Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court

William J. Nardini

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* Visiting Scholar, Italian Constitutional Court, Rome, Italy. A.B., Georgetown
  University, 1990; J.D., Yale Law School, 1994; LL.M., European University Institute,
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C. Applying the Italian Lessons to a Balanced Budget Amendment

CONCLUSION

INTRODUCTION

In 1986, the Italian Constitutional Court reviewed a law that closed hearings in tax evasion cases to the public. The Court's opinion began like any other. It surveyed the long tradition of public hearings in Italy, discussed the drafting history of the constitutional provisions dealing with procedural safeguards, and weighed the competing demands of taxpayer privacy and government transparency. The Court came down definitively on the side of openness in the courts, endorsing the view that "the public nature of hearings was implicitly prescribed by the constitutional system."1 The Court declared the law unconstitutional.

Then the opinion took a twist quite foreign to American courts. The Court let the closed-hearing law stand. According to the Court, doubts had persisted at the time of the law's enactment whether tax tribunals were mere "administrative tribunals" rather than real "courts" deserving the full panoply of procedural safeguards. Accordingly, the Italian Parliament's failure to provide for public hearings was excusable. Now that the Constitutional Court had clarified that tax tribunals were courts and that public hearings were constitutionally required, however, it had become "absolutely indispensable, in order to avoid grave consequences, that the legislature quickly intervene to bring tax proceedings into conformity" with the Italian Constitution.2 And so, pending legislative action, the Court declined to strike down the law.3

In recent years, the Italian Constitutional Court has often chosen this same model of decision making, following the pattern of denounce-decline-demand: It denounces a law for conflicting with the Constitution, but then declines to annul it, instead demanding that the legislature reform the law itself. For example, the Court has found constitutional defects in laws that failed to provide favorable parole conditions for juveniles,4 to ensure the independence of military

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1 Sent. 212/1986, 31 Giur. Cost. 1637, 1640 (1986). All translations in this Article are by the author.
2 Id. at 1642.
3 See infra notes 108-10 and accompanying text for a discussion of subsequent events.
tribunals,5 and to tax workers equally to support the national health-care system.6 In each case, the Court began its opinion by excoriating the law for failing to live up to constitutional principles. Yet, instead of nullifying the statute, the Court called upon Parliament to fix the law. Lurking behind each decision was a threat, sometimes veiled, sometimes quite explicit, that the Court’s patience would have its limits, and that protracted legislative inaction would leave it no choice but to invalidate or modify the law in a future case. Sometimes, but not always, the Court followed up on its threat. For convenience, I will refer to these decisions as “informal declarations of unconstitutionality.”

This kind of decision did not, like Athena, spring fully formed from the brows of the constitutional judges. The Court’s decisions informally announcing that a law is unconstitutional are simply the latest stage in its ongoing effort to fine-tune, rather than dismantle, the legal system. Part I of this Article begins by reviewing how the Constitutional Court, when it opened for business in 1956, had a single choice: It could declare a statute unconstitutional and thereby nullify it, or decline to do so.

Over the last forty years, the Court has developed more refined tools for operating on constitutionally problematic laws, so that it need not always amputate them from the body of the legal system. First, the Court began to interpret statutes in ways that avoided constitutional problems. Next, it limited itself to striking down particular applications of a law, thereby salvaging as much of the statute as possible. Then, the Court began to add “missing” provisions to statutes that otherwise would have been unconstitutional. In exceptional cases, it even let some laws slip by as “temporarily” constitutional, often on the ground that they were justifiable short-term responses to a national crisis. Put in American terms, the Italian Constitutional Court has engaged in a sort of judicial self-restraint. It has assiduously cultivated what Alexander Bickel called the “passive virtues” by refraining from adjudicating constitutional challenges when possible, and limiting the effects of its judgments when it does act.7 Yet this “passivity” in the sense of not

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6 See infra notes 50, 104-107 and accompanying text.
striking down laws has been made possible only by the Court's "activism" in creatively interpreting them.

The Court has been driven to this "passive activism" mainly by a desire to husband its limited reservoir of legitimacy, which it draws upon whenever it nullifies a democratically enacted law. Several factors have left the Court unsatisfied with its usual array of techniques to soften the blow of a declaration of unconstitutionality: Parliament perennially fails to respond to the Court's invalidation of defective laws (which leaves a gap in the legal system), the laws the Court is asked to strike down often involve the award of far-reaching social and economic benefits (which makes it legally problematic to create a gap in light of the social guarantees embodied in the Constitution), and these laws are more often recently enacted (which places the Court in the difficult situation of invalidating a recent expression of the majority's will). When reviewing a modern law that imperfectly vindicates so-called "affirmative" social welfare rights, or that distributes government benefits unevenly, the Court has tried to avoid striking down the law entirely, because that would leave the rights completely unprotected and repudiate a recent choice of the legislature. Nor can the Court effectively revise the law because that would exceed what it perceives to be its proper judicial function.

Part I discusses how the Court has tried to resolve these shortcomings in its techniques of "passive activism" by resorting to informal declarations of unconstitutionality. By planting a foot on either side of the constitutional fence, the Italian Constitutional Court does not "uphold" the challenged law. It does not issue the law a certificate of constitutional good health. Instead, the Court explicitly points out the constitutional defect in the law and thereby tries to prod the legislature to reform the legislation. The Court warns Parliament that if reform is not forthcoming within a reasonable amount of time, it will act more forcefully in a subsequent case, usually by striking down the entire law. The Court's practice, however, leaves much room for improvement. By leaving litigants in early cases subject to an unconstitutional law, it sacrifices individual justice. Moreover, the Court undercuts its own efforts to spark legislative reform by failing to set strict deadlines or to follow up its decisions by later striking down the unconstitutional laws. Just as

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8 Throughout this paper, references to Parliament are meant to include the two houses of the legislature, the Chamber of Deputies and Senate, as well as the Government (that is, the Council of Ministers), which is responsible to the two chambers and bears the primary responsibility for legislative initiative.
“passive activism” has its shortcomings, so too do informal declarations of unconstitutionality.

Part II examines how American courts might learn from the Italian example. This section begins by tracing how courts can give Congress time to fix an unconstitutional statute using traditional legal tools: declaratory judgments, equitable discretion to delay injunctive relief, and the retention of jurisdiction to monitor compliance with judgments. Part II then explores the types of cases in which delay may be desirable. Most of the time, American courts will have less reason to delay than will their Italian counterparts, partly because American courts have greater ability to interpret statutes to avoid constitutional adjudication, and partly because there are fewer objections in American law to leaving a “gap” in the wake of striking down a statute. Supreme Court precedent, however, suggests that, in certain circumstances, an Italian-style breathing space may be well-suited to our American legal system. This may be particularly true when nullifying a law would greatly disrupt public administration or when drawing up creative relief would require judges to seriously reallocate public spending. Properly administered, American courts can avoid the problems reflected in current Italian practice, that is, the lack of individualized justice and of credible threats. Finally, I discuss enforcement of the proposed Balanced Budget Amendment to the United States Constitution to illustrate how American courts could decide to delay the exercise of their injunctive power.

I. JUDICIAL REVIEW IN ITALY

A. The Origins & Structure of the Italian Constitutional Court

In order to understand how the Italian Constitutional Court works, it is important to realize how its place in the Italian judiciary differs from that of the United States Supreme Court in the American judicial system. In particular, it is worth noting how the numerous powers accorded to American federal courts, including the Supreme Court (e.g., interpretation of federal statutes and the Constitution, review over lawsuits against public officials, and review of the constitutionality of legislation) are divided among several Italian tribunals, each supreme within its own sphere. The Court of Cassation sits atop the hierarchy of ordinary courts, with the final word on statutory interpretation.\(^9\) The Council of State heads a

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\(^9\) See **Mauro Cappelletti et al., The Italian Legal System: An Introduction** 80-81 (1967).
separate network of administrative courts charged with supervising the far-reaching bureaucracy and web of state-owned businesses in Italy.\footnote{See id. at 81-84.} The Court of Accounts has authority over state budgetary matters.\footnote{See generally FRANCESCO DI RENZO, LA CORTE DEI CONTI: STRUTTURA E ATTRIBUZIONI (1978).} Finally, the Superior Council of Magistrature is responsible for the internal governance of the judicial branch.\footnote{See Alessandro Pizzorusso, \textit{Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies}, 38 Am. J. Comp. L. 373, 375-77 (1990) (addressing recent developments in Superior Council of Magistrature).}

The Constitutional Court is a \textit{newcomer} to Italy’s \textit{legal system}, having decided its first case only in 1956. The post-war Constitution was quite innovative in introducing \textit{judicial review of legislation} to Italy, and the Constitution concentrated this power in a single body, the Constitutional Court. The Court generally is viewed as an organ quite separate from the rest of the judiciary, in part because the Court exercises the more “political” function of reviewing the validity of legislative acts. Unlike the United States Constitution, which vests “the judicial Power” in the Supreme Court,\footnote{U.S. CONST. art. III, § 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 Italian Constitution sets the \textit{groundwork} for the Constitutional Court in articles separate from that of the “judiciary.”\footnote{See COSTITUZIONE [Constitution] [COST.] (Italy) art. 101-13, 134-37. The Constitutional Court is governed by Articles 134-37 of the Italian Constitution, grouped under the rubric of “Constitutional Guarantees.” The other courts draw their authority from Articles 101-13, headed “The Magistrature.” The Court is composed of fifteen judges serving nine-year nonrenewable terms, drawn from among judges, law professors, and lawyers with at least twenty years of experience. Five judges are nominated by the President of the Republic, five by Parliament, and five by the career judiciary. See COST. art. 135.} Yet, like the rest of the courts, the Constitutional Court is expected to stand above the fray of partisan politics. The Court is headquartered atop the Quirinal Hill in Rome, across the street from the President of the Republic, who, according to the Constitution, “represents national unity.”\footnote{COST. art. 87, cl. 1.} As with the President, the Court is expected to serve as a special guarantor of the Constitution.

The Constitutional Court’s most important duty is \textit{to rule on the compatibility of any national or regional law with the Italian Constitution.}\footnote{See COST. art. 134. Additionally, the Court is charged with resolving conflicts} The bulk of its workload arrives from lower courts,
which must certify constitutional questions on an interlocutory basis as they arise in pending cases.\textsuperscript{17} As long as the Constitutional Court agrees that the challenge is relevant to the litigation and not manifestly groundless, it is obliged to rule on the constitutionality of the impugned law.\textsuperscript{18} The Court assesses the constitutionality of the challenged law in the abstract, not simply as applied to the parties before the Court. In other words, the Constitutional Court reviews laws; it does not decide cases. This distinction is important, because it means that the Court itself cannot tailor a remedy to fit only the parties before it. That is a job for the lower court on remand. This centralized system stands in obvious contrast with the American system of diffuse constitutional review, in which both trial and

\textsuperscript{17} \textit{See} Law of March 11, 1953, n.87, art. 23, \textsc{Gazzetta Ufficiale}, Mar. 14, 1953, at 984, 986. All proceedings are stayed pending the Constitutional Court’s review of the certified question. This midstream review of constitutional issues, in conjunction with pending lawsuits, is known in Italian as “\textit{in via incidentale}.” In certain circumstances, the national or regional governments can also invoke the Court’s original jurisdiction to review a statute outside the litigation context, or “\textit{in via principale}.” \textit{See} Law of March 11, 1953, n.87, art. 31-35, \textsc{Gazzetta Ufficiale}, Mar. 14, 1953, at 984, 986-87. In 1996, the Court’s caseload was divided roughly as follows: 95% certified questions; 3% original jurisdiction; 2% conflict of powers. \textit{See} Renato Granata, \textit{La Giustizia costituzionale nel 1996}, 42 Giur. Cost. 1239, 1918 (1997) (press conference of President of Constitutional Court) (referring to cases disposed of in 1996).

\textsuperscript{18} \textit{See} Constitutional Law of 1948, n.1; Law of March 11, 1953, n.87, art. 23, \textsc{Gazzetta Ufficiale}, Mar. 14, 1953, at 984, 986; Gustavo Zagrebelsky, \textit{La Giustizia Costituzionale} 192-98 (relevance), 202-03 (not manifestly unfounded) (new ed. 1988); \textit{see generally} Elisabetta Catelani, \textit{La “Questione di legittimità costituzionale” nel processo incidentale: La Sua determinazione nella più recente giurisprudenza della Corte}, 32 Giur. Cost. 1831 (1987) (discussing standards for finding question relevant and not manifestly unfounded). Under the rubric of relevance, the Court has developed rules on ripeness and similar doctrines that allow it to avoid ruling on constitutional questions. \textit{See} Zagrebelsky, \textit{supra}, at 198-201 (discussing cases in which Court refused to adjudicate questions that were hypothetical, unripe, or in which a decision striking down a law would not have any concrete effect on the pending case). The Italian phrase “not manifestly unfounded” corresponds roughly to the American concept of “colorable.”

A lower court’s decision not to refer a constitutional question to the Constitutional Court is unreviewable. During the Court’s early years, the upper echelons of the judiciary were reluctant to submit many questions to the constitutional tribunal. This reluctance has sometimes been attributed to the established judiciary’s discomfort with the new constitutional organ, as well as to the fact that the personnel of the judiciary had not been purged of fascist elements after World War II. It is interesting to note that many of the Court’s earliest important decisions arose in cases referred by low-level, local judges, who were often appointed after the formation of the new republic. \textit{See} Cappeletti, \textit{supra} note 9, at 77-78 & n.134.
appellate courts must rule on constitutional issues as they arise. Only as a last resort does the United States Supreme Court address constitutional questions, and it enjoys broad discretion under its certiorari jurisdiction to avoid most of them.19

With respect to judicial review, the Constituent Assembly that drew up the Italian Constitution in 1948 provided the Constitutional Court with a single power: to nullify unconstitutional laws. Article 136 of the Italian Constitution reads: "When the Court declares the constitutional illegitimacy of a norm of a law or of an act having the force of law, the norm ceases to be effective on the day after the publication of the decision."20 In short, the Constitutional Court has

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20 COST. art. 136. The Italian Parliament recently debated a constitutional amendment that would have permitted the Constitutional Court to defer the date on which an unconstitutional law becomes ineffective, up to one year. The text of the proposed constitutional reforms can be found in Progetto di legge costituzionale, Revisione della parte seconda della Costituzione, Testo risultante dalla pronuncia della Commissione sugli emendamenti presentati ai sensi del comma 5 dell'articolo 2 della legge costituzionale 24 gennaio 1997, n. 1, <http://www.camera.it/parlam/bicam/rifcost/docapp/relasse7.htm> (visited Aug. 21, 1998) [hereinafter Proposed Amendments]; see also Servizio Studi della Camera dei deputati, Dossier No. 8, Il progetto di revisione della Parte seconda della Costituzione (Atto della Camera 3931-A e Atto del Senato 2583-A), <http://www.camera.it/parlam/bicam/rifcost/dossier/aindice.htm> (visited Aug. 21, 1998) (summarizing and explaining proposed reforms). Unrelated political developments seem to have doomed these proposed reforms for the foreseeable future. See James Blitz, Italy's Efforts to Reform End in Failure and Recriminations, Fin. Times (U.S. ed.), June 4, 1998, at 2.

In several cases, the Italian Court has circumvented the requirement that a law lose effect the day after judgment, simply by delaying publication of its decision until Parliament passed legislation to supplant the unconstitutional statute. For example, the Court delayed the deposit of its judgment in Sent. 64/1970, 15 Giur. Cost. 663 (1970), thus surreptitiously achieving the same results as the Austrian Constitutional Court, which is entitled to defer the effect of its decisions. See Carlo Colapietro, Le pronunce "erogatorie" della Corte costituzionale ed il vincolo costituzionale della copertura finanziaria: le "additive di prestazione" sono per loro natura esenti dai vincoli e limiti dell'art. 81 Cost., 141 Giur. It. (PART I) 1249, 1257 (1989); Vincenzo Vigoriti, Italy: The Constitutional Court, 20 AM. J. COMP. L. 404, 410 & nn.28-29 (1972). In that case, the President of the Court had informal contacts with the executive branch so that the
the power of "negative legislation." The Court can wipe off the books any law that conflicts with the Constitution. These decisions are known as sentenze di accoglimento, or judgments that "accept" a constitutional challenge. Only these judgments that strike down a law are technically binding because Article 136 of the Italian Constitution provides only for declarations of unconstitutionality. Once the Constitutional Court issues its decision, proceedings resume in the lower court. If the Court has struck down the law, the ordinary judge must proceed to decide the case without reference to the nullified law. The Constitutional Court has no power to review how its decisions are implemented in particular cases. 31

When the Constitutional Court declines to strike down a law, by contrast, its decision lacks formal binding authority because neither the Italian Constitution nor the implementing legislation makes any mention of declarations of constitutionality. 32 Technically, then, the Court never actually upholds a law; it merely declines to invalidate government had enough time to prepare a decree in response to the Court's invalidation of portions of a pretrial detention law. See Zagrebelsky, supra note 18, at 307. Similarly, in 1977, the Court delayed ruling on a challenge to a property tax until Parliament had amended the statute. Once the new law was passed, the Court remanded the question to the lower court, to re-evaluate the "relevance" of the constitutional challenge. See id. In these cases, the Court apparently coordinated its action with the political branches to avoid creating a statutory vacuum that might cause public confusion.

Nevertheless, surreptitious delay, even if tolerable on rare occasions, is unacceptable as a general rule. Aside from violating the literal strictures of Article 136, such direct coordination between the Court and the political branches raises important structural issues. First, such coordination raises the question of whether the Court might allow partisan political considerations to determine the timing of its decisions. Furthermore, by denying the litigants any chance to rebut secret arguments put forward by the legislature, behind-the-scenes negotiations violate widely accepted notions of procedural fairness to the litigants. Additionally, even if such negotiation did not create an excessive risk of mixing judicial considerations with extraneous motives, there is still the problem that informal discussion with the political branches will not always lead to a solution. The Italian Parliament already suffers from extraordinary inertia and has been unresponsive to judicial requests to reform unconstitutional statutes. The Parliament's poor track record indicates that it would be just as unable to respond in a prompt or uniform manner to covert requests for cooperation with the judiciary.

31 See Giovanni Cassandro, The Constitutional Court of Italy, 8 Am. J. Comp. L. 1, 5-7 (1959).
32 See Livio Paladin, Diritto costituzionale 771-72 (1991) (noting that, while these judgments provide useful guidance to ordinary judges, they are not considered binding precedents). For a glimpse at the minority view that these decisions should have binding precedential effect, see Roberto Pinardi, La Corte, I Giudici ed il Legislatore: IL PROBLEMA DEGLI EFFETTI TEMPORALI DELLE SENTENZE D'INCONSTITUZIONALITÀ 89-90 n.50 (1993).
it. These judgments refusing to annul a statute, known as sentenze di rigetto because they "reject" a challenge to a law, have only one formal consequence: The judge who certified the constitutional question must apply the challenged law in the pending litigation. Beyond that, the decision has only persuasive force, insofar as it indicates how the Court is likely to rule on a similar challenge in a future case.

This distinction between binding and nonbinding decisions is quite meaningful in practice because lower courts may ask the Constitutional Court to review a law that it has already declined to strike down. For example, consider the Italian statute that criminalized blasphemy against the "State religion," that is, Catholicism. In a 1973 case, the Court turned away a challenge to that law based on the principle of equality, concluding that the legislature was entitled to take into consideration the religious affiliation of a majority of the Italian population. Because this decision was not binding precedent, however, lower courts were able to continue challenging the blasphemy law in later cases. Accordingly, in 1988, a similar question was referred to the Court. It again rejected the argument that the law was unconstitutional, but noted that recent official recognition of other religions had undercut the rationale for singling out blasphemy against Catholicism as a crime. Reconsidering the issue in 1995 when yet another lower court certified the question for review, the Court finally decided that the blasphemy law was unconstitutional. The Court rested its decision on the equality provision of the Constitution, reasoning that blasphemy must be forbidden either as to all religions, or as to none. At this point, the Court's judgment was final and binding, and it nullified the blasphemy law. As will be seen later, this ability to re-propose questions to the Constitutional Court is key to its strategy of informal declarations of unconstitutionality.

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25 See Cassandro, supra note 21, at 6.
26 See id.
27 See CODICE PENALE [C.P.], art. 724 (Italy) (punishing "outrageous invective or speech, against the Divinity or the Symbols or the Persons venerated in the State religion").
31 See infra note 101 and accompanying text. Interestingly, this allows the Constitutional Court to overrule only prior decisions that found a law constitutional. The Constitutional Court cannot, by contrast, revive a law that it previously found unconstitutional. The United States Supreme Court is not subject to such a restriction. See, e.g., Agostini v. Felton, 521 U.S. 203, 237 (1997) (overruling prior decision that had declared unconstitutional a program allowing public school
The drafters of the Italian Constitution thought the power of negative legislation would give the nascent Constitutional Court all the tools it needed to fulfill its most important task: to guard against laws that curtailed civil and political rights. Memories of the fascist era and its clampdowns on political dissent were still fresh. The drafters believed that the Court, as the guardian of individual liberty, needed only the power to strike down oppressive laws. One speaker at the time of the Constituent Assembly described the proposed Court simply as an institutionalization of the popular right of resistance against tyranny, of civil disobedience of unjust laws. By erasing those unjust laws, the theory held, the Court could restore liberty and put the constitutional house back in order.

Even so, the Constituent Assembly was wary of giving unelected judges too much power, and it purposely limited the Constitutional Court to the power of negative legislation. An enduring Rousseauan strand persisted in Italian political thought, according to which a popularly elected legislature embodies the supreme expression of the general will. In pre-fascist Italy, Parliament answered to no one but the electorate and could amend the Constitution by majority vote. The rare call for a rigid constitution and judicial review fell on deaf ears. Only after World War II, when the new Italian Republic was formed, was a new, difficult-to-amend constitution adopted. Some of the old attitudes persisted, however, and Parliament was elected according to one of the purest forms of proportional representation teachers to offer instruction in parochial school classrooms).


50 See GIUSTINO D'ORAZIO, LA GENESI DELLA CORTE COSTITUZIONALE 97-99, 117 (1981). D'Orazio reviews the partisan debates over the Constitutional Court before, during, and immediately after the Constituent Assembly. See also LUCIO PEGORARO, LA CORTE E IL PARLAMENTO: SENTENZE-INDIRIZZO E ATTIVITÀ LEGISLATIVA 5-6 (1987) (discussing how the Court was designed as guarantor of individual liberty).

51 See CAPPELLETTI, supra note 9, at 76. Indeed, at times it appears that the executive answered to no one but itself. See DENIS MACK SMITH, MODERN ITALY: A POLITICAL HISTORY 260-67 (1997) (relating how the king and a handful of cabinet ministers brought Italy into World War I against the wishes of a parliamentary majority).

52 See D'ORAZIO, supra note 30, at 28-32 (discussing failed proposals for judicial review in 1925-1926, prompted by the government's increasing resort to legislation by executive decree).
in Europe. A distinct skepticism of countermajoritarian forces accompanied this preference for direct democratic representation.

Even though the postwar period saw firm support for some kind of constitutional tribunal, the Constituent Assembly was never comfortable with the notion that fifteen lawyers should be able to invalidate the acts of the people’s elected representatives. A frequently voiced concern was that the Court might transform itself into a “political organ, in a sense a supervisor of every activity of the state authorities, which, far from keeping itself impartial, would not be able to keep free from the influence of the parties and the interplay of interests.” Indeed, many Italian jurists were keenly aware of the obstacles that the United States Supreme Court had thrown up to President Roosevelt’s New Deal. These jurists feared that the American brand of “judicial activism” might take root in Italy. Judges with too much power might be tempted to interfere in decisions that belonged to the political, rather than the legal, sphere. One way to limit the reach of such judicial activism was to cabin the Court’s range of freedom, by limiting its jurisdiction to the nullification of laws that conflicted with the Constitution.

Interestingly, there was debate at the Italian Constituent Assembly regarding whether the Constitutional Court should possess a power like that of the Austrian constitutional tribunal, which can delay implementation of its decisions for up to a year in order to give the legislature time to pass corrective legislation. The drafters of the Italian Constitution rejected this plan, however, and withheld such flexibility from their Constitutional Court.

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33 Id. at 89 (quoting speech by Professor G. Astuti before 1946 Congress of the Italian Liberal Party). These concerns about political influence intensified when the time came to nominate the first judges to the Constitutional Court. The Christian Democratic-led government proposed that the five judges nominated by Parliament should be chosen by simple majority vote, and that the five judges nominated by the President of the Republic should be proposed by the minister of justice — raising the possibility that the governing party would control appointment of two-thirds of the Court. Both proposals were ultimately defeated: Parliament chooses judges by three-fifths vote, effectively requiring the consent of opposition parties, and the President has a free hand in choosing his nominees. Yet, further disputes over the appointment process delayed the Court’s inauguration until 1956, fully eight years after the new Constitution had come into force. See Zagrebelsky, supra note 18, at 488-93.

34 See D’Orazio, supra note 30, at 32, 180-81.

35 Bundes-Verfassungsgesetz [Constitution] [B-VG] (Austria), art. 139, para. 5, cited in Zagrebelsky, supra note 18, at 308, n.107.

36 It is worth noting that a parliamentary commission recently re-opened that debate, recommending a constitutional amendment that would give the Constitutional Court precisely such a power to postpone the efficacy of its judgments.
During its early years, the power of negative legislation largely sufficed for the Constitutional Court to accomplish the main task it had set for itself, namely, to clear away restrictive laws from the pre-republican (and especially fascist) period that conflicted with the new Constitution. This task was problematic particularly because both the national civil and criminal codes had been promulgated under fascism, and the new legislature never undertook a comprehensive revision of the legal codes after World War II.\(^{37}\) It was not by chance that the first decision of the Constitutional Court signaled its determination to confront those old laws head-on, by asserting its jurisdiction to review the constitutionality of laws enacted before the promulgation of the 1948 Constitution.\(^{38}\) Representative of these early decisions was the Court's invalidation of laws from the 1930s and 1940s that authorized special security commissions to label particular citizens "dangerous" and thereby limit their freedom of movement. Such laws, the Court held, were inconsistent with the new Constitution, which guaranteed that restrictions on personal liberty must be the result of regular judicial proceedings, subject to standard procedural safeguards.\(^{39}\) Nullifying such laws was enough to restore the individual citizen's freedom of movement to its rightful constitutional place, and to establish the Constitutional Court as a player on the postwar judicial scene.

See supra note 20.


\(^{38}\) See Sent. 1/1956, 1 Giur. Cost. 1, 6-7 (1956). This decision was controversial. Before the Constitutional Court began work in 1956, ordinary courts had been provisionally empowered to strike down old laws that conflicted with the new Constitution, according to the doctrine of *jus superveniens* — that when two laws conflict, the newer law prevails. See Cost. Transitional and Final Provisions, art. VII ("Until the Constitutional Court begins to function, [constitutional review] shall take place in the forms and within the limits of the norms pre-existing the entry in force of the Constitution."). It was by no means clear that the Constituent Assembly had meant to shift this power to the Constitutional Court. In Germany, with its otherwise similar system of centralized constitutional review, the power to strike down laws predating the 1949 Basic Law remained diffuse, in the hands of ordinary judges as well as the Constitutional Court. See Donald P. Krommers, The Constitutional Jurisprudence of the Federal Republic of Germany 59 (1989).

The simple negative legislation approach often proved too blunt and forceful a tool for the Constitutional Court for three reasons. First, the Italian Parliament proved unable (or unwilling) to fill gaps in the legal order after the Court invalidated laws. The proportionally elected legislature mirrored the multiple cleavages in Italian society only too faithfully, making the formation of governing coalitions an increasingly difficult task. The resulting process of political compromise slowed the law-making process to a snail’s pace and occasionally led to complete legislative paralysis. The Constitutional Court was aware that when it struck down a law, it was erasing years of delicate political negotiation in a single stroke. It would require enormous time and effort for Parliament to muster enough political will to enact a new, reformed law. Given the already high obstacles to legislative reform, the Court was understandably cautious about adding hurdles of its own. This made the Court particularly unwilling to nullify an entire law that was only partially defective.

No procedures guarantee that Parliament will respond to decisions of the Constitutional Court. The Constitution itself simply instructs that the decisions of the Court are to be relayed to Parliament "so that, as [it] may deem necessary, [it] may take steps in the proper constitutional forms."41 The internal rules of the Senate

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40 From 1953 on, no party held a majority of the seats in Parliament, forcing leaders to cobble together constantly shifting governing coalitions from a bewildering array of political parties. Since World War II, Italian governments have had an average life span of less than one year. See David Hine, Governing Italy: The Politics of Bargained Pluralism app. 1 at 345-46 (1993); 1945-1996 Archivio Della Politica in Italia (Gianfranco Pasquino ed., Laterza Multimedia 1997) [CD-Rom]. Of course, to acknowledge the constant flux within government coalitions, with its attendant braking effect on legislation, is not necessarily to claim that the Italian political system was unstable. The long-standing dominance of the Christian Democratic party provided strong elements of continuity in Italian politics until the early 1990s. See generally Joseph Lapalombra, Democracy Italian Style (1987).

41 Cost. art. 136. This command is repeated almost verbatim in the law that establishes the Constitutional Court. See Law of March 11, 1953, art. 87, n.30, 62 Gazzetta Ufficiale 984 ("The decision . . . shall furthermore be communicated to the Chambers . . . so that, as [it] may deem necessary, [it] may take measures within [its] competence."). The likely meaning of these provisions is that Parliament can amend the Constitution if it disagrees with the result reached by the Court. The Parliament "can instead, if it wishes, replace the law declared unconstitutional with a new law. It can also take steps to settle relationships as necessary upon the
and Chamber of Deputies provide that Court decisions are transmitted to the relevant parliamentary committees. Although the committees are supposed to report back on whether the judgments require legislative follow-up, in practice these rules are moribund. 43 Few reports are generated, and the committees rarely propose a legislative response. 44 A high-sounding “Standing Committee for the Study of Constitutional Court Decisions” has been repeatedly established within the Chamber of Deputies, but entire parliamentary sessions may pass without it meeting. 44 The Prime Minister has power to introduce bills responding to constitutional problems raised by the Constitutional Court, but he is under no concrete duty to track and respond to all decisions that call for a parliamentary response. 45 There is no equivalent to the law recently enacted in the United Kingdom, whereby a judicial decision that a British law is incompatible with the European Convention on Human Rights triggers a fast-track amendment procedure. 46 The Constitutional Court often has had occasion to complain about Parliament’s unresponsiveness to its imprecations for reform. 47

A second problem for the Court was that some of the laws it evaluated dealt with complex social and welfare rights, so that invalidating those laws on constitutional grounds would often have unforeseen and unfortunate consequences for the well-being of Italian citizens. The 1948 Constitution enshrined more than declaration of unconstitutionality of the norm to the extent that, prior to the declaration, the norm had effect and was applied, in judgments or otherwise.” Claudio Tucciarelli, Le istituzioni a due marce: Corte costituzionale e Parlamento tra sentenze poco seguite e seguito poco sentito, 16 QUAD. COST. 293, 299 (1996).

47 Rules of the Chamber of Deputies, art. 108; Rules of the Senate, art. 139. For a more detailed description of these parliamentary procedures, see Nicola Assini, Il seguito (legislativo) delle sentenze della Corte costituzionale in Parlamento, in 1 SCRITTI IN ONORE DI VEZIO CRISAFULLI 21, 36-37 (1985); Tucciarelli, supra note 41, at 303-08.

43 See Tucciarelli, supra note 41, at 308-13. Tucciarelli highlights “the scant attention paid by Parliament to the application of the provisions” for legislative follow-up to constitutional rulings, noting that only seven decisions of the Court were the subject of formal discussions regarding follow-up in parliamentary committees during the previous five legislatures. Id.

44 See id. at 309.

45 See id. at 300 (discussing role of prime minister).


47 See, e.g., Sent. 243/1993, 38 Giur. Cost. 1756, 1773 (1993) (stating that if the Court failed to declare a law unconstitutional after Parliament had ignored repeated urgings of the Court to enact reforms, the Court would end up protecting the legislature’s inertia rather than its discretion).
guarantees against government intrusion into the private sphere. The Constitution also called upon the government to promote social goals, such as education, health, and workers’ welfare. When laws advanced these rights only imperfectly, for example, by providing workers’ compensation for some, but not all, job-related injuries, the Court faced a quandary. If the Court nullified the workers’ compensation statute, all workers would be left without assistance, thereby eviscerating the constitutional goal of protecting workers. If the Court left the law inviolate, however, then many workers would not enjoy the promises of protection that the Constitution extended to them.

Similar problems arose under the constitutional guarantee of equal treatment. For example, different classes of workers complained that their contributions to the national health-care system were uneven. For the Court to strike down the entire health-care financing system would injure the constitutional value of universal health care. Yet, for the Court to sit on the sidelines would seem to be an abdication of its duty. Tinkering with the distribution of benefits was likewise problematic both from a legal standpoint, because the Constitution gave no guidance as to the proper allocation of health costs among the population, and from a political standpoint, because the Court’s decisions could drastically increase state liabilities in a time when fiscal austerity was increasingly demanded.

Third, the Court began to face more challenges to recently passed laws, which only highlighted its countemajoritarian nature by placing it in the position of having to invalidate laws that enjoyed the current support of a majority of the people’s elected representatives. By the 1970s, the Court had cleared away most of the problematic fascist-era laws, and many important cases involved laws enacted by the postwar republican assembly. The Court was still struggling with a tremendous backlog of cases, so its decisions at first involved laws passed by previous parliaments, long since dissolved. In the mid-

48 See Cost. art. 34 (education), 32 (health), 38 (worker’s welfare).
1980s, however, the Court finally caught up on its docket. At this point, it began facing challenges to laws passed by parliaments that were still in power, and which were thus fresh from the crucible of legislative debate.

These three evolving phenomena — parliamentary inertia, unforeseen complications of enforcing new constitutional guarantees, and increasingly swift review of freshly minted laws — made the simple power to strike down a law seem a disproportionately strong response to constitutionally defective laws. The discussion that follows will review several forms of "passive activism" that the Court used to tailor its judgments more narrowly, stretching its powers in unanticipated ways to avoid striking down laws. As each technique revealed its limitations, however, the Court continually turned to new and innovative approaches — moving from statutory interpretation, to additive judgments, to declaring a law temporarily constitutional. Most recently, the Court has resorted to the practice of pronouncing laws unconstitutional without invalidating them.

2. Statutory Interpretation

As a straightforward way to avoid striking down laws, the Constitutional Court began asserting its power to interpret not only the provisions of the Constitution, but also the statutes it was reviewing. This assertion aroused great controversy at first, since

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51 See Paolo Caretti, L'eliminazione dell'arretrato e i nuovi sviluppi della giurisprudenza costituzionale, 9 QUAD. COST. 391 (1989) (discussing the possibilities of new activity in Constitutional Court after the elimination of case backlog).

52 See Sent. 3/1956, 1 Giur. Cost. 568, 574 (1956) (asserting that the Constitutional Court is charged with autonomy to interpret not only the constitutional provision in question, but also the ordinary law that is supposed to violate the Constitution, though always taking into account the interpretation placed on the law by other courts). The Court's efforts to interpret statutes initially met with particular opposition when the Court rejected an interpretation of a statute proffered by the judge certifying a constitutional question. Some commentators argued that statutory interpretation fell exclusively within the domain of "real courts," a category to which the Constitutional Court purportedly did not belong because its power to review the constitutionality of laws was a "political" duty that fell outside the traditional "technical" domain of courts in the civil law tradition. With the passage of time, all judicial actors seem to have agreed on a legal middle ground. When push comes to shove, the Constitutional Court defers to the "living law": a widespread, consensus interpretation of a statute that is accepted throughout the ordinary courts, particularly a definitive interpretation by the Court of Cassation. This doctrine prevents the Constitutional Court from disturbing settled expectations about statutes, the meanings of which have been widely accepted. In return, other actors in the Italian legal system have conceded the Constitutional Court's independent role in interpreting statutes as ancillary to its power to review the
statutory interpretation had been the exclusive domain of the ordinary courts, headed by the Court of Cassation. The Court grounded this authority on the jurisprudential theory that it reviews not the text of a law, but rather the "norms" or rules that can be extrapolated from a law. This approach draws on the language of Article 136 of the Italian Constitution, which authorizes the Court to declare the unconstitutionality of "una norma di legge," translatable as a legal "rule" or "norm." American law does not use any term of art that precisely corresponds to the Italian idea of a "norm," but the notion is not a foreign one. At bottom, a "norm" simply refers to a particular interpretation of a statute. This emphasis on reviewing individual interpretations has allowed the Court to develop two ways to avoid striking down a law in its entirety.

First, the Court interprets laws to avoid constitutional questions. In what have become known as interpretive judgments, the Court frequently rejects a characterization of the statute offered by the ordinary court below, and instead adopts an interpretation of its own that is compatible with the Constitution. According to a canon of judicial interpretation that echoes the principles set forth by Justice Brandeis in Ashwander v. Tennessee Valley Authority, the Court must

constitutioality of legislation, particularly when the interpretation of a statute is not yet consolidated. For a discussion of some conflicts between the Italian Constitutional Court and ordinary courts over the power of statutory interpretation, see Zagrebelsky, supra note 18, at 286-91, 312; Francesco Casavola, La Giustizia costituzionale nel 1992, 38 Giur. Cost. 620, 623-24 (1993).

53 See generally Hans Kelsen, A Pure Theory of Law (1934). The elaboration of this distinction between norms and the text of a law is heavily indebted to Kelsen. See id.

54 See, e.g., Riccardo Guastini, Rules, Validity, and Statutory Construction, in 1 Italian Studies in Law 11, 16 (Alessandro Pizzorusso ed., 1992). One author defined a "norm" by stating, "I name 'rule' or 'norm' any sentence which is the meaning ascribed (by anyone) to a statutory sentence . . . ." Id. The definition went on further to state, "a rule is a part of an interpreted text." Id.

55 See DiManno, supra note 37, at 160-63 (discussing cases in which the Court grounds its interpretation solely in the statutory text), 173-76 (discussing cases in which the Court's interpretation is influenced more by a desire to avoid a conflict between statute and Constitution).

For example, the Court recently disagreed with a lower court's interpretation of a statute governing pretrial release. In the case at bar, the defendant had initially been placed under house arrest. A lower-court judge determined that there was no longer any reason to impose such a limitation, but believed that the criminal procedure code precluded him from modifying the terms of pretrial release sua sponte. The judge certified a question to the Constitutional Court, arguing that the limit on his authority to modify the terms of release violated the Constitution. The Court avoided the constitutional question by interpreting the code to authorize the judge to ease pretrial release conditions sua sponte. See Sent. 89/1998.

"keep alive a legal rule, when it can be given at least one meaning that is consistent with the Constitution." Such a decision is not binding precedent because it formally falls within the category of a sentenza di rigetto, and in any event, the last word on statutory interpretation belongs to the Court of Cassation. The Constitutional Court, therefore, can read a statute creatively only when the ordinary courts have not yet settled on the proper reading of a statute, and even then, the Court of Cassation is free to reject the constitutional tribunal's interpretation in later cases. Nevertheless, the Court's opinions in interpretive judgments usually leave little room for doubt that a contrary interpretation of the statute would be struck down. This veiled threat lends real-world effect to an otherwise "nonbinding" precedent.  

For example, one of the Court's earliest cases involved a fascist-era law that authorized government prefects to take measures "for the protection of public order and public safety." Several parties challenged the law for vagueness, arguing that it gave prefects carte blanche to issue orders that violated citizens' civil rights. The Court agreed with the parties that such a broad reading of the law could lead to constitutional problems. To avoid those difficulties, the constitutional judges endorsed a different, narrower interpretation of the statute. These judges agreed with the decisions of several lower courts that a prefect's orders were subject to strict limitations of time, place, and necessity, and were reviewable by administrative tribunals to ensure the protection of individual rights. Under this interpretation, the Court declined to strike down the statute. It thereby tried to salvage as much of the legislature's project as possible, while avoiding gaps in government authority to preserve public order.

57 Sent. 368/1992, 37 Giur. Cost. 2935, 2942 (1992). In his concurring opinion in Ashwander, Justice Brandeis set forth seven principles developed by the United States Supreme Court for avoiding the adjudication of constitutional questions. His seventh principle stated: "When 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." Ashwander, 297 U.S. at 346 (Brandeis, J., concurring).

58 On occasion, the threat is not veiled at all. Witness a 1995 Court decision, declining to strike down a provision of the criminal procedure code only if it was interpreted to authorize a judge to order, sua sponte, the collection of further evidence in criminal investigations. Under any other interpretation, the Court stated, the statute would be unconstitutional. See Sent. 111/1993, 38 Giur. Cost. 901, 919 (1993) ("[A]n interpretation different from one described here would contradict . . . the constitutional principles cited in this decision.").

In the second interpretive technique, the Court strikes down only particular norms or interpretations arising from a statute. By severing the unconstitutional applications and leaving intact other legitimate interpretations, the Court is able to cushion the blow of a declaration of unconstitutionality. To illustrate how this works, let us return to the law giving prefects open-ended authority to ensure "public order." Despite the Court’s 1956 decision endorsing a narrow reading of this law, prefects continued to issue broad-ranging orders that seriously curtailed civil rights. Furthermore, the Court of Cassation held that prefactual orders were exempt from searching administrative review, thereby rejecting the interpretation offered by the constitutional judges. In 1961, a second challenge to the law was certified to the Constitutional Court, this time with more success. The Court invalidated the law to the extent that it granted prefects the power to issue orders that violate constitutional rights or exceed the normal strictures of administrative law. Only that "norm" was unconstitutional, and the Court effectively severed it from the rest of the statute. Because the judgment struck down the statute only partially, all other "norms" remained in place. Thus, prefects retained authority to regulate public order as long as they respected the basic elements of legality: the order must be of limited duration, keyed to the necessity and urgency of the problem, adequately explained and published, and otherwise in conformity with law. This left intact as much of the legislature’s project as was consistent with the Constitution.


The Court has tried to avoid striking down unconstitutional laws in yet another creative way: It fixes them itself. More precisely, the Court declares a law invalid to the extent that it lacks a constitutionally required rule, and then effectively inserts the missing rule into the statute. Hence, Italian lawyers refer to these judgments as "additive" decisions. For example, in 1970 and 1972, the Court held a criminal defense counsel statute unconstitutional to the extent

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60 See DiManno, supra note 37, at 210-15. The Italian Court’s desire to conserve legislation by severing unconstitutional interpretations is mirrored in the United States doctrine of severability of unconstitutional textual portions of statutes. Regan v. Time, Inc., 468 U.S. 641, 652 (1984). For example, the Supreme Court has stated: "In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary." Id. at 652.

that it did not permit counsel to be present during critical pretrial events such as interrogation of the defendant and deposition of adverse witnesses. What is remarkable about additive judgments is that because the Court formally has power only to invalidate legal rules, it had to frame its decisions as “striking down” a legislative omission. In doing so, the Court relied on the distinction between a law and the norms that arise from that law. According to the Court, the code of criminal procedure embodied a rule, or norm, that defense counsel could not be present at key pretrial events. Such a norm was unconstitutional, and could therefore be invalidated even though it appeared in no legal text. As a practical matter, the effect of this judgment was to “add” a provision permitting counsel to attend pretrial events.62

Historically, the Court first made use of additive judgments to achieve the primary goal set for it by the Constituent Assembly: to safeguard individual rights against state intrusion, as in the criminal defense context described above. In part because these decisions did not impose any easily measurable financial costs on the state, and because the Court was playing its respected role as guarantor of individual freedom, its decisions were generally accepted. As time went on, however, the Constitutional Court began to face more complex cases involving newer laws, including state spending programs that formed the basis of the Italian welfare state. Citizens increasingly complained that the state distributed benefits unevenly, in violation of the equality guarantee of the Constitution. These complaints frequently involved welfare benefits, such as workers’ compensation, or pay scales at state institutions, such as teachers’ salaries. In response, the Court often added “missing” provisions to increase the class of people entitled to higher payments from the state.

Consider a typical case involving the equality provision of the Italian Constitution. In 1975, university professors challenged a law that set their maximum salary below that of state managerial employees with the same level of seniority. The Court reasoned that, because Parliament had for decades pegged the salaries of professors and managers at the same level, principles of equality required that professors continue to receive the same treatment absent explanation from Parliament. The Court, therefore, issued an additive judgment, declaring it unconstitutional to pay professors lower salaries than

state bureaucrats. The result of this judgment was to entitle professors immediately to higher salaries. Such a decision had significant financial repercussions for the state and met with much criticism.

In light of the broad array of social welfare spending in Italy, plus the enormous number of citizens employed by the state and state-owned businesses, such Court decisions placed ever-growing strains on the Italian treasury. In 1991, for example, the government was forced to appropriate an additional 600 billion lire (about 500 million dollars in 1991 dollars) to cover unforeseen expenses stemming from the Court’s decisions. The added financial burdens were particularly unwelcome during the 1980s, as the government struggled to bring public debt into line with the Maastricht criteria for European economic integration. The increasing number of such decisions required more attention from the government. In 1988, Parliament required that, whenever a new judgment of the Constitutional Court might increase government spending, the relevant ministry should notify the Minister of the Treasury who, in turn, should prepare an appropriate legislative response. Against this background, the Constitutional Court’s practice of issuing additive judgments in public expenditure cases faced mounting criticism, especially from the Ministry of the Treasury. Some suggested that the Court’s decisions violated Article 81 of the Constitution, which requires that all government spending laws indicate their source of funding. The theory was that when a Court decision expanded the range of beneficiaries under a state welfare program, the Court was in effect appropriating funds. This skewed the budget adopted by the legislature and, it was claimed, violated Article 81.

Even though the Court (and most legal scholars) rejected the notion that Article 81 prohibited it from issuing decisions that led to higher state expenditures, the constitutional judges took quite seriously the charge that their decisions were obstructing national

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64 See Tucciarelli, supra note 41, at 311.
66 Italy’s public debt ballooned from 38% of GDP in 1970 to a peak of 122.9% in 1996. See Vincent Della Sala, Hollowing Out and Hardening the State: European Integration and the Italian Economy, 20 W. EUROPEAN POL. 14, 23 (1997).
67 L. 362/1988, art. 7, cl. 7; see also Tucciarelli, supra note 41, at 300 (discussing role of government in responding to the Constitutional Court’s decisions).
68 See Grosso, supra note 65, at 2377 n.7; DiMANNO, supra note 37, at 428.
attempts at fiscal austerity. A number of proposals were vetted. One option was to return to a bare-bones negative legislation model: When faced with unequal distribution of benefits, the Court should apply its duty to annul the offending statute quite literally and strike down the entire benefits statute. Others proposed that the Court should reject all equality challenges to benefits statutes because there was no legal basis for deciding how to remedy the inequality, that is, the Court could never determine whether the statute was "missing" a provision increasing one group's benefits or decreasing another's. In many cases, the Court seems to have been attracted to this view and brusquely turned away certified questions in light of the plurality of choices for fixing a statute — choices that, it said, only a legislator was entitled to make. In a further effort to minimize the financial impact of its decisions, the Court limited the retroactive effects of its judgments, often by declaring that a law had only recently "become" unconstitutional. Furthermore, the Court ruled that it was up to the ordinary courts to determine the retroactive effects of its decisions in

69 The Court's ambivalence on this point is illustrated in the press conferences of the President of the Constitutional Court. In 1989, President Saja emphatically stated that "an increase in public spending can never be considered the necessary and direct consequence of the Court's decisions, because the political powers can simply reform the entire area by redistributing, in conformity with the Constitution, the same sums already appropriated." Francesco Saja, La Giustizia Costituzionale nel 1989, Conferenza Stampa, 115 Foro It. 65, 69 (1990). The next year, however, the new President, Giovanni Conso, suggested that the Court should take into account the national fisc as one of many elements having constitutional value. See Giovanni Conso, La Giustizia Costituzionale nel 1990, Conferenza Stampa, 114 Foro It. 109, 158 (1991).

For the views of a wide array of Italian law professors, see the proceedings of a seminar organized by the Constitutional Court on the question of Article 81. Le Sentenze della Corte Costituzionale e l'Art. 81, u.c., della Costituzione: Atti del seminario svoltosi in Roma, Palazzo della Consulta, nei giorni 8 e 9 novembre 1991 (1993); see also Grosso, supra note 65, at 2376-80 (reviewing the Court's jurisprudence in reaction to criticism of the costs of its judgments); Leopoldo Elia, Le sentenze additive e la più recente giurisprudenza della Corte costituzionale (ottobre 81 - luglio 85), in 1 Scritti su la giustizia costituzionale in onore di Vezio Crisafulli 300, 313 (1985) (distinguishing between "additive" decisions that protect individual rights at no obvious cost to the state, and decisions that expand classes of beneficiaries at the expense of the national treasury).

70 See Pinardi, supra note 22, at 81-84; Giovanni Virga, Ordinanze d'inammissibilità della Corte costituzionale e potere del giudice di merito di disapplicare norme che reputi incostituzionali, 111 Foro It. 455 (1988) (addressing the possible responses by lower courts to Constitutional Court's growing reluctance to issue additive judgments).

It is worth noting that the Court's efforts to clear an immense backlog of decisions in the 1980s may have fueled its propensity to summarily refuse to deal with some cases, much as the United States Supreme Court uses its discretionary certiorari jurisdiction to allocate its own scarce decisional resources. See generally Caretti, supra note 51; Saja, supra note 69, at 65 (noting elimination of backlog).
particular cases.\(^7\) Such decisions effectively limited claims for back payments to newly eligible beneficiaries and thereby reduced the drain on state funds that would flow from the Court’s decisions.\(^7\)

As with its practice of statutory interpretation, the Constitutional Court eventually developed limits on when it will issue an additive judgment. For example, the Court has steadfastly refused to add in missing provisions in criminal cases, when gap-filling might result in greater criminal sanctions.\(^7\) In the civil context, the Court is more flexible. In an apt turn of phrase, Vezio Crisafulli described the Court’s self-imposed standard for when it should strike down a legislative omission, thereby supplying a norm that is “missing” from a challenged law: The Court must stay within the “rime obbligate,” or “prescribed verses” of the statute.\(^7\) Perhaps the metaphor works


The Court’s efforts to reduce the monetary costs of judgments against the state echoes some aspects of the American doctrine of state sovereign immunity. As the United States Supreme Court has interpreted the Eleventh Amendment, federal courts cannot order states to pay monetary damages in compensation for past injury. Thus, a federal court cannot compel a state to make back payments to beneficiaries of social welfare programs. Yet, courts can enjoin a state from withholding future payments as they become due. See Edelman v. Jordan, 415 U.S. 651, 658-59 (1974) (holding that the Eleventh Amendment bars retroactive payment of public assistance benefits that had been wrongfully withheld by Illinois).

[7] See Sent. 467/1991, 36 Giur. Cost. 3805 (1991). In this case, the Court stated that it would not insert omitted provisions into a law regarding differentiated penalties for conscientious objectors to military conscription because such an outcome might result in the imposition of higher penalties on one class of objectors. See id. at 3816. The Italian Court’s response in such cases has been to declare the question “inadmissible,” which here roughly corresponds to the American notion of “nonjusticiable.” This judicial reluctance to tinker with criminal statutes is embodied in the “principle of legality,” common to both civil and common-law systems, whereby all penal sanctions must be set exclusively by the legislature. Compare Cost. art. 25, cl. 1 (“[N]o one may be punished except by virtue of a law that entered into force before the act performed.”) with United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that United States federal courts have no jurisdiction to create common-law crimes).

[7] See Verzio Crisafulli, La Corte Costituzionale ha vent’anni, in LA CORTE COSTITUZIONALE TRA NORMA GIURIDICA E REALITÀ SOCIALE 69, 84 (Nicola Occhiocupo ed., 1978). Additionally, the Constitutional Court has required the lower-court judge to indicate what “verse” he thinks is constitutionally necessary when certifying the question to the Court. Failure to identify the “missing” provision will lead the Court to reject the certification out of hand. See Franco Modugno & Paolo Carnevale, Sentenze additive, “soluzione costituzionalmente obbligata” e declaratoria di inammissibilità per mancata indicazione del “verso” della richiesta addizione, 35 Giur. Cost. 519 (1990).
better in English this way: Judges may not rewrite statutes in free verse. A judge may add only those clauses that the Constitution requires. When the choice among a "variety of solutions" depends on a "discretionary balancing of values," the Court has held that it may not try to fix the statute.\(^5\)

4. Temporary Constitutionality: The Precursor to Informal Declarations of Unconstitutionality

Sometimes the Constitutional Court faces a statute with a constitutional defect that it can neither interpret away, sever, nor simply fix on its own, yet the judges are still not willing to strike down the law. In some of these cases, the Court has resorted to yet another technique that pushes the boundaries of constitutional adjudication: It declares the law only temporarily constitutional. This solution has been invoked in two kinds of cases.

In the first set of cases, the Court has allowed Parliament to stretch the limits of its powers to deal with "emergency" situations of limited duration. For example, Parliament passed a law authorizing lengthy pretrial detention for suspected terrorists during the 1980s, when Italy was struggling against a wave of domestic terrorism. The Court upheld the law, otherwise constitutionally problematic, on the grounds that it had been adopted "in an emergency situation" that was "exceptional and grave, but also essentially temporary."\(^6\) The Court then put Parliament on notice that if reforms failed to materialize within a reasonable amount of time, the law in question would "become" unconstitutional, and the Court would strike it down. Although the wave of terrorism "justified unusual measures, these lose legitimacy if unjustifiably prolonged over time."\(^7\)

In other cases, the Court has worried that striking down a law would only worsen the constitutional situation. Consider a pension program that distributes benefits unequally. Assume that the statute is worded clearly enough to leave no room for interpreting the problem away. There is no apparent legal standard for deciding whether to raise the benefits of one group rather than to lower the benefits of another, and so the Court cannot fix the law itself without considering nonlegal factors. Yet while the default option of striking down the pension law would solve the equality problem, it would seriously impair the provision of a subsistence income to the elderly

\(^7\) \textit{Id.}
— a constitutional guarantee in Italy— not to mention throw into chaos the settled expectations of retirees who survive on their monthly checks.

For this reason, the Constitutional Court has balanced not only the competing constitutional values implicit within a challenged statute, but also other constitutional values that would be threatened if the statute were wiped off the books. In some cases, the Court has struck a balance by letting the law stand temporarily on the grounds that, for the time being, the law does not conflict with the Constitution. As Gustavo Zagrebelsky has put it, the Constitutional Court "recognizes the unconstitutionality of the law 'to the extent' that it is a permanent regulation of a certain field but, temporarily, does not declare it unconstitutional in anticipation of its (hoped-for) modification." In the short term, such a decision buys time for the legislature to take the lead in correcting the constitutional flaw, while in the long term the decision lays a juridical foundation for the Court to declare the law unconstitutional later if the legislature fails to act swiftly.

78 See COST. art. 38, cl. 2 ("Workers have the right to be provided and assured means that are adequate for their needs in life in case of accident, sickness, disability, old age, and involuntary unemployment.").

79 See AGGIORNAMENTI IN TEMARIO DI PROCESO COSTITUZIONALE (1990-1992), at 100 (Roberto Romboli ed., 1993) [hereinafter AGGIORNAMENTI]; PINARDI, supra note 22, at 81 (noting that the Constitutional Court seems to balance the competing constitutional values and often comes down in favor of protecting the principle of the "continuity" of the legal order).

80 ZAGREBELSKY, supra note 18, at 310 (emphasis deleted). For further discussion of temporary constitutionality, see Andrea Pisaneschi, Le sentenze di "costituzionalità provvisoria" e di "incostituzionalità non dichiarata": la transitorietà nel giudizio costituzionale, 34 Giur. Cost. 601 (1989). Pisaneschi discusses judgments in which, faced with "emergency" or temporary norms that can be considered unconstitutional in the abstract, the Court "provisionally" rejects the challenge, apparently justifying the exemption of those norms from constitutional review, and at the same time inviting Parliament with a "warning" to change the statute. If the legislature’s inertia persists, evident after a more or less lengthy series of decisions turning away challenges to the law, the Court can finally issue a judgment striking down the law and decisively resolve the question.

Id. at 601.

81 The notion of temporary unconstitutionality is not completely foreign to the United States Supreme Court’s jurisprudence. In 1977, the Court invalidated, as a violation of equal protection, a statute that automatically granted Social Security benefits to wives but not husbands of wage-earners. See Califano v. Goldfarb, 439 U.S. 199, 217 (1977). In response to that judgment, Congress enacted a new law making all spouses automatically eligible for benefits. To limit the drain on the Social Security trust fund, Congress reduced spousal benefits by the amount of any federal pension the spouse received. Yet, recognizing that many wives had planned for
The Court has resorted most conspicuously to declarations of "temporary constitutionality" in the troublesome area of television and radio broadcasting. Indeed, the Court has used nearly all of its techniques to soften the impact of its judgments while nudging the legislature toward reform. The Court's repeated warnings were eventually met with legislative reform, though often partial and painfully slow. The saga began in 1974, when the Court struck down the law that granted the state a monopoly over radio and television broadcasting. In an extraordinarily detailed ruling, the Court set forth a number of guidelines to which reform of the industry would have to adhere. A year later, Parliament responded by enacting a reform bill that took some account of the principles enunciated by the Court. The Court found this law inadequate, declared the state monopoly unconstitutional at the local level, and called for Parliament to strike a more appropriate balance between the twin constitutional values of free enterprise and freedom of expression. The failure of the 1975 law, which had embodied delicate political compromises, stalled the reform process for several years. As Nicola Assini puts it, the ensuing period is best characterized not as one of legislative "inertia," but rather "unproductive activism." Numerous bills were introduced, but the failure to achieve a political consensus around any particular proposal meant that no law was passed. A

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retirement on the assumption that they would receive full Social Security payments, Congress exempted from the pension-offset provision wives who would have become eligible for full benefits within five years after the new law took effect. See Heckler v. Matthews, 465 U.S. 728, 733 (1984). In effect, Congress had re-enacted (for a five-year window) the same preference for wives that the Court had found unconstitutional in Goldfarb. The Court upheld this pension-offset provision. It reasoned that the preference was permissible because Congress intended to protect reliance interests (a legitimate, gender-neutral goal), rather than to perpetuate stereotyped gender roles. See Heckler, 465 U.S. at 745, 750-51. One of the Court's final remarks echoes some of the concerns of the Italian Court in its temporary constitutionality cases:

We have recognized, in a number of contexts, the legitimacy of protecting reasonable reliance on prior law even when that requires allowing an unconstitutional statute to remain in effect for a limited period of time. Although an unconstitutional scheme could not be retained for an unduly prolonged period in the name of protecting reliance interests, or even for a brief period if the expectations sought to be protected were themselves unreasonable or illegitimate, there is no indication that the offset exception suffers from either of these flaws.

Id. at 746 (citations omitted).


83 See Assini, supra note 42, at 30-31 (noting introduction of bills by individual deputies, as well as failed government-backed plan in 1978).
challenge to the system returned to the Court in 1981, but the Constitutional Court simply continued to admonish Parliament that it needed to reform the broadcasting system and to avoid excessive concentrations of private power.

In 1988, the Court was confronted with yet another law that permitted private national television and radio stations, but did not limit ownership of multiple stations. Although the Court found that the absence of ownership limitations was constitutionally defective, the Court upheld the law on the grounds that it was professedly a “temporary measure.” 84 The Court warned that “if the approval of a new law should be delayed beyond any reasonable time limit, the challenged law . . . can no longer be considered provisional and shall be deemed definitive: so that this Court, once again presented with the same question, will not be able to avoid a different determination with its ensuing consequences.” 85 In January 1990, the challenged law returned to the Court, but Parliament had not acted. The Court avoided following up on its threat by delaying its decision until August, when a new law was finally passed limiting private entities to the ownership of twenty-five percent of all private networks. 86 At that point, the Court simply remanded the case in light of the new statute.

The remand simply deferred the Court’s obligation to review the new law. In 1994, when the challenge returned to the Court, it struck down the new limit because the twenty-five percent cap did not adequately protect pluralism in broadcasting. The Court, however, managed to give Parliament still more time to engineer reform, by upholding as “temporarily constitutional” a government decree that provisionally froze the status quo in the broadcasting industry, allowing all previously operating television channels to continue broadcasting. 87 After fits and starts, a new law was finally put into place in 1997, establishing a new set of comprehensive limits on the ownership of multiple media outlets ranging from television to radio to daily newspapers. 88 Although this statute promises to satisfy the criteria enunciated by the Court, no constitutional challenge has yet

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85 Id. at 3938.
86 For a description of the sequence of events, see PINARDI, supra note 22, at 95, n.66, 130-31, n.25.
been brought. This chapter of the broadcasting controversy may not be closed for the Constitutional Court.

C. Informal Declarations of Unconstitutionality

All of these forms of “passive activism” have their limits. The Court cannot always discern an interpretation that would save a constitutionally doubtful statute; no way may be open for severing unconstitutional applications of the law; and the statute may not be amenable to repair by engrafing a “missing” provision.

Two further problems limit the utility of declaring laws “temporarily constitutional.” First, many problematic laws were designed to be permanent, and few respond to emergency situations. The Court cannot always pretend that Parliament intended to respond to a temporary crisis. Second, the Court dampens the urgency of its requests for reform by approving a law even temporarily. It leaves open the question of how long the underlying “emergency” might last, during which the law may remain on the books. Even more importantly, these decisions convey the message that Parliament was justified, if only marginally, in passing the law. To declare a statute constitutional is often to impart legitimacy to it — legitimacy that may reduce pressure to reform or amend the law. As qualified as they are, declarations of “temporary constitutionality” may be counterproductive because they send a mixed message: The law ought to be fixed, but there is no rush.

Faced with this problem, the Court sometimes has announced point blank that a law is unconstitutional, but then refused to nullify it. In this way, the Court avoids both undesirable choices of either striking down the law or issuing an additive judgment. The Court then has to tackle the problem of parliamentary inertia by warning that, if legislative reform is not forthcoming within a reasonable time, the Court will be forced to make the fateful choice between annulling the law or revising the law itself. By announcing that the law is presently unconstitutional, the Court confers no legitimacy upon it. As Andrea Pisaneschi has said, even as the Court pulls back from

89 See BICKEL, THE LEAST DANGEROUS BRANCH, supra note 7, at 29-33, 129-33 (discussing the legitimating function of the United States Supreme Court); CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 34-86 (1960). Black argued that “the most conspicuous function of judicial review may have been that of legitimatizing rather than that of voiding the actions of government.” Id. at 53; see also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (discussing how court decisions addressing the constitutionality of obsolete statutes may influence the likelihood of legislative repeal or amendment of those statutes).
nullifying unconstitutional laws, "in this retreat one can discern an attempt by the Court to seize a position of greater power in its dialogue with Parliament" than that offered by its declarations of temporary constitutionality.  

The section that follows looks first at the structure of these "informal declarations of unconstitutionality." It then examines the Court's ability to follow up on its decisions, and finally reviews the criticism that Italian commentators have leveled against this practice.

1. Anatomy of the Technique

When the Court refuses to strike down an unconstitutional law, its opinions almost always follow the same pattern: denounce-decline-demand. First, the Court denounces the law as unconstitutional. The opinion leaves no doubt about how and why the law violates constitutional principles. Next, the Court declines to act. The judges wring their hands in despair over their inability to fix the defects in the law and catalog their reasons for not resorting to other types of judgments. Finally, the Court demands that Parliament take reform into its own hands, but warns that the legislature cannot delay for long. If the lawmakers fail to assume their responsibility, then the Court will be forced to intervene, by either striking down or modifying the law.

Two examples illustrate the Court's approach. First, consider how the Court dealt with a law concerning parole for minors. In its 1975 reform of the criminal code, Parliament stated that the provisions governing parole for adults would "temporarily" apply to minors as well, until appropriate legislation could be enacted. Years went by, and the legislature passed no special parole law for minors. In 1978, the Court was faced with a challenge to the parole law, on the grounds that the Italian Constitution requires particular solicitude for the rehabilitation of youthful offenders and, therefore, mandates more lenient parole possibilities. The Court agreed, but suggested that the statute might be read flexibly to allow sentencing courts more leeway when dealing with minors. Based on this interpretation of the law, the Court turned away the constitutional

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90 See Pisaneschi, supra note 80, at 637.
91 For a detailed analysis of this category of decisions, see Pinardi, supra note 22, at 80-95.
92 See Sent. 46/1978, 23 Giur. Cost. 537, 542 (1978) (noting that the statute "seem[ed] susceptible to an interpretation" that permitted favorable parole provisions for minors, and stating that such an interpretation was "the only one in harmony" with the relevant constitutional provisions).
challenge. The Court of Cassation, however, subsequently adopted a more limited interpretation that required minors and adults to be treated identically. The Court’s first delaying tactic was therefore unsuccessful.

In 1992, when the question returned to the Court, it resorted to an informal declaration of unconstitutionality. Adhering to the constitutional analysis of its earlier decision, the Court repeated that minors are entitled to special treatment in the penal system. Because the Court of Cassation had cemented its reading of the statute, the option of another interpretive judgment in the spirit of Ashwander was foreclosed. The Constitutional Court was forced to confront the validity of the law head-on. The parole law was unconstitutional, the Court announced, because “the requirements of rehabilitation and re-socialization of juvenile delinquents . . . are still not entirely satisfied.”

Nevertheless, the Court declined to strike down the law. The Court feared that eliminating the parole law would deprive minors of all possibility of parole. This would injure the constitutional goal of juvenile rehabilitation even more than the insufficiently lenient parole law then in force. Furthermore, the danger of a legislative void persisting was quite substantial, given that Parliament had already delayed its promise of parole reform for sixteen years. The Court chose not to issue an additive judgment that set more generous parole conditions because one could imagine a myriad of ways to foster rehabilitation for minors. For the Court simply to invent one out of whole cloth, without the guidance of any legal standards, would exceed the realm of proper judicial behavior and invade the province of Parliament. “[T]he choice among the various means must be entrusted to the legislator’s discretion,” the Court said, given the availability of numerous solutions. The most desirable result was one that only a legislature could achieve: a comprehensive reform of the parole system.

Accordingly, the Court asked Parliament to act. The Court warned, however, that it could not hold itself back forever. The Court would strike down the law, it said, “if the legislature did not promptly undertake to draw up regulations in this area, consistent with constitutional principles” spelled out in the Court’s opinion.

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94 See id. at 1082.
95 See id.
96 Id.
The Court acted similarly in a case involving the independence of military judges. The Italian Constitution guarantees the independence of the judges of all “special jurisdictions,” including military courts.\textsuperscript{97} Since the founding of the republic, however, the executive branch supervised military judges. Only in 1981 did Parliament reorganize the military tribunals, providing that military judges in the future would be self-governed by a body modeled on the Superior Council of the Magistrature, which is responsible for the ordinary courts. The reform legislation did not spell out the composition of this body, but instead left those details for another law to follow within a year. In the meantime, the law provisionally empowered the Minister of Defense to appoint military judges, giving only a consultative role to a committee of judges and prosecutors.\textsuperscript{98} Three years came and went, and Parliament never provided for the composition of the self-governing judicial body.

In 1984, the Court faced a challenge to this law. After noting that well over a year had “uselessly” gone by without any sign of movement, the Court announced that the law was unconstitutional, \textit{diplomatically stating that} complaints about the law’s constitutionality “could not be said to lack validity.”\textsuperscript{99} Yet the Court backed away, explaining that it could not choose either of the options suggested by the lower court. On the one hand, the Court would not strike down the transitory law because that would resuscitate the pre-1981 law, which had placed military courts fully within the executive’s authority. Turning back the clock would violate the constitutional guarantees of judicial independence even more grievously. On the other hand, the Court could not impose a more creative solution — for example, by placing the military courts under the already-established Superior Council of the Magistrature — without making a choice among various solutions for which no legal principles offered guidance. Leaving the problem for Parliament to fix, the Court announced that resolution of this constitutional question was beyond its purview. Quite emphatically, however, the Court declared that “the legislator is bound . . . to fulfill without further delay the task of creating an organ that will effectively guarantee the independence of the military judiciary.”\textsuperscript{100} Failure to do so would force the Court to act differently, if faced anew with a challenge to the law.

\textsuperscript{97} \textit{See} Cost. art. 108.
\textsuperscript{99} \textit{Id.} at 421.
\textsuperscript{100} \textit{Id.} For similar examples of the Court’s withholding a judgment, see, for example, Sent. 97/1994, 39 Giur. Cost. 884 (1994) (criticizing a law that imposes
2. The Court’s Follow-up on Its Decisions

The efficacy of these decisions depends on whether the Court is willing and able to make good on its threats in a later case, by invalidating the law if Parliament fails to act. Aside from the moral and symbolic value of announcing a law’s unconstitutionality, the Court’s power to nullify a law ultimately pressures the legislature to move toward reform. The opportunity for follow-up is usually there because lower courts are obliged to certify constitutional challenges that are not “manifestly unfounded.” Once the Constitutional Court has formally announced in a declaratory judgment that a law is unconstitutional, this threshold test seems undoubtedly satisfied.\(^\text{101}\) As new challenges to the law percolate through the lower courts, the Court should have a steady supply of opportunities to revisit the issue.

On occasion, the Constitutional Court takes advantage of these renewed challenges to strike down a law. An example is furnished by the line of cases involving military judges. Despite the Court’s admonitions in 1984 that the legislature establish a self-governing body for military tribunals “without further delay,” Parliament still had not acted by 1987. As a practical matter, the “provisional” system embodied in the 1981 reforms had ossified into permanence. When a new challenge to the law was brought, the Court announced that the legislative delay had worn out its patience. It was “no longer tolerable,” the Court said, that the appointment of military judges remain completely under the control of the executive, flouting constitutional guarantees of judicial independence.\(^\text{102}\) The Court overcame its hesitations and struck down the 1981 law that had granted the Minister of Defense authority to appoint and remove military judges. Leaving lower courts and Parliament to cope with the resulting gap in appointment authority, the Court placed responsibility for any confusion that might ensue squarely on the shoulders of Parliament. The Court announced that the law’s

\(^{101}\) See AGGIORNAMENTI, supra note 79, at 114.

unconstitutionality “derives, in fact, from legislative inertia drawn out over such a long time.”

Such a firm response is less common than one might expect from the forceful language of the Court’s opinions. The Court’s willingness to take action is not always commensurate with its ability to do so. On numerous occasions, laws have returned unchanged to the Court after having been declared unconstitutional, yet the Court has limited itself to repeating its threats without striking them down. Perhaps the most outstanding example is the long-running problem of the “health tax.” In 1987, the Court identified a number of provisions in the system of contributions to the national health-care system that violated various constitutional guarantees, most notably that of equality. In particular, the Court criticized a system that required self-employed workers to contribute more money than did workers employed by others. The Court declined to strike down the scheme, however, largely because it was unwilling to throw an already incoherent health-care financing system into further chaos. Eleven times since that first decision, the Court has declined to take up the question. Five years after its first warning, the Court was still wagging its finger at Parliament, warning that reform “cannot be delayed endlessly, without the Court being forced to take the decisive actions that, where needed, fall within its power.” The Court has never been willing to take such “decisive action.” Instead, it has limited itself to acknowledging the sporadic attempts at reform made by the legislative branch and noting with a sigh that the legislature had at least made some “initial efforts to overcome the pre-existing and, in large part, persisting incoherence” of the system. The Court’s repeated refusals to strike down the health-care contribution system, stretched over so long a period of time, has signaled to Parliament that prolonged inactivity will not provoke any reaction from the Court. This, in turn, has stripped the Court’s warnings of much of their force.

105 Id. at 1098. The Court held that its judgment invalidated only the provisional grant of authority to the Minister of Defense. The Court avoided resuscitating the earlier system, which had accorded the Minister plenary authority over judicial appointments without even bothering to obtain the nonbinding opinion of the new consultative bodies, by explaining that the 1981 law remained valid to the extent that it repealed the earlier system.


107 Id.
Even when the Court does follow up on its declaratory judgments, it often does so half-heartedly and thereby casts doubt on its readiness to strike down laws in other cases. Take the question of public hearings before tax commissions mentioned at the beginning of this Article. In two decisions in 1986 and 1988, the Court said that the law closing tax hearings to the public was unconstitutional because all court hearings must be open. Both times, however, the Court declined to strike down the law and asked Parliament to intervene. On the third challenge, in 1989, the Court finally invalidated the law, stating that "a declaration of unconstitutionality can no longer be put off." The Court took this step, however, only after reform was imminent. As the Court’s opinion noted, a new law permitting public hearings had already passed the Senate and was awaiting a vote in the Chamber of Deputies. To use a medical metaphor, the Court was willing to excise the diseased organ only when a donor was waiting in the wings. Who blinked first: Parliament or the Court? Perhaps the threat of an adverse decision by the Constitutional Court influenced the action of the legislature. Or perhaps Parliament’s decision to finally act gave the Court space to strike down the law. Even when reform finally materialized, the catalyzing effect of the Court’s decisions is hard to quantify.

These examples illustrate how difficult it has been for the Italian Constitutional Court to pressure Parliament into reforming constitutionally problematic laws. The only “pressure” that the Court can apply is its threat to strike down or modify those laws. In the world of Italian politics, however, such pressures often are not strong enough to spark legislators into action. Few votes may be at stake in a law covering something like the self-government of military judges. Alternatively, issues like radio and television broadcasting already may be so politically charged that the Constitutional Court’s threats pale in importance alongside other social forces converging on the political parties. When the Court declines to carry out its threats to strike down or modify a law in the face of legislative inaction, it

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110 See Law of May 22, 1988, n. 198. The Court held that its decision would have no retroactive effect, so as not to disrupt final judgments already rendered in closed hearings. See Sent 50/1989, 33 Giur. Cost. 252, 255 (1989). In his 1989 press conference, President Saja of the Italian Constitutional Court explained that the ruling was made purely prospective “to avoid . . . favoring tax evaders.” Saja, supra note 69, at 68.
undermines its own credibility and further reduces its limited ability to catalyze reform.\textsuperscript{111}

Given these political realities, perhaps it is better not to think of the Constitutional Court as trying to force Parliament to act, but rather as leaving room for the legislature to act. The Court is motivated more by a desire to hold itself back, to avoid acting when its powers of decisionmaking either are too clumsy or would require it to make too many discretionary decisions that are best left to the democratically representative branches. The Court limits itself to articulating guidelines that the legislature should follow when it finally does engage in reform.

In the last few years, the Italian Court has begun to show greater backbone. More frequently, when the legislature has evinced no interest in reforming laws that the Court already has pronounced unconstitutional, the Court has gone on to nullify those laws. This has taken place most commonly in areas in which the Court had earlier feared to issue additive judgments, due to the multiplicity of ways to fix the unconstitutional law. In its follow-up decisions, however, the Court has found a new way to overcome this fear. Instead of inserting a “missing” provision itself, the Court merely sets forth the general constitutional principles to which a new rule must conform. It then invalidates the law and instructs the ordinary courts to devise a stop-gap rule until Parliament revises the law. In this way, the Court relieves individual litigants of application of the unconstitutional law and lives up to its own duty to rule on the constitutionality of laws.\textsuperscript{112}

\textsuperscript{111} See \textsc{Pinardi}, supra note 22, at 128 (noting that “the more a constitutional judge manages to persuade the ordinary legislator that any protracted inertia will inevitably be punished by the nullification of the law under review, the more that warning can be said to be pressing and therefore (at least in theory) effective”).

\textsuperscript{112} These decisions are known in Italian legal jargon as “sentenze additive di principio” because the Constitutional Court sets forth only the constitutional “principles” that should guide lower courts in their selection of a stop-gap rule. Some commentators have described some of these judgments as “sentenze-mecanismi” because the Court’s judgment strikes down the statute to the extent that it lacks a mechanism for protecting a certain constitutional right. In these cases, it is up to Parliament (and pending legislative action, the courts) to devise a method of protecting that right.

For example, in one case, the Italian Court held that the laws governing computation of retirement bonuses were unconstitutional “to the extent that they do not provide mechanisms” taking into account certain types of income. Sent. 243/1993, 118 Foro It. I 1729, 1742 (1993). The Court demanded that Parliament legislate immediately, requiring that “[s]uch mechanisms shall be put into place by the legislature according to discretionary choices that respect the principles specifically indicated [in the Court’s opinion].” \textit{Id.} Reform, the Court said, “must
To understand how the Court has begun to decide cases in this manner, consider the line of cases dealing with conscientious objectors to military service. When a conscientious objector does not meet the usual statutory requirements for exemption from military service, he is subject to a sentence that, once served, discharges his draft obligation. A problem then arises: If a military judge suspends this sentence, the objector could be called up for duty a second time. If he again refuses to serve, the objector is subject to a new sentence plus reinstatement of his earlier sentence. As the Court observed, this exposed certain objectors to a theoretically endless “spiral of punishments” that is constitutionally unacceptable. As early as 1989, the Court refrained from striking down the law and called upon Parliament to reform the statute. In 1991, the Court turned away another challenge to the law, even though it continued to recognize the law’s “obvious unreasonableness and, therefore, its incompatibility with the value system set forth in the Constitution.”

In 1997, in the face of continuing legislative inactivity, the Court finally invalidated the law to the extent that it authorized multiple punishments for the same crime. The Court did not specify exactly how the law should protect the interests of conscientious objectors, for example, by making suspension of a sentence irrevocable, or by forbidding a second call-up of conscientious objectors. Instead, the Court punctuated the question to the lower courts and the draft board to find an interim solution pending legislative reform. According to the Court,

[i]t belongs to the realm of interpretation and, eventually, legislative choices to determine how [eliminating the possibility of multiple punishment], from now on required by the Constitution, may find expression in positive law: whether through a reconsideration of the administrative practice of the draft board, or of substantive or procedural criminal law regarding the matter in question.

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occur in connection with the next appropriations law, or at the first useful opportunity for devising and formulating overall budgetary policy.” Id. The Court had given Parliament ample warning that the Court might strike down this law. See, e.g., Sent. 220/1988, 35 Giur. Cost. 862 (1988); Sent. 763/1988, 33 Giur. Cost. 3482 (1988) (warning that persistence of an irrational scheme could lead to declaration of unconstitutionality); ord. 419/1989, 34 Giur. Cost. 1906 (1989) (reiterating that its warning was still “urgent”).

116 Id. at 393.
In effect, the Court disapplied the law to those affected, while leaving other government bodies to work out the details of how this should be achieved. 117

3. Criticism of the Technique

Three principal criticisms can be leveled at the Court's method of declaring a statute unconstitutional without striking it down. The first two issues are closely related. First, the practice neglects individualized justice because it leaves some litigants subject to an unconstitutional statute that the Court has determined to be illegitimate. It certainly seems unfair to sacrifice the rights of single litigants upon the altar of judicial self-restraint. 118 Second, by declining to strike down laws that it finds unconstitutional, the Court reduces the incentive for parties to raise constitutional issues. The Court could mitigate these problems by suspending application of the law in the case at bar, though not in general, thereby protecting the parties involved in the litigation and preserving their incentive to pursue constitutional complaints. 119 This seems to be the practice of the German Constitutional Court, which also can declare a law "incompatible" with the federal constitution while declining to nullify it. 120 It has long been accepted, however, that the Italian Court's

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117 See Andrea Guazzarotti, La Corte costituzionale "a colloquio con se stessa". Un'additiva "con vincolo di risultato" sull'obiezione di coscienza al servizio militare, 42 Giur. Cost. 395, 405 (1997) (discussing how the Constitutional Court sends cases back to the ordinary courts and/or the legislature to choose the means for applying the constitutional principles announced by the Court).

118 See Pisaneschi, supra note 80, at 651-33.

119 The United States Supreme Court, for example, has recognized the importance of preserving litigants' incentives to raise novel constitutional claims. See Stovall v. Denno, 388 U.S. 293, 300-01 (1967) (holding that a new rule of criminal procedure announced by the Supreme Court should apply only prospectively, though it is proper to apply the new rule in the case creating that rule, to ensure that litigants retain an incentive to raise novel claims). But see Teague v. Lane, 489 U.S. 288, 316 (1989) (holding that, in deference to considerations of federalism, federal courts generally cannot grant habeas corpus relief to state prisoners who seek the benefit of a novel rule).

120 The German Court has authority to determine whether, and to what extent, the unconstitutional law shall remain temporarily in force. See Klaus Schlaich, Corte costituzionale e controllo sulle norme nella Repubblica federale di Germania, 2 QUAD. COST. 557, 575 (1982); Sabine Stuth, Il Bundesverfassungsgericht e il profilo tecnico delle sue pronunce, 9 QUAD. COST. 287, 292-95 (1989); ZAGREBELSKY, supra note 18, at 309. It seems that the Italian Court borrowed from the German Constitutional Court this technique of declaring a law unconstitutional without striking it down. As in Italy, the German Court developed the practice of declaring laws "incompatible" ("unvereinbar"), without any express constitutional or statutory authorization, out of a similar system of constitutional review that foresaw only a bipolar choice between striking down or upholding a statute. Originally an invention of the Court itself, but
rulings are effective “erga omnes,” and thus there seems to be no legal basis for limiting its rulings to particular parties. So far, the Court has found no way to mitigate this unfairness.

The third criticism is that the Court fails to set firm deadlines, thereby weakening the urgency of its impreca tions for legislative reform. The Court rarely tells the legislature how long it will wait before striking down or modifying a law. In many cases, the Court has been willing to wait several years; sometimes, it waits indefinitely. This creates much the same problem as declaring a law “temporarily” constitutional. Such a practice undermines the Court’s assertions that reform is urgent and reduces the credibility of its threats to strike down the law.121 In the eyes of one commentator, Roberto Pinardi, that is precisely what has happened in Italy: The Court has cried “wolf” too often.122

According to Pinardi, the Court’s decisions are internally inconsistent, in the sense that the Court’s self-restraint signals its reluctance to strike down the law in the future.125 That is, after the Court has taken pains to explain why it will not invalidate or modify an unconstitutional law now, it is hard to see why the situation should be any different when a second challenge to the law presents itself in the future. If the Court decides that certain constitutional values must be protected by leaving the law intact, those constitutional values will presumably deserve continuing attention in the future. As Pinardi puts it, the judges’ self-restraint exposes their belief that “elimination of the challenged law would entail such serious consequences,

now codified in statute, the declaration of “incompatibility” has been used frequently as an alternative to the more severe measure of declaring a statute null and void (“nichtig”). See KOMMERS, supra note 38, at 61; Schlaich, supra, at 575; ZAGREBELSKY, supra note 18, at 308. Indeed, between 1951 and 1987, 144 of the 391 legal provisions invalidated by the German Constitutional Court were merely declared unconstitutional or incompatible (without suspending their general applicability), compared to 247 provisions declared null and void. See KOMMERS, supra note 38, at 60.

121 See ZAGREBELSKY, supra note 18, at 310.

122 See PINARDI, supra note 22, 126-39.

injurious to the legal system, that the Court prefers not to annul it," despite the fact that those very same judges have concluded that the law violates the Constitution.\textsuperscript{124} Parliament can detect this reluctance and will feel little compulsion to engage in the difficult game of reform, knowing that the Court feels itself paralyzed.\textsuperscript{125}

Of course, the Court's assessment of what is constitutionally "reasonable" is quite flexible. For one thing, the Court can seemingly elevate anything to the dignity of a "constitutional value." In the cases involving public tax hearings, for example, the Court seemed to ascribe constitutional importance not only to the value of "public hearings," but also to the "continuity of the legal system." This latter goal, however, boiled down to little more than a desire not to give tax evaders a windfall by halting all proceedings against them.\textsuperscript{126} Furthermore, when ascribing a particular weight or intensity to a constitutional value, the Court is not always guided by articulable legal standards. Again, in the tax hearings cases, the Court did not explain why it valued legal continuity over public hearings in its first rulings, but reversed their priority in the final ruling. As a practical matter, the Court's patience had worn thin. As a jurisprudential matter, however, the Court offered no legal principle from which one could have predicted the timing of the about-face.

The Italian Constitutional Court has not offered any convincing solution to this problem. Again, the German Constitutional Court generally fixes a strict deadline for legislative reform. If the legislature fails to pass corrective legislation by that date, the court does not hesitate to strike down the law, no matter what the consequences.\textsuperscript{127} By contrast, when the Italian Court does nothing but reiterate its pleas for the legislature to take action, the Court seems to confess that it is trapped in a constitutional no-man's land, where it can neither condone nor condemn the unconstitutional law. In doing so, the Court reveals its unwillingness to strike down the law and eviscerates its only means of nudging the legislature to amend the law.

\textsuperscript{124} PINARDI, supra note 22, at 130.

\textsuperscript{125} See id. at 134 (arguing that these decisions, far from obliging Parliament to enact reforms, in fact serve as an implicit guarantee of the Court's future reluctance to strike down the challenged law despite legislative inertia).

\textsuperscript{126} See Saja, supra note 69, at 68.

\textsuperscript{127} For example, the German Constitutional Court recently declared unconstitutional a provision of the income tax law. After a six-month deadline passed without the legislature having fixed the defect, the Court automatically invalidated the law and took away the Government's power to collect that particular tax.
II. LESSONS FOR THE UNITED STATES

The experiences of the Italian Constitutional Court provide valuable lessons for Americans. In particular, these experiences illustrate how courts can introduce a delay between declaratory and injunctive relief to give the political branches the first opportunity to fix unconstitutional statutes. That is not to say that American courts cannot improve on the Italian practice. American courts can better protect the interests of litigants by retaining jurisdiction over cases, enabling the courts to issue injunctive relief if legislative reform is not forthcoming. Furthermore, American courts can impose and enforce deadlines for legislative action, thereby making their threats of injunctive relief more credible.

This section begins by describing various American legal doctrines that authorize a court to declare a statute unconstitutional but delay nullification of that statute. It then suggests that, in exceptional cases, some of the reasons that have driven the Italian Court to issue informal declarations of unconstitutionality might support delaying injunctive relief as a matter of equitable discretion in the United States. This is particularly true when judicial relief threatens to seriously disrupt administration of the law or requires judges to second-guess discretionary decisions, such as budgeting, that are best left to the legislature. Finally, this section discusses enforcement problems that flow from a proposed Balanced Budget Amendment to the United States Constitution, as an example of a problematic case in which American courts might put these ideas into practice.

A. Comparable American Legal Doctrines

The Italian Constitutional Court’s practice of announcing that a law is invalid, but refusing to annul it, is not unknown in United States law. American courts can reach similar results by issuing a declaratory judgment, exercising their equitable discretion to delay or withhold injunctive relief, and retaining jurisdiction to monitor legislative responses to their decisions. Each of these powers constitutes familiar territory for American judges.

1. Declaratory Judgments

Since the 1930s, American courts have been authorized to issue purely declaratory judgments, that is, to define the legal rights of parties to a controversy without ordering them to take any particular
action. Because these judgments do not place parties under any legal obligations, any action inconsistent with the judgment does not expose the parties to the danger of incurring penalties for disobeying a court order. A declaratory judgment can stand on its own, although it can also lay the groundwork for subsequent orders of more concrete relief, such as awards of monetary damages or injunctions. Of course, it is not unusual for an American court to focus its attention on announcing parties' legal rights. To use Chief Justice Marshall's words, one of the main tasks of American courts has always been "to say what the law is."

Declaratory judgments serve a number of purposes. First, they let individuals obtain a "preventive" definition of their rights. Hence, a citizen can challenge the constitutionality of a criminal statute without first violating it and running the risk of going to jail. Furthermore, individuals can obtain a declaration of a statute's validity without making the difficult showing that they would suffer irreparable harm under the law, as normally would be required to obtain an injunction against enforcement of the law. Most

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128 See Federal Declaratory Judgment Act of 1934, ch. 512 (1994) (codified at 28 U.S.C. § 2201(a)) (providing that a federal court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."). Most states have adopted similar acts.


130 See 28 U.S.C. § 2202 (1994) ("Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.").

131 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

132 Of course, parties can seek declaratory judgments in all sorts of situations, such as property and contract disputes, that do not involve a challenge to the constitutionality of a statute. Yet, as Justice Brennan explained in Perez, one of the most important factors prompting the invention of declaratory judgments was the desire to limit the impact of federal-court adjudications on the enforcement of state statutes, particularly in the area of criminal law. See Perez, 401 U.S. at 111-13 (Brennan, J., concurring in part and dissenting in part).

There were other legislative responses to federal court injunctions against enforcement of state law. For example, in 1937 Congress passed the Tax Injunction Act to limit the power of federal courts to restrain the collection of state taxes. See 28 U.S.C. § 1341 (1994) ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.") Around the same time, Congress required the creation of special three-judge courts to decide cases in which a party sought to enjoin the operation of a state statute on constitutional grounds. See 28 U.S.C. § 2281 (repealed 1976).

important for present purposes, declaratory judgments are intended to be a flexible alternative to injunctive relief, to the extent that they do not tie the hands of government officials in day-to-day law enforcement and administration.

Before the invention of declaratory judgments, a party challenging a statute before it had been applied would ask a court to enjoin the statute’s enforcement. For example, a business contesting the validity of a tax provision would ask a court to prevent a state government from collecting taxes pursuant to that law. This was a very intrusive remedy because it completely foreclosed the state from enforcing its law. Courts were understandably reluctant to interfere so greatly in the everyday administration of government, especially if they thought that a law might be susceptible of some constitutional applications. Because of the courts’ excessive caution, many parties challenging the validity of laws were sent out of court empty-handed.

The availability of declaratory judgments remedied this situation. Now, when a court decides that a law is unconstitutional, a declaratory judgment clarifies the state of the law while leaving room for the government to maneuver. For example, consider a state law that criminalizes distribution of handbills without a government-issued license. If a federal court issues a declaratory judgment saying that the statute is unconstitutionally overbroad and therefore violates freedom of speech, the court does not forbid state officials from enforcing the law. Instead, the declaratory judgment simply puts those officials on notice that the federal court stands ready to overturn any convictions under that law. If the state legislature amends the law, or if state courts later put a narrowing construction on the statute that eliminates the overbreadth problem, for example, by making issuance of a license mandatory upon satisfaction of neutral time, place, and manner criteria, then the declaratory judgment leaves prosecutors free to enforce the statute within the new bounds without risking a citation for disobedience of a court order. In this way, declaratory judgments interfere less with administration of the law and leave open the possibility of salvaging constitutionally questionable laws.

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2. Equitable Discretion to Delay or Withhold Relief

In the Anglo-American legal tradition, courts enjoy broad discretion to grant, withhold, or delay the issuance of coercive relief. One reason for this broad discretion is that the power to issue injunctions — that is, mandatory orders forbidding a party from taking a particular action — traces its origins to the flexible authority of the English Chancellor to resolve disputes in accordance with broad notions of fairness when other courts offered no relief. Unlike the strictly defined actions for monetary damages in common-law courts, "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."135 Because equitable remedies are extraordinary measures, courts have enjoyed discretion to withhold injunctive relief when circumstances warrant. An injunction "is not a remedy which issues as of course."136

Modern American courts have inherited their predecessors' discretion to withhold or delay coercive relief. This power is not codified in any statute, but is instead grounded in centuries of judge-made common law. The United States Supreme Court has consistently reaffirmed that, absent a clear statutory limitation, federal courts retain their full range of discretion to grant or withhold equitable relief, or to stay the effect of a judgment for a certain time.137 This sets American courts quite apart from the Italian

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135 Hecht Co. v. Bowles, 321 U.S. 321, 329, 331 (1944) (holding that district court need not automatically issue injunctive relief upon showing that price-control statute was violated).
136 Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982) (internal quotation marks omitted). The common-law courts had discretion in more limited circumstances, also involving coercive relief. For example, when asked to issue a writ of mandamus ordering a lower court or a government official to perform an obligatory function, a common-law court had to consider all the circumstances before awarding such extraordinary relief. See David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. REV. 543, 572 (1985).
137 See Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (holding that a price-control statute does not remove the district court's equitable power to order restitution, absent an explicit congressional command to the contrary).

Courts enjoy similar, although slightly more limited discretion to withhold declaratory relief. Federal law states that federal courts "may" declare the rights of interested parties. See 28 U.S.C. § 2201(a) (1994); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 300 (1943) ("The Declaratory Judgments Act was not devised to deprive courts of their equity powers or of their freedom to withhold relief upon established equitable principles. It only provided a new form of procedure for the adjudication of rights in conformity to those principles."). As the United States Supreme Court has said, "[t]he propriety of issuing a declaratory judgment may
Constitutional Court, whose decisions must take effect the day after their publication.  

In considering whether to grant equitable relief, it is well established that American courts should take into account not only the interests of the parties to the litigation, but also broader public interests. This principle finds its most forceful expression in the doctrines governing when federal courts should abstain from exercising their jurisdiction over a case in favor of letting state courts resolve it. In Railroad Commission of Texas v. Pullman Co., for example, the United States Supreme Court held that, in an action for equitable relief, a federal court should abstain from acting if a state court's resolution of a state-law issue would permit the court to avoid ruling on a constitutional question. Two public interests converged: the desirability of avoiding "needless friction" between state and federal courts, and the need for federal courts to avoid prematurely adjudicating constitutional questions. The Court explained that "[t]he history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction." Similar considerations preclude federal courts from

depend upon equitable considerations, and is also informed by the teachings and experience concerning the functions and extent of federal judicial power." Green v. Mansour, 474 U.S. 64, 72 (1985). In general, similar considerations guide a judge's decision to issue injunctive or declaratory relief. The main distinction is that a plaintiff seeking declaratory relief need not demonstrate that he will suffer irreparable harm absent such an order.

See Cost. art. 136. As discussed earlier, the framers of the Italian Constitution expressly rejected the Austrian model, which allows the constitutional tribunal to postpone the efficacy of its judgments up to one year. See supra note 35 and accompanying text.

See Great Lakes Dredge & Dock Co., 319 U.S. at 297-98. The Court stated:

[A] federal court of equity, which may in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest, should stay its hand in the public interest when it reasonably appears that private interests will not suffer.

Id. (internal citations omitted). See also United States ex rel. Greathouse v. Dern, 289 U.S. 352, 360-61 (1933). The Dern Court noted:

The Court, in its discretion, may refuse mandamus to compel the doing of an idle act, or to give a remedy which would work a public injury or embarrassment just as, in its sound discretion, a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest.

Id.

312 U.S. 496 (1941).

Id. at 500. The abstention mechanism created by the Court in Pullman has been largely superseded by a statute that authorizes federal courts to certify to state supreme courts important questions regarding the interpretation of state law. The
enjoining ongoing criminal proceedings or entertaining lawsuits that would unduly interfere with the workings of complex state regulatory schemes.

Arguably, a court should accord even greater weight to the public cost or benefit of granting special relief when the litigation involves a law having a broad social impact, affecting more than the rights of the individual litigants. For example, in Porter v. Warner Holding Co., the Supreme Court had to decide whether a wartime price-control statute authorized a court to order restitution of overcharges to customers—a remedy that was traditionally available only from courts of equity. The Court held that restitution was available, in part because such a remedy would further the general anti-inflationary purpose of the law. As the Court explained, “since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.” Likewise, in Los Angeles Department of Water and Power v. Manhart, the Court declined to award the “equitable” remedy of back pay to women who had been required to overcontribute to their employers’ pension plans in violation of federal antidiscrimination law, on the grounds that such relief could throw pension systems around the country into disarray. Here and elsewhere, the Supreme Court has continually emphasized that the source of the courts’ ability to take into account such broad considerations of public interest lies in their historical power and duty to exercise discretion when awarding extraordinary forms of judicial relief.

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144 328 U.S. 395 (1946).
145 Id. at 398.
147 See id. at 721 (stating that “[d]rastic changes in the legal rules governing pension and insurance funds” might “jeopardize[e] the insurer’s solvency and, ultimately, the insureds’ benefits”). Strictly speaking, the Court opted not to give its decision retroactive effect, meaning that overcontributions made before its decision would not give rise to a right to back pay.
3. Follow-up

Unlike the Italian Constitutional Court, which answers an abstract question about the constitutionality of a law and then lets an ordinary court determine how to resolve a case concretely, an American court both rules on the constitutionality of a law and formulates concrete relief. As a practical matter, that means that an American court can take steps to ensure compliance with its judgment simply by retaining jurisdiction over a case. The federal Declaratory Judgment Act specifically provides for the possibility of injunctive or other coercive relief following upon the heels of a declaratory judgment.

An example of how this can work in practice is furnished by Weinberger v. Romero-Barcelo. In Weinberger, a federal court held that the Navy was violating a water-pollution law by dropping bombs into the ocean without a special permit from the Environmental Protection Agency. Rather than enjoin the Navy's bombing runs immediately, the Supreme Court exercised its equitable discretion to give the Navy time to apply for the permit. The Supreme Court did not foreclose the possibility that it would eventually issue injunctive relief: "Should it become clear that no permit will be issued and that compliance with the [water-pollution law] will not be forthcoming, the statutory scheme and purpose would require the court to reconsider the balance it has struck." To monitor this progress, the lower court retained jurisdiction over the case.

A similar procedure was followed in Pullman. In that case, the Supreme Court held that a federal court should abstain from deciding a constitutional question that might be avoided by

\[\text{of relief — a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted}.\]

\[\text{149 It is standard practice for United States federal courts to retain jurisdiction over cases to monitor compliance with their judgments. The Supreme Court itself has set the example. See, e.g., Nebraska v. Wyoming, 507 U.S. 584, 588 (1993) (discussing final judgment whereby Supreme Court retained jurisdiction over a case so that any party could petition to amend the judgment for reason of "[a]ny change in conditions making modification of the decree or the granting of further relief necessary or appropriate"); Freeman v. Pitts, 503 U.S. 467, 485-92 (1992) (discussing district court's retention of jurisdiction to supervise local school board's compliance with racial desegregation order).}\]


\[\text{151 456 U.S. 305 (1982).}\]

\[\text{152 See id. at 319 ("The exercise of equitable discretion, which must include the ability to deny as well as grant injunctive relief, can fully protect the range of public interests at issue at this stage in the proceedings.").}\]

\[\text{153 Id.}\]
interpretation of a state law, in favor of letting the parties seek adjudication of the state-law issue in state courts. If the parties did not promptly seek such a state-court adjudication, however, the federal court would be obliged to rule on the controversy. To guard against this possibility, the Supreme Court noted, the district court ought to retain jurisdiction.\(^{154}\)

By retaining jurisdiction over a case in which it has issued declaratory relief, a court can later issue a more definitive order that avoids each of the problems attached to Italian practice. First, the court can ensure individual justice and preserve litigants' incentives to pursue constitutional claims by guaranteeing that the parties are not ultimately subjected to the unconstitutional law. If the legislature does not solve the problem, the court will.

Furthermore, the court can announce in advance when it will revisit the issue of relief if no reform is enacted by the political branches — in effect, the court can set a deadline for legislative action. This authority to set deadlines derives from the inherent power of common-law courts to control the enforcement of their decrees. Moreover, because American courts are not bound by any limit like Article 136 of the Italian Constitution, there is no requirement that their judgments take effect immediately. Indeed, it is common practice for American courts to stay the effect of their judgments for a fixed period of time. Faced with a credible deadline for action, the legislature is more likely to react promptly than if it is convinced that the court is committed to indefinite delays.

In sum, these three powers — to issue a declaratory judgment, to delay coercive relief, and to retain jurisdiction over a case to monitor compliance with a judgment — provide American courts with the tools needed to introduce a delay between announcing that a law is unconstitutional and prohibiting it from having effect. These powers

\(^{154}\) See Railroad Comm’n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941). Indeed, this process of retaining jurisdiction not only enables a lower federal court to monitor compliance with its decrees, but also commonly affords the Supreme Court a chance to control how its rulings are applied by lower courts. Every time a final order is entered, a party has the chance to appeal that order all the way up to the Supreme Court. For example, the Supreme Court can accept a petition for certiorari to review a declaratory judgment rendered in a lower court. Subsequently, if the lower court grants or denies injunctive relief, another appeal can be taken. For an example of a case that returned repeatedly to the United States Supreme Court on questions regarding judicial remedies, see Missouri v. Jenkins, 515 U.S. 70, 79 (1995) (ruling on breadth of lower court’s remedial order); Missouri v. Jenkins, 495 U.S. 33, 37 (1990) (ruling on propriety of lower court’s ordering tax increase to fund school desegregation program); Missouri v. Jenkins, 491 U.S. 274, 275 (1989) (ruling on award of attorneys’ fees to civil rights plaintiffs).
also give those courts the ability to avoid the twin flaws visible in the decisions of the Italian Constitutional Court.

B. Circumstances in Which Delay May Be Desirable

In the usual case, there is no reason for American courts to hesitate before enjoining an unconstitutional law. Many of the factors prompting the development of this approach in Italy are not as pressing in the United States. American courts can interpret both the Constitution and statutes, enabling them to avoid constitutional adjudication more easily than can the Italian Constitutional Court, which must defer to the statutory interpretations of the Court of Cassation. Perhaps more importantly, American courts are less likely than the Italian Court to find complex social welfare laws unconstitutional. Unless suspect or quasi-suspect classifications such as race or gender are involved, United States courts will uphold social welfare legislation against an equal protection challenge as long as the legislation has some rational basis. This standard is far more deferential than the Italian "reasonableness" standard. Furthermore, the United States Constitution has been interpreted more as a limitation on the government's intrusion into the private sphere rather than as a source of affirmative government duties as in Italy. In the usual case in which a court strikes down a law for impinging on individual liberty, the resultant "gap" does not impair any other constitutional value. In run-of-the-mill constitutional cases, therefore, American courts will find less need to delay adjudication so that the legislative branches can intervene.

The Italian experience, however, indicates that it may be useful to introduce a delay between declaratory and injunctive relief in two sets of circumstances: (1) when striking down a law would disrupt or defeat the pursuit of important public interests in the administration of the law, and (2) when formulating creative relief would test the limits of judicial competence. This is particularly true when the main issues revolve around the allocation of public funds, a task best entrusted to the legislature. The following analysis of United States Supreme Court decisions suggests that American law values

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155 See, e.g., Dandridge v. Williams, 397 U.S. 471, 485 (1970). The Court stated:
In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety, or because in practice it results in some inequality."

Id. (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).
deference to the legislature in these areas. In extraordinary cases, therefore, American courts may find it advisable to delay the issuance of coercive relief to give the legislature a first crack at reforming a defective law.

1. Avoiding Disruption of Government Administration

Two cases illustrate how the Supreme Court, in order to avoid major disruption of the nationwide administration of law, has delayed issuing injunctive relief to buy time for the political branches to reform an unconstitutional law. In the first, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Supreme Court declared unconstitutional the newly established United States bankruptcy court system on the ground that it conferred judicial power on judges who did not enjoy life tenure or salary independence. This system, the Court held, violated Article III of the Constitution. By the time the Supreme Court issued its ruling in 1982, however, the new system had already been in effect for almost six years. Thousands of bankruptcy proceedings were pending throughout the country. For the Supreme Court to have enjoined further proceedings in the case before it would have meant that all other courts throughout the United States would have had to follow suit. Not only would this have paralyzed all liquidation and reorganization proceedings, but it also would have triggered an avalanche of litigation in the federal district courts.

To avoid these dire consequences, the Supreme Court stayed its judgment for three months. In its own words, such a “limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws.” The Court later extended this deadline to December 24, 1982, but refused to postpone it any further. As the expiration of the stay approached, it became clear that Congress would not soon reconstitute the bankruptcy courts. To avoid disruptions in bankruptcy proceedings, federal district courts throughout the country adopted a stopgap

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157 See id. at 87.
158 Id. at 89.
local rule, proposed by the United States Judicial Conference.\textsuperscript{161} This rule authorized district courts to refer core bankruptcy matters to non-Article III bankruptcy judges while retaining all other collateral matters. With a temporary system in place that seemed to comply with Northern Pipeline,\textsuperscript{162} Congress did not feel compelled to intervene until mid-1984.\textsuperscript{163}

In Buckley \textit{v. Valeo},\textsuperscript{164} the Supreme Court invalidated several aspects of the federal campaign finance laws, including the establishment of the Federal Election Commission.\textsuperscript{165} Because some members of the Commission were appointed by congressional officers, the Court ruled that the Commission could not exercise its enforcement or rulemaking powers without violating the constitutional requirement that all "Officers of the United States" be appointed by the President with the advice and consent of the Senate.\textsuperscript{166} Like the bankruptcy courts several years before, however, the Federal Election Commission already had been operating for some time. Indeed, the Commission was in the midst of rulemaking procedures. As in Northern Pipeline, the Court stayed its injunction to ensure the uninterrupted enforcement of the electoral laws that it had upheld, as well as to give Congress some breathing space to reform the appointment process. For these reasons, the Court stayed its judgment for up to 30 days

insofar as it affects the authority of the Commission to exercise the duties and powers granted it under the Act. This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the

\textsuperscript{162} See Taggart, \textit{supra} note 161, at 236 & n.27 (noting that every court of appeals that considered the validity of the emergency rules upheld them).
\textsuperscript{164} 424 U.S. 1 (1976).
\textsuperscript{165} See \textit{id.} at 143.
\textsuperscript{166} \textit{Id.} at 138-39 (noting that minor officers may constitutionally be appointed by the President alone, the courts, or the heads of departments).
interim to function de facto in accordance with the substantive provisions of the Act.\footnote{167}

This initial stay lasted until February 29, 1976, and was later extended to March 22, 1976.\footnote{168} Fifty days after the stay expired, the President signed a new law providing for revised appointment procedures.\footnote{169} Although the political branches had not managed to comply with the Court’s deadline, their action seems speedy by legislative yardsticks, and was undoubtedly spurred in part by the elimination of the Commission’s authority.

In showing special solicitude to leave the legislature a chance to reform the law before an injunction interrupted the normal functioning of the electoral system, \textit{Buckley} harkened back to the Supreme Court’s voting rights and electoral reapportionment cases. One case that the Court cited was \textit{Maryland Committee for Fair Representation v. Tawes} \footnote{170} in which the Court held that the apportionment of the Maryland State Legislature was not consistent with the one-person, one-vote principle.\footnote{171} After concluding its constitutional analysis, the Court sent the case back to the state court for further proceedings with the following instructions:

Since primary responsibility for legislative apportionment rests with the legislature itself and since adequate time [two years] exists in which the Maryland General Assembly can act, the Maryland courts need feel obliged to take further affirmative action only if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the courts to do so. However, under no circumstances should the [next] election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan.\footnote{172}

Although the Supreme Court’s guidance was not binding on the state court, it nevertheless demonstrates that the Supreme Court highly values legislative freedom of action. Courts should try not to step in immediately, if a little time will let legislatures resolve political issues on their own and delay will not jeopardize constitutional rights.

\footnote{167} \textit{Id.} at 143.  
\footnote{170} 377 U.S. 656 (1964).  
\footnote{171} See \textit{id.} at 674.  
\footnote{172} \textit{Id.} at 676.
It is interesting to observe that the political branches produced an amended law more quickly after *Buckley* than after *Northern Pipeline*. In the aftermath of *Buckley*, the Federal Election Commission's authority had lapsed, so there was greater urgency for legislative reform. Although Congress did not manage to pass a new law governing appointment of election commissioners before the Supreme Court's stay had expired, it did pass a new law shortly thereafter. The situation after *Northern Pipeline* was quite different. When it became clear that the lower federal courts could temporarily hold the bankruptcy system together by local rule, congressional response time was much slower. The new bankruptcy amendments came more than eighteen months after the Supreme Court's stay had expired.

In each of these cases, the Supreme Court had the same instincts as the Italian Constitutional Court in the public tax hearings case. On the American side, the Supreme Court wanted to avoid "interrupting enforcement" of valid bankruptcy and election-finance laws. In Italy, the Constitutional Court wanted to avoid disrupting all pending proceedings against tax evaders. Each court announced that the law was invalid, yet delayed the effect of its judgment precisely so that the legislative branch could reform the law.

While the Supreme Court is generally receptive to the strategy of staying injunctive or declaratory relief to give legislatures time to amend laws, it has demanded that judicial orders doing so be sufficiently detailed. In this way, government officials are put on notice as to exactly how they ought to comply with a court's ruling, or, if they disagree, how to seek prompt appellate review. These points are illustrated by *University Committee to End the War in Viet Nam v. Gunn* in which a three-judge district court held unconstitutional a Texas disturbing-the-peace statute. The panel refrained from entering a formal judgment and ended its opinion in this way:

We reach the conclusion that Article 474 is impermissibly and unconstitutionally broad. The Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of [the Texas statute] . . . . However, it is the Order of this Court that the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements.\(^174\)

\(^{174}\) *Id.* at 475.
The Texas legislature adjourned without amending the law, the lower court never issued a more definite order, and the State appealed the decision directly to the United States Supreme Court.

The Supreme Court dismissed the appeal on technical grounds because at the time it only had jurisdiction to review a decision of a lower court that granted or denied an injunction. The decision below did neither and was merely an advisory opinion so vague that "it is simply not possible to know with any certainty what the court has decided." The Court gently criticized the lower court for failing to be more specific in its original opinion or to issue a subsequent order when the Texas legislature failed to act:

The restraint and fact that evidently motivated the District Court in refraining from the entry of an injunctive order in this case are understandable. But when a three-judge district court issues an opinion expressing the view that a state statute should be enjoined as unconstitutional — and then fails to follow up with an injunction — the result is unfortunate at best. For when confronted with such an opinion by a federal court, state officials would no doubt hesitate long before disregarding it. Yet in the absence of an injunctive order, they are unable to know precisely what the three-judge court intended to enjoin, and unable as well to appeal to this Court.

A declaration of unconstitutionality must be reasonably clear and detailed so that the political branches can adequately respond or, if the order comes from a lower court, appeal to a higher judicial authority.

2. Letting the Political Branches Balance Spending Priorities

When litigants challenge government spending priorities, the Supreme Court has often been sensitive to the necessity of leaving delicate questions of political balancing to legislatures. This has been especially true in areas involving social and economic rights, as well as in cases challenging the equal distribution of government benefits. In both types of cases, in which parties seek to reallocate limited government resources, American courts have been reluctant to

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175 Gunn v. University Comm. to End the War in Viet Nam, 399 U.S. 383, 388 (1970). It is worth noting that in most circumstances today, a federal district court order declaring a law unconstitutional would be immediately reviewable by a federal court of appeals, regardless of whether injunctive relief also was involved. See 28 U.S.C. § 1291 (1994) (authorizing appellate review over all final judgments).

176 Gunn, 399 U.S. at 390-91.
second-guess the legislative branches. After finding that a
government has violated a constitutional command, courts
commonly issue broadly worded injunctions that leave space for the
government to determine how it will comply with the court’s order.
Although courts may ultimately have to intervene quite decisively,
they generally do so only after the government fails to devise a
satisfactory solution on its own.

Take social and economic rights first. The United States
Constitution protects mainly what are often called “negative” rights,
that is, rights to be free from government interference. Most of the
rights enumerated in the Bill of Rights fall within this category:
freedom of speech, freedom of religion, freedom from unreasonable
searches and seizures, and so on. The Supreme Court repeatedly has
turned away claims that the United States Constitution guarantees
certain “affirmative” rights that would require the government to
provide services to individuals, such as education or a subsistence income. In this respect, the American charter differs
fundamentally from the Italian. Yet, there are many examples of
American constitutional guarantees that can be characterized as
affirmative rights, to the extent that the government must pay for
certain services as a condition of taking certain action. Two

177 See, e.g., Califano v. Jobst, 434 U.S. 47, 54 (1977) (upholding statute that
terminates dependent child’s eligibility for Social Security benefits upon his
marriage); Maher v. Roe, 432 U.S. 464, 479 (1977) (upholding state regulation that
funded abortions only if “medically necessary,” after making the deferential inquiry
as to whether the regulation was rationally related to a constitutionally permissible
purpose).

178 The Supreme Court has forcefully reiterated its warning that federal courts
should be wary of issuing detailed “structural injunctions” that virtually take over the
management of state agencies without detailed showings that the agencies failed to
satisfy constitutional requirements. See Lewis v. Casey, 518 U.S. 343, 390-93 (1996)
(reversing a trial court’s wide-ranging attempt to reform the Arizona prison system);
see also Bell v. Wolfish, 441 U.S. 520, 548 (1979) (explaining that judges must defer to
the judgment of prison administrators not only because of their greater expertise,
“but also because the operation of our correctional facilities is peculiarly the
province of the Legislative and Executive Branches of our Government, not the
Judicial”).

(“Education, of course, is not among the rights afforded explicit protection under
our Federal Constitution. Nor do we find any basis for saying it is implicitly so
protected.”).

unequal distribution of welfare benefits because it did not implicate any “freedoms
guaranteed by the Bill of Rights”); see also Lindsey v. Normet, 405 U.S. 56, 73-74
(1972) (recognizing that there is no federal constitutional right to housing).

181 See supra notes 48-49 and accompanying text.

182 There is no bright line distinguishing between affirmative and negative rights,
examples that immediately come to mind are the rights of prisoners and patients involuntarily committed to government psychiatric institutions. In neither case does the United States Constitution require the state to confine anyone; but once the state decides to do so, it must treat confinees according to certain minimal standards. In the prisoners' case, the state must not let conditions deteriorate to the level of "cruel and unusual punishment;" in the patients' case, the state must ensure that individuals are offered adequate food, shelter, and clothing, as well as basic rehabilitation services.

While the Supreme Court is prepared to decide whether the government is satisfying constitutional standards in treating inmates and patients, it is hesitant about substituting judicial judgment for that of the political branches, particularly when a case turns on the reallocation of scarce government resources. For example, the Supreme Court has reiterated that, upon finding unconstitutional conditions in a prison system, a court should give prison officials the first chance to propose a remedial program. Judges must limit themselves from overly interfering with the judgment of the legislative and executive branches.

The same is true in cases involving challenges to the equal distribution of government resources. Here, education stands out as an area in which conflict has been carried out largely in the judicial arena. The federal courts have most often become involved when parties claim that educational opportunities are skewed against racial minorities. Upon a finding of racial discrimination, the courts are not immediately to draw up their own plans for eliminating racial disparities. Instead, the primary responsibility for drafting solutions is left to local school boards, with judges ensuring that those plans are

_of course. For example, the right of a poor criminal defendant to have a free lawyer can be conceived either way. It is a negative right if formulated as the right to be free from prosecution without free legal advice. Or it is an affirmative right if viewed as a government obligation to provide a lawyer to criminal defendants._

183 U.S. CONST. amend. VIII.

184 See Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (holding that involuntarily committed mental patients have a right to adequate food, shelter, clothing, medical care, safe living conditions, and freedom from undue bodily restraint); Society for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1259, 1250 (2d Cir. 1984) (adding that patients have a right to training sufficient to preserve basic life skills).

185 See Lewis, 518 U.S. at 362-63 (praising the procedure followed in Bounds v. Smith, 430 U.S. 817 (1977), in which the district court charged state prison officials with the task of devising a prison reform plan, and then adopted a modified version of that plan after considering objections by inmates); Preiser v. Rodriguez, 411 U.S. 475, 492 (1973) (requiring federal courts to give state prison officials "the first opportunity to correct errors made in the internal administration of their prisons").
adequate to resolve constitutional deficiencies.\textsuperscript{186} Even when the courts have gone as far as to require the government to increase spending to remedy a constitutional violation, the courts must let the government determine (in the first instance) precisely how that money is to be raised.\textsuperscript{187} Only as a last resort, if the government fails to offer a satisfactory plan, or fails to live up to its promises, is a court justified in substituting its own remedial judgment for that of the political branches.

C. Applying the Italian Lessons to a Balanced Budget Amendment

American precedent suggests that United States courts have the technical ability, as well as some of the same motivations as the Italian Constitutional Court, to build in a delay between the issuance of declaratory and injunctive relief. This technique is useful in extraordinary cases in which standard forms of judicial relief are inadequate to deal with an unconstitutional law, but a timely legislative response could eliminate the problem. To illustrate how concerns of public administration, the setting of government spending priorities, and the preservation of legislative discretion could all come together to make judicial temporizing appropriate, consider how a court would be forced to deal with a proposed Balanced Budget Amendment to the United States Constitution.

For a number of years, Congress has considered proposals to amend the Constitution to require the federal government to adopt a balanced budget. There have been numerous formulations of this amendment, but almost all of them would institute a requirement that "[t]otal outlays for any fiscal year shall not exceed total receipts for that fiscal year" absent a supermajority vote in Congress.\textsuperscript{188} The

\textsuperscript{186} See Jenkins, 495 U.S. at 52 ("By no means should a district court grant local government carte blanche, but local officials should at least have the opportunity to devise their own solutions to these problems.") (citation omitted); cf. Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 614-15 & n.77 (1983) (discussing how the Supreme Court, when authorizing a delay in the implementation of desegregation in Brown v. Board of Education II, 349 U.S. 294 (1955), drew on prior cases authorizing delay in parties' compliance with complex remedial decrees; discussing whether Supreme Court properly allowed desegregation to take place "with all deliberate speed").

\textsuperscript{187} See Missouri v. Jenkins, 495 U.S. 33, 50-52 (1990) (approving district court's authority to order local school district to raise taxes to meet expenses of school desegregation plan, but ruling that court should have allowed school district to determine how it would obtain that tax revenue).

political impetus behind the amendment has recently faded somewhat as the American economy continues to grow, and surging federal revenue has allowed political leaders to eliminate the annual federal budget deficit for the first time in thirty years. Some supporters, however, still believe that budgetary discipline is best written into the Constitution, as protection against the day when the economy takes a downturn and Congress is again tempted to spend on credit.

The goal of this Article is not to argue about the political wisdom of a Balanced Budget Amendment, nor about whether courts are the

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to 35. See 142 Cong. Rec. S5873, S5903 (daily ed. June 6, 1996). The text of the proposed amendment read:

SECTION 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote.

SECTION 2. The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a rollcall vote.

SECTION 3. Prior to each fiscal year, the President shall transmit to the Congress a proposed budget for the United States Government for that fiscal year, in which total outlays do not exceed total receipts.

SECTION 4. No bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a rollcall vote.

SECTION 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for any fiscal year in which the United States is engaged in military conflict which causes an imminent and serious military threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law.

SECTION 6. The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts. The judicial power of the United States shall not extend to any case or controversy arising under this Article except as may be specifically authorized by legislation adopted pursuant to this section.

SECTION 7. Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal.

SECTION 8. This article shall take effect beginning with fiscal year 2002 or with the second fiscal year beginning after its ratification, whichever is later.

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best-suited organs to enforce it. Instead, the sole aim is to use the amendment as an illustrative tool. A case involving the amendment would present just the sort of awkward circumstances in which American courts might find inadequate their usual array of judicial tools, and in which it might prove useful to introduce a delay between declaratory and coercive relief. For purposes of this discussion, therefore, this Article puts aside as extraneous other important issues that would probably dog any adjudication of such an amendment, such as standing and justiciability.\footnote{The most commonly mentioned candidates for standing are taxpayers and members of Congress, both of whom would have to surmount serious obstacles to justify their right to sue. See Flast v. Cohen, 392 U.S. 83, 102-03 (1968) (holding that taxpayers had standing to challenge federal spending under the Establishment Clause because that provision is a "specific constitutional limitation imposed upon the exercise of the congressional taxing and spending power"); Raines v. Byrd, 521 U.S. 811, 826 (1997) (rejecting legislators' standing to challenge Line Item Veto Act); see also Gay Aynsworth Crosthwait, Note, Article III Problems in Enforcing the Balanced Budget Amendment, 83 COLUM. L. REV. 1065, 1077-82 (1983) (discussing problems inherent in taxpayer standing).

As for justiciability, one might question judicial competence to second-guess the political branches' application of general terms used in the proposed amendments such as "revenue" and "outlay." See Theodore P. Seto, Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed to Do (and No More), 106 YALE L.J. 1449, 1479-84 (1997) (criticizing recent drafts of the amendment for seemingly adopting the cash method of accounting, and thereby leaving open innumerable ways for Congress to restructure federal expenditures and borrowing to evade the letter of the amendment). Yet state supreme courts have dealt with similar interpretive issues in connection with state budget requirements. See generally Donald B. Tobin, The Balanced Budget Amendment: Will Judges Become Accountants? A Look at State Experiences, 12 J. L. & POL. 153 (1996).

Finally, there is the possibility that the amendment itself might explicitly forbid courts from hearing disputes over the federal budget. In one recent draft, the courts would have no authority to implement the new constitutional provision unless Congress enacted legislation to that effect. See H.R.J. Res. 1, § 6, supra note 188. A 1993 version of the amendment, which also narrowly failed passage, would have limited courts to issuing declaratory relief unless Congress provided for further remedies: "The power of any court to order relief pursuant to any case or controversy arising under this article shall not extend to ordering any remedies other than a declaratory judgment or such remedies as are specifically authorized in implementing legislation pursuant to this section." S.J. Res. 41, § 6, 103d Cong., 1st Sess. (1993), 140 Cong. Rec. S1824 (daily ed. Feb. 24, 1994). Senator Danforth of Missouri proposed this language to ensure that federal courts could not raise taxes to bring the budget into balance. This modification came in response to the Supreme Court's then-recent decision in Missouri v. Jenkins, 495 U.S. 33 (1990), in which the Court held that federal courts could order local governments to levy taxes to comply with a federal judgment.}
to social and economic rights. The postponing of injunctive relief might be a logical response so that Congress could pass an amended budget without requiring the Supreme Court to take more drastic action. As elsewhere, the Court's decision could follow the pattern of denounce-decline-demand.

Upon determining that a budget is unbalanced, the Court would find itself faced with two remedial options, neither of which is particularly attractive. First, the Court could try to balance the budget itself. Yet, there seem to be no legal standards for doing so. For one thing, the Court would have no legal basis for choosing between raising taxes or cutting spending. None of the vetted balanced budget amendments provide for either solution; either would be perfectly acceptable if undertaken by Congress, as far as the balanced budget amendment is concerned. Furthermore, the Court would have no judicially manageable standards for determining how to allocate spending cuts among the manifold federal expenditure programs, or to distribute revenue increases among the various federal taxes. For the Court to pick and choose among programs obviously would involve the judiciary in judgments that are wholly political, that is, informed entirely by values extraneous to the legal system. Such judicial intrusion into the realm of legislative spending authority would violate separation-of-powers principles. The United States Supreme Court would find itself much in the same position as the Italian Constitutional Court when it finds the avenue of an additive judgment foreclosed due to the excess of discretionary decision making involved.

Second, the Supreme Court could enjoin all spending under the budget, on the theory that it is wholly invalid because it was enacted in violation of the amendment. This sort of relief would not, it seems, engage the Court in the sort of political value judgments that would trespass on the competencies of other branches of government. Hence, there would be no justiciability bar to such a remedy. Such a decision, however, would have extraordinary

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191 Some have read the Supreme Court's decision in Missouri v. Jenkins, 495 U.S. 33 (1990), as a warning that the Court could raise taxes to close a budget deficit. See supra note 187. Yet this worry seems misplaced. In Missouri v. Jenkins, the Court determined that a local school district had discriminated against black children and held that the State was constitutionally required to increase spending to relieve the effects of past discrimination. See Jenkins, 495 U.S. at 57-58. The State had an affirmative duty to provide educational services. Thus, because spending constitutionally had to be increased, taxing had to follow. A balanced budget amendment, however, has no similar bias towards greater or lesser expenditures. All it requires is that outlays be in synch with revenues.
consequences for the public, and, as pointed out earlier, the Court must take into account the public interest when deciding whether to grant injunctive relief.\textsuperscript{192} A decision freezing all federal disbursements could have catastrophic effects. Millions of Americans rely on monthly Social Security checks to survive. Millions of others are employed by the government, and depend just as surely on their paychecks. Enjoining all federal expenditures would greatly disrupt life in the United States. These are equitable issues worthy of consideration.\textsuperscript{193}

One also could imagine constitutional issues being at stake. For example, the United States Constitution provides that a federal judge’s salary shall not be reduced during his tenure in office. If no federal budget were approved, and judges’ salaries were withheld, would that result in a constitutional violation? On occasion in the past, Congress has managed to pass short-term, stop-gap budgets to keep essential government operations flowing while the overall budget was still unresolved. Government shut-downs have caused tremendous disruptions, and it is not clear whether a balanced budget amendment would leave room for such interim solutions. It would be difficult for the Supreme Court to conclude, after considering the public interests at stake, what course of action to take.\textsuperscript{194}

To put off this dilemma, the Supreme Court could try to temporize. The Supreme Court could issue a declaratory judgment and then announce that it was delaying relief, for a set amount of time, for Congress to reach agreement on a new budget that complied with the criteria set forth in the Court’s judgment. This sort of decision would be perfectly compatible with decisions like \textit{Northern Pipeline} and \textit{Buckley}, in which the Court, to avoid the inconveniences of shutting down parts of the government, postponed the effect of its judgment to buy time for legislative reform.

\textsuperscript{192} \textit{See supra} notes 135-47.

\textsuperscript{193} \textit{See} Califano v. Westcott, 443 U.S. 76, 89 (1979) (dicta) (noting that, as a matter of equitable discretion, “[i]n previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course” partly because “an injunction suspending the program’s operation would impose hardship on beneficiaries whom Congress plainly meant to protect”).

\textsuperscript{194} \textit{But see} Crosthwait, \textit{supra} note 190, at 1097-98 (assuming that an injunction ordering the Treasury to withhold authorization for expenditures under an illegal budget would result in the “full termination of federal spending,” but hypothesizing that the “loss of essential services” would spark political disobedience of the decree).
For the Court's decision to have practical effect, that is, to truly pressure Congress into enacting a proper budget, the Court would have to be ready to back up its threats with deeds. One of the lessons to learn from the Italian Constitutional Court is that if a court is not prepared to follow up on a declaratory judgment with more incisive action — invalidating the law in the Italian case, or enjoining it in the American — then its decisions lose most of their bite. The United States Supreme Court would do well to set a deadline up front, putting Congress on notice that it had a limited amount of time to pass a new budget. If that deadline passed unheeded, then more definite relief would issue. If the Supreme Court were not prepared to take such action, then it would do better to simply abstain from adjudication in the first place, rather than call its credibility into question as the Italian Court has done.

**CONCLUSION**

Since its founding after World War II, the Italian *Corte Costituzionale* has constantly searched for ways to move beyond a bare-bones model of negative legislation, in which it can either strike down a law or do nothing. In remarkable testimony to the power of judicial ingenuity, the Constitutional Court has developed a highly nuanced range of judicial decision-making techniques within the formalistic bounds of these two seemingly rigid categories. The Court has been extraordinarily “activist” in expanding into areas like statutory interpretation, yet paradoxically this activism has been largely designed to permit the Court to exercise the “passive virtue” of abstaining from striking down laws on constitutional grounds. This flexibility has not always proved sufficient, however, and the Court has often faced unconstitutional laws that it finds itself unable to strike down or fix. This has been especially true in cases in which issuing standard forms of judicial relief would lead the Constitutional Court to exceed the limited powers accorded to the judiciary by making value judgments unguided by legal standards. In several innovative decisions, the Court severed the link between declaring a statute unconstitutional and rendering it inapplicable. In doing so, the Court sought to establish a dialogue with the legislature, sometimes begging, increasingly demanding. Unfortunately, the Italian Parliament often has been unreceptive to judicial imprecations. The Court contributes to the inefficacy of its own threats because it does not always follow up on them. The Court thereby reinforces the impression that Parliament is under no special pressure to implement the Court’s decisions.
It is remarkable to realize that this power to delay or withhold injunctive relief, toward which the Italian Court has moved over the past forty years, is virtually taken for granted in the more flexible American legal system. American courts, however, can draw some useful lessons from the Italian practice. On a constructive note, the Italian decisions demonstrate how courts can buy time for the political branches to repair a defective law. While American courts technically are capable of delaying relief, the Italian Constitutional Court’s experience highlights precisely how courts can more systematically use these capabilities to shift some of the burden of reform onto the shoulders of legislators. Indeed, scattered precedents like *Northern Pipeline* suggest that the United States Supreme Court should be receptive to such efforts. Moreover, the Italian experience suggests that it is most appropriate to leave room for legislative reform when two factors come into play: when forceful judicial action would disrupt the orderly working of government, or when crafting remedial orders would push judges into areas of policy-making normally reserved for legislators (such as the allocation of public resources).

The other lesson is more cautionary because the Italian experience also shows that too much temporizing is a mistake. American courts would do well to avoid vacillating as has the Italian Constitutional Court, which rarely sets firm deadlines for the legislature to act. If no response is forthcoming from the legislature within a specified time, courts must be ready to follow up with injunctive relief. To do otherwise would undercut the credibility of the courts’ threats and reduce the legislature’s incentive to fix unconstitutional laws. There must be limits to judicial self-restraint.