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A Lighter Touch: American Constitutional Principles in Comparative Perspective

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The United States is perhaps the most frequently cited example of a nation constituted by its constitution. "The U.S. Constitution functions as something more than a binding legal instrument. As often observed, it has taken on over time something of the character of a civic religion – in the sense that commitment to the Constitution is a central, indeed constitutive, element of national identity."[1] For many of those embracing this commonly held view the Constitution's centrality in the development of American national identity is predicated on its incorporation of foundational political principles whose scope transcends the boundaries of time and place. "[M]ore than most people," wrote Martin Diamond, "we tend to consider the relationship between ethics and politics in universal terms."[2] This relationship received its most eloquent articulation in the person of Abraham Lincoln, who famously maintained that "I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence."[3] These words were spoken just prior to Lincoln's ascendance to the presidency and at the place where the Constitution had been composed. What followed, of course, was the tragic and climactic testament to the fact that many people did not share in those sentiments. Or to the extent that they did, they were understood so divergently that the directive force of these principles on subsequent constitutional development was only lightly felt.[4]

[1] Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (New York: Oxford University Press, 2010), 104. Or as Bruce Ackerman has written, "[O]ur constitutional narrative constitutes us as a people." Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991), 36.

[2] Martin Diamond, "Ethics and Politics: The American Way," in Robert H. Horwitz, ed., *The Moral Foundations of the American Republic* (Charlottesville: University of Virginia Press, 1977), 39.

[3] Roy Basler, ed., *The Collected Works of Abraham Lincoln*, Vol. 4 (New Brunswick, NJ: Rutgers University Press, 1953), 240.

[4] Applicable here is Rogers Smith's "multiple traditions" thesis, which holds that "American political actors have always promoted civic ideologies that blend liberal, democratic republican,

In this essay I conclude that a comparative national assessment of constitutional principles reveals a less decisive constitutive significance in the American case than is widely assumed. Consistent with this assumption one might think, for example, that the following declaration comes from the pages of the *U.S. Reports*, but the source is a landmark German Constitutional Court decision, often referred to as that nation's *Marbury* v. *Madison*. "There are constitutional principles that are so fundamental and to such an extent an expression of a law that precedes even the constitution that they also bind the framers of the constitution."[5] The comparison with *Marbury* is apt inasmuch as the Federal Constitutional Court (FCC) for the first time in its history exercised its power of judicial review to invalidate a law of the national legislature, but it went considerably beyond what its American counterpart had done by claiming the additional authority to invalidate a constitutional amendment on substantive grounds. In itself this greater willingness to assert judicial dominance over the higher lawmaking power may not be an indication of substantial national differences in the role played by principles in constitutional practice; thus to this day the FCC has not struck down a constitutional revision, even as it has continued to maintain that the "core of the Basic Law is exempt from amendment."[6] Elsewhere – India is the main additional example I will discuss – constitutional amendments *have* been invalidated; while very significant this too does not independently signal a contrast of comparative consequence. Still, what I will argue is that the jurisprudential underpinnings of the commitment to exercise judicial power in this way present us with an important starting point for a comparative depiction of constitutional principles as playing a less prominent role in American political life than its familiar depiction in the "Constitution as constitutive of the nation" story.

The argument proceeds as follows. I use the German and Indian cases in the first section briefly to contrast the increasingly widespread practice of judicial invocation of implicit and explicit substantive limits to formal constitutional change with its absence in the American constitutional experience. The German and Indian examples are themselves distinguishable from each other, in that the constitution of the former, like that of the United States, contains certain entrenched provisions that are designated unamendable, whereas in India the substantive constraints on the amendment process are only those that emerge from the activity of judicial interpretation. Yet it is the willingness of the courts in these two foreign polities to defend identity-defining principles against the higher lawmaking power of the state that sets them apart from the American

and inegalitarian ascriptive elements in various combinations designed to be politically popular." Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997), 6.

[5] *Southwest Case*, 1BVerfGE14 (1951), S4c. D, par. 2 (quoting from the statement of the Bavarian Supreme Court).

[6] *Maastricht Treaty Case*, 89 BVerfGE 155 (1993), Sec. B, par. 5.

aversion to do the same. Again, this contrast can readily be understood in a way that does not implicate the constitutive role of principles; for example, as an expression of the relative difficulty of amending the document in the United States as compared to these other places. Nothing in such an explanation, however, requires that we abandon a supplementary account in which both the relatively equivocal commitment to foundational principles – as well as the nature of those principles – possesses explanatory value in illuminating the American case.

As with so much in the unfolding drama of constitutionalism in the United States, the omnipresence of the slavery issue is hugely significant. In this connection I argue that the compromised circumstance of the American constitutional launching is critical for assessing the character and subsequent application of principles. Here it is noteworthy that one of the two unamendable provisions in the American document concerns the slave trade and the other involves Senate representation, which, if it did not originate as a concession to slave interests, in time came to serve them.[7] The contrast with the objects that are protected against amendment in Germany and India could not be more striking, much of the substance of which concerns constitutional commitments to human dignity and freedom. Whether textually provided as in Germany or judicially constructed as in India, they betray a more acquiescent jurisprudential orientation than is evident in the United States toward the invocation of defining principles of constitutional identity.

The essay's second section explores the comparative timidity of constitutional actors in deploying political principles to defend the idea of republican governance. The early landmark Supreme Court case of *Luther* v. *Borden*, which had no direct connection to the slavery issue, is illustrative of a phenomenon that represents a recurring theme in the essay. There are instances, such as in *Luther* and *Barron* v. *Baltimore* (to be discussed in the following section) where critical decisions are made that have the effect of setting limits on the potential scope and impact of constitutional principles while ostensibly advancing basic regime features such as liberalism and federalism. Although these decisions are about other things, a full account of them cannot avoid their significance for the tortured subject of race. Accordingly, a major theme in this essay is that comparative reflection on the expressive importance of American constitutional principles must consider the ways in which the founding contradictions concerning that subject, in tandem with broader commitments to liberalism and federalism, have functioned to resist the imposition of what in Germany has come to be known as "an objective order of values" and in India as a mandated set of constitutional essentials grouped under the rubric of "basic structure."

[7] As Vicki C. Jackson points out, "The fact that the constitutional rule for the Senate reflected a compromise meant that it did not stand for a broader constitutional principle." Jackson, *Constitutional Engagement in a Transnational Era*, 228.

The relative pervasiveness of constitutional principles is specifically taken up in the third section. The question of whether the rights and principles embedded in the Bill of Rights are applicable to the states was first resolved in 1833 by Chief Justice John Marshall and later restored for vigorous debate by the ambiguous terms of the Fourteenth Amendment. There are arguments on both sides of the debate that appeal to eminently reasonable principles that are commonly associated with constitutional democracy. Some say that if rights are important enough to bind the national government, then there is no good reason to accept their limited applicability to other levels of government. If in one nation constitutional rights are applied uniformly and in another they are incompletely enforced, then it is logical to conclude that the principles have more constitutive weight in the first polity than in the second. To this it might be said that the willingness to embrace more diversity within the different parts of the system actually reveals a strong commitment to principles of federalism that advance the end of democratic politics and innovation. In this account limiting the reach of certain principles does not in itself diminish the power of principles in providing definitional meaning to the nation. But what if the deference to locality is historically associated with deference to the unprincipled politics of racial discrimination?

While the incorporation controversy is a uniquely American debate, the other contestable uniformity/consistency issue emerging from the adoption of the post-War amendments is ubiquitous in comparative constitutional experience. Does the reach of constitutional principles extend beyond the public domain to order relationships and conduct in the strictly private sphere? Here again the issue of race in the United States looms large in assessing the constitutive significance of a reserved application of principles. Consider that the only explicit mention of slavery in the American Constitution appears in the amendment that makes its continued practice illegal. The Thirteenth Amendment, however, has another feature that sets it apart from other provisions, in particular the two that follow it: the wrong that is affirmed in its language must be terminated regardless of the source of the targeted injustice. Slavery "shall [not] exist within the United States" reads very differently than do the amendments that make the denial of equality, due process, and the franchise constitutional encroachments only when the state is responsible for violating a person's rights. A comparative perspective on the limited reach of the American Constitution – its "vertical" as opposed to "horizontal" application – enables us to appreciate this characteristic liberal feature of American constitutionalism as more than a choice of one theory of government over another but as a further manifestation of the less conspicuous way in which, relative to some other places, constitutional principles function in the United States. The German model is in this regard most strikingly different, as the "radiating" effect of certain "objective values" indirectly governs the arena of private-law disputes, with results similar to their direct application to the domain of state action.

Nothing in what follows is meant to suggest that we should begin anew the account of constitutional principles as critical to an understanding of American self-understanding. Rather, my aim is to gain some comparative perspective on the role such principles play in this process, thus providing a more tempered and realistic assessment. If indeed my consideration of unamendable amendments, republican guarantees, and limits on the reach of judicially enforceable entitlements suggests a lighter touch in the constitutive meaning of American constitutional principles, the most we can say is that the validity of such a finding is established only within the framework of a very limited comparison of specifically selected regimes. This may be sufficient to conclude that the United States is not the paradigmatic case of a nation constituted by its constitution; it is certainly insufficient to conclude that its constitution is unimportant in that regard or that it does not in this connection outrank most constitutions.

OBJECTIVE AND SUBJECTIVE COHERENCE

In 1776 two new state constitutions – New Jersey's and Delaware's – included provisions explicitly limiting the amendment power. These constitutions prohibited amendments involving important matters: for example, in New Jersey, the non-establishment of churches and the provision for trial by jury; in Delaware, the bans on slave importation and the establishment of a specific religious sect.[8] No new ground was broken, therefore, when eleven years later the document framed in Philadelphia also included two provisions that were textually designated immune from subsequent constitutional revision. Yet it is fair to say that what was prohibited in Article V from being amended – abolition of the slave trade until 1808 and equal suffrage in the Senate – were more the result of practical compromise than of a determination to entrench core principles of constitutional identity.[9]

That there are such core principles is commonly viewed as certain, although the early lack of agreement on what they were makes their absence as entrenched principles in the Constitution unsurprising. While the Supreme Court has not embraced the idea of implicit substantive limits, others with allegiance to principles that they comprehend as so vital to American national identity as to require their enforced immutability have argued for the Court's authority to declare

[8] Yaniv Roznai, "Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea," *The American Journal of Comparative Law* 61 (2013): 657, 662.

[9] Or as Melissa Schwartzberg has argued, "This was [done] not on the grounds of moral or rational certainty, but on the grounds that without these self-interested provisions, the entire constitutional project would fail." Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge: Cambridge University Press, 2007), 151. Schwartzberg, however, is skeptical that failure would have resulted from the noninclusion of the entrenched provisions. Her skepticism supports her general opposition to constitutional entrenchment of any kind. "In disabling amendment we may protect the reprehensible, instead of simply securing the precious." Ibid.

a constitutional amendment unconstitutional. John Rawls, for example, believed that adopting a principle-repudiating amendment – one, say, reversing the First Amendment – would be tantamount to "constitutional breakdown, or revolution in the proper sense, and not a valid amendment of the Constitution."[10] What is more, "The successful practice of its ideas and principles over two centuries places restrictions on what can now count as an amendment, whatever was true at the beginning."[11] In this he was following in the tradition of Lincoln, who famously said in his First Inaugural: "This country belongs to the people who inhabit it. Whenever they should grow weary of the existing government, they can exercise their CONSTITUTIONAL right of amending it, or their REVOLUTIONARY right to dismember or overthrow it."[12]

Tellingly, however, Lincoln's comment appears in the same paragraph as his mention of having no objection to the adoption of the so-called Corwin Amendment, which would have prohibited any amendment extending to Congress the power to abolish or interfere with slavery within any state.[13] In light of how events unfolded we can only speculate whether, had it been ratified, this extraordinary concession to slave interests would have led to a serious effort to establish its unconstitutionality; thus one can imagine an argument predicated on Lincoln's own logic, according to which the pro-slavery thrust of the amendment was so palpably offensive to the Constitution's underlying commitment to human freedom that it constituted a revolutionary act rather than one suitable for the amendment process. For someone like Lincoln, whose sentiments about the Constitution's meaning sprung from ideas "embodied in the Declaration of Independence," such reasoning hardly seems strained.[14] On the other hand, as noted by Mark Brandon, it is by no means clear that the amendment was indeed revolutionary. "[I]n order for an amendment to render the text incoherent, it would have to be a stark departure from a widely accepted meaning of the text to which it is attached. The Corwin Amendment was not such a radical departure."[15]

[10] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 239.
[11] Ibid. [12] Abraham Lincoln, *First Inaugural Address*.
[13] As Mark Brandon has noted, "Lincoln may have understood the amendment to protect slavery only where it then existed, but the amendment's plain words do not suggest such a limitation." Mark Brandon, "The 'Original' Thirteenth Amendment and the Limits to Formal Constitutional Change," in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995), 219.
[14] As Don E. Fehrenbacher has written, "Mainstream abolitionists were . . . disposed to consider the Constitution proslavery in certain details but antislavery in underlying purpose and ultimate potential." Don E. Fehrenbacher, "Slavery, the Framers, and the Living Constitution," in Robert A. Goldwin and Art Kaufman, eds., *Slavery and Its Consequences* (Washington: AEI Press, 1988), 5. Assuming Lincoln to have been of this mindset, the Corwin Amendment could not easily have been reconciled with such purpose and potential.
[15] Brandon, "The 'Original' Thirteenth Amendment and the Limits to Formal Constitutional Change," 235. Consider in this regard Luther Martin's reflections in 1787 on the Declaration and the Constitution. "That *slavery* is *inconsistent* with the *genius* of *republicanism, and has a*

Lincoln of course was concerned with heading off the revolutionary act of secession, but to appreciate the vexed nature of constitutional principles in the American experience with substantive limits to constitutional change, consider these views of one whose understanding of those principles was decidedly different from Lincoln's. In his *Discourse on the Constitution and Government of the United States*, John C. Calhoun wrote: "[I]f it transcends the limits of the amending power, – be inconsistent with the character of the Constitution and the ends for which it was established, – or with the nature of the system . . . [i]n such case, the State is not bound to acquiesce. It may choose whether it will, or whether it will not secede from the Union . . .."[16] Calhoun does not detail what the Supreme Court would be authorized to do "if a power should be inserted by the amending power, which would radically change the character of the Constitution,"[17] but given the legitimacy that such a development would confer upon the much more extreme act of secession, one can easily imagine that while remaining wary of an extraordinary exercise of national power, for him the lesser act would also be justified.

A radical change in "the character of the Constitution" presumes that such a character exists, in which case, as Rawls suggested, a transgressive amendment could portend "constitutional breakdown" or "revolution in the proper sense." This might be the only point of agreement between Rawls and Calhoun, both of whom subjectively ascribe to the Constitution a coherent meaning or identity whose violation could validly trigger a response that embodies the derivative presumption that this sort of challenge to constitutional particularity is illegitimate. If these bedfellows are not strange enough, we might add both the abolitionists like Lysander Spooner, who subscribed to *The Unconstitutionality of Slavery*,[18] and their Garrisonian adversaries who saw the Constitution as an unambiguously hellish pro-slavery document. The first, as will be discussed in the next section, advocated for the Guarantee Clause as a club to be used against states whose slavery institutions were a glaring repudiation of the Constitution's commitment to republican principles; and the second advanced its own version of secession under the banner of "No Union With Slaveholders." What all of these examples have in common is a rendering of the Constitution as the embodiment of a unified vision, the supreme importance of which justifies an extraordinary response to actions that would, for better or worse, effectively render that vision incoherent. Calhoun and Spooner (and more famously

tendency to destroy those *principles* on which it is *supported*, as it *lessons the sense* of the *equal rights of mankind*, and habituates us to *tyranny* and *oppression*." Luther Martin, "The Constitution and Slavery," in Justin Buckley Dyer, ed., *American Soul: The Contested Legacy of the Declaration of Independence* (Lanham: Rowman & Littlefield, 2012), 47.

[16] John C. Calhoun, *Disquisition on Government: And, a Discourse on the Constitution and Government of the United States* (Ithaca: Cornell University Press, 2009), 300.

[17] Ibid., 301.

[18] Lysander Spooner, *The Unconstitutionality of Slavery* (Portland: Gregorivs Publishing, 2010).

Frederick Douglass[19]) as well as Garrison (Rawls is a more complicated case) saw in the exercise of constituent power that formed the Constitution the instantiation of a principled commitment to pursue noble ends (Calhoun, Spooner, Douglass) or evil ones (Garrison). Their particular and very subjective perspectives on these principles dictated whether they were prepared to attribute sacrosanct status to this original expression of constituent power. However divergently they viewed this expression, their general level of agreement that a discernible and clear constitutional identity was manifest in the document embodying it, led each to accept the conceptual possibility that has never been embraced by the Supreme Court, that there could be an unconstitutional constitutional amendment.

The approach of the Court's German counterpart is revealingly different. Thus there is no comparable statement in American constitutional jurisprudence to this assertion by the FCC: "Article 79, para. 3 of the GG [Grundgesetz] links the development of the State in Germany to that core of the constitutional order which it itself describes, and thus seeks to secure the prevailing constitution against any development which endeavors to establish a new constitution ...."[20] While the United States is often cited as the paradigmatic instance of a nation constituted by its constitution, it is the German document that is arguably the better example of this phenomenon.[21] To be sure, national identity is not necessarily coterminous with constitutional identity. So where a constitution is designed to function in effect as a subversive instrument seeking transformation of an entrenched social order central to the nation's identity, care must be taken not to mistake one identity for the other. India and South Africa are examples of transformative constitutions whose success or failure can be measured by their ability to facilitate the restructuring of their respective societies. Hence progress in these places is marked by the degree of achieved

[19] "In that instrument [the Constitution] I hold there is neither warrant, license, nor sanction of the hateful thing [slavery]; but interpreted, as it ought to be interpreted, the Constitution is a GLORIOUS LIBERTY DOCUMENT ... [T]ake the Constitution according to its plain reading, and I defy the presentation of a single pro-slavery clause in it. On the other hand, it will be found to contain principles and purposes, entirely hostile to the existence of slavery." Frederick Douglass, "Fourth of July Oration," in Herbert J. Storing, ed., *What Country Have I?* (New York: St. Martin's Press, 1970), 37, 38.

[20] *Maastricht Treaty Case*, at Sec. B, par. 5.

[21] Not everyone would agree. Michel Rosenfeld is correct to see in the German model of constitutional identity a strong negation of the past and a commitment to endow the constitutional order with a new content. But I disagree with him in saying: "Constitutional identity ... is much more central to national identity in the United States model than in the ... German model. In short, in the German model, the constitution is supposed to provide the means for giving expression to an existing national identity ...." As much as the new German constitutional order seeks to establish an "ethnocentric democracy," to see this effort as affirming an existing national identity may obscure its more radical intent. Michel Rosenfeld, "The European Treaty-Constitution and Constitutional Identity: A View from America," *International Journal of Constitutional Law* 3 (2005): 316, 323.

convergence between national and constitutional identities; in theory maximum success would mean they had become indistinguishable. There is a transformative aspect to the German constitution as well, but it is the specific document itself that embodies the requisite change, in the sense that its creation signals the moment when Germany acquired its new identity.[22] "To a great extent," according to Juliane Kokott, "the national identity of post-war Germany is founded on and shaped by the Constitution ... [R]espect for the Constitution is indispensable and has to be ensured to prevent even the appearance of a relapse to the past."[23]

As astutely expressed by another German constitutional theorist, Ulrich Preuss, this indispensability illuminates the unconstitutional amendment issue. "[N]o constitution can contain rules which allow its abolishment altogether; this would permit revolution, whereas it is the very meaning of constitutions to avoid revolutions; and to make them dispensable."[24] But if constitutions do not explicitly contain rules for their own eradication, most do not provide insurance against the possibility of this happening. Germany is the most notable exception; its eternity clauses are, in Preuss's terms, intended to render revolutions dispensable. Its document is structured to prevent a transformation of such principled magnitude that its constitutional identity would become something very different from what it is. Or as Kokott's formulation would have it, an arrangement of this type is essential in order to preclude any possibility that the substance of German national identity would be permitted to look anything like it did before the constitutional revolution that culminated in the Basic Law.

Ironically, it is the constitutional theorist most prominently linked to the earlier discredited totalitarian regime who developed the ideas deemed essential for preventing this catastrophic reversion to the past. On the occasions when the FCC has declared its rationale for holding amendments subject to substantive limitations in the existing document, its reasoning is clearly traceable to the theorizing of Carl Schmitt, who insisted on the distinction between "constitutional change" and "constitutional annihilation."[25] "The boundaries of the authority

[22] Fritz Stern's illuminating memoir, *Five Germanys I Have Known* (New York: Farrar, Straus & Giroux, 2006), is a wonderful meditation on the identity transitions in German history, poignantly capturing the significance of the post-War constitutional moment.

[23] Juliane Kokott, "Report on Germany," in Anne-Marie Slaughter, Alec Stone Sweet and J. H. H. Weiler, eds., *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* (Oxford: Hart, 1998), 77–131, 111.

[24] Ulrich K. Preuss, "Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the New Constitution," in Michel Rosenfeld, ed., *Constitution, Identity, Difference, and Legitimacy* (Durham, NC: Duke University Press, 2004), 157.

[25] Carl Schmitt, *Constitutional Theory* (Durham, NC: Duke University Press, 2008), 151. As Ulrich Preuss points out, "Carl Schmitt was the pioneer of the intellectual movement that aimed to limit the power of the *Reichstag* ... Article 79, sec. 3 incorporated Schmitt's idea that certain core elements of the constitution should remain unamendable, even by super majorities in

for constitutional amendments result from the properly understood concept of constitutional change. The authority to 'amend the constitution' [must proceed] under the presupposition that the identity and continuity of the constitution as an entirety is preserved."[26] Elsewhere he contended that an amendment process functioning in total indifference to itself and its own system of legality was a testament to the blind subordination of substance to form that was the basis of modern constitutionalism, of which, of course, Weimar was exhibit A. In such a system, Schmitt wrote, "A purely formal concept of law, independent of all content, is conceivable and tolerable."[27] Echoes of Schmitt's boundary setting reverberate in the *Southwest Case* in the early days of the post-War constitutional regime: "A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions of the Basic Law are subordinate."[28] As the Court elaborated nearly twenty years later, "even basic constitutional principles" may be modified by constitutional amendment, as long as this occurs in a "system-immanent manner."[29]

With this in mind we might speculate that had Calhoun's argument about "transcend[ing] the limits of the amending power" and not "radically chang[ing] the character of the Constitution" connected with an American analogue to what in Germany is held to be "an objective ordering of values," he might have enjoyed the same ultimate jurisprudential prominence as Schmitt. "[R]ather than being shattered by the Third Reich, the German belief in law over politics motivated a return to law as it originally and naturally was – a legal renaissance as a natural law renaissance."[30] But unlike the constitutional project of reconstructed Germany, no comparable development has occurred in the United States that extends to American constitutional principles an arrangement for their objective

both houses." Preuss, "Constitutional Powermaking for the New Polity," 438–39. Melissa Schwartzberg agrees that Schmitt could legitimately claim to be the father of entrenchment in Germany, but "less plausible" is that he was the source for making unamendable the clause on human dignity. Schwartzberg, *Democracy and Legal Change*, 173.

[26] Schmitt, *Constitutional Theory*, 150.

[27] Carl Schmitt, *Legality and Legitimacy* (Durham, NC: Duke University Press, 2004), 20.

[28] 1 BVerfGE 14, 32 (1951). Consider Justice Dieter Grimm's comment on the substance of these principles, around which there has developed a consensus as to their foundational value: "human dignity and the commitment to republicanism, democracy, rule of law, and the social state." Dieter Grimm, "The Basic Law at 60 – Identity and Change," *German Law Journal* 11 (2010): 33.

[29] 30 BVerfGE 1 (1970).

[30] Bernhard Schlink, "German Constitutional Culture in Transition," in Michel Rosenfeld, ed., *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham, NC: Duke University Press, 1994), 210. According to Schlink, the framers of the Basic Law "considered fundamental rights as necessary, but not sufficient, conditions for a satisfactory ordering of social relations." Ibid., 211. Beyond such [subjective] rights there were "'objective principles,' [according to which] social relationships, as well as the relationship between state and society, are to be ordered." Ibid., 203. The comparative implications of this orientation will be pursued more fully in the third section.