The Role of Basic Values in the Contemporary Constitutional Hermeneutics of Germany and the United States

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The idea of a written constitution promises that respect for a paramount text can place state power in the service of political and human values, which experience shows to be essential to society's happiness and good order. Constitutionalism's value lies in the basic ends it advances. Nations with less sanguine prospects contemplate with envy the relative stability, prosperity, and freedom of the German and American constitutional systems. Looking beyond the obvious, threshold significance of fidelity to the constitutional text, one is stimulated to ponder the more comprehensive schemes of basic value these two systems offer as internal measures of their justification.

While it is fair to conclude that the two constitutions – German and American – advance kindred political and human values, it is also inescapable that they do so in different ways. The differences, both conceptual and practical, reflect differing legal cultures, disparate historical experience, and even substantively diverging visions of the ideal human society. A dialectic of contrast challenges each system to discover its stengths and weaknesses, as well as the distinctive challenges lying before it in a moment of far-reaching and rapid political, social, and economic change.

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This article seeks to advance this dialectic by exploring two recurring themes in the interpretive work of the high courts charged with reviewing constitutional issues in the two countries. One theme which it will address for this purpose is the role of basic values in determining the scope and structure of governmental power, specifically that of the federal legislature. The other is the role they have in resolving conflicts between individual dissent and legislative decision over "public morality," in particular, the public regulation of abortion. Both themes recommend themselves for use in the present context, because central to the recent jurisprudence of the two courts; the focus of controversies in both countries over the value-basis of constitutional order; and, by nature, in any case suited to fruitful theoretical reflection on the role of basic values in constitutional adjudication.

The German Constitutional Court's *Maastricht Treaty* judgement of October 12, 1993 on the scope of parliamentary power to cede authority to the European Union,[1] a German question arising in the relatively recent past, lends itself to comparative analysis in connection with the first theme, when placed in profile against the American Supreme Court's decision in *United States* v. *Lopez* of April 26, 1995 on the scope of Congress's power over state-level affairs,[2] a longerstanding American problem. The German Court's *Second Abortion* decision, of May 2, 1992,[3] forms the obvious choice for a study of the second theme, as compared to the American Court's holding in *Casey* v. *Planned Parenthood of Southeastern Pennsylvania*, decided June 29, 1992.[4]

A theoretical statement of the role of basic values in constitutional interpretation within the two systems offers a preliminary foundation for exploring the meaning of the cases. Clarification of the meaning of the cases, in turn, prepares the ground for some conclusions about the specific lessons of contemporary comparative analysis for American and German constitutionalism.[5]

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[1] BVerfGE 89, 155, II.

[2] 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).

[3] BVerfGE 88, 203, II.

[4] 505 U.S. 833, 112 S.Ct. 2791, 120 L. Ed. 2d 674 (1992). The treatment of abortion has been found a useful point of reference in recent comparisons of German and American legal systems. See, e.g., Mary Ann Glendon, Abortion and Divorce in Western Law (1987); Donald P. Kommers, The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?, 10 Journal of Contemporary Health Law and Policy 1 (1994).

[5] Both German and American legal systems are sufficiently pluralistic that many aspects of the judicial decisions considered in the course of this article could conceivably have been decided differently – in some cases, in fact, they could even have resembled holdings which

I. The Role of Basic Values in the German and American Constitutional Frameworks

A theoretical statement of the role of basic values in a given system of constitutional interpretation calls for attention to the place of basic values in the constitutional text; the methodology which the Court charged with finally adjudicating constitutional disputes applies in interpreting the text; and the ontological, societal, or political terms in which that Court envisions basic values as being concretely realized through its adjudications.

In the German system, the constitutional text presents a detailed array of values, which it propounds as corresponding to an objective moral order.[6] The value of the dignity of the human person forms the text's *leitmotif*.[7] This dignity is represented as flowing from the inherent status of persons as beings whose fulfillment lies in self-realization through autonomous moral choice, political participation, and social solidarity.[8]

The part of individual dignity lying in autonomous self-realization is expressed principally through the concept of basic rights.[9] The portion found in political participation is communicated primarily through that of militant democracy.[10] The aspect equated with social solidarity is honored

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the article treats as cross-cultural counterpositions. The article does not assume that some kind of immanent historical necessity required the holdings to turn out as they did, but it does presuppose that law has a historical character ensuring that as long as Germany and America continue to represent separate legal cultures, as they do at present, even reversals bringing with them new similarities, will take on coloration from deeper orientations to concepts and values keeping the meaning of outcomes distinguishable. Compare Fr. C. v. Savigny, System des heutigen Römischen Rechts, 212 *passim* (Berlin 1840).

[6] Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland 118–19, 124 – 27 (19th ed. 1993). The degree to which judges are competent creatively to interpret the content of these rights in changing circumstances is contested. Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 Emory Law Journal 837, 859 – 61 (1991).

[7] Grundgesetz Art. 1 Abs. 1; Klaus Stern, Idee der Menschenrechte und Positivität der Grundrechte, in: Josef Isensee/Paul Kirchhof [eds.], 5 Handbuch des Staatsrechts 4 – 8 (1992).

[8] Peter Häberle, Die Menschenwürde als Grundlage der staatlichen Gemeinschaft, in: Isensee/Kirchhof (note 7) 828 – 33 (1987).

[9] Grundgesetz Art. 1–19; more precisely, the relevant concept is one of the "subjective" exercise of rights, "als subjekte, statusbegründende Rechte sind die Grundrechte verfassungsrechtliche Fundamentalrechte des Einzelnen als Mensch und als Bürger", Hesse (note 6), at 121.

[10] Grundgesetz Art. 20 Abs. 4, 21 and 38. See generally Eckhard Jesse, Streitbare Demokratie (1980).

under the rubric of the social state.[11] The value of law as an inherently appropriate means of supporting all of these values is expressed in the concept of the rule of law.[12] The particular channels and prerogatives of power the text lays out, whether relating to separation of powers, federalism, or the individual standing to assert constitutional claims, are offered as deriving essential meaning in relation to this same scheme of values centered on the dignity of the human person.[13]

The German Constitutional Court's methodology for adjudicating constitutional disputes assumes that material conflicts arising in changing circumstances allow the specification of the concrete content of the basic values which are given as first principles with the text. Specific disputes are acknowledged as capable of implicating more than one basic value, but the Court assumes that principles also exist for allocating concrete burdens towards their resolution, to ensure that the core meaning of all implicated values can be vindicated in every circumstance with no essential qualification.[14]

Based on confidence in the essential unity and knowability of an objective moral order existing beyond the constitutional text, and amenable to concrete realization through law, the Court aims, in each case before it, to contribute to a more general statement of concrete rights and duties satisfying the demands of the constitutional scheme of values. Cumulatively, the Court aims at a comprehensive and coherent conceptualization of the fullest implications of the constitutional value order in relation to all configurations of fact yet within its notice. This textually grounded concept of the Court's task explains, for example, the Court's issuance of decisions over abstract issues outside of "the concrete case or controversy" require-

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[11] Grundgesetz Art. 20 Abs. 1 and Art. 28 Abs. 1; Ekkehart Stein, Staatsrecht 170–178 (14th ed. 1993).

[12] Grundgesetz Art. 20 Abs. 3; Volkmar Götz, Legislative and Executive Power under the Constitutional Requirements entailed in the Principle of the Rule of Law, in: Christian Starck [ed.], New Challenges to the German Basic Law (1991), 141–166.

[13] E.g., Grundgesetz Art. 30, 31, 33, 38, 50, 54 & 93. "Die verfassungsrechtliche Betrachtung kann nicht an einen 'vorverfassungsmäßigen' Bundesstaatsbegriff anknüpfen. Eine solche Anknüpfung ist ihr um so mehr verwehrt, als der für sie maßgebliche Begriff des Bundesstaates ein normativer Begriff ist", Hesse (note 6), at 89.

[14] The German constitutional tradition is one "in which freedom tends to be seen not as the polar oppposite of community, but as a value that must be achieved in synthesis within community". W. Cole Durham, General Assessment of the Basic Law – An American View, in Kommers, Donald P. and Kirchhof, Paul (eds.), Germany and Its Basic Law 45 (1993); see also Stein (note 11), at 230 – 233, and Hesse (note 6), at 129–138.

ment bounding the American Supreme Court's judicial power, in what is termed *abstrakte Normenkontrolle*.[15]

As the realization of value occurring through its adjudicative activity, the Court envisions the actual flourishing of individual human personality in a context of embodied social and political accountability.[16] It considers its adjudication to effectuate that flourishing, not only through its coherent articulation and concrete enforcement of constitutional rights and duties, but also by the common moral interpretation of changing circumstances and the more effective avenues of political decision and governmental administration, which it offers to guide general societal cooperation for the common good.

In the American scheme, the written constitution and its key amendments establish a different emphasis. The text expresses the values of a – more or less – utilitarian notion of welfare; fairness; and individual liberty, conceived as freedom from governmental intrusion. The substantive content of the powers enumerated for Congress in Article I,[17] the aptness of the presidency for executing laws and policies set out in Article II,[18] and the basis for a unitary jurisprudence established by provision for a Supreme Court in Article III all express utility.[19] The principle of majority rule of Article I,[20] the procedural protections in the Bill of Rights,[21] and the equal protection and due process guarantees of the XIV Amendment[22] communicate fairness. The separation and division of powers concepts of

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[15] Grundgesetz Art. 93 Abs. 1–3; Klaus Schlaich, Das Bundesverfassungsgericht 77 – 82 (2d ed. 1991).

[16] "In the reality of its constitutional life," Germany is "a state which has taken seriously its obligation to create favorable external conditions for its citizens to achieve a life in conformity with human dignity." Kurt Sontheimer, Principles of Human Dignity in the Federal Republic, in: Kommers/Kirchhof (note 14), at 216.

[17] U.S. Const. art. I, § 8.

[18] U.S. Const. art. II.

[19] U.S. Const. art. III, § 1. Winfried Brugger observes that the classical utilitarianism of Jeremy Bentham reflects the kind of ideas which historically influenced the development of the American system, along with related strands in Adam Smith and John Locke. Winfried Brugger, Grundrechte und Verfassungsgerichtsbarkeit in den Vereinigten Staaten von Amerika 421–22 (1987).

[20] U.S. Const. art. I, §§ 2, 3 & 5.

[21] E.g., U.S. Const. amend. IV, V, VI, VII, & VIII.

[22] U.S. Const. amend. XIV, § 1. On fairness as a basic constitutional value in the United States, see John Hart Ely, Democracy and Distrust 135 – 79 (1980).

the body of the Constitution,[23] along with the Bill of Rights's civil liberties, are meant to serve individual liberty.[24]

The interpretive methodology of the American Supreme Court is oriented to refereeing power in shifting circumstances to ensure these same basic values of governmental efficiency, fairness, and individual autonomy. Where conflicts arise between the first and third goals, the Court generally gives concrete priority to individual autonomy, except where concerns relating to utility reach an intensity considered compelling.[25]

Guided by a skeptical moral and political epistemology, the Court prefers plural and conflicting justifications for many of its concrete holdings. It relies on the stability of precedent and the practical success of government, more than on common appropriation of abstract concepts or meanings, to validate its work.[26] Where the Court's members offer more theoretical justifications of their decisions, they tend to ground them in the intention of the founders[27] or on the formal scope of isolated concepts,[28] rather than more substantive or systematic notions of value.

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[23] Elements include bicameralism and presidential veto, U.S. Const. art. I, § 7; the separation of federal powers, art. I, II, & III; and the division of state and federal power, amend. X. James Madison alluded to this core value of the separation of governmental powers, when he stated: "The accumulation of all powers, ... in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced, the very definition of tyranny", Max Beloff [ed.], The Federalist No. XLVIII 245 – 46 (2d ed. 1987).

[24] U.S. Const. amend. I-X.

[25] In this process, the Court both identifies individual interests constituting protectible liberties and governmental interests compelling enough sometimes to outweigh them. *Korematsu* v. *United States*, 323 U.S. 214, 216, 65 S. Ct. 193, 194, 89 L. Ed. 194 (1944). By default, Justice Stone's footnote 4 in the case of *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4, 58 S. Ct. 778, 783 – 84 n.4, 82 L. Ed. 1234 (1938), generally is taken as a schema of the diverse ways in which individual rights may take priority over majoritarian decision. For contemporary interpretations, see David L. Faigman, Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice, 78 Virginia Law Review 1521 (1992), and T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale Law Journal 943 (1987).

[26] Winfried Brugger expresses this point as follows: "empirisch hängt viel von der Frage ab, ob von der Judikative, der Exekutive oder der Legislative mehr Tyrannei oder Machtmißbrauch zu erwarten ist. Solche streitigen und nach historischer Lage wechselnden Urteile bestimmen auch das Verständnis institutioneller Kompetenzen", Brugger (note 19), at 355.

[27] A position advanced in a well known form by Robert H. Bork, The Tempting of America (1990).

[28] Justice Black offers perhaps the clearest case, assuming that the conceptual content of the text is self-interpreting. See, e.g., *Youngstown Sheet & Tube Co.* v. *Sawyer* 343 U.S. 579, 582, 72 S. Ct. 863, 864, 96 L. Ed. 1153 (1952) and Hugo L. Black, A Constitu-

As the social and political outcome of its adjudication, the Court expects a plenum of individual decisions free of governmental interference, and a flourishing of social, commercial, and political exchange satisfying popular preferences. The Court's tools to these ends include the guarantee of a plurality of governmental powers, but also of moral and religious societal perspectives;[29] a common language of utility; and governmental organs functioning sufficiently well to be practically effective, but sufficiently uncertain in scope to threaten no definitive substitution of the decisions of the collective will for those of autonomous individuals or the associations they freely form.

From a comparative perspective, the German constitutional scheme affirms basic values as inherently worthwhile moral ends, while the American scheme treats them as the functional requisites of the freedom and wealth believed to be conducive to an individualized pursuit of happiness. Germany ordains constitutional interpretation to the discovery of the meaning of concrete situations for a project of common governmental and societal cooperation towards realizing objective values. America directs it to finding the material opportunities in changing circumstances for society and individuals alike to multiply wealth and to realize the diverse projects of the individual imagination.

A comparison of the cases selected treating the scope of national legislative power and the regulation of public morality will serve to test and confirm the validity of this account, identify its implications for the treatment of concrete issues of contemporary import in the two systems, and permit a more informed judgment about stress and opportunity currently before each.

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tional Faith (1968), but so-called the derivation of extratextual meaning in relation to the fourteenth amendment concept of liberty by a Justice Douglas or Brennan in the context of the "new substantive due process" also reflects reliance on isolated concepts. The approach of Justice Douglas or Brennan differs from that of Justice Black merely by acknowledging that the meaning attributed to such concepts does not reside in the text as such. See, e.g., *Griswold* v. *Connecticut*, 381 U.S. 479, 480, 85 S. Ct. 1678, 1679, 14 L. Ed. 2d 510 (1965) and *Eisenstadt* v. *Baird*, 405 U.S. 438, 440, 92 S.Ct. 1029, 1031, 31 L. Ed. 2d 349 (1972).

[29] This jurisprudence finds a focus in both the establishment and free exercise clauses of the first amendment. Its central idea was given classic expression by Justice Jackson: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187, 87 L. Ed. 1628 (1943).

II. The Constitutional Scope of Federal Legislative Power

The exercise of governmental power is not taken for granted under a constitution, but requires justification. Recognized forms of such justification in both Germany and America appeal to basic values, although these may be given statement variously as substantive underlying purposes or reasons for the differential allocation of governmental power. Because the legislative branch originates new law and the national legislature has global impact, the scope of national legislative power has special importance for the meaning of basic constitutional values in both systems.

The German Experience

In its 1993 *Maastricht Treaty* judgment on Germany's accession to the European Union, the German Constitutional Court ruled on the scope of federal parliamentary power. In so doing, it fashioned a unique opportunity for practical insight into how contemporary Germany justifies national legislative power in relation to basic constitutional values.

To reach its judgement in the case, the Court treated federal parliamentary power, both with respect to internal scope and external limitation by other elements of governmental structure, as a matter, not so much of positive constitutional provision, as of basic constitutional value. The Court's chosen point of departure was the value of democracy, more specifically, democracy from the angle of the individual's right to participate in legislative decisionmaking through meaningful representation.[30] The Court interpreted the Federal Parliament's delegation of aspects of its authority to the European Union as implicating this value.

It found Parliament's enactment compatible with the individual German's right to participate in democracy and, thus, to be constitutional, on the grounds that the delegation had been defined with sufficient specificity to reserve essential democratic decisionmaking to the national legislative body,[31] and that the supranational body on which authority was conferred advanced democracy, commensurate with the scope of the delegation.[32]

The Court recognized the rule of law as a second implicated value. The issue was whether a body standing outside the German framework of law

[30] BVerfGE 89, 155, II (171).
[31] *Id.* at 181.
[32] *Id.*

as such, could be eligible to bear the values constituting the constitutional order.[33] Neither the openness of the Basic Law through its original Preamble and Articles to the transfer of authority to supranational bodies,[34] nor the later amendment of the Basic Law expressly to permit Germany's accession to the European Union was found by the Court to resolve the question.[35] Parliament's act of accession was upheld as constitutional, but only because the Court specifically found it compatible with the structural legal integrity of German constitutionalism, considered as a basic value.

To reach its conclusion that accession did not threaten the rule of law as a value constitutive of the German constitutional order, the Court construed the delegation of power occurring under the Maastricht Treaty narrowly, holding that it permitted termination of membership by legislative act of member states, with at least studied ambiguity about whether such termination could be effectuated by the German Parliament acting unilaterally;[36] that the implementation of acts of the Union violative of the concrete order of basic values in Germany could be annulled by itself;[37] and that the Union lacked power to reach either original, nondelegated democratic judgements affecting Germany,[38] or to allocate, in any definitive way, jurisdictional competences between itself and Germany or other member states.[39]

In reaching these conclusions, the Court did more than merely confirm the scope of German legislative power within some existing allocation of power. It interpreted the Treaty as well as the German Basic Law, to arrive at an original account of the entire supranational framework of power within which German legislative power would fit, assuming due respect for German constitutional principles. An opinion, purporting on its face to clarify the nature of a national "part" of European integration, in fact addressed the shape of the supranational "whole".

Significantly, the Court accomplished this constructive effort, only by sidestepping the issue of whether moments of constitutional decision

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[33] *Id.* at 188.

[34] Grundgesetz Präambel and Art. 24 Abs. 1.

[35] Grundgesetz Art. 23 Abs. 1.

[36] BVerfGE 89, 155, II (190, 207).

[37] *Id.* at 174–175, 178; the opinion continues a discussion on this point which the Constitutional Court commenced in its decisions *in Solange I*, BVerfGE 37, 271 (1974), and *Solange II*, BVerfGE 73, 339 (1986).

[38] *Id.* at 191–192.

[39] *Id.* at 197.

might not arise giving democracy precedence over the ordinary rule of law, so that constitutional judgements over the shape of the "whole" might be placed beyond its own purview.[40] The Court's evasion cannot be taken to imply insistence that consent to constitutional change need always occur through pre-existing legal channels, for the "consent" giving the Basic Law its own legitimacy has never been given by any established form of plebiscite, or the like.[41] Germany's own experience argues, in fact, for the derivation of constitutional authority from the customary observance, over time, of overarching legal form.

It would be error, as well, to interpret the Court's choice of not acknowledging the possibility that democracy, under some circumstances, preempts the ordinary rule of law in a process of gradual, not less than radical revolution, as constituting a reactionary political intervention on behalf of the German Mark or the country's "bürgerlichen Wohlstand." The Court's decision rests neither on positivistic regard for existing German constitutional form, nor power-political regard for Germany's material interests, but on its evaluation of the ripeness of a European constitutional moment for realizing objective constitutional values. Its elevation of rule of law considerations represent its prudential regard, informed by historical memory, for the seriousness of galloping inflation's threat to constitutionalism.

The recognition that lies at the opinion's heart that fidelity to the rule of law may impose requirements on the mode in which democratic – even constitutional – consent is expressed, finds its true ground in the Court's prudential judgement of the meaning of contemporary circumstances for the perpetuation, not of either democracy or the rule of law alone, but inclusive of all the values of the constitutional order. The Court reasoned, in effect, that democracy's expression as a value must be pursued within existing legal categories, until conditions ensure that entry, whether formal or informal, into a different constitutional order has, not only the sufficient popular consent to validate the value of democracy as such, but, in

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[40] The Court does not openly acknowledge another side to the "dynamism" that it admits shapes the European Union's self-concept, *id.* at 184, and asserts merely that the democratic impulse must be channelled in the European context through national parliaments, since the national legislatures are the "masters of the Treaty", *id.* at 185.

[41] Klaus Stern, General Assessment of the Basic Law – a German View, in: Kommers/Kirchhof (note 14), at 20; it has been pointed out that a "Volksabstimmung" in the context of the reunification of Germany could have created the impression of a "Legitimationsdefizit" in the German "Grundgesetz", Matthias Herdegen, Die Verfassungsänderungen im Einigungsvertrag 32 (1991).

fact, sufficiently safeguards the whole objective constellation of values of the constitutional order.[42]

The nature of the prudential judgement underlying the opinion has important ramifications for the meaning of the specific structures the Court outlines allocating power between the European Union and the organs of German constitutional government. Descriptive and evaluative criteria for understanding and evaluating these proposals must, namely, be formulated with due regard for the distinctive interpretive role which this prudential judgement brings to expression. American notions of longterm pragmatic workability would clearly be misplaced if applied as a criterion for understanding or evaluating the German Court's proposals.

The Court's role, which the prudential judgement in the case exemplifies, is one of contributing to a common societal appropriation of basic values through reason and responsible moral decision that transcends any purely formal allocation of jurisdiction. This role is incompatible with permanent service as the gatekeeper over the power to advance interests.[43] Although questions of value and authority unavoidably blur with those of power and interest in discussions of national sovereignty, the former and not the latter form the German Court's ultimate frame of reference.

A correlary of the tenet of the objectivity of basic values characterizing German constitutionalism is the universal accessibility of such values to reasonable appropriation. The model within which the Court sets forth its structural analysis in the opinion is thus one ultimately oriented to common cooperation for the good, based in reason, not a final allocation of jurisdictional competencies, even that framed by current constitutional law itself. The Court knows itself to be taking part in a cooperative dialogue for the common good, already occurring, in fact, if not yet law, on the supranational level. Rather than to stake out a permanent role for itself as the gatekeeper of power, the Court means to invite a transformation, if possible, of the relevant factual premises of discussion, through an

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[42] The constitutional provision most closely linked to the Court's mandate in this regard is the so-called "eternity clause" of Art. 79 Abs. 3. As illustrated in this case, the Court's function in this regard is, notwithstanding its positive proposals, more fundamentally, a negative one: "The judgment leaves the discussion on the constitutional limits of further European integration beyond Maastricht entirely open", Matthias Herdegen, Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union", 31 Common Market Law Review 235, 249 (1994).

[43] The role the Court claims for itself both with respect to passing on basic rights questions and delegations of legislative authority creates this appearance. BVerfGE 89, 155 II, (174 – 75, 178, 190, 207).

ongoing gradual concrete realization of basic values foreseeably bringing with it the obsolescence of its specific allocation of competencies, but not its basic methodology.

The American Experience

The American holding on national legislative power which is nearest to the *Maastricht Treaty* case in its contemporary comparative significance is *United States* v. *Lopez*, which the United States Supreme Court decided this past April. The context – the inverse of the German holding's in two respects – was the relationship of central to regional power, at a time long subsequent to, rather than immediately before, the adoption of a plan of political integration. While Germans show little desire broadly to import American federalistic structures to Europe, the problem of allocating authority between the central and regional government arising for the American Court in *Lopez*, nonetheless, bears instructive parallels and contrasts to the *Maastricht Treaty* case's distribution of legislative power.

The concrete issue in *Lopez* was whether the scope of congressional legislative power could justify the federal enactment of a "Gun-free School Zones Act"[44] criminalizing the possession of a firearm at local schools. The "first principle" from which Chief Justice Rehnquist developed his opinion in support of the holding was the idea of limited governmental power. This he derived from the concept of enumerated powers found in Article I of the Constitution.[45] This concept is generally given at least lip service as an axiom that Congress has no general legislative, welfare, or "police" authority, but only specific grants of power. Rehnquist made it clear that the majority on the Court was prepared to put teeth back in the axiom. He grounded the value of the principle, in turn, in its importance for the preservation of "fundamental liberties."[46]

Congress had proposed its enactment under the Commerce Clause of Article I, empowering it to "regulate commerce among ... the several states." Taking with renewed seriousness the idea that the premise of limited government restricted Congress's ends to specifically enumerated powers, the majority, for whom Rehnquist spoke, found itself obli-

[44] 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V).

[45] 115 S. Ct. 1624, 1626, 131 L. Ed. 2d 626, 633 (1995). At the time of the writing of this article, the official United States Reports version of the opinion was not yet available to the author and so pinpoint citations to that source are not provided.

[46] *Id.*

gated to decide whether the private deployment of firearms at local schools was, without more, "commerce among ... the several states."[47]

To resolve the issue, Rehnquist's opinion adopted, as its starting point, the assumption that the clause had so to be interpreted that meaningful limits demonstrably appeared along with any concrete power recognized.[48] Rehnquist scrutinized the adequacy of the Court's prior rulings on the clause's scope in this light. Those rulings supplied a deferential rule of interpretation, treating "commerce among ... the several states" as encompassing any activity "substantially affecting" commerce among the states which Congress wished to treat as commerce, with the paradigm of commerce being (as Justice Thomas emphasized in his concurrence) buying and selling or transport for purchase and sale.[49]

The Court in *Lopez* held that the premise of limited power required an adjustment in the inherited interpretive rule, which was so open-textured, as to entail no restriction on the scope of power being concretely recognized.[50] To arrive at a new, constitutionally adequate rule, Rehnquist explained that the majority found it necessary to add, as a more specific condition, the requirement that "commerce among ... the several states" be read thenceforth to mean only commercial activities, i.e. buying and selling or transportation for purchase and sale, substantially affecting commerce interstate.[51] The new rule supported continued reliance on substantial indirect effect to satisfy the textual requirement that a regulated activity be "among ... the several states," or "interstate", but no longer the textual requirement that it be "commerce". The Court held that Congress's "Gun-free School Zones Act" was a constitutionally inadmissable arrogation of power, because the introduction by teenagers of guns into schools, for whatever indirect impacts on the national economy, was not itself economic or commercial in nature.[52]

The considerable significance commentators already ascribe to *Lopez* reflects the holding's departure from nearly sixty years of precedent under-

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[47] *Id.*

[48] The court reviewed the history of its decisions to show that "limitations on the commerce power are inherent in the very language of the Commerce Clause." 15 S. Ct. at 1627, 131 L. Ed. 2d at 633.

[49] 115 S. Ct. at 1630, 131 L. Ed. 2d at 638; and 115 S. Ct. at 1643, 131 L. Ed. 2d at 655 (Thomas, J., concurring).

[50] 115 S. Ct. at 1633, 131 L. Ed. 2d at 642.

[51] 115 S. Ct. at 1634, 131 L. Ed. 2d at 643.

[52] *Id.*

girding Congress's role in Franklin D. Roosevelt's New Deal, the Civil Rights Movement, and America's adoption of the welfare state. The change *Lopez* effects in the allocation of legislative power within the American federal system does not appear on the opinion's face, however, but only in relation to the larger body of American constitutional case law.

To grasp the exact nature of the change, one must first understand what the holding leaves unaltered. Even after *Lopez*, Congress retains powerful and wide-ranging legislative authority under a line of Supreme Court cases going back to Chief Justice John Marshall's 1819 opinion in *McCulloch* v. *Maryland*.[53] Based on this precedent, Congress is still to be viewed as enjoying its authority by direct constitutional grant from the people, not state delegation, and its enumerated powers are still to be liberally construed as implying all secondary powers useful to their accomplishment.

Other precedent surviving *Lopez* ensures that the Commerce Clause itself alots Congress the power to regulate any conduct, for any congressional motive, solely on condition that the conduct have an immediate commercial dimension. *Lopez* does not disturb precedent permitting Congress to prohibit racial discrimination on moral grounds, only on condition that the discrimination regulated occurs in the course of economic activity.[54] Congress may likewise continue to restrict extortionist activity by gangsters on criminal justice grounds, because the enterprise restricted has a commercial angle.[55]

Although the Tenth Amendment expressly allocates residual legislative power to the states, precedent is still firmly in place for reading the amendment as imposing no substantive limitations on Congress's continuing wide-ranging power under the precedent already cited. Even after Lopez, the amendment continues to be viewed, as a "truism" yielding no more power to the states than whatever legitimate legislative power remains, after Congress is accorded its full reach of power under Article I.[56]

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[53] 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819).

[54] *Katzenbach* v. *McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964).

[55] *Perez* v. *United States*, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971).

[56] The expression is from *United States* v. *Darby*, 312 U.S. 100, 123 – 24, 61 S. Ct. 451, 462, 85 L. Ed. 609 (1941), and it continues to be applicable, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 551, 105 S. Ct. 1005, 1018, 83 L. Ed. 2d 1016 (1985), rehearing denied, 471 U.S. 1049, 105 S. Ct. 2041, 85 L. Ed. 2d 340 (1985), with the caveat only that the Court has found that procedural restrictions under the Tenth Amendment on the federal congress's ability to impose co-responsibility for its policies on state legislatures. See *New York* v. *United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992).

The precise shift in congressional power wrought by *Lopez* does not lie in any departure *per se* from reliance on the concept of commercial utility to define the federal grant of power under the Commerce Clause. Both the new and the older approach emphasize that the clause must be read in "economic" terms. The alteration lies, rather, in a repudiation of the idea that the Court can supplement the constitutional text to define Congress's empowerment with comprehensive philosophical, or even logical coherence, permitting a predictably expansive interpretation of Congress's power.

According to the majority in *Lopez*, Congress is now to be confined to a more functional interpretation of its powers, than it has been in recent decades. They are to be viewed as no more than discrete grants of practical authority, unassimilable to any overall philosophical justification. The point is to ensure that power is allocated between state and federal level out of functional regard for the dynamics of power, rather than a coherent philosophy differentiating kinds of governmental responsibility for basic constitutional values.

To better grasp the rejected view, one needs merely to read the dissenting opinions of the members of the Court who did not endorse the majority position.[57] That alternative stance argued, in effect, that Congress should be able to formulate overarching policies covering all dimensions of national life under the Commerce Clause, on condition only that it framed these policies in the idiom of economics. This minority position would have allowed Congress to regulate teenagers carrying guns at local schools for a raft of more immediative motives, as long as it did so within an overall justificatory schema ultimately tracing the meaning of such motives to the consequences of regulated activities for producing wealth.[58] In this view, congressional action would exceed its constitutional limit only where interests and values are inherently not susceptible to economic reasoning, with such nonassimilable interests and values – if any in fact exist – falling to the purview of the states.

Justice Kennedy's concurrence illumines deeper grounds for the Court's stated assertion that a lack of textual support requires a rejection of sixty years of precedent tending to support the minority position. Kennedy argues that Rehnquist's interpretation of the text lies not in the inherent meaning of concepts or of any stable realities to which

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[57] *Lopez*, 115 S. Ct. at 1651–65, 131 L. Ed. 2d at 665 – 84.

[58] 115 S. Ct. at 1651, 131 L. Ed. 2d at 666 (Souter, J., dissenting) and 115 S. Ct. at 1660, 131 L. Ed. 2d at 677 (Breyer, J., dissenting).

they correspond, but in the shifting requirements of preserving, in evolving circumstances, the balance of federal and state power, according to what optimally serves individual liberty.[59]

Lopez is only the most recent, in a series of Rehnquist Court cases revising constitutional doctrines incrementally and across the board, for the sake of tilting the balance of power back towards the states.[60] In the case at hand, the shift implies an option for the values of liberty and fairness over the utility of a stronger central government, which was favored by the Court's dissenters. Rehnquist's preference for the rule of law, which he expresses in terms of fidelity to the text, over democracy, which he conceives, in turn, as national legislative policymaking, is to be interpreted in these underlying terms. In adjudicating division-of-powers questions through such pragmatic balancing, the Court aims at placing the Federal Congress, the States, and even itself, in a functional equilibrium, subject to periodic adjustments to ensure popular satisfaction with the system's concrete realization of freedom, fairness, and efficiency.

III. Resolving Conflicts over the Scope of "Public Morality": The Abortion Controversy

A complementary route to understanding the distinct roles, which the two constitutional systems accord basic values, leads *via* the protections each grants individuals against invasions by state power. A particularly apt matrix for this second line of analysis is formed by the adjudication of conflicts between community assertions of moral norms and individual inclinations to contravene the community standard. In both Germany and America, the most aggravated recent controversy of this kind has been over abortion.

The German Experience

The current response of the German Constitutional Court to the specific issue of abortion can be found in its *Second Abortion* opinion of 1993. The Court's Second Senate had been called upon in the case to resolve the constitutionality of a "no-fault" scheme the Federal Parliament

[59] 115 S. Ct. at 1660, 131 L. Ed. 2d at 677 (Kennedy, J., concurring).

[60] An example is the area of procedural protections within the criminal justice system. See, e.g., *Sandin* v. *Conner*, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

had adopted for regulating early abortion.[61] The Court adopted the basic value of the life of every human person as the starting point of its evaluation of the enactment.[62] On the facts, it found human life to be present as a value from at least the implantation of the individuated embryo, the earliest unborn entity affected by definition, under a law concerned with the "interruption" of pregnancy. It held that killing the fetus even in early abortion was a presumptive violation of the constitutional order.[63]

The Court examined the concrete context to determine whether a countervailing constitutional value might sufficiently limit the recognition owed the right of life to allow it, nonetheless, to sustain the legislative enactment. The Court could not find democracy to offer such a counterweight because, within the German constitutional order, that value is itself accountable to the very human dignity at issue in the right to life itself.[64] But, it found that the pregnant woman's life, bodily health, and autonomous development of personality were such a separate value sufficient under circumstances at least, to limit the concrete recognition constitutionally owed the right to life.[65]

Where the pregnant woman demonstrated objectively grave reasons for interpreting the pregnancy as a threat to her life, physical health or the development of her personality, the Court found the legality of abortion compatible with a constitutional order vindicating the life of her unborn child as an objective basic value.[66] In such cases, therefore, abortion could be considered justified and not constitutionally wrongful.

The Court held that a law permitting such abortions did not violate the Constitution.[67]

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[61] Principally, §§ 218 & 219 of the Strafgesetzbuch as amended by the Gesetz zum Schutz des Vorgeburtlichen/werdenden Lebens, zur Förderung einer Kinderfreundlicheren Gesellschaft, für Hilfen im Schwangerschaftskonflikt und zur Regelung des Schwangerschaftsabbruchs (Schwangeren- und Familienhilfegesetz) 1992 Bundesgesetzblatt [BGBl.] I 1398–1402. The legislature wanted to leave the decision to the woman's individual conscience with an awareness of her responsibility, but without imposing objective limitations on her reasoning. As such, the approach can be said to resemble the development in both Germany and the United States of law permitting "no-fault" divorce, i.e. the legal recognition of the divorce decision without a showing of fault.

[62] BVerfGE 88, 203, II (251).

[63] *Id.* at 252, 255 – 56.

[64] Protection of life was said by the Court to be the "Aufgabe des Gesetzgebers", *id.* at 254.

[65] *Id.*

[66] *Id.* at 257.

[67] More precisely, the Court's formulation was that, through "Unzumutbarkeit", no "Rechtspflicht" to carry the child to term was "aufzuerlegen" by the state. It took care to

But such a law was not the precise point in controversy. That, rather, was whether a permissive regime of abortion, allowing abortion based on the early phase of gestation alone and without a showing of objective reason, was constitutional. The Court's response to this question was that where a woman could establish no objectively grave reason for interrupting the pregnancy, the abortion indefeasibly constituted a violation of the right to life.[68] The Federal Parliament was constitutionally obligated to treat the act as objectively wrongful at German law.[69] No loosening of legal restrictions could go so far as to alter the juridical status of an objectively unjustified abortion as an act wrongful within the constitutional order of values. The Court, thus, held the law, as enacted, unconstitutional.

The further question the Court addressed, critical to future parliamentary efforts at abortion reform, was whether the constitutional obligation to respect the right to life which the Court found incumbent on the legislature required it to criminalize objectively unjustified, early-term abortions, or whether it left open the milder path of a program of "public morality" employing means other than criminal sanctions.[70] The Court stipulated that to be acceptable any future legislative response to abortion must safeguard the minimum inviolable content of the basic value of individual human life.[71] It held further that this minimum called for some-

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say that this concept did not qualify the general maternal duty of care for a child, nor did it relieve the state of an own ongoing duty of its own to the child, holding this latter duty to be properly expressed by state assistance to the mother to ensure that the child, if at all possible, reach term, id. at 255 – 56, 259, 261. The Court noted the possibility of notions of moral or religious duty to the unborn child which might be perceived by the individual as requiring the carrying the child to term, notwithstanding the absence of a exactable legal duty to do so, id. at 257.

[68] *Id.*; the Court also held that it violated the "Sozialstaatprinzip", *id.* at 319.

[69] The Court held a no-fault regime in which "die Rechtspflicht zum Austragen des Kindes von Grundrechts wegen auch nur für eine bestimmte Zeit – generell aufgehoben wäre" constitutionally inadmissible, *id.* at 255, on the ground that the admission of the act as "nicht rechtswidrig" would compromise the integrity of the entire "Rechtsordnung", *id.* at 241. In their dissent, Justices Mahrenholz and Sommer argued that the majority was pursuing a distinction without a difference, "ob ... [das Gesetz] den Tatbestand ... einengte oder ob er einen Rechtfertigungsgrund setzte oder nur einen Schuld- oder Strafausschließungsgrund zum Inhalt hatte; in jedem Falle müsse der Eindruck entstehen, der Abbruch sei 'rechtlich erlaubt' ...", *id.* 356.

[70] The Court held that criminal sanctions had to remain an "ultima ratio" in the legal order, but need not be used in every circumstance, *id.* at 253, 258.

[71] *Id.* at 254.

thing more than simply validating that value as an abstract juridical matter: namely, it required as effective as possible a protection of the subjective right to life of all unborn children threatened with abortion.[72]

The Court examined the facts of abortion to determine what minimum concrete legal devices would both adequately safeguard the individual human lives placed at risk by abortion and properly uphold unjustified abortion's status as constitutionally wrongful. Where the former requirement was concerned, the Court ascertained that circumstances inherently relating to early pregnancy and abortion historically had made criminal sanctions ineffective in eliminating abortion.[73] The Court took notice as well of empirical arguments that counselling and social support for pregnant women were more useful than criminal sanction in lowering the abortion rate.[74] It concluded that, where certain conditions were satisfied, a counselling and social support schema could be a constitutional alternative to criminalizing early-phase abortion.[75]

A first condition was that the scheme's counselling component aim at more than merely a decrease in the frequency of unjustified abortion. The Court stipulated that such counselling must educate the woman considering unjustified abortion concerning its wrongful character and the desirability, where countervailing reasons are not objectively present, of continuing pregnancy to term.[76] The requirement flowed from the Court's judgement that the constitutional order was capable of absorbing decriminalization of early abortion in essential part, only by relying on the moral dignity of the mother's decision, as a separate, objective constitutional value.[77] The legislature could employ counselling as a response to abortion, therefore, only where it observed the objective requirements of genuinely ethical reasoning.[78]

[72] *Id.* at 251 and 261.

[73] *Id.* at 263 – 66.

[74] Notably, outsiders could not perceive that the woman was pregnant in the early phase of pregnancy, *id.* at 266.

[75] *Id.* at 264 – 65. In this key conclusion, the Court departed from its conclusion in its 1975 abortion decision that the criminalization of unjustified abortion was required, BVerfGE 39, 1, 46 – 47, and adopted a position which in some ways resembled the outlines of Justice Rupp-von Brünneck's 1975 dissent, *id.* at 79 (dissenting opinion).

[76] *Id.* at 270 and 276.

[77] *Id.* 272.

[78] *Id.* at 281.

A second condition of constitutionality, arising from the same consideration, was that any legal permission of objectively unjustified abortions occur only with provision made for winnowing out applications made from external pressure, rather than internal decision.[79] The Court, thus, held that the state was required to assure the woman of adequate social support on the birth of her baby.[80] Procedures had to be developed to protect her from undergoing abortion to satisfy third-party pressure.[81]

Finally, the Court stipulated that the preservation, which it mandated,[82] of the juridical status of unjustified abortion as constitutionally wrongful even where legally allowed was incompatible with the subsidy of unjustified abortion from insurance funds pooled for health, since such payment would necessarily imply that the procedure objectively advanced life or health.[83] In a related restriction, the Court held that the medical profession could constitutionally perform unjustified abortions only within a framework of professional ethics grounded in principled adherence to the value of each individual human life from at least the time of implantation.[84]

The Court tailored its holding to interfere no more in the interests of pregnant women than actually necessary to advance constitutional values, holding, for instance, that the dignity of women undergoing abortions merited confidentiality without regard to the constitutionally justified or unjustified character of their actions.[85] Similarly, it stipulated that the legislature could, without constitutional offense, pay the costs of poor women's unjustified abortions, if it drew on social insurance set aside for guaranteeing a minimum living standard rather than from health-pooled funds, since the former implied support only for the woman's subsistence, not the objective rightfulness of her act.[86]

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[79] *Id.* at 296 – 97.

[80] *Id.* at 259.

[81] *Id.* at 253 and 260.

[82] *Id.* at 273.

[83] *Id.* at 315; the Court held, by contrast, that medical contracts arising in the context of constitutionally unjustified abortions could be enforced, without compromising the legal system's fidelity to the value of human life, conditional only on the exclusion of damages for "wrongful life" claims, *id.* at 295 – 96.

[84] See generally *id.* at 289 – 96. The Court's term was "ärztlich verantwortbar", *id.* at 292. The Court stated that one specific duty was to withhold information identifying the gender of unborn children, unless medically necessary, to prevent gender-specific abortions. It also held that physicians had a constitutional right of conscientious objection to performing abortions, *id.* at 294.

[85] *Id.* at 317.

[86] *Id.*

The realization of basic values the Court intended through its decision included the protection in fact, wherever possible, of existing unborn lives from the killing of abortion; the moral integrity of physicians and family counsellors; and, ultimately, a commitment to, and defense of, life's value on the broadest possible societal basis. The decision had structural consequences for the allocation of responsibility for realizing the value of individual life, for it allowed the legislature to shift such responsibility from governmental organs charged with criminal justice, to ones concerned with social welfare, and, to a not insignificant degree, from government itself, to society in all its reaches. As the realization of the latter development, the Court envisioned intermediate social institutions with social service credentials engaged in counselling,[87] and, through the levy of tax revenues, the whole population mobilized in support of counselling and social services fostering respect for life.

The Federal Parliament had judged national unity to warrant a loosening of abortion restrictions in the wake of increased moral pluralism following the incorporation of the *Länder* of the former Soviet Zone.[88] In its 1993 *Abortion* decision, the Constitutional Court demanded a more nuanced legislative judgement. It validated the legislature's search for new and different strategies in further national unity on changing facts, but it would not concede the legislature authority to come to such unity by objectively abandoning a core constitutional value. Common respect for objective values as fundament of German national identity was foremost among the values the Court sought to realize.[89]

The American Experience

A comparison of the role American constitutional interpretation assigns basic values in adjudicating conflicts between legislatures and individuals over public morality, more specifically, about abortion, relies most appropriately on the United States Supreme Court's 1992 opinion in *Casey* v.

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[87] *Id.* at 304, 261.

[88] *Id.* at 219. The issue had been left open in the Unification Treaty. Einigungsvertrag, Aug. 31, 1990, art. 31(4). 104 Presse- und Informationsamt der Bundesregierung Bulletin 877 (1990); Peter H. Merkl, German Unification in the European Context 176 – 80 (1993).

[89] On August 21, 1995, the Federal Parliament enacted legislation implementing the reasoning of the Constitutional Court analyzed here, Schwangeren- und Familienhilfeänderungsgesetz, 1995 BGBl. 1050 –1057.

Planned Parenthood of Southeastern Pennsylvania. The case reviewed the constitutionality of state of Pennsylvania's law on abortion.[90]

As in Germany, the issue before the Court was whether a legislative construal of abortion as a question of public morality was constitutional. But the American court's more specific formulation effected a dramatic reversal. It phrased the problem as whether the legislature may treat abortion as a concern in public morality, in contrast to a "no-fault" exercise of freedom, guaranteed by the Constitution.[91]

Justice O'Connor's plurality opinion in support of *Casey*'s holding adopted 14th Amendment liberty as its starting point.[92] More concretely, it found that this concept had a twofold relevant meaning: "liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child and bodily integrity";[93] and freedom from governmental coercion in decisions over "medical treatment".[94] O'Connor proposed both as broad enough to embrace a woman's decision to abort, but noted that, should the recognized scope of such freedoms be considered too narrow for the purpose, *Roe* v. *Wade*[95] was, as a matter of *stare decisis* alone, sufficient to sustain that right.

Caught in the skeins of obvious doubt arising from her personal judicial philosophy over the inclusion of abortion within the meaning of fourteenth amendment liberty, O'Connor was found to assert that a single precedent assured abortion of constitutional protection *sans* the further grounding that might be found lacking in history or reason.[96] The precedent's unique force in this regard was, in any event, stated by O'Connor to be a double one. *Roe* had resolved an intense public dispute over a controverted value, and American women had relied upon it in since arranging their economic livelihoods.[97]

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[90] 112 S. Ct. 2791, 2803, 120 L. Ed. 2d 674, 693 (1992) (ruling on 18 Pa. Cons.Stat. §§ 3203 – 3220 [1990]). At the time of the writing of this article, the official United States Reports version of the case was not yet available to the author and so pinpoint citations to that source are not provided.

[91] 112 S. Ct. at 2816, 120 L. Ed. at 709.

[92] 112 S. Ct. at 2804, 120 L. Ed. 2d at 695.

[93] 112 S. Ct. at 2810, 120 L. Ed. 2d at 702 (citing *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 [1965]).

[94] 112 S. Ct. at 2810, 120 L. Ed. 2d at 702 (citing *Cruzan* v. *Director, Missouri Dept. of Health*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 [1990]).

[95] 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

[96] *Casey*, 112 S. Ct. at 2810 –16, 120 L. Ed. 2d at 701– 709.

[97] 112 S. Ct. at 2809, 120 L. Ed. 2d at 701; the general test for the force of precedent which the Court set out was phrased in terms of "unworkability", "anachronism", and "change in premise of fact", 112 S. Ct. at 2816, 120 L. Ed. 2d at 709.

The Court found the 14th Amendment liberty guarantee to confer the right to terminate a pregancy.[98] The Pennsylvania law had with respect to most of the term of pregnancy not prohibited abortion, but merely subjected it to regulation as a matter of public morality, seeking indirectly thereby to encourage a reduction in the abortion rate.[99] The critical issue was whether the burdens this scheme imposed on women seeking abortions violated the Constitution.

O'Connor inquired whether a countervailing value existed sufficient to justify limiting the abortion right to the extent of the Pennsylvania statute. She found such a value, at least potentially, in democratic decisions over matters of legitimate societal interest.[100] More specifically, she found the life of the child to constitute such an interest and, thus, to be a potential basis for limiting abortion. Where the fetus was "viable", currently for about the last three months of pregnancy, she observed that this interest was sufficiently weighty to justify prohibiting abortion, at least where no countervailing material maternal interest in life or health could be shown to militate in favor of the procedure.[101]

Where the fetus was "nonviable", currently for about the first six months of pregnancy, the plurality asserted that the State's interest in the child was too light to justify proscribing even elective abortions, but sufficiently weighty to support indirect burdens on the exercise of the right of abortion through a scheme regulatory of public morality.[102] On this critical point, *Casey* overturned the specific holding of *Roe* v. *Wade*.

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98 *Id.*

99 112 S. Ct. at 2803, 120 L. Ed. 2d at 693 – 94.

100 112 S. Ct. at 2817, 120 L. Ed. 2d at 710. The American decision assumes that the unborn child or fetus has no constitutional right to state protection, and it inquires merely the scope of the legislature's perogative to confer such protection. Gerald Neuman has pointed out that the salient distinction between the German and American abortion decisions can be generalized beyond the right of the unborn child or fetus to state protection. He notes that the deeper issue is whether the recognition of rights extend to protection from private third-party interference. Gerald L. Neuman, Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany, 43 American Journal of Comparative Law 273, 295 – 314 (1995) [hereinafter Am. J. Comp. L.]. Neuman contrasts the German approach with *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct.998, 103 L.Ed.2d 249 (1989), in which the United States Supreme Court held that a 4-year-old boy threatened with violence, known to the state, by an adult caretaker had no right to protective state intervention. For contrasting German law, see the "Drittwirkung" doctrine. Peter E. Quint, Free Speech and Private Law in German Constitutional Theory, 48 Maryland Law Review 247, 339 – 47 (1989).

101 112 S. Ct. at 2816 –17, 120 L. Ed. 2d at 710.

102 112 S. Ct. at 2818, 120 L. Ed. 2d at 712.

State power to advance an interest in the nonviable fetus during the first two-thirds of pregnancy, moreover, reached its limit, according to O'Connor, at a threshold considerably lower than attempts at outright proscription. That point was said by O'Connor to be encountered in "any substantial obstacle" to the procurement, in fact, of an abortion. Such was the essence of the Court's new "undue burden" test.[103]

Within the limit of "no undue burden", the plurality upheld all of Pennsylvania's regulations aimed at informing the woman of the state's preference for childbirth over abortion, and at making sure that her decision was both reasonably well considered and duly informed of the objective physiological characteristics of her unborn offspring at the time proposed for its abortion.[104] The Court struck down only one term in the law, which imposed a conditional duty on married women to attest that they had notified their husbands of their intention to abort. The ground was the undue burden the Court perceived in an implicit invitation to third-party pressure before the procedure, and to physical or moral retaliation after it.[105]

Both the plurality's practical purpose, and the holding's immediate effect, were to give greater legislative scope to expressions of disapproval of abortion and to efforts at a reduction in its incidence, without, however, the disruption of national unity which would have flowed from permitting individual states to adopt conflicting hierarchies of abstract value. The plurality's methodology in reaching its result had meaning for the American constitutional framework, however, that went beyond its concrete goals.

Significantly, the relatively traditionalist justices joining in O'Connor's opinion were unwilling to limit the extratextual sources of fourteenth-amendment liberty to traditions or concepts validated within the history of American and English law and jurisprudence in the once familiar manner of a Harlan or Frankfurter, and ranged instead into the still relatively novel realm of concepts of bodily autonomy and of the value-creating capacity of judicial will.

Significantly, too, these same justices chose to limit the authority of the state – not federal – legislature to advance moral or metaphysical concepts of value, as opposed to material interests. An ancillary value of the democratic decisions of American state legislatures has long been their perpet-

[103] 112 S. Ct. at 2819, 120 L. Ed. 2d at 712–13.
[104] 112 S. Ct. at 2822–26, 120 L. Ed. 2d at 717–21.
[105] 112 S. Ct. at 2826–31, and 120 L. Ed. 2d at 721–28.

uation of ancient equitable and moral principles embedded in the states' common-law traditions, traditions previously enriching and offsetting the functional or utilitarian modes of justification the Constitution requires of the legislature at the federal level.

The *Casey* plurality's interpretations both of the meaning of individual liberty and democratic decision represent a constriction of the kinds of reasons counting as rational, within the American constitutional scheme. When one seeks the deeper ground, one confronts a concern with the balance of power, similar to that seen in *Lopez*.

If *Casey* had held the reverse, and permitted states to permit or proscribe abortion according to majority will, a serious clash of modes of rationality and moral reasoning among states might have been feared, even to the point of jeopardizing the nation's unity. Justice Kennedy's concurrence in *Lopez* suggested that the Court's textual interpretations might hinge on a pragmatic assessment of the balance of power in the federal scheme. *Casey* can fairly be read as standing for the same proposition. Its resolution of the issues before it facially allocated power between the individual and the state, but, on another level, it aimed at a desired balance of national unity and local independence. Its contribution to this project was its prescription of utility and individualism[106] as the language at the state as well, as at the national level, for resolving divisive moral topics.

IV. Concluding Reflections

The materials reviewed here have been current ones, but the pictures emerging resonate with deepseated traditional differences between the legal cultures which are in view: one system – anglo-saxon, process-oriented, pragmatic, and individualistic; another – continental, substantive, communitarian, and principled. Evaluating the realization of basic values within each system requires that German and American solutions to particular problems be considered only against the backdrop of appreciation for differences in national constitutional languages.

In both systems, the interpretation of basic values relies on a prudential judgement to close the gap between constitutional concepts and their

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[106] The plurality justified the Court's holding on the individualist ground that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the state", 112 S. Ct. at 2807, 120 L. Ed. 2d at 698.

requirements in new and changing situations.[107] In the German system, this judgement principally matches the material content of new situations with the forms of inherited concepts, but, as both German cases have shown, it extends also to an ancillary process of creating new structural relationships within government and society. In the American system, the judgement in question goes primarily to allocating freedom and power, but, as we have seen from the cases considered, it requires, as well, anguishing over and, as could be developed in a more extensive review of American case law, in its own fashion, affirming the source, nature, and direction of basic values.

The right prudential judgement in each system, then, involves the same elements but in a different order. Common to both systems is the overarching requirement that the judgement linking the formal constitutional value and its realization in fact combine the due degree of closure and openness.[108] If an evalution were to be undertaken of the cases considered here, or of the tendencies they expose in their respective interpretive traditions, it would center on the correctness of this prudential balance.

Specifically, one might ask whether the American opinions find the best balance between pragmatic openness to uniting the country around an national market and closure in relation to norms of integrity in interpretive and moral reasoning. Of the German cases and their interpretive tradition, one might inquire into the source of German assurance of striking the right balance between closure represented by commitment to jurisprudential norms and values and openness to a future defined by rapidly integrating economic markets relativizing and flattening the European moral and cultural traditions on which the German interpretative tradition undoubtedly depends.

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[107] The two systems can find common ground, not only in hermeneutical methodology, but also in concrete social and political problems calling for resolution: "Despite differing historical legacies and cultural settings, ... the liberal democracies ... are wrestling with certain common problems", Mary Ann Glendon, General Report – Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations, 1993 Brigham Young University Law Review 385, 412.

[108] Winfried Brugger describes this tension as being one of "Flexibilität" and "Rigidität." Winfried Brugger, Konkretisierung des Rechts und Auslegung der Gesetze, 119 Archiv des öffentlichen Rechts 16 (1994); for a general schema of possibilities of hermeneutical methodology, see Winfried Brugger, Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks From a German Point of View, 42 Am. J. Comp. Law 395 – 421 (1994).

Rather than to presume to include such a substantive evaluation within its scope, the present article will conclude with a question which, it is hoped, will stimulate further reflection on the meaning and direction of the evaluation called for. The German and American abortion cases support legislative schemes remarkably similar[109] in their legal permissions, prohibitions and commands regarding the act of abortion, and, yet, they give virtually opposing accounts of the jurisprudential meaning of the countries' respective laws – What is one to make of this? What does it portend for the future?

[109] The pattern of similarity and difference between the two legal regimes on the question of abortion should not be oversimplified. Similarity extends, for example, beyond the positive scope conferred on the freedom of abortion to a common judicial willingness to intervene in the democratic resolution of the question. And difference goes beyond the divergent moral interpretations the respective national courts give to freedom of abortion. A critical difference in the permission legally conferred lies in the far more restrictive time limit imposed on abortion in Germany. German law gives far greater protection to the child developing *in utero* by restricting abortion to a time far ealier in pregnancy. The judicially imposed American solution is more permissive than was even the legislation seeking to accomodate a newly integrated population accustomed to abortion on demand in communist East Germany, which the German Court overturned. The American regime appears unique in its willingness to guarantee the availability of the abortion procedure so far into pregnancy. Mary Ann Glendon, U.S. Abortion Law: Still the Most Permissive on Earth, Wall Street Journal, July 1, 1992, at A 15.