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# GERMAN CONSTITUTIONALISM: A PROLEGOMENON

Donald P. Kommers\*

## I. INTRODUCTION

This essay sets out to describe the main features of German constitutionalism, and it concludes by drawing some comparisons with the United States. The term "constitutionalism," however, suffers from the vice of vagueness. As Gerhard Casper has written, "it is neither clearly prescriptive nor clearly descriptive; its contours are difficult to discern; its historical roots are diverse and uncertain."<sup>1</sup> Any attempt to explore the contours and roots of German constitutionalism in the global sense suggested by Casper's comment would be a major undertaking extending far beyond the limits of this study. As used here the term shall be limited to the principles and ideas flowing from the written constitution as interpreted by Germany's highest court of constitutional review.

Germany's written constitution is known as the Basic Law (*Grundgesetz*), so labeled because it was conceived in 1949 as a transitional document pending national unification. The more dignified term "constitution" (*Verfassung*) would be reserved for a governing document applicable to the nation as a whole and designed to last in perpetuity. Yet, over the years, having survived the test of time, the Basic Law has taken on the character of a genuine constitution.<sup>2</sup> In fact, following the bloodless coup of March 18, 1990 — the day on which East Germans voted to end Germany's division — a new and freely elected East German government chose to accede to the Federal Republic of Germany within the framework of the Basic Law. This decision and the Unification Treaty signed later by East and West Germany transposed the Basic Law from a temporary instrument of governance for one part of Germany into a document of force and permanence for the entire German nation.<sup>3</sup>

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<sup>1</sup> Casper, *Constitutionalism*, in L. LEVY, K. KARST, & D. MAHONEY, 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 473 (1986).

<sup>2</sup> See Kommers, *The Basic Law of the Federal Republic of Germany: An Assessment After Forty Years*, in *THE FEDERAL REPUBLIC OF GERMANY AT FORTY* 133 (P. Merkel ed. 1989).

<sup>3</sup> Treaty Between the Federal Republic of Germany and the German Democratic Republic on

An imposing document of 146 articles, the Basic Law draws much of its inspiration from previous German constitutions in the democratic tradition.<sup>4</sup> In its original form, the Basic Law consisted of eleven sections and 146 articles; numerous amendments over the years, particularly the addition of Section Xa (State of Defense) in 1968, produced a document of 171 articles, not to mention the five articles of the Weimar Constitution (Articles 136-139 and 141) on church-state relations absorbed into the Basic Law under the terms of Article 140.<sup>5</sup> Seven of the Basic Law's

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the Establishment of German Unity (August 31, 1990) [hereinafter Unification Treaty]. To accommodate the special needs of the eastern states belonging to the former German Democratic Republic, Article 4 (5) of the Unification Treaty provides that East German laws "may deviate from provisions of this Basic Law for a period not extending beyond 31 December 1992 insofar as and as long as no complete adjustment to the order of the Basic Law can be achieved as a consequence of the different conditions." Such deviations, however, "must not violate Article 19 (2) and must be compatible with the principles set out in Article 79 (3)." Article 19 (2) of the Basic Law provides: "In no case may the essential content of a basic right be encroached upon." Article 79 (3) requires all amendments to the Basic Law to adhere to the basic principle of human dignity laid down in Article 1 and to the principle of the "democratic and social federal state" based on "law and justice" set forth in Article 20. Article 31 (4) of the Unification Treaty singles out abortion for special treatment. Under a decision of the Federal Constitutional Court, abortion after the 14th day of pregnancy is an "act of killing" that the state is constitutionally obliged to ban subject to certain exceptions specified by law. *See* Judgment of February 25, 1975, 35 *Entscheidungen des Bundesverfassungsgerichts* 1 (1975) [hereinafter cited as BVerfGE]. East Germany, by contrast, permits abortion on request during the first trimester of pregnancy. Under the Treaty, East and West Germany are permitted to follow their respective policies on abortion until an all-German parliament enacts a new law. (Any new law will of course be subject to judicial review, and any decision that the Federal Constitutional Court hands down will apply to all of Germany.) It might be noted, finally, that with respect to certain aspects of federal-state relations, Article 4 (5) [2] of the Unification Treaty allows East Germany to deviate from the Basic Law for a five-year period.

<sup>4</sup> *See* E. HUCRO, *THE DEMOCRATIC TRADITION* (1987) and Kommers, *From Reich to Republic*, 3 *CONST.* 60-69 (1991).

<sup>5</sup> *See* Kommers, *supra* note 2, at 141. The Basic Law currently includes 14 sections. They are: Section I (Basic Rights [articles 1-19]); Section II (Federation and the States [articles 20-37]); Section III (Federal Parliament or Bundestag [articles 38-49]); Section IV (Council of States or Bundesrat [articles 50-53]); Section IVa (Joint [Federal-State] Tasks [article 53a]); Section V (Federal President [articles 54-61]); Section VI (Federal Government [articles 62-69]); Section VII (Legislative Powers of the Federation [articles 70-82]); Section VIII (Execution of Federal Laws and the Federal Administration [articles 83-91]); Section VIIIa (Joint [Federal-State] Tasks [articles 91a-91b]); Section IX (Administration of Justice [articles 92-104]); Section X (Finance [articles 104a-115]); Section Xa (State of Defense [articles 115a-115]); Section XI (Transitional and Concluding Provisions [articles 116-146]); and Appendix (articles 136-139 and 141 of the Weimar Constitution). Under the Unification Treaty, *supra* note 3, several articles of the Basic Law, including the preamble, are to be revised or repealed in the light of reunification. The Treaty, for example, repeals Article 23, which provides for the accession of "other parts of Germany" into the Federal Republic. The repeal of this article effectively freezes Germany's present borders, barring any further legal claim on the part of Germany to territory lost to Poland and the Soviet Union as a consequence of World War II. By the same

fourteen sections, representing no fewer than sixty-five articles, spell out in detail the powers of federal and state governments and their duties to each other.<sup>6</sup> Beyond the scope of this essay, however, is any in-depth discussion of federalism, the special character of which is a firm legacy from Germany's past.

Instead, our focus here is on the "new constitutionalism" reflected in the Basic Law, that is, on those of its features that represent significant departures from Germany's past. These include the binding force of basic rights, the protection of the free democratic order, the renunciation of any constitutional amendment that would erode the essential principles of the political system (*e.g.*, political democracy, rule of law, separation of powers, popular sovereignty, the social welfare state, and federalism) or the concept of human dignity laid down in Article 1, and the special role of the Federal Constitutional Court as guardian of the constitutional order. Articles of the Basic Law that incorporate these essential principles will furnish the basis of the following analysis, including the comparisons drawn with selected areas of American constitutional jurisprudence.

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token, Article 146 no longer incorporates the "achievement of unity" as a major aspiration of the Basic Law; the preamble underwent a similar change. Article 51 (2), as amended by the Treaty, changes the allocation of votes in the Bundesrat. Finally, and apart from those provisions of the Basic Law whose application to the eastern states has been temporarily suspended (*supra* note 3), the Unification Treaty provides that within two years an all-German parliament will consider various amendments to the Basic Law. These include the possibility of reorganizing the state of Brandenburg in derogation of Article 29 and of introducing certain directive principles of state policy, particularly in the social and economic field. None of these revisions, however, would alter or modify the main principles or essential core of the Basic Law.

<sup>6</sup> The prolixity of these provisions is owing to more than the well-known German penchant for completeness. Germany's complicated system of administrative federalism and its various layers of public administration require a detailed code of federal-state and interstate relations. See K. KÖNIG, H. VON OERTZEN, & F. WAGENER, *PUBLIC ADMINISTRATION IN THE FEDERAL REPUBLIC OF GERMANY* (1983) and A. GUNLICKS, *GOVERNMENT IN THE GERMAN FEDERAL SYSTEM* 67-118 (1986). Section X, for example, which Germans refer to as the "finance constitution," specifies the formulae for apportioning tax revenue between levels of government and includes provisions on financial equalization that impose certain obligations on the Federal Government in relation to the states and upon the states in relation to each other. Section X, incidentally, is a part of the Basic Law from which under the Unification Treaty the East German states may deviate for a period of five years. The five states composing the territory of the old German Democratic Republic are too poor to participate fully in the Constitution's revenue sharing schemes. See *supra* note 3.

## II. THE ROLE OF THE FEDERAL CONSTITUTIONAL COURT

Since this essay focuses heavily on the Basic Law *as interpreted* by the Federal Constitutional Court, and since the latter's role is comparable to that of the United States Supreme Court, it is worth saying more about this remarkable body, its relationship to other German courts, and its approach to constitutional interpretation. First of all, the Constitutional Court is a specialized constitutional tribunal; it decides only constitutional disputes. Secondly, the Court is separate from, and independent of, the regular judicial system,<sup>7</sup> underscoring its special character as *the* guardian of the Basic Law. It is also the *supreme* guardian of the Basic Law. Its decisions are final and binding on all other courts. Indeed, no other court, not even a high federal court, is empowered to declare a statute unconstitutional, for this power is reserved exclusively to the Federal Constitutional Court.<sup>8</sup>

The Constitutional Court's powers, set forth in ten different articles of the Basic Law,<sup>9</sup> include the authority to examine, upon the request of a state (*Land*) or the federal government (*Bund*) or of one-third of the members of the federal parliament (*Bundestag*), the constitutionality of

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<sup>7</sup> The regular judicial establishment includes ordinary courts of civil and criminal jurisdiction as well as administrative, social, finance, and labor courts. Each of these is organized into separate and integrated judicial hierarchies. The courts of first instance and intermediate courts of appeal are courts established and controlled by the various states, while the highest court of appeal in the hierarchy is a federal tribunal. Accordingly, in each of these specialized jurisdictional areas, the last court of resort is, respectively, the Federal Supreme Court, Federal Administrative Court, Federal Social Court, Federal Finance Court, and Federal Labor Court. As the ultimate guardian of the Basic Law, the Federal Constitutional Court stands above all other federal tribunals.

<sup>8</sup> Judicial review is not entirely new to Germany. The abortive Frankfurt Constitution of 1849 provided for the judicial review of legislation, and several courts during the Weimar Republic laid claim to this authority. As a general proposition, however, constitutional review by the regular judiciary was unacceptable and almost universally rejected by judges trained in the German civil law tradition. The Weimar Constitution created a high state court known as the *Staatsgerichtshof* to hear constitutional disputes between branches and levels of government, but this was a specialized tribunal created outside of and independent of the regular judiciary. The Federal Constitutional Court may be regarded as the successor to the *Staatsgerichtshof* except that the former exceeds by far the status and authority of the latter. See D. KOMMERS, *JUDICIAL POLITICS IN WEST GERMANY* 35-42 (1976).

<sup>9</sup> See Articles 18, 21 (2), 41 (2), 61, 84 (4), 93, 98 (2), 99, 100, and 126 of the Basic Law of the Federal Republic of Germany. In addition to the specific jurisdiction conferred by these articles, Article 93 (2) authorizes the Court to exercise any other jurisdiction which may be conferred by law. These provisions have been codified in § 13 of the *Bundesverfassungsgerichtsgesetz* [Federal Constitutional Court Act] [hereinafter cited as BVerfGG]. The Court's powers are broad enough to embrace every significant constitutional issue likely to arise under the Basic Law.

any federal statute or any state statute allegedly in conflict with the Basic Law or a federal law.<sup>10</sup> Such proceedings fall within the Court's "abstract norm control" (*abstrakte Normenkontrolle*) jurisdiction, so called because they do not arise out of the normal course of litigation. Governments and legislators may petition the Court to review the constitutionality of a statute immediately after its enactment, a procedure that results in the instant judicialization of a constitutional dispute.

Three other proceedings underscore the Court's crucially important role in Germany's constitutional system. The first is the Court's "concrete norm control" (*konkrete Normenkontrolle*) jurisdiction. Judges presiding over the regular judiciary may not declare laws unconstitutional, but if they regard as "unconstitutional a law the validity of which is relevant to [their] decision," they "shall" refer the constitutional issue to the Federal Constitutional Court.<sup>11</sup> (Once the latter decides the issue, the lower court may proceed with the case.) The second procedure authorizes the Court to declare political parties unconstitutional if they "seek to impair or abolish the free democratic basic order or . . . endanger the existence of the Federal Republic of Germany."<sup>12</sup> This provision, revisited later in the paper, calls attention to another important aspect of German constitutionalism. Third, the Basic Law empowers "any person who claims that one of his basic rights . . . has been violated by public authority" to file a constitutional complaint in the Federal Constitutional Court.<sup>13</sup> The Court is constitutionally mandated to hear several other types of proceedings, but they are not important for present purposes. Let it suffice here to note that any decision of the Court on the constitutionality of a statute "shall have the

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<sup>10</sup> THE BASIC LAW, Art. 93 (1) [2].

<sup>11</sup> *Id.*, Art. 100.

<sup>12</sup> *Id.*, Art. 21 (2).

<sup>13</sup> *Id.*, Art. 93 (1) [4a]. Until 1971 the ability of an ordinary person to file a constitutional complaint was a statutory privilege, and Parliament might have withdrawn this jurisdiction at any time. After all, Germans enjoyed easy access to an efficient system of administrative courts open to their complaints over the legality (albeit not the constitutionality) of governmental actions. The constitutional complaint proceeding, however, grew increasingly popular. By 1970 the Court had received over 21,000 constitutional complaints, representing 96% of its caseload. Although rejecting over 95% of these complaints, the Court viewed them as an important means of instructing Germans in the ways of the Constitution and alerting them to their constitutional rights and responsibilities. About 55% of the Court's reported decisions derive from constitutional complaints. In any event, the increasing number of persons filing such complaints, together with the high value that the Court itself attached to them, prompted parliament to anchor the constitutional complaint procedure in the Basic Law itself. See D. KOMMERS, *supra* note 8, at 167-75.

force of law" and, as law, shall be published in the *Federal Gazette*, along with other federal statutes.<sup>14</sup> As a consequence, the Court's decisions bind all organs of government, federal and state, and all courts and public officials.<sup>15</sup> Finally, as suggested at the start of this paragraph, the Court's jurisdiction is compulsory; it may not avoid decision in a case properly before it by invoking a "political question" doctrine or the "passive virtues" of Bickelian jurisprudence.<sup>16</sup> By the same token, conventional wisdom holds that the Court is powerless to exercise authority not rooted in the express language of the Basic Law.<sup>17</sup> The German version of the *Rechtsstaat* leaves little doubt as to the nature of its jurisdiction or the effect of its decisions.

For all of these reasons, the source and authority of the Federal Constitutional Court are relatively undisputed. In the United States, by contrast, the main task of constitutional theory is to find the source and establish the limits of judicial review. *Marbury v. Madison*<sup>18</sup> inaugurated this effort, but the glaring deficiencies of Marshall's reasoning have prompted a perennial search in the United States for a more convincing theory of when and why the judiciary should invalidate the acts of elected officials. This situation poses a dramatic irony: on the one hand, judicial review is one of the hallmarks of American constitutionalism; on the other hand,

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<sup>14</sup> BVerfGG, § 31 (2). *But see* M. KRIELE, *THEORIE DER RECHTSGEWINNUNG* ch. 11 (2d ed. 1976).

<sup>15</sup> BVerfGG, § 31 (1). The relative specificity of the Court's jurisdiction does not erase difficult problems of application. For example, what aspects of a constitutional decision have the force of law? The actual ruling of a case or, in addition, the reasons given to support the ruling? Are courts in the regular judiciary obliged to accept the reasoning, as opposed to the result, of a Constitutional Court decision? May other courts organized in their own separate hierarchies interpret constitutional provisions differently than the Constitutional Court? (Such courts, while not empowered to nullify laws on constitutional grounds, are often obliged to consider constitutional values when deciding cases under ordinary law.) These questions are still heatedly debated in Germany.

<sup>16</sup> A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). In this widely cited work Bickel defends various strategies and techniques, some of which he labels "passive virtues," by which the American Supreme Court for prudential reasons may decline to exercise jurisdiction that is given. One should not, however, exaggerate this difference between the American and German tribunals. Even though the Constitutional Court may not formally decline jurisdiction that is given, it has, in highly charged "political" cases, delayed handing down its decision, even for years, in the hope that the moving party will eventually withdraw the case. *See* D. KOMMERS, *supra* note 8, at 165.

<sup>17</sup> The doctrine of implied power, so familiar to American constitutionalism, has no place in German constitutional theory. *See* I. VON MÜNCH, *1 GRUNDGESETZ-KOMMENTAR* 829-30 (3d ed. 1985). Yet the language of the Basic Law is often very broad, allowing the Court to exercise some kind of implied power.

<sup>18</sup> 5 U.S. (1 Cranch) 137 (1803).

there exists no "convincing theoretical explanation of where the Supreme Court's power comes from and how it should be used."<sup>19</sup> Supplying that explanation has become the central focus of American constitutional theory.<sup>20</sup>

It would be misleading, however, to suggest that there is little or no controversy in Germany over the role of the Federal Constitutional Court. Judicial nullification of majoritarian policy draws as much fire in Germany as in the United States. What is different is that the fire in Germany is directed against government agencies or party leaders who would resort to constitutional litigation for essentially political ends. The Court itself catches the fire when it appears to cooperate in the achievement of these ends,<sup>21</sup> one of the hazards, incidentally, of the abstract judicial review proceeding. Nevertheless, the so-called "counter-majoritarian difficulty," the term Alexander Bickel used to describe the root problem of judicial review in America, is not a major problem in Germany.<sup>22</sup> The Basic Law itself resolves the difficulty, for no reliance on a theory of judicial review is necessary to justify the exercise of judicial power.

This picture of German constitutional decisionmaking, however, is only partially correct. The counter-majoritarian difficulty does arise in Germany to the extent that the Federal Constitutional Court decides cases on the basis of historical and functional considerations. In truth, as we shall see later on, the Court has invoked theories of its own creation, the most prominent being the notion of an "objective order of values,"<sup>23</sup> on the

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<sup>19</sup> Neuberne, *Justiciability, Remedies, and the Burger Court*, in *THE BURGER YEARS* 3 (H. Schwartz ed. 1987).

<sup>20</sup> Some of the more important works are R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); J. ELY, *DEMOCRACY AND DISTRUST* (1980); J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982) and *MORALITY, POLITICS, AND LAW* (1988); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); P. BOBBITT, *CONSTITUTIONAL FATE* (1982); G. MCDOWELL, *CURBING THE COURTS* (1988); R. NAGEL, *CONSTITUTIONAL CULTURES* (1989); and R. BORK, *THE TEMPTING OF AMERICA* (1990). See also *MODERN CONSTITUTIONAL THEORY: A READER* (J. Garvey & T. Aleinikoff eds. 1989).

<sup>21</sup> See, e.g., C. LANDFRIED, *BUNDESVERSASSUNGSGERICHT UND GESETZGEBER* 47-124 (1984). See also C. STARCK, *DAS BUNDESVERFASSUNGSGERICHT IM POLITISCHEN PROZESS DER BUNDESREPUBLIK* (1976).

<sup>22</sup> A. BICKEL, *supra* note 16, at 16.

<sup>23</sup> The Federal Constitutional Court's understanding of the Basic Law appears to be substantive rather than procedural; the Constitution is an ensemble of substantive values. Its contents are frequently described as fundamental values. The established legal order [*positive Rechtsordnung*] is



basis of which it has struck down a number of important statutes, including a liberal abortion law.<sup>24</sup> Some of these decisions have invited the objection, so familiar to Americans, that the justices are doing little more than imposing their own personal values on the nation as a whole. What makes the Constitutional Court's "activism" less objectionable in terms of democratic theory, however, is that Parliament — not the executive — elects each justice by a two-thirds vote for a single nonrenewable term of twelve years, thereby averting the rise of an aging judicial oligarchy out of tune with major currents of modern life.<sup>25</sup>

What also makes the exercise of judicial review in Germany somewhat less problematic — albeit no less predictable — than in the United States is a set of generally agreed-upon approaches to constitutional interpretation. These approaches might be brought together under the general heading of "constitutional textualism." The code law tradition, with its emphasis on specific norms and structures, leads to legal positivism in adjudication, and the Constitutional Court often talks as if it is adhering strictly to the constitutional text. But the Court also employs systematic and teleological modes of inquiry. The focus here is often on the unity of the text as a whole from whence judges are to ascertain the aims and objects — *i.e.*, the *telos* — of the Constitution, a style of reasoning that allows judges to incorporate broad value judgments into their decisions.<sup>26</sup> These judgments are strikingly reminiscent of the Supreme Court's substantive due process decisions. Historical arguments, finally, are also legit-

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based on these values, values which the Constitution's framers have combined to form an order of values and to constitute a state which is ideologically neutral but not value-neutral.

"These values have incorporated the traditions of the liberal, representative parliamentary democracy, of the liberal rule of law, and the federal state and have added new principles such as the social state [Sozialstaat]." K. HESSE, *GRUNDZÜGE DES VERFASSUNGS-RECHTS DER BUNDESREPUBLIK DEUTSCHLAND* 4 (16th ed. 1988). For a critical study of the concept of an objective value order, see H. GOERLICH, *WERTORDNUNG UND GRUNDGESETZ* (1973).

<sup>24</sup> 39 BVerfGE 1 (1975).

<sup>25</sup> Article 94 (1) of the Basic Law provides that "half of the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat." The Bundestag, however, has delegated the task of selecting its share of the justices to a special Judicial Selection Committee whose 12 members the Bundestag in turn elects. Party membership on the committee is proportionate to the strength of each party in the Bundestag as a whole. BVerfGG, § 6 (2). Two-thirds of all votes cast in the Bundesrat is required to elect a justice. For a discussion of this process of selection, see D. KOMMERS, *supra* note 8, at 113-19.

<sup>26</sup> See Brugger, *Wertordnung und Rechtsdogmatik im Amerikanischen Verfassungsrecht*, in *RECHTSPOSITIVISMUS UND WERTBEZUG DES RECHTS* 174, 188ff (R. Dreier ed. 1990).

imate, although German legal scholars agree that history ranks last in persuasive force among these modes.

History in the sense used here refers to the objective conditions out of which a constitutional value or provision arose. It helps to confirm judgments arrived at on the basis of purposive or teleological reasoning. Original intent, on the other hand, defined as the subjective understanding of the framers, plays no significant role in German constitutional interpretation. In the United States, by contrast, original intent and the weight it should be given in constitutional adjudication is a hotly contested issue, dividing both scholars and judges.<sup>27</sup> It might seem that the "aims and objects" approach of teleological inquiry differs little from the determination of original intent, but the German judicial mind distinguishes sharply between these methods.

Finally, and relatedly, the Federal Constitutional Court is not formally bound to the rule of *stare decisis*. In the culture of Germany's code law world, with the single exception, as noted, of certain decisions of the Federal Constitutional Court, judicial decisions do not enjoy the status of law as in the common law world, although in reality courts do follow their own prior decisions. While the Constitutional Court has spun a complicated web of doctrine around the Basic Law, and while its opinions brim with citations to earlier cases, its judges can more easily maintain the fiction that they are interpreting the documentary text rather than building upon their own precedents. These precedents in any event project a sublime vision of what the German Basic Law is and what it means. The core of German constitutional theory, which we now proceed to sketch, is contained in this vision.

### III. THE NEW CONSTITUTIONALISM OF THE BASIC LAW

#### A. *Supremacy of the Constitution*

The Basic Law marks a radical break with Germany's past. Previous constitutions in the democratic tradition were easily amended and not re-

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<sup>27</sup> The literature on this subject is massive. For a recent defense of original understanding as the most legitimate mode of interpreting the United States Constitution, see R. BORK, *supra* note 20. For a superb analysis of the American debate on original intent, see G. BASSHAM, *ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL INQUIRY* (doctoral dissertation, University of Notre Dame, 1991).

garded as binding in all respects.<sup>28</sup> By contrast, the Basic Law is a binding document. As several of its provisions make clear, it controls the entire German legal order, in which respect Articles 1, 19, 20, and 79 are particularly relevant. Article 1, paragraph 3, declares that the fundamental rights listed in the Basic Law, including the inviolable principle of human dignity, "shall bind the legislature, the executive, and the judiciary as directly enforceable law." In reinforcing this provision, Article 20 subjects "legislation" to the "constitutional order" and *binds* "the executive and the judiciary to law and justice."

In binding executive and judicial authority to "law" (*Gesetz*) and "justice" (*Recht*), the Basic Law's founders were recreating the formal *Rechtsstaat* — a state based on the rule of positive law (*i.e.*, *Gesetz* or *Rechtspositivismus*) — but now, unlike the situation under previous constitutions, positive law is subject to the supra-positive notion of justice or *Recht*, a notion that appears to include unwritten norms of governance. In one of its landmark decisions the Federal Constitutional Court declared that laws "must also conform to unwritten fundamental constitutional principles as well as to the fundamental decisions of the Basic Law, in particular the principles of the rule of law and the social welfare state."<sup>29</sup> In short, the *Rechtsstaat*, far from being an end in itself, now serves the constitutional state (*Verfassungsstaat*).

Articles 19 and 79 carry the principle of the Basic Law's supremacy even further. Article 19, paragraph 2, bans any law or governmental action that invades "the essential content of [any] basic right." But this is not all. Article 79, paragraph 3 — the so-called "eternity clause" — bars any amendment to the Basic Law that would tamper with the principle of federalism or impinge upon "the basic principles laid down in Articles 1 and 20." Article 1, as already noted, sets forth the principle of human dignity and imposes upon the state an affirmative duty "to respect and protect it," whereas Article 20 proclaims the basic principles governing the polity as a whole — *i.e.*, federalism, democracy, republicanism, separation of powers, the rule of law, popular sovereignty, and the social welfare state.<sup>30</sup> The Basic Law's framers believed, quite clearly, that the best

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<sup>28</sup> Brugger, *supra* note 26, at 188-92.

<sup>29</sup> 6 BVerfGE 32, 41.

<sup>30</sup> Article 20 defines West Germany as a "democratic and social federal state," provides for representative institutions through "elections and voting," and channels the exercise of state authority

way to realize human dignity, now and in the future, is to freeze certain principles of governance into the constitutional structure itself.

Finally, the authority conferred upon the Federal Constitutional Court, as well as upon the judiciary as a whole, assures every person that the Basic Law will prevail over all legal rules or state actions that would subvert or offend it. Accordingly, Article 19, paragraph 4, grants a judicial hearing to any person whose rights the state violates. Indeed, "recourse shall be to the ordinary courts" in the event that some other judicial remedy is not specified by law. In addition, Article 80 (1) helps to insure the protection of the rule of law against the decisions of executive officials. It requires that any law delegating the power to make legally enforceable regulations specify the "content, purpose, and scope of the authorization." The right of administrative judges — and indeed all judges — to refer constitutional questions to the Federal Constitutional Court in cases where they seriously doubt the constitutionality of a statute under which an action is brought backs up this guarantee.<sup>31</sup> Failing these protections, the individuals affected have the option, once their legal remedies have been exhausted, of filing a complaint with the Constitutional Court.<sup>32</sup>

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into "specific legislative, executive and judicial organs." (Article 28 requires the adoption of these principles at the state level. It reads: "The constitutional order of the *Länder* [states] must conform to the principles of republican, democratic, and social government based on the rule of law within the meaning of the Basic Law.") Each of these principles is the subject of extensive commentary in the literature of constitutional law and theory. An extraordinarily good treatment of these principles is in Häberle, *Die Menschenwürde als Grundlage der staatlichen Gemeinschaft*, in J. ISENSEE & P. KIRCHHOF, I HANDBUCH DES STAATSRICHTS 815-61 (1987). Other articles in HANDBUCH that deal with these principles are W. Henke, *Die Republik*, *id.* at 863-85; E.-W. Böchenförde, *Demokratie als Verfassungsprinzip*, *id.* at 887-952; P. Badura, *Die parlamentarische Demokratie*, *id.* at 953-985; and E. Schmid-Assmann, *Der Rechtsstaat*, *id.* at 987-1041. For an overview in English, see MAIN PRINCIPLES OF THE GERMAN BASIC LAW (C. Starck ed. 1983) and Dürig, *An Introduction to the Basic Law of the Federal Republic of Germany*, in THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 11-24 (U. Karpen ed. 1988).

<sup>31</sup> THE BASIC LAW, Art. 100 (1).

<sup>32</sup> By 1990 German citizens had filed more than 78,000 such complaints, the overwhelming majority against judicial decisions allegedly in conflict with fundamental rights secured by the Basic Law. For a discussion of these complaints, see D. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 15-17 (1989). See also Singer, *The Constitutional Court of the German Federal Republic: Jurisdiction over Individual Complaints*, 31 INT'L. & COMP. L.Q. 331-56 (1982).

### B. Normativity of the Constitution

The Basic Law is an elaborate framework of rules and principles that define the nature of West Germany's constitutional state. Every provision of the Constitution is a legally binding norm requiring full and unambiguous implementation. In Kelsonian language, the Constitution may be said to represent the *Grundnorm* (basic norm) that governs and legitimates the entire legal order.<sup>33</sup> It controls public law directly but it also influences, albeit indirectly, the interpretation of private law.<sup>34</sup> In brief, any law, administrative regulation, legal relationship, or political practice that cannot be justified in terms of the Basic Law is by definition unconstitutional and, in the German variant of the constitutional state, it must be so declared if the order of legality and legal certainty — among the highest values of the German *Rechtsstaat* — is to be maintained.

The preservation of the constitutional state in *all* of its particulars is indeed the function of the Federal Constitutional Court. As already suggested, the Court's role is to *decide* constitutional issues, not to avoid them or to resolve them as a matter of last resort. When serious doubts arise over the validity of a law or practice having the force of law, the Court's function is to resolve the doubt in the interest of constitutional clarity and certainty. Gaps in the Constitution cry out for closure, for which reason all issues arising under the Basic Law and properly before the Court are justiciable. Even the Basic Law's provisions relating to the maintenance of peace and security appear to be justiciable.<sup>35</sup> Vague constitutional terms

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<sup>33</sup> H. KELSON, *GENERAL THEORY OF LAW AND STATE* 115 (1961). Kelson's notion of *Grundnorm*, however, is formal and thus empty of content, whereas the Basic Law's *Grundnorm* is a substantive concept.

<sup>34</sup> See in this regard Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 *MD. L. REV.* 247 (1989).

<sup>35</sup> German leaders invoked Article 24 of the Basic Law in defense of their position that the Federal Republic could not participate militarily in Desert Storm. Indeed, political parties in opposition to the government threatened to seek a temporary restraining order from the Constitutional Court in the event that the Kohl-Genscher government ordered German military forces into the Persian Gulf. Under the prevailing interpretation of Article 24, the Federal Republic may deploy its army and navy only within the framework of the North Atlantic Treaty Organization. See *Frankfurter Allgemeine Zeitung*, August 18, 1990, at 2. Prior to German unification even the preamble's reference to the goal of reunification was a legally binding command limiting the discretion of German foreign policymakers. See *Basic East-West Treaty Case*, 36 *BVerfGE* 1 (1973). A partial translation of this case appears in W.F. MURPHY & J. TANENHAUS, *COMPARATIVE CONSTITUTIONAL LAW* 232-39 (1977).

such as "human dignity," "democracy," and "social state" have also been found to possess a sharp set of teeth capable of killing legislation and even to compel certain forms of state action if public officials are to avoid its bite. In the United States, by contrast, major constitutional provisions like the republican form of government clause, the foreign relations powers clause, the privileges and immunities clause of the fourteenth amendment, and the clause on the ratification of amendments to the Constitution have been relegated to the limbo of nonjusticiability.

In the German constitutionalist view, the political process above all must yield to the hegemony of the Constitution. The Federal Constitutional Court has insinuated itself deeply into this process by carefully policing legislative procedures, by laying down detailed rules for the conduct of election campaigns and the funding of political parties, by defending the "free democratic basic order" against anticonstitutional movements and parties, and by forcing federal and state governments into changing the structure of their parliamentary pay systems.<sup>36</sup> In this respect, of course, the American Supreme Court has been similarly active in policing the political process, although some of the American cases would probably have turned out differently in the German Court.<sup>37</sup>

On the other hand, the German tribunal has been more vigilant than the Supreme Court in reviewing national legislation impinging upon the federal system. Holmes' observation that the American federal system would not collapse if the Supreme Court were to lose its power to invalidate national legislation would be unacceptable in Germany. For example, it is hard to imagine a German equivalent of *Garcia v. San Antonio Metropolitan Transit Authority*<sup>38</sup> as the solution to a principled problem of federal-state relations. The Constitutional Court has refused to abdicate its responsibility to decide in this or any other area of constitutional litiga-

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<sup>36</sup> Cases relating to these matters are treated at length in D. KOMMERS, *supra* note 32, at 170-246.

<sup>37</sup> A good example is *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* struck down as violative of free speech a limitation on independent expenditures on behalf of a particular candidate for public office. The German Court's jurisprudence in the area of electoral law and party competition contains a strong equalitarian strain. It has tended to sustain legislation designed to bring about greater equality in electoral competition. See *Party Tax Deduction Case*, 8 BVerfGE 51 (1958); *Party Finance Case*, 20 BVerfGE 56 (1966). Translations of these cases appear in D. KOMMERS, *supra* note 32, at 202-10.

<sup>38</sup> 469 U.S. 528 (1985).

tion. It is well to remember that the German tribunal was created in large part *for the purpose of* protecting the formal organization of the state.<sup>39</sup>

This notion that every provision of the Constitution represents an enforceable norm is deeply rooted in the civilian law tradition; that is, a tradition that seeks to lay down in advance, to the extent humanly possible, all the specific rules and general principles that shall govern society. In the civilian and especially the German legal order, human dignity and personal freedom derive from the rights and duties laid down in law. Law therefore serves as a guide to freedom and right living. In the common law tradition, by contrast, freedom precedes law; freedom, after all, is the individual's natural state; judges therefore make law on a case-by-case basis as persons seek remedies for intrusions upon their freedom. Thus common law has emphasized remedies rather than rights, although rights surely flow from the judicial creation of remedies.

In short, and at the risk of over-simplification, the Anglo-American legal mind is content to let law evolve over time as reality unfolds, whereas the civilian public mind seeks to specify reality in comprehensive codes of law. These tendencies — and they are only tendencies — spill over into constitutional law. The discretionary authority of the American Supreme Court, for example, together with its various strategies for avoiding or postponing constitutional decisions, is perfectly compatible with this common law view of the world. The German Constitutional Court, on the other hand, is an organ explicitly entrusted with the perpetual guardianship of the Constitution, a stewardship that implies the continuous elaboration of the Constitution's meaning, its singular purpose being to close the gap between constitutional reality and constitutional normativity. As Ernst Benda, former President of the Federal Constitutional Court, recently wrote, "the main task of the Constitutional Court . . . [is to] control the power of the state, to insure compliance with constitutional law, and to make the constitution more concrete and attend to its further

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<sup>39</sup> The *Garcia* Court, finding the state's interests adequately protected by safeguards inherent in the structure of the federal system, rejected the invitation to decide the case by reference to its own independent judgment. Germany's framers set up the Federal Constitutional Court precisely to resolve this kind of controversy, one reason for the procedure known as abstract judicial review. As noted earlier, abstract review allows one level of government to challenge the acts of another level on a simple petition to the Constitutional Court. For an extended discussion of abstract judicial review, see Löwer, *Zuständigkeit und Verfahren des Bundesverfassungsgerichts*, in J. ISENSEE & P. KIRCHHOF, *supra* note 30, at 774-81.

development."<sup>40</sup>

### C. *Unity of the Constitution*

In German constitutional theory the Basic Law represents a unified structure of principles and values. As the Federal Constitutional Court remarked in one of its earliest decisions: "No single constitutional provision may be taken out of its context and interpreted by itself. . . . Every constitutional provision must always be interpreted so as to render it compatible with the fundamental principles of the Constitution and the intention of its authors."<sup>41</sup> In other instances, the Court has alluded to "the unity of the Constitution as a logical-teleological entity,"<sup>42</sup> an interpretive principle that commands the assent of leading constitutional commentators in Germany. It is also a concept that seeks to fuse Germany's positivistic and natural law traditions of legality.

Closely related to the concept of the constitution as a structural unity is the principle of "practical concordance" (*praktische Konkordanz*). According to this principle, constitutionally protected legal values must be harmonized with one another in the event of their conflict. One may not be realized at the total expense of the other. Both are to be preserved in creative tension with one another.<sup>43</sup> Thus, in adjudicating a concrete case involving a conflict, say, between freedom of speech and the right to the "inviolability of [one's] personal honor" (Article 5, paragraph 1), the Court must seek to resolve the conflict so as to harmonize both values to the greatest possible extent. The Court may not prefer one value over another or perform a balancing act that would minimize the importance of a valid constitutional norm. To preserve the unity of the Constitution is to preserve the Constitution as a whole.<sup>44</sup>

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<sup>40</sup> Ernst Benda, Relationship of the Bundestag and the Federal Constitutional Court 7 (no date) (unpublished manuscript).

<sup>41</sup> See D. KOMMERS, *supra* note 32, at 52.

<sup>42</sup> See, e.g., Church Construction Tax Case, 19 BVerfGE 206, 220 (1965).

<sup>43</sup> Or, to put it another way, "[t]he principle of the Constitution's unity requires the optimization of [values in conflict]: Both legal values need to be limited so that each can attain its optimal effect." See K. HESSE, *supra* note 23, at 27.

<sup>44</sup> This tendency of the German legal mind to envision the Constitution as an almost perfect — and gapless — unity is illustrated by the extraordinary pains taken in 1968 to amend the Basic Law so as to equip the national government with the tools needed to deal with an emergency created by an attack on the Federal Republic but without subverting or sacrificing the principles of democracy,



The German notion of an "unconstitutional constitutional amendment" also flows from the Constitution seen as a unity of values and structures. In the German constitutionalist view, accepted and propagated by the Constitutional Court itself, any constitutional amendment conflicting with the core values or spirit of the Basic Law as a whole would itself be unconstitutional. In the well-known *Klass Case*, for example, the Court considered the constitutionality of an amendment to Article 10 of the Basic Law limiting the "inviolable" right of "privacy of posts and telecommunications." Ratified along with the state-of-defense amendments of 1968,<sup>46</sup> it replaced judicial with administrative recourse for any violation of this right.<sup>46</sup> The Court sustained the validity of the amendment over the objection of three justices who felt that it did in fact contravene the principles of human dignity, separation of powers, and the rule of law.<sup>47</sup>

#### IV. THE CONSTITUTIONAL STATE: ITS GOVERNING ORDER

##### A. *A Representative Democracy*

The governing system created by the Basic Law needs to be placed in a wider context of understanding. The spirit of the age in which the Basic Law was crafted is particularly important. Like other European constitutions adopted in the immediate post-World War II period, the Basic Law created a pragmatic system of checks and balances. Seasoned politicians hammered it out on the anvil of experience against the backdrop of the Hitlerian tragedy. As Carl Friedrich noted, they crafted a "negative

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federalism, or constitutional review. The 11 articles in Section Xa — the new section on the state of defense — establish an elaborate system of checks and balances designed to preserve, to the extent possible, the powers and prerogatives of the Bundestag and Bundesrat. Article 115g even bars an amendment to the Constitutional Court Act interfering with the functions or independence of the Federal Constitutional Court unless in the opinion of two-thirds of the Court's members such an amendment is deemed necessary. And so, even during a national emergency, the Court's authority remains intact unless the Court itself should decide otherwise.

<sup>46</sup> THE BASIC LAW, Arts. 115a-115l.

<sup>46</sup> The amendment (Art. 10 [2]) reads:

Restrictions [on the privacy of letters, posts, and telecommunications] may only be ordered pursuant to a statute. Where a restriction serves to protect the free democratic basic order or the existence or security of the Federation, the statute may stipulate that the person affected shall not be informed of such restriction and that recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament.

<sup>47</sup> See 30 BVerfGE 1 (1970). A translation of this case appears in W.F. MURPHY & J. TANENHAUS, *supra* note 35, at 659-65.

revolution” that said “no” to all utopian schemes for rebuilding the political order.<sup>48</sup> Their primary purpose was to establish peace and stability and to secure human rights. To a large extent the framers were engaged in a work of restoration. They wanted to stem the tide of change, curtail the power of the state, and suppress dangerous political movements. In so doing they borrowed heavily from past German constitutions in the democratic-republican tradition, most especially from the Weimar Constitution.<sup>49</sup>

At the same time, as this paper has made clear, the Basic Law marks a radical break with the past. In broadest outline, the gulf between Weimar and Bonn represents a major shift from constitutional *democracy* to *constitutional* democracy, emphasizing both the permanence and enforceability of certain limits on majority rule. Democracy, of course, is one of the unchangeable values of the Basic Law, but it now finds itself locked in the permanent embrace of mutual tension with constitutionalism. Thus, far from being restorative, the Basic Law is in truth revolutionary, although perhaps in the negative sense suggested by Friedrich.

The Basic Law arranges political institutions in such a way as to shield the new polity against being overwhelmed by the undisciplined power of popular majorities: Popular sovereignty is reaffirmed, but it would now manifest itself in representative rather than plebiscitary institutions, not to mention the indirect election of the Federal President; parliamentary democracy would embody a strong chancellor unremovable save by a constructive vote of no confidence. Federalism would be placed entirely beyond the power of the people to amend and separation of powers would include the judicial control of constitutionality. Majority rule would be overlaid with a complex system of checks and balances, including the corporate right of the *Länder* (the German states) to participate in the national legislative process. Finally, in still another break with German constitutional tradition, the Basic Law recognizes political parties as the principal organs of political representation but empowers the Federal Constitutional Court to declare them unconstitutional if “by reason of their aims or behavior of their adherents, they seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal

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<sup>48</sup> *The Political Theory of the New Democratic Constitutions* in CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II 14-15 (A. Zurcher ed. 1951).

<sup>49</sup> See E. HUCKO, *supra* note 4.

Republic of Germany." The "free democratic basic order" mentioned in Article 21 is more than idle phrasing. These terms are repeated in seven other places in the Basic Law and are clearly meant to define the nature — indeed, as we have seen, the unamendable character — of the Federal Republic.<sup>50</sup>

### B. A Guarded Democracy

The Federal Constitutional Court has often described the polity created by the Basic Law as a "fighting," "militant," or "guarded" democracy.<sup>51</sup> a doctrine with a clear textual basis in the Basic Law. As noted in the previous paragraph, political parties may be declared unconstitutional under Article 21 (2). Article 18 also provides for the forfeiture of certain basic rights if these rights are used "to combat the free democratic basic order." Accordingly, Germany's militant democracy obliges the state actively to oppose persons and groups who would use the rights and institutions of a free society to subvert or destroy democracy. To guard against the abuse of this authority, the Basic Law empowers only the Constitutional Court to rule on the unconstitutionality of parties or the forfeiture of basic rights.

The party prohibition cases are the most striking illustration of Germany's militant democracy. The Constitutional Court declared a neo-Nazi party unconstitutional in 1952 and in 1956 it issued a similar declaration against the Communist Party of Germany.<sup>52</sup> Various internal security cases also incorporate the principle of militant democracy.<sup>53</sup> In more re-

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<sup>50</sup> The terms "free democratic basic order" also appear in Articles 10 (2), 11 (2), 18, 73 (10b), 87a (4), and 91 (1). The concept shows up in slightly different garb in Articles 20 and 28. In addition, Articles 115a through 115l (Section Xa on the State of Defense [see note 44 *supra*]) seek to protect democracy in the event that the federal territory comes under attack or is in imminent danger of being attacked. In the places where the terms "free democratic basic order" appear they serve mainly to limit rights, as in the case of Article 21. Article 10, as seen in the discussion of unconstitutional constitutional amendments, is another example of this.

<sup>51</sup> For a discussion of this concept and the effect of its application, see E. JESSE, *STREITBARE DEMOKRATIE* (1980) and J. LAMEYER, *STREITBARE DEMOKRATIE: EINE VERFASSUNG-SHERMENEUTISCHE UNTERSUCHUNG* (1978). See also D. KOMMERS, *supra* note 32, at 222-43.

<sup>52</sup> See Socialist Reich Party Case, 2 BVerfGE 1 (1952); Communist Party Case, 5 BVerfGE 85 (1956). For partial translations of these cases, see W. F. MURPHY & J. TANENHAUS, *supra* note 35, at 602-07 and 621-27. These cases are also discussed in D. KOMMERS, *supra* note 32, at 222-31.

<sup>53</sup> See, e.g., Klass Case, 30 BVerfGE 1 (1970) (upholding restrictions on the privacy of letters and posts); Civil Servant Loyalty Case, 39 BVerfGE 334 (1975) (upholding a decree barring from the

cent years, however, the Constitutional Court has been more inclined to defend the political rights of radical groups,<sup>54</sup> just as West Germany's political leaders have acted with restraint in invoking the party prohibition clause of Article 21 (2).

In the light of German reunification and the disappearance of the Cold War, the militancy of German democracy can be expected to decline even more. The concept of a militant democracy, however, remains intact. The state has a constitutionally mandated duty to fight the enemies of the Federal Republic. And so, as German judges and commentators are fond of saying, the Basic Law is anything but neutral toward values, for it embraces the basic value decisions of the Founding Fathers that the state is obliged to enforce. What is more, all constitutional provisions must be interpreted in the light of these values, a perspective on interpretation — to repeat a familiar refrain in German constitutional theory — that gives structural unity to the Basic Law.

## V. THE STRUCTURE OF RIGHTS AND VALUES

### A. *The Primacy of Rights*

The West German Basic Law takes rights seriously. It leads off by proclaiming that “[t]he dignity of man is inviolable” and then, in the very next sentence, commands the state to respect and protect it (Article 1 [1]). All of the ensuing rights enumerated in the remaining eighteen articles of the Bill of Rights are designed to actualize this crowning principle of human dignity. Human dignity, as the Constitutional Court repeatedly emphasizes, is the highest value of the Basic Law, the ultimate basis of the constitutional order, and the foundation of guaranteed rights.<sup>55</sup> All other rights proceed in logical succession, moving from the general to the

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public service applicants found to have engaged in “anticonstitutional” activities); National Democratic Party Case, 40 BVerfGE 287 (1975) (upholding the legality of an Interior Ministry report describing the party as a “radical right [party],” “an enemy of freedom,” and “a danger to the free democratic basic order”).

<sup>54</sup> The Court showed considerable tolerance toward such groups in its judgment of February 14, 1978, when it sustained the constitutional complaints of several radical parties, including the Marxist-Leninist German Communist Party, after radio and television stations had denied them broadcast time for campaign purposes. See 47 BVerfGE 198 (1978).

<sup>55</sup> An excellent treatment of human dignity as an interpretive principle in German constitutional law is E. Benda, *Die Menschenwürde* in E. BENDA, W. MAIHOFFER & H. VOGEL, I HANDBUCH DER VERFASSUNGSRECHTS 107-128 (1984).

particular. Article 2 secures to every person "the right to the free development of his [or her] personality" and the right to personal inviolability. Article 3 contains a general equality clause together with provisions forbidding discrimination based on gender, race, national origin, language, religion, and political affiliation. The remaining articles guarantee all the rights and liberties commonly associated with liberal constitutionalism. These include the freedoms of religion, speech, assembly, association, and movement as well as the rights to property, privacy, and petition. Conscientious objection to military service and the right to choose a trade or occupation round out this list of fundamental rights.<sup>56</sup>

The Bill of Rights, however, includes more than these personal liberties. It also protects communal interests such as marriage and the family and the right of parents to decide whether their children shall receive religious instruction in public schools. In sharp contrast to the United States Constitution, the German Bill of Rights speaks of duties and responsibilities as well as rights. Article 6, for example, tells parents that it is their "natural right" and "duty" to care for their children while simultaneously instructing the "national community" to "watch over their endeavors in this respect." Article 14 declares that the right to property "imposes duties" and should "serve the public weal." Under Article 12a, finally, all men eighteen years or older are subject to military service or, if a male citizen refuses induction because of conscience, he may be required to serve society in an alternative civilian capacity for a period equal to the time he would have spent in the military. While Article 20 is not part of the Bill of Rights it nevertheless incorporates the concept of the social welfare state in terms of which basic rights are often interpreted.<sup>57</sup> German constitution-makers thus believed — and have always believed — that any realization of human dignity implies a fusion of individual rights and social responsibilities.<sup>58</sup>

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<sup>56</sup> The Basic Law embraces rights other than those found in its first 19 articles (Bill of Rights). These include the ban on capital punishment (Article 102) and various procedural rights of criminal defendants (Articles 101, 103, and 104), the right to vote (Article 38 [2]), the right to resist any effort to abolish the constitutional order (Article 20 [4]), the right to form political parties (Article 21), the right of every German to equal treatment in seeking entry into the civil service or public office (Article 33), the right of any person to file a complaint with the Federal Constitutional Court in the event that his or her rights have been violated by the state (Article 93 (1) [4a]), and various provisions of the Weimar Constitution related to religious freedom (Article 140).

<sup>57</sup> See H. Zacher, *Das Soziale Staatsziel* in ISENSEE & KIRCHHOF, *supra* note 30, at 1045-1111.

<sup>58</sup> See K. STERN, *DAS STAATSRECHT DES BUNDESREPUBLIK DEUTSCHLAND* 877-937 (2d ed.

A close look at the Basic Law discloses an interesting hierarchy of rights. Some are cast in unqualified language,<sup>69</sup> others in conditional language. In actuality, however, no right under the Constitution is absolute. A right framed in unconditional language may conflict with another express constitutional right in which case the task of the Court is to apply a balancing test consistent with the interpretive principle of concordance. The broad principle of human dignity, for example, which under the explicit terms of Article 1 (1) binds all state authority, may also serve to limit the exercise of a so-called unconditional right.

In addition, all rights, including those cast in more absolute terms, are limited by the architectonic *political* principle that informs the Basic Law as a whole, namely, the "free democratic basic order." As already noted, this normative view of constitutionalism — contrary to the theory of the Weimar Constitution — implies a sturdy defense of certain principles of political obligation. And so, as Article 5 (3) declares, "[a]rt and science, research and teaching, shall be free," but "[f]reedom of teaching shall not absolve [one] from loyalty to the Constitution." The right to association, couched in otherwise unconditional terms, is similarly restricted to activities consistent with the constitutional order.

All other rights are conditional, and they fall into three categories. First are those rights which can only be limited by the terms of the Basic Law itself. These rights, like those framed in unconditional terms, are the object of the Constitutional Court's special vigilance. The state has the burden of showing that any limitation upon such rights falls within the explicit exceptions mentioned in the Constitution, examples of which may be drawn from the rights of speech and personality. Article 5 (2) declares that speech rights "are limited . . . by the . . . provisions of law for the protection of youth and by the right to the inviolability of [one's] personal honor," just as Article 2 secures the general right to the development of one's personality so long as "he [or she] does not violate the rights of others or offend the constitutional order or the moral code." These reservation clauses also have the distinctive merit of providing the Federal

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1984).

<sup>69</sup> Examples of such rights are freedom of religion (Article 4 [1]), freedom of art, science, and research (Article 5 [3]), freedom of association (Article 9 [1]), and freedom to choose one's trade or occupation (Article 12 [1]). Textually, these rights resemble the simple, absolute commands of the American first amendment.

### Constitutional Court with interpretive guidelines.

The second category of conditional rights are those whose contours are to be defined by law. For example, the right to life and to the inviolability of one's person, under the terms of Article 2 (1), "may only be encroached upon pursuant to a law." Numerous other rights (*e.g.*, the rights to privacy of posts and telecommunications, open-air assemblies, practice of a trade, conscientious objection to military service, inviolability of the home, and property) can only be limited by means of a special legislative enactment. Here too the Basic Law seeks to circumscribe legislative power, for under Article 19 (1), any basic right "restricted pursuant to a law . . . must apply generally . . . and name the basic right, indicating the Article concerned." Finally, certain rights may be restricted by the "general laws." The reference here is to the general provisions of the civil and criminal code. No specific legislation is required here to restrict the applicable right, but in the case of speech rights, for example, they "are limited by provisions of the general laws" (*e.g.*, libel and slander), just as the right to association — to take another example — is limited by general criminal law.

### B. *An Objective Order of Values*

In its search for constitutional first principles, the Constitutional Court has seen fit, as noted earlier, to interpret the Basic Law in terms of its overall structural unity. Perhaps "ideological" unity would be the more accurate term here, for the Constitutional Court envisions the Basic Law as a unified structure of *substantive* values.<sup>60</sup> The centerpiece of this interpretive strategy is the concept of an "objective order of values," a concept that derives from the gloss the Federal Constitutional Court has put on the text of the Basic Law. According to this concept, the Constitution incorporates the "basic value decisions" of the founding fathers, the most basic of which is their choice of a free democratic basic order — *i.e.*, a

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<sup>60</sup> The proximate source of this notion of the Constitution as substantive or material rather than a formal or procedural entity is the Bavarian Constitutional Court's decision of June 10, 1949, interpreting the postwar constitution of Bavaria as a substantive unity. The Federal Constitutional Court cited the case at length in its famous *Southwest Case*, one of the Court's earliest judgments and a seminal opinion fully comparable to the importance of *Marbury v. Madison* in American constitutional law. See 1 BVerfGE 14, 32-35 (1951). *Southwest* has been partially translated and reprinted in W.F. MURPHY & J. TANENHAUS, *supra* note 35, at 208-11.

liberal, representative, federal, parliamentary democracy — buttressed and reinforced by basic rights and liberties. These basic values are objective because they are said to have an independent reality under the Constitution, imposing upon all organs of government an affirmative duty to see that they are realized in practice.<sup>61</sup>

The notion of an objective value order may be stated in another way. Every basic right in the Constitution — *e.g.*, freedom of speech, press, religion, association, and the right to property or the right to choose one's profession or occupation — has a corresponding value. A basic "right" is a negative right against the state, but this right also represents a "value," and as a value it imposes an obligation on the state to insure that it becomes an integral part of the general legal order.<sup>62</sup> One example may suffice: The *right* to freedom of the press protects a newspaper against any action of the state that would encroach upon its independence, but as an objective *value* applicable to society as a whole the state is duty-bound to create the conditions that make freedom of the press both possible and effective. In practice, this means that the state may have to regulate the press to promote the value of democracy; for example, by enacting legislation to prevent the press from becoming the captive of any dominant group or interest.

Value theory is controversial among constitutional scholars because the enforcement of a basic value may curtail the exercise of a basic right.<sup>63</sup>

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<sup>61</sup> See D. KOMMERS, *supra* note 32, at 53-55.

<sup>62</sup> Peter Quint puts it this way: "These [objective] values are not only specified rights of individuals but are also part of the general legal order, benefitting not only individuals who may be in a certain relationship with the state but possessing relevance for all legal relationships." See Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 261 (1989).

<sup>63</sup> Value theory as defined here competes with a number of other theories about rights; these theories serve as guides to constitutional interpretation. German constitutional theorists have described these theories as classical, democratic, welfare-state, and institutional. The classical and democratic perspectives have their equivalents in American constitutional theory. The first proceeds from the individualist assumption that the human person is autonomous and therefore in need of no help from the state in the realization of liberty; the second is associated with an interpretive approach that values rights for their capacity to facilitate political participation and representative government. The welfare-state perspective, like value theory, requires the state *inter alia* to provide subsidies to persons and groups who would not otherwise be able to exercise their rights effectively (*e.g.*, support for qualified students in need of a specialized education in order to exercise their constitutional right to choose their trade, profession, or occupation. (Institutional theory is mentioned briefly below in the discussion on positive and negative rights.) Which of these competing theories is used by the Constitutional Court to interpret the Basic Law often depends on the particular right being interpreted and its



Professor Ernst- Wolfgang Böchenförde, who is also a Justice of the Federal Constitutional Court, has written:

The particular liberty enshrined in the basic right is qualified in a special way by relating all basic rights to values. As a result of this value dimension it is aimed at realising and fulfilling the value expressed in and through such rights. This makes possible and justifies the drawing of a legally relevant distinction between uses of liberty that realise and uses that jeopardise that value. The particular liberty is thus qualified and made subject to the logic of fluctuating values.<sup>64</sup>

In the event, therefore, of a conflict between a subjective right and an objective value, the latter is often likely to trump the former.

The Justices of the Federal Constitutional Court have not only postulated an objective order of values; they have also arranged these values in a hierarchical order crowned by the principle of human dignity. It was precisely this principle of human dignity that prompted the Court in 1975 to strike down a liberalized abortion statute.<sup>65</sup> Not all of the justices — or constitutional scholars — are comfortable with the value theory of constitutional interpretation. For example, Justice Böchenförde has argued that with respect to freedom of conscience, value order theory “protects the very person who has no need of its protection, since he conforms to the prevailing view [of the value order].”<sup>66</sup> Wolfgang Zeidler, a former President of the Federal Constitutional Court, strongly criticized the Court’s tendency “to superimpose ‘a higher order of values’ on the positive constitutional order.”<sup>67</sup> In his opinion, the notion of a basic value order — a “tyranny of values” according to some commentators<sup>68</sup> — is often used as a tool to incorporate religious and philosophical views into the meaning of

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placement within the general structure of the Constitution. For a discussion of these various theories, see R. ALEXY, *THEORIE DER GRUNDRECHTE* 28-32 (1985) and E.-W. BÖCHENFÖRDE, *STATE, SOCIETY, AND LIBERTY* 175-198 (1991).

<sup>64</sup> E.-W. BÖCHENFÖRDE, *supra* note 63, at 190.

<sup>65</sup> Abortion Case, 39 BVerfGE 1 (1975).

<sup>66</sup> E.-W. BÖCHENFÖRDE, *supra* note 63, at 191. He added: “There is no sign as yet of either a rational justification for values, let alone of an order of values, or a recognisable and debatable system of preference for weighing and ranking values.” *Id.*

<sup>67</sup> Zeidler, *Grundrechte und Grundentscheidungen der Verfassung im Widerstreit*, (Festvortrag anlässlich des 53. Deutschen Juristentages in Berlin am Dienstag, 16. September 1980), at 3.

<sup>68</sup> The standard reference here is to C. Schmitt, *Die Tyrannei der Werte*, in *SÄKULARISATION UND UTOPIE: EBRACHER STUDIEN* 37-57 (1967).

the Constitution.<sup>69</sup> In any event, by advancing the notion of an objective value order, the Court seemed clearly to reject the legal positivism (*Rechtspositivismus*) and moral relativism presumed to have been at the basis of the Weimar constitutional order. That the Basic Law is a value-oriented — not a value-neutral — constitution is a familiar refrain in the Constitutional Court's case law. Early on in its jurisprudence the Court spoke of certain "unwritten" or "supra-positive" norms that presumably govern the entire constitutional order.<sup>70</sup> Justices intellectually rooted in the Christian natural law tradition adhered to this view. Today the Court is more inclined to speak of the value system inherent in the Basic Law itself. The objective values of the Basic Law define a way of life to which the German people, as a nation, are committed. The task of the Court in adjudicating constitutional controversies is one of integrating these values into the common culture and common conscientiousness of the German people. The task is no less than creating and maintaining a nation of shared values.

### C. *Negative and Positive Rights*

German constitutional theory posits the dual character of basic rights. These rights are both negative and positive.<sup>71</sup> A negative right is a subjective right to liberty. It protects the individual against the state, vindicating his right to freedom and personal autonomy. A positive right, on the other hand, represents a claim that the individual has on the state. In the German understanding positive rights embrace not only a right to certain social needs but also a right to the *effective* realization of personal freedoms and autonomy. Yet personal freedom and autonomy are limited by the requirements of human dignity — which the state is duty-bound to respect — and the common good, a principle found to exist in the Basic

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<sup>69</sup> On other occasions, however, President Zeidler wrote as if he too were subscribing to value theory. "Far from being some vague spirit hovering over the land," he noted, "[basic] values can be discerned by a careful reading of the Basic Law." Zeidler, *supra* note 67, at 4. The values he specifically mentioned, perhaps betraying his Social Democratic background, were those of equality, social justice, the welfare state, the rule of law, and militant democracy. These values, he said, constitute the "objective contents" of the Basic Law and are equal in rank to any and all guaranteed basic rights. Like German constitutional commentators generally, he distinguished basic rights from basic values, and appeared as willing as other justices to use values for the purpose of overriding rights.

<sup>70</sup> See D. KOMMERS, *supra* note 32, at 53-55 & n.88.

<sup>71</sup> See Currie, *Positive und negative Grundrechte*, 111 ARCHIV DES ÖFFENTLICHEN RECHTS 230-52 (1986).

Law's "social state" clause (*Sozialstaatsprinzip*).

Although closely related, a positive right is not the same as an objective value. An objective value of the Basic Law addresses itself exclusively to the state. The state *must* create and maintain an environment conducive to the realization of basic values. In short, objective values speak to the organization of the state as a whole. A positive right, on the other hand, is an individual right or, perhaps more accurately, an entitlement that the individual may claim from the state. Reference to the positivity of rights implicates not society as a whole but the particular situation of an individual, an individual who may need the state's help to enjoy a basic right effectively such as, for example, equality. In this respect, the notion of a right under the Basic Law is broader than the concept of a right under the United States Constitution. A right in the German constitutionalist view is not only the right to be left alone, free of state interference, but the right to some form of state assistance in the enjoyment of the right. A positive right, however, cannot be made the object of a constitutional complaint. Here Parliament enjoys broad discretion, given the limited resources of the states, to determine the degree of assistance that individuals shall receive from the state.

Some rights that might be described as positive are better known in Germany as institutional guarantees. These guarantees, which may require state intervention in the interest of their preservation and development, include the right to marry and raise a family (Article 6 [1]), the right to property (Article 14 [1]), the right to research and teaching (Article 5 [3]), and the right to a free press (Article 5 [1]). In this constitutionalist view marriage, family, property, higher education, and a free press are privileged institutions meriting the state's special protection and promotion. Indeed, the failure to safeguard these institutions may trigger a cause of action before the Federal Constitutional Court whose authority would extend to ordering affirmative action to preserve these institutional guarantees. In sum, the dual character of basic rights seems to reflect an effort to combine the values of both liberty and community.

This discussion underscores the various purposes served by basic rights. German constitutional theorists speak of the "multi-functionality" (*Mehrfunktionalität*) of fundamental rights. At the risk of repetition let us once again refer to Article 6, which places marriage and the family under the "special protection of the state." This declaration serves, first,

as a negative right. The state may not interfere with the fundamental right of a person to marry, a right that the Constitutional Court resoundingly vindicated in the well-known *Spanish Marriage Case* after German officials barred the marriage of a Spanish national to a German divorcee because Spain refused to recognize the divorce. The Court declared that the freedom to marry within the terms of Article 6 is one of the most basic of human rights and extends to foreigners and stateless persons as well as to Germans.<sup>72</sup>

Marriage, however, constituting a "basic decision" of the founding fathers, is also an objective value of the Basic Law. This value may translate into a positive right under circumstances where it may be difficult to sustain a marriage or where special burdens are placed on the decision to marry. In the *Joint Income Tax Case*, for example, the Court nullified a tax law that put married couples at a disadvantage compared to unmarried wage-earners.<sup>73</sup> Here the Court considered the implications of the equality clause of Article 3 along with the state's obligation to protect marriage and the family. The negative right to marry may of course conflict with the positive right to state assistance in maintaining the marital relationship. For example, does a relaxed or liberalized divorce law conflict with the state's obligation to protect marriage and the family? Other examples of potential conflicts between negative rights and objective values could be listed. Suffice to note that when such conflicts arise the Court's tendency is to resolve the conflict in the light of the principle of proportionality and the hierarchical value structure of the Basic Law, at the top of which resides, as so often noted in this article, the principle of human dignity.

## VI. FUNDAMENTAL RIGHTS: SOME GERMAN-AMERICAN COMPARISONS

The foregoing section dealt with the general structure of rights and values. This section considers three areas of German constitutional jurisprudence with which American constitutionalism contrasts most dramatically. A focus on the distinguishing features of the two constitutions and their interpretation, however, should not be allowed to obscure major similari-

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<sup>72</sup> 31 BVerfGE 58 (1971).

<sup>73</sup> 6 BVerfGE 55 (1957).

ties in German and American civil liberties jurisprudence. After all, both constitutions are charters of liberty. They share a common faith in the integrity and autonomy of the human person. Rights for the most part trump power in both documents. One could also point to many converging trends in German and American constitutional law, underscoring a vast area of common agreement with respect to spheres of freedom deemed worthy of judicial protection against governmental intrusion.<sup>74</sup> We proceed with this caveat in mind.

### A. *Equality and The Welfare State*

The Federal Constitutional Court's equal protection jurisprudence is substantial.<sup>75</sup> It is also complex because of the Basic Law's numerous provisions relating to equality.<sup>76</sup> These provisions are themselves arranged in a hierarchy, and they bear some resemblance to the high scrutiny jurisprudence of the United States Supreme Court. Article 3 contains a general equality clause and two additional clauses banning certain kinds of discrimination.<sup>77</sup> It reads:

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<sup>74</sup> Useful comparisons of German-American fundamental rights jurisprudence are Cappelletti, *Judicial Review in Comparative Perspective*, 58 CALIF. L. REV. 1017 (1970); Dietze, *America and Europe — Decline and Emergence of Judicial Review*, 44 VA. L. REV. 44 (1958); Note, *Comparative Study of U.S. and West German Political Finance Regulations: The Question of Contribution Controls*, 4 HASTINGS INT'L & COMP. L. REV. 543 (1981); Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657 (1980); Benda, *Impact of Constitutional Law on the Protection of Unborn Human Life: Some Comparative Remarks*, 6 HUM. RTS. 223 (1977); Casper, *William v. Rhodes and Public Financing of Political Parties under the American and German Constitutions*, 1969 SUP. CT. REV. 271 (1969); Kauper & Halberstadt, *Religion and Education in West Germany: A Survey and an American Perspective*, 4 VAL. U.L. REV. 1 (1969); Kommers, *Abortion and the Constitution: U.S. and West Germany*, 25 AM. J. COMP. L. 255 (1977); and Morris, *Abortion and Liberalism: A Comparison Between the Abortion Decisions of the Supreme Court of the United States and the Constitutional Court of West Germany*, 11 HASTINGS INT'L & COMP. L. REV. 159 (1988). German and American comparisons are also included in M. CAPPELLETTI & W. COHEN, *COMPARATIVE CONSTITUTIONAL LAW* (1979); W.F. MURPHY & J. TANENHAUS, *supra* note 35; *CONSTITUTIONAL PROTECTION OF EQUALITY* (T. Koopmans ed. 1975); and E. BERENDT, *FREEDOM OF SPEECH* (1985).

<sup>75</sup> See, e.g., I. von Münch, 1 GRUNDGESETZKOMMENTAR, 163-224 (3d ed. 1985). See also C. LINK, *DER GLEICHHEITSSATZ IM MODERNEN VERFASSUNGSSTAAT* (1982).

<sup>76</sup> See generally *DER GLEICHHEITSSATZ IM MODERNEN VERFASSUNGSSTAAT* (C. Link ed. 1982).

<sup>77</sup> Article 33 contains other guarantees of equality. It confers equal political status on German citizens and guarantees equal eligibility to public office and the civil service and, in addition, makes such eligibility independent of religious affiliation.

- (1) All persons shall be equal before the law.
- (2) Men and women shall have equal rights.
- (3) No one may be prejudiced or favored because of his [or her] sex, parentage, race, language, homeland and origin, faith, or religious or political opinions.

Paragraph 1 implicates what Americans would describe as “non-suspect” classifications; paragraphs 2 and 3, on the other hand, involve “suspect” classifications. With respect to these classifications, the standards of constitutional review are virtually identical in the United States and Germany, although judicial outcomes may differ. Article 3 (1), however, as informed by the social state principle (*Sozialstaatlichkeit*) has no equivalent in American constitutional law. The following discussion is limited to the *Numerus Clausus Case* because it illustrates the relationship between the general equality clause of Article 3 (“All persons shall be equal before the law”) and the social state principle (*Sozialstaatlichkeit*) that the Constitutional Court has extracted from Article 20 (1) (“The Federal Republic of Germany is a democratic and *social* federal state.”) (emphasis supplied).

What is interesting about the Constitutional Court’s resort to the principle of equality is that it is rarely interpreted on its own terms. Standing alone, the notion of equality has a protean quality that allows it to be filled with almost any kind of content. But as *Numerus Clausus* shows, the principle of equality helps to inform the meaning of related constitutional provisions and is in turn vested with substantive content by the general principle of the social welfare state. *Numerus Clausus* challenged numerical limits imposed by two universities upon admission into their law and medical schools in order to relieve the pressure of overcrowding. The Constitutional Court struck down these limitations because they violated Article 12 when read in tandem with the general equality clause and the social state principle. Article 12 guarantees to “all Germans . . . the right to choose their trade, occupation, or profession” while the social state principle, as interpreted, obligates the legislature to shape society and the economy in such a way as to maximize individual choice and minimize risks that threaten human dignity. No such constraints limit the state in the American constitutional order.

While German constitutional theorists argue fiercely over the exact meaning of the “social” state, they seem generally to agree that it incorporates a directive principle of social policy that requires the state to do

what is necessary to contribute to human growth and development.<sup>78</sup> Thus, in *Numerus Clausus* the Court held that the principle of equality, when construed in the light of the *Sozialstaatsprinzip* against the backdrop of the constitutional right to choose one's occupation, requires the state to admit all qualified persons into their chosen fields of study.<sup>79</sup> The ruling required state governments to expand their facilities to permit the admission of such students or, alternatively, to prescribe *in law* new admission policies that would inform prospective students, exactly and precisely, what standards would be applied in admitting them to the university. The Court regarded this matter as too important to be left to the discretion of university authorities. After all, what is at stake here is the growth and development of the human personality. As an objective value of the constitutional order this principle of human dignity must be carved into the order of legality. This is part of what the Germans mean by the *Rechtsstaat* except that under the new dispensation of the Basic Law the traditional *Rechtsstaat* (*i.e.*, the state as formally conceived) has been indissolubly wedded to the modern *Sozialstaat* (*i.e.*, the state as materially conceived). There is no such marital bond in American constitutional law.

The constitutionalism of duty that one finds in the Basic Law,<sup>80</sup> and which is conspicuous for its absence in the United States Constitution, reflects a deep theory of the human personality. In a nutshell, and at the risk of overdrawing the comparison, the United States Constitution incorporates a vision of personhood that is individualistic and self-regarding, whereas the Basic Law incorporates a vision of personhood that is both personalist and communal. In other words, the United States Constitution extols the ethic of individualism and, at the same time, exhibits a

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<sup>78</sup> For a summary of the debate surrounding the meaning of the *Sozialstaat*, see K. STERN, *supra* note 58, at 877-988.

<sup>79</sup> 33 BVerfGE 303 (1972). As a result of its increasing involvement in this field over the years the Constitutional Court "transformed itself into a veritable ministry of education. With each successive decision the Court seemed to narrow the discretion of university officials, forcing legislators to devise increasingly precise and nondiscriminatory standards governing university admissions." See D. KOMMERS, *supra* note 32, at 303-04. For a discussion and partial translation of the *Numerus Clausus Case*, see P. KATZENSTEIN, *POLICY AND POLITICS IN WEST GERMANY* 296-325 (1987).

<sup>80</sup> We noted earlier that the Basic Law protects certain social interests such as marriage, family, and parental rights, not to mention the special care it manifests for the interests of illegitimate children. In a similar vein, Article 6 (4) declares that "[e]very mother shall be entitled to the protection and care of the community." The duty connected with the ownership of property and the right of the state to socialize land and heavy industry reinforce this ethic of the common good in German constitutional thinking.

profound distrust of governmental power. The Basic Law, by contrast, while it surely vindicates the individual's personal search for happiness, sees the individual in terms of his social attachments and commitments. One vision is partial to the city perceived as a private realm in which the individual is alone, isolated, and in competition with his fellows, while the other vision is partial to the city perceived as a public realm where individual and community are bound together in some degree of reciprocity. Thus the authority of the community, as represented by the state, finds a more congenial abode in German than in American constitutionalism.

As Leonard Krieger has emphasized in his definitive historical account of the German idea of freedom, most German intellectuals, liberals included, have always rather firmly believed in the ethical mission of the state.<sup>81</sup> One part of this mission is to provide for human welfare. In short, individuals have a positive right to help when they are in dire need. What constitutes a need in the sense of "dire" is of course a controversial question; indeed, German constitutional scholars have yet to work out a theory of need. Suffice to say that the principle of positive liberty is rather firmly rooted in the German notion of the *Sozialstaat*, and it is also fair to say that such things as homelessness, illiteracy, abject poverty, or some other grossly demeaning social inequity would be constitutionally suspect in the Federal Republic.

This constitutional view of the relationship between state and society — a relationship of mutual support and trust — is far removed from the theory underlying American constitutionalism, a point dramatically illustrated in *Deshaney v. Winnebago County*,<sup>82</sup> a case handed down by the Supreme Court in 1989. The case involved a father who over a two year period mercilessly beat his son of under five years of age into a condition of profound retardation even though state officials knew that the child was in danger and had arranged counseling sessions for the father. Later the child's mother, who was divorced from the father, sued the state for not coming to the child's rescue and thus depriving him of the liberty protected by the fourteenth amendment. In any event, the facts of the case are less important than the Supreme Court's view of the person-state relationship. Chief Justice Rehnquist, speaking for the majority, rejected the

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<sup>81</sup> L. KRIEGER, *THE GERMAN IDEA OF FREEDOM* (1957).

<sup>82</sup> 489 U.S. 189 (1989).



mother's argument, saying in part:

[There is] nothing in the language of the Due Process Clause [that] requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. . . . [Its] language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.<sup>83</sup>

Whatever we may think of this doctrine, Chief Justice Rehnquist is surely right in suggesting, as he does late in the opinion that American history does not support a theory of positive liberty, for the purpose of our Constitution was "to protect the people from the State, not to ensure that the State protected them from each other."<sup>84</sup>

### B. *Church-State Relations*

Church-state relations feature another major difference between the German and American Constitutions. For one thing, the boundary between church and state is drawn at different angles in the two documents. The first amendment simply bars Congress from making any law "respecting an establishment of religion or prohibiting the free exercise thereof." The rest is left to interpretation. By contrast, the Basic Law contains numerous provisions on church-state relations, leaving less to interpretation. Several of these provisions uphold religious liberty and vindicate the principle of nonestablishment. Other provisions, however, define churches as "religious bodies under public law" and clothe them with corporate privileges and rights, including the express power to levy taxes for the support of religious activities (Article 140). The Basic Law also provides for religious instruction in state schools (Article 9 [2]), although many German commentators see this practice as a manifestation of the free exercise of religion.<sup>85</sup>

The words of the American religion clauses, standing alone, could easily be interpreted to allow such accommodations between church and

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<sup>83</sup> *Id.* at 195.

<sup>84</sup> *Id.* at 196.

<sup>85</sup> For an overview of church-state relations in Germany see Kommers, *West German Constitutionalism and Church-State Relations*, 19 GERMAN POL. & SOC'Y 1 (1990).

state. The Supreme Court, however, has forced these provisions into a strong separationist mould, reflecting in part, as Mark Tushnet suggests, the inability of the American liberal tradition, so powerfully represented in the judiciary, to develop "a concept of politics into which religion would comfortably fit."<sup>86</sup> The result has been the confinement of religion to the private sphere of human life. Both German and American constitutionalism require the state to be neutral with respect to religion, but neutrality means different things in the two systems. To Americans, neutrality means toleration and no public support; to Germans it means encouragement and at least some support. The American perspective reflects an essentially negative view of religion's role in the nation's public life, whereas the German perspective reflects a measurable degree of cooperation between cross and sword so long as each respects the autonomy of the other and the state favors no one religion over another.

The tilt toward cooperation or accommodation in Germany reflects the Basic Law's belief that religion is a constitutive component of society and an essential element in any genuine definition of personhood. Accordingly, the Basic Law treats religion — the term is used broadly to include ideological convictions of a secular kind — with far less timidity than the jurisprudence of the Supreme Court. If religion resides at the core of the human personality and furnishes the basis of connection to transcendent values — that is, if it is an identity-defining attribute of personhood — then under the objective value order of the Basic Law the proper constitutionalist agenda is the creation of an environment that encourages persons to manifest their religious personalities. In short, the state should make it easy and not hard for them to practice their religion; they should not have to make sacrifices to exercise the fundamental right of religious freedom.<sup>87</sup>

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<sup>86</sup> Tushnet, *The Constitution of Religion*, 50 REV. OF POL. 628 (1988).

<sup>87</sup> The *German School Prayer Case* illustrates this point of view. See 52 BVerfGE 233 (1979). Unlike *Engel v. Vitale*, 370 U.S. 421 (1962), and its progeny, the German case sustained the validity of prayer in state schools. The Constitutional Court based its decision in part on the Basic Law's free exercise clause and on its empirical finding that the policy of allowing students who do not wish to pray to excuse themselves during the recitation of prayer does not constitute religious coercion. In speaking of the place of religion in the American constitutional scheme, Robert Rodes has written: "Religion is of course the special domain of the lowest common denominator of approval at its most banal. We have still found no way to institutionalize the respect that people of serious and divergent religious communities ought to (and often do) feel for one another." See R. RODES, *LAW AND LIBERATION* 73 (1986).

### C. *Abortion*

The state also derives an ethical mission from the Constitution's basic value decisions. In some circumstances these decisions, as part of the Basic Law's objective value order, may require the state to channel personal and social conduct into desired courses of activity, *i.e.*, activity consistent with the principle of human dignity. The constitutionalism of duty associated with the Basic Law's objective order of values is perhaps best illustrated in the *Abortion Case*. In 1975, two years after the decision in *Roe v. Wade*,<sup>88</sup> the Federal Constitutional Court struck down a liberalized abortion statute because it violated the "right to life" as these terms are understood within the meaning of Article 2 (2).<sup>89</sup> Ruling that the right to life includes the unborn fetus, the Court said that fetal life is a value the state must protect throughout all stages of pregnancy, beginning with the fourteenth day after conception (*i.e.*, at the point of implantation), even against the wishes of the pregnant woman. Because the right to life is *the* preeminent value decision of the Basic Law, declared the Court, Parliament must not only proclaim *in law* that abortion is "an act of killing" but also it must punish any intentional destruction of the fetus in the absence of alternative non-criminal measures that would effectively protect fetal life.<sup>90</sup>

The American view, by contrast, holds that the state must refrain from influencing personal choices with respect to privacy. The individual's freedom of choice overrides all values rooted in community. One could of course rather easily explain the German and American perspectives by

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<sup>88</sup> 410 U.S. 113 (1973).

<sup>89</sup> Under the new version of the law a woman could procure an abortion during the first three months of pregnancy without penalty if she first submitted to a specified counseling procedure. The law permitted abortions after the third month only in the presence of medical, eugenic, or moral indications.

<sup>90</sup> The two justices in dissent felt that the legislature's policy of decriminalizing abortion during the first three months of pregnancy, together with provisions for counseling prior to any decision to abort, was sufficient to protect the value of fetal life. All of the justices agreed that the right-to-life clause of Article 2 required the state to respect and safeguard the value of fetal life at all stages of pregnancy. They disagreed over whether the new abortion statute was enough to accomplish this result. In the minority's view Parliament had made an allowable legislative judgment on how best to protect unborn life and the interests of the pregnant woman. They argued that the implementation of an objective constitutional value is the primary responsibility of Parliament and not the judiciary. For a full translation of the majority and minority opinions, see 9 J. MARSHALL J. PRAC. & PROC. 605-84 (1976).

pointing to the language and history of their respective constitutions. After all, the United States Constitution does not contain a right-to-life clause analogous to the German Constitution and the historical experience that gave birth to the Basic Law was radically different from the genesis of the Constitution. Still, as the *Abortion Case* shows, the Basic Law as interpreted assigns to law an important rhetorical function. Law receives its legitimacy from the constitutional value of human dignity and law must give expression to this norm. Law is seen as enhancing the moral self as the moral self is envisioned in the Basic Law's value system. Indeed, the high moral purpose of law is to remind citizens of their duty to self and community.

The reference to self and community reminds us again that the Basic Law creates a symbiotic relationship between negative rights and objective values. Rights and values, like rights and duties, may be in tension with one another but in the German constitutionalist view — the view that regards the Basic Law as a structural unity — they are not mutually antagonistic. Indeed, under the principle of “practical concordance” (*praktische Konkordanz*) constitutionally protected legal values (or rights) must, as noted, be harmonized with each other. Courts must not protect one at the total expense of the other. If two values conflict, the Court must do what is necessary to optimize each one,<sup>91</sup> a perspective that usually requires a balancing approach to constitutional interpretation.<sup>92</sup> Even rights stated in absolute terms (*i.e.*, unqualified by a reservation clause) may not claim total victory over competing rights (or values) expressly set forth in the Constitution. In effect, the Basic Law limits all rights. Under the prevailing approach to constitutional interpretation, however, the Constitutional Court will invalidate laws that limit rights if those laws ignore the Basic Law's hierarchical value order or offend the principles of proportionality or legality.<sup>93</sup>

The *Abortion Case* also serves to illustrate the foregoing approach to interpretation. Two rights — or values — cried out for recognition here: the right to life (Article 2 [2]) and the countervailing right of pregnant women to the development of their personalities (Article 2 [1]). Both

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<sup>91</sup> See K. HESSE, *supra* note 23, at 27.

<sup>92</sup> Yet, in balancing rights, the Court cannot get away from the fact that it is giving one right or value more weight than the other, a decisional process that permits a good deal of judicial discretion.

<sup>93</sup> See D. KOMMERS, *supra* note 32, at 53.

rights, in turn, were measured in the light of the principle of human dignity. The Court acknowledged that the right to personality is also an objective value that the state must respect, although it ranks lower on the scale of constitutional values than the right to life.<sup>94</sup> While the right to life is cast in unqualified terms the right to personality may not "violate the rights of others or offend against the constitutional order or the moral code." In the end the Court sought to balance the value of unborn life against the woman's interest in her own well-being and ruled that in situations of extreme social hardship, the state has no right to impose upon the woman a burden that she cannot be expected to bear, and thus an abortion can legally be performed when, after counseling, the proper authorities decide that her pregnancy is indeed too heavy a burden for her to bear in the light of a set of given circumstances.

## VII. CONCLUSION

The American public mind is unlikely to share the Constitutional Court's enthusiasm for the notion of an objective value order, in part because of its pervasive skepticism in matters both moral and constitutional. The ethic of individualism at the basis of the American Constitution celebrates negative not positive liberty. Ours is, moreover, a constitutionalism of rights not duties. As suggested, the two constitutions project different visions of personhood and social reality. The vision of the person in *Roe v. Wade* and its progeny is that of a woman alone, isolated and autonomous, unattached to any natural community, not even to the family, or to any ensemble of values that transcends her immediate interests. The person of American constitutional jurisprudence is a calculating person absorbed in self-vindication. The vision of the person in the German *Abortion Case* is that of a woman engulfed in a web of human relationships, one that sees the essence of personhood in communication, not separation, and views the individual as sheltered by a moral community or social structure larger than herself.

Some years ago, in another article, I tried to describe the core of German constitutionalism in the following words:

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<sup>94</sup> Yet, even here, the Court was unwilling to rank fetal life with personhood. It is interesting to note that the Court never refers to the fetus as a person and never suggests that the fetus possesses the rights of living persons. What the Court said is that fetal life is "life" within the meaning of the Basic Law and that this life is a *value* that the state must respect.

The Basic Law . . . reflects a conscious ordering of individual freedoms and public interests. It resounds with the language of human freedom, but a freedom restrained by certain political values, community norms, and ethical principles. Its image of man is of a person rooted in and defined by a certain kind of human community. Yet in the German constitutionalist view the person is also a transcendent being far more important than any collectivity. Thus, there is a sense in which the Basic Law is both contractarian and communitarian in its foundation: contractarian in that the Constitution carves out an area of human freedom that neither government, private groups, nor individuals may touch; communitarian in the sense that every German citizen is under obligation to abide, at least in his overt behavior, by the values and principles of the moral and political order.<sup>95</sup>

The Basic Law sees no necessary antagonism between individual rights and communitarian values. The German view, at bottom a Kantian moral perspective, finds the real meaning of liberty *in* community not apart from community. It does not identify autonomy with *mere* freedom of choice. To associate liberty with mere choice or atomistic individualism is to misunderstand the very nature of personhood. Listen to the Federal Constitutional Court: "The concept of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on the commitment to the community, without infringing upon a person's individual value."<sup>96</sup>

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<sup>95</sup> Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, *supra* note 74, at 677.

<sup>96</sup> 4 BVerfGE 7, 15-16 (1954).

