

MEMORIAL: DONALD P. KOMMERS – A MEMORIAL COLLECTION

# Can German Constitutionalism Serve as a Model for the United States?\*

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## A. Introduction

What can we Americans learn from Germany's constitutional experience? This question has usually been put the other way around. A bibliography of works dealing with American influences on constitutional developments abroad would fill a small library.<sup>1</sup> Many of these works focus on Germany. They range from Robert von Mohls "Das Bundes-Staatsrecht der Vereinigten Staaten von Nord Amerika" (1824) down to contemporary accounts of American influences by such German scholars as Horst Dippel, Georg Christoph von Unruh, Ernst Fraenkel, and Helmut Steinberger.<sup>2</sup> In the nineteenth and for most of this century, constitution-makers around the world, particularly in Latin America and Europe, looked to the United States Constitution for guidance in designing their systems of constitutional governance.<sup>3</sup> In recent decades, however, Germany's Basic Law has replaced the American Constitution as the world's leading model of democratic constitutionalism. The Basic Law's influence is clearly discernible in dozens of democratic constitutions drafted in the last decade,

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\*[Originally appeared as Donald P. Kommers, *Can German Constitutionalism Serve as a Model for the United States?*, 58 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 787 (1998). Republished here with permission of the original publisher.]

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<sup>1</sup>See Andrzej Rapaczynski, *Bibliographical Essay: The Influence of the U.S. Constitution Abroad*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 405, 405–62 (Louis Henkin & Albert M. Rosenthal eds., Columbia Univ. Press 1990).

<sup>2</sup>See HORST DIPPEL, *GERMANY AND THE AMERICAN REVOLUTION 1800–1900* (Steiner 1978); ERNST FRAENKEL, *AMERIKA IM SPIEGEL DES DEUTSCHEN POLITISCHEN DENKENS* (Westdeutscher Verlag 1959); Georg Christoph von Unruh, *Nordamerikanische Einflüsse auf die deutsche Verfassungsentwicklung*, DVBL 455 (1976); Helmut Steinberger, *American Constitutionalism and German Constitutional Development*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 199–224 (Louis Henkin & Albert M. Rosenthal eds., Columbia Univ. Press 1990). On the whole, however, I have the impression that American scholars tend to attribute far greater influence to the United States than the evidence warrants. This is particularly true of the Basic Law. I could find no more than five to ten references to the United States in the proceedings of the Herrenchiemsee Conference or the Parliamentary Council.

<sup>3</sup>See Albert Blaustein, *The Influence of the United States Constitution Abroad*, 12 OKL. CITY U. L. REV. 435 (1987). See also CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 405–62 (Louis Henkin & Albert M. Rosenthal eds., Columbia Univ. Press 1990); *AMERICAN CONSTITUTIONALISM ABROAD* (George Athan Billias ed., Greenwood Press 1990).

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paradigmatic examples of which are several recent Latin American constitutions, the post-1990 constitutions of Eastern Europe, and the 1996 Constitution of South Africa.<sup>4</sup>

In this short space, however, my focus is less on the text and structure of the Basic Law than on its interpretation by the Federal Constitutional Court. Americans—and many other English-speaking lawyers and judges—have come to know the Basic Law mainly through the Court's decisions, about two hundred and fifty of which are now available in fairly good English translation. It may interest this audience to know that these cases make up the core of comparative constitutional law courses now being offered in several North American and other English-speaking universities. In addition, and more importantly, many of these decisions are being cited by leading constitutional courts around the world.

Americans too are beginning to manifest increasing interest in the work of your constitutional court.<sup>5</sup> After all, Germany has now had fifty years of experience in constitutional governance [*Verfassungspolitik*] under the rule of a constitution designed to secure both individual liberty and political democracy. American lawyers, scholars, and judges, in my opinion, can no longer ignore Germany's experience in facing the vexing problems of modern constitutional law and interpretation. Indeed, Chief Justice William Rehnquist had Germany's Constitutional Court clearly in mind when, on the forty-fifth anniversary of the Basic Law, he remarked before a conference of German and American lawyers that "it is time that United States courts begin looking to the decisions of other constitutional courts to aid them in their own deliberative process."<sup>6</sup>

What, then, can we Americans learn from the Basic Law as interpreted by the Federal Constitutional Court? Within the brief compass of this essay, I propose to do two things: First, to point out, from an American perspective, what distinguishes the Basic Law from American constitutionalism and, second, to identify three areas of American constitutional law that might benefit from a close study of the equivalent German law. I have in mind constitutional cases on church-state relations, freedom of speech, and abortion. It may be foolhardy to treat such controversial and complex issues in so short a space as this, but these cases are familiar to us all and, at some level, they affect the lives of each of us. In addition, these issues are excellent candidates for exploring the differences between German and American constitutionalism. In doing so, however, and at the risk of overlooking important points of convergence between German and American constitutional law, I shall confine myself to paradigmatic or illustrative cases.

Let me begin with a couple of prefatory remarks. For present purposes, I am less concerned with who wins or loses a constitutional case than in judicial approaches to constitutional interpretation. I am not suggesting that who wins or loses in particular cases is unimportant. Outcomes do matter, and they are often determined by given methods of interpretation. Outcomes in

<sup>4</sup>With respect to Eastern Europe see, for example, Andreas Zimmermann, *Bürgerliche und politische Rechte in der Verfassungsrechtsprechung mittel- und osteuropäischer Staaten unter besonderer Berücksichtigung der Einflüsse der deutschen Verfassungsgertichtsbarkeit*, in *GRUNDFRAGEN DER VERFASSUNGSGERICHTSBARKEIT IN MITTEL- UND OSTEUROPA* 89–124 (Jochen Ahr. Frowein & Thilo Marauhn eds., Springer 1998). As for South Africa, see DAVID VAN WYK ET AL., *THE NEW SOUTH AFRICAN CONSTITUTION* 64–121 (Clarendon Press 1966) and Francois Venter, *Aspects of the South African Constitution of 1996: An African Democratic and Social Federal Rechtsstaat?*, 57 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 51–82 (1997).

<sup>5</sup>See DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* (Univ. Chicago Press 1994); DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (Duke Univ. Press 2d ed. 1997). Several books and articles comparing particular aspects of German and American constitutional law have also appeared in recent years. In the subject-areas under discussion, see Mary Ann Glendon, *ABORTION AND DIVORCE IN WESTERN LAW* (Harv. Univ. Press 1987); Douglas G. Morris, *Abortion and Liberalism: A Comparison Between the Abortion Decision of the United States and the Constitutional Court of West Germany*, 11 *HASTINGS INT'L AND COMP. L. REV.* 159 (1988); Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 *J. CONTEMP. HEALTH LAW & POL'Y* 1 (1994); Peter Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 *MD. L. REV.* 247 (1988). On religion, see CURRIE, *supra* note 5, at 244–69.

<sup>6</sup>See William Rehnquist, *Verfassungsgerichte - vergleichende Bemerkungen*, in *DEUTSCHLAND UND SEIN GRUNDGESETZ* 453, 454 (Paul Kirchhof & Donald P. Kommers eds., Nomos Verlagsgesellschaft 1993).

German constitutional law are, of course, frequently rooted in the Basic Law's structural features and textual provisions which in some instances are very different and even incompatible with related provisions of the U.S. Constitution.<sup>7</sup> It would be unwise, therefore, and a misuse of the comparative method, to advocate the adoption of German outcomes in the United States. For historical, cultural, and conceptual reasons, we could no more "Germanize" American than to "Americanize" German constitutional law.<sup>8</sup> On the other hand, to say that German constitutionalism has nothing to offer Americans is to accept a false relativism that rejects the universality of certain human values and aspirations.

Moreover, along with Basil Markesinis—the distinguished Oxford comparative legal scholar so well known to Germany's legal academic community—I am convinced that judicial cases are wonderful tools for bridging legal cultures.<sup>9</sup> Their most important contribution, in my judgment, is what they teach students—as well as lawyers and judges—about their own law. They serve as critical standards by which to measure the shortcomings and pathologies, as well as the strengths, of American constitutional law. I realize, of course, that this is a two-way street, and that Germans are likely to see the Basic Law more clearly through the lens of American constitutional law. My present task, however, is to see what guidance Americans may derive from Germany.

## B. Dignity Versus Liberty

We may begin by underscoring important differences between the German and American constitutions. After all, they were created in different centuries and out of entirely different sets of historical circumstances. Both documents are nevertheless leading models of liberal democratic constitutionalism and, at the end of the day, their common values outweigh their differences. What is distinctive about the Basic Law from an American perspective, however, is that it merges liberal constitutionalism with a strong commitment to social solidarity. In uniting the *Rechtsstaat* to the *Sozialstaat*,<sup>10</sup> it speaks in the language of responsibilities as well as rights. In American constitutional rhetoric, by contrast, we hear a lot about rights and the rule of law, but very little about solidarity or, for that matter, the common good.<sup>11</sup>

In explaining the essential difference between our two constitutions, I have often characterized the Basic Law as a constitution of dignity and the American document as a constitution of liberty. In short, human dignity and liberty are their respective architectonic values.<sup>12</sup> One must be careful to note, however, that the values of dignity and liberty are interrelated. Claims to liberty are usually rooted in respect for dignity, just as the realization of dignity requires the exercise of liberty. Indeed, the overlap between the constitutions of liberty and dignity is greater than their disparity, the difference being one more of degree than of kind.

<sup>7</sup>See Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 845–52 (1991).

<sup>8</sup>On this point, Leonard Leigh of the London School of Economics notes: "Constitutional structure, traditions, preexisting bodies of law and the presence of particular social problems in any given jurisdiction all have a part to play in the formation of a satisfactory response to the interplay of public interest and private right." See *Of Free Speech and Individual Reputation: New York Times v. Sullivan in Canada and Australia*, in IMPORTING THE FIRST AMENDMENT: FREEDOM OF SPEECH AND EXPRESSION IN BRITAIN, EUROPE AND USA 51, 52 (Ian Loveland ed., Hart Publishing 1998).

<sup>9</sup>See Basil S. Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 MODERN L. REV. 1 (1990); BASIL S. MARKESINIS, FOREIGN LAW AND COMPARATIVE METHODOLOGY: A SUBJECT AND A THESIS 172–74, 194–210 (Hart Publishing 1997).

<sup>10</sup>For a comprehensive treatment of the "social state" principle, together with an accompanying bibliography, see Hans F. Zacher, *Das soziale Staatsziel*, in 2 HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND 659 (Josef Isensee & Paul Kirchhof eds., C.F. Müller Verlag, 1995).

<sup>11</sup>Mary Ann Glendon, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (The Free Press 1991).

<sup>12</sup>The primacy of dignity in Germany's Basic Law is symbolized by its placement in Article 1, which heads the list of basic rights. It reads: "Human dignity is inviolable. To respect and protect it shall be the duty of all state authority." For the equivalent emphasis on liberty in the U.S. Constitution, see the text of the First Amendment, *infra* note 16. The rights secured in the First Amendment—i.e. rights secured against invasion by Congress—are equally secured against the states under the terms of the Fourteenth Amendment, the relevant provision of which reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Germany's emphasis on dignity is nevertheless important, and for three reasons: First, the principle of human dignity makes normative demands on the state; second, it informs the scope and meaning of all the rights and guarantees of the Basic Law; and third, it is the source of the so-called objective value order that the Federal Constitutional Court has inferred from the Basic Law's principles and structures. In short, the Constitutional Court envisions the Basic Law as a unified structure of objective principles and rights crowned by the master value of human dignity.<sup>13</sup>

The dignitarian jurisprudence of the German Court also embraces an interpretive approach marked by balance and equilibrium among the contrasting rights and principles of the Basic Law. One thinks here not only of the tension between rights and values, but also between positive and negative rights, between personal and institutional guarantees, between the *Rechtsstaat* and the *Sozialstaat*, and between individual liberty and the moral claims of the community. The Basic Law can, in short, be analogized to a symphony whose counterpoints and contrasting movements blend into a unified composition.

In fact, it is this interplay of opposites which is the distinguishing mark of Germany's constitutional case law. The interplay manifests itself in the Court's systematic approach to constitutional interpretation as well as in the interpretive principle of "practical concordance," an approach that actually generates the kind of creative tension that results in the harmonization of conflicting rights and values.<sup>14</sup> It should of course be clear that harmonization is not the same as uniformity, anymore than opposites are the same as contradictions. A living tradition thrives on the reconciliation of tensions within it. It is in this sense that a constitutional tradition, like a religious or literary tradition, contains within itself the seeds of its own renewal or revitalization.

### C. Religious Liberty, Free Speech, and Abortion

In shifting the scene to the United States, on the other hand, one finds a far less integrated or holistic approach to constitutional interpretation, at least in the three jurisprudential areas under discussion. A major revolution has taken place in American constitutional law since 1950, and that is the expansion of individual liberty beyond anything contemplated by the Constitution's framers. In many respects, this has been a healthy development: I think especially of the judicial expansion of the rights of women and racial minorities.<sup>15</sup> This jurisprudence, however, draws its inspiration and integrity not only from the equal protection clause of the Constitution, but also from the powerful themes of democracy and self-government that pervade the document as a whole. The situation is different in fields such as religious liberty, free speech, and abortion. Here the Court has tended to follow a narrow clause-by-clause approach to interpretation.

1. In its church-state jurisprudence, for example, the Court has tended to see the establishment clause and the free exercise clause, not as opposites in creative tension with each other, but rather as incompatible principles requiring totally different approaches to constitutional analysis.<sup>16</sup> By broadly interpreting the establishment clause and narrowly interpreting the free exercise clause, the Court has erected a kind of Berlin Wall between church and state. The metaphor, I think, is apt because the

<sup>13</sup>See Kommers, *supra* note 7, at 851.

<sup>14</sup>See KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 133–35 (C.F. Müller Verlag 19th ed. 1993).

<sup>15</sup>For summaries of the case law expanding these rights, including a list of cases and bibliographical references, see 2 RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW 359–383, 431–51 (St. Martin's Press 4th ed. 1995).

<sup>16</sup>The so-called so-called "establishment" and "free exercise" clauses are contained in the First Amendment, which reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." See U.S. CONST. amend. I.

American Supreme Court has completely subordinated the free exercise of religion to the perceived demands of the no-establishment clause,<sup>17</sup> a theme to which I shall return in a moment.

In addition to its clause-bound approach to interpretation, and indeed largely because of this approach, the Court has imported an ideology of individualism into the Constitution's general concept of liberty as well as into its free speech and religion clauses. I refer here to a relentless individualism, one that is more absolute and more insular in its conception of social life than anything we find in Germany's constitutional jurisprudence. This ideology of individualism is not new. It once marked the Court's attitude toward limitations on the rights of property and contract. Laws that regulate such matters, declared the Court in 1905, are "mere meddlesome interferences with the rights of individuals."<sup>18</sup> Today, however, the Court distinguishes sharply between economic rights and personal rights, extending its protection against legislative interference primarily to the latter and hardly at all to the former.<sup>19</sup>

Here too, by the way, is where the German Court has got it right and the American Court has got it wrong. In exalting personal rights over economic rights, our Supreme Court has established a hierarchy among the Constitution's negative rights. The hierarchy is not only logically and morally indefensible, as I believe Germany's caselaw shows; it also illustrates what happens when a court of judicial review interprets a constitution clause-by-clause rather than holistically or systematically.

Let me amplify this point by returning to the American religion clauses. The jurisprudence flowing from these clauses has been variously described, by commentators and judges alike, as unprincipled, incoherent, simplistic, and ahistorical. If these are valid criticisms, and I think they are, they owe their origin to the artificial distinction the American Supreme Court has drawn between the values of non-establishment and the free exercise of religion. The equivalent German case law, by contrast, has avoided this mistake, or so it seems to me.

As a historical matter, our Constitution was designed to secure and to promote religious liberty, first, by banning the official establishment of a religion and, second, by forbidding the state to interfere with the exercise of religious freedom. In short, religious freedom was singled out for special protection, independent of the right to freedom of speech or any other liberty anchored in the Constitution. Indeed, it was thought for much of our history, as Alexis de Tocqueville noted in his classic study of American democracy, that religion would play an important role in our public life and that religious associations, together with the values they represent, would be crucial to the well-being of civil society.

This general perspective on religious freedom changed drastically, however, with the Supreme Court's decision in *Everson v. Board of Education*,<sup>20</sup> the 1947 case that marked the birth of the doctrine of strict separation. In the ensuing decades, following *Everson*, a deeply divided Court has invalidated most forms of interreligious cooperation in the public realm, even to the point of stopping church and state from working together to resolve common problems of a purely secular nature. On one occasion, the Court even barred Congress from passing a law establishing a remedial program in mathematics and reading for disadvantaged students attending religious schools.<sup>21</sup> In *Lee v. Weisman*, decided in 1992, the Court even ruled that a non-sectarian prayer could not constitutionally be offered in a benediction at a high school graduation exercise if it included a reference to God.<sup>22</sup> In this case, to use the German Court's terminology, the negative right of one non-religious student prevailed over the positive right of all other students.

<sup>17</sup>See Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 447, 447, 494–99 (1991). For a recent and comprehensive treatment of the Supreme Court's Establishment Clause jurisprudence, see Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE ST. L. REV. 1317 (1997).

<sup>18</sup>*Lochner v. New York*, 198 U.S. 45 (1905).

<sup>19</sup>For a strong attack on this distinction in American constitutional law, see BERNARD SIEGEN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (Univ. Chicago Press 1980).

<sup>20</sup>330 U.S. 1 (1947).

<sup>21</sup>See *Meek v. Pittenger*, 421 U.S. 349 (1975).

<sup>22</sup>505 U.S. 577 (1992).

In my view, by the way, *Weisman* has very little in common with Germany's recent and controversial *Classroom Crucifix Case*.<sup>23</sup> *Weisman* had nothing to do with "learning under the cross." The graduation exercise was a one-time event in the life of mature students and included no more than a general, ecumenical reference to the deity. Last year, an American law review commentary on the *Crucifix Case* inquired whether it represented Germany's *Everson v. Board of Education*.<sup>24</sup> My answer to this question is "no." Germans may quarrel over the result in this case, but as I read the opinion, it does not reject those long-standing principles of rationality and proportionality by which the Court tries to resolve conflicting liberty claims. These principles of reasonableness manifest, it seems to me, greater toleration and respect for religious values than the categorical or all-or-nothing approach of the American Supreme Court.

As already noted, the Supreme Court's broad interpretation of the establishment clause matches its narrow definition of free exercise. In the prevailing view, the state violates the free exercise clause only when it explicitly discriminates against or disfavors a religious belief or practice. A law that seeks to encourage or support religious activity, on the other hand, is likely to be nullified. In short, the Court has told the American people and their elected representatives that only laws wholly secular in both purpose and effect can satisfy the principle of neutrality in religious matters. David Beatty, a distinguished Canadian constitutional scholar, has aptly described this American view as "a major constraint on the freedom of the people to define their own destiny and their own understanding of what constitutes the common good."<sup>25</sup>

The difference between the German and American caselaw, however, is more than one of methodology. Different visions of freedom also emerge from the work of the two courts. The American cases project a highly individualistic vision of religious liberty, ignoring its important associational and institutional aspects. One commentator has suggested, rightly in my view, that the American vision advances a "privatized" model of freedom, in which the state plays no role, whereas the German vision advances a "facilitative" model in which the state feels obliged to lend its support to institutions and activities that assist the individual in developing his or her religious personality.<sup>26</sup> The German model does not see freedom as the opposite of community, but as a value to be achieved in harmony with community.

Having made these comparisons, I conclude with a few qualifying remarks. First, I have not suggested that Germany's system of church-state relations could or should be transplanted to the United States. Our legal culture, for historical reasons, would resist any such transfer. Second, Germany, arguably one of the most secular societies in the democratic world, provides more formal public space for the exercise of religious liberty than does the United States, arguably one of the world's most religious societies. I would not wish to argue, however, that the vitality of religion

<sup>23</sup>Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] May 16, 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 1995 (Ger.).

<sup>24</sup>Lark E. Alloway, *The Crucifix Case: Germany's "Everson v. Board of Education"*, 15 PENN. ST. J. INT'L L. 361 (1997).

<sup>25</sup>David Beatty, *Two Concepts of Rights 8–9* (1997) (unpublished manuscript).

<sup>26</sup>See W. Cole Durham, *General Assessment of the Basic Law—An American View*, in DEUTSCHLAND UND SEIN GRUNDGESETZ 41, 45–7 (Paul Kirchhof & Donald P. Kommers eds., Nomos Verlagsgesellschaft 1993). Article 7 of the Basic Law, by the way, is a prominent example of a facilitative model of religious freedom. Not only does it provide that religious instruction "shall form part of the curriculum in state schools;" it also guarantees the establishment of private schools. Article 7(4) does not say whether the state must subsidize private schools. In 1987, however, in a case arising out of Hamburg, the Federal Constitutional Court ruled that the state does have a duty to support such schools. See Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] Apr. 8, 1987, 75 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 40, 1987 (Ger.). What an American such as myself finds interesting about this case is the Court's appeal to the principles of both dignity and liberty. In a wonderful example of holistic reasoning, the Court examined the educational provisions of Article 7(4) in the light of the Basic Law's human dignity (Article 1), personal liberty (Article 2), religious freedom (Article 4), parental rights (Article 6), and social state (Article 20) clauses, finding that together they pointed to the state's duty to protect private schools and, if necessary, to subsidize them. The Court underscored the importance of this duty not only in the interest of personal dignity and freedom, but also of furthering a civil society based on diversity. Needless to say, any direct state assistance to religious schools in the United States would be struck down as a forbidden "establishment" of religion.

in American society has anything to do with post-*Everson* case law. Third, led by Chief Justice Rehnquist, the Supreme Court has begun to question the dogmatism of its church-state jurisprudence.<sup>27</sup> We are beginning to see signs faint though they are, of a better settlement between the religion clauses, one that sees them in harmony rather than in opposition. But whether a judicial consensus emerges around the effort to harmonize the two clauses remains to be seen.

2. In the matter of abortion and free speech, finally, I shall be equally concise, even at the risk of overlooking important converging trends in German and American constitutional law. As with the religion clauses, the Supreme Court identifies liberty here too with life's private sphere. A woman's right to procure an abortion is based on the right of privacy, a right the Court has discovered in the Constitution's concept of personal liberty.<sup>28</sup> Indeed, the Court has struck down almost all attempts to restrict this liberty, even in the late stages of pregnancy. Free speech too is conceived as a private right that is perhaps best illustrated by judicial decisions on the mass media. Broadcasting in the Court's view is a private market system in which any decision affecting speech must remain totally free of government regulation.<sup>29</sup> In Germany, by contrast, both abortion and speech are viewed within a wider framework of social values and public interests, not to mention the role that the concept of human dignity plays in qualifying the exercise of certain liberties.

The Supreme Court's exaltation of liberty at the expense of competing constitutional values is associated, as already mentioned, with its tendency to interpret particular words and phrases in absolute or categorical terms. In the original abortion case, for example, the Supreme Court recognized only one player in the game. It gave everything to the woman and nothing to the unborn child. The Court solemnly declared that the state has no duty to protect unborn life because the fetus is not a "person" within the meaning of the Constitution. End of debate. In short, the woman's right to end her pregnancy is as absolute as the physician's right to define the medical procedure for destroying the fetus. And so, with one blow, the Court stopped the legislatures of all fifty states from striking a better balance between individual interests and common values.

The German cases, by contrast, seem more discriminating.<sup>30</sup> First, they decline to declare whether the fetus is a person. Rather, they speak of the value of "germinating life." Second, they do not divide pregnancy into trimesters for the purpose of measuring the validity of state restrictions on abortion, an analytical framework so flawed that the Supreme Court had to give it up altogether in a recent case.<sup>31</sup> Finally, the German cases seek to honor the values of both personality and life and, in addition, has left parliament with far more discretion to balance the competing interests than the Supreme Court has left to the American states.<sup>32</sup>

A similar absolutism marks American free speech law. In striking down laws that seek to limit certain kinds of offensive conduct or hate speech, the Court has virtually obliterated the distinction between liberty and license. In *Cohen v. California*, for example, the Court held unconstitutional the conviction of a person who wore a jacket bearing the words, "Fuck the draft," while sitting in a state courtroom.<sup>33</sup> In doing so, the Court did no less than to vindicate the principle of expressive individualism. The decision is best understood in terms of liberty defined as radical autonomy. Autonomous individuals must be true to themselves, the Court seemed to be saying. They must be free to express feeling, release anger, discharge bile, and blow off steam no matter

<sup>27</sup>See especially the opinions of Justice Sandra Day O' Connor and Chief Justice William Rehnquist in *Wallace v. Jaffree*, 472 U.S. 38 (1985).

<sup>28</sup>See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>29</sup>See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 242 (1974).

<sup>30</sup>See Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 1975 (Ger.); Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203, 1993 (Ger.).

<sup>31</sup>See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

<sup>32</sup>For a detailed comparison of the German and American cases, see Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L & POL'Y 1 (1994).

<sup>33</sup>402 U.S. 15 (1971).

how crude or offensive the message. “We cannot sanction the view,” wrote the usually staid Justice Harlan, “that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element in the overall message to be communicated.”<sup>34</sup> Justice Harlan then garnished that statement by invoking the old saw that “one man’s vulgarity is another’s lyric.”<sup>35</sup>

The principle of expressive individualism seems also to have been vindicated in *Texas v. Johnson*, the controversial flag desecration case.<sup>36</sup> The expressive act of burning the flag as a symbol of political protest, ruled the Court, trumps the state’s interest in preserving the flag as a symbol of nationhood. In a 5–4 decision, the majority fell back on what it regarded as “a bedrock principle underlying the First Amendment,” the principle being that government may not ban the expression of an idea simply because society finds it repulsive. Chief Justice Rehnquist, in dissent, joined by one of the Court’s more liberal justices, denied that the conduct at issue here conveyed any idea at all. The act in question, he wrote, “is the equivalent of an inarticulate grunt or roar” designed merely “to antagonize others.” The majority might have been better advised to suggest that even inarticulate grunts deserve constitutional protection if they bubble up from the well springs of inner being, allowing self-indulgent individuals to luxuriate in their autonomy.

It would seem that if government has no power to regulate conduct that is offensive and repulsive to veterans and other Americans, then it has no power to prohibit hate speech that is offensive and repulsive to racial or ethnic minorities. The Court did not quite say this in *R.A.V. v. City of St. Paul*,<sup>37</sup> but it nonetheless reversed a conviction of a teenager who burned a cross inside the fenced yard of a black family that lived across the street from the house where he was staying. St. Paul prosecuted the young lad under an ordinance prohibiting, among other things, cross-burning and the display of the Nazi Swastika when the violators know that such conduct will arouse anger, alarm, or resentment in others on the basis of race, creed, or gender. While the justices were sharply divided over the level of judicial scrutiny to be employed in the case, *R.A.V.* is best understood by seeing it in terms of the Constitution’s underlying concept of autonomous liberty.

Finally, in the much heralded case of *New York Times v. Sullivan*,<sup>38</sup> the Court has made it virtually impossible for a politician to collect damages for a libelous statement of fact about his public conduct. But as one commentator recently noted: “What canon of civilized living confers a right to publish factual falsehoods which blight lives and livelihoods of others?”<sup>39</sup> One may wonder whether *Sullivan* and related decisions have anything to do with the increasing debasement and trivialization of political debate in the United States.<sup>40</sup> The Court’s absolutist interpretation of free speech has also shielded powerful interest groups and wealthy individuals from state regulation of their political expenditures. In *Buckley v. Valeo*, finally, the Court ruled that money is speech, and thus struck down a federal law limiting the amounts of money any one candidate or organization could spend in an election campaign.<sup>41</sup> Such regulation is impermissible even for the purpose of equalizing electoral competition. These then are just a few examples of the lack of proportionality and balance in American speech law.

<sup>34</sup>*Id.* at 26.

<sup>35</sup>One is struck here by Justice Harlan’s image of democracy. “That the air may at times seem filled with verbal cacophony,” he wrote, “is not a sign of weakness but of strength.” *Id.* at 25. Justice Harlan’s democracy seems more like the tower of Babel than the republic of reason contemplated by the framers of the U.S. Constitution.

<sup>36</sup>491 U.S. 397 (1989).

<sup>37</sup>505 U.S. 112 (1992).

<sup>38</sup>376 U.S. 254 (1964).

<sup>39</sup>See Stephen Sedley, *The First Amendment: A Case for Import Controls?*, in *IMPORTING THE FIRST AMENDMENT: FREEDOM OF SPEECH AND EXPRESSION IN BRITAIN, EUROPE AND USA* 23, 24 (Ian Loveland ed., Hart Publishing 1998).

<sup>40</sup>For a recent treatment of the *Sullivan* case and a comparison of American defamation law with the corresponding decisional law of the European Court of Human Rights, see Eleni Micha, *Defamation: Dignity Lost?*, 16 *NETH. Q. HUM. RTS.* 261 (1998).

<sup>41</sup>424 U.S. 1 (1976).

#### D. Concluding Remarks

Allow me, finally, to add these concluding observations. In this all-too-brief presentation, I may well have oversimplified a complex jurisprudence; my purpose, however, was to point out important differences between the constitution of liberty and the constitution of dignity. As noted at the outset, general orientations and styles of reasoning interest me more than who wins or loses in particular cases. Nevertheless, as I said earlier, particular outcomes are important, and what many of the German outcomes show is that there are valid paths through the forest of liberal democracy other than—perhaps even superior to—those traversed by the United States Supreme Court. But the deeper fascination of comparative constitutional law as a field of scholarly inquiry, at least for me, is to identify the moral, political, and social theories that help to explain different outcomes and different styles of reasoning from country to country. This is the real intellectual challenge of comparative constitutional law.

The contrasts between German and American case law is best understood, I think, in terms of the differing images of liberty, society, and the human person that they project, sometimes explicitly, but more often implicitly. The American cases often disengage liberty from responsibility and community, a concept that is not the same as the “ordered liberty” of America’s founding generation. Liberty for the founders was closer to the contemporary German view; namely, one wedded to certain principles of moral and political obligation and restrained by the exercise of social discipline.

As for the Basic Law’s image of man, I am aware of the debate in Germany over what the Federal Constitutional Court thinks this means.<sup>42</sup> Yet the Court has repeatedly said that this image is “not that of an isolated, sovereign individual,” but rather one of a social being who lives in community with others. In the American judicial view, by contrast, which stems in part from a profound distrust of governmental power, there is little room for social units larger than the individual. In short, one vision is partial to the city perceived as a private realm in which the individual is alone, isolated, and in competition with his fellows, while the other vision is partial to the city perceived as a public realm where individual and community are bound together in reciprocity.<sup>43</sup>

What I am suggesting, finally, is that American constitutional law is in need of a better settlement between the values of liberty and community. There is a profound uneasiness in my country with prevailing doctrine in the three areas that I have discussed, an uneasiness which reaches into the Supreme Court itself. The problem is not the text of our Constitution, but rather the standards used to interpret it. For one thing, a more holistic view of the Constitution would result in a better balance between conflicting rights. For another, a more judicious use of the principles of rationality and proportionality would produce results which I believe would be more acceptable to the American people and more compatible with American democracy. The point that I have tried to make here is that Germany’s case law could become the catalyst for rethinking and renewing American constitutional law, at least in the three topical areas discussed.

<sup>42</sup>See ULRICH BECKER, DAS “MENSCHENBILD DES GRUNDGESETZES” IN DER RECHTSPRECHUNG DER BUNDESVERFASSUNGSGERICHTS (Duncker & Humblot 1996).

<sup>43</sup>For an excellent discussion of the theories of community associated with the *Grundgesetz*, see Winfried Brugger, *Kommunitarismus als Verfassungstheorie des Grundgesetzes*, 123 ARCHIV DES ÖFFENTLICHEN RECHTS 337 (1998).