

CONSTITUTIONAL REVIEW IN THE GLOBAL CONTEXT

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It's already been said several times that the American model of judicial review is spreading like wildfire—Chris just said it, John Sexton started the panel with it—and it's not really correct. The United States is virtually unique in having judicial review, if judicial review means a system in which ordinary judges can review and strike down legislation.¹ Other countries that have adopted constitutional review have taken great pains to exclude ordinary judges from having any part in it. This was true at the time of the origination of the new model of constitutional review in Austria after World War I,² and it was true in Germany³ and Italy⁴ after World War II. It was true in

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1. For the origins of the American system of judicial review, see, for example, *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803).

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id.

2. See Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183, 185–86 (1942) (explaining that Austria's 1920 constitution prohibited ordinary courts from reviewing constitutionality of statutes; task left to special Constitutional Court (*Verfassungsgerichtshof*)).

3. See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 3–4 (1989) (West Germany's power of judicial review reserved for special politically-appointed tribunal rather than multi-jurisdictional high court of legal technicians).

4. See Alessandro Pizzorusso, *Constitutional Review and Legislation in Italy*, in *CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON* 109, 111–14 (Christine Landfried ed., 1988) (explaining that fifteen members of Italy's Constitutional Court are specially and politically appointed; one third by President, one third by Parliament, and one third by senior judiciary); see also MARY L. VOL-

Spain⁵ and Portugal⁶ after the collapse of their authoritarian governments. And it was true after the collapse of Soviet hegemony over Eastern Europe.⁷ In every case we see that American style judicial review was rejected in favor of something different. We need to pay attention to that basic fact.⁸

Why is it that the form of constitutional review spreading like wildfire is not the American form, but is another form altogether? Why is it that the American style has not been very popular? I think we can get answers to these questions by asking about the circumstances that have given rise to constitutional adjudication over the past half century.

There have been three distinct waves of constitutional adjudication in post-war Europe. The first took place right after World War II in Germany and Italy.⁹ The second wave was after the collapse of the Spanish and Portuguese authoritarian governments, and of the Greek dictatorship about quarter century ago.¹⁰ And, the third wave followed the collapse of the Soviet Union about ten years ago. In every case, the nations adopted the same model, pretty much. The choice was always what I shall call the Kelsenian model: specialized constitutional courts, populated by law professors, and never were ordinary

CANSEK, CONSTITUTIONAL POLITICS IN ITALY: THE CONSTITUTIONAL COURT 15 (2000) (identifying Kelsen-inspired, interwar Austrian system, and to lesser extent American system, as inspiration for postwar judicial review in Italy).

5. See Francisco Rubio Llorente, *Constitutional Review and Legislation in Spain*, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON 127, 127–31 (Christine Landfried ed., 1988) (explaining that Magistrates of Spanish Constitutional Court must be “either magistrates, government attorneys, university professors, civil servants or attorneys—in all cases, legal professionals of recognized competence with 15 years of practice”).

6. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 714–15 (2001) (claiming that judicial review in countries such as Portugal is polar opposite of American system).

7. See *id.* at 715–16 (claiming that Central and Eastern European countries have eschewed American model of constitutional review); Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective* 54 OHIO ST. L.J. 559, 585 (1993) (“To date, the Austrian model has also been the most popular choice of new nations in Central and Eastern Europe.”). See generally Rett R. Ludwikowski, *Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe*, 3 CARDOZO J. INT’L & COMP. L. 73 (1995).

8. For a more detailed analysis, see JOHN FERREJOHN AND PASQUALE PASQUINO, *DELIBERATIVE INSTITUTIONS* (W. Sadurski ed., Cambridge Univ. Press, forthcoming 2002) (on file with author).

9. See VOLCANSEK, *supra* note 4, at 1, 15 (describing establishment of constitutional review in Axis countries after World War II).

10. See Gardbaum, *supra* note 6, at 715.

judges permitted to participate.¹¹ No country ever adopted the American practice of judicial review, and in most cases the rejection was explicit and decisive.¹² Why?

Part of the answer, of course, is that in every case I mentioned, a formerly authoritarian system adopted a new constitution and provided for constitutional review in order to enforce constitutional provisions. That was the case in Germany and Italy, obviously, and also in Spain, Portugal, Greece, and the nations previously part of the Soviet empire. These were all cases of failed authoritarian systems with no recent history of democracy or liberty. By contrast, in the old (stable and successful) democracies—Britain, New Zealand, the Netherlands, Sweden—there was no move to create new constitutions, or indeed, any real constitutions at all.¹³ And, of course, without a written constitution, there is little need for constitutional courts. The home of contemporary constitutional adjudication, the wildfire, is post-authoritarian systems.

One thing that post-authoritarian systems have in common is that the judges that are still on the bench are implicated, to some extent, in the practices of the previous regime. The citizenry in such circumstances have every sociological reason to be suspicious of how those officials would go about their business. In other words, there exists a characteristic circumstance of distrust. In fact, there's actually a secondary circumstance of distrust arising naturally in post-authoritarian settings, and that is distrust of the lawmakers as well of the judges. In such circumstances, there is a natural desire to place both the positive lawmakers and the law enforcers under constitutional control. The question is how best to do that.

Broadly speaking, the answer for nations that have adopted constitutional review is one that was developed after World War I. Hans Kelsen, an Austrian legal theorist, deserves credit for inventing the model of constitutional adjudication that has become popular over the past few decades. Kelsen, an eminent young legal scholar, happened

11. See Pasquale Pasquino, *Gardien de la constitution ou justice constitutionnelle? C. Schmitt et H. Kelsen, in 1789 ET L'INVENTION DE LA CONSTITUTION* 141–52 (Michel Troper & Lucien Jaume eds., 1994).

12. See VOLCANSEK, *supra* note 4, at 15 (Kelsenian model “rejected the US style of decentralized judicial review and advocated instead a special institution that alone held the power of constitutional review”); see also Klaus von Byne, *The Genesis of Constitutional Review in Parliamentary Systems, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON* 21, 29–30 (Christine Landfried ed., 1988).

13. Cf. Gardbaum, *supra* note 6, at 759–60 (noting shift away from American model of constitutionalism in British Commonwealth).

to be a staff member to a committee charged with framing a new constitution,¹⁴ and was asked to draft the section of it dealing with constitutional review.¹⁵ And that draft constitution created a new institution—a constitutional court of professors—that would have the power to control ordinary legislation.¹⁶

Kelsen recognized the need for an institution with power to control or regulate legislation. In the case of post-World War I Austria, the concern was mostly for maintaining federal arrangements, that is, regulating the relationship between the national and provincial governments. He recognized, too, that constitutional control essentially involves legislative activity. He recognized, in other words, that constitutional adjudication involves legislating as well as judging. The processes by which constitutional adjudicators make or declare general rules are different from those employed in ordinary legislatures,

14. See Nicoletta Bersier Ladavac, *Hans Kelsen (1881–1973): Biographical Note and Bibliography*, 9 EUR. J. INT'L L. 391, 391–92 (1998); see also Albert A. Ehrenzweig, *Preface*, 59 CAL. L. REV. 609, 610 (1971) (acknowledging Kelsen as principle drafter of Austrian Constitution). Known both as an excellent jurist as well as an exceptional human being, Hans Kelsen dedicated his life to scholarship and the development of the law, most notably in the area of International Law. Born in Prague in 1881, Kelsen later moved with his family to Vienna. In 1906, Kelsen received a doctorate in law and went on to become a professor, establishing and editing the Austrian Journal of Public Law. Of Jewish descent, Kelsen was forced to flee to Geneva in 1933, and navigated Europe's tumultuous political circumstances to study, teach, and research the law, often pioneering new concepts in the international arena. In his early 60s, Kelsen moved to the United States, where he continued to distinguish himself, including serving as a professor at the University of California, Berkeley, in the Department of Political Science. Upon his death at the age of 92, his legacy included the publication of almost 400 works and a career that had not only touched many, but benefited even more.

15. Clemens Jabloner, *Kelsen and His Circle: The Viennese Years*, 9 EUR. J. INT'L L. 368, 374 (1998).

16. Kelsen, *supra* note 2, at 186; see also Zdzislaw Czeszejko-Sochacki, *The Origins of Constitutional Review in Poland*, 1996 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 15, 15 (“[T]he European model of judicial review, based on 18th and 19th century ideals and significantly different from its American archetype, unquestionably derives from the Austrian Constitutional Court established by the . . . 1920 Austrian Constitution.”).

Kelsen also earned an important place for himself in the history of his country as co-drafter of the Austrian Constitution of 1920. . . . Kelsen developed the theoretical underpinnings of constitutional jurisdiction as a constitutional option and defended it against the critique of German constitutional law in particular. . . . As an expert on constitutional law, Kelsen formulated the sixth main part of the Constitution, which covers the organization and procedures of the Constitutional Court. Austria thus introduced a specialized and functional constitutional jurisdiction for the first time in legal history.

Jabloner, *supra* note 15, at 374.

and the considerations and arguments taken into account are different, but constitutional adjudicators are still legislating.

Secondly, Kelsen was of course writing after the age of democratic revolution. Throughout nineteenth century Europe, a new model of government had become dominant.¹⁷ It was the model in which the people and their representatives became the sole source of governmental authority, which we may call the model of parliamentary sovereignty—one in which the parliament is superior both to the judiciary and to the executive. In that system, the executive is responsible directly to the legislature—it remains in office only as long as it can command a majority in the legislature. And, the job of the judiciary is to enforce what the legislature mandates.¹⁸ This model of parliamentary sovereignty didn't succeed everywhere of course; some nations retained the outward (and sometimes the inward) form of monarchical or, better, mixed government. Austria, for example, resisted it until after World War I.

Now, this model is accepted throughout most of Europe, and it became accepted as well after World War I in Austria, and Kelsen didn't wish to undercut it. He did however, want to maintain the place of the legislature within the new Austrian constitutional system, and this involved some check on the power of the legislature itself. Kelsen's innovation was to invent a new body—a legislative body, a constitutional court—which stood outside the model of parliamentary supremacy, and which regulated the product of the legislature. And, incidentally, as it has come to happen, this body regulates the product of the rest of the government as well. Insofar as this new body exercises legislative authority, and insofar as its powers are traceable to the people (because its members are politically appointed), legislative authority remains superior to executive and judicial authority. So, constitutional judges as they function now, in Europe and elsewhere, regulate legislative production, administrative production, and judicial action. That is their position. So, this is the new model, the European

17. Cf. Gardbaum, *supra* note 6, at 713 (“Prior to 1945, the model of legislative supremacy, as exemplified not only by the British doctrine of parliamentary sovereignty but also by the French doctrine that acts of the legislature are the supreme expression of the peoples’ general will, was the dominant model of constitutionalism throughout the world, particularly with respect to the issue of individual rights and civil liberties.”).

18. See *id.* (“[T]he sovereignty of Parliament means that no court has the power to question the validity of an Act of Parliament, the supreme law of the land.”); see also Kelsen, *supra* note 2, at 185 (“Before the Constitution of 1920 . . . [t]he power of the courts to pass on the legality and hence on the constitutionality of ordinances . . . was not restricted.”).

model of constitutional adjudication. I think it is useful to think about it as a new model, because it allows us to see more clearly the attractiveness of Kelsen's "solution" to the problem of regulating democratic processes.

One way to put Kelsen's key idea is to distinguish between legislation and a legislature. A legislature is one institution that can produce legislation—general rules of prospective application. Chris Eisgruber rightly pointed out that legislation can and does happen all over government, and there are powerful normative reasons why that should be the case. Think of heavily technical legislation requiring special expertise and academic discipline (for example, that kind of policy made by the Federal Reserve Board). Our politicians, that is, our legislature (Congress and the President together) have decided that kind of policy is best hived off away from political processes, given a high degree of insulation from those processes, and made sensitive to expert inputs. When economists and bankers, who are professional economists, are put on that body and insulated from other forces, what they are doing is legislative in nature, only it is in a specialized institutional context, a context sensitive to certain kinds of normative arguments which might not be given enough play in a different kind of process.

This is a common choice in designing administrative state institutions, including judicial institutions.¹⁹ So, looking at the matter this way, it suggests that the way Waldron frames the debate in his book,²⁰ and that I think most of the panelists have largely accepted, is not quite right. It is not a matter of some foreign elite from Mars taking over the judiciary and imposing itself on a functioning legislature.

19. See Jennifer C. Root, *The Commissioner's Clear Reflection of Income Power Under § 446(B) and The Abuse of Discretion Standard of Review: Where Has the Rule of Law Gone, and Can We Get It Back?*, 15 AKRON TAX J. 69, 75–76 (2000) ("The general expansion and complexity of governmental regulation has caused the legislature to rely on outside expertise in many areas of the law in which the legislature cannot itself be expert. Congress' resource limitations make it difficult to efficiently and effectively legislate meaningful rules. For these reasons, administrative agencies have been relied upon to take on a large amount of the responsibility for governmental regulation. The administrative agencies are many times saddled with vague mandates from the legislature and are asked to perform duties that are a combination of rulemaking, enforcement, and adjudication." (footnotes omitted)); see also Richard S. Frase, *The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines*, 28 WAKE FOREST L. REV. 345, 368 (1993) ("The creation of an independent commission to draft sentencing guidelines has been recognized as having the advantage of allowing sentencing policy to be more expertly crafted, while insulating the process from the distortion of political pressures.").

20. See generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

Rather, the people, from the standpoint of constitutional design, must decide how to allocate legislative authority among various governmental entities. It seems to me a better way to look at the issue: how shall we, “the people,” organize and distribute legislative power? How much of it shall be allocated to the parliament, how much to administrative agencies, how much to judges? And, what are the appropriate terms of debate that will govern and criticize that allocation?

From this standpoint, we should ask whether there is anything in Waldron’s book that would preclude the people from making their choice one of American-style judicial review, or from making the European choice that I have described above: a specialized body of politically appointed law professors to control the operation of the ordinary judiciary, legislature, and administrative state? Should anything cause us to stand up and say, “No, you can’t do that, you can’t possibly allocate that portion of legislative authority to this particular institution”? The answer to this question is not obvious in either case. But, it does seem to me that the American model is easier to reject on democratic grounds than the European one.

Waldron’s argument in the book suggests that we might be concerned that a court, however constituted, lacks democratic pedigree. But as Chris Eisgruber indicated in his example of the Federal Reserve Board, democratic pedigree is a complex issue when considering the exercise of legislative power. In practice, the people themselves may very well think it undesirable to have a democratic pedigree when it comes to occupying a seat on the Federal Reserve Board. They might decide that fourteen years is good term length, and that not all appointments should be made by elected politicians, and that meetings ought to be closed to the public and proceedings kept secret. They might accept these strictures to ensure what they see as an appropriate amount of insulation, so that the institution will be more likely to act as the people would want it to over the long run. In other words, the people may very well choose, through ordinary statutes, to establish an insulated institution. Whether they are right to do so or not is an issue of comparative institutional performance. Does the central bank, so constituted, operate better or worse than a less insulated institution?

By the same token, it’s not so clear that there is a reason to argue against the people choosing to allocate insulated authority of this kind to judges. They might choose to do so through ordinary statutes—as when they create new federal courts, or enlarge their jurisdictions.²¹

21. See, e.g., U.S. CONST. art. III, § 1 (authorizing Congress to establish isolated federal courts, members of which “shall hold their Offices during good Behaviour,

Or the people may resort to constitutional innovations to achieve the same purposes. Either way, in republican government, this is a choice made by the people to regulate their own political processes.

I doubt that the issue as to how the people ought to allocate legislative authority is going to be settled in the abstract. Rather, this issue is more appropriately decided—insofar as it is settled at any moment in time—by making practical judgments about how different institutions function. Which institutions are doing a good job? Which aren't doing a good job? What's a good reform to try? Of course, people won't agree on the answers to these questions—that's why they need to be settled politically. That is the way I understand the European choice to reject the American model of judicial review in favor of the Kelsenian model. What has spread like wildfire, at least after the collapse of authoritarian regimes, is the idea that there ought to be some checking institution that stands over the actual legislature, and over the government, and especially, over the judiciary.

So, this is a valuable feature that many democracies seem to have embraced from very different paths, and we need to respect that. But we should also recognize that different nations have made very different choices as to how to check the legislature. And, as I have argued, the Europeans have rejected the American model of judicial review in favor of another, Kelsenian, model. The European model differs from the American one in several respects.

First, one feature of these constitutional courts, not true of the American judiciary, is that they do not give lifetime tenure to new judges.²² They provide long terms, but rarely permit reappointment. So, basically, a judge will serve for ten years, nine years, seven years, some relatively longish term and then leave the court.²³ Because

and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office”).

22. Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT'L & COMP. L. 1, 24 (2000) (“[I]n Bulgaria, Romania, Lithuania, and Hungary justices are elected for nine years, in Albania for two years, in Belarus for eleven years, in the Czech Republic and Ukraine for ten years, and in Slovakia for seven years; in Poland, the tenure of justices was eight years, and was extended by the 1997 Constitution to nine years.”); see also Ryszard Cholewinski, *The Protection of Human Rights in the New Polish Constitution*, 22 FORDHAM INT'L L.J. 236, 286–87 (1998) (Polish Constitutional Tribunal judges may only serve one term); Amy J. Weisman, Comment, *Separation of Powers in Post-Communist Government: A Constitutional Case Study of the Russian Federation*, 10 AM. U. J. INT'L L. & POL'Y 1365, 1391 (1995) (twelve year term for Russian Constitutional Court judges).

23. See Ludwikowski, *supra* note 22.

there's no question of seeking reappointment, judges have no particular reason to kowtow to those in power.

Second, while these judges are appointed politically (as are those in the United States), these appointments tend to be made in a way that requires assent by the majority political factions. For example, to get appointed to the German Federal Constitutional Court, a prospective justice must garner the votes of two thirds majorities in both chambers of parliament (*Bundestag* and *Bundesrat*). Thus, all the major political formations must agree on a new appointment. As a result, nearly all of the constitutional judges tend to have moderate judicial viewpoints.

Contrast that with the American system. We have a system in which, some guy might happen to be elected by the voters of, let's say, Florida, and then he takes office. Actually, not even the voters, the counters of Florida [laughter]. And as long as the president has a majority in the Senate, he has a pretty good chance of getting an appointment on the Supreme Court who was acceptable only to the members of his own party (so long as the other party didn't have the spine to actually filibuster). The American process will therefore result in Justices pretty far in viewpoint from the "median" Senator. In other words, American court appointments can be fairly extreme, ideologically or jurisprudentially. Justices may be appointed who are acceptable only to the Republicans or only to the Democrats.

Third, because of fixed terms, European constitutional judges retire regularly. You don't get a situation where, as with Jimmy Carter, there were no Supreme Court appointments.²⁴ The makeup of the European courts tends to track election returns more closely than the makeup of the American courts does. There is less possibility of a drift of the court away from where the political branches are. There is much to be said, I think, for the European practices. Even if we're going to have judicial review, it seems a good idea to move in the direction of the European processes.

A fourth special aspect of the American style of judicial review is that any judge can review statutes. A municipal court judge in Poughkeepsie—no problem; she can simply strike down the law. That's ex-

24. Carter served from 1977–81, but did not appoint any Supreme Court Justices, as none retired during that period. President Gerald Ford appointed John Paul Stevens, who began serving on December 19, 1975, and the next person elevated to the Supreme Court was Sandra Day O'Connor, appointed by President Reagan, who ascended to the Court on September 25, 1981. See MEMBERS OF THE SUPREME COURT OF THE UNITED STATES, available at <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/www.supremecourtus.gov/about/members.pdf> (last visited Nov. 17, 2002).

actly what the Europeans didn't want: Of course, ordinary judges in Europe are appointed and promoted bureaucratically, by competitive examination.²⁵ In many countries, as in Italy, there is almost no exterior influence at all, it's automatic.²⁶ They are bureaucratic appointments, with no incentives to be responsive to politicians in place. Judges are really just civil servants who join the judiciary right out of law school and remain within it throughout their careers, and are therefore very insulated. So perhaps it is not surprising that Europeans are suspicious of judicial review when, in their systems, that review can be exercised by a twenty-five year old with a fresh law degree.

And fifth, the United States has an extremely rigid Constitution. It is surely more difficult to amend than any other national constitution.²⁷ Europeans have rejected that aspect of American experience as well. They have opted, instead, for more flexible constitutions and for specialized constitutional courts made up of judicial moderates, with limited tenures. Their courts tend to work in closed proceedings, more or less by consensus, without frequent dissenting opinions. Their justices are seldom public figures with articulated public identities and recognizable voices. They are rarely ideological apologists. The European rather than the American model seems to me to be the choice that future constitutional democracies will tend to make. In that model, the

25. See, e.g., Maria Dakolias and Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT'L L.J. 353, 395 (2000) ("In Germany and France, exams are required to become a judge and French judges most often come from the Judicial School."); Jason Marin, *Invoking the U.S. Attorney-Client Privilege: Japanese Corporate Quasi-Lawyers Deserve Protection in U.S. Courts Too*, 21 FORDHAM INT'L L.J. 1558, 1574 n.97 (1998) ("Judges in civil law countries have little or no advocacy experience. Instead they are appointed as judges directly out of law school or equivalent educational body. Civil law countries include France, Italy, Spain, Belgium, and countries that were their colonies, including those in Latin America, South America, and French Africa. Germanic countries such as Germany, Austria, and the Netherlands are also civil law countries." (citations omitted)).

26. See, e.g., K.D. Ewing, *A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary*, 38 ALBERTA L. REV. 708, 720 (2000) ("In Italy as in other countries, graduates may choose a judicial career, perhaps an unusual arrangement for those of us schooled in the common law. There, graduates enter the magistracy as a career, having sat and passed the entrance examinations. Entrants must be over 21 but younger than 40. Once in the system they move automatically through the various stages—*Tribunale*, *corte d'appello*, and *Cassazione*—as they become more experienced.")

27. See U.S. CONST., art. V (amendments can be proposed by two thirds of both Houses or by the legislatures of two thirds of the states calling for a constitutional convention. In order for an amendment to be adopted, it must be ratified by three fourths of the states.); STONE, ET AL., CONSTITUTIONAL LAW, 72–75 (4th ed. 2001) ("[M]any nations allow constitutional amendment through a process that is far less arduous than the American one . . .").

tensions between democracy and legality that Waldron emphasizes in his book are much less sharply drawn.

We could fruitfully pay some attention to these European examples. I think, for example, that the American prescription of lifetime tenure for judges is not such a great answer. I don't think I have time to go into great detail about this. But I want to make the following simple distinction. From my point of view, judges do two things. First, they decide cases between particular litigants. That is, they judge disputes. Second, they produce general rules or legislation. The first function—deciding disputes among litigants—requires a pretty high degree of insulation. It is not so obvious, however, that the second lawmaking function requires or justifies the same degree of insulation. Of course, these two functions are commingled. Judges make law while deciding disputes; that is what makes the institutional design question hard.

Paying attention to the European model would also help us to think critically about how widely we really want judicial review authority to be distributed in the judiciary. Maybe the Europeans are right about restricting it more than we do and organizing its exercise differently. And maybe we ought to think differently about the modes of protection of judges, if we're going to have a system of constitutional review. On the other hand—this is not so much a criticism of American judicial practice, it's a matter of saying that we should pay attention to what has gone on in the world in terms of constitutional adjudication, and recognize that our system is but one way, among others, to implement this idea. Our people have every right to have chosen the institutions and practices that we have chosen. But I think we should probably be willing to learn from the experience of others, other countries, other nations, other peoples of the world, and maybe realize that our system can be improved to make it more responsive to democratic forces than is currently the case. Thank you.

