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Comparative Law and Comparative Politics

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I recently attended a lecture by Professor Isi Foegel of the University of Copenhagen who has been a leading participant in the drafting of new Danish legislation designed to operate as a constitution for Greenland, which has been granted a large measure of autonomy. His lecture described in detail the careful consultative processes that culminated in this constitution. At the conclusion of his lecture, I asked him whether the drafters had anticipated the emergence in Greenland of political parties and their impact on the political processes that the constitution was designed to shape. He replied that in the course of their exhaustive labors the drafters had not considered parties, but that two parties had actually come into existence between the time at which constitutional ruminations got under way and the time at which the final draft emerged.

Such an answer is bittersweet for an American constitutional scholar, particularly for one who is a political scientist. That parties would emerge even among the few thousand Esquimaux and Danish civil servants huddled in the dozen ice girt villages of Greenland would, of course, have been predicted by any political scientist. We have told generations of college freshmen that the framers of our constitution did not consider at the constitutional convention two of the central phenomena of modern politics: political parties and governmental bureaucracies. We have also told them that, as a result, the actual workings of the United States Constitution are markedly different from those anticipated by its framers.

That the American experience has been confirmed at the very polar extremity of political life on our continent is comforting to those who believe that political science may actually become a science. On the other hand, that the most fundamental experience of the most successful of all experiments in written constitutions should have been to-

tally ignored by sophisticated and meticulous European constitutional scholars is a cause for considerable despair. Are constitution drafters and constitutional scholars doomed to repeat endlessly the mistakes of their predecessors?

Professor Barav's Article\(^1\) raises this question in an acute form. It is a careful and systematic exposition of the judicial review provisions of the "constitution" of the European Economic Community, an exposition that is helpful for a newcomer to these materials. But it represents a stage of constitutional scholarship out of which American constitutional law must have passed about seventy years ago (although remnants of it are still to be found). It is constitutional law without politics. Professor Barav presents the Community as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional teleology.

If such an approach has proved fundamentally arid in the study of individual constitutions, this approach must also be fruitless in the comparative study of constitutions. Surely it must reduce constitutional scholarship to something like that early stage of archeology that resembled the collection of antiquities. Picking up bits of this and that, oblivious to their context or living matrix, the antiquarian stumbled upon an occasional serendipitous discovery. The antiquarian noted, for instance, that the swastika appears among the pottery decorations of Neolithic Europe and of the Indians of the American Southwest. He then pondered the comparative significance of the fact that the ancient Chinese did not employ the swastika because they always closed their rectilinear designs and left open only the ends of their curved designs.

Professor Barav's Article presents a number of such serendipities. For instance, we find that the European Economic Community Court of Justice presumes in some contexts the validity of community legislation, which Professor Barav points out is basically economic legislation.\(^2\) But he also notes that the court is sensitive to claims of invasion of individual rights.\(^3\) At another point, however, it appears that what

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2. Id. at 476.
3. Id. at 467-68. This is similar to the famous footnote four in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). In Carolene Products, the Supreme Court rejected a fifth amendment due process challenge to a federal prohibition of the interstate shipment of filled milk. The Court indicated that it would presume the existence of facts supporting the legislative
Americans would call "the scope of review" employed by the court in examining what we would call "legislation" and "administrative regulations" is, in verbal form, very close to our arbitrary and capricious standard.4

But, at least in the form presented, all of this is just a hunt for swastikas and curlicues. Because the study of American administrative law has become acutely political in recent years, we know that it is not the formal difference between "arbitrary and capricious" and "substantial evidence" that is significant. It is the realpolitik of the relations between the regulatory agencies, the activist judges of the Court of Appeals for the District of Columbia, and the litigating interest groups that establish the effective scope of review. And, under political analysis we now understand that footnote four of Carolene Products is not a shard of truth for the centuries, but a transfer of judicial patronage from Republican to Democratic clients.5 Until we know the politics of the European presumptions and scope of review language, we are in no position to make a comparison. In other words, it is not the little designs on the pottery of the case law, but the political content of the pots that must count for comparison. The modern archeologist, whose pollen counts tell us what was in the pots as well as what was on them, should be our model.

Professor Barav does give us one glimpse of the pollen. He tells us that the Court of Justice has moved from an inductive consideration of "effet utile" to a deductive consideration of "effet consequence," and that, although the Court has a jurisprudential policy, it does not employ a political jurisprudence.6 I must confess that I have reread these paragraphs many times, and I appreciate them in the sense that one appreciates French legal "science." The subtlety of fine distinction clothed in an elegant precision of language, what Professor Barav himself calls a "jeu de mots," is most certainly there. I am not quite sure, however, how to translate it into either simple English or comparative judgment behind regulatory legislation affecting ordinary commercial transactions. In his famous footnote to the majority opinion, however, Justice Stone suggested that there may be a "narrower scope for operation of the presumption of constitutionality" in the regulation of matters other than commercial transactions. This footnote has often been used to explain the Court's "double standard" of review—sometimes interventionist, sometimes deferential—in modern cases involving substantive due process challenges. See generally G. Gunther, Cases and Materials on Constitutional Law 584-96 (1975).

4. See Barav, supra note 1, at 476, 495.
6. Barav, supra note 1, at 497.
politics. I think, however, that what he is saying is roughly this: After a Marshallian stage of establishing the supremacy of Community law over national law, the court has moved on to the stage of concerning itself with the substantive policies embodied in the Community's now supreme regulations, while being properly circumspect in its exercise of substantive review.

I am sure Professor Barav prefers his own formulation of this distinction but, in any event, I would hope that it is with his Delphic comments on policy and politics that scholars of comparative constitutional law will start. To start with his general level of formal analysis will doom us to reenact painfully the evolution of American constitutional scholarship, step by step, from the constitutional limitations of Cooley to the reluctant sociological jurisprudence of Cardozo. I hope that we can avoid this and begin no further back than the neoformalism of Wechsler and the neorealism of Bickel.

One of the most striking features of Professor Barav's Article is that it so thoroughly introduces us to the Community's law of judicial review without ever exposing, even for an instant, the human flesh of its judges. I am not an enormous fan of the sort of around-the-world-in-eighty-Guttman-scales approach that marked the comparative judicial behavior movement in political science in the 1960's. But on the other hand, it is hard to persuade me that the Community's constitution exists wholly apart from the human beings that man its constitutional court. Here again, we must avoid a slow reinvention of the wheel. We ought not spend years studying the constitutional law of the European Community before starting the study of its constitutional lawmakers.

Finally, one ought to subject one's own analysis to the critical method one has wielded against others. It might well be argued that, in the final analysis, mine is the politically naive analysis, and Professor Barav's the politically sophisticated one. For we must bear in mind that, particularly in the European tradition, professorial writing is simultaneously an act of scholarship and an act of lawmaking—that is to say, an act of politics. In this light there is much to be said for Professor Barav's unspoken, but none the less emphatic, assertion of the autonomy of law and the teleological inevitability of the Community's legal system. To appreciate his political sophistication we must return to the point about political parties with which I began this essay.

When the European Economic Community was initiated, it rested upon a number of existing and incipient political realities, among them
some interesting developments in European party structures. In the 1940's and 1950's, it was possible to envision the growth of a pan-European two-party system based, on the one hand, on the noncommunist socialist parties that existed in all Western European nations, and, on the other hand, the Christian Democrats of Germany and Italy, and the French Catholic party, the M.R.P. The Communist parties were, of course, defined right out of the system as Soviet dominated international rather than pan-European parties. Thus, the development of pan-European parties could have provided the political substructure for a really transnational European super-state, not merely a transnational apparatus tacked onto the traditional nation states.

This incipient development has been undercut from two directions. First, the M.R.P. fell apart, to be replaced by a center-right party that was not pan-European as any Catholic party must be, but Gaullist-nationalist. Second, the Communist parties refused to be read out of Europe, and have begun to take on a pan-European complexion that we label as “Euro-Communism.” Thus, we did not observe in each of the nation states of Western Europe a neat situation in which a Catholic party faced a socialist party in electoral competition, a parallelism of two-party systems on which might be built a truly pan-European government.

This failure was but one facet of a continued complexity that has bedeviled the development from nationalism to regionalism to internationalism that was the dream of the post-World War II internationalist movement. Instead of the one-way “beyond the nation-state” movement that was anticipated, there has been a revival of nationalism and a movement “below the nation-state.” In Europe, the former has manifested itself in France and the latter is illustrated by the independence movements in Scotland and Wales and the revival in Belgium of language-based conflicts. Instead of the simple and unidirectional movement from national to transnational and international loyalties that many anticipated, and of which the European Community was to be a major part, we have seen a growing complexity and diversity of political loyalties.

Along with this continued political diversity, both at the level of political parties and in broader political loyalties, there have also arisen additional economic complexities. Japan and West Germany, as national economic units rather than as members of transnational economic blocs, have become major world economic powers with worldwide economic responsibilities. The Germans must make critical
decisions about the growth rate of their national economy in light of the world economic situation quite apart from their membership in the European Community.

In short, the real political and economic world has not worked out in the simple, unidirectional way hoped for by the founders of the European Community. There is no hint of this in Professor Barav’s Article. Rather, his Article captures nicely the brave intellectual climate of the founding years.

But from the point of view, not of comparative scholarship, but of European political action, is not what Professor Barav has done the best thing to do? In spite of the revival of national loyalties, Euro-Communism, Gaullism, and German industrialism, the Community has been working. Under the circumstances, it may be best to preserve the myth of the founding years, to deal with juristic developments as if they were autonomous, and to speak as little as possible about economic and political threats. After all, legal realities are realities too. Because the law of the European Community has been growing successfully, the Community itself has a better chance of growing successfully. To treat the law as autonomous is to accentuate the positive; that sort of accentuation is important to institution building.

Perhaps comparative constitutional law can play a special role in resolving the tension between scholarly and political action. As a distinguished European, Professor Barav has special obligations to foster a European ideal to which he is committed. An essential part of comparative constitutional law will be the comparison not only of constitutions, but of the attitudes and responsibilities of those who study constitutions. Just as European scholars have shed light on a United States Constitution, in which they have no direct political stake, perhaps non-Europeans will be able to make some contribution to a more direct understanding of the evolving constitution of Europe precisely because they have no direct responsibility for that evolution.