INTRODUCTION

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In recent decades, nations such as Germany, Mexico, Italy, and Japan have adopted written constitutions—documents that have often explicitly been modeled in part on the United States Constitution. Each of these countries has, for example, adopted some form of judicial review. Moreover, the adoption of written "constitutions" has not been confined to national borders. The nations that signed the Treaty of Rome,[1] which established the European Economic Community (or Common Market), have formed a sort of limited federal union. Thus, the Treaty allocates certain lawmaking powers to the Community institutions, and it provides that the Community's enactments shall be superior to contrary laws of the Member States. Judicial review is also a part of the Community organization: the Court of Justice has been assigned a role analogous to that of the Supreme Court of the United States in monitoring and enforcing the distribution of lawmaking powers that the Treaty establishes. Finally, even in nations where written constitutions have not been adopted, such as Britain and Israel, the notion of a "higher law" that may be judicially enforced in the face of contrary "ordinary" law has emerged.

Despite the obvious influence of the American model of constitutionalism on these developments, there is little recognition in American constitutional law or scholarship of the constitutional decision making in foreign nations and in the European Community. With few notable exceptions, American constitutional lawyers and scholars have seemed to assume that foreign constitutional developments are simply not relevant to the American scene. Thus, opinions of American courts rarely take into account developments in other countries, even though these

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1. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3, *reprinted in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 173 (European Communities ed. 1973).

developments are analogous to constitutional issues faced by American courts. For example, although many of the world's constitutional courts have now confronted the abortion question (reaching varying results) discussion of the abortion question in this country, in both judicial opinion and scholarly commentary, rarely deals with these cases and their analysis of the issues.

We first became interested in the possible utility of comparative study of constitutional issues when we participated in a conference in Europe three years ago. The subject of that conference was, broadly speaking, "equal educational opportunity." It focused on the ramifications of a decision of the West German Constitutional Court holding unconstitutional the system of university admissions that had been in use for many years in the Federal Republic.[2] The court's decision had the consequence of producing a constitutional right to university admission for qualified applicants. Because all universities in Germany are publicly financed, the decision effectively held that a certain category of applicants had a constitutionally guaranteed right to state subsidized higher education. Not surprisingly, this decision created a political furor and administrative frenzy in West Germany, and it raised serious questions about the appropriate role of the judiciary vis-a-vis both democratically elected officials and educational "experts." Critics charged that there was no basis in constitutional principle for the newly announced right, that the distribution of resources for higher education involved both political considerations and expertise that made judicial intervention inappropriate, and that the courts would be incapable of enforcing orders against other branches of government. The debate continues and its resolution is by no means clear, but the court's decision certainly spurred other political and administrative bodies to take action, and some of the most dire predictions of a "constitutional crisis" have failed to prove accurate.

Learning of this German constitutional law "problem" led us to speculate as to whether our thinking about similar issues in American constitutional law might be advanced by study of the German experience. American constitutional law began experimenting with a conceptually similar notion of constitutional "subsidy rights" in *Gideon v. Wainwright*.[3] During the years following *Gideon*, the Warren Court, using the equal protection clause, extended this notion of constitutional subsidy and seemed on the threshold of opening up a major new range

2. Numerus Clausus Case, 33 BVerfGE 303 (1973).
3. 372 U.S. 335 (1963).

of constitutional rights. This trend, however, was significantly restricted in the early 1970's in a case that also involved access to educational services—*Rodriguez v. San Antonio School District*.[4] Upon reflection, it seemed to us that the arguments for and against this right to subsidy principle in American law were similar to the arguments about the higher education case in West Germany. Many American commentators who, like their German counterparts, saw no principled foundation for the plaintiff's claim to subsidy, claimed that the issue involved control of social resources over which the judiciary had neither legitimate authority nor policy expertise, and as a result, forecast grave enforcement problems leading to a potential constitutional crisis.

Could American lawyers and scholars learn anything about the wisdom and appropriateness of the American decisions from a close examination of the German decisions? Several possibilities suggested themselves. Americans might conclude, for example, that the German decisions simply reflect a different scheme of underlying values, social problems, or institutional arrangements, and that the decisions therefore suggest little about the wisdom of the American decision. We might conclude, instead, that the differences in German and American approaches reflect an unwarranted reluctance on the part of the American judiciary to engage in what might be called an "administrative" allocation of resources necessary to achieve full participation in society. Or, Americans might conclude that the evidence on the German judicial experiment is not yet capable of evaluation and that we cannot yet know whether the costs of the German approach have been worth the benefits.

As we reflected on the potential results of comparative study, we became convinced that the potential benefits of comparative study of constitutional issues were worth more serious investigation. Because we are not principally comparativists, it was apparent that we would have to seek the involvement of persons more familiar than we are with foreign constitutional developments. At the same time, we believed that the American audience that would be the most appropriate both for contributing to and learning about the potential benefits of comparative study would be American constitutional law scholars. We therefore concluded that the best way to further explore the potential fruitfulness of comparative constitutional study would be to organize a

4. 411 U.S. 1 (1973).

small conference of comparativists and American constitutional law experts to explore constitutional developments of mutual interest.

The Articles and Comments appearing in this symposium formed the program of such a conference. We were very fortunate that the Annenberg Center for the Study of the American Experience at the University of Southern California agreed to sponsor the conference. The generous support of the Annenberg Center made possible a conference that included several foreign scholars and jurists as well as American constitutional law scholars. We are most grateful to the Center for its excellent support.

In planning the conference, we gave serious thought to the types of Articles that would be most useful in testing the hypothesis that research in comparative constitutional law would be useful and interesting. Our participation in the European Conference convinced us that there were both benefits and costs to a narrow, essentially problem-oriented format. In the end, we decided that the preferred course was to combine several possible approaches. We therefore solicited papers dealing with institutional concerns, with particular problems or specific doctrines, and with broader thematic issues, such as "judicial role."

The first three Articles address structural or institutional issues. Professor Cappelletti's Article[5] traces the development of judicial review in several nations and in the European Economic Community, suggesting that it is increasingly becoming an accepted institution. Professor Barav's Article[6] focuses on the Court of Justice of the European Economic Community. It describes the Court's jurisdiction and its procedures for reviewing what in essence are constitutional challenges to community and Member State laws and regulations. Professor Lorenz' Article[7] treats legislative and judicial control of administrative agencies in Germany, providing both an overview of German administrative process and a concrete setting for illustrating an important feature of the separation of powers in the Federal Republic of Germany.

The next two Articles address more discrete legal or doctrinal problems. Professor Tanaka's Article[8] begins with a brief description

5. Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409 (1980).

6. Barav, *The Judicial Power of the European Economic Community*, 53 S. CAL. L. REV. 461 (1980).

7. Lorenz, *The Constitutional Supervision of the Administrative Agencies in the Federal Republic of Germany*, 53 S. CAL. L. REV. 543 (1980).

8. Tanaka, *Legal Equality Among Family Members in Japan—The Impact of the Japanese Constitution of 1946 on the Traditional Family System*, 53 S. CAL. L. REV. 611 (1980).

of judicial review in Japan and then focuses on the Japanese attempt to resolve the clash between traditional family values and the equality provisions of the Japanese Constitution. Professor Kommers' Article[9] discusses the application of the German freedom of speech provision to the regulation of subversive activities and libel and slander, compares German and American doctrine in these areas, and suggests that German conceptualizations provide insights of interest to Americans on freedom of speech problems.

The final two Articles treat thematic issues. Professor Murphy's Article[10] is a multinational comparison of sources of constitutional interpretation. He considers such sources as the constitution's text and the framer's intent, arguing, both descriptively and normatively, for the inclusion of "natural law." Dean Casper's Article[11] concludes the symposium with an overview of the state of judicial review in Germany.

Following a summary presentation of each of these Articles at the conference, one or more brief responsive papers were also presented, and thereafter the floor was open for general discussion and debate. These responsive Comments are published in the order of their presentation. The final session of the conference was devoted to a discussion of the prospects and directions for future comparative constitutional law work. We summarize this discussion, no doubt slightly colored by our own views, below.

There was a surprising degree of consensus among conference participants with respect to both the prospects and direction of future comparative work. Virtually all participants were quite enthusiastic about the conference and the general subject of comparative constitutional law. Even those who came as skeptics conceded that the experience had been a worthwhile one. While some differences of opinion existed as to the most fruitful course for future work, all seemed to agree that knowledge of foreign developments would at a minimum increase the base of information for intelligent criticism of American legal developments. Virtually all of the participants also expressed skepticism at the notion that constitutional doctrine can simply be transnationally transplanted.

We believe that comparative constitutional law can play a significant role in the development of both legal theory and practical solu-

9. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657 (1980).

10. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980).

11. Casper, *Guardians of the Constitution*, 53 S. CAL. L. REV. 773 (1980).

tions to major social problems. Two kinds of activities would be valuable and appropriate in the near future: (1) An educational program or series of programs to teach American and European experts the general structure and doctrinal organization of other constitutional systems; and (2) research and writing in the comparative mode.

With regard to both of these activities, our experience in this conference as well as our prior German experience led us to believe strongly that one can articulate sensible boundaries for early stages of work. In our judgment it would not be fruitful to begin by questing for a general theory of constitutional law, whether normative or descriptive. We believe it would be equally unwise to focus on topics that are too technical or narrow to hold any promise for eventual theory generation. The kind of work that we believe might be most fruitfully pursued in the near future might be described as "interpretive description."

We believe that the appropriate audience for any teaching program would consist of American and foreign constitutional law experts, and our hope would be to stimulate comparative research and writing by these individuals. We do not mean to exclude scholars whose chief field of expertise is comparative law as such, but in our judgment the prospects for highly sophisticated interchange and research would be maximized by drawing upon those who specialize in constitutional law-related issues.

Our experience suggests that the efficient exchange of information and ideas among constitutional scholars in different nations is best accomplished by a not easily attained balance between rudimentary and sophisticated subject matter. For example, American scholars would not be able fully to understand the significance of German case law decisions without having some sense of the institutional relationships among courts and other organs of government, and, at least in some instances, the nonconstitutional legal norms that interface with constitutional law. At the same time, however, American constitutional scholars are capable of assimilating rudimentary information quickly and ultimately would be more interested in relatively sophisticated doctrinal, institutional, or problem-oriented comparisons. We also believe that topics with some measure of practical importance would be of greatest interest to American and foreign scholars, and, further, that the study or comparison of concrete cases is by far the most efficient way to promote rapid and reasonably sophisticated understanding and interchange. Finally, we are convinced that intelligent inquiry cannot

be limited to what Americans would call "constitutional law." Public law questions that in the United States often wind up as constitutional issues are often dealt with by statutory or administrative regulation in other nations.

The sort of research projects we envision for the future can be illustrated by some of the conference subjects. For example, Professor Kommers' Article, considered together with the responses to it, suggest that American and German conceptions of free speech are to some extent quite different. Underlying the traditional American conception is a construct sometimes referred to as the marketplace of ideas or content-neutrality model, which posits that the content of speech ought not to be relevant in determing whether it is constitutionally privileged. Thus, our courts attempt somewhat aggressively to avoid any prioritization or ranking of the importance or legitimacy of ideas. In contrast, the German conception (at least to some extent) sees the protection of speech as directly related to the other substantive values protected by the German Constitution, and therefore as inviting some ranking of ideas according to their contribution to these values. American scholars and judges have recently begun to wonder whether the content-neutral approach is capable of solving some major contemporary free speech problems, for example, the extent to which monopolistic mass media can be regulated, the scope of the first amendment privilege for libelous or slanderous utterances, and the range of activities protected as "commercial speech." To the extent that issues like these may require some sort of content evaluation, the American conception may be evolving somewhat toward the German approach. At all events, it seems fairly clear that we might gain perspective on the currents and crosscurrents of developing free speech doctrine in the United States by studying the somewhat different model in Germany. Assuming, as is probably true, that no single model fully explains the development of doctrine in either country, the study of comparative developments surely can give both countries a clearer picture of their own underlying conceptions and norms. The very thought of implicit judicial content regulation is perhaps "unthinkable" to many American constitutional lawyers today, but as Professor Linde forcefully pointed out during the conference, one of the main points of comparative constitutional law is to get people to think about the unthinkable.