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Introduction

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The articles that follow, initially presented in 1983 as the thirty-second series of Thomas M. Cooley Lectures, address a subject that has deep roots in the United States' history. Assurances that there would be constitutional protection of what are now called human rights—in the United States, they have more frequently been referred to as civil liberties and civil rights or individual rights and liberties—was a practical condition for the adoption of the Constitution. The belief that such guarantees are of vital importance in maintaining a society that is both free and just has over time become even more deeply embedded in our national consciousness. Despite the intense controversy that from time to time erupts over one or another Supreme Court decision—or perhaps because of it—it has become an article of faith among Americans that a constitutional specification of rights, enforced and elaborated by courts, is necessary to ensure liberty and as a safeguard against injustice.

The history of other Western democracies is quite different. Nations whose laws may differ from ours in particulars, but that we would readily acknowledge to be as free as our own, have traditionally been governed under a rule of parliamentary supremacy. The liberty of citizens and their assurance of a just legal order emerged from the political process, not as the product of judicially enforceable constitutional guarantees.

It is a matter of some interest, therefore, that in the years since the Second World War there has been, in many of these countries, growing interest in securing human rights by judicially enforceable constitutional or (what may be called) "constitution-like" guarantees. The 1983 Cooley Lectures were intended to acquaint an American audience with several important manifestations of this interest: the Charter of Rights and Freedoms in the new Canadian Constitution, the supranational protections that have emerged in Europe under the European Convention on Human Rights and to a lesser extent under the Treaty of Rome, and the seemingly intensifying dis-

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cussion in Great Britain regarding the possibility and desirability of an entrenched Bill of Rights.

The intrinsic interest of these developments is alone a sufficient reason for acquiring some familiarity with them, but there may also be more practical reasons. Our understanding of the problems and opportunities within our own tradition may be deepened by an appreciation of the circumstances and arguments that have led other nations to adopt or consider constitutional or "constitution-like" protection of human rights, their efforts to identify and define the interests that should receive such protection, and the ways in which they have thought about and dealt with such issues as the tension between judicial review and democratic values.

The convergence of the Western democracies on both judicial review to ensure governmental respect for human rights and, despite important differences, the definition of those rights is less surprising than emphasis on their differing political histories and institutions might suggest. Their common commitment to liberal ideals and the similarity of their political and economic circumstances seem to entail common problems for which only a limited number of institutional responses are available. These similarities are, of course, a major reason for the attractiveness of comparative study, but they are also the source of its hazards.

Americans may well experience *déjà vu* as they read these descriptions of the issues and arguments that Canadians and Europeans have confronted in recent years. The interests for which protection has been sought, the nature of the threats to those interests, and even the terms of debate about the place of courts in a democratic society have an uncanny familiarity. The sense that one has lived through these discussions before *is* an illusion, however, for it is only at a rather high level of abstraction that the issues and arguments confronted in Europe and Canada can be said to be the same as those that the United States has confronted. Local circumstances shape and color even seemingly identical issues and arguments in ways that affect their meaning and significance in different national settings. It is, therefore, appropriate to introduce these articles with the ritual caution against facile assumptions regarding the transferability of institutional forms and legal rights across national boundaries.

The experience of other Western democracies with judicial elaboration and enforcement of human rights guarantees does, nevertheless, offer the prospect of enlarging our understanding of the problems and opportunities in the United States, broad-

ening the base of experience upon which we can draw in considering our own situation. The point is not, of course, that we can readily transfer to the United States conclusions reached in Canada or Europe, but that a consideration of the applicability of their experience to the United States will deepen our understanding of the issues we face. What is called for, in other words, is not imitation, but comparison. The traditional insularity of American law, especially American constitutional law, may well stand in the way of even so limited a use of foreign experience. The articles by Professors Frowein, Jacobs, and Weiler will, I think, persuade most readers that such an outcome would represent a lost intellectual opportunity of some significance.