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GUARDIANS OF THE CONSTITUTION

GERHARD CASPER*

In the almost two hundred years that have passed since its adoption, the Constitution of the United States, though greatly changed through interpretation and application, has rarely been altered by formal amendment. If one leaves aside the original eleven amendments, there are only fifteen in number. By far the most important of these later amendments were those added just after the end of the Civil War, for the purpose of securing equal rights to recently emancipated black citizens. These amendments were to cause an expansion of the Constitution's influence on the law of the states that no one dreamt of at the time. For the most part, however, the United States Constitution has resisted formal alteration even through drastic social and economic changes and remains the nation's major source of legitimacy and authority.

During the same two hundred years Germany has endured a great number of constitutional changes: The collapse of the Holy Roman Empire, the charter of the German Confederation, the Constitution of 1848, Bismarck's Constitution, the Weimar Constitution, the dictatorship of the Third Reich, the Basic Law of the Federal Republic in the West, and two constitutions, the last explicitly socialist, of the Democratic Republic in the East. This count does not include constitutional changes in the German states, which at least in the nineteenth century, were of far greater significance to their citizens than those of the whole.

To contrast American constitutional continuity with German discontinuity is not to say that there have been no German constitutional traditions. Rather, at least on the ideological plane, German continuity and discontinuity must be examined in reference to such abstractions as the German "idea" of freedom,¹ the German of "concept" of consti-

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1. The classical study is L. KRIEGER, *THE GERMAN IDEA OF FREEDOM* (1957).

tutionalism (*Verfassungsbegriff*),² or the German "understanding" of the rule of law (*Rechtsstaat*).³ Given the political uncertainties of modern German history, the role of the courts in fleshing out constitutional principles had to be extremely limited. This was as true for the Reich as it was for the constitutional arrangements in the German states. Also, when judicial review in Germany was at last unambiguously adopted, it took a different institutional form from that in the United States. This difference occurred in part because the Germans stressed a question which in the United States was relegated to secondary importance: Who shall be the guardians of the constitution?

John Marshall had profound influence on the American debate over judicial review by asking: *Is the Constitution law?* While Marshall's contemporary opponents, as well as his modern critics, never failed to point out that an affirmative answer does not necessarily entail the power of judicial review, it remains true that Marshall's "deeply interesting" but not so "intricate" question structured the discussion in ways favorable to the outcome he desired. In the early years of the American federation, judicial review of state legislation served to consolidate the understanding expressly set forth in article VI⁴ of the Constitution as *law*.

During the same historical period, roughly the first half of the nineteenth century, the German situation was entirely different.⁵ The German Federation of 1815, which attempted to organize the remnants of the Holy Roman Empire out of the shambles left after the Napoleonic wars, was not sufficiently cohesive to contemplate judicial resolution of the attendant disputes. Conflicts between a member state and the Federation were committed to political resolution by the Federation's major political and decisionmaking organ—the Federal Assembly.

The German Federation did develop an elaborate and complicated arbitration mechanism (*Austrägal-Verfahren*), mostly for disputes between or among states and ruling princes, which assigned to state courts some rudimentary jurisdiction, but nothing amounting to judi-

2. See generally W. HENNIS, VERFASSUNG UND VERFASSUNGSWIRKLICHKEIT (1964).

3. See generally E. FORSTHOFF, RECHTSSTAAT IM WANDEL (1964).

4. U.S. CONST. art. VI.

5. For a general overview of judicial review in Germany, see SCHEUNER, DIE ÜBERLIEFERUNG DER DEUTSCHEN STAATSGERICHTSBARKEIT im 19. und 20. Jahrhundert in: 1 BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ 2 (C. Stark ed. 1976). The magisterial treatise on German constitutional history is E.R. HUBER, DEUTSCHE VERFASSUNGSGESCHICHTE, vols. 1-5 (1957-78).

cial review. The Federation of 1815 thus lagged, even by comparison with the Holy Roman Empire, in providing for a judicial role in what were essentially viewed as affairs of state. While neither the *Reichskammergericht* nor the *Reichshofrat* had exercised a power of judicial review under a constitution, they did possess jurisdiction over certain disputes of a constitutional nature. The *Reichskammergericht*, in particular, could under certain circumstances act as a court of last resort for citizens alleging a flagrant denial of due process of law (*Rechtssverweigerung*).

The first half of the nineteenth century witnessed a gradual political and legal redefinition of governmental powers and of the mode and scope of their exercise. This redefinition resulted from the precarious interplay of old forces (monarchy and estates) with new forces (the bourgeois middle class in particular). The resulting social contracts (constitutions) in the German states, however, were not easily committed to the judiciary for purposes of enforcement. In Germany it was difficult to see the courts as neutral guardians of a compact between the *ancien régime* and society. This was in contrast to the United States where courts were enforcers of the supreme law of a self-governing people.

There are two telling exceptions to the rule. First, in this period of spreading constitutionalism, a number of states established so-called *Staatsgerichtshöfe* (courts concerned with "inatters of state") with jurisdiction mainly over the impeachment of cabinet members. One of the purposes of these courts was to forestall the danger that the new legislatures representing essentially one of the parties to the social compact might also consider themselves its guardians.

Second, the failure of the Frankfurt Constitution of 1849 dramatically makes the point that Germany, in particular Prussia, was not ready for the kind of social compact which underlays the American founding. One of the tasks of the Frankfurt National Assembly was to constitute "e pluribus unum." This unification was to be achieved in part by guaranteeing forty million people basic rights against both the central government and the states as a matter of federal constitutional law. The new constitutionalism needed a guardian. The German framers decided to establish a court with far-reaching powers of judicial review—the *Reichsgericht*. While the new court was to have some extremely limited civil and criminal jurisdiction, it was essentially a constitutional court. Sections 125 and 126 of the 1849 Constitution gave the *Reichsgericht* jurisdiction over disputes between states and the

Reich, disputes among the states, constitutional disputes within the states, and complaints brought by German citizens for "violation of their constitutionally guaranteed rights."

Under the Constitution of 1849, the *Reichsgericht* was a specialized constitutional court similar to the courts found nowadays in Austria, Italy, and West Germany. The framers of the Frankfurt Constitution understood the jurisdiction of the *Reichsgericht* to be, at least to some extent, political in nature; this was expressed in section 125(c) which referred to disputes among the states as "political and private law disputes of any kind." Furthermore, the court was designed to provide a neutral guardian even for state constitutions: Section 125(e) conferred jurisdiction over disputes between state governments and their legislatures concerning the validity or the interpretation of state constitutions. The constitutional complaint provision of section 126(g) was a potentially far-reaching mechanism for the legalization of basic rights previously protected primarily by political means. Its sweep remained unparalleled in German constitutional history until the Bonn Republic.

Roughly two decades later, the unification of Germany took place under Prussian auspices and under a constitution which looked toward the political resolution of constitutional disputes. A bill of rights was absent. Article 76 of the 1871 Constitution conferred the power to settle constitutional controversies among the states, as well as within states without a competent authority of their own, upon the *Bundesrat*—the major political and legislative organ of the Bismarck Reich. The *Bundesrat* was also authorized to intervene in cases of *Justizverweigerung* (denial of justice) in the member states.⁶ The constitution was silent about the resolution of all other constitutional disputes. The establishment of the *Reichsgericht* in 1877 in Leipzig did not entail any change in this political understanding of constitutionalism as its jurisdiction did not extend to constitutional issues.

It would be wrong to conclude from the constitutional history of the nineteenth century that the German experience with judicial review was somehow linked to the presence or absence of democratic institutions. While such a view would not be entirely implausible, the extensive debate on the subject among politicians, lawyers, law professors, and judges of the Weimar period indicates how seriously the Germans

6. GERMAN CONST. OF 1871, art. 77.

took the question of guardianship and how they found the answer to be less than obvious.

Under article 19 of the Weimar Constitution a *Staatsgerichtshof* had jurisdiction over controversies among the states as well as disputes between the states and the federation.⁷ The *Staatsgerichtshof* was also competent to resolve constitutional controversies within a state if there was no state court with jurisdiction. While the jurisdiction of the *Staatsgerichtshof* under article 19 was frequently invoked, especially in state electoral disputes, it did not extend to what we have come to consider the core area of judicial review—the review of federal or state statutes for their federal constitutionality. Indeed, under article 13 it was the *Reichsgericht* (under certain circumstances the highest tax court—the *Reichsfinanzhof*) that was empowered to review the validity of state statutes alleged to be in conflict with federal law in violation of the Weimar supremacy clause. Since 1877, the *Reichsgericht* had been the court of last resort in matters of private law and criminal law. It was considered to have implied authority to pass on state statutes in the course of adjudicating actual cases or controversies. Article 13 provided the *Reichsgericht* with original jurisdiction in declaratory judgment suits brought by the Reich or a state. Article 13 was silent, however, as to the authority of the *Reichsgericht* in proceedings of this nature to review federal legislation alleged to be supreme under the constitution.

This silence echoed the overall silence of the Weimar Constitution with respect to constitutional review of federal statutes. While the constitution provided for a bill of rights, it left this core question unanswered, neither authorizing nor prohibiting judicial review. There is evidence from the deliberations of the Weimar National Assembly to suggest that this ambiguity was intended by the framers.

Thus, it is not surprising that the Weimar Republic saw the most intensive arguments over who should be the proper guardians of the constitution. The debate centered on the power of the courts to review the constitutionality of federal legislation in deciding actual cases or controversies—what one might call the American analogue. The discussion also extended to the advisability of a special constitutional court as guardian of the constitution (a kind of expanded *Staatsgerichtshof*) and to the problems associated with a legalization of

7. For English language literature on judicial review during the Weimar period, see Friedrich, *The Issue of Judicial Review in Germany*, 43 POLITICAL SCI. Q. 188 (1928); Lenoir, *Judicial Review in Germany under the Weimar Constitution*, 14 TUL. L. REV. 361 (1940).

politics and a politization of the judiciary. An academic consensus had not been reached when the collapse of Weimar put an end to it all.

By contrast, the *Reichsgericht's* handling of the matter is a fascinating study in and of itself. In 1925 the *Reichsgericht* announced that the constitutional silence meant judicial review was authorized.⁸ Then, in 1929, the court actually found a federal statute unconstitutional.⁹ Politically, the *Reichsgericht* was seen as supporting essentially conservative interests.

These considerations were swept away by the Third Reich. The German post-World War II discussion centered on the failure of the German constitutions, particularly on the discrepancy between the constitution on paper and in operation. For the post-war Germans, heeding the lessons of history meant the creation of an explicit and highly visible guardian of the constitution (a "supreme" guardian). They created it in the Federal Constitutional Court, in some ways a combination of the Frankfurt *Reichsgericht* of 1849 with the Weimar *Staatsgerichtshof* of 1919. The mission of this court was not simply to apply law of a higher rank but also to be a political body. In performing this mission the *Bundesverfassungsgericht* has developed a notion of constitutionalism which in some important respects is similar to the role played by American constitutional law.

In the United States the Constitution has to some extent been assigned the function of defining the American way of life, both descriptively and prescriptively. The term "constitution" here is meant to comprise those fundamental principles of political life enunciated both in the Declaration of Independence and the Constitution itself. In the words of historian Daniel Boorstin, what the United States did was to "canonize not an event or an act, but a statement, a public declaration of legal rights and general principles."¹⁰

To stress the ideological importance of the Constitution is not to assert it as the only ideological resource. Other ideologies (for instance a belief in science) are increasingly resorted to in order to make political problems "somewhat more manageable."¹¹ Moreover, there have

8. 111 RGZ 320 (1925).

9. 124 RGZ 173 (1929).

10. R. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 377 (1965) (referring to the Declaration of Independence).

11. IDEOLOGY AND DISCONTENT 32 (D. Apter ed. 1964). A "scientific" solution may come into direct or indirect conflict with the constitutional tradition. Such conflict surfaced over the role of "experts" in shaping policy during the Viet Nam War. Today, the part taken by the social

been historical developments to which the Constitution had very few ideas to contribute; for example, the revolutionary changes in the structure and regulation of the American economy. Yet, in the thirties, the debate about these changes was carried on as if the Constitution were relevant. Both the advocates and opponents of laissez-faire alleged that the Constitution provided the answer to the question of how a modern industrial society should draw the line between the public and private realm.¹² Still more surprisingly, that is where the answer was "found."

In periods of social, psychological, and cultural strain, few Americans free themselves radically from the governance of received tradition.¹³ More often than not, they invoke constitutional principles as authoritative concepts for the understanding and resolution of conflicts. To be sure, there are those critics who believe that American constitutionalism as conceived and developed has failed as an integrative force because of the interest group pluralism that characterizes much of its actual operation.¹⁴ Also, the role of the American constitution as a national ideology involves the danger of identification of American law and American civilization with law and civilization as such. The effects this can have on foreign policy are well known.¹⁵ Judith Shklar speaks of "national ideology as law;"¹⁶ Boorstin finds "conserving narcissism."¹⁷ The question of whether the American attitude, always tempered by a large amount of skepticism, even cynicism, about law and politics, should be characterized as a vice or a virtue is not the point of comparison. Of interest is the phenomenon itself: the Constitution as a crucial component of the national ideology.¹⁸

When one looks for authoritative concepts that serve this kind of

sciences in dealing with the complex problems of school integration is also a source of such conflict. See *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954).

12. Adams, *Krise des amerikanischen Konstitutionalismus: Der New Deal vor Gericht*, in *DIE GROSSE KRISE IN AMERIKA* 189 (Winkler ed. 1973).

13. See Geertz, *Ideology as a Cultural System*, in *IDEOLOGY AND DISCONTENT*, *supra* note 11, at 64.

14. See S. WOLIN, *POLITICS AND VISION* 388-93 (1960).

15. See K. KRAKAU, *MISSIONSBEWUSSTSEIN UND VÖLKERRECHTS-DOKTRIN IN DEN VEREINIGTEN STAATEN* (1967).

16. J. SHKLAR, *LEGALISM* 179 (1964). See also S. HOFFMAN, *GULLIVER'S TROUBLES, OR THE SETTING OF AMERICAN FOREIGN POLICY* (1968).

17. D. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 205 (1964).

18. The term "ideology" is employed here with little confidence in its usefulness. Almost every user has had a different answer to the crucial question: Ideology as distinguished from what? See Mullins, *On the Concept of Ideology in Political Science*, 66 *AM. POLITICAL SCI. REV.* 498 (1972). Here, it designates no more than those national concepts and principles that in periods of crisis are invoked to give meaning to politics. See Geertz, *supra* note 13, at 63-64.

ideological function in modern German history, one finds a preponderance of national or nationalistic ideas.¹⁹ While the Constitution has been essential in defining the American polity—the *res publica*—this has not been so in Germany, at least until recently.

It seems that friends and foes of the German Federal Constitutional Court agree that a good part of its work in the last quarter of a century has basically been an attempt to give the German Basic Law an ideological role similar to that which the United States Constitution plays in American life. Thus, in the celebrated controversy between Ernst Forstthoff and his critics, for instance, the major question was not whether Forstthoff had misconceived the Constitutional Court's self-image, but rather whether his relatively formal conception of the rule of law really caught the essence of the constitutional law.²⁰ Konrad Hesse's characterization of the way the high court judges conceive of the constitution is by and large correct:

The constitution is viewed as a substantive whole whose provisions are indehibly stamped by fundamental values which are prior to the positive legal order. With the integration of the traditions of the representative parliamentary democracy, the liberal constitutional state, and the federal state, and with the introduction of newer principles, especially that of the welfare state, the framers of the constitution connected these fundamental values to a value system and created a political system which is neutral as to Weltanschauung but not as to values.²¹

I am not advancing the thesis that German and American constitutionalism is now substantially the same. Nevertheless, in contrast with the past, the constitution, with the assistance of the Federal Constitutional Court, today fulfills an important ideological role in Germany as does the United States Constitution. This change is not a matter of mere imitation of the American model, despite the importance of American influences in the political life of the Federal Republic. It is more a result of the autonomous endeavor to "overcome the past" and of the distribution of political power in post-war Germany rather than a result of foreign influences, although of course the distribution of political powers was directly and indirectly influenced by the occupying powers. It was because of those very discontinuities in German constitutional history recited at the beginning of this Article that

19. K. BRACHER, *DIE DEUTSCHE DIKTATUR* 28 (1969).

20. See E. FORSTHOFF, *supra* note 3; Hollerbach, *Auflösung der rechtsstaatlichen Verfassung?*, 85 ARCHIV DES ÖFFENTLICHEN RECHTS 241 (1960).

21. K. HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK* 4 (1970).

the German post-war discussion centered on the failure of the German constitutions, particularly on the previously mentioned discrepancy between the constitution on paper and in operation.²² Above all, attention was turned to the Weimar Constitution, that "professionally engineered document, so widely acclaimed in its time, such a dismal failure in operation."²³ The endeavors of the Federal Constitutional Court to heed the lesson of the destruction of the Weimar Republic find their clearest expression in the concept of a "fighting democracy," whose application is often characterized by a fixation on a simplistic view of yesterday and a still unknown tomorrow.²⁴

Although the constitutions of the Federal Republic and of the United States serve very similar functions today, the roles of the courts in establishing and developing the constitutional ideology, while largely quite comparable, are in many, often undetected, ways very different. An important distinction should be made between the monopoly on the "power to nullify" law possessed by the Federal Constitutional Court and the monopoly on constitutional interpretation of the United States Supreme Court.

The positions that the Constitutional Court and the Supreme Court occupy in their respective legal systems are similar, although there are important procedural differences. In many respects, the Constitutional Court has a wider jurisdiction than the Supreme Court, particularly in its power to review a law in the abstract; its monopoly on nullifying laws in the context of a case or controversy (if a lower court considers a statute unconstitutional it has to submit the issue to the Federal Constitutional Court for its final determination); and the provision for a direct constitutional complaint against a law by any person, independent of its actual application. At least in theory, the Supreme Court can only decide a legal question if an actual legal controversy arises (the "case or controversy" requirement of article III). These days, of course, the necessity for an actual legal controversy is often circumvented by relaxing the standing requirements. Such a relaxation followed in part from decisions of the Supreme Court itself and in part from federal statutory laws.²⁵ On occasion, moreover, the Supreme Court will arrive at a decision of first instance in important constitu-

22. See HENNIS, *supra* note 2.

23. H. ECKSTEIN & D. APTER, *COMPARATIVE POLITICS* 17 (1963).

24. See G. CASPER, *REDEFREIHEIT UND EHRENSCHUTZ* 34-39 (1971).

25. See Monaghan, *Constitutional Adjudication: The Who and When*, 82 *YALE L.J.* 1363, 1380-83 (1973); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 *HARV. L. REV.* 645, 645-46, 654-55 (1973).

tional disputes by broadening its extraordinarily restricted original jurisdiction with the aid of procedural fictions.²⁶ Still, the Supreme Court basically has no power to review laws in the abstract, nor power to hear first-instance, direct constitutional challenges to a law, nor exclusive power to nullify a law. Any state court or federal court can declare state as well as federal law unconstitutional.

The status of the Federal Constitutional Court as a special court for constitutional disputes is more clearly defined than that of the Supreme Court. The chief example of the Supreme Court's more generalized tasks is its jurisdiction as a court of last instance for disputes involving all federal law. In reality, the Supreme Court today is mainly a constitutional court. In the Supreme Court's 1973 term, sixty-six percent of the pending cases involved constitutional questions (sixty-two percent concerned criminal law or criminal procedure).²⁷ This is a sharp contrast to the situation in the 1930's.²⁸ The Supreme Court, under the pressure of its ever-expanding caseload, has made a decisive contribution to this development by giving preference over the years to the constitutional cases.

It would be convenient to assume, on the basis of the difference between the outward positions of the two courts within their respective court systems, that the Constitutional Court has the better defined monopoly on constitutional interpretation. This is certainly correct as far as procedure goes. But to observers of both systems it appears that, despite the exclusive power to nullify vested in the Constitutional Court, constitutional interpretation seems to be viewed more in Germany than in the United States as the business of the entire legal community. It would be impossible to deny, of course, that contrary tendencies also exist in the Federal Republic.²⁹

The contrast between the common law and the so-called continental legal systems receives less attention from comparative lawyers today than in the past. The main issue is the significance that judicial decisions take on in interpreting the law. The bipolar model so often constructed in former years doubtless does distort reality. Nevertheless, it must be said that in performing its tasks the Supreme Court is not just the last-instance guardian of the Constitution; it also possesses an ex-

26. *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

27. G. CASPER & R. POSNER, *THE WORKLOAD OF THE SUPREME COURT: A THEORETICAL AND EMPIRICAL STUDY* 35, 51 (1976).

28. The reasons for this development are extraordinarily complex and beyond the scope of this Article. For an in-depth analysis of these reasons, *see id.* at 27-62.

29. *See generally* F. SCHARPF, *DIE POLITISCHEN KOSTEN DES RECHTSSTAATS* (1970).

tensive monopoly on interpretation. Again and again it has proven exceedingly difficult to make constitutional arguments in areas where there is little or nothing in the way of Supreme Court precedent as a result of, for instance, the political question doctrine.³⁰ Thus whoever is called before a Congressional committee as an authority on the question of the separation of powers between Congress and the executive will find as a rule that arguments resting on the text and system of the Constitution are met with the question: "But where did the Supreme Court say so?"³¹

The identification of law and legal thought with the step-by-step development of case law is still a distinctive element of American legal culture. This is not just a function of the common law tradition; it also comes from the theory of American "legal realism" with its emphasis on sanctions as an essential element of the law.³² The well-known comment of Charles Evans Hughes, "the Constitution is what the judges say it is,"³³ still has descriptive value.

The American legal culture's fixation on the courts, which accords the Supreme Court its monopoly on constitutional interpretation, results in a rather sharp division between constitutional law and politics which, unlike the Federal Republic, makes the bounds of constitutional law coextensive with the limits of justiciability. This American approach exacts a cost: the impoverishment of general constitutional thinking and scholarship which in times of crisis, when the ideological function becomes especially important, results in very vague, emotional discussions.

In contrast, observers of the Federal Republic get the impression that the tendency of German constitutional teaching and practice is to overwork the "systematic" approach to the constitution, not just in times of crisis but in everyday situations as well. This is partially because the Germans have had only the short time span since 1949 to look to for their constitutional learning while the Americans have two centuries under one constitution behind them. On the other hand, the Federal Constitutional Court has seemed more inclined in recent years

30. See generally Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517 (1966).

31. See Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 466-67 (1976).

32. See G. CASPER, JURISTISCHER REALISMUS UND POLITISCHE THEORIE IN AMERIKANISCHEN RECHTSDENKEN 56-64 (1967).

33. THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 143 (D. Danelski & J. Tulchiu eds. 1973).

to throw off restraint in applying its constitutional ideology. Consider, for instance, the frequency with which the court has used the technique of interpreting a law in a way that makes it "conform" with the constitution.³⁴ Consider the decisions that call on the concept of "fighting democracy,"³⁵ the judgments concerning the structure of universities,³⁶ the *Grundlagenvertrag*,³⁷ and the abortion decision.³⁸

It is of some interest to compare the respective abortion decisions of the Federal Constitutional Court and the Supreme Court.³⁹ It is hard to dispute that the Supreme Court's decision, which grants a basic right to abortion, was not specifically warranted by the Constitution. Nowhere in the United States Constitution does it say that a state is barred from making abortion a crime—nor does it say that a state is barred from *not* criminalizing abortion. The "right to privacy"⁴⁰ developed in earlier decisions was extended to abortions regardless of the conceptual difficulties. The Court's reasoning comes to little more than locating the right to an abortion within the right to privacy without furnishing any more precise reasoning (unless one can find a presumption in favor of autonomy between the lines).

In contrast, the Federal Constitutional Court supports its ruling enforcing the "right to life" with an extraordinarily detailed analysis of the "objective value judgments" made by the Basic Law, although these ideological elaborations place a great strain on the constitution. In a case that placed a heavy responsibility on the justices, the Supreme Court's decision was deplorable for its lack of rationale, although the justices did not hold the case out as being much more than a weighing of the equities of the case. At the opposite extreme is the Federal Constitutional Court, which forces on us an overly comprehensive system of constitutional "values" whose individual components are of questionable validity. That the concept of "values" might become a vehicle "to transfer to the Constitutional Court the specifically legislative functions involved in ordering society"⁴¹ has long been a recognized danger. When looking at the ideological role constitutions play in the political life and society of the Federal Republic and the United States,

34. See F. SCHARFF, *supra* note 29, at 36-38.

35. See generally G. CASPER, *supra* note 24.

36. See, e.g., 35 BVerfGE 35, 79 (1973).

37. 36 BVerfGE 1 (1973).

38. 39 BVerfGE 1 (1975).

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

40. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

41. 39 BVerfGE 1, 72 (1975) (Rupp-von Brünneck & Simon, JJ., dissenting).

it is all too clear that the line between “constitution as ideology” and “ideology as constitution” is becoming blurred. Each step across that line is a step towards the end of constitutionalism.

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