

60 Jahre deutsches Grundgesetz
(Erste Folge)

60 Years of the Basic Law and its Interpretation:
An American Perspective

by

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Certainly most American observers would agree that, over the past 60 years, the Basic Law of the Federal Republic of Germany, and its interpretation by the Federal Constitutional Court, form one of the most brilliant success stories of democracy in the post-war world. The jurisprudence of the Constitutional Court – which now extends to more than 118 volumes of official reports – rivals (or even possibly exceeds) that of any of the world's other constitutional courts in complexity and subtlety of doctrine, cogency of argument, and in the protection of human rights and basic democratic structures of government.

This achievement is even more striking when one considers the intellectual landscape of Germany in the period immediately following World War II. A population demoralized by war, defeat, and – to a substantial extent – prior adherence to Nazism did not seem to provide the most favorable soil for the growth of strong democratic institutions. But for various complex reasons – including, among others, economic prosperity, the growth of European institutions, and a resumption of earlier traditions of legalism – these fragile structures grew stronger and more self-confident year by year, with the impressive results that we see today.

I. The Basic Law and the American Constitution

The Basic Law of the Federal Republic of Germany is a product of the mid-twentieth century, and it is a successor, in several respects, of the adventurous Weimar Constitution of 1919. As such, the Basic Law possesses many characteristics that may well surprise an American observer schooled in the rather more modest eighteenth century Constitution of the United States.¹ Addressing problems that were not yet

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¹ On these points, see *Quint*, *What is a Twentieth-Century Constitution?*, 2007, 67 *Maryland Law Review* 238.

fully apparent in the eighteenth century, the Basic Law covers substantially more areas and is considerably more detailed than the elegant and spare American Constitution. For example, the Basic Law contains provisions on political parties and labor unions, institutions that were unknown in the America of the 1780s; and the Basic Law also provides much more detailed regulations on subjects such as governmental administration, governmental finance, and special emergency measures to be taken in times of military threat or hostilities. The complex and systematic emergency provisions, which were added to the Basic Law after bitter controversy in 1968, contrast sharply with the fleeting and fragmentary references to certain aspects of emergencies in the Constitution of the United States.² The German emergency provisions reflect the fears and tensions of the Cold War in Europe and, indirectly, the internal tensions of Germany during the 1960s as well.

Also in significant contrast with the American Constitution, the Basic Law imposes obligations on the government to provide a measure of social welfare for its citizens – although these obligations are primarily contained in laconic “social state” clauses³ and are generally not spelled out in more elaborate detail, as they were in the Weimar Constitution of 1919, or as they are in the present-day Constitution of South Africa. A highly qualified article on the environment⁴ – a recently added “third generation” provision – also goes far beyond anything present in the Constitution of the United States.

An American observer would also be impressed by the “internationalist” nature of the Basic Law. Indeed, in addition to significant provisions on international law in general,⁵ the Basic Law contains detailed regulations governing the relationship between the Federal Republic of Germany and the European Union⁶ – an institution of apparently “superior” constitutional standing, which has no parallel in the constitutional structure of the United States. In this connection one commentator has concluded that “ever since 1990 Europeanization has been the most important theme in German constitutional life.”⁷ Interestingly, this form of “Europeanization” reflects the original view of Chancellor Adenauer (later reprised by Chancellor Kohl) that in order to discourage a revival of potentially dangerous nationalism, German political institutions should be embedded in broader European structures. Finally, as will be discussed more fully below, the Basic Law imposes broad limits on its own amendment in a manner that seems to go substantially beyond the narrow and partially obsolete limits on amendments contained in Article V of the Constitution of the United States.

² See, e.g., U.S. Const., Art. I, § 9, cl. 2 (suspension of Habeas Corpus).

³ Arts. 20 (1), 28 (1) GG; compare Art. 6 (4) GG.

⁴ Art. 20a GG.

⁵ Arts. 24–26 GG (see below).

⁶ Art. 23 GG.

⁷ *Spevack*, 2001, *Allied Control and German Freedom*, at 526.

II. The Basic Law and Rejection of the Nazi Past

The development of the Basic Law in the past 60 years – both in the rather frequent amendment of its text as well as the extraordinary development in the jurisprudence of the Constitutional Court – provides a wealth of interesting and important similarities and contrasts with constitutional doctrine in the United States. Yet certain aspects of this 60-year history stand out as holding special interest for American observers. Certainly of very great importance to Americans – particularly those of an older generation – is the transformation of Germany from a dictatorial World War II adversary to a democratic partner in the post-War world. Viewed in this light, an especially impressive aspect of the Basic Law is its quality as a reaction to and rejection of the Nazi and authoritarian past. Although the essential first impetus in this direction was given by the victorious World War II Allies, the drafting of the details (and certainly the elaboration by the Constitutional Court) was principally a German project.

In this respect, the placement of a ringing guarantee of human dignity at the beginning of the constitution, immediately followed by a broad panoply of Basic Rights, demonstrates and symbolizes the rejection of this past. Furthermore, the incorporation of the general principles of international law into the domestic legal system⁸ – and, most particularly, the adoption into constitutional law of the Nuremberg principle criminalizing the planning of aggressive war⁹ – are also especially worthy of note. Indeed, the entire concept of the *Rechtsstaat* (government according to the rule of law), which runs throughout the Basic Law,¹⁰ implies a total rejection of the arbitrary nature of Nazi rule. Other provisions make this rejection more specific by authorizing the prohibition of totalitarian political parties and groups.¹¹

Yet an American observer might question whether even more might not have been done along these lines. For example, the citizenship provisions of the Basic Law fundamentally incorporate an ethnic concept of citizenship (*jus sanguinis*) which might seem uncomfortably close to earlier racialist views. It might also seem jarring that Hitler's Concordat with the Vatican, which gave "great advantages" to the Nazi regime in 1933¹², continues in effect, at least to some extent, under the Basic Law.¹³ Transatlantic observers might also be surprised to learn that, in the doctrine of the Constitutional Court – and apparently in the views of the framers of the Basic Law – the German "Reich" did not disappear at the end of World War II¹⁴; rather this "Reich" continued on in a way that might even have allowed the theoretical assertion of German rights over territory east of the Oder-Neisse line, which was in effect transferred to Poland and the Soviet Union at the end of the War. In response, de-

⁸ Art. 25 GG.

⁹ Art. 26 GG.

¹⁰ See, e.g., Arts. 19 (4), 103 GG.

¹¹ Arts. 21 (2), 9 (2).

¹² See *Holborn*, 1982, *A History of Modern Germany 1840–1945*, at 743.

¹³ BVerfGE 6, 309 (1957). In the course of the *Concordat* decision, the Constitutional Court also retrospectively upheld the effectiveness of the "Ermächtigungsgesetz", through which Hitler consolidated power in March 1933. *Id.* at 330–32.

¹⁴ See, e.g., BVerfGE 5, 85, 126 (1956) (KPI) Case).

fenders of the theory of the “continuing Reich” might argue that this concept was important for German unification in 1990 and that, in any case, Germany has conclusively abandoned any claim to former German territories now in Poland or Russia.¹⁵

Yet notwithstanding certain possibly questionable aspects of doctrine, in important instances the Constitutional Court took significant steps to eradicate vestiges of the Nazi past in the Federal Republic. At a very early point, for example, the Constitutional Court issued a seminal opinion banning a far-right political group that appeared to be an attempted continuation of the Nazi Party.¹⁶ In other notable decisions, the Court also rejected arguments that former members of the Nazi civil service possessed continuing constitutional claims for full pensions and other support under the Federal Republic.¹⁷ In these decisions – which clearly seemed to favor a new constitutional jurisprudence over more traditional views held by many members of the ordinary judiciary – the Constitutional Court pointed out that the German civil service had been politicized and thus destroyed under the Nazis, with the result that its members had no continuing constitutional claim against the government of the Federal Republic.

The theme of confronting the past was also clearly evident – although in a more indirect manner – in the classic *Lüth* case of 1958.¹⁸ In this famous decision, the Constitutional Court extended protection to the free speech of an anti-fascist activist who called for a boycott of a new film by Veit Harlan, the director of a vicious anti-Semitic film under the Nazis. In this decision, as well, the Constitutional Court emphasized the primacy of constitutional law over more traditional structures of the “ordinary” German law.

In the course of the *Lüth* opinion, the Court also took two steps that were to be fundamental for important aspects of German constitutional law in the future. First, the Court found that the constitution was applicable (to some extent at least) in questions of private law and that, indeed, the “radiations” of constitutional rights affected all branches of German law; this doctrine, which appears to apply broadly to legal relations among private persons, implied a role for constitutional law that went significantly beyond the limits of the “state action” doctrine in American constitutional jurisprudence. Second, the Court in *Lüth* held that statutes limiting the freedom of expression must be “balanced” against the very weighty constitutional freedom of expression protected by the Basic Law. Indeed, the Court quoted the American jurist Benjamin Cardozo in declaring that the freedom of expression is “the matrix, the indispensable condition of nearly every other form of freedom.”¹⁹ Accordingly, if the constitutional value is weightier under the circumstances, it will prevail over what might otherwise have been the statutory resolution of the “ordi-

¹⁵ Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, Art. 1.

¹⁶ BVerfGE 2, 1 (1952) (SRP Case).

¹⁷ BVerfGE 3, 58 (1953); BVerfGE 6, 132 (1957); for discussion, see *Baade*, 1961, *Social Science Evidence and the Federal Constitutional Court of West Germany*, 23 *Journal of Politics* 421.

¹⁸ BVerfGE 7, 198 (1958). For more detailed commentary on this case and other free speech cases discussed below, see *Quint*, 1989, *Free Speech and Private Law in German Constitutional Theory*, 48 *Maryland Law Review* 247.

¹⁹ BVerfGE 7, 198, 208.

nary" law – as it did in *Lüth* itself. In reaching this conclusion, the Court turned away from the literal text of the Basic Law (Article 5 (2)), which seemed to allow any statutory "general law" to prevail over the constitutional value of the freedom of expression.²⁰ Thus, in its early years, the Court provided a significant foundation for the constitutional protection of freedom of speech.

In finding that the interests of free speech prevailed in *Lüth*, the Constitutional Court placed particular weight on the speaker's position as a well-known activist who sought reconciliation between Germans and Jews and who was attempting to prevent international opinion from believing that significant figures under the Nazis could again achieve prominence in the arts under the Federal Republic.²¹ The Court also approved *Lüth's* statement that Harlan's trial for crimes against humanity had resulted in a "formal acquittal" but a "moral condemnation": although Harlan was found to have committed crimes against humanity, he was acquitted because he was acting under orders.²² Moreover, "respected figures in public life", within Germany and abroad, had also deplored Harlan's re-emergence in the post-war German cinema.²³

Working through the extraordinary twists and turns of the *Lüth* opinion, the reader is confronted with a lesson that is important to understand in any system of judicial review: the constitutional text of the Basic Law itself is only an outline – and very often not a very clear outline – of the body of doctrine that becomes the real "constitution" only in the course of judicial interpretation. One could not possibly deduce in a "syllogistic" manner the principles of *Lüth* from the bare language of the Basic Law. But the doctrine of the *Lüth* case – even though it has been subject to some criticism in recent years – has become the doctrine of the Basic Law just as much as (or indeed even more than) the laconic outline of the text itself.

In a third case of the same early period, the Constitutional Court employed concepts of federalism, as well as the freedom of expression, in order to invalidate Chancellor Adenauer's plan to establish a national television channel that would be subject to the control of the federal government.²⁴ According to the Court, the Basic Law required that a variety of different views be broadcast on available radio and television channels. One may surmise that recent recollections of centralized government control of communications under the Nazis formed the theoretical background of this important decision.²⁵

III. Freedom of Expression Under the Basic Law

Of course, especially as time went on, much of the Court's work was not devoted to such spectacular decisions, but rather to the more typical work of a constitutional

²⁰ *Currie*, 1994, *The Constitution of the Federal Republic of Germany*, at 178–81.

²¹ BVerfGE 7, 198, 216–18.

²² *Id.* at 221–28.

²³ *Id.* at 229–30.

²⁴ 12 BVerfGE 205 (1961).

²⁵ Cf. *Wesel*, 2004, *Der Gang nach Karlsruhe: Das Bundesverfassungsgericht in der Geschichte der Bundesrepublik*, at 122.

court — making more modest interstitial adjustments to basic principles already set out. A number of these less spectacular — but, nonetheless, very interesting — decisions fell into the area of the freedom of expression, regulated under Article 5 of the Basic Law. This is an area of particular interest to American observers because the freedom of speech and press, protected by the First Amendment, forms one of the most distinctive and controversial areas of American constitutional law. Moreover, the German cases differ considerably — in technique and, sometimes, in result — from American First Amendment doctrine. As we have seen, the German Constitutional Court employs a technique of balancing in the individual case — a technique that is also used by the European Court of Human Rights and certain other modern courts. In contrast, the Supreme Court of the United States often resolves these issues by defining a number of quite narrow categories in which speech will no longer be protected. As a result, the Supreme Court's doctrine protects certain forms of expression that remain unprotected in Germany — and indeed, in most other countries of the world.

In cases following *Lüth*, the German Constitutional Court upheld the speech interests of a small magazine publisher that propagated unpopular political views, against the economic power of one of Germany's largest commercial publishers;²⁶ and it reversed an injunction that prohibited a political figure from stating that a prominent right-wing foundation was "a nationalistic enterprise ... in democratic clothing."²⁷

On the other hand certain other cases rejected speech interests, or subordinated them to privacy or other values, in a manner that might strike many American observers as not granting sufficient protection to the freedom of expression.²⁸ Indeed, in a number of these cases, the Court seemed to retreat from a strong emphasis on the primacy of constitutional law by deferring to the assessment of contending interests undertaken by the ordinary civil or criminal courts. For example, the Court upheld an order banning the publication of a novel by the well-known writer Klaus Mann (son of the famous novelist Thomas Mann), which was said to have defamed the memory of a German actor and director who had collaborated with the Nazis.²⁹ Certainly, the prohibition of the publication of a novel — as a remedy for claimed defamation — would violate the general prohibition of prior restraints under American constitutional law.

In a particularly interesting decision of the same period, the Constitutional Court banned a television film because it portrayed a named individual who had participated, as an accessory, in a famous murder of German army personnel.³⁰ The individual was about to be released from prison, and the Court found that his rehabilitation might be impaired by a television portrayal of his crime. This decision is widely admired by German commentators as an example of the protection of human dignity; but many American observers might object that important speech interests — re-

²⁶ BVerfGE 25, 256 (1969) (Blinkfüer).

²⁷ BVerfGE 42, 163 (1976) (Echternach).

²⁸ See, e.g., BVerfGE 42, 143 (1976) (*Deutschland-Magazin*).

²⁹ BVerfGE 30, 173 (1971) (Mephisto). In this case the Court upheld the order by an equally divided vote.

³⁰ BVerfGE 35, 202 (1973) (Lebach).

lating to a public event of particular importance – had been subordinated to a questionable extension of the concept of privacy.³¹

IV. The Constitutional Court in the 1970s: Attack from the Left

Although these more routine cases inevitably make up the bulk of the jurisprudence of any constitutional court, three prominent episodes in the history of the Constitutional Court and the Basic Law deserve particular mention because they evoked, in very sharp form, a type of criticism that, sooner or later, may be levied against any constitutional court in any constitutional system. The criticism was that, in these episodes, the court was acting as a political actor, willfully imposing its own choice of values on the legislature, executive, and the people, instead of following a path that in one way or another could be considered a “judicial” interpretation of the Basic Law. This is an issue, of course, that has also been present in the history of the United States Supreme Court for two hundred years – from the great opinions of Chief Justice Marshall in the early 19th Century³², all the way up to the highly controversial decision of the Supreme Court in the 2000 Election Case, *Bush v. Gore*³³ – and beyond. Thus, for an American observer, these extraordinary episodes in the interpretation of the Basic Law, may suggest interesting comparative reflections on the nature not only of a particular constitutional court, but of the project of constitutional jurisprudence in general.

The first of these three episodes occurred in the 1970s. Up until 1966, the federal government had been controlled by a conservative coalition under Chancellors Adenauer and Erhard. But after three years of joint government by a “grand coalition”, the SPD under Chancellor Willy Brandt assumed control of the national government (in coalition with the FDP) for the first time in the history of the Federal Republic.³⁴

Under Brandt, the Social Democrats sought to loosen the strictness of German government and society, and Parliament enacted a number of initiatives along these lines. But during the 1960s the conservative coalition had secured the appointment of a preponderance of conservative justices³⁵, and the Constitutional Court invalidated several important legislative changes initiated by SPD governments at the state and federal level. In so doing the Court sometimes deployed inventive constitutional techniques. In these cases, it could be argued that the Constitutional Court aligned itself with conservative social and political forces, in endeavoring to preserve tradi-

³¹ In its decades-long history, the Constitutional Court has adjudicated many other cases that sought to strike a balance between free expression and countervailing interests such as privacy. For some of the most important of these decisions, see BVerfGE 12, 113 (1961) (Schmid-Spiegel); BVerfGE 34, 269 (1973) (Soraya); BVerfGE 54, 208 (1980) (Böll); BVerfGE 82, 272 (1990) (Democrat by necessity); BVerfGE 101, 361 (1999) (Caroline of Monaco).

³² See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803); *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Gibbons v. Ogden*, 22 U.S. 1 (1824).

³³ 531 U.S. 98 (2000).

³⁴ This historical moment might remind American observers of the election of 1800 in the United States, in which, for the first time, the Jeffersonian party replaced the more conservative Federalists.

³⁵ *Wesel* at 97–107.

tional social structures and to check the flow of possible social reform. Indeed one such criticism went so far as to claim that the conservative CDU/CSU and the Constitutional Court judges were allied in an "extra-parliamentary opposition" (*außerparlamentarische Opposition*).³⁶

From an American perspective, by far the most interesting of these cases is the first German Abortion Case, decided in 1975.³⁷ In this decision, the Constitutional Court took a position that, in theory, contrasted sharply with the position of the Supreme Court of the United States, in its great abortion decision of the same period.³⁸ The American decision begins with a constitutional "privacy" or "autonomy" right of a pregnant woman to decide to terminate her pregnancy, and that right is then qualified – to a certain extent only – by the state's interests in maternal health and the potential life of the fetus. The German doctrine, on the other hand, begins at the other side of the issue with the assertion of a constitutional right to life of the fetus, which then is qualified – to a certain extent only – by certain "personality" rights of the pregnant woman. Arguing from this premise, the German Court reached a position that would probably be impossible under the eighteenth century Constitution of the United States: the Court found that the government had a constitutional *duty* to impose criminal penalties on persons who undertook abortions in certain circumstances – a position that was vigorously criticized in a dissenting opinion.³⁹

An American observer might conclude that the result in the first German Abortion Case bears an unexpected (and perhaps paradoxical) relationship to the German guarantee of the "social state" – in that both doctrines impose significant constitutional obligations on the government. The "social state" clause imposes an obligation on the government to provide *benefits* to its citizens in the form of social welfare; in contrast, the first Abortion Decision imposes an obligation on the government to impose *burdens* on certain of its citizens in the form of criminal penalties – although these penalties are viewed by the Constitutional Court as providing a *benefit* to the fetus. For better or worse, the eighteenth century Constitution of the United States, which largely eschews governmental obligations, has generally remained inhospitable to both forms of doctrine.⁴⁰

There were other cases of the same period in which the Constitutional Court seemed to set its face against social change. Responding to student unrest of the 1960s, an SPD state government enacted a reform measure which required that students and nonacademic personnel be represented in the councils of the university. According to the Court, this statute violated the constitutional right of the full pro-

³⁶ *Lamprecht & Malanowski*, 1979, Richter machen Politik: Auftrag und Anspruch des Bundesverfassungsgerichts, at 23. For detailed discussion of these cases, see *Wesel*, at 223–75.

³⁷ BVerfGE 39, 1 (1975).

³⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

³⁹ BVerfGE 39, 1, 68–95 (opinion of Justices Rupp-v. Brünneck and Simon).

⁴⁰ Interestingly, the stern rhetoric of the Court's 1975 Abortion Decision could not completely withstand the pressures of life: in certain of the *Länder*, at least, one of the exceptions to criminal liability acknowledged by the Court – the "social" exception – seemed to be expanded to the point of swallowing the rule; and, in any case, the rigor of the decision was considerably mitigated later, in the context of German unification, when the Court allowed decriminalization if the pregnant woman underwent an approved course of counseling before choosing an abortion. BVerfGE 88, 203 (1993).

fessors to retain majority control on questions of teaching and research.⁴¹ The Court inferred this broad institutional right of the full professors from language of the Basic Law which simply stated that “research and teaching shall be free.”⁴² During this period, the Court also struck down a federal statute that relaxed the procedure for claiming an exemption from conscription as a conscientious objector: instead of requiring a hearing on the question, the statute allowed the candidate to claim the exemption by simply filing a written declaration. In invalidating the statute – principally on grounds of equality and the absence of consent by the Bundesrat – the Court seemed anxious to preserve certain traditional structures of the military.⁴³

Finally, in a very important case of the 1970s, the Constitutional Court upheld the cornerstone of Willy Brandt’s *Ostpolitik* – the Basic Treaty with the German Democratic Republic (GDR) – against claims that such a rapprochement violated a constitutional requirement of reunification and the underlying theory of the “continuing Reich.”⁴⁴ The Court upheld the agreement, but its opinion so narrowed the effect of the treaty that it is questionable whether this decision could actually be considered a truly favorable result for Brandt and the Social Democrats.

These cases of the 1970s were decided against the background of the 1968 students’ movement, which some saw as profoundly liberating, but many others viewed as a threat to the carefully nurtured post-war stability of Germany. Accordingly, what the critics believed was the determined political intent of these cases led to charges that the justices were acting more as politicians than as judges, in an attempt to preserve oppressive traditional structures of government and society. Yet these attacks from the left – although bitter and widespread – did not ultimately seem to shake or undermine the foundations of public confidence in the Constitutional Court.

V. The Basic Law and German Unification

Certainly when the history of the Basic Law is written, the episode of German unification will play one of the most important roles. The Basic Law had been adopted in West Germany alone, but its framers had been adamant in declaring their goal of ultimate unification with the Soviet Occupation Zone or its successor the German Democratic Republic (GDR). When this event actually took place in 1990, the requirements of democratic theory might have seemed to favor the adoption of a new all-German constitution as contemplated by Article 146 GG; but in light of practical exigencies, the GDR simply “joined” West Germany under Article 23 GG. This method preserved the Basic Law and, of course, it also preserved the Constitutional Court’s jurisprudence interpreting the Basic Law. An alliance of Social Democrats and representatives of the East German reform movement sought to amend the Basic Law to include more specific social welfare provisions and plebiscitary elements; but, after a parliamentary commission (*Gemeinsame Verfassungskommission*)

⁴¹ BVerfGE 35, 79 (1973).

⁴² Art. 5 (3) GG.

⁴³ BVerfGE 48, 127 (1978).

⁴⁴ BVerfGE 36, 1 (1973).

studied the problem, very few amendments were adopted – aside from technical changes required to accommodate unification and amendments related to the adoption of the EU's Maastricht Agreement. Thus the Basic Law was not significantly altered in a manner that would have moved it even farther from certain basic characteristics of the Constitution of the United States.

In the cases evoked by the epochal events of German unification, the Constitutional Court acted in a generally consistent manner. The justices upheld the main political choices made in the course of unification; but they also seemed anxious to give a degree of solace to some of the losers in the process. The main political choices concerned issues of profound importance, and the Court seemed reluctant to interfere with these great historical decisions. But by making significant adjustments that seemed directed toward reconciling various contending interests in the course of unification, the Court also made clear to the political branches that it must always be reckoned with, even in moments of high historical importance.

Thus, in the massive property settlement upon unification, the Court upheld the decision to deny restitution of property expropriated under the Soviet occupation regime (1945 to 1949).⁴⁵ Nonetheless the Court required that a measure of compensation be paid to the former owners of that property, even though the political settlement had made such payments optional only.⁴⁶ In another case, the Court upheld the dissolution of the vast East German bureaucracy, but it also insisted on certain measures of social welfare or preference for some of the most socially vulnerable among those who were affected.⁴⁷ Finally, the Court struck down plans for the first all-German parliamentary election, but at the same time it provided an easy road map for a constitutionally valid election.⁴⁸ The Court's preferred system gave an increased chance to certain small East German parties that would probably have been obliterated under the original plan which the Court found unconstitutional.

When we take an overall view of the episode of German unification, therefore, we see that the Constitutional Court seems to be acting as a mediator between the contending interests. The Court stands with the government as a general proposition, but it also gives consideration to the losers in the process – whether they are on the side of the generally prosperous (the former large landowners and their heirs), or on the side of the socially disadvantaged (certain individuals whose jobs were lost or imperiled in the dissolution of the eastern bureaucracy). The nature of these issues, and the extraordinary generality of the relevant constitutional provisions makes it very difficult to view the Court as proceeding in any syllogistic or otherwise clearly “juristic” way from established constitutional principles to any clear conclusions demanded by those principles. Rather, the Court seems here to be acting in a thoroughly pragmatic manner to achieve the results thought best for the process of uni-

⁴⁵ BVerfGE 84, 90 (1991); for more extended discussion of the unification cases along the lines set forth here, see *Quint*, 1997, *The Imperfect Union: Constitutional Structures of German Unification*.

⁴⁶ In this case, the Basic Law had been amended to support the statutory settlement. Yet in a manner of particular interest to American observers – as discussed more fully below – the Court indicated that it was empowered to pass on the constitutionality of these constitutional amendments. See *Quint*, *Imperfect Union*, at 136–38.

⁴⁷ BVerfGE 84, 133 (1991).

⁴⁸ BVerfGE 82, 322 (1990).

fication in general and for the reconciliation of the losers in certain aspects of that process.

VI. The Constitutional Court in the mid-1990s: Attack from the Right

The Court's performance in the context of German unification did evoke unhappiness among some groups, but it generally met with popular approval. In contrast, the third of the episodes that we will examine did seem to precipitate a real crisis for the Constitutional Court and its role as interpreter of the Basic Law. Indeed, during this period in the mid-1990s, some observers thought that certain prominent decisions of the justices had seriously undermined public confidence in the Constitutional Court. In these cases the Court extended the reach of certain constitutional rights, and this time the attacks came from the conservative right, instead of the progressive left as was the case in the debates of the 1970s. The great outcry that these liberalizing decisions evoked may remind American observers of attacks on the progressive Warren Court of the 1950s and '60s in the United States. Certain of these cases also moved the Court's doctrine on freedom of speech and religion somewhat in the direction of American doctrine on the same subjects, and could possibly be viewed as another episode in the "Americanization" of Germany that has been the subject of much commentary (particularly among historians) over the years.⁴⁹

In general, these cases of the mid-1990s aroused outrage because the Court seemed to prefer the interests of anti-nuclear or anti-war protestors, or other apparently marginal figures, over the interests of traditional governmental or cultural institutions such as the army or the church. In one case, for example, the Court reversed the criminal libel convictions of anti-war activists who had declared that "soldiers are murderers". Citing the freedom of expression, the Court very narrowly limited the circumstances under which such statements could be penalized.⁵⁰ In another controversial decision, the Court overturned the convictions of protestors who had blockaded the entrances of NATO missile bases in Germany. Although civil disobedience was not itself protected by the Basic Law, the Court found that the criminal statute employed against the protestors had been unduly extended by the lower courts, in violation of the rule of law.⁵¹ In yet another decision, the Court seemed to minimize the interests of religion and the church by finding that it was unconstitutional for a state school to place a cross or crucifix in a classroom, over the objections of parents or students.⁵²

Although at least two of these decisions – the *Soldiers* and *Crucifix* cases – would seem clearly correct (and not even particularly controversial) under American constitutional law, these opinions elicited an extraordinarily bitter reaction from conserva-

⁴⁹ For this point, and for a detailed analysis of these cases, see *Quint*, 2008, Civil Disobedience and the German Courts: The Pershing Missile Protests in Comparative Perspective, Ch. V.

⁵⁰ BVerfGE 93, 266 (1995); see also 1994 NJW 2943.

⁵¹ BVerfGE 92, 1 (1995).

⁵² BVerfGE 93, 1 (1995).

tive circles in the Federal Republic. Indeed, in a sort of mirror image of certain arguments of the 1970s, some critics of these decisions claimed that the radical 1968 generation had made a “long march through the institutions,” ending up on the Constitutional Court itself. Like similar controversies over desegregation and school prayer in the United States, these German cases illustrate the very interesting interplay between judicial doctrine and popular reaction. Although Jutta Limbach, the Court’s President at the time, seemed to fear that this controversy might significantly impair the Court’s reputation and authority, the controversy eventually died away – perhaps in part by virtue of President Limbach’s extraordinary public efforts to explain the role of the Court as an independent judicial organ. And indeed, in the succeeding years, the Court seems to have generally followed its liberalizing trend – for example, in important cases dealing with significant forms of religious liberty.⁵³

VII. Conclusion: Amending the Basic Law

Another liberalizing decision of quite recent years brings us back to some important points of distinction between the Basic Law and the Constitution of the United States, and we may conclude with some brief reflections on this case. In 1998, responding to fears of increased organized crime in Germany, Parliament authorized stringent measures of electronic surveillance in serious criminal cases. These measures seemed inconsistent with Article 13 of the Basic Law, which protected the inviolability of the home, and the Basic Law was amended for the purpose of supporting the new surveillance regime.⁵⁴

An American observer might well raise an eyebrow at this development because the Constitution of the United States has never been amended for the purpose of limiting a specific constitutional right. (Indeed, in at least two previous instances – one also involving electronic surveillance and one concerning an alien’s right of asylum – the German Basic Law had already been amended to limit the scope of a constitutional right.)⁵⁵ But, of course, the American Constitution is extremely difficult to amend, generally requiring a two-thirds vote of both houses of Congress and ratification by three-quarters of the states. The result has been that the American Constitution has been amended only a handful of times since it was adopted in 1789.⁵⁶

In contrast, the Basic Law is a much more “flexible” constitution, which can be amended by two-thirds vote of both houses of Parliament – no separate ratification by the *Länder* is required. The result is that the Basic Law may easily be amended if both of the major political parties agree. The relative “flexibility” of the Basic Law is generally consistent with the provisions of many other important constitutions of the

⁵³ See BVerfGE 104, 337 (2002) (Muslim Butchers Case); BVerfGE 102, 370 (2000) (Jehovah’s Witnesses).

⁵⁴ See Art. 13 (3)-(6) GG; BGBl I S. 610.

⁵⁵ Art. 10 (2) GG; see BVerfGE 30, 1 (1970); Art. 16a GG; see also note 46 supra.

⁵⁶ The first ten constitutional amendments were adopted as a single package in 1791; thereafter, the Constitution of the United States has been amended only 17 times in more than 200 years.

world; it is the Constitution of the United States that seems to be the exception in this respect.

Yet what appears to be a comparative ease of amendment – from an American point of view – is counterbalanced, to some extent at least, by an important factor that is essentially absent from the American Constitution. The provisions of Article 79 (3) GG impose significant limits on constitutional amendment; these limits are intended to preserve the fundamental values of human dignity and basic constitutional structure set forth in Articles 1 and 20 of the Basic Law and elsewhere. Moreover, the Constitutional Court has asserted the authority to strike down constitutional amendments if they violate the limitations on amendments set forth in Article 79 (3) GG. Certainly, a similar power has never been claimed by the Supreme Court of the United States.⁵⁷

Thus, in the Basic Law we have an idea of constitutionalism that goes beyond anything found in, or implied by, the Constitution of the United States – that is, the view that there are certain fundamental constitutional principles that are inviolable and that must prevail as long as the constitution itself prevails. Thus, although natural law concepts permeated the thinking of the founders of the American Republic, it seems that certain natural law principles remain even stronger under the German Basic Law than under the Constitution of the United States.

Accordingly, the argument advanced in the electronic surveillance case was that this amendment of Article 13 of the Basic Law was itself invalid because the intrusions that it authorized unduly invaded human dignity in violation of Article 79 (3) GG. In a fascinating decision, the Court protected many of the claimed constitutional rights, but it did so in a manner that avoided a direct confrontation with Parliament.⁵⁸

In reaching this decision, the Court seems to have been animated by two somewhat contradictory factors: first, the Court clearly concluded that aspects of the constitutional amendment were extremely dubious and could not really be sustained; but, second, it did not want to go too far in confronting the Parliament. Of course, as noted, the Court had previously asserted its authority to invalidate constitutional amendments that violate Article 79 (3) GG – but, in reality, the Court had never actually invalidated a constitutional amendment, and it did not seem to be willing to do so on this occasion either. Thus, instead of striking down the constitutional amendment, the Court *interpreted* the amendment in a narrow manner, so that a substantial portion of what the drafters seem to have intended to accomplish by the amendment could not actually be achieved. In this way, the Court's substantive objections were satisfied, but the Court did not actually have to tell the Parliament that its constitutional amendment was null and void. Thus the Court was acting both as an enforcer of constitutional principle, and as a political organ: when confronted

⁵⁷ Article V of the Constitution of the United States does impose certain limitations on amendments. But some limitations (involving slavery) are obsolete, and there has never been an occasion to test the surviving provision, which prohibits impairment of the states' equality of representation in the Senate. In any case, these American provisions were designed to protect political compromises among various regions and states and, in contrast with Article 79 (3) GG, were not intended to reinforce great protections of human rights.

⁵⁸ BVerfGE 109, 279 (2004).

with the apparent necessity of asserting the invalidity of an amendment of the Basic Law, it drew back from the constitutional brink.

In conclusion, what lessons can be learned by an American observer from sixty years of the Basic Law and its interpretation? First, as noted at the outset, the Basic Law represents one of the great successes of democracy in the post-War era – but this success is attributable not only to the text of the Basic Law but also to the sustained work of the Constitutional Court in interpreting that text.⁵⁹ Indeed, in a number of areas, the “Constitution” has rapidly shifted from the text of the Basic Law to the complex pattern of interpretations handed down by the Constitutional Court – many (if not most) of which cannot be deduced, in any direct syllogistic manner, from the constitutional text itself. Accordingly, the success of the Basic Law may well have depended as much on the good judgment of the justices as on the good judgment of the constitutional drafters.

An American observer will also note with interest that, as a twentieth-century constitution, the Basic Law covers considerably more areas, in considerably greater detail, than the spare eighteenth-century Constitution of the United States. The Basic Law provided a framework for the rejection of the Nazi past in the Federal Republic, and it also allowed the development of strong guarantees of the freedom of expression – although this was one notable area in which the Constitutional Court in effect ignored language of the Basic Law which, if literally applied, could have yielded a much weaker form of protection. The Basic Law and the Constitutional Court also provided a reasonable basis for the epochal events of German unification, and the Court survived various crises, or potential crises, resulting from attacks on the Court by the left in the 1970s and – perhaps more ominously – by the conservative right in the 1990s. Finally, an American observer might well be intrigued by the provisions for amendment of the Basic Law which – differing considerably from provisions for amendment of the American Constitution – allow the democratic forces considerable “flexibility” in amending the details of the Basic Law as time goes on. Yet the amendment provisions also reflect an infusion of natural law ideas – arising in reaction to the depredations of the Nazi era – and accordingly seek to protect a certain core of constitutional principle which may not be changed or affected as long as the Basic Law endures.⁶⁰

⁵⁹ See, e.g., *Grimm*, 2001, *Die Verfassung und die Politik*, at 295–324.

⁶⁰ See *Quint*, *Twentieth-Century Constitution*, 67 *Maryland Law Review* at 257.