To ask what is regulated by administrative law and how administrative law regulates are two questions whose answers also can tell us about the emergence and development of law. In terms of what is regulated, the collapse of the basic assumption underlying the nineteenth-century market economy paralleled the collapse of a strict private law model and led to the rise of modern twentieth-century legal consciousness, which embraced stronger notions of public rights to be protected under administrative law. If the collapse of legal formalism and the rise of modern legal consciousness are symptomatic of a more general relationship between economic philosophy and administrative regulation, then today are we witnessing a return to the private law model (or new hybrids of it) in many countries and at the regional and global levels? If so, what does this model imply with regard to democratic accountability?

This volume is unique. It brings together previously published works by two important scholars who have worked independently on similar problems from different angles (public law and comparative politics). They have produced a spectacular arrangement of their work. Their ensemble articulates for us and, at the same time, instructs us about where the field of comparative legal studies has been and, possibly, where it is heading. The reader is asked to rethink common scholarly assumptions and approaches with regard to the role of law and politics in building institutions and social relations and their relationship to shaping our research agendas. The book reopens old doors long since thought shut. It advances theory building and demonstrates the utility and flaws of a wide range of methodological approaches. It exemplifies what is exciting about this field as it deploys and helps to create a transdisciplinary canon.


Ralf Rogowski and Thomas Gawron eds., Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court (Berghahn Books 2002), 262 pp.

Reviewed by Russell Miller*

These are hard times for the Atlantic Alliance. One has come to expect rough patches in Franco-American relations, but the policies of the second Bush Administration have now seemingly plummeted relations between the United States and Germany into crisis as well. The grosser Teich (“big pond,” as many Germans were once fond of referring to the Atlantic Ocean) is looking more oceanic by the day. The intensity of the alarm

* Associate professor of law, University of Idaho College of Law.

1 Recall, the trend was set well before the terrorist attacks of September 11, 2001, based on the Bush Administration’s approach to such issues as the Kyoto Protocol and the International Criminal Court, but they have undoubtedly been exacerbated and aggravated by the Iraq conflict.
being expressed over these tensions is, in my opinion, unjustified. Washington and Berlin may not exactly see eye to eye these days, but Americans and Germans decidedly occupy the same world. The slender volume from editors Ralf Rogowski and Thomas Gawron entitled *Constitutional Courts in Comparison*, focusing as it does on the U.S. Supreme Court and the Bundesverfassungsgericht (Federal Constitutional Court), could have been a timely and effective testament to this fact.

The editors articulate the book’s concept and structure in the coauthored introduction. Operating from a “sociolegal” perspective, the contributors to the book were asked to illuminate the distinctions and similarities between constitutional litigation in the United States and Germany. This sociolegal perspective takes as its premise that constitutional litigation is first and foremost a form of dispute processing, a method by which “a social or political conflict is transformed into a legal dispute, and then back into a social or political conflict.” The book is divided into four sections, which, according to the editors, reflect the “phases of” constitutional “dispute processing.” Those phases, described for each court, are conceived as follows: (1) history, organization, and jurisdiction; (2) access to the court, case selection, and the implications of success on the merits of a claim; (3) judicial decision making, including the role of judges and law clerks; and (4) the impact, implementation, and evaluation of decisions.

Unfortunately, aside from offering a single, vague line about the lessons one can learn from an examination of the similarities and dissimilarities between the two courts, the editors fail altogether to explain why they have bothered to compare the U.S. Supreme Court and the German Federal Constitutional Court. Why develop a comparative project around these particular institutions? This lack of self-reflection is a common methodological flaw in much comparative legal literature and not a shortcoming unique to this project, but it is surprising given the project’s clear grounding in social science. A majority of the contributors of the book’s twelve essays are social scientists (from political science or sociology) from whom one expects greater concern for methodology than is typical of (at least American) legal researchers.

The book’s first section, “Political Functions and Organization,” consists of three eclectic but nonetheless enriching essays, which are meant to introduce the United States Supreme Court and the German Federal Constitutional Court. Robert A. Kagan

---


3 But see ROBERT KAGAN, OF PARADISE AND POWER 1 (2003) (“It is time to stop pretending that European and Americans share a common view of the world, or even that they occupy the same world”).


5 Id. at 2.

6 Id.

7 Id. at 1.

(charged with introducing the Supreme Court) and Alfred Rinker (introducing the Federal Constitutional Court) offer quite different outlooks on the respective institutions. Kagan presumes a familiarity with the history and structure of the Supreme Court, focusing instead on the “geological” (that is to say, social and political) conditions that have led to a “constitutional eruption”9 of an ever increasing number of cases brought before the Supreme Court. He attributes this eruption to two factors. First, Kagan notes the growing number of “organizations dedicated to the pursuit of political goals and ‘law reform’ by means of constitutional litigation.”10 Second, he illuminates some of the more fundamental elements of American legal culture, including the instability of American constitutional doctrine (referring to dissent rates and the malleability of constitutional doctrine) and the structurally politicized nature of the American judiciary.11

Rinker provides an exemplary but very basic introduction to the Federal Constitutional Court, an effort perhaps justified for the German Court and not for Kagan’s treatment of the U.S. Court, given the likelihood that the book’s English-speaking audience is not as familiar with the Federal Constitutional Court.

The first section concludes with Hans Leitzmann’s brilliant theoretical challenge to the appropriateness of any comparison of the two courts. Leitzmann finds little commonality worth remarking between an eighteenth-century (U.S.) and twentieth-century (German) court. He is, however, intrigued by the fact that both courts seem to have abandoned (in the last two-thirds of the twentieth century) any hope of playing a significant role in shaping the political economy of their respective societies, what he calls their Realpolitik. Leitzmann concludes that both courts have opted instead to pursue a “habitual commitment of the constitutional judicature to the patriarchal granting of civil freedoms to a world that is ‘in principle’ not prepared for them…. “12

This is the pursuit of civic culture or civil liberties (as opposed to the more weighty issue of political economy) that some have termed the “rights revolution” in the jurisprudence of the Supreme Court in the second half of the twentieth century.13 Lietzmann recognizes that, at least in the case of Germany, the European Court of Justice has assumed much of the responsibility for the jurisprudential shaping of Germany’s political economy.

The essays in the book’s second section, “Access and Case Selection,” provide sometimes tediously detailed but nonetheless useful surveys of the jurisdictional competencies and the realities of case selection at both courts. Joel Grossman and Charles Epp, charged with outlining the terms of the Supreme Court’s jurisdiction and case selection, have an easier task than their German counterparts, given the Supreme Court’s now well-entrenched and formalized discretionary authority to select the cases it will hear (an authority admitting of only a handful of exceptions). Grossman and Epp do, however, raise the interesting possibility that the discretionary nature of the Supreme

9 CONSTITUTIONAL COURTS IN COMPARISON, supra note 4, at 25.

10 Id. at 31.

11 For a more thoroughgoing survey of American “adversarial” legal culture as compared with other legal cultures, see ROBERT A. KAGAN, ADVERSARIAL LEGALISM (Harvard Univ. Press 2001).

12 CONSTITUTIONAL COURTS IN COMPARISON, supra note 4, at 95–96.

Court’s authority has had the effect of expanding access to and broadening the Court’s constituency, rather than limiting it. This surprising claim is based on two arguments. First, discretionary authority has moved the court beyond the strictures of rigid admissibility norms. Second, discretionary review has permitted the Court to encourage a “vastly more diverse set of litigants” by moving beyond its earlier focus on settling “particularized, largely bipolar, economic disputes” and to transform itself into a forum in which issues of general importance—those that “‘transcended’ the interests of the parties to the case”—would be decided.

Werner Heun and Erhard Blankenburg contribute separate but overlapping essays describing the Federal Constitutional Court’s case access and selection procedures. Both emphasize the difficulties created for the Court by the “official lore” that it is obliged to review all matters presented to it. Heun and Blankenburg outline the “numerous means of access and comprehensive control competencies on the one hand, and a differentiated ‘system of sluices’ to channel and steer the flood of complaints on the other,” which operate in contradiction to this mythology and which serve to narrow radically the real scope of the Court’s obligation to hear all complaints. Heun’s is the more painstakingly detailed of the two essays. Both commentators illuminate the considerable flexibility in the system that accords a not insignificant degree of discretion to the Federal Constitutional Court in setting its doctrinal agenda, in spite of the relevant jurisdictional, admissibility, and admittance rules. This flexibility results from a number of statutory or judge-made exceptions to the admissibility criteria particularly with respect to the subsidiarity and exhaustion requirements. Heun also notes that the Court’s substantive constitutional interpretation has served as a mechanism by which the Court has secured control over its docket, and thus its doctrinal agenda. For example, he explains that the Court’s expansive interpretation of article 2.1 of the Grundgesetz (Basic Law), providing for a general right to liberty, has had “beneficial consequences for the Court in that the legal interventions of the state are now fully submitted to control by the Court.”

The book’s third section, “Judicial Decision Making and the Role of Law Clerks,” is the project’s most difficult to justify. Given the very narrow scope of the book (it is a mere...
256 pages long), the informal and highly secret role played by law clerks and judicial assistants at the courts seems a less than compelling aspect of these institutions. Does this subject really merit a whole section when, for example, the selection of the justices of the courts was confined to the coverage it receives in the general introduction to the courts? All three essays in this section are especially plagued by the dearth of information available about the nature of the clerkships and the role played by clerks in both institutions. Both Lester Mazor (reporting on the Supreme Court clerks) and Joachim Weiland (reporting on the legal assistants at the Federal Constitutional Court) observe that the clerks at both courts play a key role in preadmission case screening and that they are generally elite, developing members of the legal profession who benefit immensely from the prestige of their tenure at the courts. The rest, we are told, “remains cloaked in secrecy,” “guarded by a large measure of privacy and confidentiality,” and enveloped in “darkness.” Contributing further to one’s uncertainty about the merit of this section is Otwin Massing’s six-page neo-Marxist critique of the role of judicial law clerks, “the perpetrators behind the perpetrators,” in the “judgment factory of justice.” It is a rousing essay but, to the limited extent that it specifically treats judicial clerks and assistants in any concrete sense, it does so parenthetically.

The book’s final section, “Structures and Processes of Implementation,” is one of its best. Both essays in this section urge that far more study of the implementation of the decisions of the two courts must be done before any conclusive claims can be made. But both carefully outline the terms and concepts with which any such study must grapple. Lawrence Baum’s consideration of the implementation of the U.S. Supreme Court’s decisions maps the generalizations that must be managed (the widespread nature of imperfect implementation, the wide variance in implementation behavior depending on subject matter, and the wide variance in implementation behavior depending on actors) as well as the factors that must be weighed when seeking to account for implementation (communication, capability, and disposition). Baum leaves the matter with many unanswered questions, although he has ably charted the course that must be taken in answering them. The same is true of the contribution from the book’s editors, Rogowski and Gawron. Admitting that the subject of the implementation of the Federal Constitutional Court’s decisions are and Rogowski carefully analyze the various mechanisms at the Court’s disposal to ensure the implementation of its decisions. It is these mechanisms (the authors refer to them as the “instrumental part” of the Court’s decisions) that ought to serve as the basis for the hoped-for empirical studies of the subject.

22 The issue receives only cursory treatment from Kagan and Rinker in their chapters introducing the institutions.

23 CONSTITUTIONAL COURTS IN COMPARISON, supra note 4, at 175.

24 Id. at 193.

25 Id. at 198.

26 Id. at 211.

27 Id. at 212.

28 Id. at 223–24.

29 Id. at 225.

30 Id. at 244.
The book’s tight packaging of essays from scholars from both sides of the Atlantic provides an opportunity to engage in a comparative analysis of scholarly styles. Traditional stereotypes—of pragmatic Anglo-American scholarship and Continental scholarship that is fraught with philosophical abstraction—are exemplified, almost as caricatures, in essays from Grossman/Epp (University of Kansas and Johns Hopkins University, respectively) and Massing (University of Hannover). This juxtaposition of styles, not to mention the depth of knowledge of the two courts that so enriches the book’s project, is in no small part made possible by Patrick Vollmer’s high-quality translations of a number of substantively and stylistically complex German-language chapters.

It should be noted that the publisher, Berghahn Books (Oxford/New York), has begun to carve out a niche for itself in the field of comparative legal studies, particularly German legal literature in the English language. In addition to Constitutional Courts in Comparison, Berghahn also publishes the English-language translation of Michael Stolleis’s Public Law in Germany, 1800–1914, as well as the Annual of German & European Law.

I began this review with the qualification that the book “could have been a timely and effective testament” to the core (and, I believe, still not widely spread) democratic values shared by the United States and Germany. The book is concerned with a distinct part of this common tradition: the U.S. and Germany boast two of the world’s most well-established and well-respected systems of constitutional judicial review. The twelve essays collected in the book, however, focus exclusively on either the U.S. Court or the German Court and generally fail to remark the commonality and the comparative relevance of the dissimilarities that arise out of this important, shared heritage.

The lack of consciousness of the “other” that haunts the essays leaves the reader with the feeling that there are two books here, shuffled together. In this sense, the book would have benefited from some brief editorial commentary at the close of each section, drawing the essays into dialogue with each other. This is an unfortunate missed opportunity, as the reader pursuing the comparative project suggested by the book’s title, employing his or her own critical wiles, cannot ignore the rich vein of relationships apparent in the book’s two parallel tracks. Rogowski and Gawron recognize, on the book’s first page, that a comparison of these courts points to the “similarities in the political cultures of Western democracies” that form the solid foundation that is obscured by the present tensions. In any era, a more conscious treatment of this fact throughout the book would have strengthened the project. In today’s climate, that effort would have been a welcome, and reassuring tribute.

34 With the exception of the volume’s introductory chapter and the essay by Leitzmann in the first section.
35 Constitutional Courts in Comparison, supra note 4, at 1.