

REFERRALS TO NATIONAL CONSTITUTIONAL COURTS: A PRELIMINARY EXAMINATION

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I. INTRODUCTION

Though relatively uncommon—and thus relatively unknown—in the United States legal system, many judicial systems around the world utilize a process known as a “referral,” in which one court has the ability to call upon another court, particularly a superior court, for definitive interpretations of law.¹ In fact, the constitutional judicial systems in many European countries are built in no small measure through the ability—and necessity—of ordinary court judges to refer constitutional questions to their national constitutional court.² Yet, apart from the preliminary reference process used in the Court of Justice of the European Union (ECJ), very little has been written about the referral process.³ This Article serves as a starting point to better understand and explain the process of referrals at the national level and their importance in the legal world, using Germany as a representative example. Because there is little written about the topic (apart from the ECJ preliminary reference process), there is also little to no extant data examining the process of referrals.⁴ This Article also incorporates two different sources of data on the process of referrals—both a series of interviews with German constitutional and regular court judges and a novel dataset of referral outcomes from the German Constitutional Court—to better understand the factors that may lead to referrals and that may contribute to successful referrals.

A referral can be defined as a “request from one court to another court for a definitive interpretation of law prior to the ultimate ruling in the case.”⁵ Referral processes exist in different forms and under different names in various countries.⁶ Though the names may be different, what unites them is

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¹ See Herbert Hausmaninger, *Judicial Referral of Constitutional Questions in Austria, Germany, and Russia*, 12 TUL. EUR. & CIV. L. F. 25 (1997).

² See *id.*

³ Existing work is fleeting. See, e.g., *id.*, for one example.

⁴ See *id.*

⁵ Benjamin Bricker et al., *Referrals*, in THE OXFORD HANDBOOK OF COMPARATIVE JUDICIAL BEHAVIOR (Lee Epstein et al. eds) (forthcoming 2024) (manuscript at 3) (on file with author).

⁶ *Id.*

the existence of a common set of procedures in which “an existing case is interrupted to obtain a legal answer from another court.”⁷ Thus, there are two common elements that unite the referral process: one, interrupting an existing case to request a legal answer, and two, breaking the traditional concept in which only final rulings from one court can be heard by another court.⁸ Though uncommon, referrals are, in fact, not unknown in the U.S. legal system.⁹ The “certification” process that exists today in at least forty-seven states, the District of Columbia, and Puerto Rico allows federal courts to ask a state high court specific questions relating to the interpretation of state law.¹⁰ Many states also have a separate certification process in which lower state courts can certify questions of state law to their state supreme court.¹¹ The interlocutory appeal process in federal courts also permits federal district courts a limited right to ask federal appellate courts for answers on controlling issues of civil law that are central to the case and about which substantial grounds for disagreement exist.¹²

Still, the referral process is perhaps most widely known from its use in the European Court of Justice, which has long thrived on receiving referrals (known as a “preliminary reference”) from national courts within the European Union (EU).¹³ The preliminary reference process is perhaps the most important tool the ECJ has to hear cases on matters of EU law and thus has become the primary way to implement EU law and expand the power of the EU legal order.¹⁴ Through the preliminary reference, the ECJ has become an essential institutional actor in the creation and maintenance of the

⁷ *Id.*

⁸ See Robert Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 770-71 (1993); see Note, *Appellate Jurisdiction—Final Judgment Rule—Class Certification Orders—Microsoft Corp. v. Baker*, 131 HARV. L. REV. 323, 325 (2017); see 28 U.S.C. § 1291 (2012) (Appellate courts have jurisdiction over “all final decisions of the district courts.”).

⁹ See, e.g., Rebecca Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 203 (2013).

¹⁰ *Id.* at 159.

¹¹ See, e.g., *id.*

¹² Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1812-14 (2018); 28 U.S.C. § 1292(b) (2012). It is important to note that appellate courts retain discretion on whether to answer interlocutory appeals or not. *Id.*

¹³ See generally KAREN ALTER, *THE EUROPEAN COURT’S POLITICAL POWER* (2009). It is important to note here that, as some have noted, the ECJ is not necessarily a “superior” court in the preliminary reference relationship. See Arthur Dyevre et al., *Chilling or Learning? The Effect of Negative Feedback on Inter-judicial Cooperation in Non-hierarchical Referral Regimes*, 10 J. LAW & CTS. 87 (2021). Instead, it is a supranational court with jurisdiction over questions of EU law. *Id.* However, the ECJ is the only court with the power to give final interpretations on matters of European Union law, which makes its power effectively similar to other courts that are courts of final appeal. *Id.* And, the ECJ’s relationship with national courts is at the very least functionally similar to that of the U.S. Supreme Court’s relationship with lower federal courts and state courts. *Id.*

¹⁴ See generally Arthur Dyevre et al., *Chilling or Learning? The Effect of Negative Feedback on Inter-judicial Cooperation in Non-hierarchical Referral Regimes*, 10 J. LAW & CTS. 87 (2021).

European Union project.¹⁵ With recognition of the importance of the reference process to ECJ and EU power, a vast literature has developed to examine the preliminary reference process at the ECJ, including questions of which courts refer, which countries or regions refer, and whether the ECJ itself seeks out specific cases and why.¹⁶

Yet, the ECJ's preliminary reference process is, in fact, derived from the judicial referral processes adopted after World War II in several national judiciaries of the EU member states, particularly Italy and (West) Germany.¹⁷ In the aftermath of World War II, the new political leadership in Italy and West Germany (with American prodding) sought to create a new type of constitutional system to prevent democratic backsliding and ensure a slate of basic human and civil rights to all citizens.¹⁸ One of the primary deficiencies of the previous constitutional orders in those countries was the inability of individual citizens to go to court and assert that laws passed by parliament violated their constitutional rights.¹⁹ Judges in the continental civil law system had long been disqualified from exercising judicial review.²⁰ The traditional view had been that rights protection in a parliamentary democracy was a matter for the democratically-elected legislature to determine, not unelected judges.²¹ The terrors of the Nazi regime in Germany had plainly exposed the problem of not providing a check on legislative and governmental abuses of power.²² Yet, many in the post-World War II political world still harbored a distrust of the judiciary and a reluctance to extend judicial review powers to the judiciary.²³ The solution was the creation of a separate stand-alone court, known as the constitutional court, that would be empowered to hear and decide cases involving constitutional rights or constitutional powers.²⁴ This court could exercise judicial review

¹⁵ See generally KAREN ALTER, *THE EUROPEAN COURT'S POLITICAL POWER* (2009); Bricker, *supra* note 5, at 3.

¹⁶ See Anne-Marie Burley & Walter Mattli, *Europe before the Court: A Political Theory of Legal Integration*, 41 INT'L ORG. 47 (1993); Karen Alter, *The European Court's Political Power*, 19 W. EUR. POL. 458 (1996); see Clifford Carrubba & Lacey Murrah, *Legal Integration and Use of the Preliminary Ruling Process in the European Union*, 59 INT'L ORG. 399 (2005); R. Daniel Kelemen & Tommaso Pavone, *Mapping European Law*, 23 J. EUR. PUB. POL'Y 1118 (2016); see Arthur Dyevre et al., *Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System*, 27 J. EUR. PUB. POL'Y 912 (2019).

¹⁷ TOMMASO PAVONE, *THE GHOSTWRITERS: LAWYERS AND THE POLITICS BEHIND THE JUDICIAL CONSTRUCTION OF EUROPE* (2022); Hausmaninger, *supra* note 1, at 25.

¹⁸ ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 40 (2000).

¹⁹ *Id.*

²⁰ TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* 1-3 (2003).

²¹ *Id.*

²² See Jeffery Herf, *Emergency powers helped Hitler's rise. Germany has avoided them ever since*, WASH. POST. (Feb. 19, 2019), <https://www.washingtonpost.com/outlook/2019/02/19/emergency-powers-helped-hitlers-rise-germany-has-avoided-them-ever-since/>.

²³ SWEET, *supra* note 18, at 40-41.

²⁴ Hausmaninger, *supra* note 1, at 25.

and would be empowered to overturn acts of the legislature and government that contravened the constitution.²⁵ Judges in the regular judicial system would still be precluded from deciding matters of constitutional rights or policy.²⁶ But, if a constitutional claim arose in an ordinary court case, those regular judges would be empowered to pause that case and send, or *refer*, the constitutional issue to the constitutional court for a resolution.²⁷

This Article examines the constitutional referral process at the national level, using the German Constitutional Court as a representative example to examine different ideas of why regular court judges refer cases to their national constitutional courts and how the constitutional courts respond to judicial referrals. There are important reasons to examine this question. First, despite the large growth in the literature examining the preliminary reference procedure at the ECJ, there is still relatively little work examining the referral process within national judicial systems.²⁸ Second, the literature that has been developed for the ECJ's reference process may be of limited value in explaining non-ECJ judicial processes and outcomes.²⁹ The ECJ's preliminary reference literature is by now quite comprehensive, with many interesting answers to equally interesting questions of referral dynamics.³⁰ However, the ECJ is an international court, not a domestic court, and the pathways to the entry of a case on the ECJ's docket are often quite distinct from those seen in the national court systems.³¹

Further, the reasons why the ECJ's reference docket has grown have much to do with transnational activity, particularly national and international economic trade, as well as national levels of openness to Europeanization and the EU itself as an institution.³² These factors may have little to no theoretical or practical relevance at the national level. Finally, the ECJ is, in the end, *not* empowered to overturn national laws—it provides a legal interpretation of EU law and allows the national court to rule in ways that overturn national laws (or not).³³ Yet, potentially overturning laws is precisely the job of

²⁵ *Id.* at 26.

²⁶ *Id.* at 30.

²⁷ *Id.*

²⁸ *See id.*, for one exception.

²⁹ *See generally* KAREN J. ALTER, *THE EUROPEAN COURT'S POLITICAL POWER* (2009) (analyzing the ECJ process and integration into the European legal system).

³⁰ TOMMASO PAVONE, *THE GHOSTWRITERS: LAWYERS AND THE POLITICS BEHIND THE JUDICIAL CONSTRUCTION OF EUROPE* (2022); Hausmaninger, *supra* note 1, at 25.

³¹ *See generally* CLIFFORD J. CARRUBBA & MATTHEW J. GABEL, *INTERNATIONAL COURTS AND THE PERFORMANCE OF INTERNATIONAL AGREEMENTS* (2014) (analyzing the ECJ and its role in effectuating international agreements and contrasting it with the domestic political and judicial processes).

³² Tommaso Pavone, *Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance*, 6 J. L. & CTS. 303 (2018); Clifford Carrubba & Lacey Murrah, *Legal Integration and Use of the Preliminary Ruling Process in the European Union*, 59 INT'L ORG. 399 (2005).

³³ *See generally* ALTER, *supra* note 29.

national constitutional court referrals.³⁴ Thus, it seems apparent that we cannot rely simply on reference to the work done on the ECJ's preliminary references and will need new theories and new pathways to explain referral activity at the level of the national judiciary. This Article reflects an attempt to do just that—examine the relationship between the national courts and the constitutional court in these instances of concrete judicial review. Specifically, this study examines when and why constitutional courts will act to affirm or reject the constitutional reference made by the national court.

II. BACKGROUND: THE REFERRAL PROCESS

The procedural rules of the German Constitutional Court are quite different from those of common law courts, and notably those of the U.S. Supreme Court.³⁵ The constitutional court's rules of procedure allow several distinct pathways for cases to enter the court's docket.³⁶ First, some institutional actors are provided the opportunity to send constitutional questions directly to the constitutional court for resolution in a process known as abstract review.³⁷ Notably, this process does *not* require the party initiating the case be injured in any direct or concrete way.³⁸ The federal government, Land (state) governments, and groups of members of parliament (MPs) in the Bundestag—the lower house of the federal legislature—can send cases to the court in the abstract.³⁹ This means that political actors have a direct pathway to using the legal system to challenge the constitutionality of laws.⁴⁰ Separately, federal governmental institutions can send questions regarding the proper constitutional boundary line between the federal powers, and Land and federal government actors can send federalism disputes to the court directly as well.⁴¹ In a second avenue, private individuals can submit constitutional complaints to the constitutional court after they have exhausted all of their other legal remedies in the ordinary court

³⁴ Hausmaninger, *supra* note 1, at 26.

³⁵ See generally Bundesverfassungsgerichtsgesetz [BVerfGG] [Federal Constitutional Court Act], Aug. 11, 1993, Bundesgesetzblatt [BGBl I] at 1473, last amended by Gesetz [G], Nov. 20, 2019, (Ger.), https://www.gesetze-im-internet.de/englisch_bverfgg/englisch_bverfgg.html.

³⁶ *Id.* at 1724, §§ 13, 80-82.

³⁷ *Id.* § 13.

³⁸ See *id.* This is converse to the standard justiciability requirements in common law courts. The U.S. Supreme Court has, at least since *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), noted that plaintiffs must show at least a concrete and particularized injury-in-fact from the law challenged to meet standing and related justiciability requirements.

³⁹ SWEET, *supra* note 18, at 45.

⁴⁰ *Id.*

⁴¹ See Bundesverfassungsgerichtsgesetz [BVerfGG] [Federal Constitutional Court Act], Aug. 11, 1993, Bundesgesetzblatt [BGBl I] at 1473, last amended by Gesetz [G], Nov. 20, 2019, BGBl I at 1724, § 13 (Ger.), https://www.gesetze-im-internet.de/englisch_bverfgg/englisch_bverfgg.html.

system.⁴² Functionally, this second path is the way most cases get on the German Constitutional Court's docket.⁴³

A third pathway comes from judicial referrals from the regular courts.⁴⁴ As noted above, the German system, like nearly all continental European legal systems, does not permit judges in the regular court system to overturn laws of parliament on their own.⁴⁵ Instead, Article 100 of the German Basic Law empowers regular court judges to submit referrals to the constitutional court when they believe a statute at issue in their case may be unconstitutional.⁴⁶ The referral process, also known as “concrete” judicial review or “specific” judicial review,⁴⁷ is initiated by the ordinary judiciary in the course of pending litigation.⁴⁸ When, in the course of that litigation, the judge overseeing the case—or a majority of judges in the case of multi-judge judicial panels—concludes that a law vital to the ongoing case is unconstitutional, the court is then obligated to refer the issue to the constitutional court for a resolution.⁴⁹

Despite the importance of the referral process to the judicial order, research on constitutional referrals in European court systems has been lacking.⁵⁰ Perhaps because the abstract review process directly brings political actors and political debates to the court, most research and theory on constitutional court decision making have tended to focus on the abstract review docket.⁵¹ There is some reason for the emphasis: It is likely true that the concrete docket is less “politically provocative” than abstract cases.⁵² The most direct confrontations between major political actors, including cases pitting the parliamentary majority against opposition parties or the president, are contained in the abstract review docket.⁵³ It is certainly true that the referral (or concrete review) process is a longer and likely much costlier process than abstract review and often arises in cases pitting two private

⁴² *Id.* at § 90.

⁴³ BUNDESVERFASSUNGSGERICHT [FEDERAL CONSTITUTIONAL COURT], ANNUAL REPORT (Eng.) 50-51 (2022), available at https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2022.pdf [hereinafter BUNDESVERFASSUNGSGERICHT].

⁴⁴ Grundgesetz [GG] [Basic Law], translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html, art. 100 (Ger).

⁴⁵ *See, e.g.*, MATHIAS SIEMS, COMPARATIVE LAW (2014).

⁴⁶ Grundgesetz [GG] [Basic Law], translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html, art. 100 (Ger).

⁴⁷ *See, e.g.*, BUNDESVERFASSUNGSGERICHT, *supra* note 43, at 50-51.

⁴⁸ *See, e.g., id.*

⁴⁹ DONALD KOMMERS & RUSSELL MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 13 (3d ed. 2012).

⁵⁰ *See* Christoph Hönnige, *The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts*, 32 W. EUR. POL. 963 (2009).

⁵¹ *See, e.g.*, BENJAMIN BRICKER, VISIONS OF JUDICIAL REVIEW: A COMPARATIVE EXAMINATION OF COURTS AND POLICY IN DEMOCRACIES (2016); *Id.* at 963.

⁵² SWEET, *supra* note 18, at 51.

⁵³ *See id.*

parties against one another—or a private individual against the state in criminal and administrative matters.⁵⁴ Each case that gets referred to the constitutional court must be stayed—essentially put on hold—while the case is lodged and, if accepted, a final decision gets made.⁵⁵ This adds cost to parties seeking a resolution to their legal issue.⁵⁶

In many European constitutional courts, the abstract review docket, broadly conceived, is a relatively large part of the overall work of the court.⁵⁷ However, in Germany the abstract docket is relatively small when compared to the number of constitutional complaints and judicial referrals, and it has been for years.⁵⁸ From 2015 to 2021, the German Constitutional Court resolved an average of just over one abstract review case per year.⁵⁹ During the same time period, the court resolved an average of eighteen referrals per year (See Figure 1).⁶⁰ Thus, despite its relative lack of glamour, judicial referrals represent a significant part of the German Constitutional Court's work.⁶¹ A study performed by Wendel found that judicial referrals are the second most common type of proceeding at the constitutional court, comprising one-quarter of the published decisions in the court's official report series.⁶² And with referrals representing a relatively large proportion of the court's overall work, examining the outcomes from the court's judicial referral docket is important to understand the larger work of the constitutional courts.⁶³

⁵⁴ *See id.*

⁵⁵ BUNDESVERFASSUNGSGERICHT, *Constitutional complaints*, https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Verfassungsbeschwerde/verfassungsbeschwerde_node.html (last visited Feb. 9, 2024).

⁵⁶ *See SWEET, supra* note 18.

⁵⁷ *See, e.g.,* BUNDESVERFASSUNGSGERICHT, *supra* note 43, at 46–47.

⁵⁸ KOMMERS & MILLER, *supra* note 48, at 11.

⁵⁹ BUNDESVERFASSUNGSGERICHT, *supra* note 43, at 46–47.

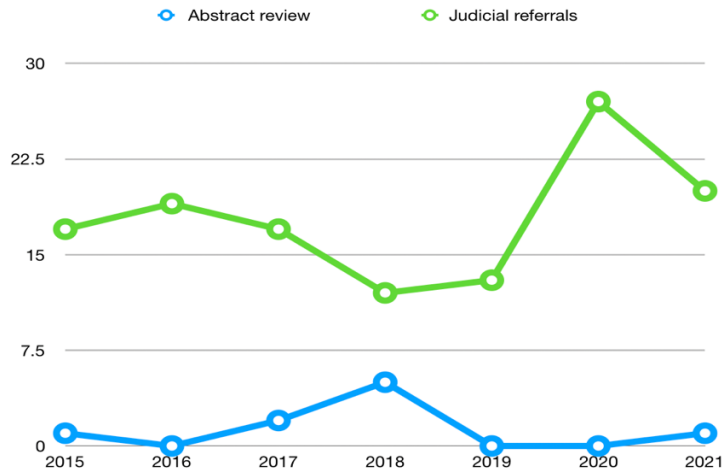
⁶⁰ *See id.*

⁶¹ Constitutional complaints from individuals comprise the bulk of the court's cases and docket. *See id.*

⁶² Luisa Wendel et al., *From Modeled Topics to Areas of Law: A Comparative Analysis of Types of Proceedings in the German Federal Constitutional Court*, 23 GER. L.J. 493, 495 (2022).

⁶³ *Id.*

Figure 1: Number of cases resolved: abstract review and judicial referrals.



III. WHY COURTS AND JUDGES MIGHT REFER

In Germany, the referral process is governed by the Basic Law (Germany's constitutional document) as well as the Law on the Constitutional Court and its related rules of procedure.⁶⁴ As noted earlier, Article 100 of the Basic Law states that when ordinary courts believe that a law on whose validity their decision depends is unconstitutional, that court should stay proceedings and send the question to the Federal Constitutional Court.⁶⁵ The policy applies to both federal and Land laws that might violate the federal constitution, as well as Land laws that might be incompatible with federal laws.⁶⁶ However, as Germany is a federal system, each state (Land) in Germany also has its own constitution and its own state constitutional court to examine state laws that might violate the state constitution.⁶⁷ Interviews conducted with state constitutional court judges in several courts indicate that state constitutional courts are quite cognizant of their role as

⁶⁴ Grundgesetz [GG] [Basic Law], translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html; Bundesverfassungsgerichtsgesetz [BverfGG] [Federal Constitutional Court Act] Aug. 11, 1993, BGBl. I at 1473, last amended by the Act of Nov. 20, 2019, BGBl. I at 1724, § 27(a) (Ger).

⁶⁵ Grundgesetz [GG] [Basic Law], translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html, art. 100 (Ger).

⁶⁶ *Id.* at arts. 93, 100.

⁶⁷ *Id.* at art. 28.

guardians of state constitutional order and of ensuring that they are the entity responsible for non-federal (i.e., state) constitutional questions.⁶⁸

The directions in the Basic Law seem straightforward. Still, within those directions, there is considerable latitude that ordinary court judges have when making the determination to send or not send a referral.⁶⁹ Why might ordinary courts decide to send a referral to the constitutional court? The more robust literature on ECJ preliminary references shows us that a variety of legal and non-legal factors contribute to the calculus judges make about whether they feel a referral is warranted and whether a referral will be made.⁷⁰ Certain issues are particularly likely to be sent by national judges to the ECJ for a preliminary ruling.⁷¹ Trade issues are often the subject of references to the ECJ—which may not be too surprising given the trade-based history of the EU.⁷² Courts located in regions with high amounts of industry and trade will often make trade-based references to the ECJ.⁷³ Similarly, research on the German Constitutional Court’s outcomes has found that judicial referrals are more likely with certain issues, particularly tax law, criminal law, and social law issues.⁷⁴

Referrals to national constitutional courts are also similar to ECJ preliminary references in one more respect. The process is dependent on the determination by the ordinary court judge of two things: one, that the law is likely unconstitutional, and two, that the outcome of their case “depends” on the validity of the law.⁷⁵ As Wind and her colleagues have noted with regard to ECJ preliminary references, it is almost always possible for judges to conclude that the outcome of their case does *not* depend on the EU-national law conflict.⁷⁶ Similarly, it should almost always be possible for an ordinary court judge to come to the conclusion that recourse to a constitutional referral is not necessary because the case does not “depend” on the answer to the referred question.

⁶⁸ Interview with Hessian Const. Ct. Judge, in Hessen, Ger. (June 2018); Interview with Bavarian Const. Ct. Judge, in Bavaria, Ger. (June 2018).

⁶⁹ See Grundgesetz [GG] [Basic Law], translation at http://www.gesetze-im-internet.de/englisch_gg/index.html, art. 100 (Ger).

⁷⁰ Clifford Carrubba & Lacey Murrah, *Legal Integration and Use of the Preliminary Ruling Process in the European Union*, 59 INT’L ORG. 399 (2005).

⁷¹ *Id.*

⁷² *Id.*

⁷³ R. Daniel Kelemen & Tommaso Pavone, *The Political Geography of Legal Integration: Visualizing Institutional Change in the European Union*, 70 WORLD POL. 358 (2018).

⁷⁴ Wendel et al., *supra* note 62, at 517.

⁷⁵ Grundgesetz [GG] [Basic Law], translation at http://www.gesetze-im-internet.de/englisch_gg/index.html, art. 100 (Ger).

⁷⁶ Marlene Wind et al., *The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe*, 10 EUR. UNION POL. 63 (2009).

At the same time, the court that receives the referral request makes its own choices about accepting referrals.⁷⁷ Simply put, the German Constitutional Court does not need to accept every case it receives as a referral.⁷⁸ In Germany, the constitutional court's rules state that the chambers or Senates⁷⁹ may determine that referrals are inadmissible.⁸⁰ And for many years, the court was quite stringent in its application of jurisdictional rules, rejecting over fifty percent of the referral cases lodged in the court.⁸¹

However, as one German Constitutional Court judge stated in an interview with the author, the informal rules for accepting referral cases have changed over recent years.⁸² Until around 2017, the informal rules for accepting referrals were quite strict, and the constitutional court rejected most applications.⁸³ Yet, this proved to be an unideal rule for encouraging referral claims. The same German Constitutional Court judge noted in the same interview that the constitutional court eventually realized that if they started to treat the regular courts with more respect for their judgment on referrals, the court might receive more and better referrals.⁸⁴ Subsequently, the court has received more referrals since the 2017 change.⁸⁵ The judge's statement on referral activity does, in fact, comport well with the established literature on ECJ preliminary references, which has found that the more comfortable national judges feel about EU law and the ECJ as an institution, the more likely they are to believe they could or should refer a question.⁸⁶

In the end, ordinary court judges face their own decision calculus on when and whether to refer cases to the German Constitutional Court in judicial referrals.⁸⁷ Given that each referral begins with the determination by the referring judge that the law is likely unconstitutional, are there factors

⁷⁷ Grundgesetz [GG] [Basic Law], translation at http://www.gesetze-im-internet.de/englisch_gg/index.html, art. 100 (Ger).

⁷⁸ *Id.*

⁷⁹ The German Constitutional Court is divided into two chambers, known as Senates. Each Senate has eight judges, and each Senate hears matters independently of the other Senate. Most of the work of the constitutional court is done within the two Senates, though for some major cases the full plenum of sixteen judges is required to decide a case. *See* BUNDESVERFASSUNGSGERICHT, *supra* note 43.

⁸⁰ Bundesverfassungsgerichtsgesetz – [BVerfGG] [Federal Constitutional Court Act], August 11, 1993 (BGBl. I at 1473), as last amended by the Act of 20 November 2019 (BGBl. I at 1724), § 80, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=1.

⁸¹ Interview with German Const. Ct. Judge, in Ger. (March 2022).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Juan A. Mayoral et al., *Creating EU Law Judges: The Role of Generational Differences, Legal Education and Judicial Career Paths in National Judges' Assessment Regarding EU Law Knowledge*, 21 J. EUR. PUB. POL'Y 1120, 1123 (2014); Tommaso Pavone, *Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance*, 6 J.L. & CTS. 303 (2018).

⁸⁷ Interview with German Const. Ct. Judge, in Ger. (March 2022).

that might lead the constitutional court to agree with that determination, and if so, what are they?

A. The Relationship Between the Type of Referring Court and Referral Outcomes

The German legal system is based on continental civil law principles.⁸⁸ The civil code is the reference point for nearly all decisions, with what we call “case law” or precedent not formally recognized as a source of law.⁸⁹ Notwithstanding the lack of formal recognition for precedent, the reality of civil law decision making is that past cases are still important, if not essential, to the proper functioning of the judicial system and are used informally to create coherence and structure to judicial decisions.⁹⁰ Though the German legal system is organized similarly to other civil law systems, there are some unique aspects.⁹¹ It is a decentralized system, with regular courts at the trial and appellate court levels that rule on many civil and criminal matters.⁹² However, parallel to the regular court system is a system of specialized courts—notably labor courts, tax and finance courts, social courts, patent courts, and administrative courts—that have jurisdiction over specific subject matters.⁹³ As Hanjo Hamann has noted, these courts are “regionally dispersed, but centralized in their respective subject matter authority.”⁹⁴ The legal system is also organized hierarchically, with the regular court system operating through local courts (Amtsgerichte), regional courts (Landgerichte), higher regional courts (Oberlandesgerichte), and high courts, notably the Federal Court of Justice.⁹⁵ The specialized courts in the German legal system (labor, tax, social, patent, administrative) generally only have a lower court system along with the high courts for each of the specialized court systems (i.e., there generally are no appellate specialized courts).⁹⁶ In keeping with the decentralization, lower courts are operated at a Land (or

⁸⁸ See generally Grundgesetz [GG] [Basic Law], translation at http://www.gesetze-im-internet.de/englisch_gg/index.html.

⁸⁹ JOHN MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 50-54 (4th ed. 2019).

⁹⁰ See generally MITCHEL DE S.-O.-L’E. LASSER, *JUDICIAL DELIBERATIONS* (2008) (offering a major comparative study of the judicial reasoning and interpretive processes of civil and common law systems and the European Court of Justice).

⁹¹ See Hanjo Hamann, *The German Federal Courts Dataset 1950–2019: From Paper Archives to Linked Open Data*, 16 J. EMPIRICAL L. STUD. 671, 672 (2019).

⁹² *Id.*

⁹³ *Id.* at 673.

⁹⁴ *Id.* at 672.

⁹⁵ William T. Sweigert, *The Legal System of the Federal Republic of Germany*, 11 HASTINGS L.J. 7, 10 (1959).

⁹⁶ Each of the specialized courts also has a high court: the Bundesfinanzhof is the highest court for the tax and finance court system, for example. These peak courts are operated at the federal level. See, e.g., Manfred Dauster, *The German Court System in Combating State Security Matters, in Particular Terrorism*, 42 S. ILL. U. L.J. 31 (2017).

state) level, and lower court judges are employed by the Land that operates the court.⁹⁷ As noted earlier, the Federal Constitutional Court is empowered as the sole body to hear constitutional questions on any federal matters.⁹⁸

Thus, in the German legal system, some courts operate as specialized courts hearing specific, even technical, legal questions on distinct areas of law, while others operate more like general courts—the ordinary courts that hear many criminal and civil claims.⁹⁹ And within this difference might lie one important factor for understanding references to constitutional courts. The judges on the constitutional court might be more willing to accept and overturn laws sent to them by the courts with specialized jurisdiction, like tax courts, administrative courts, and social courts.¹⁰⁰ The basic logic focuses on the very specialization these courts and judges have. When a generalist judge suspects a law is unconstitutional, it might be viewed with greater skepticism than when a specialist judge with special training and knowledge of that area of law is similarly suspect of a law.¹⁰¹ Put another way, the constitutional court might be more likely to view referrals from specialist judges with greater respect for that judge's judgment on a law's constitutionality and its possible fit (or lack of fit) within the larger network of laws and constitutional arrangements.¹⁰² The very specialization of these latter judges means that they are likely to have greater knowledge of the specific laws they are reviewing, as well as a greater practical understanding of the law's application and potential conflicts. So, when a case arises in the area of tax or finance that a judge (or a panel of judges) in the tax court believes is unconstitutional, it should be treated with greater deference than the referrals from other, general courts. Recent research has already demonstrated that certain issues generally arising from the specialized courts, including tax and social issues, are more likely to be referred to the court.¹⁰³ These cases should also be the cases most likely to be overturned, as well.

This insight is also corroborated by discussions with judges on the Federal Constitutional Court.¹⁰⁴ In an interview with the author, one German Constitutional Court judge noted that there are some issues, notably tax issues and some medical issues, where constitutional judges are more likely to need help understanding the complexities—and even the ethics—in the law.¹⁰⁵ These feelings could also lead to greater deference toward a court or judge who specializes in adjudicating those legal issues. Ultimately, one

⁹⁷ Sweigert, *supra* note 95, at 10.

⁹⁸ Hausmaninger, *supra* note 1, at 26, 30.

⁹⁹ Sweigert, *supra* note 95, at 10.

¹⁰⁰ *See id.* at 11.

¹⁰¹ *See id.* at 19.

¹⁰² *See id.*

¹⁰³ *See* Wendel et al., *supra* note 62, at 517.

¹⁰⁴ Interview with German Const. Ct. Judge, in Ger. (March 2022).

¹⁰⁵ *Id.*

likely path that might lead constitutional courts to accept a referral and overturn the law in question comes from when courts of specialized jurisdiction submit referrals.

Similarly, referrals from peak federal courts¹⁰⁶ in the German system could be treated more favorably by the Federal Constitutional Court than other courts in the regular court system. Given that a prelude to referral activity is a belief by the referring court that the law is likely unconstitutional, it is certainly possible that the judges on the constitutional court will take more seriously the judgments of peak courts about the possible unconstitutionality of the law. Conversely, the referrals made by lower regular courts, the *Amtsgerichte*, could be the least likely to see the constitutional court overturn.

It should be noted that there is a well-established literature on references to the European Court of Justice (ECJ), and the theoretical outline described above—that the high courts are more likely and the lower courts less likely to gain traction with the constitutional court—does not necessarily match much of the early and established literature on referral activity at the ECJ.¹⁰⁷ In fact, many early theoretical studies of the ECJ’s preliminary reference process began with the assumption that lower regular courts would see the most to gain—in terms of their own institutional power and standing—from referring cases, and so they would be the most likely to use the referral process.¹⁰⁸ These lower regular court judges, after all, lack the power of judicial review and thus would naturally see the preliminary reference process as one that could, in practice, expand their scope of power.¹⁰⁹ Further, the lower trial court judges—those with the least policy-making power in the judicial system—would see the most to gain (at least in terms of power) through the use of the preliminary reference.¹¹⁰ Seeking their own power, the judges on the ECJ would have their own interest in helping lower national courts submit references. Later studies have shown that superior courts have come to predominate the reference process.¹¹¹

Yet, even with the knowledge from these later studies, it is unlikely the “judicial empowerment” theories described above would ever have applied with equal force in the national context. For one, the empowerment logic would not go as far in the domestic setting: Ordinary judges refer questions

¹⁰⁶ See Sweigert, *supra* note 95, at 19. Though most lower courts are operated by Land governments, the peak courts in the regular and specialized court systems are operated by the federal government. *Id.*

¹⁰⁷ Anne-Marie Burley & Walter Mattli, *Europe before the Court: A Political Theory of Legal Integration*, 41 INT’L ORG. 47 (1993).

¹⁰⁸ *Id.*

¹⁰⁹ Sweigert, *supra* note 95, at 10.

¹¹⁰ ALTER, *supra* note 29 (interpreting the political influence of the ECJ).

¹¹¹ Arthur Dyeve et al., *Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System*, 27 J. EUR. PUB. POL’Y 912 (2019).

to the national constitutional court, which then rules on the constitutionality of the law in question.¹¹² Simply put, there is no “empowering” of the lower courts in the national context—it is the constitutional court that determines the critical matter of the constitutionality of legislation.¹¹³

A second reason why judicial empowerment theories would not apply at the national level (one that also undercuts the theory in a general sense) focuses on workload and the rational labor interests of judges.¹¹⁴ Judges take on many roles (inquisitor, manager, writer, among others) but also are likely to be driven by desires similar to other workers in the labor market—namely, to maximize their workload efficiency and carve out free time for themselves.¹¹⁵ In this labor market theory of judicial decision making, judges are already busy individuals and have little interest (like all other workers) in acquiring too much work.¹¹⁶ The labor market theory would undercut any theoretical interest that constitutional court judges might have in seeking out the difficult work of constitutional referrals. At the same time, many lower court judges also do not want the added workload pressures that come with a referred case.¹¹⁷ In interviews conducted by the author with several German ordinary court judges, those judges all noted the ever-present need to rule on cases in an efficient manner that keeps their judicial senates from seeing a backlog of cases.¹¹⁸ Referrals stop a case in its tracks until the constitutional court rules on the issue,¹¹⁹ a process that can take well over a year.¹²⁰ This prevents cases from being disposed of efficiently, so the referral process is unlikely to be overused by lower courts.

Despite the lack of traditional and established incentives for judicial referrals in the domestic court environment, there is one group for whom the referral process may see concrete benefits. Peak courts, particularly, do not have the same type of time pressures that lower courts have.¹²¹ These courts are most likely to see the benefits of referrals, and because of the importance of those courts in the legal system, the constitutional court should be more likely to both take those referrals seriously and agree with those peak courts on the possible unconstitutionality of the referred law.¹²² This should remain true even when considering the ingrained skepticism many national peak

¹¹² Sweigert, *supra* note 95, at 18.

¹¹³ *Id.*

¹¹⁴ LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* 7 (2013).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See, e.g.*, Interviews with Six Ger. Higher Reg'l Ct. Judges, in Ger. (June 2018).

¹¹⁸ *Id.*

¹¹⁹ *Specific judicial review of statutes*, BUNDESVERFASSUNGSGERICHT, https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Konkrete-Normenkontrolle/konkrete-normenkontrolle_node.html (last visited Feb. 9, 2024).

¹²⁰ Interviews with Six Ger. Higher Reg'l Ct. Judges, in Ger. (June 2018).

¹²¹ *Id.*

¹²² *Id.*

courts had for the (relatively) newer constitutional courts.¹²³ Because of the specialized organization of the German system, there are several such peak courts: the Bundesgerichtshof (Federal Supreme Court),¹²⁴ which hears final appeals from the ordinary regular courts; the Bundesfinanzhof (Federal Fiscal Court),¹²⁵ which hears final appeals from the specialized finance courts; the Bundessozialgericht (Federal Social Court),¹²⁶ which hears final appeals on social insurance and pension laws from the specialized social courts; and the Bundesverwaltungsgericht (Federal Administrative Court),¹²⁷ which hears appeals on administrative law from the specialized administrative courts, as well as the Federal Patent Court and the Federal Labor Court.¹²⁸ Laws referred from these peak courts should be more likely to be overturned by the constitutional court, while laws referred from lower ordinary courts are less likely to be overturned by the constitutional court.

Once cases are referred to the German Constitutional Court and accepted by the court, the case becomes part of the court's workload.¹²⁹ The case will generally be assigned to a judge based on the subject matter of the dispute—cases generally are assigned to judges based on the subject matter expertise of that judge.¹³⁰ That judge then becomes the rapporteur, or reporting judge, responsible for writing the court's final decision.¹³¹ In keeping with the civil law tradition of the judge as a case manager or supervisor,¹³² the reporting judge is empowered to ask third parties to submit written briefs that might help assist in providing a resolution to the case.¹³³ Thus, unlike the U.S. Supreme Court, outside briefs in the German Constitutional Court are mostly initiated at the discretion of the court itself and the judges deciding the case.¹³⁴ In an interview, one German Constitutional Court judge provided some details on the process of obtaining

¹²³ See VITTORIA BARSOTTI ET AL., ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT 36 (2017).

¹²⁴ Schweigert, *supra* note 95, at 10.

¹²⁵ *Id.* at 19.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 20.

¹²⁹ *Court and constitutional organ*, BUNDESVERFASSUNGSGERICHT, https://www.bundesverfassungsgsgericht.de/EN/Das-Gericht/Gericht-und-Verfassungsorgan/gericht-und-verfassungsorgan_node.html (last visited March 24, 2024) (The Federal Constitutional Court receives more than 6,000 constitutional complaints each year.); Schweigert, *supra* note 95, at 18-19.

¹³⁰ KOMMERS & MILLER, *supra* note 48, at 28.

¹³¹ *Id.* at 27.

¹³² See John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

¹³³ Bundesverfassungsgerichtsgesetz [BVerfGG] [Federal Constitutional Court Act] Aug. 11, 1993, BGBl. I at 1473, last amended by the Act of Nov. 20, 2019, BGBl. I at 1724, § 27(a) (Ger.); see also Benjamin Bricker, *Breaking the Principle of Secrecy: An Examination of Judicial Dissent in the European Constitutional Courts*, 39 LAW & POL'Y 170, 183 (2017).

¹³⁴ Bundesverfassungsgerichtsgesetz [BVerfGG] [Federal Constitutional Court Act] Aug. 11, 1993, BGBl. I at 1473, last amended by the Act of Nov. 20, 2019, BGBl. I at 1724, § 27(a) (Ger.).

third-party briefs.¹³⁵ The reporting judge for each case is responsible for creating a list of outside actors that will be asked to submit written briefs.¹³⁶ Once that list is created, it is then distributed to the other judges in the Senate, who then sign off on it.¹³⁷ In almost all instances, the other judges on the panel assent to the list in its entirety.¹³⁸ But, why might third-party briefs be needed in the first place, and could the type of referring court matter to these decisions?

In fact, it is certainly possible that some referrals could necessitate the constitutional court to seek more outside third-party briefs. First, it could be necessary for the judges on the constitutional court to ask for more outside briefs when the referral is either poorly drafted or leaves out important information.¹³⁹ In a perhaps less negative frame, the court might also need to ask for more outside actors to submit their views when the referring court is not a “repeat player”—that is, when the judge submitting the referral does not sit on a court that refers many cases to the constitutional court.¹⁴⁰ Instead of being poorly drafted, the referral may just be the product of an inexperienced judge who either rarely or never submits referrals to the constitutional court. Any judge, and any court, may lack previous experience with submitting a judicial referral. However, it is most likely that judges in the lower ordinary courts would lack this experience.¹⁴¹ This could make it more likely that the court will need to ask for outside briefs to be submitted when it accepts referrals from the lower ordinary courts and less likely to ask for outside briefs when a peak court has sent the referral.

There are related alternative reasons that involve the composition of courts at different levels in the German legal system. More briefs may be needed when the referring judge does not have a large support staff to assist with research and documentation, which is more likely to be the case when the referring judge comes from the lower courts.¹⁴² In an interview, one German Constitutional Court judge noted that there is “more work put into the federal [peak] court requests” than those from the *Amtsgerichte* and other lower courts, which helps the court tremendously in reviewing the case.¹⁴³ Separately, the constitutional court may be less likely to need outside briefing when the court is comprised entirely of professional career judges. At the higher regional court level and above, panels are comprised entirely of

¹³⁵ Interview with Ger. Const. Ct. Judge, in Ger. (Mar. 2022).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Interview with Ger. Const. Ct. Judge, in Ger. (Mar. 2022).

¹⁴² *Id.*

¹⁴³ *Id.*

professional judges.¹⁴⁴ At lower levels, lay judges often also participate and sit in panels as judges along with professional judges.¹⁴⁵ Thus, higher level referrals *may* bring with them greater assurance of quality in analysis. Given that professional judges sit on the lower court panels as well, this alternative reason may not hold true in the analysis. Overall, then, we may expect that constitutional referrals from lower ordinary courts will see more outside briefs requested by the constitutional court and that referrals from higher regional courts and peak courts will see fewer outside briefs requested by the constitutional court.

IV. EXAMINING THE OUTCOMES OF GERMAN CONSTITUTIONAL COURT CASES

To examine the factors that might contribute to constitutional court referrals, I use a dataset of all final decisions by the German Constitutional Court from 1992 to 2014, narrowing the data to only those final decisions made by the German court on referrals—that is, concrete or specific judicial review cases sent to the constitutional court by another court in the German court system.¹⁴⁶ Cases from the court’s abstract review docket and individual constitutional complaints are excluded. The dataset used here comprises 125 cases in total.¹⁴⁷ Because the dataset is limited to final decisions, this analysis cannot address questions surrounding why the court accepts some cases and not others.¹⁴⁸ Still, the data here should provide a good look at the trends and the continued development of the use and outcomes of judicial referrals.

There are many good reasons to focus specifically on the outcomes from judicial referrals. First, this is an area that has not received much scholarly attention.¹⁴⁹ Though studies on referrals are commonplace in the ECJ literature, there are almost no studies that focus on the factors that drive the referral process at the national court and constitutional court level.¹⁵⁰ To some extent, the lack of focus on this subject could be a product of the constitutional court’s own practices with regard to referrals. In Germany, for example, past practice has resulted in nearly half of referrals being rejected

¹⁴⁴ Dauster, *supra* note 96, at 31.

¹⁴⁵ *Id.*

¹⁴⁶ The data used originates from Jay Krehbiel’s 2016 dataset of German Constitutional Court cases. See generally Jay Krehbiel, *The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court*, 60 AM. J. POL. SCI. 990 (2016). I use all referral cases in the Krehbiel dataset, adding new information on the type of originating court, the number of outside briefs received, and other information.

¹⁴⁷ See generally *id.*

¹⁴⁸ B. GUY PETERS, *COMPARATIVE POLITICS: THEORY AND METHODS*, 1-25 (1998).

¹⁴⁹ See, e.g., BENJAMIN BRICKER, *VISIONS OF JUDICIAL REVIEW: A COMPARATIVE EXAMINATION OF COURTS AND POLICY IN DEMOCRACIES* (2016); Hönnige, *supra* note 50.

¹⁵⁰ See, e.g., *id.*

for inadmissibility.¹⁵¹ In other words, the constitutional court itself, for many years, did not seek to elevate or emphasize referrals and the concrete review docket.¹⁵²

A second reason to focus on the referral process comes from the insight we can gain on court decision-making practices. With constitutional referrals, we should be able to see a wide range of possible issues within constitutional law.¹⁵³ As a theoretical matter, there is no reason why judges would be hesitant to send up specific areas of law, nor are there any structural reasons why the courts would not want to have the constitutional court resolve certain issues. Though the German Constitutional Court has handled referrals stringently for many years, this should not systematically affect the types of issues or cases that are accepted or rejected.¹⁵⁴ And with many aspects of the decision-making practices of non-U.S. peak courts still vastly understudied,¹⁵⁵ any additional insights on the factors that contribute to decisional outcomes on these courts should be welcomed.

There also are good reasons to focus on the German Constitutional Court. It is a well-established, deeply legitimate institution in German government and society.¹⁵⁶ Its decision-making process is respected around the world, and particularly in Europe, where the court has been a model that newer constitutional courts have tried to emulate.¹⁵⁷ And with a high degree of judicial independence, the outcomes from the constitutional court do not generally suffer from outside pressures or other pernicious constraints on decision making.¹⁵⁸

The German ordinary court system is also known as a highly professional and legitimate institution.¹⁵⁹ Unlike many other European countries, the German court system today is primarily a decentralized, Land-based (state-based) judicial organization.¹⁶⁰ Hiring and promotion is

¹⁵¹ Wendel et al., *supra* note 62, at 495; see also Rüdiger Zuck, *Die Wissenschaftlichen Mitarbeiter Des Bundesverfassungsgerichts* [The Research Staff of the Federal Constitutional Court], in *DAS BUNDESVERFASSUNGSGERICHT IM POLITISCHEN SYSTEM* [THE FEDERAL CONSTITUTIONAL COURT IN THE POLITICAL SYSTEM] 290 (Robert C. Van Ooyen & Martin H.W. Möllers eds. 2006).

¹⁵² *Id.*

¹⁵³ Wendel et al., *supra* note 62, at 495.

¹⁵⁴ *Id.*

¹⁵⁵ See, e.g., Sebastian Sternberg et al., *The Legitimacy-Confering Capacity of Constitutional Courts: Evidence from a Comparative Survey Experiment*, 61 EUR. J. POL. RES. 973, 975 (2022).

¹⁵⁶ GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* (2005); Hönnige, *supra* note 50, at 963.

¹⁵⁷ See, e.g., Lech Garlicki, *Cooperation of Courts: The Role of Supranational Jurisdictions in Europe*, 6 INT'L J. CONST. L. 509 (2008).

¹⁵⁸ Julio Ríos-Figueroa & Jeffrey K. Staton, *An Evaluation of Cross-National Measures of Judicial Independence*, 30 J. L. ECON. & ORG. 104 (2014).

¹⁵⁹ See Hans-Ernst Bottcher, *The Role of the Judiciary in Germany*, 5 GER. L. J. 1317, 1318, 1323 (2004).

¹⁶⁰ See *id.*

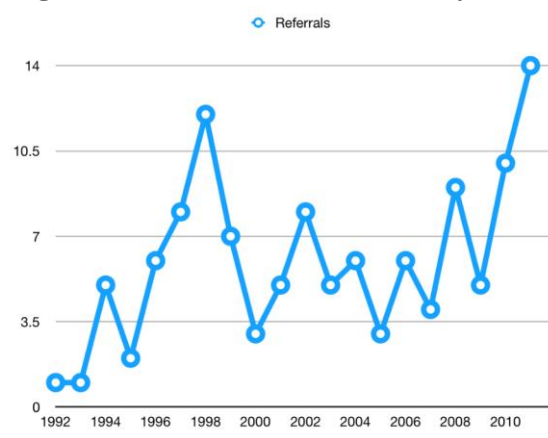
generally the province of the Land government.¹⁶¹ Thus, it should be harder than typical for the central government to exert pressures, both hidden and seen, on the outputs of judges working within the national judiciary.

Logical testing in social science requires the proper identification of the outcome of interest.¹⁶² Given that the main focus of this study is the point of decision within the constitutional court, the main outcome I will be examining below is whether the constitutional court agrees with the referring court or not. With a referral only made when the referring judge believes the law is likely unconstitutional, the outcome of interest I will be examining is the question of whether the constitutional court rules the law under review as unconstitutional or not. Separately, I also ask whether the type of referring court will influence whether the constitutional court may feel the need to request more outside briefs. The outcome I will be examining for that supposition will be a count of the number of outside briefs requested.

A. What the Data Shows

Figure 1 shows the overall rate of referrals to the German Constitutional Court over the twenty-three-year time period of this study.¹⁶³ Overall, the trend of referrals appears to be on an upward climb in the period from 1992 to 2014, showing a steady but somewhat uneven climb in the number of referrals sent to the German Constitutional Court during the period (see Figure 1), with a notable upward tick in the 2010s.¹⁶⁴

Figure 2. Number of Referrals, by Year.



¹⁶¹ See *id.* at 1322.

¹⁶² PETERS, *supra* note 148, at 80-86.

¹⁶³ See Schweigert, *supra* note 95, at 19.

¹⁶⁴ See *id.*

Looking more specifically at the rate of referral by individual courts, several outcomes are notable. First, there are specific courts in the German judiciary that have sent more referrals than others.¹⁶⁵ Perhaps not surprisingly, several peak courts of the German system—the Bundesfinanzhof (Federal Finance and Tax Court) in Munich, the Bundessozialgericht (Federal Social Court) in Kassel, and the Bundesverwaltungsgericht (Federal Administrative Court) in Leipzig—all submitted eight or more referrals during this period.¹⁶⁶ All are the peak courts for the specialized finance, social, and administrative court systems.¹⁶⁷ The Bundesgerichtshof (Federal Supreme Court) in Karlsruhe submitted three referrals during this period—a comparatively smaller amount than the other peak Federal courts.¹⁶⁸ And two peak courts, the Federal Labour Court and the Federal Patent Court, did not submit any referrals during this time period.¹⁶⁹ Table 1 shows the overall numbers of referrals by court.¹⁷⁰ Also included in the Table is a line noting how many referred cases resulted in the constitutional court striking the law referred (what are noted in the Table as “successful” referrals). The Bundesfinanzhof was the most successful in having the constitutional court agree with their supposition that the law in question was unconstitutional.¹⁷¹

Conversely, the Bundesgerichtshof, the peak court least likely to refer in the first place, did not have a successful referral during this time period.¹⁷² Overall, peak courts in the German system made thirty-seven of the 125 accepted constitutional referrals from 1992 to 2014.¹⁷³ Considering that these are but six of the thousands of courts in the German legal system, it is certainly the case that peak courts are dominant actors in the constitutional referrals system—though, given their importance in the German legal system, that may not be too surprising.

¹⁶⁵ See *infra* Table 1.

¹⁶⁶ See *id.*

¹⁶⁷ See Sweigert, *supra* note 95, at 19.

¹⁶⁸ See *infra* Table 1.

¹⁶⁹ See *infra* Table 1.

¹⁷⁰ See *infra* Table 1. As noted earlier, the Federal Labor Court and the Federal Patent Court did not submit a single referral during this time period.

¹⁷¹ See *infra* Table 1.

¹⁷² See *infra* Table 1; see generally Sweigert, *supra* note 95, at 10.

¹⁷³ See *infra* Table 1.

Table 1. Number of references, by referring peak court

	Bundesfinan- zhof (peak tax court)	Bundessoz- ialgericht (peak social court)	Bundesve- rwaltungs- gericht (peak admin. court)	Bundesge- richtshof (Supreme Court)
Total referrals	12 references	14 references	8 references	3 references
Successful referrals	6	6	3	0

Looking at the non-peak courts, two specific lower courts are also high referrers of constitutional issues. The Verwaltungsgerichts (lower Administrative Court) in Hannover and the Finanzgerichts (lower tax and finance court) in Münster submitted five and four references, respectively, during this time period, making them the most common lower courts to use the constitutional referral procedure.¹⁷⁴ In fact, the judges within these two lower courts made more referrals than half of the six peak courts in the German legal system.¹⁷⁵ Among all of the lower courts, the Administrative courts made the most references to the constitutional court (twenty-six overall), followed by the Tax courts.¹⁷⁶ The Tax courts were also proportionally the most successful, with ten of their thirteen references resulting in the constitutional court ruling the law in question unconstitutional.¹⁷⁷ All of the Tax courts referrals involved specific issues of tax and finance, while the Administrative courts mainly referred issues of social insurance (eight referred cases), education (six referred cases), and tax or budget issues (five referred cases).¹⁷⁸ Table 2 shows the number of references to the German Constitutional Court broken down by the referring court.¹⁷⁹ The numbers in Table 2 exclude all referrals made by peak courts, so the figures below represent only referrals from the lower (non-peak) courts. Again, “successful” referrals are those in which the constitutional court rules the law referred unconstitutional.

¹⁷⁴ See *infra* Table 2.

¹⁷⁵ Compare *infra* Table 2 with *supra* Table 1.

¹⁷⁶ See *infra* Table 2.

¹⁷⁷ See *infra* Table 2.

¹⁷⁸ Krehbiel, *supra* note 146, at 990.

¹⁷⁹ See *infra* Table 2.

Table 2. Number of references, by type of referring court (*excluding* peak courts).

	Verwaltungsgerichte (administrative court)	Finanzgerichte (tax court)	Sozialgerichte (social court)	Amtsgerichte (local courts)	Arbeitsgerichte (labor court)
Total referrals	26 references	13 references	10 references	7 references	6 references
Successful referrals	14	10	6	2	1

What factors might contribute to the possible success of a referral—that is, the constitutional court agreeing with the referring court that the law under review is unconstitutional? One basic supposition presented earlier is the idea that constitutional court judges could be more likely to accept cases from specialized courts and agree with that court's suggestion that the referred law might be unconstitutional. Again, the basic logic is that the very specialization of the judges in these specialized courts gives them a higher degree of respect and professional deference when compared to the judges in the generalist court branches.¹⁸⁰

Table 3 shows the results when we examine whether the constitutional court is more likely to agree with referrals from the specialized courts.¹⁸¹ The figures show a mixed result,¹⁸² but with some relatively clear conclusions that can be drawn. There is a clear association in which the referrals from the tax courts (at all levels, but particularly the lower-level court) lead to the referred laws being struck down.¹⁸³ The social courts and the administrative courts also see a strong association between a referral and subsequent striking of the law in question, but when the peak courts are added in, the association is less than what we see in Table 2.¹⁸⁴ Conversely, the specialized labor courts and

¹⁸⁰ See, e.g., Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1765 (1997) (explaining that administrative law judges hold a dominant presence in Article I tribunals and that the appellate review of their cases is deferential).

¹⁸¹ See *infra* Table 3; cf. Hausmaninger, *supra* note 1, at 36 (“Judicial referral of constitutional questions to specialized Constitutional Courts is an important part of European systems of constitutional review.”).

¹⁸² See *infra* Table 3.

¹⁸³ See *infra* Table 3.

¹⁸⁴ Compare *infra* Table 3 with *supra* Table 2.

the generalist courts are less successful.¹⁸⁵ Given the specialized, complicated nature of many tax issues, the result seen for the tax courts does suggest the constitutional court relies on the specialized expertise of those judges as a key factor in whether to overturn the law in question. Similarly, the German social courts hear cases that arise from the complex, multifaceted area of social security insurance, pensions, and occupational accident law.¹⁸⁶

Table 3. Success of references, by type of referring court (including peak courts).

	Verwaltungsgericht (administrative courts)	Finanzgericht (tax courts)	Sozialgericht (social courts)	Arbeitsgericht (labor courts)	Regular courts
Total referrals	34 references	25 references	24 references	6 references	27 references
Successful referrals	17	16	12	1	12

Are laws referred by the lower courts less likely to be overturned by the constitutional court than laws referred by the peak courts? Table 4 shows the results of a simple test examining whether the law referred to the constitutional court is overturned or not.¹⁸⁷ Lower-level courts referred the most cases to the constitutional court over the time period of this study.¹⁸⁸ Though the earlier theory predicted that peak courts, due to their expertise and prestige in the judicial system, would be more likely to see referred laws overturned by the constitutional court, peak courts are, in fact, the least likely group to see their referred laws overturned, while the local and lower-level courts and appellate courts are both more likely than not to have their constitutional referrals lead to a law being struck.¹⁸⁹

¹⁸⁵ See *infra* Table 3.

¹⁸⁶ See *The Federal Social Court and social jurisdiction*, BUNDESSOZIALGERICHT, https://www.bsg.bund.de/EN/Home/home_node.html (last visited Feb. 6, 2024) (indicating that the social courts are responsible for adjudicating in several areas that involve “social security matters,” such as long-term care insurance and basic income for job seekers).

¹⁸⁷ See *infra* Table 4.

¹⁸⁸ See *infra* Table 4.

¹⁸⁹ See *infra* Table 4.

Table 4. Successful referrals, by referring court.

	Peak courts	Appellate courts	Lower-Level Courts
Referrals	37 referrals	11 referrals	77 referrals
Law overturned	15	7	42

The final consideration from the earlier theoretical discussion focused on whether referrals from lower-level courts would require more outside briefs requested by the constitutional court, and, conversely, whether referrals from appellate/higher regional courts and peak courts would see fewer outside briefs requested by the constitutional court. The basic logic is that, unlike in common law courts, it is not outside actors that drive the amicus curiae process in the German system, but rather the judges on the constitutional court that direct outside actors to submit briefs.¹⁹⁰ And, for various reasons, the constitutional court judges may need more outside information and more additional context from the lower court cases, whether because of the fewer clerks and staff available to lower court judges, the overall quality and merit of the request, the fact that the record will likely be less developed at the trial court level, or some other reason.

Table 5 shows that more briefs are requested, on average, when the referral comes from lower-level courts (specialized or general) and that fewer are requested by the court when a peak court refers a case.¹⁹¹ These figures appear to corroborate the idea that the judges of the constitutional court need more information to resolve constitutional referrals from the lower courts.

¹⁹⁰ See Bundesverfassungsgerichtsgesetz [BVERFGG] [Act on the Federal Constitutional Court], Aug. 11, 1993, BUNDESGESETZBLATT, Teil I [BGBl. I] at 1724, § 27(a), translation available at https://www.gesetze-im-Internet.de/englisch_bverfgg/englisch_bverfgg.html#p0408 [<https://perma.cc/FCH6-4PPZ>].

¹⁹¹ See *infra* Table 5.

Table 5. Number of briefs requested by the constitutional court, by referring court.

	Peak courts	Appellate courts	Lower-Level Courts
Referrals	37 referrals	11 referrals	77 referrals
Average number of outside briefs	3.7 per case	4.2* per case	4.7 per case

* Two constitutional referrals from appellate courts had an unusually high number of outside briefs requested (17 and 13) and were excluded as outliers from the average listed above. If those two cases are included, the average for appellate courts rises to 6.2 per case.

V. CONCLUSION

This study represents a preliminary attempt to examine the question of referrals from national courts to their national constitutional court. The literature on referrals has developed exponentially over the past two decades, though nearly all of the theory and data examines referrals from national courts to the European Court of Justice.¹⁹² There is good reason to study the ECJ—it is one of the most consequential courts in the world, and its rulings have helped to shape the modern EU and modern Europe.¹⁹³ However, the reasons why ordinary courts would refer a question to the ECJ are likely not the reasons why those same courts would refer (or not refer) a question to their national constitutional courts. The interactions are different and thus require different theoretical expectations. Similarly, the reasons why the ECJ would accept a case and create a specific ruling are not the same reasons that would explain why a national constitutional court would accept a case and rule to overturn or not overturn the referred law. Thus, again, different theoretical expectations are required.

One prominent finding from this study is the connection between referrals from the specialized tax courts and the decision to overturn the referred legislation. The constitutional court is highly likely to agree with the tax courts when they question the constitutionality of legislation.¹⁹⁴ One probable explanation for this phenomenon comes from the specialized understanding these judges have of the tax laws under their purview. Though this specialization might lead to tunnel vision in other regards, in the area of

¹⁹² See ALTER, *supra* note 29, at 98-99 (“Other national high courts have sent relatively few referrals to the European Court compared to the number of referrals coming from lower courts.”).

¹⁹³ See Arjen Boin & Susanne K. Schmidt, *The European Court of Justice: Guardian of European Integration*, in GUARDIANS OF PUBLIC VALUES 135, 150 (Arjen Boin et al. eds., 2021).

¹⁹⁴ See *supra* Table 3.

referrals, the specialization of legal knowledge seems to lead to greater trust in the referring court. At the same time, it is worth noting that there is not a similarly strong association between referrals from several other specialized courts and the decision of the constitutional court to overturn the referred legislation. Thus, the results here could show special deference toward the tax courts—both peak and non-peak—and their expertise.

Second, referrals from the lower courts see more outside briefs submitted to the court. Given that (unlike the U.S. Supreme Court) most outside briefs are submitted at the request of the court itself, this result seems to show the constitutional court in greater need of outside information when lower courts refer cases.¹⁹⁵ Reasons for this association are somewhat speculative: This result could indicate lower quality of the written text of the referral itself, though it could also indicate something more benign. Perhaps when a peak court submits a referral, its larger support staff can include additional evidence and background that a lower court, with more modest staff and larger caseloads, simply cannot do.

Going forward, it will be important to expand the time period of study to see if trends seen here still remain over more recent years. Overall, however, the results here are an important step toward understanding the process of referrals to national constitutional courts. Currently, most theory and data on judicial referral activity focus on the national court-ECJ preliminary reference process.¹⁹⁶ This is certainly an important relationship, yet the world of referrals is much broader and more varied than one court. As seen above, different concepts need to be examined when examining referrals at the national level. Though they generally are not as politically important as the abstract review docket, judicial referrals are an important aspect of the work of constitutional courts, and examination of these concrete review cases will only add to our understanding of constitutional courts and how they interact with their national courts.

¹⁹⁵ See *supra* Table 5.

¹⁹⁶ See, e.g., BENJAMIN BRICKER, VISIONS OF JUDICIAL REVIEW: A COMPARATIVE EXAMINATION OF COURTS AND POLICY IN DEMOCRACIES (2016); Hönnige, *supra* note 50, at 963.