*, 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1068-75 (1986). For a brief but valuable description of the historical development of the jurisdiction of the lower federal courts, see Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L.Q. 499, 507-15 (1928).

FALLON ET AL., *supra* note 24, at 21 n.3; *see also id.* at 26–30 (noting congressional reforms of federal court jurisdiction from the Antebellum years through the beginning of the twentieth century).

59. Act of March 3, 1891, ch. 517, 26 Stat. 826.

al circuit courts of appeals and abolishing the Supreme Court justices' requirement of "riding circuit"<sup>60</sup> to hear lower court cases.<sup>61</sup> The Evarts Act also introduced an innovative procedure in 1891 that is taken for granted today: the Supreme Court could now exercise discretionary review of federal decisions on writ of certiorari.<sup>62</sup> Second, in the Act of December 23, 1914,<sup>63</sup> Congress "expanded the Supreme Court's appellate jurisdiction to encompass for the first time cases in which a state court rendered a decision favorable to a claim of federal right,"<sup>64</sup> once

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60. "Riding circuit" was one of the least popular aspects of serving as a Justice of the United States Supreme Court:

When Congress created the U.S. circuit courts as the primary trial courts of the federal judiciary, it did not create judgeships assigned exclusively to those courts. Instead, the local U.S. district court judge and two justices of the Supreme Court were to preside in the circuit courts. Under the practice known as "circuit riding," each justice was assigned to one of three geographical circuits and traveled to the designated meeting places within the districts of that circuit. The travel was arduous, and after a plea from the justices, Congress reduced the number of justices designated to hold circuit court from two to one. In 1801, when the Federalist majority in Congress established new circuit courts with their own judges, circuit riding ceased, but it began again when the 1801 reorganization was repealed the following year. Not until 1869 did Congress again create separate circuit judgeships, and while this development did not end circuit riding completely, it greatly lessened its burdens upon the justices. In 1911 Congress abolished the circuit courts, thereby eliminating circuit riding.

*Circuit Riding*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/timeline/circuit-riding>. But although the Justices do not literally "ride circuit" anymore, they still do some tasks for the circuit court of appeals to which they are assigned. *See id.* at 1 ("The law has continued to require the Chief Justice to allot the justices to the judicial circuits, however, for which they perform occasional duties such as ruling on applications for emergency actions.").

61. Act of March 3, 1891, ch. 517, 26 Stat. 826; *see also* FALLON ET AL., *supra* note 24, at 29 ("The Act, which finally absolved the Justices of the Supreme Court of their obligation to 'ride circuit,' established circuit courts of appeals, consisting of three judges each, for each of the nine existing circuits.").

62. *Id.*; *see also* FALLON ET AL., *supra* note 24, at 30 ("With respect to the Supreme Court's appellate jurisdiction, the Evarts Act introduced the then revolutionary, but now familiar, principle of discretionary review of federal judgments on writ of certiorari."). *See also* Roger Foster, *Recent Decisions Under the Evarts Act*, 1 YALE L.J. 95 (1892).

63. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

64. FALLON ET AL., *supra* note 24, at 30.

again providing for review “by writ of certiorari.”<sup>65</sup> Third, in the Act of February 13, 1925,<sup>66</sup> often called the Judges’ Bill,<sup>67</sup> Congress greatly expanded the Supreme Court’s discretionary review to where it remains today.<sup>68</sup>

Presently, the jurisdiction of the Supreme Court is codified in several provisions of Title 28, Chapter 81 of the United States Code.<sup>69</sup> First, 28 U.S.C. § 1251 provides for the Supreme Court’s original jurisdiction, thereby distinguishing the concept of original jurisdiction and *exclusive* jurisdiction.<sup>70</sup> Second, 28 U.S.C. § 1253 establishes the

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65. *Id.* The specific provision of the U.S. Code that the 1914 Act amended is 28 U.S.C. § 1257, discussed *infra* note 73.

66. Judiciary Act of 1925, 43 Stat. 936 (1925).

67. The Act was commonly called the “Judges’ Bill” because “it was drafted by a committee consisting of Justices Willis Van Devanter, James McReynolds, and George Sutherland.” Jake Kobrick, *The Role of the U.S. Courts of Appeals in the Federal Judiciary*, FED. JUDICIAL CTR. (last visited Dec. 16, 2022), <https://www.fjc.gov/history/courts/Role-of-the-Courts-of-Appeals>.

68. William Howard Taft, who served as the 27th President of the United States from 1909 to 1913, became the 10th Chief Justice of the United States in 1921. Chief Justice Taft strongly pushed for enacting the Judges’ Bill: “The Supreme Court’s gradual jurisdictional about-face over the past two centuries is owed largely to the efforts of Chief Justice William Howard Taft, who drafted and lobbied for the instrument that made the Court what it is today: the Judiciary Act of 1925.” Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, J. OF SUP. CT. HIST., Feb. 19, 2008, at 2. The Supreme Court Case Selections Act of 1988 removed most of the Supreme Court’s *mandatory* jurisdiction, which furthered the discretionary nature of the Court’s appellate review. *See generally* Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988).

69. The following U.S. Code sections do not proceed in numerical order because some sections have since been repealed, and the remaining sections do not change number when a section within the same chapter is repealed.

70. 28 U.S.C. § 1251 concerning the Supreme Court’s original jurisdiction provides:

- (a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.
- (b) The Supreme Court shall have original but not exclusive jurisdiction of:
  - (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;
  - (2) All controversies between the United States and a State;
  - (3) All actions or proceedings by a State against the citizens of another State or against aliens.

Supreme Court's review of direct appeals from district courts' three-judge panels.<sup>71</sup> Third, 28 U.S.C. § 1254 provides for Supreme Court review of court of appeals' decisions by either a writ of certiorari or question certification.<sup>72</sup> Fourth, 28 U.S.C. § 1257 establishes that the Supreme Court of the United States may review decisions of *state* supreme courts, but only in limited circumstances.<sup>73</sup> Fifth, 28 U.S.C. § 1258 provides for Supreme Court review of decisions by the Supreme

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28 U.S.C. § 1251.

71. 28 U.S.C. § 1253 concerning the Supreme Court's appellate jurisdiction over direct appeals from three-judge panels of district courts provides:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1253.

72. 28 U.S.C. § 1254 concerning the Supreme Court's appellate jurisdiction to review court of appeals' cases provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1254.

73. 28 U.S.C. § 1257 concerning the Supreme Court's appellate jurisdiction over state supreme court decisions in limited circumstances provides:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question *or* where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, *or* where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C. § 1257 (emphasis added).

Court of Puerto Rico.<sup>74</sup> This section uses virtually identical language as § 1257(a) but gives a unique code section to Puerto Rico for its designation as a United States territory instead of a state.<sup>75</sup> Sixth, 28 U.S.C. § 1259 establishes the Supreme Court's limited review of decisions by the Court of Appeals for the Armed Forces.<sup>76</sup> Finally, 28

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74. 28 U.S.C. § 1258.

75. *Id.* concerning the Supreme Court's appellate jurisdiction over decisions by the Supreme Court of Puerto Rico in limited circumstances provides:

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question *or* where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, *or* where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1258 (emphasis added).

76. 28 U.S.C. § 1259 concerning the Supreme Court's appellate jurisdiction over certain decisions by the Court of Appeals for the Armed Forces provides: Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

- (1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.
- (2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.
- (3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.
- (4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

28 U.S.C. § 1259. For reference, 10 U.S.C. § 867(a) provides:

(a) The Court of Appeals for the Armed Forces shall review the record in—

- (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;
- (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General, after appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps, orders sent to the Court of Appeals for the Armed Forces for review; and
- (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

U.S.C. § 1260 provides for Supreme Court review of decisions by the Supreme Court of the Virgin Islands, using identical language, *mutatis mutandis*, as Section 1258 for decisions by the Supreme Court of Puerto Rico.<sup>77</sup>

## 2. Constitutional Court of Italy

Although the Constitutional Court of Italy was “born” with the Constitution in 1948, it did not begin its work until 1956.<sup>78</sup> In these years, the Italian legislature passed both constitutional and ordinary laws to shape the function and jurisdiction of the Constitutional Court. First, the last project of the Constituent Assembly—the legislative body tasked with drafting the new Constitution of the Italian Republic—adopted Constitutional Law No. 1 of 1948.<sup>79</sup> This constitutional

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10 U.S.C. § 867(a).

77. 28 U.S.C. § 1260 concerning the Supreme Court’s appellate jurisdiction over decisions by the Supreme Court of the Virgin Islands in limited circumstances provides:

Final judgments or decrees rendered by the Supreme Court of the Virgin Islands may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question *or* where the validity of a statute of the Virgin Islands is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, *or* where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1260 (emphasis added).

78. See, e.g., *Cos’è la Corte costituzionale*, CORTE COSTITUZIONALE, <https://www.cortecostituzionale.it/jsp/consulta/istituzioni/lacorte.do> (last visited Nov. 28, 2022) (It.) (“La Corte costituzionale è il più giovane tra gli organi costituzionali della Repubblica: ‘nata’ con la Costituzione del 1948, ha cominciato a funzionare nel 1956.”) [“The Constitutional Court is the youngest of the constitutional bodies of the Republic: ‘born’ with the Constitution of 1948, it began to function in 1956.”]; see also CAROZZA ET AL., *supra* note 20, at 24 (explaining that the first members of the Constitutional Court “finally took their oath of office almost exactly eight full years after the approval of the new Constitution. The President of the Republic convened them to begin their first judicial term in January 1956, and the Court held its first public hearing three months later, on April 23, 1956.”).

79. *Legge Costituzionale no. 1, 1948*, NORMATTIVA: IL PORTALE DELLA LEGGE VIGENTE, <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge.costituzionale:1948-02-09;1!vig> (last visited Nov. 28, 2022); see also CAROZZA ET AL., *supra* note 20, at 19 (explaining that the Constituent Assembly “adopted Constitutional Law

law only had three substantive articles: Article 1 concerned the “incidental method” of Constitutional Court review; Article 2 created the “direct method” of Constitutional Court review; and Article 3 was “limited to establishing a series of guarantees of immunity” for the Constitutional Court’s judges.<sup>80</sup> Accordingly, the incidental method pertains to “constitutional questions,” which are initiated in the course of ordinary adjudication. When regular judges handling specific disputes believe that the applicable statute is unconstitutional, or have doubts about its validity, they stay the proceedings and certify the issue to the Constitutional Court.<sup>81</sup> The Constitutional Court receiving the question decides whether the statute is constitutional, and once it is deemed constitutional, it “is then for the ordinary judges who raised the question to decide the specific controversies in light of the answer

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No. 1 of 1948, entitled ‘Norms regarding judgments of constitutional legitimacy and on the guarantee of the independence of the Constitutional Court.’”).

80. CAROZZA ET AL., *supra* note 20, at 19 Carozza translates Article 1 of Constitutional Law No. 1 of 1948 as follows:

A question of the constitutional legitimacy of a law of the Republic or of an act having the force of law, raised *ex officio* or raised by one of the parties in the course of a proceeding *and not considered manifestly unfounded*, shall be submitted to the Constitutional Court for its decision.

*Id.* (emphasis added). Carozza then translated Article 2, in pertinent part, as follows:

When a Region claims that a law of the Republic, or an act having the force of law, intrudes upon the sphere of competence assigned to it by the Constitution, it may . . . bring forward a claim of constitutional legitimacy to the Court. . . . It also provides for the possibility of one Region to impugn the laws of another Region.

*Id.* For the original Italian text, see *Legge Costituzionale no. 1, 1948, supra* note 79. In Italian, the phrase “incidental method” is called *via incidentale*. See *Glossario della Corte Costituzionale: Giudizio di legittimità costituzionale delle leggi in via incidentale*, CORTE COSTITUZIONALE, <https://www.cortecostituzionale.it/jsp/consulta/link/glossario.do> (last visited Dec. 16, 2022) (“[È] il giudizio di costituzionalità promosso, nel corso di un processo, da un giudice che chiede alla Corte di vagliare la legittimità costituzionale di una norma di legge di cui deve fare applicazione.”). The phrase “direct method” is called *via principale* in Italian. See *Glossario della Corte Costituzionale: Giudizio di legittimità costituzionale delle leggi in via principale*, CORTE COSTITUZIONALE (last visited Dec. 16, 2022), <https://www.cortecostituzionale.it/jsp/consulta/link/glossario.do> (“[È] il giudizio di costituzionalità promosso dallo Stato avverso una legge regionale ovvero da una Regione avverso una legge dello Stato o di altra Regione.”).

81. VICTOR FERRERES COMELLA, *The Rise of Constitutional Courts, in CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE* 3, 7 (Yale Univ. Press, 2009).



provided by the [C]onstitutional [C]ourt.”<sup>82</sup> By contrast, the direct method permits Regions to bring the claim of constitutional legitimacy directly to the Constitutional Court, that is, not through the ordinary court system.<sup>83</sup>

Constitutional Law No. 1 of 1948 did not complete the project of organizing the Constitutional Court of Italy. Paolo Carozza<sup>84</sup> rightfully notes that “[e]ven after this constitutional statute, half the work of making the Constitutional Court functional still remained to be done. The ordinary law needed to define the procedural and technical requirements to activate the supervisory power of the Constitutional Court had yet to be adopted.”<sup>85</sup> Thus, after years of deliberation, the first Italian Parliament passed Constitutional Law No. 1 of 1953,<sup>86</sup> and Ordinary Law No. 87 of March 11, 1953,<sup>87</sup> to complete the organizational process and activate the Constitutional Court.<sup>88</sup> Finally, after

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82. *Id.*

83. *Id.*

84. In addition to serving on the Notre Dame Law School faculty, Professor Paolo Carozza currently serves as the United States member of the European Commission for Democracy through Law, also known as the Venice Commission. One focus area of his legal scholarship has been a comparative analysis of the Italian legal system. *See, e.g.*, *DIALOGUES ON ITALIAN CONSTITUTIONAL JUSTICE: A COMPARATIVE PERSPECTIVE* (Vittoria Barsotti, Paolo Carozza, Marta Cartabia, Andrea Simoncini eds., 2021).

85. CAROZZA ET AL., *supra* note 20, at 19.

86. *See L. COST. 11 Marzo 1953*, n. 1, G.U. Mar. 14, 1963, n.62 (It.). Compared to the 1948 constitutional law, this 1953 constitutional law was more detailed, comprising 15 articles instead of only three. *Id.* Carozza explains that this constitutional law, “requiring the application for the first time of the constitutional amendment procedure established in Article 138 of the Constitution, needed to be approved twice by each house of the legislature, each time by a two-thirds majority, and with the two votes occurring at least three months apart.” CAROZZA ET AL., *supra* note 20, at 20. The Parliament succeeded in passing the constitutional law by a wide margin. *Id.*

87. *Norme sulla costituzione e sul funzionamento della Corte costituzionale*, CORTE COSTITUZIONALE (last visited Nov. 29, 2022), [https://www.cortecostituzionale.it/documenti/istituzione/LEGGE\\_11\\_marzo\\_1953.pdf](https://www.cortecostituzionale.it/documenti/istituzione/LEGGE_11_marzo_1953.pdf).

88. Paolo Carozza emphasizes the enormity of this achievement by highlighting how Livio Paladin viewed the accomplishment: “Livio Paladin, one of the most noted scholars of Italian constitutional history, regarded [the approval of the laws activating the Constitutional Court] as the most important constitutional development in at least the first 20 years of the Republic.” CAROZZA ET AL., *supra* note 20 at

two years of political gridlock about the proper ideological orientation, the three appointing bodies succeeded in naming the Constitutional Court's first fifteen judges by the end of 1955.<sup>89</sup>

## II. CASE SELECTION MECHANISMS

Having analyzed the historical development and jurisdiction of both the Supreme Court of the United States and the Constitutional Court of Italy, it is now appropriate to examine how each apex court uses particular case selection mechanisms to choose which cases it will decide. The scope of Part II's analysis is limited to comparing the Supreme Court's discretionary review and the Constitutional Court's incidental method. These methods can be considered parallel because the apex courts both receive cases that have already been adjudicated in the lower courts. The same cannot be said for the Supreme Court's original jurisdiction and the Constitutional Court's direct review, for in these instances the case is brought directly to the apex court. Although the apex court judges still must exercise judgment in disposing of these cases, this article is limited to comparing the Supreme Court's discretionary review and the Constitutional Court's incidental method in an effort to maintain a relatively parallel procedural posture and thus minimize confusion.

### A. *Supreme Court of the United States*

The Supreme Court of the United States promulgates its own Rules to organize and manage its affairs vis-à-vis the parties arguing the case before it. Part III of the Rules of the Supreme Court of the United States addresses "Jurisdiction on Writ of Certiorari" in Rules 10 through 16.<sup>90</sup> Rule 10 first notes that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" and that "[a] petition for a writ of certiorari will be granted only for compelling reasons."<sup>91</sup> Rule 10 then lists non-dispositive factors that may influence

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21 (citing LIVIO PALADIN, *PER UNA STORIA COSTITUZIONALE DELL'ITALIA REPUBBLICANA* 130 (2004)).

89. *Id.* at 24.

90. *See* SUP. CT. R. 10–16.

91. SUP. CT. R. 10; *see also* *Certiorari*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An extraordinary writ issued by an appellate court, at its discretion, direct-

whether the Supreme Court will grant the writ of certiorari including circuit splits and state rules conflicting with federal law.<sup>92</sup> Rule 11 states that the Supreme Court will only grant the petition for a writ of certiorari *before* a federal court of appeals decides a case if the petitioner shows that “the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination.”<sup>93</sup> Rule 12 provides rules regulating practical matters, such as how to submit the petition for a writ of certiorari and proper decorum by involved parties.<sup>94</sup> Rule 13 regulates the time for petitioning the Supreme Court, requiring the petitioner to file the petition within 90 days of the entry of final judgment to be considered timely.<sup>95</sup> Rule 14 regulates the content of a petition for a writ of certiorari.<sup>96</sup> Rule 15 provides rules for opposition briefs, reply briefs, and

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ing a lower court to deliver the record in the case for review.”). The word “certiorari” comes from legal Latin meaning “to be more fully informed.” *Id.*

92. Rule 10 provides a list of factors that the Court may consider relevant when deciding whether to grant the writ of certiorari for a given case:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

SUP. CT. R. 10.

93. SUP. CT. R. 11 (citing 28 U.S.C. § 2101(e)).

94. SUP. CT. R. 12 (requiring, *inter alia*, that a regular petitioner file 40 copies of the petition but a petitioner *in forma pauperis* need only file an original petition and 10 copies).

95. SUP. CT. R. 13 § 1.

96. SUP. CT. R. 14 (requiring, *inter alia*, that the petitioner include the questions presented for review, a list of all parties and proceedings below, a table of contents and table of authorities if the petition exceeds 1,500 words, and citation to relevant legal provisions). Section 3 states that “[a] petition for a writ of certiorari

supplemental briefs.<sup>97</sup> Finally, Rule 16 establishes that “[a]fter considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.”<sup>98</sup>

The parties must adhere to these aforementioned Supreme Court Rules, which the general public can easily access online.<sup>99</sup> The Supreme Court’s decision whether to grant or deny the petition for a writ of certiorari is also promulgated in a public manner.<sup>100</sup> The Court’s *decision-making process* whether to grant or deny the petition, however, is made only behind closed doors. The justices discuss a case<sup>101</sup>

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should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Rule 33.” *Id.*

Rule 33 specifies particular word counts depending on the type of filing, ranging from 3,000 to 13,000 words. SUP. CT. R. 33(g).

97. SUP. CT. R. 15.

98. SUP. CT. R. 16.

99. To access the Rules of the Supreme Court, see *Rules of the Supreme Court of the United States*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/ctrules/2019RulesoftheCourt.pdf> (last visited Nov. 29, 2022).

100. Like the more well-known full opinions, the Supreme Court issues an opinion when denying or granting certiorari. The opinion is often brief in this context. *See, e.g., Tremelling v. United States*, 514 U.S. 1122, 1122 (1995) (“Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.”). Similar to dissents from the denial of rehearing en banc at the circuit courts, the Supreme Court justices also may write fully reasoned dissents from the denial of certiorari. *See, e.g., Elmore v. Holbrook*, 137 S. Ct. 3, 3 (2016) (Sotomayor, J., dissenting) (disagreeing with the Supreme Court’s denial of writ of certiorari).

101. The Supreme Court only grants certiorari in about 1% of cases per Term. *See Supreme Court Procedure*, SCOTUSBLOG, <https://www.scotusblog.com/supreme-court-procedure/> (last visited Nov. 29, 2022) (of the 7,000 to 8,000 cert. petitions filed each Term, the court grants cert. and hears oral argument in only about 80.”). Due to the sheer volume, a “cert pool” has been developed to sift through which cases have merit to present at the justices’ conference and which are frivolous. The justices’ law clerks are randomly assigned cases, and they analyze all the case materials and write a memo recommending granting or denying certiorari:

The cert pool clerk randomly assigned to the case reads the petition and all relevant materials included with it—such as a response or amicus briefs—and writes a preliminary memo that summarizes the proceedings and legal claims. The clerk concludes with a recommendation for how the Court should treat the petition. The pool memo is then distributed to the chambers of the participating Justices. Relying on the memo and other information, the Chief Justice circulates a list of the petitions he thinks deserve consideration by the Court at its next conference. This master list is called

during a conference and then vote whether to grant or deny the petition. The current practice is to require at least four votes in favor of granting the petition for the petition to be granted.<sup>102</sup>

The Supreme Court has generally trended towards granting fewer and fewer petitions for review in recent decades.<sup>103</sup> Such a downward movement has been observed by scholars, the general public, and the justices themselves.<sup>104</sup> The *cause* of this downward trend, however, is a source of constant and controversial debate.<sup>105</sup> All things being equal, the Supreme Court's discretionary review inevitably means not

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the “discuss list.” The Court summarily—without a vote—denies petitions that do not make the discuss list.

Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1226 (2012); see also ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 119 (2006).

102. This practice is known as the “Rule of Four.” Amy Howe explains that this “Rule of Four” is “the Supreme Court’s practice of granting a petition for review only if there are at least four votes to do so. The rule is an unwritten internal one; it is not dictated by any law or the Constitution.” Amy Howe, *Rule of Four*, SCOTUSBLOG, <https://www.scotusblog.com/election-law-explainers/rule-of-four/> (last visited Nov. 29, 2022). It is important to note that under the Rule of Four, “the court can grant review and hear oral argument even if a five-justice majority of the court prefers not to do so.” *Id.* Justices have referenced the Rule of Four in opinions. See, e.g., *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 521, 559 (1957) (Harlan, J., concurring in part) (“In my opinion due adherence to [the “Rule of Four”] requires that once certiorari has been granted a case should be disposed of on the premise that it is properly here, in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted.”). *But see id.* at 529 (Frankfurter, J., dissenting) (“The ‘rule of four’ is not a command of Congress. It is a working rule” or a “rule of thumb.”).

103. See, e.g., Owens & Simon, *supra* note 101, at 1225 (“Since the 2005 Term, the Court has decided an average of 80 cases per Term, far fewer than the roughly 200 cases it heard earlier in the twentieth century.”).

104. Justice Douglas, for example, commented almost half a century ago on the Supreme Court’s decreasing caseload: “I think the Court [today] is overstaffed and underworked . . . . We were much, much busier 25 or 30 years ago than we are today. I really think that today the job does not add up to more than about four days a week.” Michael Heise, Martin T. Wells & Dawn M. Chutkow, *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 NOTRE DAME L. REV. 1565, 1567 (2020) (citing WARD & WEIDEN, *supra* note 101, at 119).

105. *Id.* at 1570–73 (citing internal and external factors as well as ideological dispersion from inside and outside the Supreme Court).

only that the Court will decline to hear all possible cases but also that it will not hear all *meritorious* cases.<sup>106</sup> Accordingly, the decisions of the federal courts of appeals have increased influence, as they are ever more likely to be the final judgment issued in those cases.<sup>107</sup>

### B. Constitutional Court of Italy

When reviewing a case *in via incidentale*,<sup>108</sup> the Constitutional Court of Italy is not the first tribunal to consider the matter. On the contrary, an ordinary judge (called the judge *a quo* in this context) has heard the case and referred a question concerning the constitutional legitimacy of the law at issue to the Constitutional Court for its consideration.<sup>109</sup> The Constitutional Court is an apex court of mandatory jurisdiction, so if an ordinary judge refers a question, the Constitution-

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106. *But see* Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 CONST. COMMENT. 221, 224 (2016) (although the Supreme Court’s docket is discretionary, “its strategy in selecting cases should affect how it crafts its opinions—at least if the provision of guidance is among the Court’s core objectives. Case-selection may be discretionary and still create important obligations for the way in which judges go about their work.”).

107. *See* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 2 (2007) (“In large measure, it is the circuit courts that create U.S. law. They represent the true iceberg, of which the Supreme Court is but the most visible tip. The circuit courts play by far the greatest legal policymaking role in the United States judicial system.”).

108. *See Glossario della Corte Costituzionale: Giudizio di legittimità costituzionale delle leggi in via incidentale*, *supra* note 80 and accompanying text (the phrase *via incidentale* means “incidental method” in English).

109. Article 1 of Constitutional Law No. 1 of 1948 provides for the incidental method of judicial review:

A question concerning the constitutional legitimacy of a statute or of an act with the same force, raised by the judge on his own motion or upon request of one of the parties in the course of a judicial proceeding, and considered by the judge to be not manifestly unfounded, must be referred to the Constitutional Court for its consideration.

*L. COST.*, 9 novembre 1948, no. 1, G.U. Feb. 21, 1948 n.43 (It.); *see also* CAROZZA ET AL., *supra* note 20, at 54 (the procedures of the incidental method “can be considered concrete because the laws whose constitutionality is in doubt are considered in their concrete application to an actual controversy and not per se.”).

al Court must dispose of it in one way or another.<sup>110</sup> However, history has shown several ways that the Italian judicial system may functionally streamline the Constitutional Court's docket.

The first method concerns the interpretation of the word "judge" for purposes of the incidental method's judge *a quo*. The Constitutional Court has already construed the word "judge" more broadly and narrowly at different points in its history.<sup>111</sup> Thus, if the Constitutional Court were to believe that its docket had grown too unmanageable, there would be precedent for the Court to simply restrict the scope of the word "judge" for purposes of the incidental method. Accordingly, fewer ordinary judges would be eligible to refer constitutional questions to the Constitutional Court, which would then lead to the Court having fewer cases to adjudicate. Such a process would not happen overnight; interpretation on this macro-level scale would take years if not decades to achieve. But given the constitutional structure currently in place, the Constitutional Court has this interpretive method as an option to trim its mandatory docket *ex ante*.

The second method the Constitutional Court may streamline its caseload does not originate in the Constitutional Court itself or its members. Instead, it comes from how ordinary judges interpret the legal provisions in front of them. Ordinary judges seeking to follow past Constitutional Court decisions have sought to interpret the disputed provision in a manner consistent with the Constitution.<sup>112</sup> In

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110. CAROZZA ET AL., *supra* note 20, at 48 ("The Italian Constitutional Court only has mandatory jurisdiction and therefore lacks this power [of certiorari]. It must decide all the cases properly set forth before it.").

111. Carozza explains that during the first, earlier period from 1956 to 1971, the Constitutional Court construed the word "judge" broadly "in order to declare a great number of Fascist laws unconstitutional and to implement the new Constitution's values." CAROZZA ET AL., *supra* note 20, at 55. The only condition for a judge to be eligible for standing was that "the constitutional question be referred by a permanent part of the Judiciary, capable of rendering a final decision on the case (Judgments 129/1957 and 83/1966)." *Id.* However, the Constitutional Court changed its interpretive direction towards construing the word "judge" more narrowly since the early 1970s. Carozza posits that the "reason for the change in case law lies in the position that the Court has gained within the institutional system. The Constitutional Court is no longer a new and unprecedented body in search of authority." *Id.* at 56.

112. The Italian phrase for this interpretive methodology is *interpretazione conforme a Costituzione*. Angelo Giraldi, *L'interpretazione conforme a costituzione tra teoria e pratica*, ALTALEX (Feb. 13, 2015), <https://www.altalex.com/documents/news/2015/02/13/l-interpretazione-conforme-a-costituzione-tra-teoria-e-pratica>. *See*

other words, the ordinary judges interpret the provision *in accordance with* the Constitution, “*conforme a Costituzione*.”<sup>113</sup> This methodology means that ordinary judges sometimes “force the literal meaning of the text in order to save the statute and therefore do not refer it to the Constitutional Court.”<sup>114</sup> Analyzing this interpretive method as a mechanism to trim the Constitutional Court’s docket, it logically follows that if ordinary judges interpret the disputed provisions of their cases in a manner that avoids constitutional conflict, they will have fewer questions of constitutional legitimacy to refer to the Constitutional Court. And fewer questions referred means fewer cases that the Constitutional Courts must adjudicate. However, since the impetus to interpret in accord with the Constitution lies with ordinary judges and not the Constitutional Court itself, this docket-streaming method leaves the Constitutional Court with less control over ultimate outcomes. It is possible that the Court receives fewer questions, but this eventuality is not guaranteed. Even if the Constitutional Court issued express instructions mandating the *interpretazione conforme a Costituzione* method, ordinary judges can still creatively distinguish cases in a way that invites referring the constitutional question. Thus, this second method might be seen as a convenient conjunction to achieve docket-trimming outcomes, but it would be too strong to consider it among the Constitutional Court’s *own* docket-trimming devices.

The third method—the one most functionally parallel to the certiorari process in the Supreme Court of the United States—is the Constitutional Court’s use of procedural devices such as *manifesta inammissibilità*<sup>115</sup> and *manifesta infondatezza*<sup>116</sup> to quickly dispose of re-

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*also* CAROZZA ET AL., *supra* note 20, at 56 (“especially since the mid-1990s, ordinary judges collaborate with the Court: they do *not* refer questions if it is possible (even at times forcing the plain meaning of the constitutional text) to construct the challenged statute in a way that does not violate the Constitution.”).

113. Marta Cartabia, *Of bridges and walls: the “Italian Style” of constitutional adjudication*, Corte Costituzionale, 10 (2016), [https://www.cortecostituzionale.it/documenti/relazioni\\_internazionali/Bled\\_Juned\\_23\\_2016\\_fin.pdf](https://www.cortecostituzionale.it/documenti/relazioni_internazionali/Bled_Juned_23_2016_fin.pdf).

114. CAROZZA ET AL., *supra* note 20, at 49.

115. The English translation of this phrase is best as “manifest inadmissibility.” See IL QUADRO DELLE TIPOLOGIE DECISORIE NELLE PRONUNCE DELLA CORTE COSTITUZIONALE, 1.2 (M. Bellocci and T. Giovannetti eds., 2010) (It.) (“Una variante della decisione di inammissibilità semplice è rappresentata dalle pronunce di manifesta inammissibilità, con cui la Corte sottolinea come l’eccezione di costituzionalità risulti di facile e pronta soluzione (nel senso, appunto, dell’inammissibilità”). In English, the



translation of the description proceeds as follows: “A variant of the simple decision of inadmissibility is the judgment of manifest inadmissibility, with which the Court underlines as excluding constitutionality results in a quick and easy solution (in the sense of *inadmissibility*).” The following passage describes some reasons for the Constitutional Court to choose to rule by manifest inadmissibility:

Le ragioni che inducono la Corte ad optare per la formula della inammissibilità manifesta, in luogo della inammissibilità semplice, non sono sempre esattamente rilevabili, giacché i motivi che impediscono al giudice delle leggi di entrare nel merito della questione sono i medesimi che giustificano l’adozione di pronunce di inammissibilità semplice. Tuttavia, è opportuno ricordare che la dichiarazione di manifesta inammissibilità ha, sul piano formale e procedurale, la conseguenza di consentire alla Corte di pronunciarsi con ordinanza, anziché con sentenza, e di procedere in camera di consiglio, anziché in udienza pubblica.

*Id.* In English, the translation of this explanation proceeds as follows:

The reasons that lead the Court to opt for the formula of *manifest* inadmissibility in lieu of *simple* inadmissibility are not always exactly detectable, since the reasons that prevent the judge from entering into the merits of the question are the same that justify the adoption of the simple inadmissibility judgment. Nevertheless, it is appropriate to remember that the declaration of manifest inadmissibility has, on a formal and procedural level, the consequence of allowing the Court to rule by order rather than “sentence” (disposition or decision), and to proceed in chambers rather than in a public hearing.

(emphasis added). See also LE PRONUNCE DI INAMMISSIBILITÀ DELLA CORTE (M. Boni, ed. Feb. 2016), [https://www.cortecostituzionale.it/documenti/convegni\\_seminari/STU\\_292.pdf](https://www.cortecostituzionale.it/documenti/convegni_seminari/STU_292.pdf).

116. In English, this phrase translates as “manifest unfoundedness.” See IL QUADRO DELLE TIPOLOGIE DECISORIE NELLE PRONUNCE DELLA CORTE COSTITUZIONALE, *supra* note 115, at 2.1:

Al pari di quanto si è visto accadere con riferimento alle pronunce processuali di inammissibilità, anche per quanto riguarda le decisioni di rigetto la Corte può giungere ad una dichiarazione di manifesta infondatezza della questione. Tale pronuncia è espressamente prevista dall’art. 29 della legge n. 87 del 1953, la quale fa riferimento all’ordinanza “con la quale è dichiarata la manifesta infondatezza dell’eccezione di incostituzionalità.

In English, this description translates as follows:

Like what has been seen to happen with reference to procedural judgments of inadmissibility, the Court in rejection decisions too can reach a declaration of manifest unfoundedness of the question. Such a judgment is expressly provided for in Article 29 of Ordinary Law No. 87 of 1953, which makes reference to the order “with which the manifest ungroundedness of the objection of unconstitutionality is declared.”

ceived constitutional questions.<sup>117</sup> Although the declarations indicate what they say—the constitutional question brought by the judge *a quo* was either manifestly inadmissible or manifestly unfounded, and accordingly, to be summarily dismissed—there might be hidden meaning if one reads between the lines: the Constitutional Court increasingly uses these mechanisms as a deterrent perhaps to suggest that the ordinary judge referred the case improperly.<sup>118</sup> The effect of these procedural mechanisms on the Constitutional Court’s docket must be viewed on two tiers. The first tier—the disposition for the specific case adjudicated—results in a direct trimming of the Court’s docket, since the Court summarily disposes of the case in a quick, efficient manner. That case no longer clogs the mandatory docket because it has already been resolved. The second tier—the macro-level effects across the entire judicial system from the Court’s habitual use of these mechanisms—might also result in a trimmer docket but in a more indirect way. On this tier, the Constitutional Court imposes discipline by issuing these summary decisions. Ordinary judges receiving these decisions might feel rebuked and thus refrain from referring as many constitutional questions to the Constitutional Court in the future. Thus, on a macro-level spread across the entire Italian judiciary, the Court’s consistent use of summary decisions might lower the number of incidental method cases the Court must adjudicate.

In sum, the Constitutional Court may indirectly consider these three methods as viable options to trim its mandatory docket. It is not likely that any one of these methods would be sufficient in of itself to trim the Court’s docket to the level that the Court’s members might prefer. But some combination of the methods might be effective in the long run to lessen the Court’s caseload.

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117. See CAROZZA ET AL., *supra* note 20, at 49 (these procedural mechanisms may “discourage[] ordinary judges from referring constitutional issues”); see *id.* at 56 (“these summary decisions seem to be used as a hidden means of case selection.”).

118. *Id.* at 58 (“The Court has increasingly used summary decisions of *manifesta inammissibilità* and *manifesta infondatezza* to suggest that judges have misused or abused their referring powers.”).

### III. COMPARING THE APEX COURTS' CASE SELECTION MECHANISMS

A proper comparison of the case selection mechanisms available to the United States Supreme Court and the Constitutional Court of Italy must contemplate both formal and functional considerations. On the one hand, several formal differences exist between these apex courts. For example, the number of court judges and their appointment;<sup>119</sup> American discretionary jurisdiction versus Italian mandatory jurisdiction;<sup>120</sup> and American centralization in the certiorari process versus Italian decentralization with the referring judge *a quo*.<sup>121</sup> On the other hand, the ultimate *result* might often be the same between apex courts: by the Supreme Court of the United States denying certiorari<sup>122</sup> and the Constitutional Court of Italy issuing a decision of manifest inadmissibility or unfoundedness,<sup>123</sup> both cases are resolved and removed from the courts' dockets efficiently.

It may be tempting to retreat to pure formalism or pure functionalism when evaluating the similarities and differences between these apex courts. On the extreme of pure *formalism*, one could conclude that the formal differences between the courts prevent any meaningful comparisons to be made in the first place. In this manner, the project of comparing the apex courts would be doomed from the beginning. On the opposite extreme of pure *functionalism*, one could decide that since the outcomes can be the same in both courts, the formal differences do not matter because both courts arrive at the same result. Both of these extreme views are susceptible as polemics and resist a more nuanced, balanced approach to these apex courts' distinctive qualities.

This article offers a conclusion that aligns with the moderate structural nature of these courts: a *via media* outlook between pure formalism and pure functionalism is appropriate. A brasher conclusion at either extreme is not warranted precisely due to *how much discretion* these constitutional judges have and yet, simultaneously and paradoxically, *how little control* they have. Considering the method of the Supreme Court of the United States, the certiorari process is formally

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119. See *supra* notes 12–16 and accompanying text.

120. See *supra* notes 90–93 and 108–118 and accompanying text.

121. See *supra* notes 101–104 and 111–117 and accompanying text.

122. See *supra* notes 102–107 and accompanying text.

123. See *supra* notes 115–118 and accompanying text.

established as a tool of judicial discretion and remains 99% effective per annum at trimming the Court's docket. With the power of that discretion, it *is* possible for the Court to only grant certiorari for the types of cases it wants to accept and decline cases dealing with other areas of the law. At the same time, the Rule of Four effectively means that no one justice alone can accept a case but rather must convince three other justices to agree to grant certiorari. This check on individual power makes it much harder for the Court to consistently grant or deny cases based solely on policy preferences of the individual justices. Such a check is a prudent policy of democratic accountability, meaning no one justice or even small factions of justices can exert a long-lasting vision for the Court's selected case trajectory.

Similarly with the Constitutional Court of Italy, several methods exist to circumvent the Court's mandatory jurisdiction. Like the Supreme Court of the United States, the Constitutional Court of Italy could align its use of these mechanisms only to employ them against cases it does not want to hear. But these strategies are also vulnerable to relying on ordinary judges outside the Constitutional Court's direct control or, in the methods of interpretation and summary decisions, requiring a long time to observe meaningful effects. Moreover, using summary decisions all too frequently presents a risk that these tactics could be seen as manipulative and disparaging of the Court's mandatory docket and thus turn public opinion against the Constitutional Court.

Accordingly, this article recognizes the tension between a high level of judicial discretion and yet a low level of judicial control observed in both apex courts. Therefore, this article concludes that although the Supreme Court of the United States and the Constitutional Court of Italy could employ case selection mechanisms in a way to make their outcomes *functionally* alike, the number of factors outside of the judges' control renders that possibility difficult to achieve. It is far more likely that the procedural mechanisms employed by the Constitutional Court of Italy to efficiently dispose of cases from its mandatory docket will remain an *analogy* to or an *approximation* of the Supreme Court of the United States' discretionary review. How tight the analogy fits will ebb and flow over time, but the Constitutional Court's lack of full control will likely never completely offset its *formal* differences compared to the Supreme Court of the United States.

## CONCLUSION

Part I of this article examined the legal and historical development of both the Supreme Court of the United States and the Constitutional Court of Italy, with particular focus on the constitutional and statutory foundations of these apex courts. Part II then analyzed the case selection mechanisms that the Supreme Court of the United States and the Constitutional Court of Italy use to reduce their caseloads. Although the Supreme Court of the United States has the power of discretionary review while the Constitutional Court of Italy has mandatory jurisdiction over its cases, strategic employment of these mechanisms could allow the Constitutional Court to arrive at a similar outcome to the Supreme Court's shrinking docket. Part III compared these case selection mechanisms directly and recognized that both apex courts face the paradox of simultaneous discretion and lack of control. This article has thus concluded that when comparing how these apex courts choose cases, it is proper to adopt a *via media* approach, one that considers both the formal differences and functional similarities of these apex courts' case selection mechanisms. Such a conclusion identifies the courts' present circumstances and deduces a moderate, *via media* approach from those facts. It does not operate by starting with what one might *want* to be or think is the *best* way to approach trimming an apex court's docket. Instead of seeking aspirational viewpoints, this article discovered how these case selection mechanisms really work in practice. As a result, comparing the two apex courts, this article reached a conclusion that seeks a virtuous mean between the two extremes of pure formalism and pure functionalism.