INTERNATIONAL REMEDIES ARTICLE

THE REMEDY OF CERTIORARI: FRENCH AND U.S. PERSPECTIVES*

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Although the remedy of certiorari has existed in the United States for more than two centuries,[1] and even longer in the United Kingdom,[2] it is of relatively recent origin in France. In England, the "writ" of certiorari was one of the four so-called prerogative writs (which also included the writs of prohibition, quo warranto, and mandamus) that courts used to exercise control over public authorities.[3] The writ was issued in the name of

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1. *See* David M. O'Brien, *Constitutional Law and Politics: Struggles for Power and Governmental Accountability* vol. 1, 174 (8th ed., W. W. Norton & Co. 2011) (documenting the history of dockets and filings in the United States Supreme Court from 1800–2009); *see also* Russell L. Weaver et al., *Constitutional Law: Cases, Materials, and Problems* 10 (2d ed., Aspen Publ'g 2011) (recognizing the United States Supreme Court's appellate jurisdiction dating back to 1816).

2. *See* S.A. de Smith, *The Prerogative Writs*, 11 Cambridge L.J. 40, 45–50 (1951) (tracing the development of certiorari in the United Kingdom dating back to 1260); Edward Jenks, *The Prerogative Writs in English Law*, 32 Yale L.J. 523, 528–529 (1923) (noting that the use of certiorari in the United Kingdom dates back to the twelfth century).

3. *See Rasul v. Bush*, 542 U.S. 466, 482 n. 12 (2004) (quoting William Blackstone, *Commentaries on the Laws of England* vol. 3, 80) (Garland Publ'g 1978)) (describing "exempt jurisdictions" where the ordinary writ did not run); *Withrow v. Williams*, 507 U.S. 680, 716 (1993) (Scalia & Thomas, JJ., concurring in part and dissenting in part) (acknowledging that prerogative writs were used to call for the assistance of the "power of

the monarch,[4] and its purpose was to allow a higher court to review the decision of a lower court for "errors of law" that were evident "on the face of the record."[5] Once a writ of certiorari was issued to a lower court, the lower court could take no further action in the case.[6]

In the United States, although the writ of certiorari continues to exist in its traditional form, the most common form of certiorari is nontraditional and does not stem from the common law writ. On the contrary, it is the mechanism by which the United States Supreme Court decides whether to accept a case, thereby allowing the case to be transferred from a lower court to the Supreme Court for review and decision.[7] Under French law, such a filter has existed for many years in a similar form. For example, a *pourvoi en cassation* (petition for review) allows the *Conseil d'État* (the highest administrative court) to review the decision of a lower administrative court for errors of law.[8] The *pourvoi* is subject to a prior decision regarding the permissibility

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the crown"); *Hartranft v. Mullowny*, 247 U.S. 295, 300 (1918) (suggesting that prerogative writs were primarily used as a tool to exercise "supervisory authority" over inferior courts); *see also* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 608 n. 81 (2008) (listing mandamus, prohibition, certiorari, and quo warranto as prerogative writs); James E. Pfander, *Government Accountability in Europe: A Comparative Assessment*, 35 Geo. Wash. Intl. L. Rev. 611, 613 (2003) (disclosing that the prerogative writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus all secured review of official action); Harold Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y. L. Forum 478, 487–488 (1963) (explaining that prerogative writs were used to enforce government accountability). The common law included other mechanisms for controlling governmental action, including, for example, the possibility of tort suits against governmental officials. Pfander, *supra* n. 3, at 613. The focus, however, was on executive branch officials rather than on the monarch who could "do no wrong." *Id.*

4. *See* Pfander, *supra* n. 3, at 613 (maintaining that prerogative writs were issued in the name of the king).

5. Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence"*, 25 San Diego L. Rev. 631, 731 (1988) (explaining that the court must determine whether the decision of the lower court was rationally made based on all the evidence in the record).

6. *See Pulliam v. Allen*, 466 U.S. 522, 533 (1984) (disclosing that the issuing of a writ of prohibition enjoined a lower court from proceeding).

7. *See Hartranft*, 247 U.S. at 302 (clarifying that the writ of certiorari is a discretionary method of removing cases from the lower courts up to the United States Supreme Court).

8. *CDR Crânces S.A. v. Euro-Am. Lodging Corp.*, 801 N.Y.S.2d 232 at *2 (N.Y. Sup. 2005); Damien Arnaud, *The Judiciary in France* 32, 35 (Béatrice Gaffory ed., IME 2008) (available at http://www.justice.gouv.fr/art_pix/plaquette_justiceenfrance_angl.pdf) (explaining that the *Conseil d'État* acts as a *cour de cassation* regarding appeals against lower administrative court decisions).

of hearing the case.[9] A formal certiorari process, however, did not exist until the 2008 constitutional reforms, which added a formal certiorari process allowing parties to seek constitutional review when a trial calls a law's validity into question.[10]

In this short Article, we trace the development and use of the writ of certiorari in the United States and its similar development in France and attempt to draw conclusions about similarities and differences between how the remedy is used in the two systems.

I. CERTIORARI IN THE UNITED STATES

In the United States, the common law writ of certiorari continues to exist in its traditional form at both the federal and state levels. At the federal level, although the authority to issue the common law writ is statutorily authorized[11] and recognized in the United States Supreme Court's rules,[12] the Court rarely grants the writ.[13] Most petitions for certiorari arise under the Court's statutorily provided discretionary jurisdiction[14] rather than under the common law writ.[15]

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9. Art. R822-2 Code de justice administrative (available at http://www.legifrance.gouv.fr./affichCode.do;jsessionid=A76E95AE8CFE237B303B331784589877.tpdjo03v_2?idSectionTA=LEGISCTA000006150500&cidTexte=LEGITEXT000006070933&dateTexte=20110830) (indicating that if it appears the admission of the appeal may be refused, the president of the *section du contentieux* will set a hearing for the parties to argue against its nonadmissibility).

10. Const., Art. 61-1 (available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/pdf/conseil-constitutionnel-5074.pdf). The French Constitution was modified by the constitutional law of July 23, 2008. *Id.*

11. *See* 28 U.S.C. § 1651(a) (2006) (stating that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law").

12. *See* Robert L. Stern et al., *Supreme Court Practice* 491 (7th ed., Bureau of Nat'l Affairs 1993) (noting that the United States Supreme Court is statutorily empowered to issue all writs, including mandamus, prohibition, habeas corpus, and certiorari).

13. *See* Ira P. Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four—Or Is It Five?* 36 Suffolk U. L. Rev. 1, 6–7 n. 30 (2002) (referring to the "seldom used common law writ").

14. *See id.* (pointing out that "[t]he more frequently used writ of certiorari is statutory, 28 U.S.C. §§ 1254, 1257, and was created by Congress with the Circuit Court of Appeals (Evarts) Act," 26 Stat. 826 (1891)).

15. *See id.* at 6 (noting that "[w]hile there exists a common law writ of certiorari that can be considered an extraordinary writ and which is rarely granted, most writs of certiorari that the Supreme Court considers are statutory, created by Congress in 1891").

In some U.S. states, the writ continues to be used as a mechanism for preventing lower courts from exceeding their jurisdiction.[16] For example, Florida's Constitution provides that Florida courts retain "the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction."[17] Other state constitutions contain similar provisions.[18] In Arkansas, for example, the writ of certiorari has been used as a way to prosecute an interlocutory appeal of a lower court order.[19] In some states, the writ of certiorari has been abolished.[20]

As previously noted, the statutorily authorized form of certiorari is the most frequently used form and is employed by the United States Supreme Court as a method for controlling its docket.[21] Under the United States Constitution, the Supreme Court's original jurisdiction is relatively limited,[22] extending only

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16. *See* Larry Howell, *"Purely the Creature of the Inventive Genius of the Court":* State Ex Rel. Whiteside *and the Creation and Evolution of the Montana Supreme Court's Unique and Controversial Writ of Supervisory Control*, 69 Mont. L. Rev. 1, 4 (2008) (revealing that traditional writs could only be issued when the lower court exceeded its jurisdiction or refused to exercise jurisdiction at all).

17. Fla. Const. art. V, § 5(b).

18. *See* Louis L. Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769, 795–796 n. 254 (1958) (providing references to similar provisions in the Arkansas, California, Colorado, Delaware, and Georgia constitutions).

19. *See Jordan v. Cir. Ct. of Lee Co.*, 235 S.W.3d 487, 491 (Ark. 2006) (rendering the writ of certiorari a proper remedy in "extraordinary" situations); *see also* Timothy L. Evans, *A Story of Certiorari:* Jordan v. Circuit Court of Lee County *Creates Questions Regarding the Use of the Writ of Certiorari for Interlocutory Matters in Arkansas*, 60 Ark. L. Rev. 773, 773–774 (2007) (identifying certiorari as a way for parties to seek review of a decision reached in "plain error").

20. *See* Jaffe, *supra* n. 18, at 797 (referring to a New Jersey constitutional provision stating that "[p]rerogative writs are superseded and, in lieu thereof, review, hearing, and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right, except in criminal causes where such review shall be discretionary").

21. *See* Robbins, *supra* n. 13, at 6–7 (pointing out that the statutory writ of certiorari affords the United States Supreme Court increased discretion over which cases it chooses to hear).

22. The United States Constitution provides,

> **Section 1.** The 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. 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.
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> **Section 2. [1]** 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

to cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[23] In all other cases, the Court is given appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[24] As a result, most cases arrive at the Court after passing through the lower courts.

Historically, although cases could reach the high Court by either certiorari or appeal,[25] most cases arrived at the Court through certiorari.[26] Under the Judiciary Act of 1925,[27] Congress gave the Court control over its docket by eliminating most mandatory appeals and replacing them with petitions for certiorari.[28] Indeed, even when a case arrived by appeal and the Court was theoretically obligated to hear the case, the Court nevertheless did not feel obligated to provide the parties with a full briefing and oral argument.[29] As a result, the Court summarily decided most appeals.[30] Consistent with the Court's practice, most nondiscretionary review authority has been abolished.[31]

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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.

[2] 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. 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, §§ 1, 2, cl. 1–2 (footnote omitted).

23. *Id.* at art. III, § 2, cl. 2.

24. *Id.*

25. *See* O'Brien, *supra* n. 1, at 179 (distinguishing mandatory and discretionary review of appeals and certiorari petitions).

26. *Id.* (disclosing the elimination of virtually all mandatory appeals to the Court).

27. Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936, 937 (1925) (granting the Court discretionary review authority).

28. O'Brien, *supra* n. 1, at 173; *see also* Stern et al., *supra* n. 12, at 163 (pointing out that the passage of the Judiciary Act of 1925 "gave the Court flexible but firm control over the main body of its work").

29. O'Brien, *supra* n. 1, at 173. The justices were in accord that the overwhelming proportion of cases were "frivolous" and, thus, not worthy of full consideration. *Id.*

30. *Id.* (indicating that justices only give full consideration to a limited number of cases).

31. *Id.* at 179.

Over the years, the Court has aggressively used its discretionary authority to limit and control the number of cases on its docket.[32] Indeed, in recent years, the Court has heard and decided less than one percent of all cases in which parties sought review.[33] Of approximately nine thousand cases filed with the Court in a recent year, only approximately eighty cases were actually "heard" in the sense that the Court granted the parties the right to file briefs and engage in oral argument.[34]

The trend in recent years is for the United States Supreme Court to hear fewer and fewer cases. Interestingly, even though the number of cases coming to the Court has grown significantly over the centuries, the number of cases the Court has actually decided has fallen.[35] Although the Court only had fifty-one cases on its docket in 1853,[36] that number increased to nearly five thousand cases by the early 1980s and to more than nine thousand cases per year today.[37] Even though the Court heard and decided approximately one hundred fifty to one hundred eighty cases per term in the 1980s, it now hears full argument in only about eighty cases per year.[38]

The Court decides whether to grant review using the so-called "Rule of Four."[39] In other words, the parties are not allowed to engage in full briefing and oral argument unless at least four justices agree that the case warrants fuller attention.[40] If the case cannot muster the necessary votes, the Court simply declines jurisdiction.[41] A justice may vote to grant certiorari, deny certiorari, or issue a "Join-3" vote (meaning that the justice is willing to provide the necessary fourth vote if three other justices vote in favor).[42]

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32. *Id.* at 173–174 (revealing that the denial of certiorari is an important technique utilized by the Court to manage its caseload).

33. *Id.* at 174.

34. *Id.* at 175.

35. *Id.*

36. Weaver et al., *supra* n. 1, at 15.

37. O'Brien, *supra* n. 1, at 175.

38. *Id.*

39. Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* vol. 16B, § 4004.2, at 42 (2d ed., West 1996); *see also* O'Brien, *supra* n. 1, at 173 (discussing the application of the informal "Rule of Four").

40. O'Brien, *supra* n. 1, at 173.

41. *Id.* at 175.

42. *Id.* (illustrating the conflicts raised by the emergence of casting "Join-3" votes).

The Court's approach to certiorari is set forth in the Court's own rules of procedure. Rule 10 provides,

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
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> (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.
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> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.[43]

As the foregoing language suggests, Rule 10 provides the United States Supreme Court with "enormous discretion in its certiorari practice" and allows the Court "to hear only those cases it finds sufficiently important to consume its time."[44] It is impor-

43. R. S. Ct. U.S. 10 (available at http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf).

44. Robbins, *supra* n. 13, at 7.

tant to note that the Court does not believe it is obligated to correct errors committed by lower federal courts or state courts, but rather the Court believes it should address important federal questions that require the Court's involvement.[45]

Because of the Court's attitude toward certiorari, its refusal to grant a writ has no legal effect.[46] Even if the Court feels that the lower court decided a case incorrectly, the Court may deny certiorari on the basis that the case is not important enough.[47] Or, in the Court's view, it may deny certiorari because there are no "compelling reasons" for it to hear and decide the case.[48] As a result, it is inappropriate to give a denial of certiorari the weight of precedent.[49]

The Court's approach to denials of certiorari stands in contrast to its denial of an appeal. At least in theory, when the court decides appeals, its decisions do have legal effect.[50] But the precise precedential effect of a decision regarding an appeal is not always clear. Many appeals are summarily resolved without briefing or oral argument and, therefore, may not offer much insight into the Court's views regarding the law.[51] As a result, the Court has suggested that summarily decided cases do not carry the same weight as cases that were briefed, argued, and decided by opinion.[52]

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45. Craig R. Ducat, *Constitutional Interpretation* 31 (7th ed., Wadsworth 2000) (emphasizing that the Court does not exist to correct "miscarriages of justice").

46. *See Huber v. N.J. Dep't of Envt'l Protec.*, 131 S. Ct. 1308 (2011) (quoting *Boumediene v. Bush*, 549 U.S. 1328, 1329 (2007)) (commenting that "'denial of certiorari does not constitute an expression of any opinion on the merits'"); *Bridgers v. Tex.*, 532 U.S. 1034, 1034 (2001) (articulating that "[b]ecause this Court may deny certiorari for many reasons, our denial expresses no view about the merits of petitioner's claim").

47. *See* Margaret Meriwether Cordray & Richard Cordray, *Strategy in Supreme Court Case Selection: The Relationship between Certiorari and the Merits*, 69 Ohio St. L.J. 1, 7–16 (2008) (listing various factors influencing the Court's case selection decisions); *see also* S. Sidney Ulmer, William Hintze & Louise Kirklosky, *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 6 L. & Socy. Rev. 637, 639 (1971) (observing that "the Court will decline and grant review in terms of the frivolity of the petitions").

48. R. S. Ct. U.S. 10.

49. *Boumediene*, 549 U.S. at 1329.

50. *See* O'Brien, *supra* n. 1, at 179 (explaining that when the Court decides an appeal, it is binding on lower courts); Stern et al., *supra* n. 12, at 263 (articulating that an appeal is a decision by the Court having precedential value).

51. *See* O'Brien, *supra* n. 1, at 179 (maintaining that summarily decided cases invite confusion over how the Court views the merits of a case and the lower court ruling); *see also* Stern et al., *supra* n. 12, at 570 (illustrating the importance of oral argument before the Court in order to "crystallize" legal problems).

52. O'Brien, *supra* n. 1, at 179.

It is also important to bear in mind that certiorari is simply one mechanism by which the United States Supreme Court exercises control over its docket. Even if four justices agree to hear a case under the "Rule of Four," the case will not necessarily be heard by the Court and may not result in a full opinion on the merits. In a number of cases, the Court granted review under the Rule of Four but later decided to apply doctrines such as standing,[53] mootness,[54] and ripeness,[55] thereby allowing the Court to avoid reaching a decision on the merits. In addition, even if the Court hears a case on the merits, it may avoid deciding some constitutional issues. For example, the Court sometimes applies a rule stating that if two possible interpretations of a statute exist, one of which is constitutional and one of which is not, the Court should opt for the interpretation that is constitutional.[56] Another doctrine states that the Court will not pass upon a constitutional question if the case can be decided on another (nonconstitutional) ground, and the Court has also indicated that it will not decide a constitutional question until the issue actually needs to be decided.[57]

The Court's certiorari jurisdiction is not rooted in the common law prerogative writ but rather in the Court's congressionally authorized right to control its docket. Certiorari, coupled with Rule 10, serves that purpose.

II. CERTIORARI IN FRANCE

It is an abuse of language to talk about "certiorari" in a civil law context since this writ is necessarily and historically linked to a common law tradition, despite the Roman law origin of the

53. *E.g. Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 587 (2007); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558 (1992); *Mass. v. Mellon*, 262 U.S. 447, 480 (1923).

54. *E.g. L.A. v. Lyons*, 461 U.S. 95, 101 (1983); *DeFunis v. Odegaard*, 416 U.S. 312, 319–320 (1974); *Roe v. Wade*, 410 U.S. 113, 124–125 (1973).

55. *E.g. N.Y. v. United States*, 505 U.S. 142, 175 (1992); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947).

56. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932) (explaining that "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided").

57. *See Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885) (disclosing that the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it").

term and its Latin meaning ("to be more fully informed"[58]). The development of certiorari in France, however, has been similar to certiorari's development in the United States. As a result, although higher courts originally used certiorari to deprive lower courts of jurisdiction over a case, French supreme courts frequently used certiorari to control their dockets.[59] In other words, as in the United States, certiorari serves as a filter that allows the courts to avoid having to hear an excessive number of requests.

As noted, such filters have existed for decades in France and have been used by both the *Cour de Cassation* (the French supreme court for civil and criminal law matters)[60] and the *Conseil d'État* (the French supreme court for administrative law matters).[61] The real novelty in French law, however, was the introduction in 2008 of the possibility of reviewing statutes under the French Constitution through the new "certiorari process."[62]

Previously, French courts restrained their jurisdiction by refusing to decide whether a statute was compatible with the French Constitution.[63] This attitude was rooted in the traditional French suspicion toward courts, which stemmed from the "Ancien Regime" (the period preceding the French Revolution of 1789) when courts abused their power in various ways.[64] In 1958, however, reforms were adopted that allowed the President of the

58. *Black's Law Dictionary* 258 (Bryan A. Garner ed., 9th ed., West 2009); *see also* Peter J. Messitte, *The Writ of Certiorari: Deciding Which Cases to Review*, 2005 *Issues Democracy* 18, 18 (Apr. 2005) (available at http://www.america.gov/media/pdf/ejs/0405.pdf) (defining "cert").

59. Guy Canivet, *Cour de Cassation, Admission des pourvois en cassation, La procédure d'admission des pourvois en cassation*, http://www.courdecassation.fr/institution_1/autres_publication_discours_2039/publications2201/admission_pourvois_cassation_8424.html (accessed Apr. 5, 2013) (noting that certiorari allows the French supreme courts to focus more effectively on its mission).

60. *See id.* (indicating that the *Cour de Cassation* has had such a filter for centuries except between 1947 and 2001).

61. Loi n° 87-1127 du 31 décembre 1987, J.O. du 1 janv. 1988, p. 8 (available at http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=19880101&pageDebut=00007&pageFin=&pageCourante=00008). This filter has existed before the *Conseil d'État* since the law was executed on December 31, 1987. *Id.*

62. Const., Art. 61-1.

63. *See e.g. Arrighi*, C.E., 6 nov. 1936, Rec. Lebon 966 (available at http://archiv.jura.uni-saarland.de/france/saja/ja/1936_11_06_ce.htm) (holding that the plea would not likely be discussed before the *Conseil d'État*).

64. Michael H. Davis, *The Law/Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court*, 34 Am. J. Comp. L. 45, 46–47 (1986) (highlighting the "French antipathy" to judicial hierarchy).

Republic, the President of the Senate, the President of the National Assembly, the Prime Minister, or (since 1974) any sixty members of Parliament to ask the *Conseil Constitutionnel* (Constitutional Council) to review a law before it was enacted.[65] Such requests were rarely made or undertaken.[66]

Because of the historical constraints, all laws enacted before 1958, and many laws enacted since then, have not been subject to constitutional review.[67] Ordinary citizens did not have the right to seek review of a statute's constitutionality because the 1958 reforms limited the right to request review to certain politicians.[68] Thus, the 2008 reforms were revolutionary because they empowered litigants to seek constitutional review of statutes,[69] thereby moving the French system closer to the United States system.

With that said, it is worth noting that the 1958 review system still remains in place.[70] It is supplemented by the new system, which not only allows ordinary citizens to bring constitutional challenges, but also provides a new remedy that allows a "concrete" review of constitutional issues during the course of a trial.[71]

The 2008 reforms are likely to significantly alter the role of the *Conseil Constitutionnel* in considering and deciding constitutional issues. Unlike the 1958 system, under which the *Conseil Constitutionnel* reviewed the constitutionality of statutes in the "abstract," the 2008 system requires the *Conseil Constitutionnel* to review the constitutionality of statutes applied in the context of court proceedings. For example, the *Conseil Constitutionnel* might use statistics to assess whether there has been a change in the factual circumstances that requires a reversal of opinion

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65. James Beardsley, *Constitutional Review in France*, 1975 S. Ct. Rev. 189, 218–219.

66. *Id.* at 219, 221, 225.

67. *See id.* at 222–223, 225 (pointing out that since the 1958 Constitution, the *Conseil Constitutionnel* has exercised substantial deference and restraint, especially when confronted with political issues).

68. *Id.* at 218–219.

69. Const., Art. 61-1 (establishing that a matter may be referred by the *Conseil d'État* or *Cour de Cassation* to the *Conseil Constitutionnel* if it is claimed that a legislative provision infringes on the rights and freedoms guaranteed by the French Constitution).

70. *Id.* at Art. 61.

71. CC décision n° 09-595DC du 3 décembre 2009, J.O. du 11 déc. 2009, p. 21381 (available at http://www.legifrance.gouv.fr/affichJuriConst.do?oldAction =rechExpJuriConst&idTexte=CONSTEXT000021485099&fastReqId=77517213&fastPos =1) (outlining the right for review at the various stages of a trial).

regarding a statute's constitutionality. The *Conseil Constitutionnel* did just that in 2010, when it struck down the French law on pretrial custody of suspects even though the court had previously held that the law was constitutional.[72] In reversing course, the court noted that the frequency of pretrial custodial detentions had significantly increased since its prior decision, and the court viewed this increase as demonstrating that custodial practices presented a significant threat to individual freedom.[73]

Even though the 2008 reforms have dramatically altered the procedures for constitutional review of statutes, there are obvious and important similarities between the 1958 and 2008 systems. Under both systems, a specialized court conducts the review—the *Conseil Constitutionnel*—which remains officially detached from the ordinary courts and is generally given exclusive jurisdiction over constitutional questions and the authority to exercise review jurisdiction as well as issue advisory opinions at the request of governmental institutions.[74]

The *Conseil Constitutionnel*'s exclusive jurisdiction over constitutional issues has been lessened by the certiorari jurisdiction accorded to the two supreme courts (the *Cour de Cassation* and the *Conseil d'État*). The two supreme courts do a sort of "negative" constitutional review in the sense that they have the power to not transfer a case to the *Conseil Constitutionnel* if there is no constitutional infringement of the law.[75]

The *Conseil Constitutionnel*'s advisory authority, while it remains and is certainly invoked at the request of governmental or parliamentary institutions, technically is not just advisory. While the *Conseil Constitutionnel* can set aside a law, it tends to take a less hostile approach by adopting interpretative conditions

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72. CC décision n° 10-14/22QPC du 30 juillet 2010, J.O. du 31 juillet 2010, p. 14198 (available at http://www.legifrance.gouv.fr/affichJuriConst.do?oldAction =rechExpJuriConst&idTexte=CONSTEXT000022762681&fastReqId=140714447 &fastPos=) (rendering Articles 62, 63, 63-1, 63-4 paragraphs 1 to 6, and 77 of the Code of Criminal Procedure unconstitutional).

73. *Id.* at ¶¶ 19–29. The *Conseil Constitutionnel* also considered the absence of a lawyer during the first four hours of custody unconstitutional. *Id.* at ¶ 28.

74. *See* Davis, *supra* n. 64, at 52–56 (discussing the duties and powers bestowed upon the *Conseil Constitutionnel*).

75. CC décision n° 09-595DC at ¶ 27 (revealing that the *Conseil Constitutionnel* has no jurisdiction concerning the proceedings unless an application is submitted to the court for a ruling on the issue of constitutionality).

that would save statutes, and these interpretative conditions are (in effect) added to the statute.[76]

Under the 2008 reforms, three conditions must be satisfied before certiorari review can be granted regarding the constitutionality of a law. First, the challenged statute must be applied to the litigation in which it is considered.[77] Second, the challenged statute must be one that has not already been reviewed by the *Conseil Constitutionnel*, unless there are significant changes in the circumstances since its original decision that warrant further review.[78] Third, the case must be regarded as "serious."[79] When a lower court decides that the three conditions are satisfied, it transfers the constitutional issues—and only the constitutional issues—to the highest competent court, either the *Cour de Cassation* for civil or criminal law or the *Conseil d'État* for administrative law.[80]

Once an issue arrives at one of the supreme courts (the *Cour de Cassation* or the *Conseil d'État*), that court will reexamine the three issues to make sure they are satisfied.[81] In determining whether the first two conditions—whether the statute is applicable to the litigation and whether the law has been previously reviewed by the court (or whether there are significant changes in circumstances)—are satisfied, the supreme courts analyze those issues using the same approach used by the lower courts. In determining whether the third condition is satisfied, however, the courts adopt a different approach, focusing on whether the issue can be regarded as either "serious" or "new."[82] The *Conseil Constitutionnel* has interpreted the idea of "new" to mean that the constitutional norm at stake in the litigation must be one that

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76. *See Yearbook of European Law* vol. 29, 42–43 (P. Eeckhout & T. Tridimas eds., Oxford U. Press 2010) (explaining the technique of "*réserve d'interprétation*" employed by the *Conseil Constitutionnel*).

77. Loi n° 09-1523 du 10 décembre 2009, J.O. du 11 décembre 2009, p. 21379 (available at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021446446&fastPos=1&fastReqId=1359851462&categorieLien=id&oldAction=rechTexte).

78. *Id.*

79. *Id.*

80. *Id.* The decision to refer the question is addressed to the *Cour de Cassation* or the *Conseil d'État* within eight days of its delivery with the case or the parties' submissions. *Id.*

81. CC décision n° 09-595DC at ¶ 20.

82. *Id.*

has never been interpreted.[83] If these three conditions are met, the *Cour de Cassation* or the *Conseil d'État* must then transfer the question to the *Conseil Constitutionnel*, which exercises sole competence to declare a statute unconstitutional. The *Conseil Constitutionnel* can itself reconsider the three conditions to thereby deny the request for certiorari.[84]

Caselaw from the *Cour de Cassation* and *Conseil d'État* offers interesting insight into how these conditions have been interpreted. Indeed, the caselaw of these courts is more illuminating than that of the lower courts, which tend to reject only obvious claims. During the first year following implementation of the 2008 reforms, 527 constitutional questions reached the *Cour de Cassation* and the *Conseil d'État*, and 124 of those questions were later sent to the *Conseil Constitutionnel* (a rate of about twenty-four percent).[85] The *Conseil Constitutionnel* gave a partial or total verdict in favor of the claimant in about thirty-four percent of the cases.[86]

These figures may hide significant differences that existed between the *Cour de Cassation* and the *Conseil d'État* caselaw. During the first months following implementation of the 2008 constitutional reforms, the *Cour de Cassation* was reluctant to grant certiorari and thereby transfer a question to the *Conseil Constitutionnel*. For example, the *Cour de Cassation* rejected a claim regarding the *Loi Gayssot*, which imposed criminal sanctions for racist, xenophobic, and anti-Semitic speech, as well as for denials of the Holocaust.[87] The *Cour de Cassation* refused to refer the case on the basis that the implications were not "serious," even though some academics viewed the law as contrary to

83. *Id.* at ¶ 21 (disclosing that Parliament intended to require the *Conseil Constitutionnel* to rule on any constitutional provision it had not yet been asked to rule on).

84. *Id.* at ¶ 20.

85. Jean-Louis Debré, *1er mars 2011: Premier Anniversaire de la QPC* (Paris, Fr. Mar. 1, 2011) (transcript available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/actualities/2011/1er-mars-2011-premier-anniversaire-de-la-qpc.53183.html).

86. *Id.*

87. *See generally* Russell L. Weaver, Nicolas Delpierre & Laurence Boissier, *Holocaust Denial and Governmentally Declared "Truth": French and American Perspectives*, 41 Tex. Tech L. Rev. 495 (2009).

free speech.[88] On two other occasions, the *Conseil Constitutionnel* overruled the *Cour de Cassation*'s "minimalist" position. In one case, the *Conseil Constitutionnel* decided it could review an abrogated law.[89] In another case, the *Conseil Constitutionnel* held that an interpretation of a law by the lower courts was subject to review, and went on to hold that there cannot be a distinction between the wording of a statute and the interpretation given to that statute by the courts.[90]

The *Cour de Cassation*'s reluctance to embrace the 2008 reforms is likely attributable to the fact that a special chamber was created within that court to hear constitutional claims, and the members of that chamber did not seem to view the constitutional reforms favorably. This special chamber has since been eliminated, and the chamber that has subject matter jurisdiction over the case now decides constitutional questions.[91] After the special chamber was abolished, the *Cour de Cassation* has followed a path of normalization in the sense that its decisions are more objective.

Presently, the third condition (the seriousness or novelty of the constitutional question presented) is controlling in seventy-five percent of the two supreme courts' denials.[92] Of course, the question of "seriousness" or "novelty" is necessarily subjective,

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88. Cass., 7 mai 2010, n° 09-80.774 (available at http://www.courdecassation.fr/jurisprudence_2/questions_prioritaires_constitutionnalite_3396/12008_7_16224.html#); Weaver, *supra* n. 87, at 498.

89. CC décision n° 10-16QPC du 23 juillet 2010, J.O. du 24 juillet 2010, p. 13728 (available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/pdf/conseil-constitutionnel-48826.pdf) (reviewing the constitutionality of provision 1 of 7 of Article 158 of the General Tax Code, which was only applicable from January 1, 2006, to December 31, 2008).

90. CC décision n° 10-52QPC du 14 octobre 2010, J.O. du 15 octobre 2010, p. 18540 (available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/pdf/conseil-constitutionnel-49789.pdf).

91. Loi n° 10-830 du 22 juillet 2010, J.O. du 23 juillet 2010, p. 13562 (available at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022508911&fastPos=3&fastReqId=607147665&categorieLien=id&oldAction=rechTexte). Article 12 of Law No. 10-830 repealed Article 23-6 of Ordinance No. 58-1067, which established that the *Cour de Cassation* would consider referrals to constitutional questions with a bench presided over by the First President. Ord. n° 58-1067 du 7 nov. 1958 (available at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000705065&fastPos=1&fastReqId=1891556847&categorieLien=cid&oldAction=rechTexte).

92. Jean-Marc Sauvé, *Evaluation de la loi organique n° 2009-1523 du décembre 2009 relative à l'application de l'article 61-1 de la Constitution* (Paris, Fr. Sept. 2010) (transcript available at http://www.conseil-etat.fr/media/document/DISCOURS%20ET%20INTERVENTIONS/intervention-qpc-01092010.pdf).

which presents some interesting comparisons to the United States' system.

III. COMPARATIVE PERSPECTIVES ON THE CERTIORARI REMEDY

The 2008 French constitutional reforms disclose evident similarities and dissimilarities between the French and the United States' certiorari systems, and it is clear that the reforms have moved France closer to the United States model. Historically, France's review of a statute's constitutionality took place only before the law took effect, and only certain specified politicians could seek review.[93] From a United States perspective, such an approach was incomprehensible. Article III of the United States Constitution provides that federal courts can only entertain "cases" and "controversies."[94] Since the nation's early days, the United States Supreme Court has made clear that this so-called "case" or "controversy" requirement is jurisdictional, meaning the Court cannot hear a case in which a case or controversy does not exist,[95] and that federal courts do not have the power to render "advisory opinions."[96] As a result, challenges to United States

93. *Supra* n. 65 and accompanying text (describing reforms allowing certain politicians to seek review).

94. U.S. Const. art. III, § 2, cl. 1.

95. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (noting that "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it"); *Mellon*, 262 U.S. at 480 (explaining that "[p]roceedings not of a justiciable character are outside the contemplation of the constitutional grant").

96. In 1793, Secretary of State Thomas Jefferson asked the United States Supreme Court whether the Court's advice "would be available in the solution of important questions of the construction of treaties, laws of nations and laws of the land, which the Secretary said were often presented under circumstances which 'do not give a cognizance of them to the tribunals of the country.'" *Muskrat v. United States*, 219 U.S. 346, 354 (1911) (emphasis omitted) (quoting John Jay, *The Correspondence and Public Papers of John Jay* vol. III, 486–489 (Henry P. Johnston ed., G.P. Putnam's Sons 1891)). Chief Justice Jay and his associates responded that

> the lines of separation drawn by the Constitution between the three departments of government . . . afforded strong arguments against the propriety of extrajudicially deciding the questions alluded to, and expressing the view that the power given by the Constitution to the President, of calling on heads of departments for opinions, "seems to have been purposely, as well as expressly, united to the executive departments."

Id. The Court in *Muskrat* also noted that "by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does

statutes take place after the laws take effect. Indeed, if a challenge is brought before a law is even enacted (as could happen in France), it is likely that the courts would reject the challenge on the basis that the case is not "ripe" for review—in the sense that the aggrieved party must be suffering some ill effect from the law.[97] Because of the 2008 reforms, France now also has an *a posteriori* system for reviewing the constitutionality of laws through a prior certiorari process. The prior review process remains in place but is supplemented by the new system, which allows challenges after the fact.[98]

France's movement toward a United States-style constitutional review system is not, however, a direct effect of economic globalization. Indeed, the new French system is more attributable to the development of European law and, in particular, European "constitutional" law. Under various European Union treaties, as well as under the European Convention on Human Rights (ECHR), France has a duty to implement European law. Pursuant to these obligations, French courts have struck down statutes since 1975 on the basis of their incompatibility with treaties.[99] Until the 2008 reforms, however, French courts had difficulty reviewing statutes under the French Constitution. Since the 2008 reforms were adopted, French courts give priority to questions relating to the compatibility of a statute with the French Constitution. As a result, the mechanism created by the 2008 reforms is referred to as the "*question prioritaire de constitutionnalité*" (QPC).[100]

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not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred." *Id.* at 356.

97. *See Abbott Laboratories*, 387 U.S. at 148–149 (elucidating that the basic rationale of the ripeness doctrine is "to prevent the courts . . . from entangling themselves in abstract disagreements . . . until . . . [the] effects [are] felt in a concrete way by the challenging parties"); *Poe v. Ullman*, 367 U.S. 497, 503–506 (1961) (disclosing that legislation can be challenged "only at the instance of one who is himself [or herself] immediately harmed, or immediately threatened with harm, by the challenged action"); *United Pub. Workers*, 330 U.S. at 90 (establishing that "[j]udicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants").

98. Const., Art. 61-1.

99. *See e.g. Nicolo*, C.E., 20 oct. 1989, Rec. Lebon 190 (available at http://www.conseil-etat.fr/fr/presentation-des-grands-arrets/20-octobre-1989-nicolo.html) (affirming that precedence is given to treaties over legislation); Cass., Ch. Mixte, 24 mai 1975, Bull civ. 6, n° 73-13.556 (available at http://www.courdecassation.fr/IMG///Mix.Ch.,%2025%20may%201975.pdf) (according a treaty more authority than a later enacted law).

100. Gerald L. Neuman, *Anti-*Ashwander*: Constitutional Litigation as a First Resort in France*, 43 N.Y.U. J. Intl. L. & Pol. 15, 21 (2010).

The caselaw reveals that European law heavily influenced the two French supreme courts. Thus, when the courts believe that a French statute is compatible with a European principle that has an equivalent in the French Constitution, the courts will generally hold that there is no "serious" constitutional question to thereby conclude that a grant of certiorari is inappropriate. The *Conseil d'État* reached such a conclusion in a case that raised issues regarding the protection of private property.[101]

While the 2008 reforms are more attributable to Europeanization rather than economic globalization, the latter undoubtedly had an indirect effect in bringing about the reforms. In other words, there has not been a strict convergence between European and non-European legal systems[102] or the development of set standards that developed nations must satisfy, but foreign norms have nevertheless influenced French law.

IV. CONCLUSION: PARALLELS AND CONVERGENCES BETWEEN THE U.S. AND FRENCH SYSTEMS

It is difficult to draw direct parallels between France and the United States regarding the use of the certiorari remedy because of the two systems' fundamental differences. Unlike the United States, where about one percent of all cases that reach the United States Supreme Court are actually heard and decided by the Court, the *Conseil Constitutionnel* hears and renders decisions on at least five percent of the cases in which the parties sought review.[103] Although the United States Supreme Court deals only with federal matters, and only relatively important federal matters, the *Conseil Constitutionnel* deals with statutory law that

101. The *Conseil d'État* denied certiorari for a law refusing by principle any damages for a public right of way with some exceptions set by the caselaw so as to ensure its compatibility with the ECHR. C.E., 16 juillet 2010, Rec. Lebon 334665 (available at http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000022487080&fastReqId=1507779727&fastPos=1).

102. For an article comparing the European and non-European legal systems, see Pierre Legrand, *European Legal Systems Are Not Converging*, 45 Int'l & Comp. L.Q. 52 (1996).

103. The United States Supreme Court's docket numbers more than 10,000 cases per term, about 100 of which are granted plenary review. Supreme Court of the United States, *The Justices' Caseload*, http://www.supremecourt.gov/about/justicecaseload.aspx (accessed Apr. 5, 2013).

infringes on constitutional liberties.[104] In addition, although the United States Supreme Court accepts pro se petitions (which it rarely grants), litigants before the *Conseil Constitutionnel* are generally required to be represented by an attorney for the hearing of a case.[105] No filing fees are imposed in France, whereas a $300 fee is imposed in the United States.[106]

The United States and French systems also differ regarding who decides whether certiorari will be granted. In the United States, the Supreme Court sets its own docket and decides whether it will hear a case.[107] In France, the *Cour de Cassation* and the *Conseil d'État* decide whether the *Conseil Constitutionnel* should hear a case.[108] Furthermore, there is no "Rule of Four" in France, which means that certiorari can only be granted if a majority of the judges on the *Cour de Cassation* or the *Conseil d'État* (as appropriate) agree that it should be heard.

As in the United States, the French reforms do not guarantee that all issues relating to rights and liberties will be subject to a certiorari petition. The *Conseil Constitutionnel* can only consider a constitutional question if a case before a lower court directly implicates the question.[109] Another distinction is worth mentioning. In France, a case arrives at the *Conseil Constitutionnel* only when the issue is referred to one of the supreme courts by a lower court during the pendency of litigation.[110] In the United States,

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104. Const., Art. 61-1.

105. Conseil Constitutionnel, *Règlement intérieur sur la procédure suivie devant le Conseil constitutionnel pour les questions prioritaires de constitutionnalité, Article 10*, at p. 3, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/enreglement_qpc_0402210.pdf (accessed Apr. 5, 2013); *but see* Conseil Constitutionnel, *La question prioritaire de constitutionnalité, 12 questions pour commencer*, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-question-prioritaire-de-constitutionnalite/12-questions-pour-commencer.47107.html#4 (accessed Apr. 5, 2013) (pointing out that in the courts where a party can ensure itself a defense, legal representation is not necessarily required to raise the issue of constitutionality before the *Conseil Constitutionnel*).

106. R. S. Ct. U.S. 38(a).

107. *Supra* n. 27–28 and accompanying text (describing the Court's control of its docket); *see also* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill*, 100 Colum. L. Rev. 1643, 1644 (2000) (disclosing that Congress granted the United States Supreme Court this power through the Judiciary Act of 1925).

108. Const., Art. 61-1.

109. *See* Neuman, *supra* n. 100, at 19 (explaining that lower courts must refer questions of constitutional rights "up the judicial hierarchy" rather than directly to the *Conseil Constitutionnel*).

110. *Id.* at 20.

while it is theoretically possible for a lower court to certify an issue to the United States Supreme Court for a decision, the Court usually refuses to hear certified issues.[111] The Court prefers the lower courts to conduct fact-finding and issue rulings on the constitutional and statutory issues, and exercises its own review power only after the lower courts have completed their review process. As such, although in very rare instances a case can move quickly from the lower courts to the United States Supreme Court,[112] a case might not make it to the high Court for years. The French system appears to move more quickly, but only with regard to the constitutionality of a statute.

There is one other significant difference as well. As already noted, the United States Supreme Court applies various interpretive rules to avoid deciding constitutional issues. One of those rules states that if two possible interpretations of a statute are possible, one of which is constitutional and one of which is not, the Court should opt for the interpretation that is constitutional.[113] Other rules state that the Court will not rule on a constitutional question if the case can be decided on another (non-constitutional) ground, and the Court will not decide a constitutional question until the issue actually needs to be decided.[114] In France, by contrast, if a claimant raises a question regarding a statute's constitutionality in the course of a trial, the court must deal with that issue and give it priority over other questions.[115]

The motivations for denying certiorari in France are often different than they are in the United States. While the United States Supreme Court might use the certiorari process to limit or

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111. *See* Hartnett, *supra* n. 107, at 1710–1712 (commenting that "[a]t this point, certification is practically a dead letter").

112. *See e.g. Bush v. Gore*, 531 U.S. 98, 100 (2000) (recounting that one day after an emergency application for a stay was filed, it was treated as a petition for a writ of certiorari, and certiorari was granted); *N.Y. Times Co. v. United States*, 403 U.S. 713, 753 (1971) (Harlan, J., Burger, C.J. & Blackmun, J., dissenting) (illustrating that a petition for certiorari was granted within days).

113. *See e.g. Clark v. Martinez*, 543 U.S. 371, 380–381 (2005) (explaining that "when deciding which of two plausible statutory constructions to adopt, . . . [and] one of them would raise a multitude of constitutional problems, the other should prevail").

114. *See e.g. Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) (establishing that the Court "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable").

115. CC décision n° 09-595DC at ¶ 12; *see also* Neuman, *supra* n. 100, at 20 (noting that the initial court from which the constitutional question arose "ordinarily suspends its own proceedings to await a response").

control its docket or to avoid addressing constitutional issues it does not wish to decide, there are no similar motives in France. Indeed, in France, the *Conseil Constitutionnel* does not have the power to control its own docket. If one of the French supreme courts concludes that a serious or new constitutional issue has been raised, the *Conseil Constitutionnel* should hear the case. As such, the decision by the French supreme court might suggest that the case should be decided favorably to the claimant. When French courts decide to deny certiorari, they tend to carefully explain their motivations since the right to review is considered to be part and parcel of the constitutional guarantee of a free trial.

As a result, the common characteristic between the United States system and the French system lies in the discretion left to the supreme courts to grant or deny certiorari. Even though there has been much academic commentary,[116] it is difficult to discern a clear or precise reason why the United States Supreme Court decides to hear—or declines to hear—a particular case. Although commentators can speculate regarding the reasons for the United States Supreme Court's conclusions, the Court's rhetoric is often unhelpful in determining the Court's true intent. As with its substantive decisions, the Court's actions are not always consistent with its rhetoric.[117] When the Court wishes to achieve a particular result, it may emphasize the importance of certain legal or constitutional principles.[118] When the Court wishes to achieve a different result, it may completely ignore those principles.[119] Thus, when the Court is in a more activist mode, as it was during the Warren Court era, it may be less inclined to strictly apply

116. *Supra* n. 47.

117. *See generally* Russell L. Weaver, *Some Realism about* Chevron, 58 Mo. L. Rev. 129 (1993) (arguing that despite the Court's decision in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court rarely defers to agency interpretations of statutes without careful scrutiny).

118. *Id.* at 142–166; *see also* Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. Pitt. L. Rev. 587, 590 (1984) (maintaining that "[t]he Supreme Court typically ignores the [deference] rule completely except when it is convenient").

119. Weaver, *supra* n. 118, at 590; *see also* Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 62–120 (Little, Brown & Co. 1960) (tracing American courts' approaches to adhering to precedent); Walter E. Oberer, *On Law, Lawyering, and Law Professing:* The Golden Sand, 39 J. Leg. Educ. 203, 204 (1989) (pointing out the impossibility of deciding cases based on legal doctrine alone).

constitutional requirements. By contrast, when the Court is in a less activist mode, it may use doctrines like ripeness, standing, and mootness to bar the courthouse door to claims that the Court does not wish to hear or decide. Undoubtedly, in this regard, the ideological biases of the United States' justices are relevant.

Some differences between the United States and French systems are specific to the United States, while others are not. In the United States, the Court will sometimes accept jurisdiction over a case in order to harmonize differing interpretations of federal law by lower federal courts or state courts.[120] French courts would not consider such a factor in deciding whether to grant certiorari since the *Conseil Constitutionnel* has the exclusive authority to interpret the French Constitution.[121] The ideological backgrounds of the French judges may also play a role, as they do in the United States, but it is difficult to know. There are too many French judges, and too many of them are nominated by the government.[122] As a result, it can be difficult to ascertain their political or ideological biases.

Undoubtedly, the two French supreme courts, as well as the *Conseil Constitutionnel*, would certainly prefer to avoid constitutional questions that are too sensitive. On the other hand, as they cannot control their docket and issues may arise regarding the compatibility of French law with European law, they may decide to grant certiorari in order to give preference to an internal legal source (the French Constitution) rather than an external source over which they have less control.

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120. R. S. Ct. U.S. 10. The Rules of the Supreme Court of the United States specify that a split between federal circuit courts is one instance in which the Court may grant certiorari. *Id.*

121. Const., Art. 61-1.

122. *See* Mary L. Volcansek, *Appointing Judges the European Way*, 34 Fordham Urb. L.J. 363, 370–373 (2007) (describing the appointment process for judgeships in France by the Minister of Justice).