Thank you for inviting me to deliver this keynote address. This is an important conference attended by many of the world’s leading commentators on constitutionalism and constitutional review. Since the United States and Germany are leading models of constitutional review around the world, Stanley Paulson thought it might be useful if I were to draw some contrasts between the organization and significance of constitutional review in these two countries. I shall try to do this as best I can. But first, it might be appropriate to preface my main remarks with some historical background and a few observations about the development of constitutional adjudication in the post-World War II era.

In beginning a talk of this nature, you can never go wrong by quoting Alexis de Tocqueville. In his classic study of American democracy he – Tocqueville – drew a sharp contrast between American and European judicial organization. Writing some 50 years after the framing of the U.S. Constitution, he found common republican institutions on both sides of the Atlantic, but then said, and I quote: “but I am not aware that any nation of the globe has hitherto organized a judicial power in the same manner as the Americans.” He was referring of course to the authority of courts to invalidate laws on constitutional grounds, an institution he found most difficult for the stranger (i.e., non-Americans) to understand. Suffice to say that, over time, this institution -- i.e., judicial review -- would come to be viewed as America’s most distinctive contribution to modern constitutionalism, much as the principle of parliamentary supremacy marked the essence of British constitutionalism.
In the second half of the 20th century, however, this picture changed drastically; since 1945, we have witnessed a veritable explosion of constitutional review around the world. The singularity of this phenomenon needs emphasis. It is arguably the major political development of our time, and no less than revolutionary. Consider what has happened: Popular democracies have transformed themselves into juridical democracies. Judicial supremacy has replaced parliamentary supremacy. Elected representatives have relinquished power to unelected judges. Counter-majoritarian institutions have been empowered to veto majoritarian policies. The will of lawyers and judges has replaced the will of the people. In short, what was once a unique feature of American constitutionalism has spread like wild-fire around the globe.

Almost every democracy now has a constitutional court. We seem to live in a copy-cat world. Such courts are even to be found in places like South Korea, Mongolia, Turkey, Kazakhstan, and in most South American countries. In short, constitutional jurisprudence is a world-wide phenomenon. Almost every nation believes it must have a constitutional court, if only to prove, ironically, that it is truly democratic. Interestingly, our own James Madison – often called the father of the American constitution – felt that neither representative government nor the rule of law depended on the judicial nullification of law, and indeed this appeared to be the prevailing view in most democracies prior to 1945. For Madison, separation of powers, overlaid and reinforced by a system of checks and balances among branches and levels of government, would be sufficient to curb both popular tyranny and the arbitrary exercise of power. The constitution-makers of our time, by contrast, believe that a fourth branch of government is necessary to curb such power, namely a constitutional court established outside the regular judiciary and at least coequal in status with the legislature and the executive.
We have yet to fully account for this astonishing development? A full answer to the question still eludes us. A standard explanation sees the creation of constitutional courts as a reaction to the popular tyrannies of the pre-war period. In the aftermath of the war’s destruction, it was thought, some institution was needed to referee democracy, and independent constitutional courts were the institutions of choice to play this role. Others have attributed the adoption of constitutional review to the growth of the administrative state and the felt need to curtail its power over the individual, to the revival of natural law and renewed belief in transcendent principles of justice, especially in the wake of World War II, and to the proliferation of international human rights law and the creation of transnational judicial bodies entrusted with its enforcement.

Equally important, and relatedly, national constitutions took on a different role in the post-war era, especially in western democracies. They were no longer simply governing frameworks or guidelines to political action or public declarations of high ideals. They were now regarded as supreme law, superior to ordinary law, and therefore binding on all branches and levels of government. Human rights in particular were privileged in these constitutions. Under the new constitutionalism in western Europe, guaranteed rights – individual as well as some group rights – were taken seriously and placed as a consequence under the protection of constitutional courts.

The postwar creation of these courts appeared in three major waves, the FIRST in the immediate aftermath of World War II, when Germany and Italy established independent constitutional courts for the first time; the SECOND in the 1970s and early 1980s when several other European democracies followed suit, not to mention the constitutional courts created in several Latin American countries; and THIRD, in the 1990s when every post-communist country in Eastern Europe and virtually all the transitional democracies of the old Soviet Union established
Of interest here is Germany’s impact on the second and third waves. Some 80 to 90 new national constitutions were drafted in recent decades, many heavily influenced by Germany’s Basic Law, especially its sections on basic rights and the judiciary. What is amazing is that already by the 1970s, the Federal Constitutional Court was rivaling the United States Supreme Court in power and prestige around the world. And arguably, by the 1980's, Germany’s Basic Law, along with its system of constitutional justice, had replaced the U.S. Constitution, along with its system of judicial review, as the world’s leading model of constitutional governance. Indeed, almost all the countries of central and eastern Europe modeled their courts on the FCC, as did Spain and Portugal years earlier, and as did South Africa in 1992.

But in some central and eastern European states, constitution-makers adopted the German model largely out of blind imitation instead of careful deliberation in the light of their indigenous political and legal cultures. One may doubt that constitutional review will flower in some of these nations. In saying this, I have in mind particularly the transitional democracies of the old Soviet Union, many of whose constitutional courts have foundered on the shoals of corruption, political instability, or judicial timidity. On the other hand, effective regimes of constitutional justice do appear to have been created in countries such as Hungary, Poland, and the Czech Republic.

These observations, however, beg the question of how you measure the success or effectiveness of these new tribunals. By the frequency with they strike down legislation? By the frequency with which they validate laws on constitutional grounds? By the degree to which their decisions are carried out? By the willingness of ordinary judges to certify constitutional issues to them? By the reputation of such courts among the bar, the public, or the political establishment?
But there is still a prior question that neither legal scholars nor political scientists have paid much attention to. And that is: What are the legal, social, cultural, and political conditions for the successful or effective exercise of judicial review? Although I pass on all these questions here, they are certainly worthy of consideration in a conference such as this.

With this background, then, I turn to a comparison of the U.S. and Germany, the paradigmatic examples, respectively, of the European and American models of judicial review. Up to now, by the way, I have been using the term judicial review and constitutional review interchangeably but, conceptually, it would be more accurate to associate judicial review with the work of the U.S. Supreme Court and constitutional review with that of the Federal Constitutional Court (FCC).

First, a few words on the historical origins of judicial review: The origins of judicial review in the United States and constitutional review in Germany should cast some light on their essential differences. The judicial power to invalidate federal laws and regulations on constitutional grounds in the U.S. is often associated with the famous case of Marbury v. Madison. Judicial review was a power that Chief Justice Marshall inferred from the Constitution’s language and structure. Although Marbury lays claim to historic importance, it failed to inaugurate a juridical democracy of the contemporary German variety. For much of the 19th century, constitutional cases were conspicuous for their absence in the Supreme Court; indeed, it took 54 years after Marbury before the Supreme Court got around to declaring another act of congress unconstitutional and, as we all know, the second case -- Dred Scott v. Sanford -- turned out to be a national disaster. Only in the 20th century, and mainly since 1950, did judicial review take on something akin to constitutional review in the European sense.
It bears repeating that judicial review in the U.S. was a judge-made invention that Americans came to associate with the doctrine of separated powers, whereas Europeans, historically, had drawn the opposite conclusion. What is interesting about the U.S., however, is not that the Constitution was looked upon as higher law -- it was -- or that it was grounded in popular sovereignty, but the belief that courts of law generally could refuse to enforce laws and regulations that violate the Constitution.

The powers of constitutional review in Germany, on the other hand, are set forth clearly in the Basic Law, one consequence of which is the relative absence in Germany of the kind of trench warfare that you find in the U.S. among scholars and judges over the scope and legitimacy of judicial review. (The debate shapes up differently in the two countries.) But constitutional review is not entirely new to Germany. The FCC actually traces its roots to Germany’s Reichskammergericht, established as far back as 1495, to Austria’s Imperial Court, established in 1867, and to the Weimar Republic’s Staatsgerichtshof. The first two courts were quasi-judicial bodies designed to settle political controversies between the crown princes in Germany and state organs in Austria. These tribunals, like the Staatsgerichtshof and modern European constitutional courts, were created, inter alia, for the specific purpose of deciding constitutional disputes between branches and levels of government.

Constitutional review in its modern European 20th century form actually begins with the establishment in 1920 of the Austrian Constitutional Court, which Brewer-Carias accurately describes as the “personal masterpiece of Hans Kelsen,” the author of Austria’s 1920 constitution. (In fact, Kelsen was a member of Austria’s Court until 1929.) This tribunal was created as a specialized court of constitutional review, independent of the regular judiciary. As an “ad hoc”
organ of constitutional justice, its powers, of necessity, were laid down in the constitution. Its jurisdiction extended to deciding constitutional conflicts between state organs and between federal and state governments; more importantly, the Court was empowered to review the constitutionality of laws on the application of a government or one-third of the members of the national parliament.

Kelsen’s system of constitutional justice is rooted in his so-called pure theory of law. The constitution in his view represents the Grundnorm or the highest value of the legal order whose validity and democratic legitimacy form the basis of the entire polity. For him, the legal system is a unified whole, a hierarchical system of positive law capped by the superior law of the Constitution. It was a neatly packaged theory, formidable in its formality. The Constitution derives its legitimacy from the sovereign will of the people, just as laws and other public acts derive their legitimacy from the Constitution. The Constitution in turn, as the expression of popular will, confers extensive jurisdiction on the constitutional court to enforce the popular will as represented by the Grundnorm.

The function of a constitutional court in Kelsen’s project is to ensure that political reality conforms to constitutional normativity. The legitimacy of the legal system as a whole depends on the rigorous enforcement of the Grundnorm or constitution, requiring the judicial invalidation of laws that conflict with it. Kelsen acknowledges the legislative character of the constitutional court, but in his view its function is confined to negating laws in the interest of preserving constitutional legality. And while this was seen as a modification of the traditional principle of separation of powers, Kelsen felt that constitutional review would preserve the essential core of the doctrine of separated powers as well as the formal distinction, required by his pure theory of law, between law and politics. Whether this model of constitutional review conforms to experience is a question you will surely be talking about in the course of this conference.
Germany’s Federal Constitutional Court is a Kelsenian tribunal and, as noted, the prototypical example of European constitutional review except that its organization is different from and its jurisdiction broader than most European constitutional courts. Unlike the Supreme Court, which is a single body of 9 justices, the FCC divides itself into two senates of eight judges each. The two senates are equal in power and exercise mutually exclusive jurisdiction, just as the members of each senate are non-transferable. So far as I know, the two-senate structure is unique to Germany; it was the product of political negotiations between the two houses of parliament and among the main political parties. For present purposes, however, the history of these negotiations may be ignored.

In the time remaining, and obedient to my instructions, I shall confine myself to a few comparisons between the U.S. Supreme Court and the FCC. This is a large subject, one that embraces each court’s authority and jurisdiction, internal administration, issues of access and standing, agenda setting, decision-making procedures, constitutional policies and their impact, and judicial recruitment. I have compared the two courts along all of these dimensions in other places. What I plan to do here is to limit myself to a few contrasts this audience is likely to find most interesting, and perhaps along the way to hazard a remark or two about their merits or imperfections. I wish there were time to discuss the constitutional policies of the two tribunals. For some of you that would be the most fascinating, but I plan to stick to selected aspects of each court’s powers, say a little bit about the differences in their business loads and decision-making procedures, and then conclude with some observations on judicial selection and tenure.

Initially, some general differences between the two tribunals might be noted. First, the Supreme Court, unlike the FCC, is a court of generalized public law jurisdiction. It is mainly an
appellate court. Second, the United States features a diffuse rather than a concentrated system of judicial review. The Supreme Court shares its power to hear constitutional cases with other federal and state courts. By contrast, of course, the FCC is specialized court of constitutional review, and its jurisdiction is mainly original. Third, and relatedly, constitutional review in the U.S. takes place only within the context of a concrete case. As Tocqueville noted 175 years ago, American judicial power “pronounces on special cases, and not upon general principles.” That is, constitutional questions may be addressed only in the course of ordinary litigation and only when the constitutional issue is clearly framed and argued by the parties before the Court.

Fourth, the Supreme Court, unlike the FCC, has adopted strategies for avoiding constitutional issues, even when properly before it. Its tool kit of avoidance include various justiciability doctrines, prudential arguments, and the famous Ashwander rules, one of which holds that constitutional issues should not be reached in advance of the necessity for deciding them. In short, the Supreme Court has created a “buffer zone” between ordinary legal and constitutional issues, one that effectively shields the judicial process against the necessity or propriety of deciding cases on constitutional grounds.

Finally, there is the famous political question doctrine. Even when a constitutional issue of utmost gravity is before the Supreme Court, in a case over which it clearly has jurisdiction, the Court may decide not to decide the issue on the ground that it involves a question that should be resolved by Congress or the executive or both together. The political question doctrine, like other norms of judicial restraint, is in the American view a rule that proceeds from the principle of separation of powers and from the Court’s own belief that judicial forbearance is necessary in the interest of its own self-preservation, a perspective very different from the German.
Examples of cases the Supreme Court has refused to decide on political question grounds involve the President’s authority unilaterally to terminate a treaty, Congress’s authority to determine whether a state has ratified a constitutional amendment, and the scope of the Senate’s authority in an impeachment trial. By the same token, lower federal courts have refused to decide constitutional conflicts between President and Congress over the extent of their respective military powers. Some German scholars have wondered why President Clinton’s impeachment trial was not challenged in the Supreme Court, not realizing that the meaning of “high crimes and misdemeanors,” in the Supreme Court’s view, is a political question reserved for the sole determination of the U.S. Senate. But this issue would have been appropriate for constitutional review in Germany. Indeed, impeachment proceedings brought against Germany’s Federal President by the Bundestag and Bundesrat for willfully violating the Basic Law must, under the terms of Article 61, be presented to the FCC for final decision.

In this connection, I think of Bush v. Gore. Most of my colleagues seem to have consigned this case to the pantheon of infamy, not only for its reasoning, but also for the Court’s decision to decide the case in the first place. One of the country’s top constitutional scholars, Erwin Chemerinsky, recently argued in the pages of the Notre Dame Law Review that Bush v. Gore raised a political question that the court should have left alone.

Yet Bush v. Gore is precisely the kind of case the FCC would have been called upon to resolve. Granted, the facts of Bush v. Gore are unique to the American presidential electoral process. Nevertheless, I think I am confident in saying that Germany’s legal academic community would see the decision to decide the case as fully consistent with its conception of constitutional justice. Bush v. Gore, incidentally, might be compared with the Hessen Election Review Case handed down on
February 8 of this year. Allow me to discuss this case briefly because it illustrates some major differences between judicial review in the United States and constitutional review in Germany.

In the Hessen state election of 1999, Christian Democrats won 50 of the state’s 110 seats, after which they proceeded to establish a majority governing coalition with Free Democrats, consigning Social Democrats and the Greens to the role of opposition. It was found out later that Christian Democrats had used illegal campaign funds during the election, whereupon the opposition challenged the validity of the election under state constitutional and statutory provisions. (Sound familiar?) In response, the coalition government challenged the validity of the state proceeding under the Basic Law in what is known as an abstract judicial review proceeding. The case was complicated, but essentially Hesse’s law had established an Election Review Court, composed of both judges and legislators, to determine whether electoral irregularities considered to be criminal or contrary to “good morals” (guten Sitten) conflicted with the constitutional principles of popular democracy, the rule of law, and separation of powers. Voter intent also figured as an issue here as it did in Bush v. Gore.

The FCC used this case to clarify all of the constitutional issues raised by the petition, in short, to resolve doubts as to whether the standard of good morals was a rule of law principle and whether the Election Review Court was in fact a “court” in the constitutional sense. The core of the decision invalidated the state statutory provision that made the decision of the Election Review Court “non-reviewable.” It ruled that the State Supreme Court must be given the opportunity to review its decision. A month later, finally, in the aftermath of the FCC’s decision, Hesse’s Election Review Court decided that the CDU’s use of illegal funds, however regrettable, did not violate “good morals” as defined by the FCC, and thus could not be said to have unlawfully influenced the
outcome of the state election. Hence, the validity of the election.

The Hessen Election Review Case warrants attention because it is an example of abstract judicial review, the quintessence of German – and European – constitutional review. Why? Because it allows the Court to decide constitutional issues entirely apart from any “case” or “controversy” in the American sense. Upon the application of the federal government, a state government, or one-third of the members of parliament, a newly minted statute -- or an old one -- may be directly challenged in the FCC in the face of doubts -- yes, mere doubts -- about its constitutionality.

This is a uniquely Kelsenian enterprise. Its purpose is not vindicate an individual’s claim to a constitutional right or even the claim of the official party petitioning the court, but rather to vindicate the public’s interest in the validity of law. What is at stake is the constitutional order itself as well as the integrity of the polity. Kelsen regarded the American case and controversy rule as a “juristically imperfect means” of addressing issues of constitutionality. The imperfection he found in the “detour” of a lawsuit and the long period of doubt and uncertainty about the validity of a statute that delays in the course of ordinary litigation would produce. The merit of the German approach, Kelsen would say, is that it defines the meaning of the constitution expeditiously, and in the abstract, and as a matter of legal formality, for the rule of law cannot survive in a jurisprudence of doubt. Abstract review is a search for objectively right decisions in which the Constitution, not the judges speak. In this respect, you would never find a German justice saying, as did Chief Justice Hughes, that “We are under a Constitution, but the Constitution is what the judges say it is.” In Germany, it is the Basic Law that speaks.

The attitude of Americans, on the other hand, is one largely informed by realist thinking. We are largely agnostics; we don’t believe in the existence of objectively right constitutional
decisions. And we don’t think every ambiguity in the law needs to be resolved. In fact, we often thrive in ambiguity. Less formalistic and more pragmatic than the German mind-set, Americans seem to share with Holmes the view that experience rather than general principles is the life of the law. Similarly, and by the same token, Americans rely more on political than legal solutions to the problems of governance and statecraft, particularly when it comes to the operation of the national political process, even when interesting constitutional issues loom in the background. I think we Americans are more optimistic about the capacity of politics to deal with certain kinds of constitutional issues, especially those implicating federalism and separation of powers.

As you might guess, abstract review petitions are among the Court’s most politically charged cases. They are invariably brought by opposition political parties. By petitioning the Court after losing in the legislative arena, these parties can instantly transform a political defeat into a constitutional proceeding. Up to now, 135 such cases have been filed, 80 of which the Court has decided. Many are among the most controversial of its decisions, as I’ve said, among them the abortion cases of 1975 and 1992, several party finance decisions, the Foreign Resident Voting Case of 1990, and several cases arising out of German reunification. Of some 44 published opinions in this area that I looked at recently, the Court struck down the law (or a part of it) in 23 cases and sustained it in 21. Some of these case were federal-state disputes transcending party lines, but no less political for that reason. Here, however, you usually find a state government controlled by one party contesting a law or regulation enacted by the national government under the control of another party or vice versa.

Let me turn to other aspects of the FCC’s work. The Basic Law specifies no fewer than 17 subjects or proceedings over which the FCC has jurisdiction. Apart from abstract review, these
proceedings include governmental petitions to have political parties declared unconstitutional, disputes between the highest organs or branches of the federal government, conflicts between the states or between the states and the national government, constitutional complaints filed by individual citizens, and judicial requests to review the constitutionality of federal or state law. Armed with these powers, the FCC has influenced the shape of Germany’s political landscape, reaching deep into the heart of the existing state, guarding its institutions, circumscribing its powers, clarifying its goals, and in many instances even instructing politicians to revise laws in particular ways. By my rough count, the FCC has nullified or declared incompatible with the Basic Law around 500 laws, or parts thereof, a record that makes the judicial activism of the U.S. Supreme Court look pale by comparison.

What needs to be remembered in any comparison of the two tribunals is that the Basic Law itself places the FCC at the epicenter of the Federal Republic’s political system. Like the Austrian Court, it was designed to be the guardian of the Basic Law, a role quite different from that played by the U.S. Supreme Court. The FCC was created not only to protect individual and minority rights, but also to referee German democracy, to umpire the federal system, to monitor elections, and to preserve the Basic Law’s structure, such as it is, of separated powers and checks and balances. Little wonder the FCC blossomed into a powerful judicial law-making body. The Supreme Court, by contrast, could not be described as the guardian of the Constitution, at least not in the German sense of guardianship.

The workloads of the two tribunals may help to underscore the point about guardianship. As for the FCC, its present docket is numerically comparable to the Supreme Court’s. But the nature of the cases is very different. Barely 35 percent of all certiorari petitions filed with the
Supreme Court in recent years involves the Constitution as a principal issue. The same percentage holds for the 75 to 80 reported cases per year that the Court decides by signed opinions on the merits. In the FCC, by contrast, all filings -- with few exceptions -- are constitutional cases. So the two courts play very different roles in their respective societies.

The 50 year workload of the FCC -- amounting to some 140,000 cases -- has covered every field of law, from tax policy to rearmament, extending even to private contracts implicating basic rights. No area of law is insulated against constitutional resolution in the FCC. There is nothing comparable to the Supreme Court’s virtual abdication of judicial review over tax policy, the regulation of business and industrial conditions or, until recently, national legislation enacted pursuant to the commerce clause. In the German constitutional mind-set, all of the Basic Law’s provisions are normative and therefore judicially enforceable. That, in short, is what the Kelsenian Rechtsstaat is all about.

I don’t have before me an exact comparison of the substantive issues decided by the two courts, but their respective issue profiles would be quite different, a difference that relates in part to who gets to set the agenda. The Supreme Court is fully empowered to decide what it wants to decide, and what the court wants to decide, at least in the impression of some, is the product of the subjective judgments or personal views of the justices, who in almost every instance are responding to petitions financed by litigation-oriented interest groups, many of them with an ideological ax to grind.. This is not the way it works in Germany. Pressure groups do not play a major role in generating adjudication in the FCC. Apart from constitutional complaints, access to the FCC is restricted to governments, parliaments, courts, and legislative minorities. All have privileged access and their submissions must be accepted for review.

I should note, however, that 95 percent of the FCC’s annual caseload falls into two of 17
jurisdiction categories, namely constitutional complaints and so-called concrete judicial review references. In a typical year, the Court receives about 5500 constitutional complaints from ordinary citizens and anywhere from 45 to 90 cases in which ordinary judges, in a concrete case, refer laws to the FCC when they – the judges – are convinced that the law under which a case arises is unconstitutional. Additionally, in any given year, the Court can always count on receiving a handful of abstract review cases together with federal-state conflicts, petitions contesting election results or the seating of an elected representative, and, on rare occasions, an action to have a political party declared unconstitutional.

The FCC’s decisions take two forms. First, and most importantly, are the reported decisions handed down by the two senates with full written opinions. They number about 50 to 60 cases per year, not too far behind the Supreme Court’s record of 75 to 80 cases decided on the merits with full opinion. Second, an additional 400 to 500 cases are decided by three-judge panels within each senate in cases where the panel unanimously agrees that the outcome is dictated by current decisional law. These decisions, by the way, take the form of short written opinions, many of which are reprinted in German law journals. All remaining cases are also disposed of by the three-judge chambers. Constitutional complaints, for example, are rejected if the chambers unanimously agree that the complaint is frivolous or has no chance of success. If one judge dissents, then the complaint goes to the full senate for disposition and at that stage, if two judges vote to accept the case, it proceeds to a full senate decision on the merits. (Rule of 2 as opposed to U.S. rule of 4.) Hundreds of complaints, by the way, are filed by individuals without the aid of a lawyer. For the average bloke going to the court is costless – and hopeless.

What might be of interest to Americans is that even those persons whose complaints are dismissed are given reasons for their rejection, usually by letter, and occasionally by a phone call.
to a judge where a concrete judicial review case is concerned, sharply contrasting with the summary dismissal (without explanation) of certiorari petitions in the Supreme Court. The German process has much to do, I think, with the Kelsenian notion of constitutional justice and with a legal culture that demands reasons and accountability from courts of law as well as from other governing institutions.

Let me say more about the FCC’s full opinions on the merits. 1998 was a typical year. 31 of its 60 reported opinions involved constitutional complaints, 12 were concrete review cases, and the rest were cases arising out of disputed elections, abstract review petitions, and contests between branches or levels of government. Americans would recognize the significance of several cases, especially those dealing with elections, freedom of the press, and perhaps property rights. But most of the German cases would command little or no attention in the Supreme Court. I refer to at least 8 tax cases, one of which invalidated a federal tax as too burdensome on a family with several children. I also refer to two social security cases, a case challenging Germany’s membership in the European monetary union, the question of the adequacy of the salary of civil servants and judges with more than two children and – and this really blows the American mind – the Court’s review of the constitutionality of laws laying down grammatical rules in the use of the German language.

Other aspects of the decisional process within the FCC also diverge from American practice. A few highlights are worth mentioning. First, the FCC’s members are not generalists. They are specialists, much as the Court itself is a specialized organ of constitutional review. Despite the partisan recruitment of the justices, about which I’ll say more in a minute, the FCC’s members are selected largely for their expertise in given fields of law. And so, a case accepted for full senate review is sent to the justice whose expertise extends to the field it represents. He or she is responsible for researching the case and preparing the report that often forms the basis of the final
opinion. Once the report is finished – may take months – it is then forwarded to the other 7 justices and subject thereafter to full senate deliberation, and that process is truly collegial.

By the same token, the clerks who assist the justices are also specialists. They are not recent law graduates still wet behind the ears, as they are in this country, but professional judges, experienced civil servants, or young legal scholars who spend three to five or more years assisting a particular justice.

Finally, the FCC issues institutional opinions; they are unsigned and almost always unanimous. Only dissenting opinions are signed, but they are rare. (Note: Probably due (1) to the relative agreement among the justices over how to interpret the Basic Law, (2) to the psychology of legal codification which demands coherence in law’s conceptual structure, and (3) to the relative specificity of the Basic Law.) There seems to be an informal rule that justices dissent only when they have to as a matter of conscience. In 1998, for example, only two reported cases featured dissenting opinions. That 60% of all Supreme Court decisions feature dissenting or multiple opinions, not to mention the 26 out of 75 cases decided by 5-4 votes in the Supreme Court’s most recent term, would, I think, shock Germans who demand clarity, consistency, and predictability from their legal system. If a German justice were to write 16 dissenting opinions in a single year, as Justice Stevens did last year, he would be regarded as an oddball nuisance if not a little bit insane.

As for split voting on the Supreme Court, one may of course wonder whether the constitutionality of any law should depend on the vote of a single person. The frequency of 5-4 alignments on the Supreme Court strikes many Germans as major imperfection in comparison with the 5 out of 8 votes needed on a given senate to nullify a law in the FCC. Would Congress be able to pass a law requiring the Supreme Court to marshall 6 out of 9 votes to invalidate legislation?
Finally, let me say some things about judicial selection because in Germany the method of selection is associated with the legitimacy of constitutional review. As I have already noted, the FCC’s presence is deeply felt in the corridors of power. The impact of its work on the political system and the evolution of public policy has been substantial and, I would add, more pervasive politically than American Supreme Court decisions. The long shadow cast by the FCC has even prompted legislators to negotiate their differences rather than to risk defeat on a constitutional challenge in one of the FCC’s senates, not to mention the Court’s frequent practice of sustaining legislation temporarily on condition that parliament change the law by a specified date to meet constitutional standards – a kind of interplay that virtually obliterates the distinction between legislation and adjudication.

And yet the FCC remains Germany’s most respected institution, commanding substantially more trust among the population generally than other branches or agencies of government. The willingness of 130,000 people to file constitutional complaints in the space of 50 years says something positive about the FCC’s perceived role as guardian of the Basic Law and guaranteed rights. And if compliance with the Court’s decisions among political actors is a measure of general respect for the Court, that respect – and acceptance – remains enormously high.

I want to suggest that this respect – and acceptance – has much to do with parliament’s role in selecting the judges. Parliamentary selection gives them democratic legitimacy and, as a consequence, they – the judges – are seen as legitimate players in the political system. Interestingly, the German literature seldom characterizes the FCC as a countermajoritarian institution. American doctrines of judicial restraint, together with the political question doctrine, stem largely from the perceived counter-majoritarian character of the Supreme Court, owing in part to the fact that the justices are appointed for life and by the President alone, notwithstanding the Senate’s advice and
As many of you know, the Bundestag and Bundesrat each elect four justices of each senate and they alternate in the selection of the Court’s president and vice-president. What is more, they must be elected by a two-thirds vote in each house, although in the Bundestag a 12 member judicial selection committee picks the justices. The members of this committee are selected by each parliamentary party proportionate to each party’s total house membership. So the political parties control the process of selection in the Bundestag and also to a large extent in the Bundesrat, where independent state interests are also represented. Kelsen, by the way, supported this method of selection. Since striking down a law is a legislative function, according to Kelson, the members of the Court must be elected by parliament in the interest of the FCC’s democratic legitimacy.

As a consequence of the two-thirds rule for election, the judicial selection process has turned into a highly collaborative exercise between ruling coalitions and the main opposition parties in both houses. As a matter of settled practice, the two major parties command an equal number of seats in both senates. It’s pure consociationalism. The two-thirds rule usually insures political and ideological balance on the Court, just as limited tenure insures some degree of accountability without sacrificing judicial independence. The German experience prompts me to suggest that life tenure for American federal judges is a major flaw in the American constitutional design. Life tenure, after all – Jefferson, by the way, condemned its anti-democratic implications – was originally adopted because of the scarcity of people qualified to sit on the federal bench.

I am less convinced of the necessity of choosing judges behind closed doors. In fact, German law bars the release of information about negotiations over particular candidates, although the public is generally aware of who the leading candidates are. Germans I’ve spoken to regard open confirmations hearings such as those involving Robert Bork and Clarence Thomas as circuses,
bordering on the obscene. The spectacle of pressure groups lining up behind or against a nominee and threats to defeat senators who vote the wrong way strikes them not only as gross interference with the independent judgment of the senators to confirm or not to confirm, but also as an assault on principle of judicial independence itself, to say nothing about the invasion of privacy in such hearings.

I conclude.

I’ve tried to highlight a number of comparisons between American judicial review and German constitutional review. My remarks have been mainly descriptive and they have emphasized significant differences between the two systems, treating them as ideal models of diffuse and concentrated review. In highlighting the differences, I realize that I may have overlooked converging trends in the United States and Germany. But having focused on the two systems as ideal types, we are left with several questions, some of which are on the agenda of this conference. The questions are these:

1. Which country has the superior system of constitutional justice?
2. Is this a fair question, or must each system be analyzed and appraised against the backdrop of its political history and legal culture?
3. What are the arguments in favor of or against diffuse as opposed to concentrated judicial review?
4. When or under what circumstances would it be proper or advisable for a constitutional democracy to place the power of judicial review in a specialized constitutional court rather than in the judiciary generally or in a branch of its highest appellate court?
5. One major study of constitutional courts in Germany, France, Spain, and Italy concludes that these tribunals have transformed themselves into legislative bodies pure and simple, casting the
traditional doctrine of separation of powers into the limbo of obsolescence. Is this true and, if so, does this development threaten democracy as we know it?

6. How extensively can you judicialize or constitutionalize politics without curtaining a society’s political imagination?

7. In the light of the increasing maturity of Germany’s political democracy, should the Basic Law be amended to repeal the Constitutional Court’s abstract review jurisdiction in order to render its exposure to politics less direct?

8. Where is the line to be drawn between constitutionalism and democracy? At what point does one value begin to erode the integrity of the other?

9. Finally, how should constitutional court judges be selected? Is the German method to be preferred over the American? What method is best calculated to produce the kind of people we would like to occupy a constitutional bench?

All of these questions are worthy of your consideration.

Thank you for your attention.