The object of this chapter is the voting procedure in a specific setting: the Constitutional/Supreme Courts – even though the remarks presented here may be of interest for those who are interested more generally in small committees making collective decisions. The reason of this choice is quite simple: not only am I familiar with some of these institutions, but moreover in the *summa* on our topic – the volume by Hubertus Buchstein on public and secret vote – the question I’m going to discuss is not taken directly into account.  

1. In order to speak with a minimum of analytical clarity of my topic I need to introduce a couple of very simple stipulative definitions. I shall move away from the dichotomy public/secret vote and distinguish between 1) disclosed (nominal), 2) undisclosed (unrevealed, unidentified) and 3) secret vote. I’ll consider moreover another difference, the one between sovereign and justified vote. These expressions have, evidently, no objective, absolute meaning; I hope nonetheless to offer a clear and simple definition of them.

First about my tricotomy. Speaking of Constitutional/Supreme Courts it is not possible to confine the analysis to the conceptual couple public versus secret vote. In the working of really existing institutions we need to distinguish the vote of the members of the panel disclosed to the public – this is the case of the American Supreme Court and of many others.

---

1 I’m referring to committees making decisions that have an impact on the action of people who are not just the members of the decision-making body. That is not only the case of panel Courts, but also of the type of small bodies analyzed in P. Urfalino’s paper in this volume.


3 I’m assuming here the case of a committee that makes decisions for a larger group of people – so disclosed and undisclosed is in relationship to this public, where secret is predicated vis-à-vis the members of the decision making body.

4 In reality the decision making process inside the US Supreme Court is more complex and I need to clarify at least one important aspect to avoid misunderstanding. The members of the SC vote on the disposition of the case in “conference” (closed-door meeting of the 9 judges), that takes place shortly after oral argument; this vote is undisclosed and has determines who assigns the task of drafting a majority opinion – the Chief Justice if he is in the dispositional majority or – if he is not in the dispositional majority – to the senior judge in that majority. It takes no other formal vote. Upon publication of the opinion, we will learn which disposition and which opinions each Justice endorses. The papers of some retired or deceased Justices include their notes from
that can be considered embodiments of the English common law tradition – from the vote of a college which is not disclosed and appears like a decision of the court “one voice”, with other words: the decision of the collegial body as a single agency – like in the long-lasting tradition of the French panel courts. This is a crucial difference that I will discuss in details. To begin with I want to draw the attention to the circumstance that a vote taking place in a collegium (a collective body), inside the collective body that has to make the decision, can be either secret or public. As Jon Elster reminds us in the introduction to this volume, we may want to distinguish between internal and external publicity. For instance, in the Italian Constitutional Court the fifteen members of the collegium normally vote openly (even though the vote is not disclosed and even if there are no records of the vote); for the appointment of the President of the Court, chosen by the justices among themselves, they use instead secret ballot papers that, by the way, are destroyed by burning them at the end of the voting procedure. This is the reason why I suggest to distinguish secret vote (usual nowadays, but not in the past, in political elections and referendum) from disclosed or nominal, on one hand, but also from undisclosed or collegial vote, on the other. The members of the Italian Constitutional Court and the French Constitutional Council vote openly among them but, outside the body making the decision, the public doesn’t know if the vote was unanimous or divided nor how each member of the college voted.

5 This is exceptionally, to my knowledge, not the case of the French Constitutional Council. This organ was not conceived by the authors of the Constitution of the 5th Republic as a judicial organ (it is called Council and not Court). The conferences of the Council are secret but the deliberations are transcribed by some civil servants and after 25 years the minutes are published. The decision by the Parliament of making available to the public the deliberations is recent, so until few years ago the members imagined that the deliberations was entirely covered by secrecy; from here the interest of them; see Les grandes délibérations du Conseil Constitutionnel, 1958-1983, Paris, Dalloz, 2009.

6 In the cases of impeachment of the President of the Republic the decision of the Bulgarian Constitutional Court is taken by secret ballot (Constitutional Court Act, 1991; art. 21).

7 Polling booths was introduced in 1857 in Australia, 1872 in the UK, 1892 in the US for presidential elections, 1914 in France.
2. I suggest moreover that it is important to distinguish between sovereign vote, on one side, and justified or non-sovereign vote, on the other. Here why. The voters in contemporary elections of representatives or in referendums have to choose among alternative parties, candidates or options and they have the absolute right of giving no reason at all of their choice. I call that sovereign vote since this mechanism is an instantiation of the principle expressed by the sentence *sic volo, sic jubeo, sit pro ratione voluntas* (Thus I will, thus I command, my will stands for the reason), which characterizes the decision of the absolute sovereign (the point was made both by C. Schmitt and by W. Benjamin, notably in his *Ursprung des deutschen Trauerspiels*, 1925). The voter like the absolute king doesn’t need to give a reason; she has a will, a “preference” and makes her choice according to it. She doesn’t need to justify her preference to anyone, since she has the right to impose her will. Evidently the difference between an absolute king and an absolute voter is that the impact of the decision of the last one is practically null (if the number of voters is very large), where the decision of the king makes normally a crucial difference vis-à-vis the status quo. Nonetheless the rule is the same: there is no need of justifying the choice. Moreover, in order to protect the contemporary chooser, the voter, secrecy of the vote has been introduced.

---

8 This book is now translated in English: *The Origin of German Tragic Drama*, 2009.
9 Moreover, the voters cannot normally choose the options but only select one of the options offered to them.
In the case of a panel court a vote doesn’t go without internal and external justification; which makes them different from another relevant decision-making committee the jury, which most of the time do not have to give reasons. Courts, instead, even and notably the so called sovereign courts (courts whose decisions cannot be appealed) have to produce a public justification of their decisions. This obligation has a double rationale. On one side, they have to explain the reasons of a decision since no court is a sovereign in the sense of the king, to the parties of the conflict, to the citizens and to the political branches. On the other side, the justification of a judicial decision will become the content of the precedent binding the future decisions of the Court (both in the so called civil law and common law cultures). Neither the absolute king nor the voters are bound by their previous decisions.

3. Before considering what I call the internal justification, it may be worth saying a few words about the concept of justification that I’m using here. The case of the absolute sovereign decider is nowadays quite rare with the important exception of the single voter in a liberal-democratic society (whose impact as I said is very very small, if she has any!). In an equalitarian society, one in which there is no “natural” authority, every actor or agency making decisions which are imposing a commandment on the fellow citizens has somehow to justify this imposition upon them. Only a person with a gun can impose his will on me by threatening me with death (the threat is explained but not justified: “If you do not give me your money, I’ll kill you”). The judicial justification takes a special form, as Hamilton already stated in Federalist # 78, it cannot be the bare and naked expression of a WILL, it has to

---

10 In two papers I wrote with John Ferejohn we distinguish between internal and external deliberation (see “Constitutional Courts as Deliberative Institutions”, in Constitutional Justice, East and West, p. 35 (Wojciech Sadurski ed., 2002); “Constitutional Adjudication: Lessons from Europe”, 82 Texas Law Review, (2004), p. 1671 and 1692 (2004). To my knowledge, juries typically do not give reasons; Spain is an exception.  
11 Jon Elster suggests to me that in the case of juries, the arguments for forcing them to give reasons (as it is the case in Spain) are (i) the defendant needs to know why he was convicted and (ii) the appeal court needs to know the arguments of the legal decision.  
12 Who could say: “C’est mon plaisir”.  
13 It may even be a fiction, since even God in the best theologies (I think of Thomas Aquinas) doesn’t act in a totally arbitrary way, and no human agent can act politically under no constraint! Absence of constraints is an old human dream and a myth.  
14 Evidently the aggregate impact, the one of the electorate is relevant, but the “electorate” is a very peculiar and impersonal subject – it is for instance nor responsible like a single individual, and moreover its will is the result of an algorithm, “a step-by-step problem-solving procedure”, more specifically a mechanism of aggregation transforming a large number (of individual preferences) in a small number (the seats in a representative assembly): the electoral law. Now, the transformation of votes in seats may be significantly different with the variance of the algorithm. Individuals voting in exactly the same way because of different electoral laws can produce different distribution of seats in the Parliament. A very remarkable example of this paradox are the results of the last parliamentary election in Italy (February 2013): with the existing law two parties have the majority in the Lower House, with PR the alliance with the opposition would have been necessary to reach the 51% in the same House; with a more majoritarian system one single party would have been able to establish a government. It seems that neither the single voter nor the electorate matter but most of all the electoral law.
emerge from a special set of rules and procedures, the most important is probably that it results from a norm that the judges have to refer to (a *statute* for the ordinary judge, the *constitution* for the members of a constitutional court) and that they have to interpret. Sometimes the decision is made after an adversarial procedure based on the old principle *audiatur et altera pars*. The fact that the court has to publish the reasons of its decisions make them open to public scrutiny and it cannot be without detriment for the court if the decision is supported by arguments that are weak or absurd to the majority of those to whom it is addressed. A judicial justification takes moreover place inside a series of decisions according to a process that we may call *integrity* by reference to the precedents the courts has to take into account binding up to a point its choice. I cannot discuss here the strange doctrine claiming that the judicial interpreter could do whatever he wants. But it is self-evident that judges are somehow limited in their decisions and this in a variety of forms, by other political actors and by procedural constraints (some French authors speak of *contraintes juridiques*).

A point that deserves to be taken into account in this perspective (the one I suggested to call the internal justification) is that the members of panel courts (unlike the voters) have to justify their vote to the other members of the decision making body – at least if they do not agree with the draft produced by the *juge rapporteur*.

There are very significant differences between the rules and conventions for decision making inside the US Supreme Court and the Constitutional Courts of countries like France, Italy and Germany. In order to understand my argument, it is important to give some basic information.

---

15. It may be interesting and worth exploring the following difference: the elected majority claims that its decision is the result of its interpretation of the popular will – actually a synecdoche for the will of the majority/plurality of the voters; the constitutional courts instead interpret the constitution.

16. In European Constitutional Courts hearings are not mandatory and rare.


18. This may not be systematically the case in the French Constitutional Council since it has to make decisions under strict time constraints, notably less than one month for the *saisine parlementaire* which may oblige the members of the Council to vote without giving articulated reasons for their choice. In any event even if the position of a judge is not always justified those who want to persuade their colleagues have to say something, which is not the case of the *sovereign* vote of the citizen in an election. Votes of citizens have the same very small weight; arguments are more or less persuasive. True deliberation is not equalitarian. There are stronger and weaker arguments. Nihilists believe that arguments do not matter. With them I disagree. I can tell an anecdote concerning the Italian Constitutional Court that I find interesting. There was under the presidency of X the rule to ask to each judge to express his opinion in a certain order. The judge Z used to say that he agreed with the opinion of the colleague who spoke before him. The president changed the rule for the deliberation and the judge Z was forced to express his opinion before the one of his colleague. The story shows mostly the important role that a president of such a court may play.
In the US Supreme Court (probably the best known institution among those I’m discussing here,)¹⁹, after the public hearing of the parties, the justices get together and after a vote (probably without too many arguments) either the chief justice, if he is in the majority, or the oldest member of the court, if the chief is in the minority, assigns to one of the judges the task of writing a draft of the decision. Most of the time this text will be the draft of the opinion of the majority of the court, a member of the minority will write a dissenting opinion and the other justices will sign one or the other text appending possibly other arguments in the form of concurring opinions. This is evidently a simplified story. It is not impossible that there are unanimous decisions (very rare right now in cases of constitutional litigation) and sometimes there is more than one dissenting opinion (see Korematsu v. United States, 323 U.S. 214; 1944), exceptionally there may be just no clear majority²⁰!

The procedure is pretty much different in Courts like the French Constitutional Council and the Italian Constitutional Courts. Here the President has a quasi-discretionary power to assign the case to a judge who is going to prepare the draft of the decision (in Germany, instead, at the beginning of the judicial year a division of labor is established distributing the cases ratione materiae among the 16 members of the Federal Constitutional Court, the Bundesverfassungsgericht – in that sense the discretionary power of the presidents of the two Senate, the two distinct panels of the Court, is almost nil). Both the Italian and the French Court always discuss the draft in the plenum. Again the differences are significant. Here I do not need to enter in many detail, but it cannot be under evaluated that French Constitutional Council, as already hinted, operates under extreme time constraints (when the

---

¹⁹ Needless to say: the USSC is not a specialized constitutional court but the last appellate court of the federal judiciary deciding cases and controversies, cumulating the functions of the French Cour de Cassation, Conseil d’Etat and Conseil Constitutionnel. Moreover because of the rule of the certiorari, we have to be aware that large part of the constitutional adjudication is in the hands of the Circuit or even lower courts. The Constitutional courts in most of the countries cannot select the cases since they are the only agency in charge of constitutional adjudication.

²⁰ An interesting example is McConnell v. Federal Election Commission, 540 U.S. 93 (2003): Justices Breyer, Stevens, O’Connor, Souter, and Ginsburg established the majority for two parts of the Court's opinion: With respect to Titles I and II of the BCRA (Bipartisan Campaign Reform Act of 2002), Justices Stevens, O’Connor wrote the opinion of the Court. With respect to Title V of the BCRA, Justice Breyer wrote the Court's opinion.

Two dissenting opinions were included in the decision:
Justice Stevens, joined by Justices Ginsburg, and Breyer, dissented on one section of the part of the Court's opinion written by the Chief Justice.

The Chief Justice, joined by Justice Kennedy and Scalia, issued a 15-page dissent against the Court's opinion with respect to Titles I and V of the BCRA. Three other justices wrote separate opinions on the decision: Justice Kennedy, joined by the Chief Justice, issued a 68-page dissenting opinion and appendix, noting that BCRA forces "speakers to abandon their own preference for speaking through parties and organizations." Justice Thomas issued a separate 25-page dissenting opinion noting that the Court was upholding the "most significant abridgment of the freedoms of speech and association since the Civil War." Justice Scalia issued a separate 19-page dissenting opinion, a "few words of [his] own," because of the "extraordinary importance" of the cases.
juge rapporteur enter in the room for the deliberation, the Council has just a couple of hours to make a final decision), whereas the Italian Constitutional Court knows no such temporal constraints and important decisions may take days or even weeks before the justices get to a final pronouncement.

I needed to introduce these few elements of information in order to bring in two points that matters to my argument. 1) The justices who do not agree with the draft proposed by the juge rapporteur or a specific argument in it, in the Italian, French and German CC, cannot just disagree, if they want to play a persuasive role, they have to suggest a counterargument and try to persuade their colleagues, and at least the majority of them. 2) Consider moreover that unlike the case of competitive elections, the justices of these Courts cannot choose normally among two options, but have to propose alternative arguments in the form of amendments to the draft presented by the juge rapporteur. For sure, once alternative arguments are presented by different members of the collegium, the other judges may just accept one or the other of them. But the alternatives do not preexist like in competitive elections, they have to be produced by the members of the deliberative body, and that under an important number of argumentative (rhetorical) constraints (for instance the reference in the decision to constitutional provisions, principles or values, the consistence vis-à-vis recent precedents, and so on).

Another aspect of the internal deliberation deserves consideration, notably comparing the US Supreme Court with the European Constitutional courts. After the oral arguments, when the American justices get together in the conference, the discussion and the vote concern directly the disposition of the case. It is only after this vote that arguments are developed normally by the majority and the minority after and outside any collective, face to face, deliberative setting. In the European courts – and I’ll focus on the Italian case here – the juge rapporteur presents to his colleagues the draft of arguments that will be object of face to face discussion; sometimes the rapporteur can present even alternative drafts. The disposition as such is not object of a separate discussion/decision; it results from the arguments and the reasons given and is presented as the result of them.21 Most of the time22 by the way the European Courts have not to dispose of a case but their task is to answer to a question of

---

21 On this question I had the opportunity of reading a very interesting unpublished paper by Lewis Kornhauser (Deciding Together) comparing the deliberative/decision-making procedure of the US Supreme Court with the one of the French Cour the Cassation, which confirm the observations I’m presenting here.

22 Exceptions are the conflict between state (central government) and regions/provinces/Länder in federal systems and conflict of competence between central organs of the government (Organstreit in Germany, conflitti di attribuzione in Italy).
constitutinality asked by judges, citizens (litigants), or political actors. In this perspective there is not a case to adjudicate as such, but a conflict between norms and the attempt to make the statutory majoritarian norm compatible with the constitution, which is not the decision of a part of the society that a single part can modify ad libitum, but the rule to rule and the values of the body politics as such (the winner and the loser of the electoral competition).

A variety of other element distinguishes the concrete working of these high jurisdictions in Europe. For instance, the members of the French Constitutional Council, which the political class stubbornly refuses of recognizing as judges, have no clerks working with each of them, unlike the German and the Italian ones. The Council has now an important service juridique, but it works for the institution as a collective body and under the direction of its powerful secretary general.

4. As it is well known we do not know much about the deliberative process inside the Courts of European countries since the deliberation is secret (but as I said, speaking of the French Constitutional Council, the publication of the minutes of the internal debates are accessible to the public after 25 years), we know nonetheless at the least that the decision has to be one voice and that dissent is forbidden. Now, this difference attracted great attention and produced a significant literature that in my opinion tend to ignore what seems to be the crucial difference in the two cases: the American and the French/Italian. This allows me to say something on the vexata quaestio of dissent from the point of view of disclosed and undisclosed vote.

One could claim that there is indeed no difference between the two cases since, in both of them, members of the Court vote and use majority rule, but this opinion completely underestimate the role and the effect of procedures that – like the editor of this book – I tend to take seriously.

If the vote is public, in the sense of disclosed, if in other terms everybody outside the court knows who voted for which opinion, there are important consequences that have to be taken into account, and that are absent in the case where the vote is concealed.

Transparency/publicity is notoriously one of the mantras of the democratic ideology. But it may be argued, with Jon Elster, that for a Constituent Assembly closed doors (Philadelphia) may do better, may be able to produce wiser decisions, than open debates (Versailles/Paris). The point that I want to stress is a bit different. Under disclosed vote

---

23 The recent mechanism of referral introduced in France by the Constitutional reform of 2008 speaks explicitely of question préliminaire de constitutionnalité; in Italy questione incidentale di costituzionalité and in Germany konkrete Normenkontrolle.
justices have an incentive to keep a consistent public image rather than looking for a compromise. Now the function of judges in a panel court, characterized by undisclosed vote, may be conceived of as a different one: as the strenuous endeavor by a small group of people to find a common decision, the decision which is for most of the members of the panel not unfair.

Dissent in itself is something different from the fact that the members of the US Supreme Court have a public persona, and that they are identified by the public opinion with some positions on a political/partisan spectrum– almost everybody describes the American justices as liberal or conservative or median (there are even many sometimes extravagant numbers to codify them). This visible personal identity doesn’t exist for the members of the Italian, French and also German Constitutional Court, who have no public persona. Dissent as such, meaning an opinion different from the one that was shared by the majority of the members of a collective decision-making body, can perfectly be made public without disclosing the vote. Justice Valerio Onida, the president emeritus of the Italian Constitutional Court, proposed (unsuccessfully) some years ago to introduce in his Court the rule of the anonymous dissent. We care, so I believe, about arguments, not about the authors of their authors. Judges are not elected, accountable officials of whom we need to know who did what, in order to confirm them in office or get rid of them. It follows that from the point of view of the comparative analysis the difference is in principle – this my thesis – not between courts allowing dissent and courts forbidding it, but between different culture and procedures of decision making where a crucial role is played by the fact that the vote of the court is disclosed or not.

5. When we speak of panel courts, I believe that we should distinguish – and this suggestion follows from the previous point – between pluralistic courts and collegial courts.

---

24 This is the claim of my colleague Anna Harvey of the Politics department at NYU, who is working on this topic.
25 In Germany the possibility only for the Bundesverfassungsgericht (and for no other panel court) to publish dissenting opinions was introduced by the legislator, under pressure of the academic community, in 1969. But this possibility is used hardly ever. This is a point that deserves discussion since it shows that same rules may produce different effects in different context. This fact shows also that comparative analysis based only on consideration of legal norms is pretty superficial and it tells us not enough about the real functioning of (even purely legal) institutions.
26 This remark has to be understood with a caveat: J-L. Debré, the president of the French Constitutional Council had a public persona before being the president this institution, likewise Guy Canivet, who was the president of the Cassation Court. Still since they don’t sign any decision of the Constitutional Council with their name their public persona has nothing any more to do with the decisions of the Council. The contrary is true in the USSC. Thomas and Scalia were not well known by the public before being appointed. They are known now. Since as we know they “teach from the bench”.
27 Nowadays in Europe only in the Czech Republic members of the Constitutional Court can be reappointed after the first mandate.
To grasp the difference, I want to emphasize we need to look back at the historical origins of the two types, going back to the English and French Early Modern period.

The difference has to do with the historical roots of the two systems: English medieval law on the one hand, and traditions of French monarchy preserved by the Revolution on the other. In England, every judicial panel (if I understand correctly the complex history of the English courts of justice) used a mechanism of decision *seriatim* (which is still used, apparently, in India). A *seriatim* opinion “refers to a series of opinions written individually by each judge on the bench, as opposed to a single opinion speaking for the court as a whole. When appellate court judges render *seriatim* opinions, each one presents a separate judgment on a case. No one writes an opinion for the court as a whole”29. This system was used originally by the American Supreme Court until Chief Justice Marshall was able to impose for a while unanimous decisions30.

Unlike in the English context, it is easier to reconstruct the origin of the French model thanks, as we shall see, to the *ordonnances royales* by François Ier and Louis XIV. In France, judicial power was in the Middle Ages the essential and sovereign prerogative of the King; the monarch being first of all *roi de justice* and *roi de guerre*. In reality, more and more power to settle disputes among the subjects of the king was delegated to judicial panel courts 31, which, at least since the *grandes ordonnances royales* of François Ier at the beginning of the 16th century, had to speak one voice. Since the judges decided in the place of the King, they weren’t allowed to dissent, since the King could have only one will. I do not know exactly how to make sense of the English *seriatim* rule, but it seems to have something to do with the aristocratic character of English courts of common law32, where each member had equal status and spoke for himself. In any event, it is difficult to see in both these mechanisms

28 *Lois* of August 1790 about the organization of the judicial power.
31 Traditionally, we speak for France of *justice délégué* and *justice retenue*, the King was in principle the supreme judge, the last instance for the adjudication of conflicts among his subjects, and he never lost the prerogative of exercising the judicial power, originally the most important of all – the one that can be exercised ultimately only by the sovereign and that is exercised in name of the people after the Revolution.
32 At the origin (Magna Charta) the members of the English high courts were barons; but the system become soon extremely complex and any attempt of generalization (unlike in the French case) is doomed to be inevitably incorrect.
anything properly “democratic.” Popular juries have no written dissent – as far as I know. It is a fact in any event that the French Revolution substituted the name of the King with that of the People and upheld the same system of unanimous (= one voice) decision for judicial panels. Dissent in France was a misdeed and it is still strictly forbidden. The same rule, as I said, exists in Italy. Germany introduced the possibility of dissent in 1969, but the practice remains highly atypical – Justice Dieter Grimm wrote two dissents during the 12 years his tenure at the German Constitutional Court. Recently, instead, almost 80% of the decisions of the U.S. Supreme Court concerning constitutional litigation were not unanimous. The U.S. Supreme Court has been since some time notoriously and sometimes bitterly divided, and 5-to-4 decisions are frequent, especially in relevant questions. This is something that Chief Justice Roberts seems to regret, but he is unable for the time being to bring greater consensus to his Court.

6. This difference in the existence of disclosed or concealed vote has significant consequences. European Constitutional Courts are generally perceived by the public as anonymous bodies rather than as small groups of well-known individuals with considerable public profiles and personalities. Where in the States justices are celebrities, in Europe their names are barely known by the non-specialist public and no justice can care about her image since what she does or thinks or believes remains permanently hidden by the secrecy of deliberations behind closed doors. Only final decisions are publicly disclosed and they carry the signature of all members of the court. Justices are mere members of a collective body that must find the best possible solution to the questions that have been brought to its attention. Egocentrism can play a role, but apparently only in the course of secret deliberation – an egocentrism that shall remain unknown outside the court. These are facts. Now it is possible to speculate about the consequences of these different rules on the decision-making process, meaning the process that produces the final decision. The working rules of the American

---

33 Jon Elster drew to my attention that in Scotland, the foreman of the jury is asked whether the decision was unanimous or not, but not about the size of the majority. In England, the foreman must state the number of jurors who disagree with a verdict of guilty.

34 Fig. 9.2 (at the end of this chapter) shows an interesting phenomenon. Dissents were pretty rare in the US Supreme court until the 1940ties when they exploded. The reasons of this phenomenon, which in any event is not structural in the American judicial review, contrary to the vulgate, are not entirely clear.

35 The German Federal Constitutional Court in the famous decision on the Lisbon Treaty of June 30th 2009 declared that the decision was not unanimous since one member of the panel did not agree with the reasons given by the Court, but the dissenter did not publish any opinion and his/her name was not disclosed by the Court.

36 This is evidently a controversial opinion which depends among other factors from the political beliefs of people having opinions on the question. I’m not so naïf to believe that academics are more neutral politically than members of the Supreme/Constitutional Courts.

37 I counted 37 biographies of Sandra J. O’Connor, but there are probably more.

38 With the exception, as we know, of France where after 25 years the arguments and votes of the members of the Constitutional Council will be accessible to people interested.
Supreme Court pretty well known. I can tell what I know about the Italian Constitutional Court. In principle and largely in fact, we do not know anything about its internal deliberations. But the Italian CC has published an official anonymous and unanimous document describing how the Court works. The document is available in English on the website of this institution. I had, moreover, the chance to become acquainted in the last 15 years with a number of members of the Italian Court. I can tell a few things about what happens in conferences that last eight hours a day for twelve days each month. First of all, it is worth noticing that collective deliberations of the Court en banc occupy a large portion of the justices’ time. The Italian CC is a deliberative body in the strict, and not metaphorical or normative, sense of that abused word. All cases are discussed by the 15 justices together. The tradition is to distinguish between minor and major decisions. In any case, there is a juge rapporteur chosen by the president of the court (who is elected by the justices themselves mostly according to seniority and for a relatively short time). In simple cases, the juge rapporteur presents to his colleagues the draft of an opinion which is briefly discussed and, in the absence of opposition, it is approved. In important cases, the discussion may last for a long time. Justices tend to disagree (most of them being academics, this is not surprising). The absence of dissent has apparently an important consequence. If dissenters are a significant minority and if they have ostensibly serious constitutional arguments, their disagreement cannot be simply dismissed and outvoted as in Parliament or a politically accountable body where the majority, under the scrutiny of the voters, may pay for its decision at the next election. The president can ask the juge rapporteur to take into account the opinion of the minority and try to integrate it into the draft that will be discussed repeatedly until the court achieves some form of consensus. This system and style of decision-making may seem unusual to those who know the US Supreme Court, but one must take into account the fact that absence of dissent has been part of the continental legal culture for many centuries. Judges still never publish dissent in ordinary or high panel courts. The predominant idea is

39 No justice ever published anything (memories, notes, etc.) about his experience on the bench. The only book covering in a very abstract (but very interesting) way the work of the Court is by Gustavo Zagrebelsky, Principi e voti, Einaudi, Torino, 2005.
40 http://www.cortecostituzionale.it/documenti/download/pdf/TheItalianConstitutionalCourt_2009.pdf (the new edition of the text specifies that text was produced for the Court by justice Valerio Onida and more recently revised by justice Gaetano Silvestri (both are also prominent constitutional law professors), with the agreement of all the members.
41 One half-day every two weeks is devoted to public hearings of cases (only the 20% of the cases are object of public hearings), and the rest of the time is devoted to writing draft and final versions of the Court’s decisions and to studying the cases.
42 So at least we suppose following the standard democratic ideology. What happens in reality is a different question to which I do not know a clear answer.
that an agreement must be found. Court opinions may be sometimes less legally precise than in the US, because of the compromises that the judges have to strike among them. However, as the court speaks for the people and through decisions which are definitive and not subject to appeal, it seems sensible that the final opinion incorporates different points of view rather than the will or the beliefs of the majority which, by the way, is not the expression of a popular majority and which cannot legitimately or decently impose its opinion upon dissenting justices.

Note that Italy has an important form of dissent. Decisions of the Constitutional Court are published in an academic journal: Giurisprudenza Costituzionale (constitutional jurisdiction), followed by critical commentaries written by legal scholars and professors. So, the Court’s decisions do not appear to those who read them as the edicts of a secular god, but rather as the opinions of judges and law professors which are subject to analysis, investigation and (sometimes sharp) criticism from colleagues and specialists.

Figure 9.2 (from Todd Henderson, article quoted at FN 30, p. 27)