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## Comparative Constitutional Law Casebooks for a Developing Discipline

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## COMMENTARY

# Comparative Constitutional Law: Casebooks for a Developing Discipline

*Donald P. Kommers\**

### I. Introduction

Comparative constitutional law is a developing area of legal scholarship. One sign of this development is the recent appearance of two casebooks, both published in 1979. *Comparative Constitutional Law: Cases and Materials* by Mauro Cappelletti and William Cohen, focuses primarily on the procedural rights of defendants from the United States and nine European jurisdictions. *Comparative Constitutional Law: Cases and Commentaries* by Walter F. Murphy and Joseph Tanenhaus, examines the constitutional interpretation of a large number of substantive issues in six contemporary constitutional democracies. Both books were published after long periods of gestation. The author-editors had experimented with the cases and materials in their own comparative constitutional law classes long before making them available to the general public.<sup>1</sup> Although organized for classroom teaching and directed toward the beginning student, these casebooks also indicate directions of possible research. Reviewing the two books together provides an opportunity not only to compare them as teaching tools but also to assess the nature and purpose of comparative constitutional law as an evolving research enterprise.

Comparative constitutional law is by no means a new branch of learning. Its ancestry dates back at least as far as Aristotle.<sup>2</sup> Much of

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1 Three of the editor-authors are American scholars: William Cohen is Professor of Law at Stanford University; Walter F. Murphy is McCormick Professor of Jurisprudence in the Department of Politics, Princeton University; Joseph Tanenhaus, now deceased, was Professor of Political Science at State University of New York at Stony Brook. The fourth, Mauro Cappelletti, an Italian legal scholar trained in both civil and common law traditions, is Professor of Law at Stanford University and the European Law Institute in Florence, Italy. He has taught courses in comparative constitutional law at both the Harvard and Stanford Law Schools.

2 Aristotle is well known for his study of 158 Greek cities and tribes, the only surviving

the modern literature, from Montesquieu to the present, consists of analytical commentary based upon the study of constitutional texts.<sup>3</sup> In contrast, the emerging literature, exemplified by the books under review, focuses on constitutional judicial opinions. Shortly after World War II, several countries created constitutional courts. The activities of these courts<sup>4</sup> have generated studies which tend to focus on the structure and impact of judicial review in a single country or on particular foreign cases marked by their political significance.<sup>5</sup>

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remnant of which is his *Constitution of Athens*. See K. FRITZ & E. KOPP, *ARISTOTLE'S CONSTITUTION OF ATHENS AND RELATED TEXTS* (1950).

3 In this genre one may include MONTESQUIEU, *SPIRIT OF THE LAWS* (1747), and twentieth century treatises of widely varying scope and length, such as J. BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* (2 vols. 1901); J. BURGESS, *POLITICAL SCIENCE AND CONSTITUTIONAL LAW* (2 vols. 1913); C. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* (4th ed. 1968); C. MCILWAIN, *CONSTITUTIONALISM ANCIENT AND MODERN* (1958) and *CONSTITUTIONALISM AND THE CHANGING WORLD* (1969); K. WHEARE, *MODERN CONSTITUTIONS* (2d ed. 1966); and C. STRONG, *A HISTORY OF MODERN CONSTITUTIONS: AN INTRODUCTION TO COMPARATIVE STUDY OF THEIR HISTORY AND EXISTING FORMS* (1964). An important older work in the classical historical tradition is C. CRANE, *POLITICS: AN INTRODUCTION TO THE STUDY OF COMPARATIVE CONSTITUTIONAL LAW* (1884). Modern works, mainly descriptive in character, include V. FRANCISCO, *A COMPARATIVE STUDY OF DIFFERENT CONSTITUTIONS* (1956); B. GUPTA, *COMPARATIVE STUDY OF SIX LIVING CONSTITUTIONS* (1974); K. GLASER, *COMPARATIVE FEDERAL CONSTITUTIONS* (1948); K. AZIZ, *COMPARATIVE CONSTITUTIONAL AND ADMINISTRATIVE LAW* (1979); and S. WOLF-PHILLIPS, *CONSTITUTIONS OF MODERN STATES* (1968). See also I. DUCHACEK, *POWER MAPS: COMPARATIVE POLITICS OF CONSTITUTIONS* (1973) and H. MAARSEVEEN & G. TANG, *WRITTEN CONSTITUTIONS: A COMPUTERIZED COMPARATIVE STUDY* (1978).

4 See generally M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971) and Kommers, *Judicial Review: Its Influence Abroad*, 428 *ANNALS* 52-64 (1976). For a general discussion of judicial review in English-speaking countries, see E. MCWHINNEY, *JUDICIAL REVIEW* (4th ed. 1969).

5 This is a diverse literature representing different disciplinary and methodological perspectives. Works in English include conventional legal and political studies such as R. BAKER, *JUDICIAL REVIEW IN MEXICO* (1971); B. STRAYER, *JUDICIAL REVIEW OF LEGISLATION IN CANADA* (1968); D. KOMMERS, *JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT* (1976); B. LOREN, *THE DEVELOPMENT OF JUDICIAL REVIEW IN IRELAND, 1937-1966* (1967); E. MCWHINNEY, *supra* note 4; and P. BLAIR, *FEDERALISM AND JUDICIAL REVIEW IN WEST GERMANY* (1981). Sociological and behavioral perspectives are illustrated in various chapters of *COMPARATIVE JUDICIAL BEHAVIOR* (G. Schubert & D. Danelski eds. 1969) and J. GROSSMAN & J. TANENHAUS, *FRONTIERS OF JUDICIAL RESEARCH* (1969). See also T. BECKER, *COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONING OF COURTS* (1970) and *Symposium — The Political Impact of Constitutional Courts*, 49 *NOTRE DAME LAW*. 952-1050 (1974). For an analytical review of several books mentioned in this and the following two notes, see Kommers, *Comparative Judicial Review and Constitutional Politics*, 24 *WORLD POLITICS* 282-97 (1975). Commentary on individual cases is quite substantial and appears mainly in the legal periodical literature. With regard to the Federal Republic of Germany, for example, leading case commentaries include McWhinney, *The New German Federal Constitutional Court and the Communist Party Decision*, 32 *IND. L. J.* 295 (1957); McWhinney, *Federal Constitutional Law and the Treaty-Making Power — Decision of the West German Constitutional Court*, 32 *CAN. B. REV.* 842 (1957); Loewenstein, *The Bonn Constitution and the European Defense Community Treaties: A Study in Judicial Frustration*, 64 *YALE L. J.* 805

More comparative in their approach are studies of constitutional cases drawn from two or more countries,<sup>6</sup> along with a few exploratory casebooks.<sup>7</sup> These resources, however, employ a variety of analytical frameworks and differ in their comparative value. On the whole this literature projects no common vision of the teaching or research enterprise. Scholars have tended their separate gardens, the result being a rather fortuitous collage of methodological and substantive approaches largely resistant to classroom adaptation.

By contrast, one strength of the books under review is their utility as teaching tools. Adaptable to various levels of instruction, they could serve, separately or together, as the nucleus of comparative constitutional law classes in law schools or in political science departments. Although the books differ in their treatment of case analysis, they are nevertheless compatible with a variety of teaching methods.

Before considering the two books in detail, a short description of their general content is necessary. Surprisingly, they contain little duplication. Both books include cases on abortion and both draw heavily from the work of the Supreme Court of the United States

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(1955); Doeker, *West German Federal Republic: Television Competence*, 10 AM. J. COMP. L. 277 (1961); Kommers, *The Spiegel Seizure Case*, in T. BECKLER, *POLITICAL TRIALS* 5-33 (1971); Bernstein, *West Germany Free Press and National Security. Reflections on the Spiegel Case*, 15 AM. J. COMP. L. 547 (1967); Kommers, *Politics and Jurisprudence in West Germany: State Financing of Political Parties*, 16 AM. J. JURIS. 215 (1971); and Gerstein & Lowry, *Abortion, Abstract Norms, and Social Control: The Decision of the West German Federal Constitutional Court*, 25 EMORY L. J. 849 (1976).

6 Examples are R. JOHNSTON, *THE EFFECT OF JUDICIAL REVIEW ON FEDERAL-STATE RELATIONS IN AUSTRALIA, CANADA, AND THE UNITED STATES* (1969); K. Ishimine, *A Comparative Study of Judicial Review Under American and Japanese Constitutional Law* (J.S.D. Thesis, Cornell University, 1974); F. CASTBERG, *FREEDOM OF SPEECH IN THE WEST: A COMPARATIVE STUDY OF PUBLIC LAW IN FRANCE, THE UNITED STATES, AND GERMANY* (1960); T. KOOPMANS, *CONSTITUTIONAL PROTECTION OF EQUALITY* (1975); V. MACKINNON, *COMPARATIVE FEDERALISM* (1964); E. MCWHINNEY, *COMPARATIVE FEDERALISM* (1962); A. SMITH, *THE COMMERCE POWER IN CANADA AND THE UNITED STATES* (1963); P. POLYVIQIU, *THE EQUAL PROTECTION OF THE LAWS* (1980); Trombetas, *The United States Supreme Court and the Federal Constitutional Court of Germany — Some Comparative Observations*, 17 REVUE HELLENIQUE DE DROIT INT'L 281 (1964); Casper, *William v. Rhodes and Public Financing of Political Parties Under the American and German Constitutions*, 1969 SUP. CT. REV. 271; Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980); Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657 (1980); and Kommers, *Abortion and the Constitution: United States and West German*, 25 AM. J. COMP. L. 255 (1977).

7 Particularly noteworthy are H. GROVES, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* (1963) and T. FRANCK, *COMPARATIVE CONSTITUTIONAL PROCESSES* (1968). Still another collection of cases is F. BALDWIN, JR., *COMPARATIVE CONSTITUTIONAL LAW: MEXICO-UGANDA-UNITED STATES: CASES-ARTICLES-COMMENTS-QUESTIONS* (Harvard International Legal Studies Center 1974). English translations of Japanese constitutional cases appear in *COURT AND CONSTITUTION IN JAPAN* (J. Maki ed. 1964).

and the West German Federal Constitutional Court, but this is the extent of their common coverage. Apart from the American and German tribunals, Murphy and Tanenhaus have chosen their cases from the highest courts of Japan, Canada, Australia, and Ireland; Cappelletti and Cohen from various superior courts of Austria, Belgium, England, France, Italy, and Switzerland as well as from the Court of Justice of the European Communities and the European Court and Commission of Human Rights. Topically, Murphy and Tanenhaus have organized 144 cases around 11 different themes, including separation of powers, federalism, foreign affairs, economic regulation, and various subjects related to the fundamental rights of persons. Cappelletti and Cohen, on the other hand, present 88 cases dealing mainly with the procedural rights of criminal and civil defendants. Many of the cases in both volumes appear in English translation for the first time.

The author-editors have included materials and commentaries that help to elucidate the cases. Murphy and Tanenhaus preface their presentation of the cases with a description of the legal and political systems of each nation covered. Additionally, each topical chapter is preceded by a short essay describing the functions of the six constitutional courts from which the cases are drawn. Cappelletti and Cohen, on the other hand, rely primarily on secondary sources to review the history and types of judicial review in Europe. Adapted from an earlier work by Cappelletti,<sup>8</sup> this section discusses the movement toward judicial control of constitutionality in Europe after World War II and the variations in modern systems of judicial review. This section touches themes such as separation of powers and economic regulation which are more explicitly treated in Murphy and Tanenhaus. Cappelletti and Cohen also include secondary readings on the sources of higher law emerging from the European Community treaties and the European Convention on Human Rights. This background material on judicial review, absent in Murphy and Tanenhaus, helps to illuminate the context in which European judges decide constitutional cases. In many ways the two books are complementary. The weaknesses and omissions of one book are remedied by the strengths and contributions of the other.

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8 See note 4 *supra*.

## II. The Comparative Enterprise

### A. *Defining the Field*

Comparative legal scholars have long disagreed about the nature of their enterprise. For some, comparative law is a method; for others, a science.<sup>9</sup> The books under review avoid this debate. They simply presuppose that comparative constitutional law is more than a method. It is considered a form of knowledge valued for its own sake. To be sure, it is not an organized body of knowledge analogous to theoretical physics or even to the domestic law of torts. These observations, however, are not meant to disparage the author-editors' work. The books under review are collections of cases, not systematic treatises intended to distill the essence of a discipline. Indeed, the argument can be made that comparative constitutional law is more "art" than "science." It is a profoundly human task characterized less by a fixed methodology than by the prudent application of what Aristotle called "practical wisdom."<sup>10</sup>

The significance of the books under review is that they *begin* to organize the field in a manner that is both useful and intellectually fulfilling. Judicial decisions and opinions are their primary data. The two books invite the student to examine a selection of foreign cases in order to understand the process of constitutional interpretation in different political and cultural settings. The organizing principle of the enterprise, following the lead of these books, is the problem of governance in two or more nations. For Murphy and

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9 Scholarly views of comparative law as method are H. GUTTERIDGE, *COMPARATIVE LAW* (2d ed. 1971); R. DAVID, *LES GRANDS SYSTEMES DE DROIT CONTEMPORAINS* (3rd ed. 1969); Kamba, *Comparative Law: A Theoretical Framework*, 23 *INT'L COMP. L. Q.* 485 (1974); O. Kahn-Freund, *Comparative Law as an Academic Subject*, 82 *L. Q. REV.* 40 (1966); and D. JAIN & A. MATHUR, *COMPARATIVE LAW* (1979). Those treating it as science include Rheinstein, *Teaching Tools in Comparative Law*, 1 *AM. J. COMP. L.* 95 (1952); Yntema, *Comparative Law and Humanism*, 7 *AM. J. COMP. L.* 493 (1958); and J. HALL, *COMPARATIVE LAW AND SOCIAL THEORY* (1963). The terms "method" and "science" have been used loosely, and occasionally interchangeably, in the literature. Generally, however, those defining comparative law as "method" have focused on the rather elementary task of describing the similarities and differences between legal rules and concepts, often for the practical purpose of advising clients or of improving or reforming legislation. Those defining it as "science" have tended to adopt a sociological approach to explain the function of law in society or a philosophical approach to identify legal norms and principles common to two or more countries. For a general discussion of the various approaches to comparative law, see *Comparative Law and Its Teaching in Modern Society*, Proceedings of the Seventh International Symposium on Comparative Law, August 27-29, 1969 (1970). One of the best short descriptions of the functions, aims, methods, and history of comparative law is contained in 1 K. ZWIGERT & H. KOETZ, *AN INTRODUCTION TO COMPARATIVE LAW* 1-56 (1977).

10 Aristotle, *Nicomachean Ethics*, Book VI, chap. 12, in R. MCKEON, *THE BASIC WORKS OF ARISTOTLE* 1035-36 (1941).

Tanenhaus the problem is largely one of balancing liberty and authority within the political order; for Cappelletti and Cohen it is achieving fairness and effective access to justice in civil and criminal legal proceedings.

Murphy and Tanenhaus envision the enterprise as "illustra[ting] on a cross-national basis judicial involvement in formulating public policy." Their editorial notes encourage students to read the cases with a watchful eye on the cultural, social, and political influences behind judicial policy. More importantly, their materials highlight the link between judicial policy and certain methods of constitutional interpretation. Cappelletti and Cohen, on the other hand, are more doctrinally oriented. Their case selections underscore the difference between constitutional rules pertaining to defendants' rights in civil and common law systems. Cappelletti and Cohen, however, also stress the increasing convergence in the rules of the two systems. In stressing this convergence, they suggest that the transnational harmonization of constitutional procedural law is related to the phenomenon of judicial review and to the higher law on which judicial review is based. For them comparative constitutional law is an explicitly normative undertaking, a search for better rules of constitutional order and more effective access to justice. The differing perspectives of the two volumes, however, should not be exaggerated. Cappelletti and Cohen, although chiefly interested in doctrine and prescription, remain aware of the environmental influences determining the composition of constitutional policy. By the same token, Murphy and Tanenhaus have not permitted their heavier accent on policymaking to hide their concern for the proper ordering of constitutional values.

### B. *Choosing Countries and Cases for Comparison*

A closer examination of the contents of the two texts will underscore both the difficulty and the promise of comparative constitutional law as a field of study. Initially, the author-editors faced the problem of choosing political systems and constitutional courts that would best lend themselves to comparative analysis. The nature and number of countries selected for comparison in introductory casebooks are important considerations. First, the countries should not be so numerous as to risk comparisons that are superficial, unsystematic, or excessively eclectic.<sup>11</sup> Second, they should not be so diverse as to make comparative evaluation difficult.

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<sup>11</sup> These are criticisms lodged against studies in comparative law generally. For a fuller discussion of these criticisms, see A. WATSON, *LEGAL TRANSPLANTS* 10-15 (1974).

In the texts under review, the author-editors chose countries which are properly related to one another. All are modern pluralistic democracies with developed economies, largely secular political cultures, and multi-party electoral systems. Against a backdrop of rapid cultural change and technological acceleration, these countries are all faced with similar problems of governance. Yet there are substantial differences in their cultural, political, religious, and legal histories. This particular admixture of similarity and difference makes these countries inviting candidates for comparative legal analysis.

The decision of Murphy and Tanenhaus to confine their coverage to the United States, Australia, Ireland, Canada, West Germany, and Japan has considerable merit. First, all the foreign systems, with the possible exception of West Germany, have tribunals similar in organization and jurisdiction to the United States Supreme Court. Even the Federal Constitutional Court of West Germany was partially modeled after the American Court,<sup>12</sup> as was the Supreme Court of Japan.<sup>13</sup> Second, all six courts have produced comparable bodies of constitutional jurisprudence. The doctrinal outcomes and constitutional reasoning, however, differ considerably from country to country, as the cases demonstrate. Third, four of the six are English-speaking countries with common law backgrounds, thus minimizing the linguistic problems likely to arise from the translation of foreign constitutional cases. (The judicious choice of German and Japanese cases, along with excellent translations and superior editing, has also helped to minimize these problems.) Fourth, the author-editors have chosen non-English-speaking tribunals for which there exists substantial secondary literature by American scholars.<sup>14</sup>

Lastly, four of the six countries chosen by Murphy and Tanenhaus have federal systems of government. Greater unity and comparability might have been achieved by focusing exclusively on federal systems. This approach, however, would have required the omission of Irish and Japanese cases that offer pointed contrasts to several American civil liberties cases. The author-editors might have included other federal systems with courts of judicial review, such as India, Switzerland, Austria, and Malaysia, thereby exposing students to an even wider variety of constitutional thought concerning the

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12 See D. KOMMERS, *JUDICIAL POLITICS*, *supra* note 5, at 86.

13 See Nathanson, *Constitutional Adjudication in Japan*, 7 AM. J. COMP. L. 195-218 (1958).

14 Much of the literature on the Federal Constitutional Court is included in note 5 *supra*. For a representative collection of articles on the Japanese Supreme Court, see D. HENDERSON, *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-1967* (1968). See also Ishimini, *supra* note 6.



vertical distribution of political power.<sup>15</sup> On the other hand, the comparison of federal systems varying sharply in their vertical distributions of power might seem inappropriate for comparative analysis. The purpose of the cases, however, is not to introduce the student to new ideas about federalism but rather to illustrate the role of constitutional courts in establishing the boundaries of power among levels of government in representative federal systems.

What the student learns from the distribution of power cases is that federalism and separation of powers can never be defined with precision. The task of interpretation must begin where the constitutional framers left off. The student learns that little about constitutional interpretation is wholly predictable. Judges may resort to a wide range of legitimate techniques, precedents, and doctrines in arriving at their decisions. Notwithstanding the often apparent clarity of a particular governmental division of power, courts of judicial review in a constitutional democracy are called upon continually to define and redefine the boundaries between units and levels of government. American students who look to their own constitutional cases for the last word on federalism may be surprised to find foreign constitutional courts, like the Supreme Court of Australia, examining American cases and rejecting their teaching. Students will also find that doctrinal outcomes vary according to the theory of constitutional interpretation a court uses.

Cappelletti and Cohen, like Murphy and Tanenhaus, have limited their coverage to long-established, stable constitutional democracies. But there seems to be less rhythm to their grouping of nations. The number of decisions they have chosen from each nation varies greatly. Most of the European cases are from the high courts of Austria, France, Germany, and Italy. Belgium, England, and Switzerland are each represented by a single judicial opinion and thus play minor roles in the overall comparison. Recall that the comparison is primarily between civil and common law systems. Regarding defendants' rights, however, the common law side is represented only by the United States. This selection of nations raises the question

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15 The idea of federalism drawn from federal systems, old and emergent, is discussed in C. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT* 186-227 (4th ed. 1968). For a treatment of judicial review in Austria and Switzerland, see VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART 439-88, 506-26 (H. Mosler ed. 1962). For Malaysia, see Sheridan, *Constitutional Adjudication in Malaysia*, in 2 K. BRACHER, *DIE MODERNE DEMOKRATIE UND IHR RECHT* 581-606 (1966). For India, see Kapur, *Federalism under the Indian Constitution*, *Id.* at 695-742. A more general treatment of Indian judicial review is E. McWHINNEY, *JUDICIAL REVIEW IN THE ENGLISH-SPEAKING WORLD* 126-55 (3d ed. 1965).

whether the author-editors would have suggested the same pattern of divergence and similarity between the two legal systems had additional common law countries been included in the casebook. (The international cases, as noted earlier, were included to show the emergence of judicial review as a transnational phenomenon.)

By contrast, Murphy and Tanenhaus have included a large number of cases from each country. United States cases predominate, as in Cappelletti and Cohen, but the number of constitutional cases from the other countries ranges from eleven for Australia to twenty-seven for Canada. Constitutional cases from at least four countries are represented in each topical chapter, but most of the chapters include cases from five or all the countries. The student is thus given the opportunity to approach the topic comparatively throughout the text. In Cappelletti and Cohen, the author-editors' tendency to consider the American cases more in relationship to one another than to corresponding European cases occasionally sidetracks the comparative enterprise.

The case selection in Murphy and Tanenhaus enhances the comparative value of the text. The author-editors highlight cases elaborating on constitutional doctrine at great length and cases enriched by dissenting opinions. The constitutional cases in Cappelletti and Cohen, on the other hand, are not of the same caliber. Several of the tribunals from which the cases are drawn do not have the status of major constitutional courts. The French Constitutional Council, for example, is powerless to review enacted laws.<sup>16</sup> Likewise, although the international tribunals may represent models of judicial review, they differ substantially from national constitutional courts. In short, Cappelletti and Cohen advance a notion of judicial review much broader than that of Murphy and Tanenhaus. In fairness, however, it should be noted that Cappelletti and Cohen are mainly interested in illustrating how the *idea* of judicial review or constitutional review<sup>17</sup> has begun to take shape in Europe, particularly under

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16 See Tunc, *The Fifth Republic, The Legislative Power, and Constitutional Review*, 9 AM. J. COMP. L. 335-43 (1960), and Waline, *The Constitutional Council of the French Republic*, 12 AM. J. COMP. L. 483-93 (1963).

17 The Germans have distinguished between judicial review and constitutional review. Judicial review (*richterliche Prüfungsrecht*) is a procedure by which courts determine the constitutionality of laws in the ordinary course of litigation; it is mainly a twentieth-century development in Germany. Constitutional review (*Staatsgerichtsbarkeit*) antedates judicial review, going back at least to early nineteenth-century German state constitutions. It is a judicial procedure for the resolution of controversies between units of levels of government about their respective rights and duties under the constitution. Disputes concerning the legitimacy of elections and referenda, ministerial impeachments, and the validity of amendments to the

the influence of supranational tribunals. For example, the opinion of Lord Denning in *H.P. Bulmer Ltd. v. J. Bollinger S.A.*,<sup>18</sup> the only English case in the textbook, shows that some British courts are developing a feel for "constitutional" adjudication because the Court of Justice in Luxembourg has required them to review domestic law in light of European treaty law.

### C. *Problems of Interpretation*

A critique of Cappelletti and Cohen should bear in mind the author-editors' three purposes: (1) to compare constitutional procedural rules in common and civil law countries; (2) to consider the justice of those rules; and (3) to illustrate the emergence and increasing acceptance of judicial review in European civil law jurisdictions. The third objective is pursued in the first part of the book. In this section the author-editors describe a "structural analysis of constitutional adjudication in the contemporary world." Most of the material in this section includes secondary articles and commentaries on European constitutional review — both judicial and political. The last two-thirds of the book undertake the comparative enterprise. Selected cases from seven countries and two international tribunals (European Court and Commission of Human Rights) are organized into chapters on the right of action, notice and fair hearing, judicial independence, the "natural judge,"<sup>19</sup> the right to counsel, illegally obtained evidence, and abortion, in that order. Interestingly, the abortion section, which was apparently annexed as an afterthought to add dramatic flair to the otherwise technical character of the preceding materials, is most valuable from a comparative perspective.<sup>20</sup>

Several observations are warranted regarding the procedural

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constitution were, in general, other examples of constitutional review. Constitutional review in Germany, unlike judicial review in the United States, never included the authority of a court to nullify legislative acts on constitutional grounds. Both judicial review and constitutional review are species of what now is generally known as constitutional jurisdiction (*Verfassungsgerichtsbarkeit*). See D. KOMMERS, *JUDICIAL POLITICS*, *supra* note 5, at 29.

18 Court of Appeal, [1974] 2 All E.R. 1226.

19 In the European context this right means that no person may be removed from jurisdiction of his lawful judge. The "natural judge" provision of the West German Basic Law (Art. 101), for example, is a ban on extraordinary courts.

20 The decisions are from the United States (*Roe v. Wade*, 410 U.S. 113 (1973)); France (Decision of January 15, 1975, Conseil Constitutionnel, [1975] D.S. Jur. 529); West Germany (Decision of February 25, 1975, 39 BVerfGE 1(1975)); Italy, *Carmosina et al.*, Corte costituzionale, Decision of February 18, 1975, No. 27 [1975] 20 Guir. Const. 117; and Austria (Decision of October 11, 1974, [1974] Erklärungen des Verfassungsgerichtshofs 221). In addition to the U.S. and German cases, Murphy and Tanenhaus add a third from Canada (*Morgentaler v. The Queen* [1975] 20 C.C.C. (2d) 449).

rights cases. First, the organization of the materials in the order noted above appears, as the author-editors acknowledge, "unconventional and, perhaps, illogical." For example, the chapters on the right of action and notice and fair hearing might have more properly followed the chapters on judicial independence and access to courts. Cappelletti and Cohen consciously sought, however, to arrange the materials to emphasize from the start the divergence between civil and common law legal systems and then proceed to those areas where the two systems have increasingly converged. But this organization also led to an excessive preoccupation toward the end of the volume with American cases, creating the impression that the comparative enterprise is not really getting off the ground. The tendency of the author-editors to compare American cases with one another results in part from their concern for the *quality* of the rules embodied in those cases.

Apparently it is not easy to find cases from the various countries "on all fours" with one another. Consider, for example, Cappelletti and Cohen's treatment of the right to defense counsel. The chapter begins not with constitutional cases but with a general description of detention procedures in England and France. This highlights the differences between a common law and a civil law country in that regard. No cases, however, are drawn from either nation. The two European Court of Human Rights cases which follow, like the previous material, do not address defendants' rights issues as such, but show these international "tribunals" struggling unsuccessfully to bridge the gap between civil and common law rules on detention without trial. An editorial note follows, indicating that Germany and Italy, in response to these decisions, have modified, to the advantage of criminal defendants, their rules on pretrial detention. Subsequent cases show the increasing tendency of various European courts to uphold the right of counsel, but the context differs markedly from case to case. Nevertheless, the link connecting the European and American cases is provided by helpful notes and commentaries, although it is not always clear to what extent the civil law countries represented in the volume differ from one another in their procedural rules.

A problem with several European opinions in the text is their brevity. In many cases, the judges do not describe the constitutional reasoning and techniques leading to the result. (The opinions of the West German and Italian constitutional courts are happy exceptions.) Cappelletti and Cohen try to make up for this deficiency through editorial notes and related secondary materials. On the

other hand, their primary interest is in the cases' *results*, and here the comparative method proves to be a good tool for raising important value questions about the results.

Murphy and Tanenhaus's text parallels the organization and content of conventional casebooks in American constitutional law. The book includes chapters on federalism, separation of powers, national power over foreign and domestic policy, and various civil liberties issues. Each chapter opens with representative American cases, followed by comparable foreign cases. A casebook of such scope, if it is to be kept to manageable size, cannot do full justice to the constitutional law of each nation covered. For example, in the chapter on religious freedom, the student gets only the barest glimpse of German "free exercise" jurisprudence in the one case representing the Federal Republic. The same chapter includes an American blood transfusion refusal case but omits the text of an analogous and equally important blood transfusion case decided by the Federal Constitutional Court.<sup>21</sup> In the chapter on equality, which includes three leading American cases on equal educational opportunity, some relevant German "right to education" cases are also conspicuously absent.<sup>22</sup> The author-editors might have had better success if they had focused exclusively on educational equality. A more complete picture of the constitutional problem and the standards of review adopted to resolve it could then have been presented. The chapter comes close to this kind of unity in its treatment of five cases from four countries dealing with the rights of married women. (These cases are cogent demonstrations of the influence of culture on judicial outcomes.) Yet the two German cases represented in the chapter do not disclose the complexities and contradictions that mark German constitutional law in the field of gender discrimination.

Murphy and Tanenhaus' casebook, however, is not to be judged by its omissions. As noted previously, the cases serve mainly as vehicles for comparing methods of constitutional interpretation. On the other hand, students should be cautioned about problems of interpretation that arise even from the existing textual materials. One notices, for example, in the chapter on religious freedom, that the German and American cases refer to the *neutrality* of the state with respect to religious belief. These cases cannot be fully understood un-

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21 The American case, decided by Judge Skelly Wright, is *Application of Georgetown College*, 331 F.2d 1000 (1964). For the German case, see Judgment of October 19, 1971, 32 BVerfGE 98.

22 Decision of July 18, 1972, 33 BVerfGE 303 (1972); Decision of February 8, 1977, 43 BVerfGE 291 (1977); Decision of June 22, 1977, 45 BVerfGE 393 (1977).

til the student appreciates that religious neutrality has profoundly different meanings in the constitutional law of these two nations. There is a similar problem in bridging the gap between concepts such as the German *Rechtsstaat* and the English "rule of law." Even foreign terms having a literal equivalence in English — "rationality," "proportionality," "state," and "democracy" — may not be used in conceptually equivalent ways. The student should be advised of the different nuances often associated with these terms in foreign cases. In conclusion, these observations are less a criticism of what Murphy and Tanenhaus have accomplished in their casebook than a suggestion of how much richer the field of comparative constitutional law could be.

### III. Concluding Commentary

#### A. *Modest Research Proposals*

The books reviewed present a glimpse of what it means to approach the study of constitutional law on a comparative basis. As this commentary has made clear, these books contribute significantly to the development of comparative constitutional law as a field of study and analysis. The books may also encourage more research in the comparative field. Nonetheless, the needs of comparative constitutional law remain very basic. From the perspective of the American scholar they include: (1) good translations of foreign constitutional cases; (2) solid descriptions of the constitutional machinery of countries whose high tribunals invite comparison with the United States Supreme Court; and (3) accurate restatements of foreign constitutional doctrine.

Genuine comparative analysis can proceed only after these basic tasks have been performed. A useful approach, as the books reviewed demonstrate, is to focus on particular problems of governance. The problem approach is most feasible when three conditions are satisfied. First, the problem must be common to several nations. Second, as suggested earlier, the problem must be studied within similar constitutional frameworks and against the backdrop of diverse social, political, and cultural settings. Third, the problem must be one that can be abstracted from its sociopolitical context.

These conditions represent three approaches to the comparative enterprise. The first approach is descriptive, and includes a legal analysis of the differences and similarities in constitutional doctrine, along with the identification of common and diverging trends of constitutional law. The second approach is broadly "sociological" in

character. It seeks to relate constitutional policy to cultural, religious, and political variables. This approach also considers variations in judicial structures, constitutional provisions, modes of judicial review, and legal traditions, including the education and values of individual judges. The final approach is normative. Here the enterprise constitutes a search for the principles that ought to govern constitutional interpretation. Following Plato's method in *Laws*, it is a search "for principles of justice and political obligation that transcend the culture-bound opinions and conventions of a particular political community."<sup>23</sup>

### B. *The Value of the Enterprise*

The final part of this essay discusses the significance of comparative constitutional law as a scholarly discipline.<sup>24</sup> The enterprise has two interrelated goals. The first goal is to broaden the student's understanding of his own constitutional system. "[J]urisprudence without comparative understanding can scarcely rise above the level of provincial casuistry and empirical craft. . . ."<sup>25</sup> In short, the comparative approach should liberate students from the ethnocentrism associated with the exclusive study of their own legal system. "Comparative legal study," writes Alexander Smith, "enlarges the context, multiplies the instances, sharpens the issues, and enables one to realize that some defects in the law are not inevitable."<sup>26</sup> It also shows that the acknowledged merits of the American system are not regarded as inevitable by other constitutional democracies.

These observations do not imply that comparison is always undertaken to engineer changes in one's own legal system. Foreign models of constitutional government may or may not apply to the American experience. Rather, the comparative approach is likely to enrich a person's understanding and appreciation of his *own* constitutional system. W. Cole Durham makes the point eloquently: "[The comparative enterprise can be] an interpretive effort which sheds light on the meaning of one's own institutions by indirection — by penetrating the 'machinery' of another system sufficiently to reveal the contours and drives of the human consciousness that created it and thereby to make visible what familiarity hides in unconscious

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23 Kommers, *The Value of Comparative Constitutional Law*, 9 J. MAR. J. PRAC. PROC. 685, 692 (1976).

24 For an extended discussion of this topic, see *id.* at 685-95.

25 E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* xiii (1st ed. 1945).

26 Smith, *supra* note 6, at 8.

understanding of one's own system."<sup>27</sup> It is in this sense that the comparative enterprise can truly enrich the study of American constitutional law.

On the other hand, the comparative approach is not without relevance to the *development* of American constitutional law. Indeed, as Durham also reminds us, to deny other experiences in constitutional government "would be to succumb to a thoroughgoing cultural relativism which denies the possibility and benefits of cross-cultural fertilization."<sup>28</sup> Comparative constitutional law could develop into a source of constitutional interpretation in the United States. After all, the influence of American constitutionalism abroad has been substantial.<sup>29</sup> The Murphy and Tanenhaus casebook includes numerous foreign opinions in which American cases are considered though not always followed. Any suggestion that the process can not or should not work in reverse would be unabashedly ethnocentric. Considering the rich body of constitutional case law now available in Europe an observer conceded: "It is possible that we may borrow in the future from the experience of the European Constitutional Courts rather than contribute to it — that there will be another period of give and take between the new and olds worlds."<sup>30</sup> Clearly, this is not to say that American judges have less to learn from leading constitutional tribunals outside of Europe.

The particular doctrinal outcomes of foreign cases are probably less important to American students and practitioners than the constitutional reasoning supporting those outcomes. Foreign constitutional tribunals have occasionally reviewed their own reasoning in light of American constitutional interpretation. Why shouldn't the Supreme Court reciprocate? An investigation of foreign cases may lead to the discovery of serious flaws in American constitutional reasoning or to new perspectives on balancing values such as equality, liberty, and justice. It might also lead to the discovery of a common

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27 W. Cole Durham, *Religion and the Public Schools: Constitutional Analysis in Germany and the United States* (Paper presented at the First Annual Conference of the Western Association for German Studies, October 21, 1977), at 3.

28 *Id.* at 2.

29 *See, e.g.*, C. FRIEDRICH, *THE IMPACT OF AMERICAN CONSTITUTIONALISM ABROAD* (1967). A massive multi-volume project entitled "The Bicentennial Commemoration of the Influence of the United States Constitutional Abroad" is currently underway. Each book in the project will be devoted to the influence of the U.S. Constitution on a particular country. The project is under the general editorship of Albert P. Blaustein, Professor at Rutgers University School of Law (Camden).

30 Dietze, *American and Europe — Decline and Emergence of Judicial Review*, 44 VA. L. REV. 1233, 1272 (1958).



core of constitutional doctrine that could point American constitutional interpretation in new directions. "Common core" analysis could lead to a more objective legal basis for judicial policy.

American justices have occasionally looked to foreign courts for guidance in deciding cases involving procedural due process and federal-state relations.<sup>31</sup> Rarely, however, do their opinions refer to foreign cases dealing with substantive constitutional issues such as church-state relations, political representation, free speech and press, conscientious objection, the rights of minorities to equal protection, and other issues covered in the books reviewed. One may wonder, for example, whether the Supreme Court's decision in *Roe v. Wade*<sup>32</sup> would have been different had the Justices considered the reasoning of the abortion cases included in the two books reviewed. Of course, when dealing with countries outside of the Anglo-American experience the linguistic barrier is a difficult one to hurdle. Even so, except for Justice Douglas, who studied Indian constitutional law,<sup>33</sup> and Justice Frankfurter, who frequently cited foreign cases in his opinions,<sup>34</sup> few Justices have manifested any interest in the evolving constitutional case law of other nations. This may change, however, if comparative constitutional law gains popularity as an academic subject in the United States. The publication of the books reviewed in this essay may help to bring this about.

31 Examples of such cases are *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556-68 (1980) (citing English cases); *Murphy v. Waterfront Comm'r of New York Harbor*, 378 U.S. 52, 58-63 (1964) (citing several English cases); *U.S. v. Standard Oil Co.*, 332 U.S. 301, 314 n.21 (1947) (citing an Australian case); and *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138 (1934) (citing several Canadian cases). *Duncan v. Louisiana*, 391 U.S. 145 (1968) is a recent instance where the U.S. Supreme Court has consciously rejected a procedural due process practice commonly accepted in other legal systems. Of this decision, Robert E. Rodes, Jr. has remarked that "it is difficult to see what the Supreme Court of the United States has in mind if not a *Volksgeist* when it holds that an American accused of a serious crime cannot have a fair trial if he is denied a jury, whereas everyone else in the world can." R. RODES, JR., *THE LEGAL ENTERPRISE* 19 (1976).

32 *Roe v. Wade*, 410 U.S. 113 (1973).

33 See W. DOUGLAS, *WE THE JUDGES* (1955).

34 Justice Frankfurter displayed considerable knowledge of Anglo-American case law. Examples of opinions in which he cites English, Canadian, and Australian cases are *Stein v. New York*, 346 U.S. 156, 200 (1953) (dissenting); *United States v. County of Allegheny*, 322 U.S. 174, 198 (1944) (dissenting); and *Coleman v. Miller*, 307 U.S. 433, 462-63 n.4 (1939) (separate opinion). In *County of Allegheny*, he concluded his dissent with these words:

In respect to the problem we are considering, the constitutional relation of the Dominion of Canada to its constituent Provinces is the same as that of the United States to the States. A recent decision of the Supreme Court of Canada is therefore pertinent. In *City of Vancouver v. Attorney-General of Canada*, [1944] S.C.R. 23, that Court denied the Dominion's claim to immunity in a situation precisely like this, as I believe we should deny the claim of the Government. 322 U.S. at 198.