

# RLFP

Revista  
Latinoamericana de  
Filosofía  
Política

Centro de Investigaciones Filosóficas

ISSN 2250-8619 • Vol. XI • N° 8 • 2023 • Buenos Aires • Argentina

## CONSTITUTIONAL REVIEW: EX-ANTE AND EX-POST

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### SIMPOSIO

*El derecho como una conversación entre iguales*

de Roberto Gargarella

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## CONSTITUTIONAL REVIEW: EX-ANTE AND EX-POST

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### ABSTRACT

I distinguish the types of institutional arrangements designed to assure the compatibility of laws with constitutions. Then I review their respective merits and demerits. My conclusion is that relying exclusively on ex-ante review does not generate any of the disasters conjured by the advocates of “liberal democracy” and it has the merit of attenuating the conflict between majority rule and constitutionalism, democracy and “the rule of law”.

**Keywords:** Constitutional review, democracy, majority rule.

### RESUMEN

Distingo los tipos de arreglos institucionales diseñados para asegurar la compatibilidad de las leyes con las constituciones. Luego repaso sus respectivos méritos y deméritos. Mi conclusión es que confiar exclusivamente en la revisión ex-ante no genera ninguno de los desastres conjurados por los defensores de la “democracia liberal” y tiene el mérito de atenuar el conflicto entre el gobierno de la mayoría y el constitucionalismo, la democracia y el “estado de derecho”.

**Palabras clave:** Revisión constitucional, democracia, gobierno de la mayoría.

## 1. Introducción

Roberto Gargarella's (2022: Chapters 13 and 14) discussion of the relation between democracy and constitutionalism is the best I have ever read. But one aspect of it, alluded to by Gargarella but orthogonal to his analysis, merits further development. Let us accept the principle that laws should not violate constitutional norms, with all the ambiguities pointed out by the author. Does this principle imply that courts should be able to invalidate laws promulgated by legislatures (and in some countries signed by presidents), as in the United States?

The alternative institutional mechanism is one in which bills are subjected to constitutional scrutiny before they are promulgated, during the legislative process. This “ex-ante” procedure may be required or it may be invoked only if someone –often the president, sometimes a parliamentary club, sometimes some group of deputies... questions the constitutionality of a bill. When constitutional review occurs only ex- ante, once a law is promulgated it is not subject to an abstract review by any courts. Courts may still find that a law does not apply or has been incorrectly applied in a particular case but laws cannot be ruled unconstitutional ex-post. This mechanism is used in several European countries which have the longest living democracies, even if some of them experience pressures to combine the ex-ante with ex-post constitutional review of the U.S. type.

In what follows, I first distinguish the types of institutional arrangements designed to assure the compatibility of laws with constitutions. Then I review their respective merits and demerits. My conclusion is that relying exclusively on ex-ante review does not generate any of the disasters conjured by the advocates of “liberal democracy” and it has the merit of attenuating the conflict between majority rule and constitutionalism, democracy and “the rule of law”.

## 2. Distinctions and examples

Examining texts of some constitutions and the actual practice generates the following distinctions:

1. There is no ex-ante and no ex-post constitutional review.
2. Before they are promulgated, at least some bills must be subjected to a test of their conformity with the constitution and
  - 2.1. Once promulgated, laws cannot be invalidated or
  - 2.2. Once promulgated, laws can still be invalidated.
3. Before they are promulgated, bills can be subjected to a test of constitutionality if they contested by some organ or a part thereof and
  - 3.1. Once promulgated, laws cannot be invalidated or
  - 3.2. Once promulgated, laws can still be invalidated.
4. Bills are not subject to constitutional review before they are promulgated but laws can be ruled to be unconstitutional by some judicial body external to the parliament. Ex-post judicial review can be de- centralized or centralized in a single court (see Ferejohn, 2011, on this distinction).

The central ambiguity in applying this classification are cases in which particular courts can rule that laws are inapplicable or invalid in a particular case but cannot declare them invalid (*recurso de amparo*). This is true of most if not all Latin American constitutions, as well as that of the 1974 constitutions of Greece<sup>1</sup> and the 1964 of Malta. The ambiguity

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1. All the Greek constitutions says (Art.93 4) is that “The courts shall be bound not to apply a statute whose content is contrary to the Constitution”.

is due to the possibility that other courts may or may not follow the precedent of a particular ruling.<sup>2</sup> Moreover, this classification does not distinguish “strong” constitutional review, in which the decision of courts is final, from the “weak” form in which court decisions can be overruled by legislatures.<sup>3</sup>

Considering only the European constitutions that were in vigor at any time after 1945, one does find some cases without either ex-ante or ex-post constitutional review. They include Belgium (Constitution of 1831) until 1988 or 2003,<sup>4</sup> Switzerland where neither the constitution of 1874 nor the new one of 1999 provided for any checks of conformity with the constitution, Ireland (Constitution of 1937), and Latvia until 1997, where the 1922 constitution was in effect when the country became independent again in 1991. In Denmark, for which see Schaumburh-Muller (2009), the constitution of 1849 did not provide for any kind of constitutional review, while the constitution of 1953 seems to allow in cases of conflicts about executive authority, which however occurred only once.<sup>5</sup>

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2. I am grateful to Juan Gonzalez Bertomeu for a lecture on this issue.

3. I am grateful again to Juan Gonzalez Bertomeu (personal communication) for pointing out that I ignore this distinction.

4. Since 1988, the Court is also responsible for supervising the application of some particular articles of the Belgian constitution such as the principles of equality, non-discrimination and the rights and liberties in respect of education (the Articles 10, 11 and 24 of the Belgian constitution). With a special law of 2003, this competence was expanded to the Section II (Articles 8 to 32), and the Articles 170, 172 and 191 of the Belgian Constitution. (Wikipedia, Constitutional Court).

5. § 63 (1) “The courts of justice shall be empowered to decide any question relating to the scope of the executive’s authority; though any person wishing to question such authority shall not, by taking the case to the courts of justice, avoid temporary compliance with orders given by the executive authority. (2) Questions relating to the scope of the executive’s authority may by statute be referred for decision to one or more administrative courts, except that an appeal against the decision of the administrative courts shall be referred to the highest court of the Realm. Rules governing this procedure shall be laid down by statute”.

With this background, we can focus on the cases in which a judgement of constitutionality is either required or possible before laws are duly promulgated and the courts have no say once they are promulgated. Obviously, individual legislators are always free to seek advice from their legal counsels about the constitutionality of legislative proposals. Moreover, in some parliaments—I do not know how many and which—judgements about constitutionality are issued by some committees of the legislature, either before a legislative proposal is placed on the agenda (as in Brazil<sup>6</sup>) or before bills become laws.<sup>7</sup> Such practices are not considered here. Ex-ante constitutional review occurs only if judgements of constitutionality are pronounced by some bodies selected specifically for this purpose, which typically bear the name of some kind of Councils. These bodies are constituted by procedures that vary from country to country but, as distinct from the legislators, they are not directly elected. Their opinions may be sought at different stages of the legislative process but before laws become promulgated, so these bodies constitute chambers of the legislature, albeit not elected.

Although almost all attention on ex-ante review focuses on the constitution of the 1958 French constitution, the clearest case is the 1848 Constitution of the Netherlands, which provides in Article 73 (1) that “(1) The Council of State or a section of the Council is consulted on Bills and draft general administrative

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In 1999, the Supreme Court found that the Tvind law, a law that barred specific schools from receiving public funding, was unconstitutional, because it breached the concept of separation of powers by settling a concrete dispute between the Tvind schools and the government. The judgment is the only time the courts have found a law to be unconstitutional. (Wikipedia)

6. I owe this information to Fernando Limongi (personal communication).

7. Until the 1990s more or less, both chambers of the US Congress did routinely refer constitutional issues to their judiciary committees, which sometimes this resulted in substantial changes. I have it from John Ferejohn (personal communication).

orders as well as proposals for the approval of treaties by the Parliament. Such consultation may be dispensed with in cases to be laid down by Act of Parliament.” In turn, once the laws are promulgated, Article 120 (in the 1983 version) declares that they cannot be questioned by any courts: “The constitutionality of Acts of Parliament and treaties are not reviewed by the courts.”

Here is a description of the Dutch system, due to de Poorter (2013: 93):

Bills are presented to the Advisory Division of the Council of State in order to obtain the Advisory Division's advice on the bill before it is submitted to the Second Chamber. The Advisory Division determines the constitutionality of the bill.... The Government is not bound to adhere to the advice of the Council of State and has only the obligation to justify any deviations from the advice in a report.... The advisor does not issue binding decisions; it is ultimately the Government and the legislature that decide.... Yet, it would be a mistake to see the advisory role of the Council of State as characterized by a large measure of voluntariness. The fact that Article 73(1) of the Constitution of the Netherlands speaks of the ‘hearing of (horen van) and not of ‘advising by (adviseren door) the Council of State could indicate that a special meaning must be given to the Council's advice, in the sense that it cannot be readily deviated from and that at least such a deviation must be supported by sufficient grounds. This argument is strengthened by the fact that in the mentioned provision the ‘hearing of the Council of State is a mandatory step in the legislative process.<sup>8</sup>

A similar procedure was present in the French constitution of 1946 and again of 1958. The 1946 constitution provided for a body, *Comite constitutionnel*, the role of which was to see if a law requires a change of the constitution. If the *Comite* said

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8. For recent controversies about this system in the Netherlands, see van der Schyff (2020).

it did, the Parliament had to revise the constitution before adopting the law. This role of the *Comite*, however, was limited to articles 1-10 of the constitution, of which some are purely declaratory while others say there is a legislature and how it is elected. In fact, this *Comite* acted only one time (Denquin, 1988: 372).

The crucial article of the 1958 constitution says: “Art 46. Les lois organiques ne peuvent etre promulguees que apres declaration par le Conseil constitutionnel de leur conformite a la Constitution.” The original intention seems to have been to assure the quality of laws and the observance of procedures, and only the President of the Republic, the Prime Minister, and the presidents of the two chambers could raise constitutional issues. Claiming that a US-style ex-post review would not be tolerated in France as a *gouvernement des juges*,<sup>9</sup> Denquin (1988: 373) explains the origins of the *Conseil constitutionnel*:

The law will therefore retain, after promulgation, its previous status: it will remain infallible. No authority can cancel it or suspend its application. But before its promulgation it will be possible to assess its conformity with the constitutional text and if the examination is negative, to cancel it. To accomplish this task, a new institution was created. It is the Constitutional Council.

In 1971, in a coup that some authors compare to *Marbury vs Madison*, the *Conseil* unilaterally extended its role to protection of rights guaranteed in the Declaration of 1789 and the Preamble of the Constitution of 1946 (See Beardsley, 1972). In 1974, in turn, the right to raise constitutional questions was extended to any group of at least 60 deputies of either chamber. According to Morton (1988: 91),

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9. This phrase was coined by Lambert (1921), in his attack on the Lochner court.



The 1974 reform conferred this power of reference on opposition parties (providing they could muster sixty signatures), who immediately seized this opportunity as a way to obstruct, at least temporarily, new government policies.

By 1987, parliamentary references accounted for eighty percent of all decisions dealing with ordinary laws. Even more striking—since 1979, forty-six of the forty-eight decisions nullifying laws have been initiated by members of Parliament. The net effect of the two events described above has been a dramatic increase in the number and political significance of the laws brought before the Conseil Constitutionnel. From 1958 to 1974, there were only nine references to the Conseil. From 1974 to May, 1981, the number leaped to 47.

In Luxembourg, according to the 1868 Constitution, Article 83 establishes that “the Council of State is called to give its opinion on the bills and proposals of law and amendments, which have been and are proposed, as well as on all other questions which have been referred to it by the Government or by the laws”. Ex-post review, however, was introduced in 1996.

One more case is Sweden, where the 1974 Instrument of the Government specifies in Article 20 that:

There shall be a Council on Legislation which includes justices, or, where necessary, former justices of the Supreme Court and the Supreme Administrative Court, to pronounce an opinion on draft legislation. More detailed rules concerning the composition and working procedures of the Council on Legislation are laid down in law. Art. 21. The opinion of the Council on Legislation is obtained by the Government or, under more detailed rules laid down in the Riksdag Act, by a committee of the Riksdag.<sup>10</sup>

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10. This rule applies to the cases listed below: “The opinion of the Council on Legislation shall be obtained before the Riksdag takes a decision on: 1. fundamental law relating to the freedom of the press or the corresponding freedom of expression on sound radio, television and certain similar

It is not compulsory for the Government to ask for the Council's opinion nor does failure to obtain such an opinion ever constitute an obstacle to the application of the law. Yet, Nergelius (2009: 143) comments, "This fact could lead to the conclusion that the Council lacks importance, but that is hardly correct, as will be shown below." According to Bull (2011: 392), the Swedish preview system "makes it hard, though not impossible, to legislate in a way that infringes rights".

These are the four European countries in which the parliament must seek constitutional advice of some bodies before passing legislation and the courts have no say once the legislation had been passed. There are also countries in which a constitutional body can be but does not have to be consulted before laws are promulgated and courts have no say once they had been promulgated. They include Norway as of 1814 (at the request of the Storting, Article 83), Poland between 1992 and 1997 and Cyprus as of 1960 (at the request of the president, before signing the law), and Romania as of 1991 (at the request of different actors).

Finally, there are several constitutions (or amendments) that provide both for ex-ante and ex-post constitutional review: 1937 constitution of Ireland, 2000 of Finland, 1989 and 2011 of Hungary, 1992 of Estonia, and France as of 2008.<sup>11</sup>

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transmissions, public performances taken from a database and technical recordings; 2. an act of law limiting the right of access to official documents; 3. an act of law under Chapter 2, Articles 14 to 16, 20, or 25; 4. an act of law relating to the fully or partially automatic processing of personal data; 5. an act of law relating to local taxation or an act of law involving the obligations of local authorities; 6. an act of law under Article 2, paragraph one, points 1 or 2 or an act of law under Chapter 11 or 12; or 7. an act of law amending or abrogating an act of law under Articles 1 to 6.

11. "Le Conseil constitutionnel vérifie la conformité des lois à la Constitution lorsqu'il est saisi. Il peut le faire a priori, avant la promulgation des lois, en étant saisi par des parlementaires par exemple, ou a posteriori par voie d'exception via la question prioritaire de constitutionnalité, introduite par la réforme constitutionnelle de 2008. Cette dernière procédure peut être

### 3. Majority rule and counter-majoritarianism

In a April 30, 2009 op-ed in *Le Monde*, Pierre Rosanvallon claimed that “Now power is not considered fully democratic unless it is submitted to the test of control and validation concurrent and complementary to the majoritarian expression.” Is the Netherlands or Sweden not fully democratic, while the United States is?

Rosanvallon is not alone. The currently fashionable ideological language distinguishes “liberal” from “electoral” democracy<sup>12</sup> Galston (2018: 9-10) offers a clear definition:

This type of political order rests on the republican principle, takes constitutional form, and incorporates the civic egalitarianism and majoritarian principles of democracy. At the same time, it accepts and enforces the liberal principle that the legitimate scope of public power is limited, which entails some constraints on or divergences from majoritarian decision making. A liberal order can use devices such as supermajority requirements or even unanimity rules to limit the majority's power, or it can deploy constitutional courts insulated from direct public pressure to police the perimeter beyond which even supermajorities may not go.

Democracy is thus “liberal” only if some courts can invalidate decisions of a majority that emerges from free, contested, elections. Majority rule alone is not “liberal”.

Following Gargarella, let us accept Hamilton's (*Federalist* #78) claim that “the will of the people,” whatever that is, resides

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enclenchée par tout citoyen lorsqu'il estime que des droits et libertés garantis par la Constitution sont en jeu.” Wikipedia.fr

12. The very phrase “liberal democracy” may have been used for the first time by Lord Acton toward the end of the 19th century. Google Ngram shows that the phrase “liberal democracy” is new. Its use was miniscule until 1990 and increased fivefold since then.

in the constitution and that it must be treated as superior to the wills of temporary majorities. There are three rival constitutional designs that can potentially implement this principle: (1) ex-ante control, (2) ex-post control, and (3) the combination of the two, in which ex-ante control is exercised at the bequest of some state organs and the ex-post control at bequest of citizens.

One standard critique of ex-ante systems is that the constitutional control they provide is “political” rather than “judicial.” It is true that the bodies that exercise ex-ante control, various kinds of Councils, are typically staffed by politicians, not justices. Yet the very assumption that judgements of constitutionality should be delegated to a non-political institution can be questioned. Morgan (1993: 106), for example, noted that:

Both American and French scholars have persisted in asking whether the Conseil Constitutionnel is a true court? I would suggest that this is a nonproductive –or at least premature– way to begin the inquiry. It obscures the more fundamental issue of, Why should the Conseil Constitutionnel be a court? Or to pose the same question in a more technically accurate form: Why should the function of constitutional control be vested in a judicial institution?

The question here is whether judgements of Courts in the ex-post systems should be expected to be somehow constitutionally superior to the judgements of Councils in the ex-ante systems. Since, as Gargarella argues, all constitutional adjudication is highly arbitrary, this question cannot be answered. As Troper (2003: 107) observed:

As a matter of fact the majority of decisions can be explained only by the ideology of the law-making body, whether a legislature or a supreme court. If a supreme court can make a decision by a 5-4 majority, this shows that the constraints

produced nothing but a possibility of choice but the choice is not the result of a constraint and could actually have been different.

Bon (1993: 389) points out that this distinction is purely semantic: why would a posteriori control be less political than a priori one? In the United States, we had *Roe v. Wade* (1973) and we have *Dobbs v. Jackson* (2022): how can these decisions be understood other than as political?

A frontal attack on ex-ante adjudication has been offered by Shapiro (1993: 479):

If we do not know what a law will mean or the effects it will have until it has been concretely applied by the bureaucrats assigned to implement it, then constitutionality control a priori, abstract and carried out by a constitutional court entirely separate, is the wrong control, at the wrong time, and by the wrong court. Only a concrete dispute between administrators and those who are regulated over a particular application of the law, through the invocation of a particular regulation in concrete circumstances, will tell us how it really works.

Yet, even if grant that the legislators have no idea how a law would function when they adopt it, the judicial system is not incapacitated in the ex-ante systems. Courts still adjudicate the application of laws in particular cases. And even if they cannot invalidate laws in abstract, if their application becomes controversial, the majority can modify them: corrective mechanisms are not disabled by the absence of ex-post abstract review.

The system of ex-ante control entails “conversation among equals”, even if the equals include only the parliamentary representatives and appointed bodies. When the constitution declares that laws can be promulgated only after the declaration by some specialized body of their conformity with the constitution, a conversation between the representatives

and this body must ensue, in which representatives are instructed about the legislation they can adopt. The specialized body functions as a chamber of the legislature, selected differently than the elected representatives but inherent to the legislative process. Even if ex-ante constitutional review is facultative, the opposition can resist the passing of a bill by requesting a judgement by this body or, in some systems, the president can request it before promulgating the law. This interaction between political and constitutional considerations is exemplified by Morgan's (1993: 96) summary of some cases in France:

Contrary to the rhetoric of the winter of 1982, a final confrontation between the Mitterrand government and the Conseil Constitutionnel was averted. In the end, the Conseil was careful not to try to obstruct completely the government's reform agenda. More constitutional challenges were rejected than sustained. Even in those challenges that were accepted, the Conseil nullified the entire law only once.<sup>13</sup> In the all important Nationalizations Case, a refurbished version of the bill was adopted within a month. Of the 36 cases reported by Favoreu, between May 1981 and January 1984, 20 were upheld. The other 15 were "annulations partielle," a finding of a constitutional violation in a part of the challenged statute, but not sufficient to void the entire statute. The net effect of the Conseil's decisions was thus to slow the pace of reform, to force bills to be rewritten and presented to Parliament a second time. Perhaps these decisions also deterred more radical reforms from ever being tabled.

Without ex-ante control, even if legislatures may be informed by legal counsels, they must anticipate the views of courts and

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13. In fact, between 1959 and 2022, the Conseil invalidated only 17 out of 744 entire laws it reviewed, eight among them on procedural grounds.

they may err.<sup>14</sup> Unless the costs of legislation being overturned by judges is high for the majority, not knowing how the courts would decide, the majority may just punt. As Thayer (1893: 155-156) noted a long time ago,

No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it.

Moreover, this system generates incentives for “pandering”: the majority may deliberately pass laws to signal to the electorate that it supports some laws which are currently popular, with full knowledge that they would be overturned by courts. The effect, then, is that polities which have only ex-post control face many more constitutional controversies.

What then about systems that combine ex-ante with the ex-post control, a trend in several countries, including France? The advantage of such systems is that they extend the constitutional conversation to “un-equals,” namely ordinary citizens. In the ex-ante systems, citizens elect representatives and the representatives are bound by constitutional controls; in the combined systems, citizens can contest the constitutionality of laws that already passed these controls. Hence, individual citizens or groups of them, particularly minorities the rights of which had not been considered during ex-ante control can seek a remedy in the ex-post adjudication. The question here is why the Council supervising the ex- ante constitutionality would ignore the rights of a particular minority or, more

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14. “Indeed, it is often literally impossible to predict which way judges will decide constitutionality, in the name of law and their technical knowledge”. (Gargarella, 2023: 319)

precisely, if it did, why would the Court exercising ex-post control not ignore them as well. This system assumes that the constitutional views of the body that exercises ex-ante control may differ from some other views. In a sense, then, it recognizes the interpretative ambiguity intrinsically entailed in making constitutional judgements. But it also means that this system opens room for constitutional conflicts that have no ultimate arbiter: a Council within the legislature certifies a law to conform to the constitution, then some court adjudicating a particular case finds it unconstitutional, and now what? The only justification of this system I can see is that it introduces an extra precaution: two judgements are better than one. But it does undermine the legitimacy of the constitution itself: it undermines confidence that a constitution provides unique directions for legislation.

#### **4. Conclusion**

Ex-ante judicial review changes the terms of the relation between democracy and constitutionalism. This juxtaposition is stark when constitutional control is exercised only ex-post: the majority decides something, the courts invoke the constitution to validate this decision or not. According to Ferejohn and Pasquale (2003: 343), “democracy and rule of law are embodied in distinct institutional systems. Democracy principally concerns electoral institutions, governments, and legislatures. Law operates through courts, police, and lawyers.” Yet with ex-ante control majority decisions cannot be juxtaposed to independent constitutional judgements: constitutional norms are already embodied in majority decisions. Obviously, it may well still be that a majority want to pass a bill and hurls itself against a judgement by the judicial body participating in the legislative process. But from anecdotal evidence about the actual practices, it appears that the elected representatives and constitutional authorities actively cooperate in generating legislation that



to the extent possible approximates the majority will while minimizing the constitutional constraints. The legislative process is not one in which the majority formulates its proposal and the constitutional component of the parliament approves or rejects. This process is iterative and it includes both arguing and bargaining. In several cases, the Councils order or suggest to the legislators to modify just some parts of the proposed bill. Most importantly, what emerges as the law already conforms to constitutional norms.

The claim that the majority is prevented from violating the constitution only if its decisions can be ex-post invalidated by courts has no logical foundation. Moreover, there is no evidence that governments which function under constitutions which allow only for ex-ante review are less “moderate,” that they more likely to violate rights, more likely to generate larger policy swings, or to generate any other kind of undesirable outcomes. One can agree with Pasquino (1998: 41) that “A theory of democracy should also be nowadays a theory of constitutional democracy,” but constitutionalism need not entail countermajoritarian institutions blocking constitutionally informed will of representative majorities. The entire conception of “liberal democracy” is based on juxtaposing the United States model of ex-post constitutional review to a world without any constitutional constraints.<sup>15</sup> I can only echo Morton (1988: 110), “It is time that both American and European constitutional scholars conceive of constitutional control as the “genus,” and the American model as just one “species” (the judicial variation) of constitutional control”.

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15. This is why I think that an influential data source, V-Dem, which distinguishes “electoral” from “liberal” democracy, is a product of American ideology, albeit produced in Sweden.

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*Fecha de recepción*, 23 de febrero de 2023

*Fecha de aceptación*, 16 de mayo de 2023