BOOK NOTES

A USEFUL CONVERSATION

JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION. Edited by Robert Badinter* and Stephen Breyer.† New York: New York University Press, 2004. Pp. 317. $55.00.

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The inherent premise underlying *Judges in Contemporary Democracy: An International Conversation* may be stated simply: When judges talk, people listen. The attention is entirely deserved; the power of the judge in modern constitutional democracies, particularly those with provisions for judicial review, is extensive.[1] Concordantly, the authority of the constitutional judge long has been in tension with democratic structure, where the will of the people, expressed through legislative act, otherwise would be considered supreme.[2] What power does the judge have to determine the contours of constitutional imperatives, especially if judicial interpretation represents a divergence from popular sentiment and legislative decree? How can she purport to have an exclusive interpretative license on what otherwise might be thought of as common province, i.e., the securing terms of a shared constitution? The questions of legitimacy surrounding the countermajoritarian potential of judges exercising (or merely asserting) the power of judicial review have become particularly pressing following the contemporary incorporation of forms of judicial review throughout

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[1] *See generally* ALLAN R. BREWER-CARÍAS, JUDICIAL REVIEW IN COMPARATIVE LAW (1989) (surveying power of judges in states with forms of judicial review); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (rev. ed. 1994) (declaring judicial review in United States to be tantamount to judicial legislation).

[2] *See generally* ROBERT K. CARR, DEMOCRACY AND THE SUPREME COURT (1936) (examining implications of judicial review for American democracy); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988) (exploring compatibility of judicial review and democratic process).

Western European countries in the latter half of the past century.[3] No longer a vestige of American exceptionalism, judicial review—and the accordant power of the judge—has become an integral feature of the modern democratic state.[4]

Similarly, respect for constitutions as ultimate expressions of the unimpeachable rights of citizens is no longer peculiarly American. Since judicial review now determines the limits of the "state according to law" across Western Europe, the "German *Rechstaat*, the French *état de droit*, the Spanish *estado de derecho* and the Italian *stato di diritto*"[5] all are privy to the power of the judge as the final arbiter of what government may or may not do. The well-worn idea that constitutional democracies are governments "of laws, and not of men"[6] is untenable when considering the role of judicial activism in promulgating constitutional interpretations that guarantee rights and protections not specifically enumerated within that constitution's text. The ramifications of this type of judicial enterprise by no means present a novel subject for legal scholarship; the arguments bearing out the necessary inverse (i.e., that under regimes incorporating judicial review, constitutional democracies are governments of men and not of laws) are equally well-worn.

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[3] *See* Mauro Cappelletti, *The Expanding Role of Judicial Review in Modern Societies*, *in* THE ROLE OF COURTS IN SOCIETY 79, 79–89 (Shimon Shetreet ed., 1988) (discussing rise of provisions for judicial review in post–World War II Europe).

[4] *See* BREWER-CARÍAS, *supra* note 1, at 1 ("It has been said that judicial review is the most distinctive feature of the constitutional system of the United States of America, and it must be added that it is, in fact, the most distinctive feature of almost all constitutional systems in the world today.").

[5] *Id.* at 7.

[6] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Justice Marshall's famous (and "emphatic[ ]") proclamation that the power of the judiciary is the power to "say what the law is" traditionally has been cited by many as the birth, at least symbolically, of American judicial review. *Id.* at 177. One reading of *Marbury* holds that with this declaration, perhaps the most profound (and certainly the most celebrated) instance of judicial activism, Marshall deemed interpretation of the Constitution to be the responsibility of the judiciary, thereby seizing an extremely potent piece of political turf both for himself and for all those who would wear the magisterial black robes after him. *See* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 2. However, using *Marbury* as shorthand for the beginning of American judicial review has become a controversial proposition in recent years. *See* David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 655 (1982) (arguing that concept of judicial review was "by no means new" in Supreme Court jurisprudence prior to *Marbury*); Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 88–89 (2001) (arguing that *Marbury* "broke no new ground in the theory or practice of judicial review" and did not establish judicial supremacy in constitutional interpretation, but simply that "courts, too, can say what the Constitution means").

Nonetheless, it is precisely the power of the judge to be the last word on constitutionality that provokes the examination of the judicial role in modern democratic society contained in *Judges in Contemporary Democracy*—and precisely what makes the book compelling. Because judges are powerful, and because judicial review is a human rather than mechanical act, insight into the judges' sentiments on the merits of their authority is inherently interesting. But the book's focus is broader than simple consideration of the legitimacy of judicial review; rather, *Judges in Contemporary Democracy* engages the cultural, social, and political implications of an increasingly powerful judiciary in the modern democratic state, exploring consequences from the informed point of view of those who have worn the robes. As such, the book is freed from the limiting confines of familiar debate and—infused with fresh perspective—launches ambitiously into more novel terrain.

Judges in Contemporary Democracy is an unusual book, a fact quickly acknowledged by its editors. In the opening sentence of the Preface, they happily describe what follows as "a work that does not fall within any traditional category of published material" (p. 1). This assertion is certainly true: Unlike most "legal" books, *Judges in Contemporary Democracy* is neither treatise nor argument, neither history nor prescription. Instead, the book is the "record of an organized conversation" (p. 1), a discussion focusing on the evolving role of the judge in modern Western democracies. The book's content is a conversation in the literal sense: inside, one finds a direct transcript of the dialogue. Like the book's format, the editors (Stephen Breyer, a sitting Supreme Court Justice, and Robert Badinter, a former President of France's Constitutional Council) too are unusual, and uniquely suited to the subject.

As the work is centrally a conversation, the book's appeal is found chiefly in the dialogue's participants, and since the conversation is international, so too are its voices. Breyer and Badinter have assembled a distinguished collection of legal minds to compare the role of the judiciary across national borders: Antonio Cassese, former President of the International Criminal Court for the Former Yugoslavia; Ronald Dworkin, Professor at New York University School of Law; Dieter Grimm, former Vice President of the Constitutional Court of Germany; and Gil Carlos Rodriguez Iglesias, former President of the Court of Justice of the European Communities.

In prefatory remarks, Badinter and Breyer propose that the discussion will serve as "a kind of artifact, a first-hand account of . . . what is commonly referred to as the 'globalization' of constitutional law" (p. 6). To that end, the two editors establish a structure for the conversation: Each participant is to present an essay on an assigned subject, all tangentially related to Breyer and Badinter's central consideration, namely "the growth of judicial authority and the enhanced role of the judge in many modern Western democracies" (p. 1). After each presentation, the six participants engage in a discussion of the topic, guided by lines of questioning suggested by the presenter. Breyer and Badinter's aims are optimistically open-ended. The goal is for the conversation to "seek neither finality nor shared conclusions" (p. 1), but rather to "find its purpose in the discussion itself—in the free exchange of thought, the interplay of ideas, the opportunities for . . . new insights" (p. 1).

The discussions following the presentations cover an extremely broad spectrum of material, casually canvassing all manner of international cases, treaties, and historical developments. One quickly notices that the tendency among the group is towards digression from the stated topic while "talking shop." With leisurely reflection, the six allow their conversations to roam where they will. This amiable patience for questioning and deviation sometimes frustrates Badinter, who gamely tries to refocus the conversation when it has strayed too far from the stated intent, however fascinating such tangents may be. Despite Badinter's occasional protest, the real pleasure of the book is in these moments when the participants wander off the track, following their own voracious curiosities. It is then that the reader is allowed to see the legal mind in action, as it were, searching simultaneously for distinction and commonality.

It is the collegial familiarity of the discussions which lends the conversations their easy charm. For example, Justice Breyer refers to Professor Dworkin as "Ronnie," who in turn calls Breyer "Steve." Despite the casual tone, the vast experience of the conversation's participants renders it practically impossible (and probably unnecessary) to capture all the nuance, the galloping back-and-forth, of the conversation in this review. More important to note is that such a conversation should occur at all, and that it is both illuminating and interesting.

It should come as no surprise that Justice Breyer played a crucial role in organizing the conversation. It was Breyer, after all, who gave Supreme Court jurisprudence its most explicit considera-

tion of the possible utility of comparative constitutional study, albeit in a dissenting opinion[7] that earned the scorn of certain other justices.[8] In *Printz v. United States*,[9] the Court considered whether interim provisions contained in a federal law—the Brady Handgun Violence Prevention Act[10]—requiring state and local law enforcement officers to perform background checks on would-be handgun purchasers could pass Constitutional muster. The Court ultimately held that these requirements amounted to an unconstitutional "commandeering" of state and local agents by Congress,[11] but Justice Breyer, in dissent, urged the Court to consider the experience of other nations in dealing with precisely these types of federalism questions. Breyer wrote:

> [T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. . . . Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. . . . But their experience may nonetheless cast an empirical

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7 Printz v. United States, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting).

8 *Id.* at 921 n.11 ("We think such comparative analysis inappropriate to the task of interpreting a constitution . . . . The fact is that our federalism is not Europe's."). This debate over the value and legitimacy of comparative analysis in the Court's jurisprudence continues. Justice Breyer recently engaged Justice Scalia, the Court's fiercest critic of the use of comparative constitutional analysis, in a unique public discussion of the merits and disadvantages of looking to international constitutional experience in resolving our own constitutional questions. *See* Stephen Breyer & Antonin Scalia, Moderated Discussion at American University Washington College of Law (Jan. 13, 2005), *at* http://domino.american.edu/AU/media/mediarel.nsf/608575dac58ec4a785256869007c9cba/1f2f7dc4757fd01e85256f890068e6e0?OpenDocument. Throughout, Scalia forcefully questions the relevance of "foreign law." While studying foreign experience "is very useful in devising a constitution," he notes, "why is it useful in interpreting one?" *Id.* Breyer responds by invoking the underlying commonality of human experience and arguing that constitutional interpretation need not be imagined as a uniquely American endeavor, but rather one with parallels across the world:

> So here you're trying to get a picture how other people have dealt with it. And am I influenced by that? I am at least interested in reading it. And the fact that this has gone on all over the world and people have come to roughly similar conclusions, in my opinion, was the reason for thinking it at least is the kind of issue that maybe we ought to hear in our court, because I thought our people in this country are not that much different than people other places.

Id.

9 521 U.S. 898 (1997).

10 Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 921–925 (2000)).

11 521 U.S. at 933.

> light on the consequences of different solutions to a common legal problem . . . .[12]

Justice Breyer is proposing that whether one is skinning cats or distributing power between national and subnational governments, different methods can achieve desired outcomes.[13] In *Printz*, Breyer's willingness to participate in functional analysis of other constitutional systems in order to better understand the possibilities of American federalism illustrates the underlying curiosity that drives *Judges in Contemporary Democracy* and gives the book its unique appeal.

As Justice Breyer has recognized, using comparative law to analyze may prove illuminating—or, at the very least, interesting. Comparative constitutional study, though now taught in American law schools as a global corollary to more traditional constitutional law courses, is still a relatively young discipline, because only in the last half-century have a significant number of stable constitutional democracies emerged to warrant useful study.[14] The study of comparative constitutional law differs from other branches of traditional legal study because one is not studying a body of law so much as one is learning "a method, or a variety of methods, used to compare different bodies of law."[15] *Judges in Contemporary Democracy* there-

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[12] *Id.* at 976–77.

[13] However, the functionalist approach demonstrated by Justice Breyer's dissent in *Printz* is but one use of comparative analysis. In recent years, the Court has also utilized comparative analysis to provide support for decisions interpreting the content of substantive due process: In *Lawrence v. Texas*, 539 U.S. 558 (2003), Justice Kennedy's majority opinion cited decisions of the European Court of Human Rights in support of the Court's decision to invalidate a Texas statute outlawing homosexual activity. *Id.* at 573. In so doing, Kennedy implicitly endorsed the utility of comparative analysis in considering domestic constitutional issues, thus complementing Breyer's approach in *Printz*. Much has been written about the use of comparative analysis in *Lawrence*. *See, e.g.*, Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on* Lawrence v. Texas, 44 VA. J. INT'L L. 913 (2004) (discussing Kennedy's use of European Court of Human Rights precedent to interpret U.S. constitutional obligations); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004) (arguing that Breyer's method of comparative analysis would undermine rather than bolster U.S. constitutional guarantees). Even more recently, in writing the majority opinion for a sharply divided Court, Justice Kennedy again cited international legal authority as support for the Court's holding that imposing the death penalty on persons under the age of eighteen violated the Eighth Amendment. *See* Roper v. Simmons, 125 S. Ct. 1183, 1198–1200 (2005). Brushing aside questions of the validity of such comparative analysis, Kennedy wrote that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty" because "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Id.* at 1200.

[14] COMPARATIVE CONSTITUTIONAL LAW, at v (Vicki C. Jackson & Mark Tushnet eds., 1999).

[15] Ugo Mattei, *Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction*, 50 AM. J. COMP. L. SUPP. 87, 87 (2002).

fore offers an example of this methodology in casual practice, giving the comparativist student a unique demonstration of how such comparison is possible for practitioners as well as for academics.

The book illustrates how dialogue between judges, the law's most determinative agents, has the potential to open up new understandings about old legal conundrums. In that vein, it is interesting to observe what the participants here find interesting, and useful to notice what they notice. For example, when discussing the judge's role in "Supervision of the Political Process," Dworkin and Badinter engage in a lively exchange about French restrictions on political advertising. Badinter calls the American system "horrible" and "shock[ing]" (p. 150), and explains the French system of what Americans would refer to as campaign finance reform. The French Constitutional Council is responsible for final review of each candidate's expense accounts, and commissions staffed by lower magistrates monitor what Badinter calls "the game" of advertising (p. 150), determining when an advertisement is political in nature and making sure candidates receive equal television time. Fascinated, Dworkin presses Badinter as to how French judges determine when a political ad has crossed the line. Badinter has immense difficulty explaining the parameters of review to Dworkin, who, with the perspective of one outside the French system, precisely isolates the inherent assumptions:

> DWORKIN: No, no, you cannot accuse your opponent of a crime. But can you show a picture of him picking his nose?
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> BADINTER: No, no, that would not be appropriate.
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> DWORKIN: What stops that?
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> BADINTER: That would be the judge.
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> DWORKIN: Now, under what regulation?
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> BADINTER: The general statute on defamation and ridicule.
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> DWORKIN: But this is not defamation. There is no lie; there is no falsehood. You are simply using your time to show an ugly picture of your opponent. . . . Is there anything in a judge's power that can stop this kind of ad?

(p. 151). With specific reference to the infamous "Willie Horton" ad, Dworkin and Badinter eventually concede that cultural differences anchor the legal differences; as Dieter Grimm says in summary, "[t]he cultural framework plays an important role" (p. 151) in determining which legal solutions are feasible. The utility of such an exchange is apparent: It exposes both men to dramatically different systems of achieving a common end—effective regulation of political advertising. In so doing, each challenges and expands the meaning of each of the

relevant terms ("effective," "political," and "regulation" (pp. 152–53)) involved in the issue. Such is the value of comparison in conversation.

A significant part of the value of *Judges in Contemporary Democracy* is achieved through the dynamic nature of conversation. This is not simply a series of static essays; dialogue provides the possibility of growth and evolution of viewpoint. Such possibility is realized, for example, when the group discusses the conflict between freedom of speech and protection of "hate speech." Dworkin and Breyer disagree with the Europeans, arguing, in the words of Dworkin, that there exist "some kinds of harm . . . which we must suffer in order to protect the moral standing and legitimacy of coercive government" (p. 273). In return, Badinter carefully notes that "there is no freedom without responsibility" (p. 273). While neither side of the debate leaves convinced of the correctness of the other's position, each has learned—as has the reader—of the particular nuances of the represented vantage points.

Conversely, the conversational form also has its disadvantages: Digression is frequent. The participants' vast knowledge of international law can be difficult to track. Citations are scarce. As such, the audience for *Judges in Contemporary Democracy* might in effect be restricted to those already quite familiar with the international judiciary or comparative law generally, since those without the requisite background knowledge will quickly lose interest. Further, one instantly recognizes that there are no women participating and that all participants are from the United States or what some would call "old Europe." The resultant range of perspective is not without consequence: The discussion does not substantively address gender issues or experiences with democracy in any other geographic location, and the book's content is less valuable because of these glaring omissions. Are there no females serving as constitutional judges? Are Breyer and Badinter not familiar with any of their South African or Indian peers? It is disappointing that a book otherwise so dedicated to the value of discussion would allow such silence.

Ultimately, however, it is very interesting to observe the collegial conversation between judges freed from the confines of judicial form. Despite their enormous power (and the omniscient tone of many judicial opinions), judges are not oracles. It is curiously satisfying to find such clear proof that jurists are in fact human, and susceptible to the same cultural and social influences as any other citizen. After their opinions are written, judges continue to think about their vocation, and gaining access to these personal ruminations makes for engaging reading—even more so when it is in conversation with peers from other nations.