The United States Experience

Hans A. Linde

The American Journal of Comparative Law, Vol. 20, No. 3. (Summer, 1972), pp. 415-430.

Stable URL:
http://links.jstor.org/sici?sici=0002-919X%28197222%2920%3A3%3C415%3ATUSE%3E2.0.CO%3B2-9

The American Journal of Comparative Law is currently published by American Society of Comparative Law.

HANS A. LINDE

The United States Experience

I. Introduction

The preceding papers by Judge Rupp-v.Brünneck and Professor Vigoriti on the admonitory functions of the German and Italian constitutional courts invite a look at comparable practices in the U.S. In looking for analogies, however, it is worth beginning with a reminder of the differences between the institutions to be compared.

These differences lie in the structures of the courts, in the characteristics of the systems of law, and in the traditions of judicial style. With respect to judicial review of the constitutionality of legislation, they have recently been admirably summarized by Professors Cappelletti and Geck.[1] Central are the facts that American courts, including the U.S. Supreme Court, are not special "constitutional courts" and that review of the validity of statutes is not the chief form of constitutional adjudication. These and other differences affect the comparison of how courts address the lawmaking institutions, though they do not vitiate it. Where similar functions need to be served and similar problems solved, useful analogies may be found despite the differences.

Briefly, constitutional issues in the United States are raised and decided daily in litigation in the ordinary courts, state as well as federal. Unlike the constitutional courts of Germany and Italy, the U.S. Supreme Court and its counterparts in the several states are simply the highest appellate courts in their respective jurisdictions,[2] with no special responsibility for the constitutional questions that, by the very hypothesis of the appeal, should have already been decided by the court of first instance. Consistently with this premise, also, these American courts are not marked by distinctive rules of composition, qualifications, or method of selection like European constitutional courts; nor do the underlying concerns about the difference in outlook and style between professionally narrow and politically sensitive judges arise in the absence of a career, civil-service judiciary. Judicial review in the United States is thus both "decentralized" and "incidental" to conventional litigation, although constitutionality alone may sometimes be raised as the principal or only is-

Hans A. Linde is Professor of Law, University of Oregon.

1. Cappelletti, *Judicial Review in the Contemporary World* (1971); Geck, "Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices," 51 *Corn. L.Q.* 250 (1966).

2. The U.S. Supreme Court also has original jurisdiction in certain classes of cases, e.g. suits between states, U.S. Const. art III, s. 2.

sue, particularly in the form of suits for injunction or declaratory judgment.[3] Realistically viewed, professional and public opinion may not regard a serious constitutional question as really settled unless the U.S. Supreme Court has decided it; but both in theory and fact, lower courts constantly pronounce constitutional judgments and effectively direct governmental action into forms that they deem constitutionally required.[4]

Secondly, the characteristics of American federalism, with its dual system of state and federal courts, shape the relevant judicial practices in at least two ways. Federal law is, at least in theory, derived from legislation. But the state courts, which handle by far the largest volume of litigation, work in a common law tradition which is neither preoccupied with nor particularly respectful of legislation, and which takes for granted judicial responsibility for the substance and quality of law. In this tradition the question whether to change the law judicially or leave the change to the lawmaker poses a deliberate choice of strategies, and one on which judges can openly differ. Also, federalism affects our present topic insofar as state courts have final authority to interpret and apply state law, thus depriving federal courts of the opportunity to avoid constitutional holdings by means of a saving construction of the challenged state law.

Finally, the style of judicial suggestions to the lawmaker reflects the difference between the continental tradition of formal, anonymous, collegial judgments and the common law custom of signed opinions, including concurrences and dissents, with its opportunities for more personalized discussion of underlying assumptions, reasons, and policy critiques.[5]

Despite these variations, courts in each system face common problems—problems of fitting legislation to constitutional or other compelling judicial premises, of accommodating the process and effects of change, and of stimulating needed legislative action. The need may be to give advance warning that an established rule of law is being eroded by changes in social realities or in judicial doctrine. Or it may be to provide an opportunity for government to comply with a changed rule that it could not have reasonably an-

3. See Cappelletti, supra n. 1 at 46, 69 for the classification of judicial review into a "decentralized," or "American" model and the "decentralized" or "Austrian" model attributed to Hans Kelsen, and into review "incidenter" and "principaliter".

4. An example is the current rash of federal decisions reviewing public school dress and haircut regulations under constitutional premises that the Supreme Court has fastidiously avoided examining; see e.g. Bishop v. Colaw, 450 F.2d 1069 (CA 8 1971) and many cases there cited; Note, 84 *Harv. L. Rev.* 1702 (1971).

5. Cf. Nadelmann, "Non-Disclosure of Dissents in Constitutional Courts: Italy and West Germany," 13 *Am. J. Comp. L.* 268 (1964); Nadelmann, "The Judicial Dissent—Publication v. Secrecy," 8 *Am. J. Comp. L.* 415 (1959), for a review of the debate over the continental practice.

ticipated. It may be to tell the legislature not only why its attempt to deal with a problem failed, but whether any other way to deal with it could constitutionally succeed, and how. The lawmaker may be seeking this kind of assurance in advance of taking action, particularly complicated or expensive action. Finally, the judicial objective may be to compel legislative attention to a problem that the court cannot solve, but that would not otherwise have engaged political interest. These and other needs to inform and even "admonish" the legislature often arise in the context of measuring governmental obligations by constitutional norms, but not exclusively so.

II. Advisory Opinions and Prospective Overruling

One form in which some of these objectives are sometimes pursued may be distinguished at the outset: the advisory opinion. Observers preoccupied with the practice of judicial review by the U.S. Supreme Court sometimes overlook the long history, in a number of states, of direct judicial advice to coordinate branches of government beginning even before the U.S. Constitution.[6] The concept has attracted attention from time to time, particularly during periods of marked judicial activism in striking down legislation. Thus Manley O. Hudson called upon the example of the practice in England and in the states, as well as in the newly established Permanent Court of International Justice, at a time when declaratory judgment acts were still widely questioned in the U.S.,[7] only to draw from his colleague Felix Frankfurter an instant *caveat* against advisory opinions on the constitutionality of statutes. "The reports are strewn with wrecks of legislation considered *in vacuo* and torn out of the context of life which evoked the legislation and alone made it intelligible," Frankfurter wrote. "The advisory opinion deprives constitutional interpretation of the judgment of the legislature upon facts, of the effective defense of legislation as an application of settled legal principles to new situations, and of the means of securing new facts through the process of legislation within the allowable limits of trial and error. . . . Advisory opinions are rendered upon sterilized and mutilated issues."[8]

A survey published a quarter century later showed that advisory opinions were still in practical use in a number of states.[9] But advisory opinions remain peripheral to the American experience, both

6. Mass. Const. ch. III, art. 2 (1780); cf. the council of revision in New York Const. art. 3 (1777), cited in Note, "The Case for an Advisory Function in the Federal Judiciary," 50 *Geo. L.J.* 785, 788 n. 20 (1962). The Note lists eleven states in which the justices of the highest courts have some form of an advisory function and eight others in which it has once existed or been attempted. Ibid. at 788 n. 23, 789 n. 24.

7. Hudson, "Advisory Opinions of National and International Courts," 37 *Harv. L. Rev.* 970 (1924).

8. Frankfurter, "A Note on Advisory Opinions," 37 *Harv. L. Rev.* 1002, 1003, 1005-06 (1924).

9. Field, "The Advisory Opinion—An Analysis," 24 *Ind. L.J.* 203 (1949).

on account of their relative rarity and their distinctive characteristics. First, they are rendered at the initiative of the state legislature or executive, and upon a proposed law or similar question posed by it. The question presented is often not briefed or argued by adverse parties, though private interests may, of course, stimulate the request presented by the governmental agency. The subjects to which advisory opinions lend themselves are more often questions relating to the structure and powers of state government than to individual rights or other issues depending on the facts of concrete situations. They fall outside the present topic also because the advice given is that of the *justices*, not of the *court* (except in Colorado); hence advisory opinions cannot claim the force of *stare decisis*, and seem to stimulate fewer dissents or individual opinions than do constitutional adjudications.[10] Whatever their merits in the states or in other federal systems like Canada,[11] formal advisory opinions are precluded in the U.S. federal courts by art. III of the Constitution, which extends the judicial power of the U.S. only to "cases" or "controversies".[12]

Another device distinguishable from judicial "admonitions" to government, though similarly serving to mitigate the immediate effects of a decision with far-reaching impact, is the technique of giving the new doctrine only prospective application from the date of the case in which it is announced. This may give the government an opportunity to change laws or practices so as to meet the new requirements before they are widely applied. Recent use of this technique by the U.S. Supreme Court to avoid the retroactive impact of rapid developments in enforcing constitutional criminal procedures has not escaped dissent and criticism.[13] Later we shall see that this device of "prospective overruling", which is not peculiar to constitutional law, may be stretched to serve as an express and formal

10. Ibid. 208-20.

11. Wagner, *The Federal States and Their Judiciary* 279-97 (1959); Wagner, "Advisory Opinions in the Federal Judiciary—A Comparative Study," 27 *U. Kan. City L. Rev.* 86 (1958).

12. U.S. Const. art. III, s. 2. The Supreme Court's denial of an advisory function outside litigation is generally traced to Chief Justice John Jay's refusal in 1793 to respond to 29 questions submitted by President George Washington and Secretary of State Thomas Jefferson concerning legal aspects of Washington's neutrality policy. See Hart and Wechsler, *The Federal Courts and the Federal System* 75-77 (1953); Note, supra n. 6 at 802; Muskrat v. United States, 219 U.S. 346 (1911). Whatever the modern view of *Muskrat* on its facts, its rejection of advisory opinions was restated in Flast v. Cohen, 392 U.S. 83, 94-5 (1968).

13. Linkletter v. Walker, 381 U.S. 618 (1965); Desist v. United States, 394 U.S. 244 (1969); Jenkins v. Delaware, 395 U.S. 213 (1969); Williams v. United States, 401 U.S. 646 (1971); Mackey v. United States, 401 U.S. 667 (1971); United States v. United States Coin & Currency, 401 U.S. 715 (1971); United States v. White, 401 U.S. 745 (1971); Mishkin, "The Supreme Court—1964 Term. The High Court, the Great Writ, and the Due Process of Time and Law," 79 *Harv. L. Rev.* 56 (1965); Schwartz, "Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin," 33 *U. Chi. L. Rev.* 719 (1966).

prompting of legislative action. However, as employed by the federal Supreme Court, it differs from an "admonitory" function insofar as it does commit the Court to a rule binding for the immediate case and, absent a subsequent change, for the future.

Finally, it should be noted that courts may be empowered by law to make or to recommend legally binding rules for their own operations and procedures. The U.S. Supreme Court, for instance, has statutory authority to make rules of criminal, civil, and admiralty procedure, which must be reported to Congress for its possible consideration ninety days before they go into effect.[14] Likewise, judicial suggestions to the legislature may often be given an institutional framework outside the courts as such, e.g. in judicial councils and law revision commissions. The California Judicial Council, established by the state constitution in 1926 and composed of judges, attorneys, and legislators, is directed to "make recommendations annually to the Governor and the Legislature."[15]

III. Advisory Techniques in Practice

Thus we turn to judicial opinions in normal adjudications for illustrations of how American courts pursue advisory objectives comparable to the more or less explicit ways in which courts elsewhere may call upon the government to act. In a provocative study published at the height of the "realist" critique of the Supreme Court's constitutional role a generation ago, Professor Albertsworth collected a number of examples of how the Court in fact performed the disclaimed "advisory" function.[16] One section dealt with the educational and advisory uses of dissents, pointing the way toward doctrinal modifications or toward legislative action left open by the majority opinion—a contribution of the common law mode of judicial expression that is unavailable to a tradition of formal judgments in which dissenting and concurring opinions are unknown. Majority opinions, too, he found, would expose statutory defects in a course of construing successive enactments, eventually compelling their legislative correction. Most interesting for the present topic, however, were his examples of dicta designed to advise Congress how to hurdle constitutional obstacles erected by the Court's decision. Thus the Federal Employers' Liability Act was amended to limit it to railroad employees while employed in interstate commerce, after being first invalidated expressly for lacking this limitation, and the amended act was promptly sustained.[17] In holding that a purported tax on

14. 18 U.S.C. 3771 (1948), 28 U.S.C. 2072, 2073 (1948).

15. Calif. Const. art VI, s. 6 (1926). Such a format can give judges the opportunity to recommend major legislative revisions or innovations, but it differs from a call for legislation by a court in deciding a case.

16. Albertsworth, "Advisory Functions in Federal Supreme Court," 23 *Geo. L.J.* 643 (1935).

17. Employers' Liability Cases, 207 U.S 463 (1908); Second Employers' Liability Cases, 223 U.S. 1 (1912); Albertsworth, ibid. at 652-53.

grain futures trading was really a regulatory penalty beyond Congressional power, the Court wrote that Congress apparently had not considered, as it might have, possible use of the federal commerce power and its limitations: the sales for future deliveries as such were beyond Congressional power "unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon."[18] A new Act promptly passed to regulate grain futures obediently recited that manipulation of futures markets obstructed interstate commerce and was sustained accordingly.[19] The Longshoreman's and Harbor Workers' Compensation Act was enacted in 1927 partly in response to a judicial suggestion, as an escape from a sequence of decisions that had invalidated Congressional efforts to save these workers' remedies under state compensation acts.[20] Illustrations of other federal laws written to the Court's order, and of similar coaching directed to the states, are collected in Albertsworth's article and need not be repeated here.[21]

When constitutional difficulties arose largely from the Supreme Court's efforts to delineate boundaries between limited Congressional and state powers, the task of judicial guidance was to indicate how, and how far, government might constitutionally pursue a legislative goal. But when constitutional adjudication turned from the scope of governmental power to alleged transgressions against constitutional guarantees, different "admonitory" techniques in judicial opinions were called for. Confronted with a plausible claim that a particular governmental action falls short of constitutional standards, a court may, and indeed should, first question whether the action is at all authorized by law before holding that the legislator actually commanded an unconstitutional act. In *Kent v. Dulles*,[22] for instance, the Supreme Court majority first expressed grave misgivings about State Department denials of passports to alleged Communist sympathizers as an invasion of a Fifth Amendment liberty to travel. It then concluded:

---

18. Hill v. Wallace, 259 U.S. 44, 69 (1922).

19. 42 Stat. 187 (1921); Board of Trade of City of Chicago v. Olsen, 262 U.S. 1 (1923); Albertsworth, supra n. 16 at 651-2.

20. 44 Stat. 1424 (1927), Washington v. Dawson & Co., 264 U.S. 219, 227 (1924); see Robertson, *Admiralty and Federalism* 207 (1970).

21. Albertsworth, supra n. 16 at 653-63. One historic enactment that could have been mentioned was the Interstate Commerce Act of 1887, which Mr. Justice Miller thought he had hastened by his opinion in Wabash, St. Louis and Pac. Ry. v. Illinois, 118 U.S. 557 (1886); see Fairman, *Mr. Justice Miller and the Supreme Court* 314 (1939). Regulation of interstate railroad rates, the Court said in *Wabash*, "can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution." 118 U.S. at 577. Mr. Justice Bradley's dissent likewise referred to "the power of Congress to make such reasonable regulations as the interests of interstate commerce may demand," though concluding that therefore the Supreme Court need not itself strike down the rates set by Illinois. 118 U.S. at 585-96.

22. 357 U.S. 116 (1958).

> To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.[23]

The following year, the Court applied the same technique to the government's procedures in revoking a security clearance needed by an engineer employed by a Defense Department contractor.[24] Chief Justice Warren's opinion spoke of confrontation and cross-examination, recognized in the Sixth Amendment with respect to criminal cases, as exemplifying a principle "relatively immutable in our jurisprudence": that whenever government action injurious to an individual depends on factual findings, the government's evidence must be disclosed so that the individual may prove that it is untrue.[25] The tone of the opinion implied constitutionally required procedures; but the Court's actual holding was that neither the Congress nor the President had expressly authorized the security procedures employed by the Department. Express authorization would be demanded not only to protect the individual concerned, "but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws."[26] The decision resulted in the adoption of revised regulations under an Executive Order that specified more liberal opportunities for cross-examination.[27]

Waving a constitutional warning flag while basing a decision on statutory interpretation does not always achieve its objective. After enactment of the Administrative Procedure Act in 1946, the question arose whether its provisions for separating the functions of prosecutor and judge applied to deportation proceedings.[28] In rejecting this contention by the government the Supreme Court wrote:

> Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to hu-

23. Ibid. 130. The constitutional issues were later reached in Aptheker v. Secretary of State, 378 U.S. 500 (1964), Zemel v. Rusk, 381 U.S. 1 (1965).

24. Greene v. McElroy, 360 U.S 474 (1959).

25. Ibid. 496.

26. Ibid. 507.

27. Exec. Order 10865, 25 Fed. Reg. 1583-84 (1960); see Note, "New Defense Department Regulation Provides for Limited Confrontation," 75 *Harv. L. Rev.* 434 (1961).

28. 60 Stat. 237, 240, 5 U.S.C. 1004(c) (1946).

> man liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.[29]

Congress was not impressed. Within two years it again placed hearing officers under the control of officials charged with investigating and prosecuting functions, contrary to the separation provided in the Administrative Procedure Act. But in the subsequent attack on due process grounds, the Supreme Court retreated from its earlier warnings and dismissed the constitutional challenge in a sentence.[30]

In these examples, the admonition consisted not so much in calling upon the government to do something as in warning it to accept the Court's construction of law to avoid constitutional difficulties. But this technique is available to federal courts only with respect to federal laws. It cannot be used in their review of federal constitutional claims against actions taken under a state law, whose interpretation and application by the state are final and binding upon the federal court. It is here that the position of federal courts, including the Supreme Court, is most analogous to that of a constitutional court, such as the Italian, that cannot itself impose a specific interpretation or application of law upon a case in another court but can only pass on its constitutionality. In cases of an appeal from state courts, all that the Supreme Court can do to induce a statutory construction compatible with constitutional requirements is to remand the case to the state court for reconsideration in the light of specified Supreme Court decisions that cast doubt on the constitutionality of the state's action, but it cannot itself reform the state's construction in order to save its constitutionality. On the other hand, when the constitutional attack is first mounted in a lower federal court, the Supreme Court has devised the doctrine of "abstention" to give the state court an opportunity to dispose of the issue upon consideration of the alleged federal objections.[31] Another variation occurred in the wake of the Supreme Court's decision that legislative seats be apportioned to districts on the principle of one man, one vote. In the enormous task of carrying out this constitutional reorganization, fed-

29. Wong Yang Sung v. McGrath, 339 U.S. 33, 50-51 (1950).

30. "The contention is without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters." Marcello v. Bonds, 349 U.S. 302, 311 (1955).

31. See e.g. Government & Civic Employees Org. Comm. v. Windsor, 353 U.S. 364 (1957); England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964).

eral courts that found a state's apportionment unconstitutional would await an effort by the state to substitute a valid alternative before taking on the job themselves.[32] Similarly, the recent decisions invalidating public school financing through local property taxes do not prescribe an alternative system but in effect direct the state legislatures to adopt one.[33]

Even though unable to alter a determination of state law once the case is before it, the Supreme Court has ways of nudging the state into conforming to constitutional standards. One is the pregnant pause before agreeing to take a case for review, a delay that may take years. Still, states often refuse to take a hint. In *Poe v. Ullman*,[34] the Court majority dismissed an appeal against an old Connecticut law prohibiting the use of contraceptives, because there was no evidence that Connecticut would really enforce the law, while two dissenters were ready to declare the law unconstitutional. Connecticut declined the invitation to repeal the useless statute and instead, by means of a test prosecution, issued a return invitation for its removal by the distant judicial, rather than by the locally vulnerable political, process. The Supreme Court obliged in *Griswold v. Connecticut*.[35] Another method is to invalidate a state law on grounds of "vagueness" rather than some more substantive constitutional defect, thereby inviting the state to reexamine and recast its policy with more precise attention to the deeper constitutional concern.[36]

But sometimes the Court goes even further toward shaping state law to its constitutional views. In the first of a long series of opinions on the status of "obscenity" under the First Amendment, the Court noted parenthetically that it "perceived no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code,"[37] thereupon affirming convictions under a federal and a state law neither written nor

32. See e.g. Scott v. Germano, 381 U.S. 407 (1965); cf. Swann v. Adams, 383 U.S. 210 (1966); Comment, "Reapportionment and the Problem of Remedy," 13 *U.C.L.A. L. Rev.* 1345 (1966).

33. Serrano v. Priest, 5 Cal.3d 584, 487 P.2d 1241 (1971); Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971). Although these decisions were not and quite possibly would not be rendered by the U.S. Supreme Court and dealt only with specific local systems of school financing, their hortatory impact brought them a reference in President Nixon's 1972 State of the Union message, promising reform in school finance. 118 Cong. Rec. H 158 (daily ed. Jan. 20, 1972).

34. 367 U.S. 497 (1961).

35. 381 U.S. 479 (1965). The inevitable holding that public school prayers were an unconstitutional establishment of religion was similarly delayed between Doremus v. Board of Education, 342 U.S. 429 (1952) and Abington School Dist. v. Schempp, 374 U.S. 203 (1963). Cf. also Naim v. Naim, 350 U.S. 891 (1955), 985 (1956), and Loving v. Virginia, 388 U.S. 1 (1967).

36. These and other forms of colloquy between the Supreme Court and the political institutions are discussed in Bickel, *The Least Dangerous Branch* 127-83 (1962), an indispensable book for students of judicial review in the United States.

37. Roth v. United States, 354 U.S. 476, 487 n. 20 (1957).

previously construed in the terms of that non-official draft code. The effect was to turn this text into the constitutional definition of suppressible "obscenity", and to force state as well as federal laws into this construction no matter how they were written. Later in its struggles with censorship of "obscenity", the Supreme Court in effect told the states exactly what procedures were required to escape the prior restraint and "chilling effect" forbidden by the Court's First Amendment doctrines.[38]

IV. Direct Admonition

Finally, we may turn to instances in which judges have directly appealed to legislators to make law. This may occur in the form of "prospective overruling" and is not, as already mentioned, peculiar to constitutional law. Illustrations are found in the widespread modern dissatisfaction of American state courts with the doctrines of charitable immunity and sovereign immunity in the law of torts. State legislatures have been notoriously laggard in tort law reform, but the courts have often felt constrained both by the rule of *stare decisis* and the feeling that legislatures have knowingly declined to alter these immunities.[39] The Supreme Court of Illinois in 1959 neverthless overruled the prior rule of immunity for school districts, thereby impelling the legislature to address itself to the whole problem of state immunity.[40] Perhaps emboldened by this success, the Minnesota Supreme Court next chose the unusual course of coupling notice of *purely* prospective overruling, not applied in the pending case, to a waiting period designed to bring legislative consideration and action.[41] In *Spanel v. Mounds View School District No. 621*,[42]

38. Freedman v. Maryland, 380 U.S. 51 (1965). "How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide," wrote the Court. "But a model is not lacking . . . ." (referring to New York procedures sustained in Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957)). 380 U.S. 51 at 60.

39. See Peck, "The Role of Court and Legislatures in the Reform of Tort Law," 48 *Minn. L. Rev.* 265 (1963), who cites many sources.

40. Molitor v. Kaneland Community Unit District No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959); Comment, "Governmental Immunity in Illinois: The Molitor Decision and the Legislative Reaction," 54 *Nw. U. L. Rev.* 588 (1959); Schaefer, "The Control of 'Sunbursts': Techniques of Prospective Overruling," 42 *N.Y.U. L. Rev.* 631 (1967). But in later dealing with a plea to abolish the defense of contributory negligence and replacing it with comparative negligence, the Illinois Supreme Court preferred to leave reform to the legislature: Maki v. Frelk, 85 Ill. App.2d 439, 229 N.E.2d 284 (1967), 40 Ill.2d 193, 239 N.E.2d 445 (1968), see "Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?" 21 *Vand. L. Rev.* 889 (1968).

41. The idea of the moratorium may well have stemmed from California, except that there it was enunciated by the legislature. After the Supreme Court of California abrogated the state immunity in its entirety on Jan. 27, 1961 in Muskopf v. Corning School District, 55 Cal.2d 211, 359 P.2d 457 (1961), the legislature proclaimed a moratorium until the 91st day after the end of the 1963 legislative session. In 1963 it passed a comprehensive Government Tort Liability Act.

42. 264 Minn. 279, 118 N.W.2d 795 (1962).

in which the plaintiff asked that the doctrine of governmental tort immunity be overruled, the Court first set the case for reargument with participation by various municipalities, bar associations, and the state attorney general. It then affirmed denial of plaintiff's claim, while announcing that the defense of sovereign immunity would no longer be available to local public entities "with respect to torts which are committed after the adjournment of the next regular session of the Minnesota Legislature."[43] The Court expressly recognized that its statement was pure dictum, but it was

> unanimous in expressing its intention to overrule the doctrine of sovereign tort immunity [though not for the state itself] . . . after the next Minnesota Legislature adjourns, subject to any statutes which now or hereafter limit or regulate the prosecution of such claims. . . . Counsel has assured us that members of the bar, in and out of the legislature, intend to draft and secure the introduction of bills at the forthcoming session which will give affected entities of government an opportunity to meet their new obligations.[44]

The opinion continued by referring to a number of specific procedural and substantive suggestions for processing tort claims against local governmental units. The Minnesota legislature responded by recodifying the whole law of governmental immunity during the following session.[45]

Most recently, the Supreme Court of Florida ruled that its century-old law against abortions was so "vague and indefinite" as to be unconstitutional. In a procedural innovation reminiscent of the delayed publication device described by Professor Vigoriti, the court delayed the effective date of its ruling for 60 days to permit the state legislature, then in session, to adopt revised legislation. During the interim, the court stated, prosecutions might proceed under the common law definition of abortion.[46]

Federal judges are not so free as state courts in twisting the arm of the legislative branch with forewarnings that they will take action unless the legislature does so, both because federal law is not of common law but of statutory origin and because the Congressional biceps is considerably more imposing. They will, however, occasionally appeal to Congress to legislate. The following case is illustrative. In Congressional committee investigations, a witness can

43. Ibid. at 281, 118 N.W.2d at 796.

44. Ibid. at 292-93, 118 N.W.2d at 803-04.

45. See Note, "The Minnesota Supreme Court 1962-1963," 48 *Minn. L. Rev.* 119, 198-203 (1963).

46. State v. Barquet, — Fla. —, — So.2d —, 40 LW 2586 (1972). The judicial substitution of the "common law offense of abortion" for the invalidated statute is not a convincing solution to the problem of the "gap"; if a "common law" offense is revived for this purpose, should legislators assume that it could continue to serve if they fail to agree on a bill? Could they "enact" the common law offense to which the Court referred?

test his procedural or substantive objections to the inquiry only by risking conviction for criminal contempt.[47] When a defendant in this plight argued before the Court of Appeals that a witness should be allowed to challenge the legality of the committee's procedures before a court without risking contempt, the court wrote: "This is not an unreasonable suggestion; in fact, this court some years ago made the same suggestion to Congress," having earlier asked Congress to "give sympathetic consideration to Judge Youngdahl's eloquent plea:"

> * * * Although this question is not before the Court, it does feel that if contempt is, indeed, the only existing method, Congress should consider creating a method of allowing these issues to be settled by declaratory judgment. Even though it may be constitutional to put a man to guessing how a court will rule on difficult questions like those raised in good faith in this suit, what is constitutional is not necessarily most desirable. . . .[48]

Noting, however, that Congress had failed to act on the suggestion, the court sustained the contempt conviction.

As a proper climax to this review of American judicial practice, we may note that no lesser dignitary than the Chief Justice of the United States recently made striking use of a judicial opinion to address personal recommendations to the Congress. The background is the recent history of judicial agonizing over the role of courts in enforcing constitutional procedures in law enforcement, particularly through rules excluding illegally obtained evidence, a development which also raised the problems of retroactivity already mentioned. In 1949 the Supreme Court had decided that, although the proscription of unreasonable searches or seizures was judicially enforced by exclusion of the evidence in federal courts,[49] due process did not compel this means of enforcing the same prohibition against the states.[50] States remained free, of course, to adopt the exclusionary rule on their own, as the Supreme Court of Delaware, for instance, did the following year.[51] A year later, Justice Carter of the Califorina Supreme Court, dissenting from the denial of a hearing to a defendant who had been forcibly stomach-pumped for evidence, wrote:

> In view of the disinclination of the members of this court to change this obviously erroneous rule [admitting unlawfully

47. 2 U.S.C. 192.

48. United States v. Fort, 443 F.2d 670, 678-79 (CA D.C. 1971), citing Tobin v. United States, 195 F. Supp. 588, 617 (1961), 306 F.2d 270, 276 (CA D.C. 1962).

49. Weeks v. United States, 232 U.S. 383 (1914).

50. Wolf v. Colorado, 388 U.S. 25 (1949). The final paragraph of the opinion is another example of hinting to Congress that a legislative solution to the constitutional problem may be possible; ibid. at 33.

51. Rickards v. State, 77 A.2d 199 (1950).

> seized evidence]. . . . . I am asking the Legislature of California to enact legislation which will force the courts of this state to uphold the constitutional provisions, 4th Amendment to the Constitution of the United States, Section 19 of Article I of the Constitution of California, guaranteeing the right of privacy to residents of this state. * * * Such a statute should provide: *"No evidence obtained in violation of Section 19, Article I of the Constitution or any law of the State of California shall ever be introduced or admitted or used for any purpose whatsoever in any Court of this State."*[52]

This particular conviction was reversed by the U.S. Supreme Court, but without adopting a general exclusionary rule.[53] On the next occasion the Court, while affirming a conviction on evidence obtained by outrageous, systematic "bugging" of the defendant's home, sought a remedy by referring the case to the Attorney General for investigation under a federal civil rights law, but without success.[54] Soon after, however, California changed to the exclusionary rule by decision of its supreme court rather than by the legislation Justice Carter had called for;[55] and the U.S. Supreme Court, with a change of view by a Chief Justice who had been California's attorney general and governor, followed suit in *Mapp v. Ohio*.[56]

The prohibitions against use of evidence or statements obtained in disregard of constitutional protections have remained the rulings of the Warren Court most persistently opposed and criticized by other public officials, including Chief Justice Warren's successor. A decade after *Mapp*, Chief Justice Warren E. Burger seized the opportunity of a dissent, in a case not involving the exclusion of evidence, for addressing a specific recommendation to the Congress to displace the exclusionary rule. "Reasonable and effective substitutes can be formulated if Congress would take the lead," he wrote. "I see no insuperable obstacle to the elimination of the Suppression Doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials." But private damage actions against police officers were concededly not realistic:

> I conclude, therefore, that an entirely different remedy is necessary but it is one that in my view is as much beyond judicial power as the step the Court takes today. Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and res-

52. People v. Rochin, 225 P.2d 913, 914-15 (1951) (Italics in original).
53. Rochin v. California, 342 U.S. 165 (1952).
54. Irvine v. California, 347 U.S. 128, 137-38 (1954). The Department of Justice reported that it probably could not prove the *mens rea* required for prosecution of the police officers, since they had acted on directions of the state's prosecution attorneys.
55. People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955).
56. 367 U.S. 643 (1961).

> titution for persons whose Fourth Amendment rights have been violated.[57]

The Chief Justice continued by describing "a simple structure" of a statute that would (a) waive sovereign immunity, (b) create an action for damages for illegal official conduct, (c) create a tribunal like the U.S. Court of Claims to determine claims under the statute, (d) provide that the remedy would be in lieu of the exclusion of illegally obtained evidence, and (e) repeal the exclusionary rule. Police misconduct, he went on, would no doubt also become part of the officer's personnel file, and appellate judicial review of the claims tribunal's decisions should be provided.

This was not the first time the new Chief Justice had included a call for legislation in an opinion; the previous year, for instance, he wrote for the Court that it was "anomalous" that federal statutes did not give state prisoners certain post-conviction opportunities open to federal prisoners: "The obvious, logical, and practical solution is an amendment to § 2241 to remedy the shortcoming which has become apparent . . . . Sound judicial administration calls for such an amendment."[58] But his latest prescription, quoted above, is a suitably extraordinary specimen to close this selection of American illustrations of our topic.

V. Conclusion

To recapitulate: American judges can and do carry on a dialogue with American lawmakers at least as readily and vigorously as their European colleagues, perhaps with fewer formal devices for addressing legislatures officially but also with less constraint from conventions of style and role.

Since every American judge is a judge of constitutional law, but not only of constitutional law, the dialogue is conducted at every level of the federal and state courts and not limited to constitutional questions. Judges will take the occasion, while applying a rule of law, to express their views of the rule, to criticize it, to suggest what kind of improvement might be made, sometimes to hint that, unless the legislature reforms the common law by statute, the court will do so itself. In exceptional cases, state courts have prescribed a time limit for legislative action.

Constitutional law is distinctive insofar as a ruling of unconstitutionality, once rendered, closes the dialogue at least on the invalidated enactment short of a constitutional amendment. On the one hand, courts do not speak authoritatively on a constitutional issue except in the course of deciding it. On the other hand, they prefer

57. Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 403 U.S. 388, 421-22 (1971).

58. Nelson v. George, 399 U.S 224, 228 n. 5 (1970).

to avoid a decision that a coordinate branch has violated the constitution if another way out is possible. Lawmaking bodies want judicial guidance on constitutional law, but advisory opinions are permitted in only a few states and rarely used. These conflicting needs are accommodated by constitutional dicta not necessary to the decision, by discussion of constitutional considerations in opinions that ultimately decide a case on statutory or procedural grounds, by adopting an interpretation of a statute explicitly for the purpose of saving its constitutionality, by carefully pointing out in an opinion what issues are *not* being decided. These steps short of an actual constitutional decision leave lawmakers free to act in the future with such warning or assurance as the opinion provides.

When a constitutional ruling is rendered against the government, recent experiments with limiting the new rule to prospective application attempt to give government an opportunity to bring its practices into compliance and perhaps to seek necessary legislation. An opinion invalidating a law may suggest what kind of changes might pass muster. Exceptionally, a court finding unconstitutionality may not only order the government to stop acting unconstitutionally but may prescribe an elaborate affirmative course of action in great detail, as for instance in school desegregation plans or in legislative reapportionment; but these are binding rulings, not admonitions or recommendations.

Two additional observations bear on the comparison. One is that the foregoing examples only describe ways in which American judges actually address lawmakers, not any formal system for doing so. American appellate practice has no exact counterpart to the European penchant for logic and order in the legal process as reflected in Professor Vigoriti's classification of various kinds of judgments of the Italian constitutional court by their forms, propriety, and effects. While a litigant may, of course, seek different forms of relief against unlawful action—defense against enforcement, injunction, mandamus, declaratory judgment, damages—the common premise of litigation is that the outcome depends on whether he is or is not entitled to the relief sought on the facts and the law determined by the court. In theory, it is only this outcome that a court's opinion explains; the degrees of advice to lawmakers expressed therein reflect different choices of judicial style, not categories of judgments.

Secondly, this flexibility of style is enormously enhanced, if not actually dependent on, the tradition of the personal, signed judicial opinion. The individual concurring or dissenting opinion can offer alternative interpretations or analyses that can become the basis of legislative action. If a single judge, like Justice Carter or Chief Justice Burger in the quoted instances, wishes to go further and call for specific action, he can do so openly on his own responsibility, not that of the court. Ideas that may be attacked as foolish or un-

popular remain issues between a judge and his critics; they need not appear as a confrontation between the two branches of government, as unavoidably they must be when a court speaks only through an anonymous, collegial judgment. Finally, this openness and flexibility of judicial style assures that the dialogue occurs not only in the judicial chambers, nor only between court and government, but also between these and the public. The awareness that law, even constitutional law, involves choices, that these choices are made by identifiable men, and that alternative answers to legal issues can be responsibly debated contributes to the likelihood that suggested reforms will gain attention in the political arena, and to the faith that the legal system can in time respond to changing needs.