

WHY EUROPE REJECTED AMERICAN JUDICIAL REVIEW

AND WHY IT MAY NOT MATTER

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In 1803, when *Marbury v. Madison*¹ was rendered, the French were busy completing the destruction of independent judicial authority. That process began in 1789, the year the U.S. Constitution entered into force. The French law of August 16-24, 1790, which remains in application today, prohibited judicial review of legislative and administrative acts, as did the country's first written constitution, completed in 1791.² By 1804, a new legal system had emerged. It was constructed on the principle — a corollary of legislative sovereignty — that courts must not participate in the lawmaking function. The judge was instead imagined as a virtual “slave of the legislature” or, more precisely, a slave of the code system of law.³ The codes are statutes that, in their idealized form, purport to regulate society both permanently and comprehensively, thereby reducing judicial discretion to nil. Through mimesis and war, the code system and the prohibition of judicial review spread across Europe. Although the nineteenth century saw near continuous regime change, and old states disappeared or were absorbed into new ones, a relatively stable constitutional orthodoxy nonetheless prevailed. In this orthodoxy, constitutions could be revised at the discretion of the lawmaker; separation of powers doctrines subjugated judicial to legislative authority; and constraints on the lawmaker's authority, such as rights, either did not exist or could not be enforced by courts.

In 1903, the leading Public Law scholars in France were busy mounting what would become a noisy campaign to import judicial review. The movement would span three republics and as many

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1. 5 U.S. (1 Cranch) 137 (1803).

2. “Courts cannot interfere with the exercise of legislative powers, suspend the application of the laws, nor can they infringe on administrative functions, or take cognizance of administrative acts of any kind.” CONST. tit. III, ch. V, art. 3 (1791). Translations of French materials are my own. 3. As Marshall was writing *Marbury*, French lawmakers were putting the final touches on the Napoleonic Code. For an introduction and overview of the civil law system, see JOHN MERRYMAN, *THE CIVIL LAW TRADITION* (1985).

generations of scholars. In the end, it failed. The major political parties, invoking the specter of an American-style “Government of Judges,” consistently blocked proposals to authorize judicial review. They did so in the name of democracy, that is, to secure the *General Will*: the sovereignty of the People as expressed through Parliament.⁴

In 2003, after a polite nod to Westminster, parliamentary sovereignty can be pronounced dead. It was killed off during the second half of the twentieth century in successive waves of constitution-making that followed a world war, the overthrow of military dictatorship in Southern Europe, and the collapse of Communist regimes in Central and Eastern Europe. All European constitutions written after World War II establish enforceable, substantive constraints on government, including constraints on legislative and executive authority, in the form of human rights, the scope and content of which go far beyond the American Bill of Rights. With very few exceptions, all such constitutions provide for “constitutional review” by a “constitutional court.” Unlike an American-style supreme court, the European constitutional court is a specialized jurisdiction, detached from the judiciary. Its purpose is to ensure the normative superiority of the constitutional law. Such bodies have been established in Austria (reestablished in 1945), Italy (1948), Germany (1949), France (1958), Portugal (1976), Spain (1978), and Belgium (1985). After 1989, the institution spread to the post-Communist democracies of the Baltics, the Czech Republic, Hungary, Poland, Rumania, Russia, Slovakia, Slovenia, and in still other states of the former USSR and Yugoslavia.⁵

In this Article, I explore the question of why constitutional review, but not American *judicial* review, spread across Europe.⁶ I will also

4. As discussed below, Jean Jacques Rousseau’s theory of the General Will (*la Volonté Générale*) has been a core component of post-1789 French democratic and constitutional theory. See JEAN JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* (Judith R. Masters trans., Roger D. Masters ed., St. Martin’s Press 1978) (1762). Article 1 of the 1789 Declaration of the Rights of Man states: “Statute [*la loi*] is the expression of the General Will.”

5. For Western Europe, see ALLAN R. BREWER-CARÍAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* (1989), and ALEC STONE SWEET, *GOVERNING WITH JUDGES* (2000). For Central and Eastern Europe, see HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* (2000), and *CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE* (Wojciech Sadurski ed., 2002). The activities of Central and East European constitutional courts are regularly surveyed in the *East European Constitutional Review*, published by the New York University Law School. In the inter-war years, Austria, Germany, Spain, and some of the states of Central Europe had possessed some type of constitutional court, of varying effectiveness.

6. For the purposes of this paper, “constitutional review” refers to the authority of any governmental institution to declare statutes (and all other acts of government) unconstitutional. “Judicial review” comprises but one mode of constitutional review: that which is exercised by the judiciary in the course of processing litigation.

argue that, despite obvious organic differences between the American and European systems of review, there is an increasing convergence in how review actually operates. I proceed as follows. In Part I, I examine the debate on establishing judicial review in Europe, focusing on the French. In Parts II and III, I contrast the European and the American models of review, and briefly discuss why the Kelsenian constitutional court diffused across Europe. In Part IV, I argue that despite important formal, institutional distinctions, there is increasing convergence in how the two systems of review actually operate.

I. PROHIBITION AND ITS DISCONTENTS

One enduring legacy of the French Revolution is the prohibition of judicial review.⁷ The purpose of the prohibition is to seal off the “political function” (lawmaking) from the “judicial function” (dispute resolution), thereby securing the supremacy of statute within the legal order.

From the first moments of the Revolution, the Rousseauian identification of legislation with the General Will and legislators with popular sovereignty was constitutionally enshrined,⁸ producing a separation of powers doctrine that rigidly circumscribed judicial authority. During this period, parliamentarians thought the judiciary a corrupt and reactionary enemy of social reform and decried the “confusion of powers” entailed by judicial review (i.e., judicial and lawmaking functions are alleged to be indistinguishable). Not surprisingly, the *Parlements*, judicial institutions that exercised a form of review over royal acts under the *Ancien Régime*, were an early casualty; for all practical purposes, they were abolished by the Assembly in a decree of 1789.⁹ Following Rousseau, statutes were to be the only legitimate source of law, and the codes were to be written in the most simple and nontechnical language possible. In this way, politics would be made transparent, the legitimacy of the new social compact assured, and the multitude of intermediate institutions and social practices separating the People from the State, and obscuring that fundamental relationship, could be cleared away. The legislature

7. In France, the prohibition was formalized as a punishable offense in the penal code. Article 127 of the code states that “judges shall be guilty of an abuse of their authority and punished with loss of their civil rights” for interfering with the legislature or administration “by issuing regulations containing legislative provisions, by suspending application of one or several laws, or by deliberating on whether or not a law will be published or applied.” Dating from the Napoleonic era, the provision has never been abrogated.

8. Article 6 of the 1789 Declaration of the Rights of Man states: “Legislation is the expression of the general will [*la volonté générale*].”

9. See A. ESMEIN, *COURS ELEMENTAIRE D'HISTOIRE DU DROIT FRANCAIS* 518-40 (1903); M. PETIET, *DU POUVOIR LEGISLATIF EN FRANCE* 222 (1891); J.H. SHENNAN, *THE PARLEMENT OF PARIS* (1968).

considered legal science to be one of the more mystifying of these institutions, and it was hoped and expected that lawyers, and their penchant for doctrinal commentaries and formalist discourse, would gradually obsolesce and disappear.¹⁰ Judges could then proceed in a straightforward manner, as civil servants applying the codes.¹¹

To make a convoluted story too simple, the new separation of powers doctrines favored the development of specialized jurisdictions detached from the judiciary. France's two supreme courts began just this way. The Constitution of 1795 established the *Tribunal de cassation* to protect lawmakers from judicial usurpation, conferring on it the power to void judgments "that contain any manifest contradiction with statutes." Although originally part of the legislature, *Cassation* gradually evolved into a supreme appellate jurisdiction and was later explicitly attached to the judiciary. Civil judges were also enjoined from reviewing the legality of administrative acts, although a system of review gradually developed within the administration itself, without express constitutional authorization. Today, the administrative courts operate as an autonomous "judicial" system under the supervision of a specialized section of the *Conseil d'état*.

Constitutional review mechanisms were periodically proposed, and some were in fact established. In 1793, the Abbé Sieyès failed to force a vote in the *Chambre des députées* on his scheme to create a *Grand jury* ("to protect citizens against the oppression of the legislative body and the executive")¹²; but he later succeeded in vesting abstract review powers in what became the Senate of Napoléon's First Empire. Bonaparte's Senate never annulled a legislative or executive act, but the Emperor did use it to overturn judicial decisions he did not like, as

10. DONALD R. KELLEY, HISTORIANS AND THE LAW IN POST-REVOLUTIONARY FRANCE 44 (1984).

11. Although reformers recognized that problems of application might arise for judges, they worked to assure that only legislators could provide stable solutions. In 1799, one such parliamentarian put it this way:

Only the legislature has the authority to interpret the law. . . . Without this principle, judges would embark on a vast, unobstructed course of interpreting statutes according to their imaginations. . . and even their passions. Judicial institutions would thus be entirely deformed. Judges would be able to substitute their will for that of the statute. . . and establish themselves as legislators.

Quoted in J. BOURDON, LA REFORME JUDICIAIRE DE L'AN VIII 432-33 (1942).

12. The proposal was rejected after a vote on the following motion to dismiss:

considering that a court of this type already exists — it's called public opinion — and that a new such court would be disastrous for the freedom of opinion of the legislative body . . . and considering that the People are always here, that they examine the conduct of their representatives and possess the power to punish them for their abuses; I insist that this amendment be rejected.

Débats, Archives parlementaires, June 16, 1793, at 576-77.

well as “to fill gaps in the constitution.”¹³ Although the Senate disappeared in 1815, it was revived by Napoléon III for the Second Empire, if to no noticeable effect. The Fourth Republic (1946-58) had its Constitutional Committee, a bizarre body composed of parliamentarians who never actually reviewed a legislative act.¹⁴ Finally, for the Fifth Republic (1958-), General De Gaulle and his agents established a quasi-Bonapartist institution,¹⁵ the Constitutional Council, as a means of ensuring executive control over the legislature. The Council now operates on a radically different basis, mainly to review the constitutionality of legislation that has been proposed by the executive and adopted by parliament, before it has entered into force. As discussed at length in Part III, pre-enforcement constitutional review — which Europeans call *abstract review* — is today found across the Continent. In France, the various constitutional review mechanisms established after 1789 have always been of an abstract nature. The logic, again, flows from separation of powers (legislative sovereignty): once a statute has entered into force, its legal validity may not be challenged.

From the perspective of French separation of powers orthodoxies, the judicial function can only be a negligible one. As Merryman writes: “Legislative positivism, the dogma of the separation of powers, the ideology of codification, the attitude toward interpretation of statutes . . . all these tend to diminish the judge and to glorify the legislator.”¹⁶ But appearances can deceive. In the rest of this section, I describe and evaluate what I will show to be a “relatively” — and meaningfully — “autonomous” French legal tradition. The French use the term *le Droit* to describe the complex relationship between legal institutions, jurisprudence, and legal scholarship, with an emphasis on the latter. The community of legal scholars is also called *la Doctrine*. I will use both these terms. By relative autonomy, I mean the extent to which *le Droit*, and especially the legal discourse propagated by *la Doctrine*, does not conform to the classical model described above,

13. IRENE COLLINS, *NAPOLEON AND HIS PARLIAMENTS* 63 (1979).

14. The establishment of the Constitutional Committee is discussed in ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* 27-29 (1992).

15. General de Gaulle had little patience for legal niceties, once stating:

Three things count in constitutional matters. First, the higher interest of the country . . . and of that I alone am judge. Second, far behind, are the political circumstances, arrangements, tactics . . . Third, much further behind, there is legalism. . . . I have accomplished nothing in my life except by putting the welfare of the country first and by refusing to be entrapped by legalisms.

James Beardsley, *Constitutional Review in France*, 1975 SUP. CT. REV. 212-13. Later de Gaulle asked of a biographer, “Do you really believe I am bound by the constitution?” *Id.*

16. MERRYMAN, *supra* note 3, at 56.

evolving, instead, its own internally derived set of moral and professional standards of conduct.¹⁷

A wide range of judicial activities may provide evidence of autonomy, each likely flowing from one common source: the deeply held philosophical attachment to the notion of the law as a holistic system, with its own internal means of determining purpose and meaning. Simplifying, because the aim of *le Droit* is to perfect this system, it is thought both natural and necessary to insulate the law from the vagaries of the social world. There is, accordingly, a deep animosity to the incursion of *le Politique* — partisan passions, goings-on in parliament, and the like — because “things political” threaten to undermine this effort at perfection.

The widespread devotion to the law-politics distinction explains to a large extent why the public law — constitutional and administrative law — has always suffered a relative lack of prestige within the ranks of the French legal community. Because private, especially economic, relations were traditionally considered to be outside the interference of government, the civil (or “private”) law became the center of gravity for legal philosophy and science. Indeed, as Kelley notes, the civil code served almost “a constitutional function” for *le Droit*, being “the area of law in which the sole function of government was the recognition and enforcement of private rights.”¹⁸ In the nineteenth century, judges and publicists consciously exploited the relationship between judicial authority and the defense of fundamental, that is, “natural,” rights and were largely successful in reestablishing judicial primacy over interpretation.¹⁹ In contrast, the public lawyer’s universe is a provisional one, continually being scrambled by first one manifestation of political power, before being recast by another. For the whole of the nineteenth century, a stable set of public liberties can be located only with great difficulty and are seemingly impossible to defend juridically.

The most dramatic evidence of the relative autonomy of public law is to be found in doctrinal materials, not in the judgments of courts. In France, the ideology of codification did not succeed in eliminating legal discourse, although that was one of the ambitions of the code system.²⁰ On the contrary, the legal scholar reemerged as the principal

17. The question of how to define and then operationalize concepts associated with the “relative autonomy” of legal institutions, legal discourse, or “legal consciousness” is a complex one that I do not consider fully here. See STONE, *supra* note 14, at 10-15, ch. 1; Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Rogers Smith, *Political Jurisprudence, the “New Institutionalism,” and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988).

18. MERRYMAN, *supra* note 3, at 92-93.

19. KELLEY, *supra* note 10, at 56-71, 134.

20. “Bonaparte, watching the rising tide of jurisprudence, is said to have cried: ‘My code is lost.’” KELLEY, *supra* note 10, at 44.

protagonist in the ongoing project to perfect the legal system, facilitated by the community's insularity. Indeed, an extraordinary renaissance of public law occurred during the second decade of the Third Republic, and the discipline subsequently entered a golden age. I can only offer some tentative explanations for the causes of this Renaissance. First, although the prior century was an unstable one — no constitution had lasted more than fourteen years — by at least the 1890s a remarkable consensus had developed on the utility of the constitutional laws of 1875 (perhaps because they were so flexible). By the early twentieth century, the Third Republic and its constitutional life had come to be seen as a natural state of affairs. Second, a series of laws which sought to guarantee what in France are called “public liberties” were passed — on free association, union membership, freedom of the press, and so on — and these came to be seen as part of a judicially applicable bill of rights. Third, and partly in consequence of the above, the *Conseil d'état* was gradually assuming a judicial identity of its own.²¹ Fourth, new social movements, particularly on the left, were perceived by legal scholars as significant threats. Many of these scholars worked to show that a fundamental purpose of *le Droit* was to develop, as a means of achieving social order, what was alleged to be the law's inherent function of social integration.²²

In any event, during this period public law began to be taught as a separate branch of the law, and *la Doctrine* began to evolve independently. Specialized journals appeared, treatises multiplied and lengthened, and scholars, drifting away from projects oriented primarily to order the chaos of constitutional history, became consumed with the study of case law, especially the *Conseil d'état*'s. Statutes ceased to be recognized as dominant sources of law, freeing doctrinal commentary to lobby courts, not least to convince judges to rebel against strict separation of powers. In sum, this revival constituted a self-conscious movement to increase the prestige of Public Law and the social power of public lawyers. In 1894, the founder and first editor of the *Revue du droit public*, lamenting the

21. In 1872, the *Conseil d'état* was expressly recognized as a court, and it asserted for itself independence from the direct control of the ministries in 1889. It was thus able to shake off some of the taint of its imperial origins, and to provide a stable source of doctrinal commentary.

22. Henry Nezard argued that “it is certain that, provoked by the frequency of abusive and arbitrary laws made in evident violation of every judicial sense, a powerful doctrinal movement developed to bestow upon the courts the power to refuse to apply laws contrary to the Constitution.” A. ESMEIN, *DROIT CONSTITUTIONNEL* 133 (1921). It is unlikely that Third Republic legislation was more abusive than what had occurred in the past — by any standard. On the contrary, it is much more likely that the movement developed when it did because for the first time there was a greater chance that policymakers could be influenced by *la Doctrine*.

fact that all too often politicians and journalists ignore *la Doctrine*, explained the *Revue's* "program" in the journal's inaugural issue:

We hope that the idea of public law, that the forms of public law, that the procedures of public law will penetrate more deeply, each and every day, into constitutional, administrative, and international matters. Then and only then can any institution acquire the force of resistance that will permit it to brave the storms which will confront it.²³

This formative period in the history and sociology of modern French public law²⁴ yielded a coherent argument for judicial autonomy, founded on the rejection of the ideology of the General Will: legislative sovereignty and its attendant prohibition against judicial review. This argument can be broken down into three main elements: (a) the belief, traceable to legal theorists of the *Ancien Régime*, that the constitution enjoys a special status as "higher law" in any hierarchy of legal norms, and that the judicial protection of that hierarchy is essential to the achievement of both political legitimacy and social order; (b) the belief that American-style judicial review is the only acceptable form of constitutional review, and that judges are morally and professionally required to begin exercising its review authority immediately; and (c) the effort to show that the evolution toward judicial review is not only natural and inevitable, but that judges had already begun doing it. Each of these elements will be examined in turn.

A. *La Doctrine, Normative Hierarchies, and the "Necessity" of Judicial Review*

The inclination to construct and then secure normative hierarchies is a central focus of European constitutional theory. The logical result of the statutory sovereignty is to make such efforts relatively simple: statute takes precedent over ministerial decree, decree takes precedent over a local regulation, and so on. But this was not always the case. The pre-Revolutionary notion of limitations to absolute monarchical sovereignty, flowing from the scholarly development of the natural law, is an example. What is remarkable about modern (i.e., post-1890) legal discourse is the extent to which publicists embraced neo-natural law ideals, seizing upon the rejection of the official hierarchy as inimical to *le Droit* itself. As Léon Duguit, arguably France's most influential public law scholar through the early decades of the twentieth century, wrote in 1917:

[T]he persistent effort of French judicial doctrine has ever been, from 1789 to the present time, to find the true juristic basis for the legal

23. Ferdinand Larnaude, *Notre programme*, 1 REVUE DU DROIT PUBLIC 3-4 (1894).

24. I am aware of no scholarly treatment of either.

limitation upon the power of the State, and to insure its sanction. Its conceptions have been diverse. . . . But the end in view has always been the same; namely, to prove that the powers of the State are limited by a jural principle (*une règle de droit*) superior to the State itself.

....

Does there exist a jural principle (*une règle de droit*) superior to the State, which forbids it from doing certain things and commands it to do certain others? . . . If the answer is no, then there is no public law, since no act or refusal to act on the part of the State will be contrary to law.²⁵

And elsewhere:

[W]e believe firmly that there is a rule of law above the individual and the State, above the rulers and the ruled; a rule which is compulsory on one and on the other; and we hold that if there is such a thing as sovereignty of the State, it is juridically limited by this rule of law. . . . [T]o express this in words . . . is that of legal art. If this is too much for legal science and legal art, their study is not worth a moment's effort.²⁶

Scholars worked to reconstruct the foundations of their field by positing the existence of an overarching higher law, to be elaborated and refined by *le Droit*, that is through scholarly activity. They grafted their project onto deep roots in the French legal tradition. Certain physiocratic legal scholars, like Dupont, Le Trosne, Le Vauguyon, and Le Mercier, had refined theories of judicial authority based on just such notions before being overwhelmed by the events of the Revolution.²⁷ In these theories, “the laws of absolute and essential justice” were considered to be God’s law, presocial and unwritten, which judges alone had the capacity to discover, interpret, and apply. In the domain of positive law, the constitutional laws — those which establish the organization of the state and the procedures for legislating — were thought supreme and the foundation of all social order. Thus, no ordinary law could be considered to have legal status if it did not conform to them. Higher law also structured conceptions of the judicial role: judges, it was argued, had an “inescapable,” even “religious,” duty to refuse to enforce unconstitutional laws. “Ignominy and disgrace would be heaped upon [their] heads” — worse, the social order would collapse — if they failed to fulfill this duty.²⁸ While these notions lost their force during the century after the Revolution, major

25. Léon Duguit, *The Law and the State*, 31 HARV. L. REV. 1, 1-2 (1917). Duguit spent some time at the Harvard Law School during this period.

26. Léon Duguit, *Theory of Objective Law Anterior to the State*, in MODERN FRENCH LEGAL PHILOSOPHY 237-48 (Arthur W. Spencer ed., 1921).

27. See MARIO EINAUDI, THE PHYSIOCRATIC DOCTRINE OF JUDICIAL CONTROL (1938). Einaudi leaves the French quotations in their original French; the translations here are therefore my own.

28. *Id.* at 35-45, 71.

figures such as the Abbé de Sieyès²⁹ and Benjamin Constant³⁰ gave them periodic salience. Both echoed Sieyès's famous phrase — iterated before Marshall handed down *Marbury* — that: “A constitution is a body of obligatory laws, or it is nothing,”³¹ and therefore must not be “reduced to [the status of] a cheap chapter in the civil code.”³²

After 1890, no major figure in French public law took issue with the logic of Sieyès and Marshall. Henceforth, doctrinal commentary on the written sources of Public Law begin with the constitution, rather than statute. Maurice Hauriou asserted that:

The national Constitution, being the most direct expression of national sovereignty is the supreme law of the land. This superiority consists of two elements: 1) the Constitution delegates powers to the representative institutions, which the Constitution has established; 2) the Constitution is superior to ordinary law, a superiority which logically leads to a system in which provisions of ordinary laws which are contrary to the text or the principles of the constitution are invalid.³³

This point is made dogmatically, even by treatise writers such as Carre de Malberg who opposed, as a practical matter (because not in principle), the introduction of judicial review into France.³⁴

Given judges' almost fanatical worship of statute, the reverence for statute was viewed as the great obstacle to be overcome by *le Droit*. The enemy of the movement was Rousseau, “the father of ‘Jacobin despotism,’ and ‘Caesarian dictatorship.’”³⁵ “We must attack at its root the belief in the absolute power of the General Will,” Hauriou writes, “Few false doctrines have had so evil an influence as that doctrine.”³⁶ Duguit set about to show his colleagues that the orthodox, “metaphysical conception” of statute, according to which legislation constitutes “the formulated command of [indivisible] sovereign power,” could no longer be sustained. By “metaphysical,” Duguit simply meant the traditional notion of the state as a sovereign unity, or “person,” against which he offered his “realist” notion, of the state as a multi-organization entity made up of many individuals: “A statute is simply the expression of the individual will of the men who make it . . .

29. EMMANUEL SIEYES, QU'EST-CE QUE LE TIERS ETAT (Droz ed., 1970) (1789).

30. BENJAMIN CONSTANT, COURS DE POLITIQUE CONSTITUTIONNELLE (1819).

31. PAUL BASTID, SIEYES ET SA PENSEE 598 (1939) (quoting Sieyès).

32. J.H. CLAPHAM, THE ABBE SIEYÈS: AN ESSAY IN THE POLITICS OF THE FRENCH REVOLUTION (1912).

33. MAURICE HAURIOU, PRECIS DE DROIT CONSTITUTIONNEL 261 (1923).

34. *See infra* note 39.

35. KENNETH H.F. DYSON, THE STATE TRADITION IN WESTERN EUROPE 172-73 (1980).

36. MAURICE HAURIOU, PRINCIPES DU DROIT PUBLIC 235 (1910).

the private members of a legislative body. Beyond that we are in the realm of fiction.”³⁷ Gaston Jèze, the editor of the *Revue du droit public* in 1924, echoed Duguit:

Statutes do not express the national will; in France, a law is merely the manifestation of the will of the individuals — deputies and senators — who have voted for it. Deputies and senators say of course that they represent the national will. But this assertion can not change the reality of the situation. Juridically, a statute is only the manifestation of a certain number of individuals.³⁸

This “realist” notion of the statute expresses a deep mistrust and a scarcely veiled animosity toward parliament, or what *la Doctrine* calls “political authority.” Statutes, according to Jèze, because they are made by politicians — “whose technical competence might be mediocre and whose impartiality and spirit of justice might be questioned” — statutes, “no longer merit . . . the fetishism and the idolatry with which they have been invested.”

The hard reality was that the constitutional laws of 1875 were wholly inadequate as sources for the substantive limitation of legislative sovereignty. As skeptics like Carré de Malberg pointed out, they contained no reference to any body of fundamental rights or even to general principles of law; they “formulated no judicial rules” and were “vague and general” even as to procedural requirements. Worse, explicit provisions reinforced rather than eroded parliamentary sovereignty — simple legislation was all that was required to amend them, for example.³⁹ The movement countered by arguing that the constitution contained juridically discoverable, unwritten provisions, as well as the 1789 Declaration of the Rights of Man. Hauriou’s argument on the former is representative:

It would be an error to believe that the principle of constitutional supremacy only included that which is written in the Constitution; it includes many other things, for example . . . the principles of individualism [*l'ordre individualiste*] which are at the foundation of the State. . . . These principles constitute a kind of constitutional legitimacy which take their place above even the written constitution.⁴⁰

37. LÉON DUGUIT, *LAW IN THE MODERN STATE* 70 (1919).

38. Gaston Jèze, *Le contrôle juridictionnel des lois*, 41 *REVUE DU DROIT PUBLIC* 402 (1924).

39. R. CARRE DE MALBERG, 2 *CONTRIBUTION A LA THEORIE GENERALE DE L'ETAT* 545-50, 576-622 (1922). Carre de Malberg, although sympathetic to the movement’s objectives and to judicial review in theory, was the most influential public law specialist to remain faithful to the traditional model. His position was that since legislative and constituent powers were fused in France, these debates were entirely academic. Still, he argued that as a matter of legal science, the French doctrine of legislative sovereignty was “unacceptable.” *Id.* at 549-50 n.33.

40. MAURICE HAURIOU, *DROIT CONSTITUTIONNEL* 298 (1923). The notion that individual rights are the basis of higher law is echoed even by those who were not ready to support the introduction of judicial review. See ESMEIN, *supra* note 22, at 29-30.

As for the Declaration, Duguit argued that since this list of rights had been adopted before any written constitution, and had never been abrogated, it must be considered an immutable feature of the constitutional landscape.⁴¹ For his part, Hauriou called the declaration a constituent part of a permanent “social constitution,” “the basis of public law,” and thus higher than even the written, “political” constitution.⁴²

No violence is done to this doctrinal movement by describing it in terms the physiocrats would recognize, namely, in terms of natural law.⁴³ For its proponents, the constitution is only partially and imperfectly written; the solemn function of *le Droit* and judicial authority is to complete and perfect the constitution by, in essence, incorporating the natural law. Once the constitution is expanded in this way, once higher law is made the source of all legitimate authority, all laws, including the constitutional text, must conform to them, or be themselves unconstitutional. And since the development of the unwritten, extra- or supraconstitutional law is a domain wholly within the purview of *le Droit*, *le Droit* must be recognized as a sovereign authority in itself.⁴⁴ “This school does not recognize the sovereignty of the State, but only the sovereignty of *le Droit*, and this formula deserves approval,” wrote Roubier. From this perspective, neo-natural law doctrines may be characterized as functionally equivalent to rule of law notions in Anglo-American legal theory. That is, they both attempt to rationalize the coexistence of a system of judicially enforced limitations on public authority on the one hand with a sovereign lawmaker on the other (a task made more difficult for the French in the absence of the legitimizing notion, inherent in common-law doctrines, that judges help to make the law as they decide cases).

Against this onslaught, the traditional separation of powers doctrine crumbled and was swept away, and with it the illegitimate prohibition against judicial review. “Any unconstitutional law,” Duguit asserted, “contrary to a superior principle of *le Droit*, inscribed or not . . . written or not . . . is a law without effect, a law without executory force,” and one that people, most of all judges, ought to

41. LEON DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* 673 (1923).

42. HAURIOU, *supra* note 40, at 297-300.

43. PAUL ROUBIER, *THÉORIE GÉNÉRALE DU DROIT* 182-92 (2d ed. 1951); François Gény, *La Notion de Droit en France*, in 1 *ARCHIVES DE PHILOSOPHIE DE DROIT ET DE SOCIOLOGIE JURIDIQUE* 9, 18 (1931). There were, of course, great differences in form and substance between the natural law as articulated in the seventeenth and eighteenth centuries and that propagated by neo-natural lawyers in the first part of the twentieth century. Neo-natural lawyers, for example, viewed the law not as fixed and unchanging across time and space, but as an evolutive product of legal science and judicial activity. See CARL JOACHIM FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 181 (1963).

44. ROUBIER, *supra* note 43, at 281.

disobey.⁴⁵ Whereas opponents of judicial review had long argued that the review of legislation would lead to legal uncertainty and social chaos, Duguit and others turned the argument on its head: disorder is brought about by legislators who disregard and violate the “objective” norms discovered and developed by *le Droit*.⁴⁶ Judicial review, on the other hand, has the power to reinforce or restore systemic legitimacy in the face of despotism. In the absence of review, legislation that violates “inalienable and imprescriptible natural rights” may be promulgated, and its enforcement might lead, or even require, citizens to exercise their natural right to revolt against an unjust regime.⁴⁷

The dominant model of judicial authority for French public law specialists was provided by America.⁴⁸ From at least 1890 until well after 1958, every major figure in French public law condemned the very idea of a special constitutional court detached from the judiciary, and instead praised the American system.⁴⁹ They condemned “political review” exercised by a state organ detached from the judiciary without reference to what Americans would call a “case or controversy.” Equally important, critics argued that if a special constitutional court was to be established, and was to operate effectively, the practice of constitutional review would be continuously embroiled in political and partisan controversy. It was therefore thought necessary that review be separated from the legislative function. As Hauriou wrote:

We condemn absolutely any system of constitutional review by a political organ because such review must be both independent from and inoffensive to the government. . . . Such review, of whatever type, which occurs during the law-making process, and which hinders or even delays a law’s promulgation, risks provoking the worst conflicts, because it confronts parliament in the heat of that process. One of the wisest policies of *le Droit* consists in refusing to intervene . . . until after the fires have calmed, and political passions are no longer engaged. Premature intervention would lead to conflict without end, and would compromise the judge himself in [partisan] battles. We must therefore wait until the law has been promulgated, and sometimes long afterwards, before the question of its constitutionality is to be raised. . . . It’s for this reason that we are obliged to turn toward the judge, if still taking precautions to see

45. DUGUIT, *supra* note 41, at 660-68.

46. *See* Duguit, *supra* note 25.

47. ROUBIER, *supra* note 43, at 282.

48. In 1881, A. Saint-Girons wrote in his extremely influential *Essai sur la séparation des pouvoirs*: “If ever our country was to be so happy to enjoy a system of judicial authority as well organized as in the United States, if ever the tenacity with which revolutionary prejudices was lost, we would finally understand that judges are not the enemy to weaken, but the truest friend of public liberties.” A. SAINT-GIRONS, *ESSAI SUR LA SEPARATION DES POUVOIRS* 545-61 (1881).

49. I know of no exceptions. Even the great critic of the movement, Carre de Malberg, called the American system of judicial review “the best expression of the principle of national sovereignty.” *See* MALBERG, *supra* note 39, at 545-50.

that his role does not become political, that is, by rigorously restricting it to the litigation process.⁵⁰

American constitutional theory provided the movement with a powerful reinterpretation of the separation of powers. The classic texts (the law of 1790 and the constitution of 1791 quoted above), it was argued, were either no longer applicable to the “modern judiciary,” or only prohibited pre-enforcement (abstract) review by judges. That is, judges were enjoined from “suspending the execution” of duly adopted laws, something quite different from refusing to apply them in the judicial domain.⁵¹ Judicial review, in the normal discharge of the judicial function, however, violates no separation of powers; instead, control constitutes the fulfillment of the judicial function to resolve legal disputes. A nineteenth-century American rationalization is imported in its entirety and applied to the contemporary situation in France. Duguit stated:

It has long been accepted dogma that no court could accept a plea of unconstitutionality and refuse to apply a formal statute even where they considered it unconstitutional. . . . The principle of the separation of powers leads to an entirely different solution. A court which refuses to apply a statute on the grounds of unconstitutionality does not interfere with the exercise of legislative powers. It does not suspend its application. The law remains untouched. . . . It is simply because the judicial power is distinct from and independently equal to the two others that it cannot be forced to apply the statutes it deems unconstitutional.⁵²

Duguit and his colleagues, believing that judges could be “led” by *la Doctrine* and “the sheer force of events to this conclusion,”⁵³ began to lobby judges directly.

The movement worked to show judges that they were juridically required to exercise what Americans would call substantive judicial review; they also argued that judges had already begun doing so, but apparently did not yet know it.⁵⁴ The most important line of decisions supporting this interpretation involved the right of public employees to strike, heard by the *Conseil d'état*, beginning with *Winkell* (1909).⁵⁵ That case involved a provision of a 1905 law that required the government, if it were to fire certain classes of state employees, to notify the latter, in writing and in advance, of the reasons for dismissal. Mr. Winkell's contract was terminated, along with a large number of his postal service colleagues, after having taken part in a postal strike,

50. HAURIOU, *supra* note 33, at 267-68.

51. *Id.* at 281-82.

52. DUGUIT, *supra* note 37, at 87.

53. *Id.* at 92.

54. *Id.* at 89.

55. WINKELL, 3 CONSEIL D'ÉTAT 147 (1909).

and he brought action on the grounds that prior notification had not been given. The *Conseil d'état*, appealing to no source of law and making no other attempt to justify its decision, ruled simply that the law was not applicable in dismissals pursuant to strikes involving public employees (despite the fact that the law contained no such exception).

Hauriou (whose influence was enormous, not least because he wrote the doctrinal notes on administrative jurisprudence published in the quasi-official *Recueil Sirey* and in the *Revue du droit public* for more than three decades) argued that, if correct, the decision to refuse to apply the law could make sense only if the *Conseil d'état* believed that the law violated a higher, constitutional principle. Hauriou found this principle in certain provisions of the constitutional law of February 25, 1875. Among other things, these gave to the executive the power to “name civil employees” and, Hauriou inferred, the responsibility to ensure “the continuity of public service.” In a long line of subsequent cases, the *Conseil d'état* appeared to adopt Hauriou’s line of reasoning, and even his language, although it did not reference the constitution or the power of constitutional review. Hauriou, Duguit, and others then began to claim that the judges “without expressly admitting it, and perhaps without even admitting it to themselves, have opened the way to judicial review.”⁵⁶

In the 1920s, this campaign achieved an extraordinarily high degree of visibility, and began to be debated publicly in the press.⁵⁷ Outsiders took notice. In 1921, Edouard Lambert’s study of American judicial politics — *The Government of Judges and the Struggle Against Social Legislation in the United States* — appeared, and quickly became essential reading.⁵⁸ Lambert’s work radically departed from traditional French public law scholarship. He eschewed formalist exegesis of jurisprudence and abstract legal categories, focusing instead on the socialization and ideological orientation of judges. Empirically, Lambert chose to analyze a broad class of judicial decisions: those that had blocked whole categories of economic legislation (case law that Americans classify as “substantive due process” review). Lambert’s thesis was twofold. First, by virtue of their social origins, educations, and recruitment, judges were always reactionary, to the point of being dangerous to the proper evolution of society. Second, judicial review, because it inevitably leads to

56. HAURIOU, *supra* note 40, at 319. Six years later, Hauriou wrote: “[I]t can no longer be contested that the *Conseil d'état* was not engaged . . . in interpreting the constitution, and with great vigor . . . based on the constitutional principle of the continuity of public service.” HAURIOU, *supra* note 33, at 286; see DUGUIT, *supra* note 37, at 90-91.

57. See the newspaper, LE TEMPS, Nov. 14-29, 1925.

58. EDOUARD LAMBERT, LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LEGISLATION SOCIALE AUX ETAS-UNIS (Marcel Giard & Cie eds., 1921).

judge-made constitutions, must also inevitably give effective governing power to courts. Lambert introduced the term *gouvernement des juges* — which refers to any situation in which judges effectively make, rather than merely apply the law — into French parlance.

Lambert, who meant his book to be read as a direct response to “the skillful and perseverant campaign . . . to introduce into our constitutional life judicial review,” argued that an American Government of Judges situation would be the likely result if the movement were to succeed.⁵⁹ Pointing out that *le Droit* in France was dominated by conservative, individualist notions of classic liberalism and neo-natural law, Lambert’s conclusion was unequivocal:

The day when the French judiciary acquires the power of judicial review, it will discover in our Declaration of rights all of the constituent pieces of what I have described as due process of law, and which have provided the means by which the American judiciary to force the legislature to bow to their supremacy. The same patient and surreptitious play of constitutional decision-making, which permitted American jurisprudence . . . to enclose the legislature in a network of constitutional limitations which every day becomes more dense, will probably enable ours to bind the French legislature as quickly and quite as tightly.⁶⁰

French political life would be permanently altered: *laissez-faire* capitalism and its attendant morality would be frozen judicially while society evolved away from both; working-class movements would be frustrated and become dangerously alienated; and political parties would seek to control the recruitment of judges as a necessary means to ensure the success of their programs.⁶¹

Lambert’s book had an incredible impact: it destroyed whatever effective political support for judicial review that existed within parliament and weakened doctrinal consensus. For politicians, according to Lemasurier: “Judicial review was no longer considered to be only . . . ‘a play thing for jurists,’ nor even a means of defending individual liberties, but was henceforth a weapon in the hands of Reaction” — palatable only to the far right and to representatives of monopoly capital.⁶² Whereas before 1921, the doctrinal community was all but unanimously in favor of judicial review, once dutiful adherents began to express their reticence, including the editor of the *Revue du droit public*, Gaston Jèze. Having been an advocate of judicial review since at least 1895,⁶³ he withdrew his support in an

59. *Id.* at 4-7.

60. *Id.* at 227.

61. *Id.* at 220-74.

62. JEANNE LEMASURIER, *LA CONSTITUTION DE 1946 ET LE CONTROLE JURIDICTIONNEL DU LEGISLATEUR* 22 (R. Pinchon & R. Durand-Auzias eds., 1954).

63. Gaston Jèze, *Contrôle des délibérations des assemblées délibérantes*, 2 REVUE GENERALE D’ADMINISTRATION, May-Aug. 1895, at 401, 411.

influential editorial-style article in 1924.⁶⁴ Jèze did not hesitate to confirm — approvingly — that *le Droit* had conclusively demonstrated the logical necessity of judicial review, but he dismissed the movement's demonstrations that the courts had already begun doing it as acts of "pure imagination."⁶⁵ Unfortunately, he argued, "At the present, French public law being what is applied *presently* by the courts . . . the power to control the constitutionality of legislation does not exist"; and this would remain the case, he argued, so long as judges suffered from low prestige and lacked sufficient independence.⁶⁶ In his opinion, following Lambert, judicial review, far from increasing judicial prestige and authority, could very well have the opposite effect:

Let us suppose, and the hypothesis is not an idle one, that the ordinary courts or even a supreme court showed itself hostile towards democratic, social, or fiscal reforms. Under the pretext of substantive judicial review, these courts would have the formidable power to block, judicially, reform legislation of this kind. We would then have a government of judges.

And towards what result? Conflict between a democratically elected parliament desirous of social reform . . . and [judicial authority] . . . would lead to the obliteration of the judges, to the discredit of the courts, and a new diminution of the prestige and of the independence necessary to the judiciary. . . . May the French courts avoid such a catastrophic course!⁶⁷

In 1936, the practical side of the debate was put to rest by the courts themselves. In *Arrighi*, the *Conseil d'état*, echoing Jèze, ruled that: "In the present state of French public law, this ground of appeal [the unconstitutionality of a statute enabling an administrative act] may not be entered before the *Conseil d'état*," a position subsequently adhered to by other courts.⁶⁸ The doctrinal debate did not die, even during Nazi occupation, but was left hanging pending the outcome of the drafting of a new constitution.

B. *Rejecting Review and Rights*

With the demise of the Vichy regime, a Constituent Assembly, comprised of representatives of more than two dozen political parties, began the task of drafting a new constitution (for the Fourth Republic, 1946-58). The Assembly's deliberations are important for two reasons.

64. See Jèze, *supra* note 38.

65. *Id.* at 400-01, 408-11.

66. *Id.* at 412-13.

67. *Id.* at 421-22 (footnote omitted).

68. LEMASURIER, *supra* note 62, at 170 (footnote omitted). See *id.* at 169-72 for a discussion of this caselaw.

First, for the first time since the Revolution, national representatives voted on the question of whether to establish judicial review in France.⁶⁹ In December 1945, a committee of the first Assembly rejected a proposal for an American-style supreme court, by a vote of 39-2. In April 1946, elements within the Right again tried to gain support for a supreme court (this time to be composed of four politicians chosen by parliament, and four judges to be selected by the *Conseil d'état* and the *Cour de cassation*, with the President of the Republic acting as president and ninth member). The initiative was not brought to a vote. Instead, the Assembly adopted, 289-259, a resolution repudiating, as inimical to the French constitutional order, the principle of "constitutional review."⁷⁰

Second, although they failed to enshrine constitutional rights, the founders of the Fourth Republic managed to express their attachment to rights in a Preamble to the Constitution, a text that would ultimately transform French law. In a decision of 1971⁷¹ — hailed by some as France's *Marbury v. Madison*⁷² — the Constitutional Council began to incorporate a bill of rights into the Constitution of the Fifth Republic (1958-). It found these rights in the Preamble to the 1946 Constitution, which is mentioned by the Preamble to the 1958 Constitution. The Council did so despite the fact that the founders of the Fifth Republic, too, had firmly rejected proposals to establish or refer to constitutional rights in the constitution proper.⁷³

The very existence of the 1946 Preamble resulted from the founders' failure to unambiguously "constitutionalize" an updated version of the 1789 Declaration of the Rights of Man. On the opening of the first Constitutional Assembly, the three major party groupings agreed that the 1789 Declaration of the Rights of Man was out of date and would have to be substantially revised to be acceptable; indeed, the Assembly voted 429-119 against outright incorporation of the 1789 text.⁷⁴ The deputies then devoted fully one quarter of their rancorous,

69. During the Third Republic, a proposal to institute judicial review was dismissed without a vote. One response was recorded: "It should be added that our colleague wants to destroy the constitution," *Annales de la Chambre des deputes, Débats parlementaires*, Jan. 28, 1903, at 328.

70. LEMASURIER, *supra* note 62, at 32.

71. Decree No. 71-44, RECUEIL DES DECISIONS DU CONSEIL CONSTITUTIONNEL, 1971, at 29. For an account of this decision and its consequences for legislative sovereignty, see STONE, *supra* note 14, at 66-92, and Alec Stone, *Where Judicial Politics Are Legislative Politics*, 15 W. EUR. POL. 29 (1992).

72. George D. Haimbaugh, Jr., *Was it France's Marbury v. Madison?*, 35 OHIO ST. L.J. 910 (1974).

73. See STONE, *supra* note 14, at 49.

74. GORDON WRIGHT, *THE RESHAPING OF FRENCH DEMOCRACY* 136-58 (1948). For an overview of these politics, see PHILIP WILLIAMS, *POLITICS IN POST-WAR FRANCE: PARTIES AND THE CONSTITUTION IN THE FOURTH REPUBLIC* (1958).

often paralyzing, debates to the question of rights, exposing an almost “unbridgeable gulf between Marxist materialism and collectivism on the one hand, and Christian democracy and individualism on the other.”⁷⁵ Upon completion, the new declaration of rights became the first chapter of the Constitution of April 1946, subsequently rejected by the electorate in referendum. Had the April 1946 Constitution entered into force, the declaration would have become part of French constitutional law, and thereby binding on parliament. As the *Rapporteur* of the drafting committee, Gilbert Zaksas (Socialist), neatly stated, “The declaration is a true judicial text, part of the whole of the constitution.”⁷⁶ Raoul Calas (Communist) agreed: the “nation’s representatives of tomorrow will be obliged to conform to it, and to translate its spirit into legislation.”⁷⁷

Americans, however, might be surprised to learn that the Constituent Assembly did not mean to subjugate the authority of the parliamentary statute to that of constitutional rights. Edouard Herriot summarized the situation in these terms:

In the solemn hierarchy of texts that guarantee the liberties of the people, there are 3 rungs. There is, first, statute, which determines how principles will be applied. . . . Below legislation, there is the constitution, which brings together the organic principles [organizing] the life of this state. And below the constitution, there is the declaration of rights and responsibilities, which comes into play where politics meets or, more precisely, should meet, morality.⁷⁸

Had the constitution of April 1946 been ratified, France would indeed have seen the birth of a new bill of rights, but not therefore the inevitable death of parliamentary sovereignty.

For those who drafted the Constitution of October 1946, the judicial enforceability of rights was a dead issue. In order to save themselves time and perhaps another embarrassing rejection by the electorate, the drafting committee voted unanimously to remove the chapter on rights from the constitutional text, and to include a general statement of principles in a Preamble.⁷⁹ All agreed that the Preamble would not be enforceable. Jacques Bardoux, who led the fight both to establish a bill of rights and judicial review in the constitution, complained that: “The Preamble does not have the force of law. Its prescriptions, purely verbal and platonic, bind no one, neither the simple citizen, nor the public authorities, nor this Assembly, which is

75. O.R. TAYLOR, *THE FOURTH REPUBLIC OF FRANCE: CONSTITUTION AND POLITICAL PARTIES* 18-19 (1951).

76. *Débats, Assemblée Nationale Constituante*, Mar. 7, 1946, J.O. 1946, at 607.

77. *Id.* at 617.

78. *Id.* at 639.

79. An English translation of the Preamble to the 1946 Constitution is found in STONE, *supra* note 14, at 257-58.

henceforth free to contradict [it]. . . .”⁸⁰ Most understood the Preamble, as another member of the Assembly put it, to be “a polite bow to the general rules of the polity,” and certainly not “a juridical expression in a form which a judge could one day apply.”⁸¹ I can find no affirmation to the contrary, even by minor figures, in the debates of the Second Assembly.

In any case, the structure of the final text of the Preamble was not conducive to straightforward judicial application. To the general satisfaction of the Right, the Preamble states simply that “the French people solemnly reaffirm the rights and liberties consecrated by the Declaration of Rights of 1789 and the fundamental principles recognized by the laws of the Republics.” These latter “principles” were left unenumerated, but everyone understood the phrase with reference to the principle of “freedom of education,” a code for protecting the Catholic school system. As compensation for the Left and collectivist center, the vast bulk of the Preamble consecrates a long list of “political, economic, and social principles particularly necessary for our times,” which guarantee, among others, the following: equality of the sexes; the rights to leisure, employment, to join a union, to strike, and to obtain social security, education, and health care; and the responsibility of the state to nationalize all industries that are either de facto monopolies or that have taken on the character of a public service. The final product therefore constitutes an uncomfortable compromise between radically opposed notions of individual and collective rights, and of the proper relationship between the state and society.

With rare exception,⁸² doctrinal authorities (including two future Constitutional Council members, Georges Vedel and Marcel Waline) saw in the Preamble a welcome grounding for a renewal of its objectives. Ignoring the political context that gave it birth, most legal scholars energetically and overwhelmingly declared its full juridical status,⁸³ and the old debates were recast, if in wholly recognizable

80. Débats, Assemblée Nationale Constituante, Aug. 29, 1946, J.O. 1946, at 3361-62.

81. Débats, Assemblée Nationale Constituante, Aug. 23, 1946, J.O. 1946, at 3303.

82. See CHARLES-ALBERT COLLIARD, *PRECIS DE DROIT PUBLIC* 99 (Librairie Dalloz ed., 1950); GEORGES RIPERT, *LE DECLIN DU DROIT* 13, 17 (R. Pinchon & R. Durand-Auzias eds., 1949). Both argued that, since violations of the Preamble would incur no sanction, the text could not be considered law, but merely an expression of a certain political morality. Both nonetheless expressed displeasure with having arrived at such a conclusion.

83. See GEORGES BURDEAU, *DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES* 346-48 (R. Pinchon & R. Durand-Auzias eds., 1957); MAURICE DUVERGER, *MANUEL DE DROIT CONSTITUTIONNEL* 370-74 (5th ed. 1948); GEORGES VEDEL, *MANUEL ELEMENTAIRE DE DROIT CONSTITUTIONNEL ET DE SCIENCE POLITIQUE* 326-27, 552-54 (Librairie du Recueil Sirey ed., 1949); François Gény, *De l'Inconstitutionnalité des Lois ou des Autres Actes de l'Autorité Publique et des Sanctions Qu'elle Comporte dans le Droit Nouveau de la Quatrième République Française*, 1947 *JURIS-CLASSEURS PERIODIQUES: LA SEMAINE JURIDIQUE* 580, 613; Robert Pelloux, *Le Préambule de la Constitution du 27 Octobre 1946*,

forms. Some renewed efforts to convince judges to introduce judicial review on their own. Duverger, for example, argued that the Preamble unambiguously provided judges with a written source of general principles with which to construct an expansive case law of fundamental rights.⁸⁴ Most important, the 1789 Declaration could finally be judicially incorporated into the constitution by the judiciary; echoing Duguit, Duverger wrote:

The myth of the 'sovereignty of the National Assembly,' invoked by the parties on the left, has made it impossible to establish effective constitutional review.

However, we think that judicial review . . . is possible because no express provision of the constitution forbids it . . . and because the obstacles which opposed it under the 1875 regime have disappeared. . . . We think that judges should have the courage to declare that they will accept pleas based on the unconstitutionality of legislation.⁸⁵

Gény agreed, arguing that the preamble "formulates the most important rules of law" and constitutes "an insurmountable barrier to the legislature itself" whose enforcement, "in the present state of our political organization, can only be judicial."⁸⁶

Judges proved less courageous than hoped: to this day, no court has refused to apply a promulgated law on the basis of its unconstitutionality. But, if public law lost the war, it also won some very important battles. The movement's project to restore the primacy of judges over interpretation largely succeeded. The *Conseil d'état* began to catalogue, quite explicitly, a vast array of constitutional and extraconstitutional principles that could be invoked in attacking executive acts, but not statute. These "general principles of law" include such discoverable notions as "individual liberty," "equality before the law," "freedom of conscience," and "non-retroactivity," as well as previously existing, if unexplained, principles like "the continuity of public service."⁸⁷ Related to this development, the Preamble, and especially the 1789 Declaration, rapidly became a fertile source for annulments of executive acts,⁸⁸ and the enforceability

63 REVUE DU DROIT PUBLIC 248, 347 (1947); Jean Rivéro & Georges Vedel, *Les principes économiques et sociaux et la Constitution: Le préambule*, COLLECTION DROIT SOCIAL, May 31, 1947, at 13, 15; Marcel Waline, *Notes de Jurisprudence*, 66 REVUE DU DROIT PUBLIC 691, 694 (1950).

84. See DUVERGER, *supra* note 83.

85. DUVERGER, *supra* note 83, at 374-78.

86. Gény, *supra* note 83, at 613.

87. See JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW ch. 6 (1998); L. NEVILLE BROWN & J. F. GARNER, FRENCH ADMINISTRATIVE LAW 119-26 (2d ed. 1973).

88. See James Beardsley, *Constitutional Review in France*, 1975 SUP. CT. REV. 189, 197; see also LEMASURIER, *supra* note 62, at 187-200.

of the text was proclaimed in 1956 by the *Conseil d'état* in *Amicales*.⁸⁹ Finally, and most important, the Constitutional Council explicitly constitutionalized rights review in the 1970s, a move that we now know was a necessary, absolutely crucial stage in the Council's courtship of the Public Law establishment. By the end of that decade, *la Doctrine* had overcome its long-standing hostility to abstract "political review."⁹⁰

By the end of the 1980s, a new scholarly community, *le Droit constitutionnel*, had fully emerged. *La Doctrine* now seeks legitimation for review, and its own social power,⁹¹ by way of Austria, not America.⁹²

II. THE EUROPEAN MODEL OF CONSTITUTIONAL REVIEW

The modern European constitutional court is the invention of Hans Kelsen.⁹³ His followers and close collaborators were present at the founding of the Federal Republic of Germany,⁹⁴ and they successfully advocated a variant of the Austrian system as an

89. Conseil d'état, July 11, 1956, Recueil décisions du Conseil d'état, 1956, at 317, note Jacomet.

90. For a recounting of these events, see STONE, *supra* note 14, ch. 4.

91. The proponents of the "new constitutional law" now aggressively proclaim the primacy of law over politics, and of the constitutional law over all other domains of law. See LOUIS FAVOREU, *LA POLITIQUE SAISE PAR LE DROIT* (Economica 1988); Louis Favoreu, *Le droit constitutionnel, droit de la Constitution et constitution du droit*, 1 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 71 (1990).

92. The canonical texts are CHARLES EISENMANN, *LA JUSTICE CONSTITUTIONNELLE ET LA HAUTE COUR CONSTITUTIONNELLE D'AUTRICHE* (Librairie Generale de Droit & de Jurisprudence ed., 1928); and Hans Kelsen, *La garantie juridictionnelle de la Constitution*, 45 REVUE DU DROIT PUBLIC 197 (1928). Eisenmann, a close student of Hans Kelsen, argued in favor of a specialized constitutional court. Until the 1970s, his work was largely ignored. Today it is viewed as seminal. See *LA PENSÉE DE CHARLES EISENMANN* (Paul Amselek ed., Economica 1986).

93. That said, Kelsen partly adapted institutional materials that had developed in various Germanic federal states of the nineteenth century. For a discussion of the origins of European constitutional courts, see Klaus Von Beyme, *The Genesis of Constitutional Review in Parliamentary Systems*, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON, 21-38 (Christine Landfried ed., 1989).

94. Although I will not focus on the matter here, Germany, too, had its own turn to natural law, and legal scholars and judges also intensively debated judicial review. In 1863, a majority of the Association of German Jurists "declared itself in favor of judicial review." The debate provoked a new wave of constitutional theory culminating in the work of Kantorowicz, Fuchs, and Schmitt. For a review of these debates, see FRANZ NEUMANN, *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* ch. 2 (1964). During the Weimar Republic, the *Reichtsgesicht* nullified the application of several statutes adopted by the parliament during the 1921-25 period. The Court asserted the power to invalidate laws on its own, without express constitutional authorization, at a time when political authority was too fragmented to effectively resist. These decisions dealt mainly with the relationship between property and labor; the Court sided with the former.

alternative to American judicial review. Italy quickly followed suit.⁹⁵ Kelsen's legacy was secured when constitutional reformers in Spain, Portugal, and post-Communist Europe all rejected American judicial review and adopted Kelsenian courts. I will contrast the core elements of the European and American "models" of review in Part III. In this Section, I discuss Kelsen's own blueprint for building systems of constitutional justice in Continental legal systems.

A. *The Kelsenian Court*

The most significant experiment in constitutional review in pre-World War II Europe took place during the Austrian Second Republic (1920-34), at the instigation of Hans Kelsen. Kelsen developed the basic template for what we now call the "European model of constitutional review," first, in his role as the principal drafter of the Constitution of the Austrian Second Republic, and then as a legal theorist.⁹⁶ In 1928, he wrote a widely translated article elaborating and defending the European model of review.⁹⁷ In that article, Kelsen argued that the integrity of the legal system, which he conceived as a kind of central nervous system for the state, would only be assured if the superior status of the constitution, atop a hierarchically ordered system of legal norms, could be guaranteed by a "jurisdiction," or "court-like" body. Because Kelsen foresaw nearly all of the variations on the European model now in place, and because Kelsen's constitutional theory remains a standard reference for debates about the legitimacy of European constitutional review even today, it is worth examining these arguments closely.

Kelsen faced two hostile camps: politicians suspicious of the judiciary and judicial power, and a pan-European movement of prominent legal scholars who favored installing American judicial review on the Continent. Kelsen understood that the political elites would not accept the establishment of judicial review in Europe. Nevertheless, he guessed that a constitutional court, if granted carefully prescribed powers, might not arouse their hostility. The trick would be to show that such a system could provide the benefits of constitutional review without turning into a "government of judges."

95. In 1947-48, representatives to the Italian constitutional convention debated and rejected American-style judicial review. See Alessandro Pizzorsusso, V. Vigoriti, & G. Leroy Certoma, *The Constitutional Review of Legislation in Italy*, 3 CIVIL JUSTICE QUARTERLY 311 (1984).

96. Born in the worst of times, the Second Republic functioned properly for barely a decade before being engulfed by Fascism. The Court's review powers were rescinded by government decree in 1933. CHARLES GULICK, *AUSTRIA BETWEEN HABSBURG AND HITLER* 185-86, 877-88, 1075-77 (1948).

97. Kelsen, *supra* note 92. This section is based on ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* ch. 2 (2000).

In his 1928 article, Kelsen engaged both fronts at once. First, he distinguished the work of legislators, which he characterized as “creative” and “positive,” from the work of constitutional judges, which he characterized as “negative.”⁹⁸ Legislators make law freely, limited only by procedural constitutional law (which distributes governing authority among institutions and levels of government and establishes the rules of the legislative process). Kelsen acknowledged that the authority to declare legislation unconstitutional is also a lawmaking, and therefore political, authority:

To annul a law is to assert a general [legislative] norm, because the annulment of a law has the same character as its elaboration — only with a negative sign attached. . . . A tribunal which has the power to annul a law is, as a result, an organ of legislative power.⁹⁹

But if constitutional judges make law, they do not do so freely, since judges’ decisionmaking is “absolutely determined by the constitution.” A constitutional court is therefore only “a negative legislator.”¹⁰⁰

Kelsen’s distinction between the positive and negative legislator relies almost entirely on the absence, within the constitutional law, of a judicially enforceable charter of rights. Here we encounter another feature of Kelsen’s thought, a conception of the law and of the proper role of courts that goes under the label, “legal positivism.” Grossly simplifying, for positivists the law is that corpus of prescriptions that some person or group (a lawmaker) has made, which are enforceable by courts and other state institutions, and which are meant to apply authoritatively to specific situations. Kelsen’s conception of the unity of the legal system (a hierarchical system of interdependent rules) rested on the fundamentally *positive* nature of the constitution. Positivism is often juxtaposed to “natural law” theories, which generally assert that human will, however organized in any given society, is neither the only, nor the ultimate source of law. Instead, some foundational principles of law (such as human rights) transcend time and place, and therefore are (or ought to be) directly applicable in every legal system, even when they have not been proclaimed by a lawmaker. In the European positivist’s legal order, judges apply the acts of the lawmaker; in the natural law legal order, judges seek to “discover” and then apply principles that exist prior to and independent of any sitting legislature.

Kelsen argued that constitutions should not contain human rights, which he associated with natural law, due to their open-ended nature. Adjudicating rights claims, in his view, would inevitably weaken positivism’s hold on judges, thereby undermining the legitimacy of the

98. Kelsen, *supra* note 92.

99. *Id.* at 221-41.

100. *Id.*

judiciary itself, since judges would become the lawmakers. Thus, he wrote:

Sometimes constitutions themselves may refer to [natural law] principles, which invoke the ideals of equity, justice, liberty, equality, morality, etc., without in the least defining [precisely] what are meant by these terms. . . . But with respect to constitutional justice, these principles can play an extremely dangerous role. A court could interpret these constitutional provisions, which invite the legislator to honor the principles of justice, equity, equality . . . as positive requirements for the [substantive] content of laws.¹⁰¹

To the extent that constitutional judges would actually invoke natural law, Kelsen demonstrated, they would become positive legislators. A “government of judges” situation would ensue, and a political backlash against constitutional review would be the likely outcome.

Second, Kelsen argued that the constitutional court should be able to review the constitutionality of legislation before its enforcement in the public realm, thus preserving the sovereign character of statute within the legal system thereafter. Opposition politicians, sitting in parliament or in subnational governments within federal systems, should be able to initiate such review.

Third, Kelsen urged that constitutional courts should look as much as possible like “judicial” bodies. He insisted that professional judges and law professors be recruited to the court and emphasized that “members of parliament or of the government” be excluded; because the court would play a legislative role, he also proposed that elected officials should appoint the court’s members. Kelsen suggested that the Court be given jurisdiction over constitutional controversies brought forward through litigation in the judiciary, as a means of securing the superiority of constitutional law, and so as to link the Court’s work with formally judicial processes. Finally, individuals and/or a special constitutional ombudsmen might be given the authority to refer matters to the Constitutional Court

Outside of Austria, Kelsen’s ideas about constitutional justice were ignored or dismissed during the interwar period. Traditionalists, like the German theoretician, Carl Schmitt, argued that Kelsen’s court would not function as a court at all, but would instead become a kind of superlegislature.¹⁰² Proponents of American-style review regarded Kelsen’s ideas as heresy, a brief for “political” rather than “judicial” review. Most important, across Europe the major political parties remained hostile to the establishment of review of any kind.

101. *Id.*

102. CARL SCHMITT, *Das Reichsgericht als Hüter der Verfassung in VERFASSUNGSRECHTLICHE AUFSÄTZE* (1958); Nicoló Zanon, *La Polémique Entre Hans Kelsen et Carl Schmitt sur la Justice Constitutionnelle*, 5 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 177-89 (1989).

Legislation must respect constitutional principles, the argument went, but only legislators should possess the authority to assure that respect.

Of course, the awesome destruction of World War II made possible the diffusion of the Kelsenian court. The experience of fascism in Italy and Germany before the war, and the massive American presence in both countries after it, conspired to fatally undermine the view that parliaments could do no wrong. Taming the state — constraining government in a system of democratic controls, recognizing the liberties of individuals, and embedding states in pan-European structures (like NATO, the Convention on Human Rights, and the emerging European Communities) — was suddenly at the very top of the European agenda. As democratic reconstruction proceeded, higher-law constitutionalism became the new orthodoxy, replacing that of legislative sovereignty and the General Will.

The precepts of this “new constitutionalism” can be simply listed: (1) state institutions are established by, and derive their authority exclusively from, a written constitution; (2) this constitution assigns ultimate power to the people by way of elections; (3) the use of public authority, including legislative authority, is lawful only insofar as it conforms with the constitutional law; (4) that law will include constitutional rights and a system of constitutional justice to defend those rights. As an overarching political ideology, or theory of the state, the new constitutionalism faces no serious rival today.

The European model of review proved popular because — unlike American judicial review — it could be easily attached to the parliamentary-based architecture of the state. Nevertheless, Kelsen’s institutional blueprint had to be modified in one crucial respect. Kelsen had argued that constitutional courts should be denied jurisdiction over constitutional rights, in order to ensure that judicial and legislative functions remain as separate as possible. Since World War II, Europe has experienced a rights revolution, a hugely important movement to codify human rights at both the national and supranational levels. The burden of protecting these rights has fallen on modern Kelsenian courts.

III. THE EUROPEAN AND AMERICAN MODELS OF CONSTITUTIONAL REVIEW

Today, two basic models of constitutional judicial review exist in Western legal systems: the American and the European. The European model of constitutional review can be broken down into four constituent components. First, constitutional judges alone exercise review powers; the “ordinary” (that is, the nonconstitutional) judiciary may not invalidate norms or acts on grounds of unconstitutionality. Second, terms of jurisdiction restrict constitutional courts to resolving constitutional disputes. Formally, constitutional

judges do not preside over litigation or appeals, *per se*, which remain the purview of the judiciary. Instead, constitutional judges answer the *constitutional questions* that are referred to them by, among others, elected politicians and ordinary judges. Third, constitutional courts have links with, but are detached from, the judiciary and legislature. They occupy their own “constitutional” space, one that is neither “judicial” nor “political,” as those terms are commonly understood in Europe. Fourth, most constitutional courts are empowered to determine the constitutionality of statutes without respect (or even prior) to their application, usually upon referral by opposition legislators or other elected officials. This latter mode of review, called “abstract review,” is typically defended as a supplemental guarantor of constitutional justice, since it can succeed in eliminating unconstitutional legislation *before* harm has been done. Thus, in the European model, the judiciary enforces the supremacy of statute, while the constitutional court secures the supremacy of the constitution in relation to all other legal norms.

If European constitutional review is *concentrated*, in the sense of being exclusively located in a specialized state organ, American judicial review is *diffuse*. In the U.S. “any judge of any court, in any case, at any time, at the behest of any litigating party, has the power to declare a law unconstitutional.”¹⁰³ The power was derived by Chief Justice Marshall in *Marbury* from Article III of the U.S. Constitution. Article III confers on the courts jurisdiction over “cases” and “controversies” that “arise” under the “Constitution” and the “Laws.” If all American courts may enforce the constitutional law, the exercise of review powers remains a “judicial” matter to the extent that such exercise is necessary to resolve specific “cases and controversies.” For the purposes of constitutional law and politics, a “case” is defined as litigation in which one of the disputing parties alleges to have been damaged by the enforcement of an unconstitutional law or other public act.

In Europe, American judicial review is typically portrayed as being perfectly *concrete*: it is activated by a claim that the enforcement of an unconstitutional law caused a real person — one of the litigants — actual injury. Abstract review of statutes and other acts appears to be precluded by the “cases and controversies” requirement. Likewise, American courts are supposed to deny standing to parties that fail to show some degree of direct interest in the review of a public act, although doctrines governing standing have been famously unclear and unstable.

From an American perspective, European constitutional review requires the interjection of abstraction into the proceedings. In its

103. Martin Shapiro & Alec Stone Sweet, *The New Constitutional Politics of Europe*, 26 COMP. POL. STUD. 400 (1994).

pure form, abstract review is pre-enforcement constitutional review of legislation. It is *abstract* because it proceeds in the absence of litigation: the judge reads the legislative text against the constitutional law and then decides. There is no storyline or, if there is, the story is an imaginary or hypothetical one told to highlight the constitutional moral that comes at the end. What Europeans call “concrete review” is activated by a reference from a judge to the constitutional court. What makes concrete review nominally *concrete* is its connection to — being a stage in — a preexisting *judicial* process. Concrete review is activated when a judge sends a question to the constitutional court. She is required to do so when she has good reason to think that the controlling statutory or administrative norm is unconstitutional.

European concrete review, however, remains meaningfully abstract in an overt and formal way. Technically, the task of the constitutional court is to answer the constitutional question posed — for example, is a provision of the code unconstitutional? — not to try or dispose of litigation. The task of the presiding/referring judge is to (a) determine if the facts warrant a referral, (b) properly frame the question to the constitutional court, and (c) resolve the dispute in light of the answer given. The remaining basic type of review — the individual constitutional complaint — is the least abstract in the sense that an individual must have exhausted all other remedies before turning to the constitutional court. Thus, when compared to the Canadian, the Indian, or the U.S. supreme courts, European constitutional courts were designed as relatively pure oracles of the constitutional law. Their express function is to interpret the constitution and thereby to resolve disputes about the meaning of the constitution, rather than to preside over concrete “cases” in the American sense.

We can now see that in the United States the “case or controversy requirement” enables judicial (concrete) review while prohibiting abstract review. It does so in the service of peculiarly American separation of powers ideas. In the European model of constitutional review, a different mix of peculiar ideas not only permits purely abstract review but insists that concrete review, too, be meaningfully abstract. Each model defends its own version of separation of powers as being necessary to preserve distinctions between the “political” and the “judicial” functions, as these distinctions are understood locally. And each attacks the other version as establishing a “confusion” of powers that ultimately entails the usurpation of the legislative (or, more broadly, of the “political”) function.

IV. WHY IT MAY NOT MATTER

Traditional separation of powers doctrines in the U.S. and Europe are in deep crisis. They fail to model what judges actually do when

they exercise their powers of review; at the same time, the boundaries separating the “judicial” from the “political (legislative and executive)” function have blurred to the point of irrelevance. These claims are obviously too big to defend here, so I will only make two summary points. First, as documented elsewhere, European constitutional review has become more concrete as it has evolved.¹⁰⁴ “Ordinary” judges now engage in a great deal of constitutional interpretation and review. And constitutional courts (of which the most obvious examples are the German and Spanish) routinely determine outcomes, just as any court with general appellate jurisdiction in the U.S. would: through reviewing the decisionmaking of public authorities, including judges, in light of fact contexts and general policy considerations. These are not surprising outcomes, given that European constitutional courts, in their rights-based jurisprudence, have evolved extensive least-means (proportionality) balancing standards, which they then impose on all governmental authorities, including parliaments and judges. Second, American judicial review has become increasingly abstract. In the small space I have remaining, I will focus briefly on this latter point.¹⁰⁵

A. *Abstract Review in the United States*

In the jargon of European constitutional law, “the abstract review of legislation” refers to the review of a statute’s constitutionality prior to its application or enforcement. In the U.S., abstract review occurs most often in one of the following two situations.¹⁰⁶ First, under certain circumstances, plaintiffs may seek declaratory or injunctive relief by a judge that, if granted, suspends the application of the law in question pending judicial determination of its constitutionality. Plaintiffs commonly file such requests immediately after the statute has been signed into law by the appropriate authority. Second, under doctrines first developed by the Supreme Court pursuant to First Amendment litigation, plaintiffs may attack a law on its face, called a “facial challenge,” and plead the rights of third parties. Although there is often overlap between these two situations — a plaintiff mounting a facial challenge to a law will typically ask for preliminary relief — each deserves to be analyzed on its own.

Preliminary injunctions and declaratory judgments are legal remedies that were first developed by courts of equity. In the past fifty years or so, these techniques have penetrated into the constitutional

104. STONE SWEET, *supra* note 97, at ch. 4-5.

105. See Alec Stone, *Qu’y a-t-il de concret dans le contrôle abstrait aux États-Unis?*, 34 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 227 (1998).

106. Federal courts also continuously exercise the abstract (preenforcement) review of the rulemaking of federal agencies.

law, becoming instruments of rights adjudication. Preliminary injunctions are court orders taken to preserve the *status quo ante litem* pending a judicial resolution of the dispute on the merits. Declaratory judgments are used by judges to clarify the rights of one of the parties to a dispute, prior to that dispute's resolution. When exercising judicial review, federal courts, including the Supreme Court, commonly treat these forms of relief interchangeably. From the point of view of the plaintiff, moreover, there appears to be little difference in their relative effectiveness. The criteria that govern the granting of preliminary injunctions also apply to the rendering of declaratory judgments. Judges will give relief where a plaintiff's constitutional rights are at issue, where the plaintiff is likely to prevail on the merits, and where the plaintiff may suffer irreparable injury if relief is not granted.¹⁰⁷

All students of American constitutional law know that the American Supreme Court has held, since *Thornhill v. Alabama*,¹⁰⁸ that a statute that extends government authority to activities protected by the First Amendment is presumptively overbroad, and therefore unconstitutional on its face, regardless of whether, or how, the statute has been applied in concrete situations. Put differently, the Court views the normal methods of constitutional adjudication — which allegedly proceeds on a case-by-case basis and enables the judicial branch to correct the law over time, with reference to problems raised as a result of the law's application — to be inappropriate for adjudicating violations of the First Amendment.¹⁰⁹ Indeed, the Court treats the right of free expression as a “preferred freedom” since it underpins American democracy and the effective exercise of all other constitutional rights. In this area of the law, restrictive doctrines on standing and justiciability have therefore been relaxed. It is clear that the Court has been anxious to use its powers to protect the rights of individuals and groups who would normally not come before a court, in so far as they may refrain from exercising their rights for fear of punishment under a restrictive law.

Thus, in its present form, the doctrine of “overbreadth” carves out an exception to the general rule, a corollary of the case or controversy requirement, that an individual cannot plead rights of other individuals not party to the action. In fact, a court that rules that a

107. The rules are adapted from equity rules. In 1980, a U.S. Circuit Court of Appeals described “the traditional equitable criteria for granting preliminary injunctive relief” as fourfold: “(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).” *L.A. Memorial Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980).

108. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

109. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1023-24 (2d ed. 1988).

statute is overbroad may annul it and reverse the conviction of the defendant in the case, without having to determine first whether the expressive conduct of the defendant falls under the protection of the First Amendment. In *Spokane Arcades*, the Supreme Court summarized its approach to the problem of facial overbreadth and the rights of third parties in the following terms:

[A]n individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. If the overbreadth is “substantial,” the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction of partial invalidation.¹¹⁰

Courts resolve facial challenges in different ways. A court may render a decision that reduces the reach of a statute, without declaring its provisions unconstitutional. In such cases, the Court effectively interprets the statute in a particular way in order to make it constitutional. This “saving construction” binds the judiciary. A court may also invalidate the statute as unconstitutional “on its face.” A facial challenge will be successful if a court (1) agrees with the plaintiff that the law sweeps within its ambit activities protected by the First Amendment, thereby deterring these activities in a “substantial” and “socially significant” way, and (2) is unable or unwilling to construct a more narrow interpretation of the provisions being attacked, or to “sever” potential constitutional applications of the law from unconstitutional applications. Of course, even if the appeal fails to result in a total invalidation of the law, a partial invalidation — an exercise in “reconstructive surgery” — may be exactly the outcome the plaintiff wanted. To successfully defend a law, the government must demonstrate two things. First, it must show that whatever “chilling effect” on speech the regulation might provoke will not be substantial but rather improbable and socially insignificant. Second, it must prove that the statute could not have been drafted more narrowly, that is, that there was no “less restrictive alternative” statutory language available. A less restrictive alternative provision is one that is more likely to exclude unconstitutional applications and to reduce the deterrent effects of the regulation.

Most invalidations pursuant to judicial findings of overbreadth are partial invalidations: the court removes provisions that, in its view, would lead to unconstitutional applications of the law, allowing what remains of the law to be applied. However, “severing” unconsti-

110. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-04 (1985) (footnote omitted) (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).

tutional provisions from an otherwise constitutional statute is not always possible. If the offending provisions are central to the statute, the benefits of severability are absent. In such cases, the court has little choice but to invalidate the entire statute, and no part of it will be enforceable.¹¹¹

Although plaintiffs who mount a facial challenge for overbreadth may claim that the same statute is also unconstitutionally vague, overbreadth and vagueness are distinguishable.¹¹² A statute is vague, and therefore unconstitutional, if persons “of common intelligence must necessarily guess at its meanings and differ as to its application.”¹¹³ A vague statute suffers from two interrelated flaws. First, it entails a high risk of discriminatory enforcement, raising concerns about due process and equal protection of the laws. Second, the risk of discriminatory enforcement may itself substantially deter or “chill” the exercise of rights. To successfully defend a law attacked for vagueness, the government must show that the deterrent effect of the statute would not be substantial and that a more precise construction of its provisions, given the government’s purposes, was not possible.

Of course, the abstract review of statutes conflicts with orthodox understandings of judicial authority in the U.S. The role of the judiciary, states the Constitution, is to resolve cases and controversies. The precise, juridical meaning of the phrase “case and controversy” has never been fixed, however, which means the courts decide as they see fit. In practice, the phrase references doctrines related to separation of powers, standing to sue, and justiciability. Each of these legal frameworks has been constructed in complex lines of case law which are by now more or less incoherent, and therefore subject to the whims of the judges. In what is arguably the most authoritative statement on the problem by the Supreme Court, Chief Justice Warren acknowledged this “uncertainty”:

Embodied in the words “cases” and “controversies” are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine.

111. See, e.g., *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980); *Connally v. Gen. Construction Co.*, 269 U.S. 385 (1926).

112. See *TRIBE*, *supra* note 109, at 1033-35.

113. *Connally*, 269 U.S. at 391.

Justiciability is itself a concept of uncertain meaning and scope. . . . [N]o justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet it remains true that “justiciability is not a legal concept with a fixed content of susceptible or scientific verification. Its utilization is the resultant of subtle pressures. . . .”

....

Additional uncertainty exists in the doctrine of justiciability because that doctrine has become a blend of constitutional requirements and policy considerations. And a policy limitation is “not always clearly distinguished from the constitutional limitation.” . . . The “many subtle pressures” which cause policy considerations to blend into the constitutional limitation of Article III make the justiciability doctrine one of uncertain and shifting contours.¹¹⁴

No treatise on American constitutional law uses the term “abstract review.” American constitutional practice and scholarship are largely ignorant of European constitutional law, where abstract review is ubiquitous. Confronted with a statement to the effect that American judges do indeed exercise abstract judicial review, an American judge or constitutional scholar would typically respond in one of two very different ways. First, the statement might be denied outright. Any law which substantially deters the exercise of some fundamental, constitutional right — such as the freedom of speech, or the right to privacy — creates, by its very existence, a “case or controversy” between those individuals so deterred and the government that deters them. This is the logic that underpins doctrines governing facial challenges and the granting of preliminary relief. Second, in contrast to the first response, the statement might be recast in terms that make sense to American judges and lawyers. It could be acknowledged that the practices described do indeed fall outside the case or controversy requirement but are relatively limited exceptions to the normal rules or are pathologies of American case law. Thus, a leading textbook states that preliminary relief “takes a form suspiciously like that of an advisory opinion,”¹¹⁵ which is prohibited. And Justice Black, in his opinion for the majority in *Younger*,¹¹⁶ complained that “facial challenges are fundamentally at odds with the function of the federal courts” to resolve cases and controversies.

114. *Flast v. Cohen*, 392 U.S. 83, 94-97 (1968) (internal citations and footnotes omitted).

115. WILLIAM COHEN & JONATHAN VARAT, *CONSTITUTIONAL LAW* 122 (9th ed. 1993).

116. *Younger v. Harris*, 401 U.S. 37, 52 (1971).

However understood, the abstract review of statutes flourishes in the United States. Indeed, abstract review has become the “normal,” taken-for-granted mode of adjudicating in the domains of free speech¹¹⁷ and reproductive rights.¹¹⁸ All-important statutes that would restrict free speech or the right to choose to terminate pregnancies are routinely attacked on their face and are candidates for preliminary relief. In such cases, what do American judges do? They make authoritative guesses about the future: guesses about how people would likely behave under the law; guesses about how a law would likely be enforced by public officials; guesses about how a statutory provision would likely be construed by the courts; and guesses about how many citizens would likely be hurt if the court permitted the law to be applied. European constitutional courts, when they exercise abstract review, make such determinations all of the time, informed, just as American judges are, by legislative histories and debates, and by their knowledge of how similar laws have been enforced and judicially interpreted in the past. Unlike the American courts, however, European constitutional judges do not have to perform doctrinal gymnastics to justify their abstract review powers.

The specific techniques of abstract review developed by American judges are strikingly similar to those developed by European judges. I will mention three of the most important of these here. First, abstract review in both places always proceeds through the elaborate construction of balancing tests. Inevitably, such tests organize the judicial considerations of hypothetical situations, narratives with abstractions as characters, stand-ins for real people facing challenging dilemmas. There is nothing concrete in such review, except in so far as the decision reconfigures the constitutional environment for the legislature, for the future. If and when the legislators do so, they will have to imagine the situation at least partly as the judges have. Second, once American judges have concluded that specific statutory provisions are unconstitutional, they then proceed to determine if these provisions can be severed from the statute to enable the constitutional, and thus uncontaminated, parts to be applied. What is perhaps the leading constitutional law textbook in the United States characterizes this practice as “surgery,” or pruning the rotten branches

117. In 1996, in an attempt to regulate pornography on the internet, the U.S. Congress adopted the Communications Decency Act of 1996 (“CDA”). Knowing that the constitutionality of the CDA would be litigated before the Act would be enforced, legislators included a special provision, § 561, designed to expedite the review of the law’s constitutionality in the event of a facial challenge. The law was immediately attacked by some twenty interest groups, and the provisions attacked were voided by the U.S. Supreme Court as unconstitutional before they had been enforced against anyone. *See Reno v. ACLU*, 521 U.S. 844 (1997).

118. State supreme courts, too, exercise abstract constitutional review of statutes. *See, e.g., Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (concerning parental consent to abortion in the case of minors).

from the tree.¹¹⁹ European constitutional judges employ the same techniques, and judges and scholars use virtually the same language to describe the process. The French Council, for example, performs “amputations” on provisions “contaminated” by unconstitutionality, allowing what remains to be promulgated. Third, American judges and European constitutional courts routinely participate in the legislative function by using their review powers to give authoritative interpretations of statutes — the “saving construction” in American parlance and “strict reserves of interpretation” in France; other phrases are used to describe the same things in Germany, Italy, and Spain. The judges do so in order (1) to permit the law to enter into force, and thus soften the impact of constitutional review on the legislature, and (2) to control how the law will be enforced by public authorities and applied by the judiciary in the future. These similarities deserve to be studied more closely by comparative constitutional scholars.

More generally, rights review of legislation, as Kelsen predicted, makes of the judge a “positive” legislator. Clearly, the more judges are asked to protect rights in an effective manner — the pan-European situation — or the more judges consider effective rights protection to be their constitutional duty — the American situation — the less likely constitutional review will conform to, or be contained by, separation of powers doctrines that work to separate things judicial from things political. Put very differently, in systems in which the supremacy of the constitutional law within the general hierarchy of norms is defended by a jurisdictional authority, all separation of powers notions are contingent because they are secondary to, rather than constitutive of, the judicial function.

If I have emphasized the relatively formal, doctrinal construction of abstract review in the U.S., there is a far more profound sense in which all exercises in judicial review must always be more abstract than concrete. The power of judicial review is the power to determine constitutional policy, prospectively. American judges routinely engage in prospective lawmaking, and therefore in *abstract* reasoning and decisionmaking.¹²⁰

V. CONCLUSION

One issue — the political legitimacy of American judicial review — dominates this Symposium on *Marbury v. Madison*. In sharp contrast with the European situation, Americans — or at least the legal

119. TRIBE, *supra* note 109, at 1027-33.

120. The argument is made at greater length and detail in Martin Shapiro & Alec Stone Sweet, *Abstract and Concrete Review in the United States*, in MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* ch. 6 (2002).

academy — remain deeply divided over the question of if and how to defend constitutional review.

Most contemporary arguments about the legitimacy of review fall into one of two broad types. The first type of argument proceeds from some theory of delegation, that is, from the source and consequences of enumerated powers. The salient questions are those fetishized by American lawyers. Does the constitution (or do the People) authorize review, and under what conditions? How should review powers “fit” with constitutional structure and separation of powers doctrines? Can the lawmaking of the “judicial” branch of government be distinguished from the lawmaking of the “political” branches? The second type of argument proceeds from a theory, or clash of theories, about constitutional justice. Europeans, who equate constitutional justice with rights jurisprudence, tend to focus on different questions. To what extent do rights provisions possess a transcendental, or supraconstitutional, juridical status? Do rights necessarily permeate every domain of law, public and private? Does the structure of rights provisions, alone and with respect to rest of the constitution, favor certain forms of interpretation, and certain kinds of balancing techniques? The orientation seems a natural one, since the very structure of European rights provisions appears to require the development of proportionality balancing standards.

As this Symposium shows, American constitutional theory is stuck in the first type of argument. Americans grapple with, but never finally resolve, the “countermajoritarian” problem — or, what is to be done about judicial supremacy? The theorist may famously demonstrate that the courts comprise the “least dangerous branch,”¹²¹ at least in some areas of politics, under certain conditions,¹²² or he may oppose such claims.¹²³ Ultimately, judges are free to determine for themselves how intrusive their review of government shall be at any given point in time, and it is this discretion that causes so much hand-wringing. New European constitutions expressly provide for review and for the supremacy of constitutional courts with respect to constitutional interpretation. European academics and constitutional judges will state as much in one breath, and then move on to more interesting issues. For most practical purposes, the formal legitimacy of review is simply a non-issue. Elected politicians, for their part, have periodically accused constitutional courts of imposing a “government of judges,” but such complaints are increasingly muted, when heard at all. At the

121. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

122. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

123. See, for example, some of the contributions to this Symposium.

same time, European constitutional courts have steadily consolidated their positions as powerful policymakers: in just the past three decades, the French, German, and Italian courts have, respectively, invalidated more national laws than has the U.S. Supreme Court — in its entire history.

A century ago, American constitutional theory was avant-garde, a liberating and invigorating force in Europe. Today by comparison, American discourse on review appears infirm, defensive, embarrassed of what cannot be hidden away. Even Marshall's supporters seem to treat *Marbury* as if it were the original sin of American constitutionalism, the source of timeless tensions inherent and irresolvable.