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Constitutional Adjudication in Europe and the United States: Paradoxes and Contrast

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Constitutional adjudication in Europe and the United States: paradoxes and contrasts

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1. Introduction

Constitutional adjudication is much older and more deeply entrenched in the United States than in Europe.[1] Moreover, constitutional adjudication is *concrete* and *a posteriori* in the United States, whereas it is, to a large extent, *abstract* and, in certain cases, *ex-ante* in Europe, suggesting that the former should be inherently less political than the latter.[2] Indeed, in abstract, ex-ante review, the constitutional adjudicator tackles laws as they are produced by parliaments, prior to their coming into effect.[3] This gives some European constitutional adjudicators an important policy-making function. Typically, the losing parliamentary minority can challenge the constitutionality of a law it had opposed in the legislature before a constitutional adjudicator who is empowered to strike down the challenged law prior to its actual promulgation,[4] or to condition its promulgation on the

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[1] Judicial review of constitutional issues has been implemented continuously in the United States since the Supreme Court's landmark decision in *Marbury v. Madison*, 5 U.S. 137 (1803). Constitutional review in Europe, however, is largely a post-World War II phenomenon.

[2] *See* Louis Favoreu, *Constitutional Review in Europe, in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38 (Louis Henkin & Albert J. Rosenthal, eds. 1989). Whereas "abstract" review is nearly universal in Europe, only in certain countries, such as France and Portugal, is there pervasive use of "ex ante" review. In some other countries, such as Germany, ex ante review is highly exceptional.

[3] In France, constitutional review can take place only before a law is promulgated. *See* JOHN BELL, FRENCH CONSTITUTIONAL LAW 32–33 (Clarendon Press 1992).

[4] *See* ALEC STONE SWEET, THE BIRTH OF JUDICIAL POLITICS IN FRANCE 48 (1992).

adoption of interpretive glosses that limit, alter or expand it.[5] In the United States, on the other hand, judicial review is supposed to be fact-driven, meaning that courts are not supposed to decide on the constitutionality of a law in the abstract but only as it applies to particular facts linked to an actual controversy among real adversaries.[6] Two important consequences follow from the American approach: first, constitutional review cannot be triggered in the absence of a concrete controversy;[7] and, second, the factual setting of the relevant controversy tends to anchor constitutional review within a framework that is more conducive to adjudication than to legislation.[8]

Paradoxically, however, American constitutional adjudication has been attacked much more vehemently for being unduly political than its European counterpart.[9] Certainly, the common law tradition has typically afforded broad interpretive latitude to judges whereas the civil law tradition prevalent in Europe has tended to circumscribe the

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[5] *See* Dominique Rousseau, *The Constitutional Judge: Master or Slave of the Constitution?*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 261, 263–65 (Michel Rosenfeld ed. 1994) [hereinafter CONSTITUTIONALISM] (discussing the French Constitutional Council's use of three techniques of interpretation, namely *limiting interpretation, constructive interpretation* and *guideline interpretation*, to conform otherwise wanting statutes to the constitution).

[6] *See* U.S. CONST. art. III, § 2 (restricting jurisdiction of federal courts to "cases" or "controversies.").

[7] *See, e.g.*, Raines v. Byrd, 521 U.S. 811 (1997) (challenge by members of Congress on losing side of legislation granting President a "line item veto" held not justiciable). The line item veto was later held unconstitutional in *Clinton v. New York* 524 U.S. 417 (1998), a case brought by parties who were denied funds by the President's actual use of such veto.

[8] Take, for example, the issue of the constitutionality of affirmative action under a broadly phrased constitutional equality clause. Arguably, in the case of abstract review, the constitutional judge is most likely to focus on issues of principle and policy in a future-oriented exercise not unlike that typically undertaken by the legislator. Imagine, however, that the constitutional challenge is brought by a single mother from a modest background who through diligence and sacrifice would have secured a place in a professional school but for preferential admission of racial minority candidates regardless of socioeconomic status. In that case, the judge's focus is likely to be on whether the plaintiff has suffered an injustice—a backward-looking concern—rather than exclusively on principle or policy. Moreover, if the actual facts before the judge are particularly compelling, they may have a disproportionate effect on the decision. Thus, if a judge rules in the context of the above facts—which we will assume, for the sake of argument, are exceptional rather than typical—that affirmative action is unconstitutional, and if that decision becomes a binding precedent, the resulting constitutional outcome will have been unduly overdetermined by factual contingencies showcased as central when they may be rare and exceptional.

[9] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (The Free Press 1999).

scope of judicial interpretation rather narrowly. Be that as it may, expansive judicial interpretation of the constitution has fostered far greater criticism in the United States than in Europe, as evinced by the famed "countermajoritarian" difficulty.[10] More generally, the several differences between American and European constitutional adjudication—and these include the contrasts noted above, plus other distinctive variations, such as exist among the German *Rechtsstaat*, the French *État de droit* and the American conception of the rule of law, the American concern with "originalism," which is lacking in Europe, and the American focus on "checks and balances," which has no European counterpart—lead to multiple paradoxes.

I propose to examine the most salient among these differences between the American and the European approaches, to assess their breadth and depth, and to inquire whether they are predominantly systemic or contextual in nature. Section 2 compares the respective bases of constitutional adjudication in Europe and the United States. Section 3 focuses on the differences between the *Rechtsstaat, État de droit* and "rule of law" and examines corresponding differences in the respective conceptions of the constitution as law. Section 4 concentrates on the countermajoritarian problem, probes its links to the institutionalization of checks and balances, and seeks to account for the vast differences between Americans and Europeans on this point. Section 5 deals with issues of constitutional interpretation and contrasts the important role of originalism in the United States with its negligible role in Europe. Finally, Section 6 evaluates the differences

[10] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

examined in the previous sections, in order to determine whether these are predominantly structural or contextual.

2. Civil law and common law constitutional adjudication

Behind the contrast between abstract and concrete review lurks the difference between civil law and common law adjudication, reinforcing the impression that European constitutional review is inherently more political than its American counterpart. Traditionally, civil law adjudication was supposed to be a narrowly circumscribed deductive endeavor; common law adjudication, on the other hand, developed as a more open-ended empirically grounded inductive process. At the time of the French Revolution, Continental judges were largely discredited as the pliable servants of the absolute monarch's arbitrary will.[11] In reaction, in post-revolutionary France the law was codified, and the work of the judge was confined to the application of a legal rule, as crafted by the legislator, to the particular case at issue by means of a syllogism in which the law figures as the major premise and the facts of the case as the minor premise.

Inasmuch as adjudication remained deductive and syllogistic, moreover, the judge's role would seem clearly beyond the realm of politics. Constitutions, however, tend to be less specific than codes and, hence, cannot be subjected to syllogistic reasoning in the same way. Furthermore, since constitutional adjudication is bound to call periodically for judicial invalidation of popular laws, the role of the constitutional adjudicator seems far removed from that of the ordinary civil law judge. The

[11] *See* R.C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS 138–39, 151–53 (1987).

constitutional judge, therefore, must be a different kind of judge—one who, to use Kelsen's expression, functions as a "negative legislator."[12]

The constitutional judge as negative legislator may invalidate laws only to the extent that they contravene formal constitutional requirements (e.g., the rules for parliamentary lawmaking) and, therefore, may remain largely apolitical. In contrast, since World War II constitutional judges have invalidated laws on substantive as well as formal grounds, thus coming increasingly to resemble positive legislators. For example, when the German Constitutional Court decided, in its 1975 *Abortion I* Decision, that the constitutional right to life required the legislator to enact further criminal sanctions against abortion, it acted very much as a positive legislator selecting one among several plausible political choices.[13] In short, in contrast to the statutory adjudication by ordinary judges, which is supposed to be largely apolitical, constitutional adjudication by special judges seems inherently political.

Common law adjudication, on the other hand, seems to strike a middle course between the work of the ordinary judge and that of the constitutional judge. To the extent that it involves an inductive rather than a deductive process, it allows for greater variations than civil law adjudication. Assume, for example, that in a civil law jurisdiction, a statute provides that a landowner is responsible for any damage the owner's domestic animals cause to a neighbor's land. Accordingly, whether such damage is caused by a cow or a cat, a judge would determine liability through a straightforward

[12] Hans Kelsen, General Theory of Law and State 268 (Anders Wedberg, trans. 1961).
[13] 39 BverfGE 1 (1975).

use of syllogistic reasoning. Imagine, however, a common law judge confronted with damage by a cat in a jurisdiction with a single precedent holding that the owner of a cow is responsible for damage that such cow inflicts on a neighbor's property. That judge may either hold the owner liable by inferring that the cow precedent imposes liability on owners of domestic animals, or not liable by inferring that the cow precedent merely imposes liability on owners of large animals. More generally, so long as relevant precedents allow for more than one result in a case, a judge performs a legislative function in the very act of resolving a dispute—the judge produces a rule or standard applicable to future occurrences that are sufficiently similar to the one in dispute.

When it comes to constitutional adjudication, on the other hand, the common law judge, being bound by precedents, in theory ought to be more constrained than the civil law constitutional judge, who is detached from the ordinary judiciary and under no obligation to treat past constitutional decisions as precedents. Typically, constitutional provisions, such as equality or due process provisions, tend to be general and vague, leaving judges with large margins of interpretive freedom.[14] Since the civil law judge is not constrained by precedent,[15] he or she enjoys full interpretive latitude to extract any plausible legal rule or standard from an applicable constitutional provision. In contrast, a

[14] For example, different justices on the U.S. Supreme Court have interpreted the Equal Protection Clause of the U.S. Constitution respectively as broadly allowing and as all but prohibiting race-based affirmative action. *See* MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 163–215 (Yale Univ. Press 1991).

[15] As a practical matter, civil law constitutional judges are roughly as constrained as their common law counterparts. Although they are not bound by precedents, they are mindful not to contradict past decisions for reasons of institutional consistency and integrity. Nevertheless, at least in theory, civil law constitutional judges remain free to take a fresh look at constitutional provisions each time they are called upon to interpret them.

constitutional adjudicator in a common law jurisdiction enjoys less latitude, to the extent that relevant precedents constrain interpretive choices.

Both civil law and common law adjudication thus involve a legal as well as a political component—where "legal" means the application of a preexisting rule or standard and "political" means choosing one from among many plausible principles or policies for the purposes of settling a constitutional issue.[16] I have indicated, thus far, how civil law and common law constitutional and nonconstitutional adjudication differ in theory in their respective incorporations of law and politics. Before determining how those theoretical differences play out in practice, it is necessary to explore briefly three closely related features from a comparative perspective. These are: the bases of constitutional adjudication; the relevant conception of the rule of law; and the sense in which the constitution is law.

While constitutional review has been entrenched longer in the United States, it is more firmly grounded in France and Germany. The French Constitution empowers the Constitutional Council to determine the constitutionality of laws,[17] and the German Basic Law specifies that the German Constitutional Court is the authoritative interpreter of the constitution.[18] In contrast, the U.S. Constitution is silent on the subject. In *Marbury v. Madison* the U.S. Supreme Court declared that the Constitution is law, and that courts

[16] For Dworkin, policy choices are political while selection and application of principles is essentially a legal task. *See* Ronald Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14 (1967). For present purposes, unlike Dworkin, I consider both policy choices and choices among principles as being predominantly political. I offer a justification for my position in Part 3. For a more extensive discussion that casts law and politics as different though related, *see* MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 74–83 (Univ. of California Press 1998).
[17] *See* FR. CONST. art. 62, § 2 (1958).
[18] *See* German Basic Law, art. 93.

can adjudicate disputes arising under the Constitution in a way that is binding on the parties, but it did not specify whether those interpretations of the Constitution were meant to be authoritative or binding on anyone beyond the actual litigants. Although Supreme Court decisions have been treated generally as authoritative and binding on everyone, including the president of the U.S. and the Congress, there have been periodic and recurring challenges to that notion. In 1987, for example, Edwin Meese, President Reagan's attorney general, argued that while everyone was bound by the U.S. Constitution, Supreme Court decisions produced "constitutional law" that was not binding on the president or the Congress. In Meese's view, the latter are as authoritative, as interpreters of the Constitution, as the Court, given that all three branches of the federal government are coequal under the Constitution.[19]

As a consequence of these differences, the question of the authoritativeness of constitutional adjudication is much more politicized in the United States than it is in France or Germany.[20] Moreover, although challenges to the authoritativeness of constitutional adjudication tend to arise in response to politically divisive decisions,[21] such challenges are ultimately more profound than those concerning mere interpretive controversies. The issue is not whether the Court gave a wrong interpretation of the constitution, but whether it acted wrongly as the official interpreter of the constitution.

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[19] *See* Edwin Meese, *The Law of the Constitution*, 61 TUL. L. REV 979 (1987).

[20] Constitutional adjudication became more political in France after the 1971 *Associations LawDecision* 71-41 DC. The 1958 Constitution clearly empowered the Council to decide whether it was within the constitutional powers of Parliament to enact the law that was being challenged. In its 1971 decision, however, the Council invalidated a law on *substantive* grounds as violating the constitutional right to freedom of association, thus arguably exceeding its constitutional mandate. *See* F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 AM. J. COMP. L. 89, 90–92 (1988).

[21] Thus, Meese's 1987 remarks were in the context of Supreme Court decisions on abortion and affirmative action that were squarely contrary to the positions taken on these issues by the Reagan Administration.

Accordingly, it is not surprising that American constitutional scholars disturbed by the Supreme Court's recent sharp turn to the right should advocate "taking the constitution away from the courts."[22] In short, because the U.S. Supreme Court lacks a clear mandate from the Constitution as the authoritative constitutional adjudicator, its occupation of the field is subject to attack as being essentially political. And this may explain, at least in part, why, although common law constitutional adjudication is on its face less political than its civil law counterpart, the U.S. Court appears more vulnerable to attack for being political than the German Court or the French Council.

3. The rule of law and the constitution as law

The more constitutional adjudication is political, the more it would seem to be in tension with the rule of law. In the broadest terms, "the rule of law and not the rule of men [and women]," to which the aphorism refers,[23] is also not the rule of politics. In other words, the rule of law stands in contrast to arbitrary or unrestrained power and to purely political power; thus, to be legitimate, constitutional adjudication must conform to the rule of law. As will be discussed below, the American conception of the rule of law differs from the German conception of the *Rechtsstaat* and from the French conception of the *État de droit*. Because of this, to be consistent with law, constitutional adjudication may have to satisfy different requirements in the United States than it would in France or Germany.

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[22] *See* TUSHNET, *supra* note 9.
[23] *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 163 (1803) (contrasting a "government of laws" to a government of men).

Before focusing on differences, it is necessary to specify, briefly, in what sense the rule of law should be understood as not being political. To be sure, the making of law is political, and democratically enacted laws are political in that they embody the will of the majority. Moreover, a particular political vision or agenda can be furthered through the application and enforcement of certain laws. What ought to remain beyond politics, however, is the law's predictability, applicability, interpretation, and enforcement. To return to an example employed above, a parliamentary law imposing liability on the owner of domestic animals for damages that these animals may cause on neighboring lands represents a political choice and may have emerged after a political debate between representatives of cattle breeders and those of crop growers, with the latter eventually mustering a parliamentary majority. After such a law's enactment, however, and until its repeal, it is as if politics were temporarily frozen. All would be on notice regarding the rights and obligations apportioned by the law; authorities would be charged with enforcing the law generally, regularly, and evenhandedly, and judges would be charged with interpreting the law according to its terms. The syllogistic model discussed above would presumably provide the best means of ensuring interpretations that were faithful to the law and insulated from further political influences.

The ideal just sketched above would fare differently according to whether it were set within the framework of the German *Rechtsstaat*, the French *État de droit* or the American rule of law. The best fit would be with the German conception of the positivistic *Rechtsstaat*, which emerged with the failure of the bourgeois revolution attempted in Germany in 1848. Frustrated in their efforts to establish a constitutional

democracy, the German bourgeoisie settled for a guarantee of state rule through law as opposed to arbitrary or personal rule by the sovereign. In its positivistic embodiment, therefore, *Rechtsstaat* is better translated as "state rule through law" than as "rule of law." By insisting that Germans be ruled through laws and that the adjudicative function be separate from the legislative, the positivistic *Rechtsstaat* comes very close to the ideal invoked above, of law as separate from politics. The *Rechtsstaat*, however, leaves no room for constitutional challenges to legislation and thus sheds no light on constitutional adjudication.

However well the positivistic *Rechtsstaat* may have suited Germany's legal and political reality at the end of the nineteenth century, it no longer fit post–World War II Germany following the adoption of the Basic Law. Some contemporary German scholars have argued that Germany is better described today as a *Verfassungsstaat*, which is to say, "state rule through the constitution," than as a *Rechtsstaat*.[24] The *Verfassungsstaat* certainly contemplates a legitimate role for constitutional adjudication. But because the *Verfassungsstaat* encompasses not only constitutional rules and standards but also constitutional values such as human dignity (explicitly enshrined in article 1 of the Basic Law) and because it prescribes not only subjective rights but also an objective order,[25] the

[24] *See, e.g.*, Ulrich Karpen, *A Rule of Law*, *in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 169, 173 (Ulrich Karpen ed., 1988) (defining *Verfassungsstaat* as a state that "means to organize politics and evaluate goals by applying, executing the constitution.").

[25] Roughly speaking, "subjective rights" are the constitutional rights of a rights holder that constrain the state's legitimate power to legislate. For example, a law that unduly curtails the citizens' free speech rights would have to be struck down as unconstitutional. "Objective order," on the other hand, refers to the obligation imposed on those responsible for the development of the legal order to shape it according to constitutional values and to orient it in such a way as to extend and complement constitutional rights and obligations. For example, if the constitution forbids the state from discriminating on the basis of religion, implementation of the objective order may require laws forbidding religious discrimination among private parties and commanding the teaching of religious tolerance in state schools.

German Constitutional Court has assumed an expansive role that casts it, at least in part, as a positive legislator prone to dictating policy.[26] In short, by subjecting an ever-increasing slice of interactions within the polity to constitutional principles and values, the *Verfassungsstaat* tends to constitutionalize the political and to politicize the constitution. Constitutionalization of the realm of politics is fostered by a shift from purely formal constitutional constraints to predominantly substantive constitutional norms, which then become increasingly pervasive.

At one end of the spectrum, the constitution would impose formal constraints exclusively, thus minimizing the opportunities for constitutional adjudication to become political. At the other end of the spectrum, in a constitution such as Germany's—which enshrines human dignity, as an overriding constitutional value,[27] protects a wide array of substantive rights, such as free speech and equality rights; and is conceived as having horizontal as well as vertical effects[28]—much of what would be left to politics in the context of a formal constitution will assume a constitutional dimension and thus become subject to constitutional adjudication. As the reach of constitutional imperatives becomes more extensive the realm of ordinary politics is bound to shrink. For example, where the constitution does not guarantee a right to a free public education, whether to offer the latter and to increase taxes to generate revenues for it remains a political question

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[26] *See* Bernhard Schlink, *German Constitutional Culture in Transition, in* CONSTITUTIONALISM, *supra* note 5, at 197 (criticizing German Constitutional Court for engaging in policymaking while seeking to impose an "objective order").

[27] German Basic Law, art. I.

[28] "Vertical" refers to relationships between state and non-state actors while "horizontal" refers to relationships among non-state actors. Thus, in an exclusively vertical constitutional order a constitutional prohibition against state employers engaging in sex discrimination would not extend to private employers. Where the constitutional order also encompasses horizontal relationships, however, the prohibition in question would also extend to private employers.

entrusted to the legislator. In contrast, where the constitution mandates a free public education, that issue is removed from the realm of ordinary politics, and the constitutional judge's power may extend to ordering the state to raise the taxes necessary for it to meet its constitutional obligations regarding education.[29]

In the context of a broad consensus regarding an expanded constitutional sphere, the increased scope of constitutional adjudication may become widely accepted as legitimate. This has been the case for a long time in post–World War II Germany, where profound distrust of politicians as a consequence of the disastrous politics of the Third Reich has made the soil particularly fertile for expansive rule by untainted constitutional judges.[30] Thus, in the case of the *Verfassungsstaat* at its best, constitutionalization of the political can be regarded as the triumph of rule according to fundamental values and high principles over rule informed by narrow or tainted interests. In these circumstances, the constitutional judge is likely to achieve a maximum of power and prestige. As the *Verfassungsstaat* expands, however, it seems bound to encounter increasing difficulties in maintaining an adequate level of consensus. Some relatively recent decisions of the German Constitutional Court, such as the *Crucifix II* case[31] and the *Tucholsky II* case,[32] have been very divisive and illustrate the difficulties that confront a powerful constitutional court when national consensus breaks down.[33] More generally, when there

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[29] *Cf.* Missouri v. Jenkins, 495 U.S. 33 (1990) (ordering state barriers lifted to allow for raising taxes necessary to achieve constitutionally mandated public school racial desegregation).
[30] *See* LUDGER HELMS, INSTITUTIONS AND INSTITUTIONAL CHANGE IN THE FEDERAL REPUBLIC OF GERMANY 87, 95 (2000).
[31] 93 BverfGE 1 (1995). The decision produced "a firestorm of protest" throughout Germany and was widely regarded as a threat to Germany's Christian culture. *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 482–83 (2d ed. 1997).
[32] 93 BverfGE 266 (1995) (criminalization of statement "soldiers are murderers" held unconstitutional).
[33] Bavarian officials defied the Court and refused to enforce the *Crucifix II* decision. *See* DONALD

is a split over fundamental constitutional values, or over their interpretation, the *Verfassungsstaat* becomes vulnerable to the politicization of the constitution.

For example, in a polity deeply divided over abortion, with a constitution that, like the German, entrenches human dignity as a fundamental value, some are bound to insist that human dignity requires affording constitutional protection to the fetus, while others are sure to insist that the human dignity of women requires that they have full control over their bodies and, hence, that they be guaranteed a constitutional right to obtain an abortion.

In short, the advent of the *Verfassungsstaat* indicates that disenchantment with politics paves the way for the constitutionalization of the political, while the great expansion of the realm of the constitutional can lead to numerous splits over constitutional norms and values, thus provoking a politicization of the constitution. Consistent with this, the *Verfassungsstaat* greatly enhances the role of the constitutional adjudicator, but, by the same token, that very expansion increasingly threatens to weaken the adjudicator's grip on legitimacy.

Although the French expression *État de droit* is the literal translation of the German expression R*echtsstaat*,[34] the two are by no means synonymous. Actually, what comes closest to the German *Rechtsstaat* is the French *État legal*.[35] The main difference

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P. KOMMERS, *supra* note 32, at 483.

[34] *See* Jacques Chevalier, L'ÉTAT DE DROIT 11 (Montchrestien 3d. ed. 1999).

[35] *See* Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1330 (2001) (explaining that *État legal* may be roughly translated as "democratic state rule

between the positivistic *Rechtsstaat* and the *État légal* is that whereas both refer to a system of laws made by legislators, only the *État legal* requires that the legislators in question be democratically elected. *État légal* can thus be translated as "state rule through democratically enacted laws."

According to the constitutional vision launched by the French Revolution, law is the product of the legislative majority, while constitutional objectives and constraints are cast as exclusively political. Thus a parliament enacts laws that are conceived as expressing the general will of the polity,[36] and constitutional imperatives, such as those enumerated in the 1789 Declaration of the Rights of Man and the Citizen, are supposed to constrain legislators with respect to the legislative choices they are called upon to make. Consistent with revolutionary France's profound mistrust of judges, the *État légal* leaves no room for constitutional adjudication. In fact, it was not until the twentieth century, when state rule through democratically enacted laws came to be viewed as no longer adequate to meet the requirements of constitutional democracy, that exclusive reliance on the *État légal* emerged as unsatisfactory.

It was to remedy this deficiency that the *État de droit* was invoked to supplement the *État légal*. The precise task for the *État de droit* was to transform constitutional

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through law").

[36] This conception is derived from Rousseau's republican political philosophy. According to Rousseau, democratic legislation by civically minded legislators committed to the common good results in legislation that expresses the polity's "general will." *See* JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 14–18 (Charles Frankel ed. 1947). Rousseau's "general will" is a somewhat mysterious concept that corresponds neither to "the will of the majority" nor to the "will of all." Instead, it amounts to "the sum of the differences among the individual wills involved." *Id.* at 26 n.2. For present purposes, suffice it to consider the general will as the expression of the common interests of the members of the polity qua citizens (as opposed to qua *bourgeois* or private persons) as articulated in laws supported by a parliamentary majority.

guarantees that theretofore had been political in nature into legal guarantees. In short, the *État de droit* was designed to juridify the constitution, by transforming "constitution as politics" into "constitution as law." Thus, the combination of the *État légal* with the *État de droit* is closer to the *Verfassungsstaat* than to the *Rechtsstaat*. Unlike the *Verfassungsstaat*, however, the legal regime framed by the *État de droit* does not seek to constitutionalize politics; it merely subjects the realm of politics to constitutional constraints that have the force of law. In other words, whereas in the *Verfassungsstaat*, the constitution partially replaces politics as the source of lawmaking, in the *État de droit*, politics remains the exclusive source of lawmaking, though the legitimate bounds of political lawmaking are set by the constitution as law.[37]

The "rule of law" imported into the United States from England seems to fall somewhere between the positivistic *Rechtsstaat* and the *État de droit* in that it encompasses something more than law solely made by the legislature but not necessarily a set of constitutional constraints with the force of law. To be sure, as already mentioned, in the United States, unlike in France, the Constitution has been considered from the outset to be law.[38] Moreover, the rule of law must equally respect all law, whether it be common law or statutory law, and constitutional law can be regarded as a special kind of statutory law.[39] Yet, at its core, the American rule of law depends neither on statutory

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[37] To subject laws to the constitution as law, the *État de droit* must institute constitutional adjudication. This did not occur in France until the establishment of the Constitutional Council by the Fifth Republic Constitution of 1958. Moreover, the Constitutional Council, originally set up to insure against legislative usurpation of executive prerogatives, did not act as a full-fledged constitutional tribunal until its 1971 landmark *Associations Law Decision*, 71–41 DC of July 16, 1971.

[38] *See supra* note 1.

[39] Viewed phenomenologically, the constitution plus the whole body of constitutional law generated since *Marbury v. Madison* emerge as a complex mix of statutory and common law. Viewed formally, however, the constitution is more akin to a statute than to a set of rules and standards generated by the

law, as the positivistic *Rechtsstaat* does, nor on a written constitution with the force of law, as the *État de droit* does.

Stripped to its essentials, the rule of law requires that all interpersonal relationships and conflicts within the polity be subjected to regular, generally applicable rules and standards, and that no person, not even the head of state, be above them. Moreover, these rules and standards must foster predictability and fairness. Also, because it is deeply rooted in the common law, the American rule of law encompasses lawmaking as well as interpreting or deriving the law and applying it. As already pointed out, common law adjudication involves judicial lawmaking because in adjudicating a dispute arising from past events, the common law judge announces (or further specifies) a rule or standard applicable to future events.[40] In other words, understood *functionally*, the rule of law is both a source of law and an approach to existing or evolving law; seen *descriptively*, it includes at present the common law, statutes, and the constitution, and it permeates both lawmaking (whether it be legislative, administrative, or judicial) and interpreting the law, as well as applying and enforcing it. Consistent with this, the impact of the rule of law on constitutional adjudication is the product of the effects of the rule of law—as a source of law and a particular approach toward law—on the current American legal regime based on the interplay among the common law, statutes, and the constitution as law or, more precisely, as superior law.

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common law, albeit a special kind of statute elaborated by a constituent assembly rather than an ordinary legislature.

[40] *See infra* pp. 636.

Functionally and methodologically, the rule of law is inextricably intertwined with the common law and its development through judicial lawmaking. In both the rule of law and the common law, the same two key issues are highly problematic: finding and justifying the requisite sources of law; and securing adequate means to foster predictability and fairness, particularly since these objectives are often in tension. As noted above, the principal tools of the common law judge are judicial precedents and the powers of inductive reasoning.[41] The problem concerning the sources of law is ever present in common law adjudication since the sum of existing relevant precedents, combined with the proper use of the tools of inductive reasoning, cannot alone predetermine the outcome of a case in the way that reference to the civil code, combined with application of syllogistic reasoning, is supposed to do in civil law jurisdictions. Returning to the example discussed above, concerning damage caused by a landowner's domestic animal to his neighbor's crop,[42] what accounts for the decision of the judge in the case of the cat—whatever the decision turns out to be—given the precedent concerning the cow, and the powers of inductive reasoning? More fundamentally, can anything account for the decision in the unprecedented case of the cat, absent a political decision? More generally, are all common law adjudications somewhat political and all unprecedented adjudications purely political?

The answer to these questions depends on whether common law adjudication can be ultimately linked to sources of law that are, can be, or ought to be, commonly shared throughout the polity. For example, if the sources in question are found in natural law,

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[41] *See id.*
[42] *See infra* pp. 636, 639.

Lockean natural rights, Dworkinian principles, the mores of the polity, or a commonly shared morality,[43] then common law adjudication could be reasonably viewed as interpreting and applying the law rather than making the law, thus minimizing its vulnerability to the charge of being unduly political.

On the other hand, in the context of deep ideological splits, ethnic or cultural clashes, or contentious lifestyle differences,[44] the sources of law to which the common law judge must inevitably resort are bound to seem political. These sources may be no more political than those embodied in the laws of the *Rechtsstaat* or of the *État Légal*. The crucial difference is that in the latter contexts the political dimension is attributable to the legislator, while in context of the common law the political decision seems to rest squarely with the judge. The role of the judge is more crucial to the success of the rule of law than to that of the *Rechtsstaat* or of the *État de droit*. To be sure, the rule of law in the sense of acting in conformity with law extends to all branches of government, but the judiciary plays a special role in defining, shaping, interpreting, altering, and applying the law. This special judicial role is anchored both in the important role traditionally played by judges and the judicial process under the common law and in the U.S. Constitution's establishment of the judicial branch of the federal government as being coequal with the executive and legislative branches.[45]

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[43] Legal norms derived from moral norms may have the same contents, but in contrast to moral norms which are meant to govern internal relations, legal norms are applicable to external relations and are enforceable. For further discussion of this distinction, *see* ROSENFELD, JUST INTERPRETATIONS, *supra* note 16, at 69–74.

[44] *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 19 (1995) (distinguishing between national or ethnic differences and "lifestyle" differences, such as those advocated by feminists or gay-right advocates).

[45] *See* U.S. CONST., arts. I, II & III.

The unique position of judges and of the judicial system in the Anglo-American tradition goes back to feudal England, where legal norms traditionally issued from multiple sources and adjudication became divided among different and often competing institutional actors.[46] Statutory law made by parliament has existed side by side with judge-made common law; courts of law were supplemented by courts of equity;[47] and the responsibilities delegated to the judicial function were apportioned between judges and juries, with the latter serving as a check on the monarchy's judges since the seventeenth century.[48]

Unlike the Continental tradition, where the law is exclusively the product of the legislator, and judges are confined to applying the legislator's law, in the American common law tradition the judge is an independent source of law and a check against the legislator's (unconstitutional) laws. Thus, in both the *Rechtsstaat* and the *État légal* law is made by the state through the legislator, and judges serve both of these when interpreting and applying the law. In contrast, judges within the American rule-of-law system at times follow the legislator, at times make law, and at other times strike down the legislator's law or the executive's decrees, thus using the powers of the state against the state itself. In other words, whereas the *Rechtsstaat* and the *État légal* and, for that matter, the *État de droit* and the *Verfassungsstaat* involve state rule through law, the rule of law is

[46] *See, e.g.*, 2 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW 578–97 (2d ed. 1923).
[47] *See* FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 14–15 (1985).
[48] *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 472 (1985).

characterized by an interplay between state rule through law and law rule against the state.[49]

Underlying this contrast, there is an important conceptual difference. This difference—one with significant repercussions on the conception and justification of constitutional adjudication—is that between the American conception of fundamental rights as essentially "negative rights" of the citizens against the state and the Continental conception of fundamental rights as essentially "positive rights"[50] creating citizen entitlements that require affirmative state intervention for their realization. The American conception is predicated on Locke's theory of inalienable natural rights, which are prepolitical and can be enjoyed by individuals so long as the state does not interfere with their exercise.[51]

For example, the right to free speech is deemed to be innate, and therefore when the state through laws or an arbitrary use of power prevents a citizen from speaking freely, the judge is supposed to side with the citizen against the state and to order the state to cease infringing the citizen's rights. In the Continental tradition, on the other hand, a free speech right is deemed a state-granted right and infringement of that right would be regarded as a state official's failure to comply with state rule through law—in this case

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[49] From a formal standpoint, even when a judge strikes down a popular law as unconstitutional she is engaged in state rule through law as she is acting as a state official who belongs to one of the branches of government. From a substantive standpoint, however, judges who exercise equity power in the common law tradition to award a remedy unavailable at law, or a judge who strikes down a law for unconstitutionally infringing on a litigant's fundamental rights, uses law to protect a member of the polity against (unfair or unconstitutional) state rule.

[50] The distinction between "negative" and "positive" rights is analogous to that between negative and positive liberty. *See* Sir Isaiah Berlin, *Two Conceptions of Liberty* in his FOUR ESSAYS ON LIBERTY 118 (1969).

[51] *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, ¶¶ 4, 6, 44, 123 (1963).

constitutional law. Accordingly, a continental constitutional adjudicator, strictly speaking, would be vindicating state rule through constitutional law against what amounts to state lawless rule rather than taking the side of the citizen against the state.

What this conceptual difference underscores is the contrast between the rule of law as encompassing many different sources and centers of law, often competing with one another, and the *Rechtsstaat* and *État de droit* with a single source (or multiple sources aligned in a well established hierarchy) of law. Accordingly, the rule-of-law judge plays a pivotal role in the management and attempted harmonization of these multiple sources and centers of law, and alternates between imposing the will of the state (as articulated by the legislative majority) on the citizen and protecting the rights of the citizen against the state.

The Continental judge, in contrast, operates in a single hierarchical system of law and is either subordinate to the legislator (the ordinary judge) or operates at the top of the constitutional pyramid as a superlegislator with confined powers delimited by the constitution (the constitutional judge). But whether ordinary judge or constitutional, the continental judge is always on the side of the state. In order to manage the tensions produced by the juxtaposition of multiple sources and centers of law, the rule-of-law tradition has resorted to constraining devices designed to produce order and unity. These devices come in two pairs, each creating new tensions of its own. These are: (1) predictability and fairness; and (2) procedural and substantive safeguards against unwarranted extensions of state rule through law. Moreover, in the context of the

common law these two pairs of constraints are interlinked, as problems concerning predictability appear to become more manageable if the rule of law is understood as revolving primarily around procedural safeguards.

To the extent that relevant precedents do not dictate a particular outcome in a case at hand, the common law system of adjudication remains sufficiently unpredictable so as to thwart one of the principal objectives of rule through law. Unlike the Continental judge, who follows a previously established rule, the common law judge establishes the applicable rule in the course of deciding a case, and thus the parties to that case cannot know the legal consequences of their acts prior to litigation. Moreover, since it is virtually impossible for many cases to be exactly alike or for any set of relevant precedents to be thoroughly exhaustive, the rule of law based on the common law must always remain somewhat unpredictable.

Common law unpredictability can be mitigated by procedural safeguards or by adherence to certain standards of fairness. These procedural safeguards, often implemented as "due process" guarantees, have been constitutionalized in the American "due process clauses."[52] Due process requires, at a minimum, that cases be decided by impartial judges, that parties have adequate notice and an equal opportunity to present their side of the case, and that trial procedures be designed to maximize the chances of discovering the truth and to minimize the chances of prejudice and oppression. Arguably,

[52] U.S. CONST. amend. V (providing that "no person shall be deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV.

because of these safeguards, even if unpredictable the common law is not akin to the "rule of men."[53]

Fairness, on the other hand, can mitigate unpredictability by providing an assurance that justice will be done by the common law adjudicator even if, in most cases, a person cannot know beforehand the precise legal consequences of his acts. Fairness, however, can play this role only where there is a commonly shared sense of justice and equity within the polity, one that provides a reasonably well unified and integrated common law jurisdiction.

Given these conditions and a commonly shared sense of fairness,[54] the problem of unpredictability may be lessened, ensuring that rule through law will conform to the rule of law. Although the common law tradition is well entrenched in the United States, at present the legal norms issuing from the common law are supplemented by statutory law and the Constitution. As a source of law, the common law has lost much ground to the constitution and statutes; as a legal approach, however, the common law method of reasoning and interpretation remains pervasive.

Unlike the common law, statutes—like civil code provisions—seem well suited to fostering predictability. Moreover, as a body of law, the Constitution seems more akin to a statute than to norms issuing from the common law. To be sure, constitutional

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[53] *See supra* note 23.

[54] For purposes of this discussion it is assumed that the sense of fairness involved is not outcome determinative in a large number of cases. Otherwise, the norms of fairness would allow for a syllogistic system of adjudication and precedents would become superfluous.

provisions are, for the most part, more general and vaguer than statutory provisions. For example, the constitutional guarantees of "due process of law" or "the equal protection of the laws"[55] are much less specific than a statute providing that "no employee earning hourly wages shall be required to work in excess of forty hours per week." Nonetheless, constitutional provisions, like statutes, are imposed on judges who must follow them in their decisions and thus are required to do more than merely harmonize a body of judicial decisions, as would a judge operating in a pure common law environment.

A constitutional provision may be, formally, more like a statute than like an evolving juridical norm extracted from a string of relevant precedents. Paradoxically, however, the pervasive use of common law methodology in constitutional adjudication appears to exacerbate the respective tensions between predictability and fairness and between procedural and substantive safeguards. This can be illustrated by focusing briefly on the U.S. Constitution's due process clause. Like a statute, this clause imposes a legal norm on a judge in contrast to due process norms that judges have gradually developed in the course of elaborating the common law.[56] However, in the course of deploying the common law methodology to ascertain the meanings of the due process clause, judges have identified predictability and fairness as essential components of due process, thereby locating the inevitable tension between the two at the very core of constitutional adjudication. Moreover, these judges have also brought the contrast between procedural and substantive safeguards to the forefront of due process

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[55] *See* U.S. CONST. amend. XIV.

[56] It is interesting in this respect that efforts to establish the meaning of constitutional due process have referred back to the development of due process notions in English common law. *See e.g.*, Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. 272 (1856) (origins of "due process" are found in Magna Carta and its meaning is derived from English statutory and common law).

jurisprudence—by alternating between a purely procedural interpretation of due process and one that is also substantive in nature—but without ever deciding, definitively, on either of these two conceptions.[57]

Leaving to one side whether a purely procedural interpretation of due process is ultimately coherent,[58] the continued, uneasy coexistence of the two conceptions underscores a vexing tension. This tension exists between the less controverted yet probably insufficient "thin" protection afforded by procedural due process and the highly contested, often profoundly divisive, "thicker" protection afforded by substantive due process.[59]

In theory at least, common law adjudication need not involve repudiation of precedents, only their refinement and adjustment through further elaborations. Accordingly, gaps in predictability may be merely the result of indeterminacies; the recourse to notions of fairness are meant primarily to reassure the citizenry that the inevitably unpredictable will never be unjust. Constitutional adjudication, on the other hand, while relying on precedents as part of its common law methodology, must

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[57] The "substantive due process" approach was embraced by the U.S. Supreme Court in *Lochner* v. *New York*, 198 U.S. 45 (1905), one of its most criticized opinions, in which the Court held that the Due Process Clause provided constitutional protection to freedom of contract and private property rights. The *Lochner* doctrine was repudiated during the New Deal, *see Nebbia* v. *New York*, 291 U.S. 502 (1934), and the Due Process Clause has since been interpreted as affording exclusively procedural safeguards in cases involving economic relations. *See* e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955). However, there has been a revival of substantive due process in the realm of personal privacy and liberty rights. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy requires constitutional protection to use contraceptives); *see also* Roe v. Wade, 410 U.S. 113 (1973) (abortion rights).

[58] For a philosophical defense of the argument that procedural justice cannot be coherently separated from substantive justice, *See* Michel Rosenfeld, *A Pluralist Critique of Contractarian Proceduralism*, 11 RATIO JURIS 291 (1998).

[59] The fierce debate provoked by the constitutionalization of abortion rights vividly illustrates this last point. *See* LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES (2d ed. 1992).

ultimately be faithful to the constitutional provision involved rather than to the precedents. As a result, when precedents appear patently unfair or circumstances have changed significantly, the U.S. Supreme Court is empowered—perhaps obligated pursuant to its constitutional function—to overrule precedent, thus putting fairness above predictability.[60]

For example, in its recent decision in *Lawrence v. Texas*,[61] the Supreme Court overruled its 1986 decision in *Bowers v. Hardwick*,[62] which held that the due process clause did not extend constitutional protection to homosexual sex among consenting adults, thus upholding a law that criminalized such conduct. More generally, whenever a constitutional challenge raises a significant question that could entail overruling a constitutional precedent, the Supreme Court faces a choice between predictability and fairness.

American rule of law, like the *Verfassungsstaat*, involves constitutional rule through law, but unlike the *Rechtsstaat* it produces a rule through law where predictability is but one among several, often antagonistic, elements. American rule of law ultimately amounts to a complex, dynamic interplay between competing elements and tendencies. Moreover, it appears, at least initially, that more than the *Rechtsstaat* or the *État de droit*, American rule of law depends for its viability on a broad based consensus regarding extralegal norms, such as fairness and substantive notions of justice

[60] The Court elaborated criteria to determine whether to overrule a constitutional precedent in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992).
[61] 539 U.S. 558 (2003).
[62] 478 U.S. 186 (1986).

and equity. Indeed, if there is a consensus on what constitutes fairness or justice, then the tensions between predictability and fairness, and between procedural and substantive safeguards, seem entirely manageable, and the work of the constitutional adjudicator more legal than political. If, on the contrary, there are profound disagreements over what is fair or just, then the work of the constitutional adjudicator is bound to seem unduly political. Accordingly, at least *prima facie*, the task of the American constitutional adjudicator seems more delicate and precarious than that of her continental counterpart.

Under all three traditions—that of the *Rechtsstaat* (evolving into the *Verfassungsstaat*), that of the *État de droit*, and that of the American rule of law—the constitution is conceived as law and constitutional interpretation is conceived as legal interpretation.[63] Based on the preceding comparison of these three traditions, however, it becomes clear that constitutional law is not law in the same sense in all three of them. In all three, constitutional law is superior law, and the constitutional adjudicator's task is to ensure conformity with such superior law. But because the nature and scope of such superior law is different in each of these three traditions, constitutional adjudication is bound to differ among them.

By enshrining constitutional values and by conceiving of the constitution as framing an objective order as well as protecting subjective rights, the German Basic law

[63] This does not mean, strictly speaking, that all *constitutional* rights and obligations are necessarily *legal* rights and obligations, only that the vast majority are. For example, pursuant to the Political Question Doctrine elaborated by the U.S. Supreme Court, some constitutional guarantees are not legally enforceable. Thus, the Guarantee Clause, U.S. Const. art. IV, § 4, which guarantees every state a republican form of government, has been held nonjusticiable, leaving it up to Congress to define its prescriptions. *See* Baker v. Carr, 369 U.S. 186 (1962).

juridifies values and policies and endows them with the same force of law as that bestowed on those of its provisions that fit within the customary garb of legal rules and legal standards. As a consequence, the legitimate role of the German constitutional judge includes: invalidating, shaping, or reshaping laws to insure conformity with constitutional values; reshaping, extending, or even creating laws in furtherance of the establishment of the objective order prescribed by the Constitution; and, of course, performing the most common and widespread task of constitutional adjudicators, determining whether ordinary laws conform to the law of the Constitution. Just as values and policies are incorporated into German constitutional law, so they seem instilled in American constitutional law, but with one big difference.

In the American context, values and policies cannot be directly linked to the Constitution but, rather, emerge in the broader context of the Constitution as law embedded in the American rule-of-law tradition. Moreover, because of the complexity, tensions, and the multiplicity of sources of law characteristic of the rule of law, the place of values and policies is bound to be much more contested and murkier. Compare, for example, the place of human dignity in the German constitutional order with that of human autonomy in the American. Arguably, human autonomy, interpreted as encompassing broad liberty and privacy concerns, has a place in the American constitutional order that is equivalent to human dignity in the German. Evidence of the constitutional importance of human autonomy in the United States abounds. It is found in many places, such as the expansive free speech jurisprudence, and in the varied and extensive due process jurisprudence, in all its facets, from *Lochner* to *Roe* and *Lawrence*.

Yet, while human dignity is explicitly grounded in article 1 of the German Basic Law, the sources of human autonomy in America are far from obvious, since it has textual roots in the constitution,[64] unenumerated rights roots,[65] common law roots,[66] and also fairness roots.[67]

As a consequence of these distinctive features, for all that the actual differences between German constitutional law and its American counterpart may not be very significant, it is easy to understand that the legitimacy of the American constitutional adjudicator is much more fragile and contested than that of the German constitutional judge.

In France, the advent—through implementation of the *État de droit*—of the constitution as law results from the transformation of the constitution as a set of political constraints into the constitution as a set of legal rules and standards that are to be given priority over the legal rules and standards produced by the Parliament. Thus, prior to the Constitutional Council's landmark 1971 *Association*s *Law* decision,[68] the 1789 Declaration of the Rights of Man and the Citizen and other sources of fundamental rights amounted to directives to the members of Parliament requesting that they not enact laws curtailing the citizens' constitutional rights and freedoms.[69] What the *Associations Law*

[64] Thus, free speech rights are explicitly protected by the First Amendment, and privacy rights in part protected by the Third, Fourth and Fifth Amendments. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
[65] *Id*.
[66] *See id*.
[67] *See Griswold*, 381 U.S. 479.
[68] *See* 1971 *Associations Law Decision* 71–41 DC.
[69] Besides the 1789 declaration, there are other sources of constitutional rights and freedoms, such as the preamble to the 1946 Constitution and "the fundamental principles recognized by the laws of the

decision did was to change the relevant constitutional rights provisions from political directives to hierarchically superior laws. Consequently, the parliamentary law at stake in the *Associations Law* decision was declared unconstitutional because it was contrary to the constitutional prescription that citizens are entitled to freedom of association. In short, the French Constitution has become law, but, at least thus far, law in a narrower sense than the American and German constitutions.

4. Constitutional adjudication and the countermajoritarian problem

In a democracy, parliamentary law is, by its very nature, majoritarian, and the invalidation of parliamentary laws by constitutional judges who are unelected and unaccountable to the electorate, countermajoritarian. So long as constitutions clearly constrain the realm of majoritarian lawmaking, and constitutional judges routinely enforce these constraints, their countermajoritarian role should not be problematic. Given the previous discussion, it would seem that France, with its tradition of the *État légal* in which all law is parliamentary in nature and hence majoritarian, would have the greatest difficulties with countermajoritarian constitutional adjudication. Yet, surprisingly, it is in the United States, where one of the principal aims of the Constitution's framers was to guard against the "tyranny of the majority" through a system of constitutional "checks and balances," that the countermajoritarian issue has been by far the most contentious.

The American concern with the countermajoritarian difficulty is all the more paradoxical because unlike in the United Kingdom or in France, there is no tradition of

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Republic." *See* GEORGES BURDEAU, FRANCIS HAMON & MICHEL TROPER, DROIT CONSTITUTIONNEL 704–05 (25th ed. 1997).

parliamentary sovereignty in the United States. Not only is the power of the judiciary equal to that of the legislature, but, as already mentioned, judicial lawmaking has deep roots in the common law. Moreover, judicial countermajoritarianism would seem to fit well within a constitutional system of checks and balances pitting the federal electorate's majority against the various majorities in the several states, and, within the federal level of representation, congressional majorities against the majority represented by the president. Indeed, though countermajoritarian, judicial power provides yet another check on potentially runaway majority powers.

The reason that countermajoritarian constitutional adjudication can be a problem stems from its status as a check that is itself unchecked. Whereas in statutory adjudication the legislator can overcome unwarranted judicial interpretations through further legislation,[70] the only available remedy against aberrant or abusive constitutional adjudication is to amend the Constitution, which is extremely difficult in the United States.[71] As those preoccupied by the countermajoritarian difficulty note, the Constitution establishes majoritarian rule as the norm—granted, different majorities may compete against one another or divide the realm of democratic lawmaking among themselves—while making antimajoritarian constitutional constraints the exception.[72] For example,

[70] For example, the U.S. Congress enacted the Civil Rights Act of 1991 in part to overcome U.S. Supreme Court statutory interpretations with which it disagreed. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2 (2), 3 (3) (explicitly repudiating Court's interpretation in *Wards Cove Packing Co., Inc*. v. *Atonio*, 490 U.S. 642 (1989)).

[71] *See* U.S. CONST. art V. The most used path to amendment requires a two-thirds vote in each of the houses of Congress followed by ratification by three quarter of the state legislatures. In sharp contrast, amending the constitution in France or Germany requires a far less onerous process, though the German Basic Law contains some unamendable provisions. *See* German Basic Law art. 79 (3).

[72] *See* BORK *supra* note 9, at 146–47.73 *See* U.S. CONST. art. I, § 8, cl 3.

although the U.S. Congress is empowered to regulate commerce among the states,[73] it cannot ban the interstate transportation of books critical of the president as that would violate constitutionally protected free speech rights.[74]

In such a clear cut case, even those who emphasize the countermajoritarian difficulty agree that judicial invalidation of a popular law is entirely appropriate but where the constitutional proscription is not clear, they argue that judges should err on the side of democracy and refrain from striking down laws.[75] Thus, strictly speaking, the countermajoritarian objection has less to do with unchecked judicial power itself than with the problem of confining that power to a narrow range of clear cases. That restrictive view of the judge's legitimate role, however, runs counter to the habits instilled through the use of the common law methodology. The Constitution sets up a system of democratic lawmaking whereby the appropriate majority through the enactment of statutes can supersede substantive common law rules and standards. The Constitution itself is ultimately akin to a statute, albeit one issuing from a constitutional as opposed to an ordinary legislator, but its many general, broadly phrased provisions, as w ell as its incorporation of certain common law standards, make it particularly suited to interpretation by a common law approach. Thus the countermajoritarian difficulty is made more acute because, although the Constitution is set up as a statute, its broad terms and judicial practice seem to conspire to transform it into a special extension of the common law.

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[73] *See* U.S. CONST. art. I, § 8, cl 3.
[74] *See* U.S. CONST. amend. I.
[75] *See* BORK *supra* note 9, at 264–65.

Similar difficulties are largely absent in other jurisdictions. In Canada, the countermajoritarian difficulty is largely absent, since the problem of the unchecked check is obviated by section 33 of the Constitution,[76] which in many cases authorizes a legislative override of a Supreme Court constitutional ruling.[77] In France and Germany, on the other hand, there seems to be little concern about a countermajoritarian difficulty, though these two countries, along with the other constitutional democracies in the European Union, confront a far greater "democratic deficit" than could be conceivably created by the American judiciary.[78] This deficit stems from the lack of democratic accountability of the EU institutions that have lawmaking powers. It is further exacerbated through decisions of the European Court of Justice, which are binding on the judiciary of the member states and require member states to set aside laws that are inconsistent with Union law as interpreted by the European Court of Justice.[79]

The constitutional adjudicator in France and Germany invalidates popular laws it deems unconstitutional just as the American adjudicator does. But, in addition, the French and German judiciary must subordinate democratically adopted domestic law to democratically deficient Union law as interpreted by a supranational court. Accordingly, one might logically expect that France and Germany would experience a far greater emphasis on the countermajoritarian difficulty than the United States. And yet they do not—at least not when it comes to constitutional adjudication.

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[76] *See* Canada Constitution Act of 1982, § 33.
[77] Decisions in certain subject-areas, such as freedom of speech, cannot be overridden. In the vast number of permissible subject-areas, however, both the federal and the various provincial parliaments have the right to override. *See id.*
[78] *See, e.g.*, Joseph H.H. Weiler, *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219 (1995).
[79] *See, e.g.*, Case 26/62, Van Gend & Loos v. Netherlands Inland Revenue Service, 1963 E.C.R. 1, [1963] 2 C.M.L.R. 105 (1963).

Several reasons account for this seeming discrepancy. First, as far as the democratic deficit involving the EU is concerned, it is above all a legislative and administrative deficit and not a judicial one. Thus, while the countermajoritarian problem in the United States lies squarely with judges as constitutional adjudicators, the European judge—whether she be on the Union's Court of Justice or on a member state's constitutional or ordinary court—interprets and applies undemocratic Union law. Accordingly, any countermajoritarian difficulty would much more likely concern the law itself rather than its judicial interpretation.

Second, when the constitutional adjudicator in France or Germany strikes down a law as unconstitutional she frustrates the polity's legislative will just as much as the U.S. Supreme Court when it does the same, but there is a major difference in the European and American situations. Because, as already mentioned, the constitutions of France and Germany are far easier to amend than that of the United States, the effects of judicial invalidation of popular laws are far less drastic.[80] Thus the situation in France and Germany falls somewhere between the state of affairs prevailing in Canada and that of the United States. In France and Germany, decisions of the constitutional judge cannot be

[80] In France, for example, amending the constitution to overcome an invalidation of a law by the Constitutional Council is a smooth process that has often been used. For example, after the Constitutional Council found certain provisions of the European Union Amsterdam Treaty unconstitutional, *see* 97-394 DC of 31 Dec. 1997), the French Constitution was amended and the Treaty ratified. *See* NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 65, fn 1 (2003). In contrast, in the United States, while there are calls for constitutional amendments after many controversial Supreme Court decisions, these usually fail. For example, after the Court's decision recognizing a right to abortion in *Roe* v. *Wade*, 410 U.S. 113 (1973), there were many attempts to amend the constitution, but none were successful. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 531 (14th ed. 2001). Moreover, although Germany has some unamendable constitutional provisions, *see supra* note 72, in the case of those provisions any countermajoritarian difficulty would have to be ascribed to the constitution itself rather than to judicial interpretation.

overcome through simple majoritarian means as is possible in Canada, but they can be overcome through regularly achievable supermajoritarian means. Accordingly, constitutional adjudication in France and Germany is often not the final word as it is in the United States, where it confronts nearly insurmountable supermajoritarian hurdles.

Third, because of the civil law tradition and its syllogistic model of adjudication, European constitutional adjudication seems in little danger of proving excessively countermajoritarian. As already mentioned, the countermajoritarian difficulty in the United States stems less from the judicial vindication of antimajoritarian rights than from the danger that judges, nurtured on the broad and open-ended common law approach, will trample on majoritarian laws much more than is constitutionally necessary. From a theoretical standpoint, at least, civil law constitutional adjudicators should be much less likely to exceed their narrow constitutional antimajoritarian mandate, given their roots in a deductive system of judicial interpretation. From a practical standpoint, however, there may be little difference in the degree of discretion available to a common law judge, applying a broadly phrased constitutional provision, and a civil law judge, addressing equally general constitutional provisions. Significantly, however, because of the different traditions involved, criticism of a civil law constitutional judge who appears to have gone too far is not likely to be on countermajoritarian grounds but, rather, on something different, such as the application of "supraconstitutional" norms.[81] In other words, the accusation against the European constitutional judge is not that he has taken lawmaking into his own hands but, instead, that he is applying certain legal norms not explicitly

[81] This is an accusation made against the French Constitutional Council. *See* Louis Favoreu, *Souveraineté et Supra Constitutionalité*, 67 Pouvoirs 71 (1993).

within the constitution as if they were valid supraconstitutional norms, and then deducing from the latter conclusions that may not be derived from the applicable constitutional norms.

5. Constraining the constitutional adjudicator through canons of interpretation: The divide over originalism

One way to counter the dangers of excessive countermajoritarianism is through the imposition of constraints on the constitutional adjudicator. In the United States, "originalism" has been offered as the solution, which means looking to the original intent of the framers of the Constitution to resolve all interpretive issues that cannot be settled through a reading of the constitutional text.[82] In Europe, however, recourse to originalism is virtually nonexistent.[83] This contrast may seem paradoxical on first impression. Would it not be more reasonable to expect greater reliance on original intent in Spain, where the current Constitution is barely twenty-five years old, than in the United States, where the Constitution is almost 220 years old? That is to say, is not the intent of the constitutional legislator more relevant if the latter shares a contemporary perspective with the judges who must interpret the constitution and the citizens who must live with the consequences of those interpretations?

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[82] *See e.g.*, BORK *supra* note 9 at 143–60.

[83] Even though there may be no reference to originalism, some European attacks on constitutional interpretation may be characterized as being originalist in substance even if not in form. For example, 1971 *Associations Law Decision* 71 – 41 DC, can be criticized as creating an unwarranted expansion of the Constitutional Council's jurisdiction beyond the role reserved for it by De Gaulle's 1958 Constitution, namely to act exclusively as a referee on questions of division of powers between the Parliament and the President. *See* STONE, *supra* note 4 at 48. Nonetheless, in Europe even implicit references to originalism in substance are quite rare.

A closer look at the reasons for the importance of originalism in the United States, and at the practical implications of the theoretical controversy over originalism, reveals that the main concern is not with the democratic legitimacy of judicially enforced constitutional constraints, as suggested above. If it were, the constitutional legislator's intent would be relevant because it represented the will of the majority (or of the requisite supermajority, in the case of the constitutional legislator) and because democratic rule through law required that judges refrain from interpreting laws in ways that frustrate the will of the majority. When the constitutional legislator is a contemporary of the constitutional interpreter, that argument may be persuasive, but it seems less so as increasing numbers of generations separate the constitution's framers from its judicial interpreters.[84]

The American preoccupation with originalism arises not from a concern over the enduring legitimacy of the Constitution itself but, rather, from a concern over the democratic legitimacy of subjecting majoritarian laws to constitutional review. Indeed, when viewed in the context of the Constitution, strictly speaking, originalism is based on a perception of the constitution as a quasi-sacred text[85] and as a statute, rather than as an evolving set of broad principles to be elaborated through a common law–style process of accretion. Originalism, it might be argued, is premised on a belief that the framers had quasi-divine attributes that justify deference to their extraordinary wisdom and authority. Moreover, insofar as the Constitution should also be treated as a statute, the judges

[84] Consistent with this, the eighteenth century framers can only be said to express the majority or supermajority will of twenty-first century Americans in the *negative sense* that the latter have not mobilized to replace the 1787 constitution. 82 *See e.g.*, *See* BORK *supra* note 9 at 143–60.
[85] *See e.g.*, Sanford Levinson, *"The Constitution" in American Civil Religion*, 1979 S. CT. REV. 123.

interpreting it should be bound by its text and the intent of its authors as opposed to having great latitude to mold it in accordance with the broad standards embodied in the common law. Further, these two reasons for embracing originalism are mutually reinforcing. Not only does statutory interpretation require fidelity to the intent of the legislator but the constitutional legislators' extraordinary wisdom makes fidelity to their intent the optimal means of achieving the common good. On the other hand, if, as in Europe, constitutions are not regarded as quasi-sacred texts, and statutory interpretation is not seen to be vulnerable to common law judicial lawmaking, then there seems little need to resort to originalism.

American originalism has competed with many rival theories of constitutional interpretation. All of them attempt to reconcile the Constitution as a superior law, having statute-like properties, with the common law approach and tradition. Each of them also seeks to offer a solution to the countermajoritarian problem. Moreover, since there is a great deal of congruence between the way American and European judges actually go about the task of constitutional interpretation, this raises the question of why there are far

greater doubts expressed in t he U.S. regarding the legitimacy of judicial interpretation of the Constitution than are heard in Europe.

The American debate goes back to the beginning of constitutional interpretation in the United States.[86] At that time, Supreme Court justices differed over whether the constitution should be subordinated to natural law—or natural rights—principles, or

[86] *See* Calder v. Bull, 3 U.S. 386 (1798).

whether it should subjected to a positivistic approach, faithful to its provisions and understood as forming part of a unified and coherent legal code.

The latter view has prevailed and the Constitution has become firmly entrenched as the highest law of the land.[87] Nevertheless, the debate among proponents of these two positions has been recast as a debate over the legitimate means of constitutional interpretation when the constitutional text is open-ended or is not plainly outcome-determinative. In such cases, natural law or natural rights notions have been used to fill textual gaps and to shape the meaning of broadly phrased, open-ended constitutional provisions. Conversely, textualism and originalism can be viewed as the interpretive tools of constitutional positivism. Under the most extreme version of this view, the constitutional judge is confined to the "plain meaning" of the text and clear intent of the constitutional legislator, and if neither of these, individually or in combination, imposes an unequivocal solution to the constitutional problem at hand, then the judge ought to uphold the majoritarian law.[88]

In the broadest sense, originalism is one of the three principal approaches to constitutional interpretation elaborated in the shadow of the countermajoritarian difficulty. The other two approaches may be characterized, respectively, as the "principle-based" approach and the "process-based" approach. Originalism and the principle-based approach agree that constitutional adjudication is countermajoritarian but nonetheless legitimate so long as judges remain within proper bounds of interpretation.

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[87] *See* SULLIVAN & GUNTHER *supra* note 81, at 454.
[88] *See generally* BORK *supra* note 9.

What divides them, however, is that they carve out a legitimate domain for the constitutional judge very differently. The process-based approach, in contrast, does not regard constitutional adjudication as inherently countermajoritarian but, rather, as an adjunct to democratic rule, providing a corrective safeguard to majoritarian processes that have gone astray.

Originalists purport to constrain judges by demanding consistency with the intent of the framers. Principle-based theorists purport, for their part, to constrain judges to decide cases according to the dictates of principles that have been (according to them) enshrined in the constitution.[89] On the other hand, according to the most eminent process-based theory, that of John Hart Ely,[90] judicial interpretation of the U.S. Constitution can be justified, generally, as a means of safeguarding the integrity of the democratic process.

Specifically, Ely argues that most of the Bill of Rights provisions are process based. For example, protection of free speech rights is essential to maintaining an informed electorate, and thus judges in deciding free speech cases are safeguarding the democratic process rather than engaging in policy making. Moreover, if free speech decisions are considered process-enhancing, then equality decisions are deemed to be process-corrective, since racist laws stem from undue prejudice rather than from genuine policy differences.

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[89] *See e.g.* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981) (arguing that U.S. Constitution embodies liberal egalitarian principles).
[90] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

None of these approaches has dealt successfully with the countermajoritarian difficulty or with the broader issues concerning the legitimate bounds of constitutional interpretation. This failure is due to both internal and external reasons. From an external standpoint, the principle-based approaches, predicated on morals or public policy, will necessarily diverge from originalist solutions. Finally, the very possibility of a coherent process-based approach has been vigorously challenged.[91] For example, what kind of and how much free speech is necessary to ensure that an electorate be adequately informed so as to best fulfill its democratic function? Should free speech be confined to political speech? To all forms of expression, including pornography, as they may all have political implications? For many, these questions cannot be answered without reference to substantive notions of democracy and of democratic will-formation. And consistent with this, there cannot be a purely processbased understanding of free speech rights.

Internal reasons also prevent these approaches from fostering a consensus on the legitimate bounds of constitutional interpretation. Thus, proponents of principle-based approaches by no means agree on *which* principles should inform constitutional interpretation. For example, the Supreme Court's decisions in *Lochner*,[92] which interpreted the Fourteenth Amendment's due process clause as enshrining private property and freedom of contract rights, clearly evinces a principle-based approach. But the principles involved are libertarian ones that are, to a large extent, at odds with the

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[91] *See, e.g.*, Dworkin *supra* note 90 (criticizing Ely's theory for depending on one of many theories of democracy, all of which ultimately depend on a substantive political vision); Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (arguing that even most procedural rights included in the Bill of Rights, such as those of criminal defendants, only make sense in the context of a broader substantive vision).

[92] Lochner v. New York, 198 U.S. 45 (1905).

liberal egalitarian principles invoked by Dworkin.[93] Similarly, there are deep internal divisions within the originalist camp.[94] Beyond serious questions concerning the actual intent of the framers in light of the paucity of reliable sources concerning their debate, there are several key disagreements with wide-ranging implications. For example, whose original intent? The framers or the ratifiers? Specific intent or general intent?[95] Significantly, it is even claimed that the framers' intent was that their intent be ignored by subsequent generations of constitutional interpreters.[96] There is nothing comparable to the American debate concerning judicial review and constitutional interpretation in continental Europe. Moreover, the case of Germany is particularly striking, as its Constitutional Court is even more activist than the U.S. Supreme Court. As Dieter Grimm, a former justice on the German Constitutional Court, emphasizes, " . . . the counter-majoritarian difficulty, the perennial problem of American constitutional law, plays no role in Germany. Criticism of [the German Constitutional court] usually concerns individual opinions, not the legitimacy of the courts or even that of judicial review in general."[97] This does not mean that there is no debate in Germany,[98] and there seems to be even more of a debate in France.[99] Nevertheless, these debates have nothing of the scope or intensity of the American debate.

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[93] Libertarians oppose any redistribution of wealth whereas liberal egalitarians require some such redistribution. For an account of this contrast in the realm of political philosophy *compare* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974) *with* JOHN RAWLS, A THEORY OF JUSTICE (1971).
[94] *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).
[95] For example, the eighteenth century framers of the Free Speech Clause, *see* U.S. CONST. amend I, could not have foreseen the advent of television. Therefore, it may have been their general, but not their specific, intent to protect speech over the airwaves.
[96] *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that while the framers were textualists, they were not originalists; rather, they expected subsequent generations to adapt the constitution to their own needs).
[97] Dieter Grimm, German and American Constitutionalism, Address before The American Academy in Berlin (May 4, 2003) (text on file with author).
[98] *See e.g.*, Schlink, *supra* note 27.
[99] *See* Rousseau, *supra* note 5, at 261.

For all the differences at the levels of theory and ideology, when it comes to the practice of constitutional adjudication, there are remarkable similarities between the United States and Europe, or at least Germany. Viewed from the standpoint of the types of arguments made in constitutional cases by advocates and by judges in giving reasons for their decisions, the American and German practices are, in most relevant respects, largely similar. A survey of constitutional decisions by the U.S. Supreme Court reveals the use of five kinds of arguments: 1) arguments from the text; 2) arguments from the framers' intent; 3) arguments from constitutional theory; 4) arguments from precedents; and 5) value arguments.[100] In Germany, four kinds of arguments are prevalent: 1) grammatical arguments; 2) historical arguments; 3) systematic arguments; and 4) teleological arguments.[101]

American arguments from the text are equivalent to German grammatical arguments because they both rely on textual analysis. Since the text of the Constitution is rarely determinative in cases involving major constitutional issues,[102] arguments from the text must be combined, in most cases, with other arguments to justify a particular decision. And this is true in both Germany and the United States.

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[100] *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).
[101] *See* Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View*, 42 AM. J. COMP. L. 395 (1994).
[102] For example, the text of the U.S. Equal Protection Clause neither requires nor forbids racial segregation, *see Plessy* v. *Ferguson*, 163 U.S. 537 (1896), or race-based affirmative action in university admissions, *see Grutter* v. *Bollinger*, 123 S. Ct 2325 (2003).

American arguments from the framers' intent have much in common with German historical arguments, though the two are not equivalent. Both of these look to past understandings of the relevant constitutional provisions when called upon to interpret these to resolve a current constitutional challenge. The difference between the two is that arguments from the framers' intent occupy a much higher position in American constitutional interpretation than do historical arguments in German constitutional interpretation. Indeed, whereas arguments from the framers' intent are to be given greater weight than arguments from precedents or value arguments,[103] German historical arguments are given no greater weight than any of the other kinds of arguments used in constitutional interpretation. The practical effect of this clear difference is, however, quite limited. This is because arguments from the framers' intent have very rarely been decisive in major American constitutional cases.[104] Arguments from constitutional theory in the United States are essentially equivalent to systematic arguments in Germany. They both place the constitutional text at issue in the case at hand in its broader context within the constitution and interpret it from the premise of the constitution as a systematic and coherent unified whole.

There is also much congruence between American value arguments and German teleological arguments. Teleological arguments are purposive ones, and they foster an interpretation of the Basic Law and its provisions according to the purposes for which

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[103] *See generally* Richard H. Fallon, Jr., *supra* note 100, at 1194.

[104] For example, arguments from the framers' intent do not account for the decisions in such landmark cases as *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Brown* v. *Board of Education*, 347 U.S. 483 (1954), *Lochner* v. *New York*, 198 U.S. 45 (1905), *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) or *Roe* v. *Wade*, 410 U.S. 113 (1973). It is fair to claim that arguments based on the framers' intent have had scant influence on the vast majority of Supreme Court decisions in leading cases on separation of powers, federalism and fundamental rights.

constitutional rule was established in Germany. Since, to an important extent, such purposes include the promotion of fundamental values, such as human dignity, teleological arguments often result in interpretations seeking to achieve conformity with a particular value. In the United States, value arguments are those that "appeal directly to moral, political or social values or policies."[105] In Dworkinian terms, value arguments are those that are premised on either principle or policy. Thus, if the constitutional judge is confronted with two plausible alternatives, only one of which is morally compelling, then that judge ought to make the available moral value argument decisive.[106]

The principal difference between American value arguments and German teleological arguments is that whereas the values involved in the German context are internal to the Basic Law, those at stake in the American context are, by and large, external to the Constitution. For example, there is no reference to abortion in the U.S. Constitution and arguments for and against abortion rights tend to refer to general moral precepts debated within American society at large rather than clearly embedded in the constitutional text.[107] In Germany, in contrast, though there is also no reference to abortion in the Basic Law, the Constitutional Court has evaluated claims to a right to abortion in terms of the values of human dignity explicitly constitutionalized in article 1 of the Basic Law.[108]

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[105] *See* Richard H. Fallon, Jr., *supra* note 101, at 1204.
[106] *See, e.g.*, *Griswold*, 381 U.S. 479 (Harlan, J., concurring) (due process interpreted as protecting fundamental value of marital privacy).
[107] *See, e.g.*, TRIBE, *supra* note 60 (2d ed. 1992).
[108] *See Abortion I Case*, 39 BVerfGE 1 (1975).

The principal difference between the two practices is that arguments from precedents are used in the United States, but not in Germany. On closer inspection, however, even this difference is not all that important. First, although the German Constitutional Court is not bound by precedent, out of a concern for its institutional integrity, it tends to follow its past decisions as if they had precedential value.[109] And, second, although the U.S. Supreme Court tends to follow constitutional precedents, it does not do so slavishly and on many occasions has reversed itself.[110]

In the final analysis, the most relevant practical difference between the United States and Germany, with reference to the legitimacy of constitutional interpretation, derives from the greater weight given to arguments based on the framers' intent than to historical arguments. A difference of another sort stems from to the fact that, in the U.S., the values in value arguments are external to the Constitution, rather than internal, as is the case with German teleological arguments. Of these two differences, the latter seems more important, considering the vast disagreements within the United States over the significance of the framers' intent. Undoubtedly, if a constitution explicitly embraces a value, constitutional interpretation shaped by that value ought to be less subject to contest than constitutional interpretation deriving from contested values external to the constitution. But the difference may not be great. Even if the value of human dignity is constitutionally enshrined, there may still be genuine differences over what its

[109] See *supra* note 15.
[110] For example, as mentioned above, *Lawrence v. Texas*, 539 U.S. 558 (2003) overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and as mentioned below, *Adarand Constructors Inc*. v. *Peña*, 515 U.S. 200 (1995), overruled *Metro Broadcasting* v. *FCC*, 497 U.S. 547 (1990).

implications ought to be in a particular case.[111] Conversely, there may be a strong consensus in the United States about certain external values, such as fairness, liberty, or privacy, even when there is disagreement as to what these require in particular cases. In any event, it does not seem that these two differences, as noted here, can by themselves account for the vast gulf that separates the United States from Germany with respect to the legitimacy of constitutional interpretation.

Before further assessing what may account for the differences between European countries, such as France and Germany, and the United States, reference must be made to a last difference that looms large in theory and in tradition, but has come to be minimized in actual practice. That is the difference, discussed at the outset,[112] between the civil law approach to adjudication and that of the common law. Potentially, this difference could be enormous in the context of the legitimacy of constitutional interpretation. If the European constitutional adjudicator were to adhere to the civil law ideal of a purely deductive model of legal interpretation, then American preoccupations with the countermajoritarian difficulty, and concern over the adoption of illegitimate canons of constitutional interpretation, would be completely irrelevant in Europe. The practice of constitutional interpretation in Europe has increasingly veered away from the deductive model, however, and is today not much different from that employed by American judges.[113] Indeed, as European constitutional judges must apply broad values, like human dignity, or interpret general and open-ended constitutional liberty or equality provisions,

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[111] See *infra* p. 6403.
[112] See *infra* pp. 635–37.
[113] *See, e.g.*, Rousseau, *supra* note 5 (discussing role of the constitutional judge in France); Schlink, *supra* note 27 (discussing broad powers, including policy-making powers, of the German Constitutional Court).

they cannot rely on the kind of syllogistic reasoning that may be appropriate in the application of a concrete and detailed provision of the civil code. In short, the more that European constitutional judges must look to history, values, and broad principles to resove constitutional cases, the more their actual work of interpretation is likely to resemble that of their American counterparts.

6. Assessing the differences between American and European attitudes regarding constitutional adjudication

Based on the preceding analysis, the differences between American and European attitudes toward constitutional adjudication stem, in part, from structural and institutional factors and, in part, from contextual factors. More precisely, the differences derive from contextual factors interacting with structural and institutional ones. Each system of constitutional adjudication discussed above has its own structural and institutional strengths and weaknesses. Crises concerning legitimacy are most likely to occur when contextual factors exacerbate these weaknesses. Conversely, the greatest sense of legitimacy is likely to prevail when contextual factors reinforce structural and institutional strengths.

If crises in legitimacy were primarily a function of the power wielded by the constitutional adjudicator, problems of legitimacy should loom larger in Germany than in the United States, since the German Constitutional Court clearly surpasses the U.S.

Supreme Court in its power and reach.[114] On the other hand, given France's traditional mistrust of judges, and the fact that substantive constitutional adjudication was introduced by fiat of the Constitutional Council rather than by constitutional design,[115] one would expect France to be—institutionally, at least—much more susceptible than the United States to crises of legitimacy regarding constitutional adjudication.

That the crisis in legitimacy is greater in the United States than in either France or Germany is due, above all, to the fact that the United States is currently deeply divided politically. This is evinced by the closeness of the 2000 presidential election and its bitter aftermath, as well as by the prevalence of contentious politics for most of the period since that election.[116] Moreover, this political division within the country came on the heels of a period of controversy within the Supreme Court, resulting in a series of contentious 5–4 decisions.[117] These two trends actually converged in the Court's decision in *Bush v. Gore*[118] in which, by what was in effect a 5–4 decision, the Court settled the election in favor of Bush in what many consider an unprincipled, mainly political decision.[119] The

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[114] *See* Dieter Grimm, *supra* note 98.
[115] *See supra* note 37.
[116] The one notable exception was a short period following the September 11, 2001 terrorist attacks on New York and Washington. That period ended, however, once the drastic measures adopted to root out terrorism became highly contested as posing a severe threat to fundamental rights and to constitutionally prescribed checks and balances. *See e.g.*, *Online News Hour: Shields and Brooks.* Jan 21, 2004, http://www.pbs.org/newshour/bb/political_wrap/jan-june04/sb_01–21.
[117] *See e.g.*, United States v. Lopez, 514 U.S. 549 (1995), Alden v. Maine, 527 US 706 (1999), Kimel v. Florida Bd. of Regents, 528 US 62 (2000), and US v. Morrison, 529 US 598 (2000). 118 531 U.S. 98 (2000).
[118] *See* U.S. CONST. art. I, § 8, cl 3.
[119] *See* Michel Rosenfeld, *Bush v. Gore: Three Strikes for the Constitution, the Court and Democracy, But There is Always Next Season, in* THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000 111 (Arthur Jacobson & Michel Rosenfeld, eds. 2002) (distinguishing between "judicial politics" that are inevitable and "plain politics" in which Court's majority appears to have engaged as it departed from established positions developed over a long series of opinions to reach a result that squared with their apparent political leanings). The decision did have its defenders. But even among these, its virtue lay in its having put an end to an unsettling and potentially disruptive crisis, not in the soundness of its constitutional analysis. *See, e.g.*, Charles Fried, *A Response to Ronald Dworkin, ABadly Flawed Election, in id.*

current divisions not only revolve around interest-group politics but also around something deeper, namely, what Justice Antonin Scalia has characterized in bitter dissent as a *Kulturkampf*.[120] On one side are feminists, gay activists, environmentalists, zealous defenders of abortion rights and affirmative action, and the like; on the other, religious fundamentalists, defenders of traditional family values, and vehement opponents of abortion rights and of affirmative action. Because there is often no middle ground between the two groups, as the vehemence of their mutual antagonism increases it threatens to provoke a split in the country's identity. Furthermore, since most of these divisive issues end up before the Supreme Court, and since the Constitution has played a major role in shaping the country's national identity, constitutional adjudication is at the forefront of the culture wars and of the struggle over the nation's evolving identity.

This deep division exacerbates the tension between the Constitution as a species of statutory law and the common law tradition. Indeed, while this tension may play an important positive role when there is a consensus on fundamental cultural and societal values, it looms as the Achilles' heel of the American system of constitutional review when that consensus breaks down. In times of solid consensus, the common law tradition and the role of the constitutional adjudicator as mediator between the state and the citizen can cement a sense of fundamental fairness even in the face of vigorous differences at the level of interest-group politics. However, when consensus breaks down, as seems to be the case at present, the constitutional adjudicator cannot help but take sides and thus cannot foster harmony, whether he or she stands on the side of the state or on that of the citizen. For example, when the constitutional adjudicator strikes down popular laws that

[120] *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J. dissenting).

outlaw or restrict abortion or gay rights, he or she will be regarded by some as protecting citizens against state oppression, but by others as undermining the very social fabric of the polity by arbitrary fiat. Moreover, the fact that the Constitution does not explicitly address these issues aggravates the problem and contributes to a further erosion of the legitimacy of constitutional interpretation. To be sure, specific constitutional provisions granting or denying abortion rights or gay rights would not be likely to heal the existing divisions over these issues. But they would undoubtedly shift most of the existing frustration and resentment away from the courts.

The differences between the German and American attitudes toward constitutional adjudication are due to a number of factors. As widely noted, German society is more paternalistic and less individualistic than American society, and there is in post–World War II Germany a disenchantment with politics that bolsters the legitimacy of the constitutional judge.[121] There are also two institutional differences between the two countries that account, in some measure, for the greater acceptance of constitutional adjudication in Germany. One such difference, already mentioned, is the relative ease of constitutional amendment in Germany.[122] For example, while affirmative action remains in the United States a highly contentious issue that has yielded a series of closely divided and often contradictory Supreme Court decisions over a twenty-five year period,[123] in

[121] *See* Dieter Grimm, *supra* note 98.
[122] *See supra* note 72.
[123] *See e.g.*, Adarand Constructors Inc. v. Peña, 515 U.S. 200 (1995) (overruling Metro Broadcasting v. FCC, 497 U.S. 547 (1990)).

Germany the constitutional legitimacy of gender-based affirmative action has been settled through an amendment of the Basic Law.[124]

The second important difference concerns the appointment of judges entrusted with constitutional adjudication. In Germany, appointment requires a two-thirds vote in parliament, which cannot be achieved without a consensus among the major political parties.[125] In the United States, in contrast, appointment of a president's nominee requires a simple majority vote in the Senate. In times of great division, with the Senate almost equally divided among Democrats and Republicans, as is the case now, divisive nominees may squeak by on a strictly partisan basis or become blocked—leaving many vacancies on the federal courts unfilled—or be appointed without Senate confirmation in a recess appointment.[126]

Beyond these institutional differences, and given the great power of the German Constitutional Court, the most important difference between the countries is the far greater consensus in Germany concerning the fundamental values behind, and inherent

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[124] *See* 1994 amendment to Art. 3 GRUNDGESETZ [G.G.] [constitution] art. 3 (F.R.G) (amended 1994).
[125] *See* Dieter Grimm, *supra* note 98.
[126] *See* "Bush puts Pickering on appeal court: Bush bypasses democrats who had blocked judge," (Jan. 16, 2004) *available at* http://www.cnn.com/2004/LAW/01/16/bush.pickering.ap/ Blocked Bush nominees have included Texas judge Priscilla Owen, lawyer Miguel Estrada, California judges Carolyn Kuhl and Janice Rogers Brown. *See also* "Bush Dumps Clinton Nominees," (Mar. 20, 2001) *available at* http://www.cbsnews.com/stories/2001/03/20/politics/printable280123.html, listing candidates whose names were withdrawn from consideration: Bonnie Campbell, Enrique Moreno, Kathleen McCree-Lewis (nominated for 6th Circuit), James Duffy (for 9th Circuit), North Carolina State Court of Appeals Judge James A. Wynn (for 4th Circuit), Helene White (for 6th Circuit), Barry P. Goode of Richmond, Calif. (for 9th Circuit), H. Alston Johnson III (for 5th Circuit), and Sarah Wilson (U.S. Court of Claims).

in, constitutional rule under the guidance of the constitutional adjudicator. It is an attitude encapsulated in the German citizenry's commitment to "constitutional patriotism."[127]

Substantive constitutional adjudication is on much shakier ground in France than in Germany or the United States. Paradoxically, that may account, to some degree, for why there is less of a crisis of legitimacy in France than in the United States. There is a debate in France over whether the Constitutional Council is a genuine constitutional court,[128] and over the scope of its legitimate responsibilities. Moreover, this debate is going on within the Council as well as without.[129] According to one side, the Council is an extension of the political branches and as such its proper role is political. According to the other, it is more akin to a court, and its role is judicial. Another reason why the legitimacy of constitutional adjudication is a less contentious issue in France than in the United States is that the French Constitution is easy to amend.[130] A third reason is the prominent role played by supranational constitutional norms binding France to international tribunals such as the European Court of Human Rights and the European

[127] *See* Dieter Grimm, *supra* note 98.
[128] *See* STONE SWEET, *supra* note 4 at 48 (stating that the government never considered the Council to be a court). The constitution does not provide for interaction between the Council and judicial system and unlike other continental constitutional courts, there is no prerequisite of prior judicial service or minimum requirements of legal training. The 1958 constitution does not mention the Council in its chapter on "judicial authority" but rather sets it apart in its own chapter. *Id.*
[129] For example, Robert Badinter, who was president of the Council from 1986 to 1995, envisioned it as a full-fledged constitutional court whereas a later president, Yves Guéna, saw its institutional mission in much narrower terms. *See* DORSEN, ET AL., *supra* note 81, at 130.
[130] *See* FR. CONST. art. 89 (1958). For example, just as in Germany, France amended its constitution to make room for gender-based affirmative action. In the *Feminine Quotas Case*, 82-146 DC of Nov. 18, 1982, the Constitutional Council held feminine quotas unconstitutional under article 3 of the Constitution. In 1999, articles 3 and 4 of the Constitution were amended to reverse the 1982 decision. After that amendment, a law requiring overall parity between the sexes, 50–50, on certain party election candidate lists was enacted by the Parliament. In its decision 2000-429 DC of May 30, 2000, the Constitutional Council upheld that law with minor exceptions.

Court of Justice.[131] For example, France was forced to recognize a right of privacy with regard to phone tapping as a consequence of the European Court of Human Rights ruling that it was in violation of privacy rights protected under the European Convention of Human Rights.[132]

Even though such norms represent European or European Union standards and may or may not be supported by a substantial majority of the French citizenry, conflicts over them are unlikely to be focused on the French constitutional adjudicator. Moreover, even if the latter relied on such norms to settle a question under French constitutional law, there would be little incentive to seek a reversal if the norms in question most likely would be imposed eventually by the European courts.

Beyond these relevant institutional differences there seems to be a much broader consensus regarding the contours of fundamental rights in France and Germany—and, for that matter, throughout Western Europe—than in the United States. Perhaps the best example is the wide variation in attitudes toward the death penalty. The abolition of the death penalty throughout Europe has often been initiated "from above" and, in several cases, as a precondition to coveted admission to the Council of Europe or the European Union rather than out of conviction.[133] Nonetheless, there now seems to be a solid consensus throughout Europe against the use of the death penalty. In contrast, the death

[131] Technically, the norms involved are treaty-based norms whether they derive from the European Convention on Human Rights or the various treaties among the members of the European Union. From a substantive standpoint, however, many of the treaty-based norms involved have all the attributes of legally enforceable constitutional norms.
[132] *See* Kruslin v. France, 12 Eur. H.R.Rep. 547 (1990).
[133] *See* Alkotmánybiróság (Hung. Const. Ct.) Decision 23/1990 (X 31) AB hat (absent a constitutional provision on the subject, the Hungarian Constitutional Court held the death penalty unconstitutional based on generally accepted European standards about the sanctity of life.

penalty remains a highly divisive issue within the United States and within the Supreme Court.[134]

7. Conclusion

Constitutional adjudication currently enjoys less legitimacy in the United States than in Europe as a consequence of an interrelation between structural and institutional factors, on the one hand, and contextual factors, on the other. The prevailing contextual differences ultimately seem more weighty, as the profound divisions over fundamental values found in the United States do not appear to be replicated anywhere in Western Europe. For reasons noted throughout this article, the structural and institutional features prevalent in Germany and, to a somewhat lesser extent, those in force in France seem better suited than their American counterparts to the task of averting the deep divisions prevalent in the United States.

Still, the national and supranational structural and institutional apparatuses currently in place in Europe may not always be able to blunt the effect of dramatic divisions over fundamental values and thus help to avert crises in legitimacy with respect to constitutional adjudication. Resistance to decisions of the German Constitutional

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[134] The death penalty is in force in thirty-eight of the fifty states. *See* David W. Moore, *Public Divided Between Death Penalty and Life Imprisonment Without Parole: Large majority supports death penalty if no alternative is specified*, The Gallup Organization, June 2, 2004, available at http://www.gallup.com/content/login.aspx?ci=11878. According to the Gallup Poll, over the past 20 years, Americans' support for the death penalty in preference to life imprisonment has fluctuated between a low of forty-nine percent and a high of sixty-one percent. *See also* Edward Lazarus, *A Basic Death Penalty Paradox That Is Tearing the Supreme Court Apart* (Nov. 4, 2002), at http://writ.news.findlaw.com/lazarus/20021031.html.) "On the current Court, there is an "unbridgeable gap—between those who do not want to look again at the troubling realities of the capital punishment system, and those anxious to pursue the legal conclusions to which those realities point them."

Court, such as occurred in Bavaria after the order to remove crucifixes from public elementary school classrooms,[135] may be isolated, as Dieter Grimm emphasizes.[136] Nevertheless, one can imagine greater divisions within Germany and other European countries as an increasingly heterogeneous society, in both a secular and religious sense, struggles to maintain harmony in the public sphere. Furthermore, as the European Union expands and adopts its own constitution,[137] it is unclear whether the Continent will move toward greater unity or greater divisions. And, if the latter, whether European constitutional adjudicators or national ones will be perceived as bearing a significant part of the responsibility. In any event, it seems clear that without a workable consensus on fundamental values, it is unlikely that constitutional adjudication will be widely accepted as legitimate.

[135] *See Classroom Crucifix II*, 93 BverFGE 1 (1995).
[136] *See* Dieter Grimm, *supra* note 98.
[137] *See* Thomas Fuller and Katrin Bennhold, *Leaders Reach Agreement on European Constitution*, N.Y TIMES, June 19, 2004, at A3 (documenting the adoption of the EU's first constitution by European leaders, characterized as the first step in what will prove to be a long and trying process).