

**MEMORIAL:  
DAVID CURRIE AND GERMAN CONSTITUTIONAL LAW**

## **David Currie and German Constitutional Law**

*By Peter E. Quint\**

### **A. Introduction**

Without much doubt, the two great pillars of American scholarship on the German Basic Law and the jurisprudence of the Federal Constitutional Court are (in the order of first appearance) Donald Kommers's monumental casebook, *The Constitutional Jurisprudence of the Federal Republic of Germany*<sup>1</sup> and David Currie's magisterial treatise, *The Constitution of the Federal Republic of Germany*.<sup>2</sup> Professor Kommers's comprehensive work was a milestone in a long career that has been very substantially devoted to the study of German constitutional law. In the late 1960s, Kommers spent a research year at the German Constitutional Court and, drawing in part on personal interviews with the justices, he published the first major work in English on that court.<sup>3</sup> Since then, Kommers has produced a steady stream of significant works on German constitutional law.

David Currie's treatise, on the other hand, came as more of a surprise. For several decades Professor Currie, who died in late 2007 at the age of 71, was an eminent figure in American public law. He was the author of an extraordinary number of notable works on American federal courts, conflict of laws, environmental law, and American constitutional law and history. These works included eminent casebooks, dozens of scholarly articles, and several important volumes on the history of constitutional interpretation by the Supreme Court and the history of

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<sup>1</sup> DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (1<sup>st</sup> ed. 1989; 2<sup>nd</sup> ed. 1997; 3<sup>rd</sup> ed., with Russell Miller, forthcoming 2009).

<sup>2</sup> DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* (1994).

<sup>3</sup> DONALD P. KOMMERS, *JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT* (1976).

debates on the Constitution in Congress.<sup>4</sup> Although Currie had also published articles discussing topics in German constitutional law,<sup>5</sup> these articles had not really presaged a treatise of this extraordinary scope and depth. Indeed, it is nothing short of remarkable that, in the midst of his very full career concentrating on some of the most complex and difficult aspects of American public law, David Currie was able to produce this extensive and mature work on German constitutional law, which required mastery not only of a foreign constitutional system, but mastery of a foreign language as well.<sup>6</sup>

As pillars of the American study of German constitutional law, these works of Kommers and Currie focus on the German Basic Law and the German Constitutional Court. In many important respects, however, they are both very American products. Of course, the Kommers work is a casebook, and therefore it is an example of a genre which, since its "invention" at Harvard in 1871 by Christopher Columbus Langdell,<sup>7</sup> has been thoroughly American in its style and development. Currie's treatise does not represent a distinctively American genre, but on the other hand, it does share many American traits.

To say this is by no means a criticism of Currie. It would be highly unreasonable to expect an American scholar, trained in the methods of the common law, to be able to "jump over his shadow" (to use a German expression) and fully internalize the methods of analysis and processes of thought of a different legal system. (Indeed Currie himself acknowledges as much when he disarmingly notes that American observers are "separated [from the German system] by a cultural gap as well as an ocean...").<sup>8</sup> Moreover -- and this is the important point -- we would not necessarily want a comparativist to become completely assimilated in a foreign system, even if he or she were actually able to accomplish this improbable feat. Rather, one of the

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<sup>4</sup> See *infra* note 27. In addition to traditional legal articles, Currie contributed numerous shorter articles on constitutional history and other topics to the second series of the *Green Bag*, a journal of informal commentaries on the law.

<sup>5</sup> David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333; David P. Currie, *Separation of Powers in the Federal Republic of Germany*, 41 AM. J. COMP. L. 201 (1993). These two articles are reprinted in this issue of the *German Law Journal*. See also David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

<sup>6</sup> In addition to his attainments as a scholar, Professor Currie was, by all accounts, a great teacher in his decades at the University of Chicago Law School. According to friends and colleagues, he was also a notable performer in the operas of Gilbert & Sullivan. See generally, *In Memoriam: David P. Currie (1936-2007)*, 75 U. CHI. L. REV. 1 (2008).

<sup>7</sup> See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 125 n. 3 (1977).

<sup>8</sup> CURRIE, *supra* note 2, at 289.

most valuable aspects of comparative law -- and in this instance, comparative constitutional law -- is to subject the reasoning and decisions of one legal system to analysis and criticism animated, at least in part, by thought processes of another legal system. In this way, the material may yield unexpected insights -- both for the comparativist viewing another legal system, and also for the scholars of that system reading what "outsiders" have to say about their structures and doctrines. This is presumably at least part of what Currie himself meant by including, as the epigraph at the outset of his treatise, a thought-provoking remark of Thomas Mann from *Joseph and His Brothers*: "For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be."

## B. Forms of Commentary

From this perspective, it may be useful to point up the significant ways in which Currie's work differs from standard German treatises on the same subject, and to try to suggest some insights that American techniques might yield in the study of German constitutional law.

First, it should be noted that Currie's treatise is a relatively compact work by a single author, and it divides the subject of German constitutional law into conceptual chapters, such as the Federal System, Separation of Powers, and Freedom of Expression. As might be expected, each of these chapters typically covers cases and ideas that arise from more than one constitutional provision.

In contrast, the major German treatises on constitutional law differ significantly in each of these respects. Instead of separating the material by conceptual chapters -- as does Currie -- the major German treatises begin at the Preamble and Article 1 of the Basic Law and then proceed systematically step by step through each succeeding Article, analyzing the provision in general, and then typically analyzing each sub-Article in a separate section or set of sections.<sup>9</sup> (Indeed, at least one major

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<sup>9</sup> Currie cites particularly the vast Maunz-Dürig commentary, which is probably the most comprehensive, highly respected and frequently cited of all commentaries on the German Basic Law. GRUNDGESETZ KOMMENTAR (Theodor Maunz, Günter Dürig, Roman Herzog *et al.* eds., edition with looseleaf supplements 2008). Interestingly, Currie also frequently cites the "Alternative Commentary" (AK), a more left-wing work that is generally intended to counter the conservative centrism of commentaries such as Maunz-Dürig. See KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (REIHE ALTERNATIVKOMMENTARE) (Richard Bäuml *et al.*, 1984). Even today, the AK is ignored in much German constitutional writing and frequent citation of the AK, in the German literature, generally counts as a statement of dissent from the "prevailing view" (*herrschende Meinung*) of the traditional German constitutionalists. Currie notes that his "secondary sources" have been "selected in order to afford a variety of views." CURRIE, *supra* note 2, at xii. Other important commentaries on the Basic Law -- also proceeding systemically through the constitutional text -- include, for example,

commentary goes even further in this systematic method of analysis and sometimes analyzes important phrases or even words, in separate subsections).<sup>10</sup> Typically, as discussed further below, commentaries of this sort employ lapidary general statements of doctrine, avoiding extended discussion of individual cases. Originally, this form of commentary was employed for the explication of legal codes, such as the civil, criminal, and procedural codes of German law. Whether this traditional form is as well suited for the study of constitutional law is a separate question that will be noted below.

Because of their scope and impressive level of detail, each of these standard German constitutional treatises is a major undertaking of several volumes, and the work is allocated among a number of different authors. Thus, while the authors may (or may not) share the same general point of view, the chapters contributed by one author may have their own distinctive qualities, differing from other chapters in the work.<sup>11</sup>

Another typical product of German constitutional scholarship is the "Handbook" on constitutional law or on the law of the state. In these frequently-consulted works, which also may run to several volumes, the material is divided up into conceptual chapters, but -- here again -- separate chapters are typically contributed by different eminent specialists.<sup>12</sup> In the various chapters of a "Handbook," the distinct points of view of the respective authors are likely to vary even more widely than in the constitutional commentaries.

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KOMMENTAR ZUM GRUNDGESETZ (Hermann v. Mangoldt, Friedrich Klein, Christian Starck eds., 5th ed. 2005); GRUNDGESETZ-KOMMENTAR (Ingo von Münch & Philip Kunig eds., 5th ed. 2000). In the American constitutional literature, a similar technique was employed, for example, in the classic constitutional commentary of Justice Story. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (3d ed. 1858).

<sup>10</sup> See von Münch & Kunig, *supra* note 9.

<sup>11</sup> To take one example, the contributions of Günter Dürig to the Maunz-Dürig treatise are frequently viewed as particularly distinctive and influential. See, e.g., KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 137 (20th ed. 1995). In fact, the recent replacement of one of Dürig's original chapters with a new version by another scholar -- putting forth a considerably different view of human dignity -- drew an emotional public rebuke from a former Justice of the Constitutional Court. See Ernst-Wolfgang Böckenförde, *Die Würde des Menschen war unantastbar*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 3, 2003.

<sup>12</sup> Currie cites particularly HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND (Josef Isensee & Paul Kirchhof eds., 1st ed. 1987; 2nd ed. 2003). For another such "Handbook," see HANDBUCH DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND (Ernst Benda, Werner Maihofer, Hans-Jochen Vogel eds., 2nd ed. 1994). This type of work was also produced under the Weimar Constitution of 1919. See HANDBUCH DES DEUTSCHEN STAATSRECHTS (Gerhard Anschütz & Richard Thoma eds., 1930).

There are, however, several books in the German literature that are more like Professor Currie's treatise. One of the most eminent of these is *Fundamental Principles of the Constitutional Law of the Federal Republic of Germany* by Konrad Hesse, a noted teacher of constitutional law and a former member of the Constitutional Court.<sup>13</sup> This is a book that covers, in general, the same material that is discussed by Professor Currie and it is a volume by a single author that is approximately the same length as Professor Currie's treatise. Although it is intended principally as an introduction to constitutional law for students -- and therefore technically falls within the genre of *Lehrbuch* or textbook<sup>14</sup> -- Hesse's volume is actually a work of considerable subtlety and complexity, and it is regularly cited in the German scholarly literature.

From our perspective, however, what is most interesting is the quite dramatic distinction between the method of analysis employed by Currie, and that which is more common in Hesse's *Fundamental Principles* -- and, indeed, in almost all of the longer German treatises as well.<sup>15</sup> This is a difference that should come as no surprise, given the differing characteristics of the respective legal systems. The discussion in the German treatises tends to contain general statements of principle, of greater or lesser complexity. Although cases are regularly cited, they tend to be collected in non-textual footnotes and clearly occupy a subordinate role. The cases themselves, and the facts behind the cases, are not commonly discussed.

In contrast it is clear that, as a scholar educated in the Anglo-American case law system, Currie is primarily interested in cases -- and particularly, of course, the cases of the German Constitutional Court. Accordingly, these cases are frequently the primary focus of Currie's attention, and the language and context of the opinions are often very closely analyzed. There are many notable examples. This case-centered approach is clearly evident, for example, in Currie's long discussion of the famous *Parliamentary Dissolution Case*, which allowed the *Bundestag* to be dissolved, and a new election to be held, after Chancellor Kohl's bogus "loss" of a vote of no confidence in 1982.<sup>16</sup> Currie discusses the case in the American style as a sort of story with accompanying analysis throughout. Currie presents the dramatic

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<sup>13</sup> HESSE, *supra* note 11. For another one-volume treatment by an eminent German law teacher, see, e.g., PETER BADURA, *STAATSRECHT* (3d ed. 2003).

<sup>14</sup> Traditionally, the *Lehrbuch* or textbook has played a central role in legal education in Germany. Much more important than the American "hornbook," which it resembles in some respects, the *Lehrbuch* tends to be the form of source material that is most widely read by students in the course of their studies.

<sup>15</sup> On this point, see also Markus Dirk Dubber, *Book Review*, 40 AM. J. LEGAL HIST. 107, 108 (1996). This review is reprinted in this issue of the *German Law Journal*.

<sup>16</sup> BVerfGE 62, 1 (1983).

facts behind the decision, follows the twists and turns of the relevant arguments, finds some similarities between the Court's opinion and the American political question doctrine, and ultimately suggests that, in upholding the questionable dissolution, the Court was engaging in "strategic behavior."<sup>17</sup> In the treatment of the same general topic by Konrad Hesse, in contrast, the results of this case are transmuted into general statements and the drama, and the nuances, of the specific decision disappear.<sup>18</sup> Similarly, in a series of extended case analyses, Professor Currie examines the facts and argumentation of the major free expression cases in the German Constitutional Court, proceeding case by case and interlacing the analysis with illuminating American comparisons.<sup>19</sup> As Currie remarks, "only an examination of actual decisions can give us an insight into the degree of freedom that prevails in Germany."<sup>20</sup> Later in the same chapter, Professor Currie presents three of the crucial Cold War cases in the Constitutional Court, analyzing them in a trenchant manner and including American comparisons throughout.<sup>21</sup> Currie notes that, even though the United States has no constitutional provision authorizing the banning of political parties (such as that contained in Article 21 (2) of the German Basic Law), formulations employed by the Constitutional Court do not differ greatly from the doctrinal results reached in *Dennis v. United States*,<sup>22</sup> a contemporaneous Cold War case in the United States Supreme Court. A close examination of the relevant cases makes this point considerably more vividly than would a general statement of principles or comparison of textual provisions.

Similarly, Currie's extremely sophisticated discussion of the problem of nondelegation (with numerous apt American comparisons) is basically an American-style discussion of cases which sets forth the underlying facts in each case -- including, particularly, the details of the statutory delegation -- and discovers and analyzes the relevant trends in the German decisions and the surprisingly diverse constitutional provisions on which the decisions are based.<sup>23</sup> In this discussion we see Currie, the American administrative lawyer, impressively transferred to the German realm.

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<sup>17</sup> CURRIE, *supra* note 2, at 113-16.

<sup>18</sup> HESSE, *supra* note 11, at 268.

<sup>19</sup> CURRIE, *supra* note 2, at 178-207. In particular, Currie discusses a number of important cases at some length: BVerfGE 7, 198 (1958) (*Lüth*); BVerfGE 25, 256 (1969) (*Blinkföer*); BVerfGE 12, 113 (1961) (*Schmid-Spiegel*); BVerfGE 30, 173 (1971) (*Mephisto*); BVerfGE 34, 269 (1973) (*Soraya*).

<sup>20</sup> CURRIE, *supra* note 2, at 181.

<sup>21</sup> *Id.* at 213-27.

<sup>22</sup> 341 U.S. 494 (1951).

<sup>23</sup> CURRIE, *supra* note 2, at 125-34.

In this context, Currie's work may be enlightening for American and other non-German readers as an excellent introduction to the actual work of the Constitutional Court. But beyond that, Currie's work may also be enlightening for German readers as an indication of the flexibility and subtlety that can be achieved by the analysis of cases, in what has become in reality -- under the influence of the German Constitutional Court -- very much a case law system. Indeed, Currie's subtle and trenchant analysis of the cases might also raise a question about whether traditional techniques of German commentary -- which have arisen in the context of private law codification, where cases generally play a minor role -- can ultimately do justice to the complexity and often creative unruliness of a constitutional case law system.<sup>24</sup>

### C. Cases and Constitutional History

Currie's treatise has many additional virtues. As suggested above, one of the most notable is Professor Currie's apparently comprehensive mastery of hundreds of German decisions -- not only the famous cases that set the general outlines of German constitutional law, but also the subsequent cases which fill in the details and are frequently as important as the major cases themselves for the purpose of truly understanding the realities of the German system. In the preface, Professor Currie remarks that he has limited his reading of commentaries to a few of the most famous treatises "in the interest of finishing this book within the present [twentieth] century..."<sup>25</sup> But, significantly, there is no comparable indication of any limitation of Professor Currie's extraordinarily deep reading in the German *decisions*.<sup>26</sup> Currie regards the cases as *primary*, and the treatises and similar material as *secondary*. Certainly, any American observer would accept this view as self-evident; but it is an approach that may still be somewhat controversial in continental legal cultures.

Particularly in his later work, Professor Currie became an important legal historian, tracing the history of the American Supreme Court and the history of constitutional

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<sup>24</sup> See Dubber, *supra* note 15, at 108: "It would have been unusual for a German book on the constitution to rely as heavily on opinions of the German constitutional court as does Professor Currie's. The German commentators are still having a hard time acknowledging that the deference to written law texts, characteristic of a formalistic civil law system that has developed marvelously complex interpretive techniques to subsume particular fact scenarios under statutory principles, goes out the window as soon as these techniques are applied to such texts as the guarantee of human dignity in Article 1(1) of the Basic Law."

<sup>25</sup> CURRIE, *supra* note 2, at xii.

<sup>26</sup> See *id.* at xi.

debates in Congress, in six comprehensive volumes.<sup>27</sup> His interest in constitutional history -- and his evident conviction that this history has strong illuminating power for the present -- also comes through very clearly in his work on the German Constitution. Thus, in order to provide background for the German cases, Professor Currie frequently introduces enlightening historical material from earlier German constitutions, such as the abortive Paul's Church Constitution of 1849, the Prussian Constitution of 1850, and Bismarck's Imperial Constitution of 1871, as well as early versions of the post-war German state constitutions. The Weimar Constitution of 1919 was clearly the most important predecessor of the German Basic Law, frequently providing useful examples to be followed but sometimes also containing cautionary mistakes to be avoided. Currie clearly immersed himself in the provisions of the Weimar Constitution as well as contemporaneous commentary on that constitution, and the treatise provides a particular depth of reference to this important historical material. There are also numerous illuminating references to the discussions at the Herrenchiemsee meeting and in the Parliamentary Council, where the Basic Law was drafted and then ultimately adopted.

In a trait that is particularly valuable for American readers, Currie's discussion of the German doctrine constantly refers back to comparable American problems. As one might expect, Professor Currie's knowledge of the German cases is certainly matched by his deep knowledge of the jurisprudence of the American Supreme Court -- again, not only the famous cases but many relatively obscure cases that nonetheless illustrate important points. The author of a two-volume constitutional history of the Supreme Court is certainly evident in these passages.

#### **D. Comprehensive Treatment**

Although Professor Currie does not cover all the topics of German constitutional law, the major areas are comprehensively treated. After an introductory chapter which outlines relevant aspects of German constitutional history and usefully surveys general traits of the Basic Law (Chapter 1), Currie turns to federalism and the separation of powers, structural issues that occupied much of his attention in American constitutional law as well. In two subtle and realistic chapters (Chapters 2 & 3), Currie notes the complementary effect of these and other doctrines in

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<sup>27</sup> DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888* (1985); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986* (1990); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* (1997); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829* (2001); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861* (2005); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861* (2005).



checking excessive power in the German system. For example, Currie finds that aspects of German federalism, as well as the independence of the civil service, substantially compensate for the merging of the legislative and executive powers in a parliamentary system.<sup>28</sup> Moreover, the ability of a strong minority party to commence and to guide a parliamentary investigation provides another “important means of control of the executive.”<sup>29</sup> Currie also teases out certain “less obvious” aspects of the separation of powers -- such as the doctrine that, in many areas particularly relating to basic rights, the executive may not act in the absence of authorization by the legislature.<sup>30</sup>

In the German system, the federal government has the authority to enact most legislation, but the strong legislative role of the *Bundesrat* (made up of representatives of the states), as well as the states’ major role in the execution of federal law, tends to redress what might otherwise be overwhelming federal power. The intertwining nature of the institutions of separation of powers and federalism in Germany -- both intended to work against undue concentration of power -- is strikingly encapsulated by Currie in the following passage:

State administration of federal law in Germany is motivated in part by the same considerations that underlie our separation of legislative and executive powers. The dangers of an all-powerful federal executive were all too vividly illustrated during the Nazi period; the risk of inadequate enforcement is the price of protection against prosecutorial abuse. The Basic Law goes beyond our Constitution by taking enforcement not only out of legislative hands but largely out of federal hands as well; in a parliamentary system this may be necessary to assure effective freedom from legislative control.<sup>31</sup>

Overall, Currie’s flexible discussion of separation of powers in the German system contrasts somewhat, in tone at least, with the more hard line conceptual position

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<sup>28</sup> CURRIE, *supra* note 2, at 103.

<sup>29</sup> *Id.* at 110.

<sup>30</sup> *Id.* at 121-25.

<sup>31</sup> *Id.* at 68.

that he tended to adopt in commenting on the separation of powers in the United States.<sup>32</sup>

In a detailed chapter on German federalism, Currie perceptively expands the scope of his examination by including “additional layers”<sup>33</sup> of federalism that have no parallels in the constitutional law of the United States. On the one side, the Basic Law contains express guarantees of independence for municipal governments<sup>34</sup> and, on the other side, Germany is a constituent state within the more encompassing European Union, a relationship that is also expressly recognized and authorized in the German Basic Law.<sup>35</sup> These additional “layers” create a further network of constitutional rules that limit both the states and the federal government.

In Germany, as in the United States, the freedom of expression is a subject of absorbing interest, presenting no small measure of unresolved mysteries and conundrums. In his long chapter on the freedom of expression (Chapter 4), Currie examines the meaning and implications of the balancing test that the Constitutional Court has primarily used in cases in that area. Because a “balancing test is no more protective of expression than the judges who administer it,”<sup>36</sup> Currie’s examination takes the form of a long series of case analyses, accompanied by frequent references to the constitutional history of the Weimar Constitution and the drafting of the Basic Law. Currie sees these cases as falling into an early period in which the Constitutional Court “evinced a fierce attachment to the values of free expression,” followed by a significant period of lesser protection, which was in turn followed by a renewed period of greater protection.<sup>37</sup> Currie notes that the degree of protection extended by the Court is often related to the justices’ willingness or unwillingness to defer to the lower courts on the question of whether the balancing was properly undertaken. Currie’s sustained analysis of the cases in this chapter well reveals the often chaotic nature of a constitutional case law system, which cannot be wholly domesticated by general formulas, no matter how capacious.

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<sup>32</sup> See David P. Currie, *The Distribution of Powers after Bowsher*, 1986 SUP. CT. REV. 19.

<sup>33</sup> CURRIE, *supra* note 2, at 35; 81-100.

<sup>34</sup> GRUNDGESETZ [GG] [Constitution] art. 28(2) (F.R.G.).

<sup>35</sup> *Id.* art. 23 (F.R.G.).

<sup>36</sup> CURRIE, *supra* note 2, at 181.

<sup>37</sup> *Id.* Currie’s analysis ends of course in 1993, shortly before his treatise was published, but it seems fair to say in general that the period of greater protection has extended up to the present.

In the chapter on Church and State which follows (Chapter 5), Professor Currie assists American readers in making their way through the maze of relevant constitutional provisions (a number of which are drawn directly from the Weimar Constitution) by analyzing the cases under the familiar American rubrics of “establishment of religion” and “religious freedoms.”

In a final *tour de force* in his last substantive chapter (Chapter 6), Professor Currie surveys a broad range of other constitutional rights recognized in the jurisprudence of the German Constitutional Court. Some of these, such as rights of property and equality, are expressly mentioned in both the German and American constitutions; others, like rights of marriage, family, private schools and rights of illegitimate children, are expressly mentioned in the German Basic Law but not in the American Constitution -- although they have received at least some degree of protection from the American Supreme Court. Yet the Constitutional Court has protected several other important rights (whether or not specifically mentioned in the Basic Law) that go far beyond any rights now recognized by the Supreme Court. Indeed, overall, this final chapter emphasizes the much broader extension of rights under the Basic Law, as well as the degree of seriousness with which many “substantive” rights -- such as the right to choose an occupation -- are enforced in the German system.

### E. Central Themes

Indeed, looking back over the work as a whole, the reader will note that a number of important themes (or one may say *leitmotifs*) wind their way through the volume. For example, the topic of “positive” rights of individuals (or constitutional obligations of the state) runs through the entire treatise as an important theme.<sup>38</sup> This is a topic of particular fascination for American observers, because the absence of social welfare rights and other affirmative governmental obligations is the trait that most dramatically distinguishes the eighteenth century Constitution of the United States from certain prominent twentieth century constitutions. In the late 1960s, at the end of the Warren Court period, there were notable (but unsuccessful) attempts to try to locate such affirmative governmental obligations in the broad language of the American fourteenth amendment.<sup>39</sup> Although the Basic Law contains only a few indications of the existence of such rights, the Constitutional Court has been rather receptive to the imposition of constitutional obligations on the state in various ways. In some instances these constitutional obligations require

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<sup>38</sup> See also Currie, *Positive and Negative Constitutional Rights*, *supra* note 5.

<sup>39</sup> See, e.g., Frank L. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

the government to impose *burdens* on individuals (as in the abortion cases<sup>40</sup>), and in some instances these obligations require the government to furnish *benefits* to individuals or groups (as in an important case providing subsidies for some private schools).<sup>41</sup> Currie discusses several variations on these themes throughout the course of the treatise.

The legacy of the New Deal judicial crisis still haunts American constitutional law, and it particularly haunts those who -- like Professor Currie (and the present writer) -- were taught by those who had actually experienced that crisis. One of the important results of the New Deal crisis was the Supreme Court's withdrawal from judicial review of economic regulation under the doctrine of "substantive due process" as it was applied, for example, in the famous case of *Lochner v. New York*.<sup>42</sup> Many spectres haunt German constitutional law, but, interestingly, this is not one of them. Accordingly, the German Constitutional Court has been much more willing to pass upon the substantive "reasonableness" of legislation under open-ended doctrines that resemble the American doctrine of "substantive due process." The extent to which the German Constitutional Court has applied doctrines of this kind, forms another of the major themes of Currie's treatise. Currie finds that a number of provisions of the Basic Law "have been employed to make the Constitutional Court ultimate censor of the reasonableness of all governmental action."<sup>43</sup> Although it is clear that Currie deplores this sort of tendency in the United States, he nonetheless seems to harbor some grudging admiration for this development in Germany, noting that "[u]nlike their American counterparts during the *Lochner* years, the German judges do not seem often to have blocked desirable or even fairly debatable reforms; they do seem to have spared their compatriots a flock of unjustified restrictions on liberty and property."<sup>44</sup> Yet ultimately Currie questions whether a power of this sort "is consistent with one's conception of democracy."<sup>45</sup>

In another interesting general theme, Currie looks back with a measure of nostalgia on certain largely vanished or depreciated doctrines in American constitutional law, which, however, remain current and alive in the jurisprudence of the German

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<sup>40</sup> BVerfGE 39, 1 (1975); BVerfGE 88, 203 (1993).

<sup>41</sup> BVerfGE 75, 40 (1987).

<sup>42</sup> 198 U.S. 45 (1905).

<sup>43</sup> CURRIE, *supra* note 2, at 337.

<sup>44</sup> *Id.* at 338.

<sup>45</sup> *Id.*

Constitutional Court. These include, for example, what Currie sees as the “inferior” status of property rights in American constitutional law -- rights that are not so “relegated” in the German cases.<sup>46</sup> Currie also approves the Constitutional Court’s active policing of the border-line between state and federal authority -- which, as Currie notes, has largely fallen by the wayside in American constitutional law. Interestingly, Currie’s treatise was published in 1994, the year before the Supreme Court decided *United States v. Lopez*,<sup>47</sup> the case in which the Court began to reimpose serious limits on congressional power under the Commerce Clause. It would have been interesting to know the extent to which Currie believed that *Lopez* and its progeny (for example, *United States v. Morrison*<sup>48</sup>) brought the American decisions into closer alignment with the German approach to this subject. Certainly, in later writing, Currie welcomed the *Lopez* case and similar decisions, like *Printz* and *City of Boerne v. Flores*.<sup>49</sup> Similarly, in another nostalgic backward glance, Currie measures the rather vigorous enforcement of the nondelegation doctrine by the German Constitutional Court, against its virtual abandonment by the American Supreme Court, and comes to the conclusion “that we [in the United States] have lost something significant that the Germans have worked hard to maintain.”<sup>50</sup> Yet Currie’s own discussion of the nondelegation problem may suggest an important historical difference between the role of that doctrine in the two systems: In the United States the nondelegation doctrine has often been asserted in an attempt to thwart progressive economic regulation; in Germany, in contrast, unduly broad delegations may evoke unpleasant memories of the “*Ermächtigungsgesetz*”, the statute through which the Weimar Parliament in 1933 relinquished its power to the Hitler regime.<sup>51</sup>

## F. Conclusion

As we move away in time from the publication of this extraordinary treatise -- and as the German Constitutional Court accumulates new decisions that may confirm, qualify, or alter the conclusions and analysis set forth by Professor Currie -- readers who are interested in the study of German constitutional law will increasingly miss

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<sup>46</sup> *Id.* at 290.

<sup>47</sup> 514 U.S. 549 (1995).

<sup>48</sup> 529 U.S. 598 (2000).

<sup>49</sup> David P. Currie, *Subsidiarity*, 1 GREEN BAG 2<sup>ND</sup> SERIES 359, 361 (1998); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>50</sup> CURRIE, *supra* note 2, at 133.

<sup>51</sup> *See id.* at 125-26.

Professor Currie's commentary on these new developments. No similar work seems to be in the wings, and certainly it is unlikely that anyone else will achieve the depth of understanding of both the German and the American constitutional cases that was so uniquely possessed by David Currie. But this volume, approaching German constitutional law from a basically American perspective, will stand as a monument to the illumination that can be provided by the deep, comprehensive and perceptive comparison of constitutional systems.