

## Germany's German Constitution

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*Comparative lawyers, working with blunt taxonomies such as “legal families,” have been satisfied with characterizing Germany as representative or a member of the “Germanic-Roman” law tradition. The life of the Federal Republic’s post-war legal culture, however, reveals a richly more complicated story. The civil law tradition, with its emphasis on abstract conceptualism and codification, remains dominant. But it has had to accommodate a new, vigorous constitutionalism that bears many of the traits of the common law tradition, including judicial supremacy and a form of case law. This is the encounter of discrete legal traditions within a particular legal system that H. Patrick Glenn imagined. The dialogue between the civil law and common law traditions in the German legal system has produced symbiotic effects. In this article, I suggest a number of ways in which Germany’s prevailing civil law culture uniquely shapes and marks its constitutional law regime, producing Germany’s distinctly German constitutional law.*

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## I. INTRODUCTION

Not long ago I visited the German Federal Constitutional Court (*Bundesverfassungsgericht*) with a group of my American law students. When our tour of the Court reached the luminous, wood-and-glass hearing chamber, our guide triumphantly declared: “Welcome to the only common law court in Germany!”

It would have pleased the legendary comparative law scholar H. Patrick Glenn to hear it.<sup>1</sup> In his seminal work, *Legal Traditions of the World*, he argues that legal systems such as Germany's cannot be categorically classified as emblematic of a single legal tradition.<sup>2</sup> Glenn contends that state legal systems are the sites of encounters between the world's complex, commensurable, and interdependent legal traditions.<sup>3</sup> He uses

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1. Sadly, McGill University Law Professor H. Patrick Glenn passed away in 2014. A memorial essay in the *American Journal of Comparative Law*, a publication produced by the American Society of Comparative Law (over which he presided as President at the time of his death), described him as “one of the most respected comparatists of our time.” David J. Gerber, *In Memoriam, H. Patrick Glenn (1940–2014)*, 63 AM. J. COMP. L. 1, 2 (2015); see also Daniel Jutras, *Saying Goodbye to Professor H. Patrick Glenn (1940–2014)*, MCGILL U. FAC. L. NEWS (Oct. 3, 2014), <http://www.mcgill.ca/law/channels/news/saying-goodbye-professor-h-patrick-glenn-1940-2014-239330>.

2. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 368 (5th ed. 2014) (“All categories are vague . . . all efforts at separation are arbitrary and artificial.”).

3. *Id.* at 43; see also H. Patrick Glenn, *Are Legal Traditions Incommensurable?*, 49 AM. J. COMP. L. 133 (2001).

words such as “bridging,” “dialogue,” and “interchange” to describe this unavoidable dynamic, which he imagined to be something similar to Russian nesting dolls, with lateral traditions and subtraditions supporting and complementing a system’s leading or primary tradition.<sup>4</sup> The tour guide at the Constitutional Court seemed to have all of this in mind, implying that German constitutional law (embodied by the Constitutional Court) represents the subaltern common law tradition asserting itself in the German legal culture, which is predominantly shaped by the continental or civil law tradition.

This is not a novel characterization of Germany’s post-war legal culture. Others have remarked on the tension that resulted from the encounter between the new constitutional law and the old civilian legal order.<sup>5</sup> In fact, the story is usually cast in less reconciliatory terms than Glenn would have preferred. Germany’s ordinary courts, our tour guide was suggesting, are the carriers of the German legal culture’s predominant civil law gene.<sup>6</sup> But the Constitutional Court represents a recessive — albeit thriving — common law genetic adaptation that has gradually conquered and colonized Germany’s civilian legal culture.<sup>7</sup> According to this account of developments in post-war German law, while facing resistance from the ordinary courts and the German legal culture’s entrenched civil law orientation, the Federal Constitutional Court heroically overcame the system’s formalism and positivism in its common-law-like pursuit of constitutional justice. In fact, few courts have shaken off the continent’s old civilian shackles and taken up the common law judicial role with as much gusto as the German Constitutional Court.<sup>8</sup> The

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4. GLENN, *supra* note 2, at 366–67, 373–74.

5. See Thomas Dietrich, *Bedeutung der Grundrechte im Zivilrecht*, in 60 JAHRE GRUNDGESETZ–VORTRAGSREIHE 97 (Institut für Wirtschaftsrecht der Universität Kassel ed., 2010). Dietrich refers to a “krachende Konfrontation der Grundrechte mit dem geltende Zivilrecht . . . .” (“crashing confrontation between constitutional rights and private law . . . .”). *Id.* at 101 (Miller trans.).

6. See RENÉ DAVID & JOHN E. C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD* 58–60, 63–72 (3d ed. 1985); MATHIAS SIEMS, *COMPARATIVE LAW* 76 (2014); JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 31 (3d ed. 2007); John Henry Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. CAL. L. REV. 1865, 1871 (1988) (“The ‘old’ individual rights . . . have largely been achieved and solidified in the work of ordinary courts quietly applying the traditional sources (principally the civil codes) and methods of private law.”).

7. See Merryman, *supra* note 6 (“The rise of constitutionalism is thus an additional form of decodification: the civil codes no longer serve the constitutional function, which has moved from the most private of private law sources—the civil code—to the most public of public law sources—the constitution.”); see also A. Pearce Higgins, *The Making of the German Civil Code*, 6 J. SOC’Y COMP. LEGIS. 95, 96 (1905) (“[F]or the first time in the history of Germany, there came into being a veritable common law, which, sweeping away all anomalies and local customs, was . . . to regulate the relations of all the members of the German Empire in the most important details of private law.”).

8. Donald P. Kommers & Russell A. Miller, *Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court*, 3 J. COMP. L. 194, 208 (2009) (“The Court’s record . . . reveals a self-confident tribunal deeply engaged in Germans’ lives and politics . . . . The number and range of cases in which the Federal Constitutional Court has acted to dramatically impact German

Herculean role the Court now plays in the German polity might even make a native common law jurist blush.<sup>9</sup>

This story of dynamic diversity and pluralism within the German legal system (what Glenn referred to as “multivalence”) is an important facet of Germany’s determined effort to confront and overcome its National Socialist past,<sup>10</sup> a process the Germans call *Vergangenheitsbewältigung*.<sup>11</sup> In this version of the story the civil law tradition helped to shape the preexisting legal culture, and it functions as the negative frame against which Germany’s post-war constitutionalism serves as a rebuke.<sup>12</sup> As a matter of substantive law, the fronts in this *Kulturkampf* especially involved family law and gender equality, but noteworthy skirmishes have also taken place in contract law, tort law, property law, and criminal law. The triumph of German constitutional law (and its common law orientation), so the myth would have it, required a number of innovative jurisprudential devices that are now closely identified with German constitutional law. For example, the Constitutional Court pioneered the idea that the constitution’s basic rights must be regarded as “objective values” applicable across the entire society — and not merely as a set of subjective and negative limits on the state’s interactions with its citizens.<sup>13</sup> Flowing inevitably from this innovation, the Constitutional Court also concluded

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politics are too great to systematically or comprehensively recount in this brief introduction.”); *see also* B. S. Markesinis, *Conceptualism, Pragmatism and Courage: A Common Lawyer Looks at Some Judgments of the German Federal Court*, 34 AM. J. COMP. L. 349, 359 (1986) (“The 1900 Civil Code could not have survived without some very daring judicial interventions which, if not allowed by the term judicial law-making, come as close as any Common law judge has come into making new law.”).

9. *See* RONALD DWORKIN, *LAW’S EMPIRE* 239–40 (1986); *see also* Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT’L ORG. 177, 201 (1998) (“In the German case, the commitment to *Verfassungspatriotismus*, or constitutional patriotism, results in the Constitutional Court’s unusual willingness to decide cases with important foreign policy implications. According to Juliane Kokott, this willingness flows from the renewed German commitment to the *Rechtsstaat* in the wake of World War II — no questions are above or beyond the law. The Constitutional Court thus conceives itself as an equal participant with the political branches of the German government in the process of European integration.”).

10. GLENN, *supra* note 2, at 368–72.

11. *See* PETER REICHEL, *VERGANGENHEITSBEWÄLTIGUNG IN DEUTSCHLAND: DIE AUSEINANDERSETZUNG MIT DER NS-DIKTATUR IN POLITIK UND JUSTIZ* (2001); Thomas McCarthy, *Vergangenheitsbewältigung in the USA: On the Politics of the Memory of Slavery*, 30 POL. THEORY 623 (2002); *see also* *Word of the Week: Vergangenheitsbewältigung*, DEUTSCHE WELLE, <http://www.dw.de/vergangenheitsbew%C3%A4ltigung/a-6614103> (last visited Dec. 1, 2016).

12. *See* Gerhard Casper, *Guardians of the Constitution*, 53 S. CAL. L. REV. 773, 781 (1980) (“It was because of those very discontinuities in German constitutional history . . . that the German post-war discussion centered on the failure of the German constitutions . . . 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.”) (internal quotation omitted).

13. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 BVerfGE 198, 1958 (Ger.) [hereinafter Lüth Case]; *see also* DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 59–62 (3d ed. 2012); Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 858–62 (1991).

that the Basic Law's objective values may be applied horizontally — albeit indirectly — across all of German law, even in private legal disputes that do not involve state action.<sup>14</sup> Finally, the Constitutional Court championed the use of proportionality in constitutional interpretation, giving itself the discretion to weigh constitutional harm and consider constitutional priorities on a case-by-case basis.<sup>15</sup> Ultimately, this is the myth of the Basic Law (*Grundgesetz*) completing the arch of Germany's turbulent constitutional history by subduing the country's indigenous civilian tendency toward formalism and positivism to truly and at last bind the legislature, the executive, and the judiciary to (constitutional) law and justice.<sup>16</sup>

The story of constitutional common law's triumph in Germany depends on a number of fundamental premises, which I will survey and mostly confirm in Section II. The first premise is that the civil law tradition is the primary tradition in the German legal culture. The second premise is that constitutional law, as practiced by the Constitutional Court, bears many of the hallmarks of the common law tradition. The third premise is that there is a tension — perhaps even a hard-fought rivalry — between these different jurisprudential orientations in the post-war German legal order. The final premise is that the German Constitutional Court can claim victory in this struggle because it has succeeded in giving the constitution, with its common law orientation, priority (as a legal-cultural matter and not as a doctrinal matter of constitutional supremacy) over the entrenched civil law tradition and especially the revered German Civil Code.<sup>17</sup>

Yet, although there is considerable evidence of constitutional common law's ascendance in contemporary German legal culture, Glenn understood that the encounters between legal traditions within a particular system are reciprocal affairs. The post-war constitutional regime profoundly introduced elements of the common law tradition into the

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14. Lüth Case; see also KOMMERS & MILLER, *supra* note 13; Bernhard Schlink, *German Constitutional Culture in Transition*, 14 CARDOZO L. REV. 711, 718 (1993) (“The Court found that because fundamental rights had importance not only as subjective rights of citizens against the state, but also as society’s most important values, they governed the entire legal order, including civil laws that regulated the relationship of citizens to each other.”).

15. See KOMMERS & MILLER, *supra* note 13, at 67; see also AHARON BARAK, *PROPORTIONALITY* (2012); ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (2002) (Julian Rivers trans.); Schlink, *supra* note 14, at 729 (“While methodologically convincing decisions still occur every now and again, there are many others that simply arise from the Court’s feel for what is indicated by social and political life—for what is accepted and ‘fits’ into the social and political landscape. Decisions thus encompass only the individual cases *sub judice*, and are expressed and handed down as such.”).

16. See GRUNDGESETZ [GG] [BASIC LAW] arts. 1(3), 20(3), *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

17. “The legislature shall be bound by the constitutional order . . . .” *Id.* art. 20(3). (German Bundestag trans.).

German legal culture.<sup>18</sup> But the old, predominant civilian legal tradition in Germany has influenced German constitutional law, too. Glenn suggests that the interaction of these legal traditions would “blur the distinction between the two” and that both traditions would become subject to “multivalent, bridging, complexity” involving “rejection, limitation, accommodation or even adoption.”<sup>19</sup> It is on this unremarked dynamic — the civil law tradition’s influence on Germany’s constitutional law — that I want to focus in this article. Section III documents the civil law tradition’s symbiotic influence on German constitutional law. There is evidence of this influence in the character of the constitutional text, in some constitutional theory, in the lingering priority given to the legislature (as opposed to the judiciary) to develop and refine the constitutional framework, in the civilian character of the Constitutional Court’s jurisdiction, and in the Constitutional Court’s civilian decisional style.

My analysis is significant for comparative lawyers’ work because it suggests that German constitutional law — if it is to be studied and understood at all — must be taken on its own complex, multivalent terms. Of course, the common law/civil law interdependence I describe here is just one such distinctly contextual facet of German constitutional law. There are other influences — ranging from the expansive sweep of political history to the contributions made by discrete individuals — that make equally important explanatory and determinative contributions to the tapestry of contemporary German constitutional law.<sup>20</sup> As comparative lawyers we ignore this thick web of meaning at the risk of engaging with nothing more than a chimera of German constitutional law. The object of comparative lawyers’ study cannot be an abstract classification or taxonomic archetype of constitutional law, at least not if we want to be saying anything about something.<sup>21</sup> As this study demonstrates, the Basic Law anchors a highly contingent and contextually determined constitutional regime that features a unique mix of distinct kinds of common law and civil law traditions and much, much more: it is Germany’s German constitutional law.

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18. Glenn notes the reverse phenomenon in the United States, suggesting that the civil law tradition had come to shape American constitutional law. GLENN, *supra* note 2, at 265.

19. *Id.* at 374.

20. Pierre Legrand calls these elements “traces” and identifies the following as a non-exhaustive list of possibilities: “traces of historical configurations enmeshed with traces of political rationalities intertwined with traces of social logics interwoven with traces of philosophical postulates plaited with traces of linguistic orders darned with traces of economic prescriptions interlaced with traces of epistemic assumptions . . . .” Pierre Legrand, *Negative Comparative Law*, 10 J. COMP. L. 405, 419–20 (2015).

21. *Contra* David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153 (2017).

## II. HALF THE STORY: GERMAN CONSTITUTIONAL LAW AS THE TRIUMPH OF THE COMMON LAW TRADITION OVER THE CIVIL LAW TRADITION

There is an almost messianic narrative about post-war German law that suggests that the Basic Law has vanquished the formalistic and positivistic impulses in the German legal culture that are the residue of the civil law tradition's historical predominance in Germany. This myth depends on four premises. The first is that German legal culture is steeped in the civil law tradition's statutory formalism and positivism. The second is that constitutional law, with its focus on judicial interpretation and case-by-case decision-making, resembles the common law. The third is that the German Constitutional Court, as the guardian of the constitution (and, thereby, the prophet of the common law tradition in Germany's civilian desert), has had to struggle against the enduring dominance of the civil law in post-war Germany.<sup>22</sup> The fourth is that the German Constitutional Court has triumphed in this struggle, ushering in an era of previously unattainable constitutional law and justice — of *Rechtsstaatlichkeit*. Each of these premises has a basis in truth, which will be explored in this section.

Before turning to that endeavor, I will first offer brief definitions of the “civil law” and “common law” traditions, which are two concepts that are fundamental to this study.

### A. *The Civil Law and Common Law Traditions Defined*

Throughout this article I refer to the “civil law” and “common law” to represent two distinct legal traditions from among the many that find expression in the world. These are old labels with considerable explanatory force.<sup>23</sup> They are also quite dangerous. In the worst cases they are asserted as taxa — static and exclusive categories — into which many of the world's legal systems can be dumped in our mania to classify or map global legal phenomena.<sup>24</sup> Drawing almost satirically from the natural sciences, comparative lawyers have sometimes called these categories “legal families,”<sup>25</sup> as if they represent empirically discoverable biological species.<sup>26</sup>

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22. Kommers, *supra* note 13 (providing details about the Constitutional Court's background, including antecedent tribunals as well as the intentions and ambitions of the drafters of the Basic Law, in which the Court is specifically identified).

23. See DAVID & BRIERLEY, *supra* note 6; see also Jorge L. Esquirol, *René David: At the Head of the Legal Family*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 212 (Annelise Riles ed., 2001).

24. See SIEMS, *supra* note 6, at 41–43.

25. See Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 AM. J. COMP. L. 1043 (2012); H. Patrick Glenn, *Comparative Legal Families and Comparative Legal Traditions*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 421 (Mathias Reimann & Reinhard Zimmermann eds., 2006); Jaakko Husa, *Legal Families*, in *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* 382 (Jan M. Smits

Elsewhere I argue that this kind of taxonomic thinking in comparative law is perilous because it is superficial and allows us to ignore the dynamic and discursive character of sociological phenomena such as the law.<sup>27</sup> These legal families (and other encompassing archetypes) seem to tell us so much about a legal system only because they tell us nothing at all.

I do not use legal traditions as a taxonomic device. I am not interested in trying to definitively classify Germany (or any other legal system) as belonging to an exclusive *legal family*. First, I embrace Glenn's definition of "legal traditions," which represent identifiable epistemic constellations of normative information about ways of doing (and not doing) the law.<sup>28</sup> Glenn explains: "[T]radition emerges as a loose conglomeration of data, organized around a basic theme or themes . . . ."<sup>29</sup> That information, he argues, counts as tradition because it is carried forward from the past to the present. I find that Merryman and Pérez-Perdomo have helpfully clarified Glenn's concept of "legal traditions," concluding that they are

[a] set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way the law is or should be made, applied, studied, perfected, and taught.<sup>30</sup>

Second, I share Glenn's conviction that many different legal traditions can exist as part of a dynamic discourse within a single legal system. For example, Glenn tells of the churning mix of Hindu legal tradition, Islamic legal tradition, and British common law tradition in India.<sup>31</sup> Hindu digests "continued to be written through the arrival of the British," Glenn explains. But the "arrival of the British was to supplant both Hindu and Islamic law as territorial law," leaving these traditions with a "special status, as personal laws of Hindu or Islamic people."<sup>32</sup> This colonial "reception" of western law, perhaps better understood as the violent imposition of the colonizer's legal traditions,<sup>33</sup> was repeated along the knife-edge of western expansion in the world.<sup>34</sup> Still, Glenn could

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ed., 2006); Jaako Husa, *Classification of Legal Families Today. Is it Time for a Memorial Hymn?*, 56 REVUE INTERNATIONALE DE DROIT COMPARE 11 (2004).

26. Pargendler, *supra* note 25, at 1050.

27. See generally Russell A. Miller, *Comparative Law's Taxonomy Problem* (Apr. 15, 2016) (unpublished manuscript) (on file with author).

28. See GLENN, *supra* note 2, at 12–14.

29. *Id.* at 16.

30. MERRYMAN & PÉREZ-PERDOMO, *supra* note 6, at 2.

31. See GLENN, *supra* note 2, at 312.

32. *Id.* at 310–11.

33. See Upendra Baxi, *The Colonialist Heritage*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 46 (Pierre Legrand & Roderick Munday eds., 2003).

34. See GLENN, *supra* note 2, at 345.

conclude that “[t]he effect of English law on Hindu law [in India] was . . . not immediate or abrupt, nor did it prejudice the legitimacy and availability of classic Hindu sources. The change was more subtle . . . .”<sup>35</sup> Used in this way, legal traditions merely provide a means for talking about the multivalent legal attitudes that are in conversation within any legal system, such as the interchange between the civil law tradition and the common law tradition in Germany.

As a way of thinking about what the law is or should be, the civil law tradition is commonly understood to be the heir to the Roman *ius civile*.<sup>36</sup> This ancient provenance — and the civil law’s far-reaching reception around the world — led David and Brierley to refer to it as the “first family of laws.”<sup>37</sup> Legal scholars play a prominent role in developing and extending the tradition,<sup>38</sup> even if the ideal source of law within the civil law tradition is now a highly systematic and comprehensive code.<sup>39</sup> It is the legislator’s and professor’s law, not the judge’s. Judges are thought to play an almost bureaucratic function in the formalistic, positivistic, and deductive application of the code’s settled concepts to the facts of any given case.<sup>40</sup> The spirit of the civil law tradition, it is argued, has always been its moral recognition of the individual.<sup>41</sup> It is necessary to point out, however, that this rough sketch of the civil law tradition glosses over what many see as discursive diversity within the so-called civil law family. It is often subdivided between French and German siblings.<sup>42</sup> David and Brierley felt obliged to call it the “Romano-Germanic family.”<sup>43</sup> A fundamental difference between these siblings is thought to be the high degree of systematization found in the German codifications that is lacking

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35. *Id.* at 311.

36. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 6, at 6.

37. DAVID & BRIERLEY, *supra* note 6, at 33; see also MERRYMAN & PÉREZ-PERDOMO, *supra* note 6, at 3 (“The civil law tradition is older, more widely distributed, and more influential than the common law tradition . . . . It should be added that many people believe the civil law to be culturally superior to the common law, which seems to them to be relatively crude and unorganized.”).

38. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 6, at 56.

39. See *id.* at 27.

40. See *id.* at 36 (“The picture of the judicial process that emerges is one of fairly routine activity; the judge becomes a kind of expert clerk . . . the judge’s function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union.”).

41. See GLENN, *supra* note 2, at 147–51.

42. “The German Civil Code (*Bürgerliches Gesetzbuch*) appeared at the end, and the French Civil Code at the beginning, of the turbulent century of the Industrial Revolution. The German Code emerged from an intellectual and political background that differed in many ways from the Enlightenment and revolutionary thought that informed the Code Civil. It is thus not surprising that Germany and France have inspired somewhat different sub-traditions in the civil law world.” MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 38 (3d ed. 2008).

43. DAVID & BRIERLEY, *supra* note 6, at 33.

in the French Civil Code.<sup>44</sup> This is one of the civilian features of German constitutional law that I will illuminate in this article. For that reason, I have to concede that I am really only talking about the reverse influence of *German* civil law on *German* constitutional law, while at the same time accepting that all of these labels represent dynamic and evolving conditions depending on what kind of normative information is being carried forward from the past into the contemporary life of the law in Germany.

The civil law's foil is imagined to be the common law tradition.<sup>45</sup> The common law does not share the civil law's Roman roots (or at least not to the same degree).<sup>46</sup> It is the product of the Norman conquerors' efforts to govern occupied — and often hostile — England.<sup>47</sup> This led to some of the common law tradition's most distinctive characteristics, including an empowered judiciary working on a case-by-case basis with local norms and in cooperation with local populations to settle on the most acceptable (or least offensive) substantive rules to resolve disputes as they arose.<sup>48</sup> The galvanizing focus of the tradition was on the process leading to the court's jurisdiction over the case, and not the substantive resolution of the case once the courthouse doors had been pried open.<sup>49</sup> The accretion of these judicial decisions is the case law that has priority in the common law tradition.<sup>50</sup> The common law is altogether less conceptual and less systematic. It is inductively focused on facts, which we are told "are the life of the law."<sup>51</sup> But here, too, I cannot neglect the practice of recognizing distinct Anglo and American currents within the so-called common law family.<sup>52</sup> A key difference between the two, according to David and Brierley, is the Americans' unique and less rigorous application of the rule of precedent or *stare decisis*.<sup>53</sup> David and Brierley conclude:

Really, all that can be said with certainty about the American rule of *stare decisis* is that, as compared to the corresponding rule in England, it has an important limitation: the United States Supreme Court and the supreme courts of the different states are not bound

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44. *See id.* at 71.

45. *See id.* at 334 ("English legal structure is not the same as that of French law and it poses the greatest difficulty for a continental jurist since it is, in fact, totally different to anything with which he is familiar."); MERRYMAN & PÉREZ-PERDOMO, *supra* note 6, at 1–5; SIEMS, *supra* note 6, at 43–64.

46. *See* DAVID & BRIERLEY, *supra* note 6, at 309–11.

47. *See id.* at 311–18; GLENN, *supra* note 2, at 237–41.

48. *See* GLENN, *supra* note 2, at 237–41.

49. *See id.* at 254–55.

50. *See id.* at 243; DAVID & BRIERLEY, *supra* note 6, at 366–67, 376–78.

51. "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

52. *See* DAVID & BRIERLEY, *supra* note 6, at 397, 407.

53. *See id.* at 434–35.

to observe their own decisions and may, therefore, operate a reversal of previously established judicial practice.<sup>54</sup>

It is this kind of unbounded judicial authority, among other factors, that convinces me of the temperamental link between the common law tradition and constitutionalism. And so I have to concede that I may only be talking about an American style of common law constitutionalism.

Glenn knew that the traditions that interested him were complex, evolving, and contingent in confounding ways, and that they could only do limited service as fixed concepts.<sup>55</sup> Still, he believed that they maintained “some form of external coherence.”<sup>56</sup> It is in this spirit that I rely on such traditions here, where they do just enough to allow us to look for the surprising interplay of diverse approaches to the law in the context of the German legal system.

### B. *The Predominance of the Civil Law Tradition in Germany*

In any myth worthy of the name, a hero must achieve his enlightenment by passing a test.<sup>57</sup> In fact, the odds were long that the common law tradition — with the priority and privilege it extends to judges at the expense of the legislature — would gain a prominent foothold in Germany. The German legal culture, after all, is definitively civilian.<sup>58</sup> The German Federal Justice Minister once insisted that “German law is steeped in the tradition of the system of codified law that has evolved throughout continental Europe and that has proven its worth

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54. *Id.*

55. See GLENN, *supra* note 2, at 366–76.

56. *Id.* at 374; see also James R. Fox, *Common Law*, in *DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW* 62 (3d ed. 2003); James R. Fox, *Civil Law*, in *DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW* 55 (3d ed. 2003); HOLMES, *supra* note 51; MERRYMAN & PÉREZ-PERDOMO, *supra* note 6; GLENN, *supra* note 2, at 133, 237; Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VICTORIA U. WELLINGTON L. REV. 817, 819 (2001) (“One of the basic characteristics of the civil law is that the courts main task is to apply and interpret the law contained in a code, or a statute to case facts. The assumption is that the code regulates all cases that could occur in practice, and when certain cases are not regulated by the code, the courts should apply some of the general principles used to fill the gaps . . . . The most obvious distinction between civil law and common law systems is a that civil law system is a codified system, whereas the common law is not created by means of legislation but is based mainly on case law. The principle is that earlier judicial decisions, usually of the higher courts, made in a similar case, should be followed in the subsequent cases, i.e. that precedents should be respected.”).

57. “Our hero, then, has to qualify for the throne in two ways: he must pass a test in some such subject as rain-making or riddle-guessing, and he must win a victory over the reigning king.” LORD FITZROY RAGLAN, *THE HERO: A STUDY IN TRADITION, MYTH, AND DRAMA* 190–91 (1956); see also JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* (3d ed. 2008).

58. See LAW — MADE IN GERMANY 7 (2d ed. 2012), [http://www.lawmadeingermany.de/Law-Made\\_in\\_Germany.pdf](http://www.lawmadeingermany.de/Law-Made_in_Germany.pdf) (“German law belongs to the long-standing family of continental European legal systems in the tradition of Roman law . . . . This legal family is characterised by its codified system of legal provisions, e.g. in the form of statutes.”).

even in difficult times.”<sup>59</sup> German law is presented as an example of the continental civil, or codified, legal tradition in most comparative law projects,<sup>60</sup> including the best-known English-language introductions to the German legal system.<sup>61</sup>

The German Civil Code (*Bürgerliches Gesetzbuch* or “BGB”), and the prominence it enjoys in Germany, is the clearest indication of the far-reaching influence the civil law tradition has had over German legal culture.<sup>62</sup> The Civil Code has been an intense point of pride for Germans and is a leading export of one of the world’s leading exporters.<sup>63</sup> The Civil Code, after all, was a source of political and cultural unity for a long-fragmented people.<sup>64</sup> For more than a century the Civil Code has been law’s foundation in German society. In one English-language introduction to the German legal system the point is made this way: “In Germany, all important legal issues and matters are governed by comprehensive

59. *Id.* at 3.

60. *See, e.g.*, GLENDON ET AL., *supra* note 42, at 63; DAVID & BRIERLEY, *supra* note 6, at 49–75; GLENN, *supra* note 2, at 133–80.

61. *See* Reinhard Zimmermann, *Characteristic Aspects of German Legal Culture*, in INTRODUCTION TO GERMAN LAW 7, 9 (Mathias Reimann & Joachim Zekoll eds., 2005) (“[T]he civilian tradition . . . still provides a fair idea of what may be dubbed German legal culture.”); NIGEL FOSTER & SATISH SULE, *GERMAN LEGAL SYSTEM AND LAWS* 3 (3d ed. 2002) (“The German legal system belongs to the central European family of legal systems, broadly classified as civil law countries.”); HOWARD D. FISHER, *THE GERMAN LEGAL SYSTEM AND LEGAL LANGUAGE* XXVII (4th ed. 2009) (“The German legal system remains, generally speaking, a system of (positive) norms i.e. traditional German legal thinking revolves, in the vast majority of cases, around the twin immutable ‘pillars’ of an established system and norms regarded as authoritative.”); E.J. COHN & W. ZDZIEBLO, *MANUAL OF GERMAN LAW* 3 (2d ed. 1968) (“German law is a member of a family of laws, which one might well call the European Continental laws . . . . Notwithstanding many and striking differences between the branches and members of this family, the basic structure . . . is very similar.”); GERHARD ROBBERS, *AN INTRODUCTION TO GERMAN LAW* 15 (4th ed. 2006) (“German law [has] the characteristics of a codified legal system, in other words, one whose rules are laid down in legislation which cover all aspects of the law. This characteristic is not the least of the factors which identify Germany law as Continental European.”).

62. *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGL]; *German Civil Code*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/230659/German-Civil-Code> (last updated July 20, 1998) (“The concept of law embodied in the code was the gemeines Recht, the common law based on the 6th-century codification of Roman law put in force by the emperor Justinian . . . . Although altered to some extent by feudal law, customary law again came under Roman influence in the 15th century, when Roman law was received into Germany in an effort to systematize customs and legal institutions.”).

63. The BGB has strongly influenced civil law codifications around the world, including in China. Indeed, the first English-language translation of the BGB was prepared by the Chinese scholar Chung Hui Wang. *See* CHUNG HUI WANG, *THE GERMAN CIVIL CODE — TRANSLATED AND ANNOTATED WITH AN HISTORICAL INTRODUCTION AND APPENDICES* (1907); *see also* Russell A. Miller, *Law Land: Germany as a Legal Super Power*, in AM. INST. FOR CONTEMP. GERMAN STUD. POLY REP. (2015), <http://www.aicgs.org/site/wp-content/uploads/2015/12/GAI-17-Germany-Law-Land.pdf>; Ernest J. Schuster, *A Chinese Commentary on the German Civil Code*, 8 J. SOC’Y COMP. LEGIS. 247 (1907).

64. *See* NEIL MACGREGOR, *GERMANY: MEMORIES OF A NATION* (2014); *see also* Higgins, *supra* note 7, at 96.

legislation in the form of statutes, codes and regulations. The most important legislation in the area of business law includes . . . the Civil Code.”<sup>65</sup> At the time of its enactment and entry into force, the Civil Code was described in nearly breathless terms:

- “The greatest among [Germany’s] exploits is a Civil Code;”<sup>66</sup>
- “[The Civil Code is] a monument of legal learning and . . . one of the ripest expressions of the aims and methods of modern civil jurisprudence;”<sup>67</sup>
- “[The Civil Code] works an almost unprecedented revolution in the jural life of the German Empire. It may well be questioned whether an upheaval of like extent has ever taken place anywhere;”<sup>68</sup>
- “[The Civil Code] is the most carefully considered statement of a nation’s laws that the world has ever seen.”<sup>69</sup>

More than a century after its promulgation, the Civil Code is in force almost exactly in its original form. One commentary sums up the wonder of the Civil Code’s endurance in these terms: “The fact that the BGB has lasted so long, providing legal solutions to a variety of social and economic problems arising under imperial, social democratic, totalitarian and liberal social state political regimes, provides a lasting tribute to the wisdom and foresight of its drafters. The BGB has served Germany well.”<sup>70</sup> Another contemporary scholar simply called the Civil Code “one of the masterpieces of European legal culture.”<sup>71</sup>

What makes the Civil Code — and the German legal culture it both embodies and enraptures — so paradigmatically civilian? First, although it is circular to say it, the Civil Code itself is profound evidence of the civil law tradition’s grip on the German legal culture. After all, codification is a central feature of the civil law tradition.<sup>72</sup>

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65. LAW — MADE IN GERMANY, *supra* note 58, at 7.

66. Frederic William Maitland, *The Making of the German Civil Code*, in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 474, 476 (H.A.L. Fisher ed., 1911).

67. Ernst Freund, *The Proposed German Civil Code*, 24 AM. L. REV. 237, 254 (1890).

68. Arthur Ameisen, *Some Features of the New Civil Code of the German Empire*, 33 AM. L. REV. 396, 407 (1899).

69. Higgins, *supra* note 7, at 105 (quoting OTTO FRIEDRICH VON GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE xvii (Frederick William Maitland trans., 1900)).

70. Joseph J. Darby, *The Influence of the German Civil Code on Law in the United States*, 1999 J. S. AFR. L. 84, 84 (1999).

71. Karl-Heinz Ladeur, *The German Proposal of an “Anti-Discrimination”-Law: Anticonstitutional and Anti-Common Sense: A Response to Nicola Vennemann*, 3 GER. L.J., no. 4, 2002, at para. 1, <https://www.germanlawjournal.com/volume-03-no-05>.

72. See FOSTER & SULE, *supra* note 61, at 3 (“One of its basic features is that a country which has adopted the civil law tradition would usually have as the core of its legal system five codes, normally including civil law in the Roman law definition, criminal law, civil procedural law, criminal procedural law, and commercial law.”).

Second, as with the other achievements of the civil law tradition, the Civil Code traces its roots to Roman law.<sup>73</sup> Yet the German process of codification did not involve a direct adoption of the Justinian legacy. Under the influence of von Savigny, the Civil Code instead sought to Germanize the Roman heritage so that it would reflect the spirit of the German people, a concept von Savigny called the *Volksgeist*.<sup>74</sup> According to Catherine Valcke, the French civilian orientation (surely the world's "other" great codification) is characterized by a single conceptual framework, namely the revolutionary force of rationality. Only rationality could explain the violent rupture with the historical inertia of tradition and caste that ordered French society prior to the Revolution.<sup>75</sup> "Centuries of history were to be erased," Valcke explains, "and a whole new nation rebuilt out of ideas."<sup>76</sup> As its complex, systematic structure demonstrates, rationality also has a vital place in the German Civil Code. But Valcke's point is that the BGB accommodated the experiences Germans had made with law prior to codification. That von Savigny's historicism ultimately played a fundamental role in the German codification process is evidence of the Civil Code's irrational, culturally contingent possibilities. It might be better to understand the Civil Code as a rationalization and codification of the historical facts of German law — it was not a clean, rational, and revolutionary break with the jurisprudential past. Still, the Roman legacy's rationality and systematics are strongly present in the Civil Code, perhaps most obviously in the fact that it is arranged in five parts, or "books," that roughly reflect the Pandects' division of the Roman law into its relevant fields.<sup>77</sup>

Third, the Civil Code invariably embodies the jurisprudential features that are typically attributed to the civil law tradition. It is an expression of the preference for positively enacted legislation, as opposed to judge-made law. But the Civil Code is no ordinary statute. It is highly systematic, it has comprehensive ambitions, and it aspires to a tightly fitted ordering of life's affairs. The Civil Code superseded all prior-existing law. It is viewed as a complete and absolute normative framework. In its completeness, it is thought to provide cherished certainty and predictability. Judges are meant

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73. See Catherine Valcke, *Comparative History and the Internal View of French, German, and English Private Law*, 19 CAN. J.L. & JURIS. 133, 137 (2006) ("It is well-known that German law shares the *ius commune* heritage of French law and indeed resembles it in many ways.").

74. Susan Gaylord Gale, *A Very German Legal Science: Savigny and the Historical School*, 18 STAN. J. INT'L L. 123, 131 (1982).

75. See Valcke, *supra* note 73, at 139; see also Sarah Maza, *Luxury, Morality, and Social Change: Why There Was No Middle-Class Consciousness in Prerevolutionary France*, 69 J. MOD. HIST. 199 (1997) (illustrating the social debate that was raging among thinkers prior to the Revolution).

76. See Valcke, *supra* note 73, at 139.

77. See WILLIAM L. BURDICK, *THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 7, 21 (1938); FOSTER & SULE, *supra* note 61, at 3.

only to apply the Civil Code's clear and systematic framework. To achieve all of this, the Civil Code relies extensively on conceptual logic and abstraction in identifying prescribed solutions to human dilemmas.

The Civil Code is conceptual, rational, scientific, and deductive. This is a defensible characterization of Germany's thoroughly civilian legal culture, which Pierre Legrand describes as "the land of *Rechtswissenschaft*, of seemingly relentless legal conceptualism and systematization, or apparently incessant categorical thinking, the country where one appreciates being told one is a good dogmatician."<sup>78</sup>

### C. *The Common Law Character of Constitutional Law*

The civil law tradition emphasizes statutory law — for example, taking the form of the German Civil Code — and it relies on notions of formalism and positivism to greatly limit judicial discretion in the interpretation and application of legislation. This is not the way of the common law. More than any other legal tradition, the common law has been viewed as "the civil law's other, the difference of its identity."<sup>79</sup> The common law's champions are judges, and its raw materials are the particular facts of each case. The common law is inductive, and it is shaped by the logic of analogy.

Especially in the power it bestows on judges at the expense of legislation, constitutional law can be seen as possessing many of the hallmarks of the common law tradition. Thomas Poole suggests that this claim advances the idea that constitutional law is "grounded in fundamental common law principles and is structured around the institution of the common law court."<sup>80</sup> Two arguments support the claim: First, Poole maintains that it is possible to deduce a set of values and political commitments that are central to constitutionalism and are uniquely expressed by the common law tradition. Second, Poole contends that the core features of constitutional law "are most consistently recognized and protected by the common law, particularly in the context of judicial review."<sup>81</sup>

Walter Murphy argues for the nexus of the common law and constitutionalism in his article "Civil Law, Common Law, and Constitutional Democracy."<sup>82</sup> "Wondering" about the viability of the new constitutions being adopted in Eastern Europe in the 1990s,<sup>83</sup> Murphy

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78. Legrand, *supra* note 20, at 405.

79. Pierre Legrand, *Antivonbar*, 1 J. COMP. L. 13, 23 (2006).

80. Thomas Poole, *Questioning Common Law Constitutionalism*, 25 LEGAL STUD. 142, 142 (2005).

81. *Id.* at 162.

82. Walter F. Murphy, *Civil Law, Common Law, and Constitutional Democracy*, 52 LA. L. REV. 91 (1991).

83. *Id.* at 99–100.

worried that the new democracies' civil law orientation might prejudice those heady efforts every bit as much as the East-Bloc countries' post-war totalitarian experiences. Had Murphy looked into the roiling constitutional futures of Hungary and Poland? On the one hand, he noted that the "most successful" constitutional projects were founded in common law legal systems. On the other hand, Murphy concludes that civil law legal systems produced repeated, dramatic constitutional failures.<sup>84</sup> But more than just projecting from this rough accounting of constitutional history, Murphy advances the fundamental argument that the character of the civil law is at odds with constitutionalism and that the character of the common law is aligned with constitutionalism. He contrasts "the civil law's tense commitment to order" with the common law's embrace of chaos.<sup>85</sup> The civil law, Murphy concludes, "leaves judges no respectable room to maneuver,"<sup>86</sup> while the common law instructs judges "to walk around rather than try to fill in the abyss, to hunker down when the great wind blows rather than to attempt to contain it."<sup>87</sup> The common law's inductive, case-by-case approach, Murphy concludes, involves a "supple pragmatism over tight logic" that is inherent in the "messiness of constitutional politics."<sup>88</sup>

Murphy is not the only scholar to remark on the correlation between the common law tradition and constitutionalism. Others note that the non-textual balancing tests and constitutional standards that have developed in constitutional jurisprudence are more akin to the common law than to the practice of any other legal tradition. David Strauss, for example, argues that "it is the common law approach . . . that best explains, and best justifies, American constitutional law today."<sup>89</sup> Henry

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84. *Id.* at 93. ("The preeminent constitution-making feat was pulled off more than two centuries ago in a backward but developing country whose nascent legal systems were offshoots of the Common Law. If we measure success by continuance over time, a pair of Common Law countries, Canada (1867) and Australia (1900), generated the other most 'successful' constitutional democracies . . . In stark contrast, Latin American countries — all consumers of the Civil Law — have changed their constitutions with a regularity analogous to that with which modern farmers rotate crops. Moreover, as was also the case in Meiji [sic] Japan and the Russian, German, and Austro-Hungarian empires, these 'constitutions' have sometimes made scant pretense of trying to establish regimes that were either democratic or limited. And when constitutional democracy was the objective in other Civil-Law nations, as in Germany and Poland after World War I, the resulting politics were often unstable, providing only one phase in a sequence that quickly cycled back to authoritarian rule.").

85. *Id.* at 95–96.

86. *Id.* at 95.

87. *Id.* at 96.

88. *Id.*

89. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996). The notion that American constitutional law is a common law system has occurred to many. *See, e.g.*, Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 470 & n.41 (1989) (reviewing MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988)); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 228–29, 228 n.90 (identifying "adjudication" and the "common law" method" with "nonoriginalist strategies of constitutional decisionmaking").

Monaghan was so persuaded by the linkages that he fashioned a theory of the “constitutional common law” that accounts for the law constitutional courts develop, either through authoritative constitutional interpretation or as a “substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from” the constitution.<sup>90</sup> It is easy to see why this uncontroversial description of the work of constitutional courts might be seen as closely allied with the common law tradition. In fact, Monaghan’s thesis has gained adherents in the generation since he proposed it. More recently, Abigail Moncrieff once again confirmed that “the judicial habit of enforcing broad constitutional norms” was precisely the “feature of modern constitutionalism that Henry Monaghan famously identified [as] ‘the constitutional common law.’”<sup>91</sup> Advocates of common law constitutionalism have described their approach as the idea “that courts do and should develop the meaning of general or ambiguous constitutional texts by reference to tradition and precedent, rather than original understanding, and the related idea that courts do and should proceed in a Burkean, rather than ambitiously rationalist or innovative fashion.”<sup>92</sup> The Burkean common law tradition — and its near cousin constitutionalism — contrast sharply with the civil law tradition. Burke, of course, is celebrated for his practical reason, which built its arguments in response to specific political circumstances and did not aspire to the generality, broad theory, and abstract conceptualism that characterize the civil law.<sup>93</sup> This very common law understanding of constitutional law

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Harry H. Wellington has endorsed what he describes as a “common-law method of constitutional interpretation.” HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 127 (1990); *see also* Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 265–311 (1973); JOHN ELY, DEMOCRACY AND DISTRUST 63–69, 218 n.112 (1981) (criticizing Wellington); 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 17–18 (1993) (describing a “Burkean sensibility” that is “pronounced amongst practicing lawyers and judges,” but that lacks a full theoretical justification). The “Burkean tendency” Ackerman describes — which he says is to some degree reflected in Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981), and Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567 (1985) — seems substantially more conservative than the common law approach I defend here, which, as I will discuss below, allows for innovation and even sudden change. Compare ACKERMAN, WE THE PEOPLE 17–18.

90. Henry P. Monaghan, *The Supreme Court Term 1974 — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3–4 (1975).

91. Abigail R. Moncrieff, *Validity of the Individual Mandate*, 92 B.U. L. REV. 1245, 1248 (2012).

92. Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1482 (2007).

93. *See* Francis P. Canavan, *Edmund Burke’s Conception of the Role of Reason in Politics*, 21 J. POL. 60, 69 (1959) (“The essential difference between Burke’s political thought and the type of thinking of which he accused his opponents, is that he thought in terms of practical reason, and they, as he saw it, did not. That is to say, Burke thought primarily of the end to be achieved and then of the ways of attaining it in the given circumstances. The questions to be answered were: what do we really want? how must we act in order to obtain it?”) (citation omitted).

engages with two distinct claims.<sup>94</sup> First, it accepts that judges possess some form of latent wisdom and that they will “generally do best by deferring to the wisdom embodied in precedent and tradition, rather than trusting” reason.<sup>95</sup> Second, it claims that “legal principles such as fairness and equality reside within the common law, are constitutive of legality, and inform (or should inform) statutory interpretation on judicial review.”<sup>96</sup>

There is no doubt, as our tour guide at the Constitutional Court understood so well, that constitutionalism possesses many of the characteristics of the common law tradition and that the processes Monaghan described have emerged as the “pervasive mode of constitutional enforcement.”<sup>97</sup>

#### *D. The Post-War Civil Law/Common Law Clash in the German Legal Culture*

If the first two premises have been confirmed, then what have been the consequences of the emergence of a vital and effective constitutional law regime in a German legal culture long dominated by the civil law tradition? The third premise of this prevalent narrative is that the civil law and the common law traditions have found themselves in conflict with one another, vying for the soul of the German jurist.

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94. See Mark D. Walters, *The Common Law Constitution and Legal Cosmopolitanism*, in *THE UNITY OF PUBLIC LAW* 431 (David Dyzenhaus ed., 2004); J Goldsworthy, *Interpreting the Constitution in Its Second Century*, 24 MELBOURNE U.L. REV. 677 (2000). *But see* Poole, *supra* note 80, at 142.

95. See Vermeule, *supra* note 92, at 1482; Thomas Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, 23 OXFORD J. LEGAL STUD. 435, 439 (2003) (“The essence of the theory of common law constitutionalism is the reconfiguration of public law as a species of constitutional politics centred on the common law court. The court, acting as primary guardian of a society’s fundamental values and rights, assumes, on this account, a pivotal role within the polity.”).

96. Evan Fox-Decen, *Democratizing Common Law Constitutionalism*, 55 MCGILL L.J. 511, 513 (2010); see, e.g., T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (2001).

97. Moncrieff, *supra* note 91, at 1248. Others have identified and discussed this trend. See Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1582 (2001); Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1282–83 (2002); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596–97 (1992); Richard H. Fallon, Jr., *The Supreme Court 1996 Term — Forward: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997); Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 FORDHAM L. REV. 769, 769–70 (2006) (arguing that federalism is a good way to deal with deep and intense disagreements over individual liberty); Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 888–89 (2006) (making the case for state elaboration of substantive rights, at least as a way of evolving national consensus prior to federal judicial enforcement); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 199 (1976); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010); Monaghan, *supra* note 90, at 2–4; Matthew C. Stephenson, *The Prices of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L. J. 2 (2008); Laurence A. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); Ernest A. Young, *Constitutional Avoidance, Resistance Norms and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1550–51 (2000).

In fact, that tension is on spectacular display in Karlsruhe, Germany. On the northern edge of this charming little city known as the *Hauptstadt des Rechts* (“Capital of Justice”), the “new” Constitutional Court serves as the “protector of the *Grundgesetz*” from its sleek, modern, Bauhaus-influenced building. But the Constitutional Court has had to carve out a place for itself alongside the revered Federal Court of Justice (*Bundesgerichtshof*). From its baroque residence in a leafy neighborhood in the southwest corner of Karlsruhe, the Federal Court of Justice, a most civilian institution, presides as the last-instance jurisdiction over Germany’s four great codifications, including the Civil Code. The Federal Court of Justice, in particular, is seen as a bastion of civilian formalism and positivism in Germany. Its judgments have been described as formulaic, abstract, “highly conceptual, even metaphysical,” and containing “detailed consideration of the views of contemporary (and past) academic writers.”<sup>98</sup> That is classic civilian jurisprudence.

Knut Wolfgang Nörr characterizes this clash of cultures as a struggle between codification and the constitution.<sup>99</sup> There was good reason to believe that codification would persist as the *Leitbild* (essence) of German law even after the Basic Law entered into force.<sup>100</sup> After all, Nörr explains, “the civil code had survived the Nazi regime, at least in its outward shape.”<sup>101</sup> The question was whether German law “would find its identity” by returning to codification’s formalism and positivism, or whether it would turn to the new Basic Law and constitutionalism.<sup>102</sup>

The horizontal effect principle (*Drittwirkung*), fashioned early on by the Federal Constitutional Court, is significant evidence of the struggle in the German legal culture between the constitutional common law and the civil law tradition. Horizontal effect refers to the application of the constitution’s basic rights protections in the “horizontal” relationships between equally positioned individuals. That, however, is the realm of the Civil Code. Horizontal effect is the Basic Law’s response to the prominence of the German Civil Code, which was thought to comprehensively regulate these private relations. Nörr explains how horizontal effect sought to resolve the conflict between the civil law and constitutional law:

Of course, the question came up from which source [post-war] norms should be taken. One usually turned to the values of the

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98. BASIL S. MARKESINIS & HANNES UNBERATH, *THE GERMAN LAW OF TORTS — A COMPARATIVE TREATISE* 8–14 (4th ed. 2002).

99. See Knut Wolfgang Nörr, *From Codification to Constitution: On the Changes of Paradigm in German Legal History of the Twentieth Century*, 60 *TIJDSCHRIFT VOOR RECHTSGESCHIEDNEIS* 145 (1992).

100. *See id.*

101. *Id.*

102. *See id.*

Codification, of the codes themselves to extract from them the standards for the development of law. In this respect[,] a crucial change occurred [after the promulgation of the Basic Law]. Certain constitutional jurists founded the doctrine of the [Civil Code's] general clauses being the link between the Codification and the Basic Rights of the Constitution [so-called "*Drittwirkung der Grundrechte*"]. The doctrine maintains that also the relationship between individuals ought to be measured to a certain extent by the standards of the Basic Rights. Whereas according to the traditional view the Basic Rights serve to protect the citizen against the power of the state, now they shall protect one citizen against the other. The Constitutional Court in 1958 adopted this theory [in the *Lüth Case*, 7 BVerfGE 198]. In this way, the Constitution — through the general clauses of the Codification — found its way into the Codification itself, and right into its zones of growth.<sup>103</sup>

*E. The Myth of German Constitutional Law's Triumph over Civilian Formalism and Positivism*

According to the myth, the result of this culture clash has been constitutional law's victory over the civil law tradition. But constitutional law's triumph in Germany is just another way of saying that the common law tradition now plays a prominent role in the German legal culture where it is in dialogue with the still-predominant formalism and positivism of the civil law tradition.

In many ways, this victory is Gustav Radbruch's story. The twentieth-century German legal philosopher's life and work have come to embody the prevailing myth.<sup>104</sup> The University of Heidelberg law professor is widely seen as having championed legal positivism alongside Kelsen and others before the Nazis dismissed him from the university because of his social-democratic politics.<sup>105</sup> According to the accepted version of events,<sup>106</sup> the horror of witnessing the immoral uses to which the Nazis could put Germany's strictly formalist and positivist jurisprudence turned Radbruch against the civilian tradition, a conversion he supposedly

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103. *Id.*

104. See, e.g., Thomas Mertens, *Nazism, Legal Positivism and Radbruch's Thesis on Statutory Injustice*, 14 L. & CRITIQUE 277 (2003); Thomas Mertens, *But Was it Law?*, 7 GER. L.J. 191 (2006); Stanley L. Paulson, *Lon L. Fuller, Gustav Radbruch, and the "Positivist" Theses*, 13 L. & PHIL. 313 (1994); Stanley L. Paulson, *Statutory Positivism*, 1 LEGISPRUDENCE 1 (2007).

105. See ARTHUR KAUFMANN, *GUSTAV RADBRUCH* (1987); GÜNTER SPENDEL, *JURIST IN EINER ZEITENWENDE: GUSTAV RADBRUCH ZUM 100. GEBURTSTAG* (1979).

106. See Stanley L. Paulson, *Radbruch on Unjust Laws: Competing Earlier and Later Views?*, 15 OXFORD J. LEGAL STUD. 489 (1995).

consecrated in his famous post-war essay, “Statutory Lawlessness and Supra-Statutory Law” (*Gesetzliches Unrecht und übergesetzliches Recht*).<sup>107</sup> In the essay Radbruch seethes with disdain for the Nazis’ reliance on legal positivism as a defense in their post-war criminal trials.<sup>108</sup> The Nazis’ claim that “a law is a law,” Radbruch agonizes, “expressed the positivistic legal thinking that, almost unchallenged, held sway over German jurists for many decades.”<sup>109</sup> The essay is still celebrated for Radbruch’s resounding rejection of the positivist tradition, but it was a struggle that he said was “being taken up everywhere.”<sup>110</sup> Radbruch proposed a formula that would free judges from the fetters of banal statutory interpretation and blind application of the codes so that they might pursue supra-statutory justice. If that sounds nothing like the civil law tradition, with its technocratic judges unquestioningly applying the legislature’s statutes,<sup>111</sup> then it just might be Radbruch’s call for the ascendance of the common law.<sup>112</sup>

It is, at the same time, the triumph of constitutional law. In fact, the Constitutional Court rather self-consciously imagines itself to be Radbruch’s heir. The Court’s justices are the rarefied German jurists who are at last truly free of the formalist and positivist bonds of unjust statutes. We know this because, from its earliest decisions, the Constitutional Court acknowledged its authority to refuse to enforce unjust laws. This exceptional circumstance, the Court explained, would exist if the “norm in question so evidently contradicts the principle of justice that prevails in all formal law, such that the judge who would be applying or accepting the legal consequences of the norm would in fact be enforcing injustice rather than justice.”<sup>113</sup> This is just Radbruch’s formula, which provides that “the positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law,’ must yield to justice.”<sup>114</sup> And in case there was

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107. Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law*, 26 OXFORD J. LEGAL STUD. 1 (2006) (Bonnie Litschewski Paulson & Stanley L. Paulson trans.).

108. *See id.* at 7.

109. *Id.* at 1.

110. *Id.* at 6.

111. *See, e.g.,* Hermann Kantorowicz, *The Battle for Legal Science*, 12 GER. L.J. 2005, 2006 (2011) (Cory Merrill trans.) (“The reigning ideal image of the jurist is as follows: a higher civil servant with academic training, he sits in his cell, armed only with a thinking machine, certainly one of the finest kinds. The cell’s only furnishing is a green table on which the State Code lies before him. Present him with any kind of situation, real or imaginary, and with the help of pure logical operations and a secret technique understood only by him, he is, as is demanded by his duty, able to deduce the decision in the legal code predetermined by the legislature with absolute precision.”).

112. *See, e.g.,* Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63 (2001).

113. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 17, 1953, 3 BVerfGE 58, 119 (Russell Miller trans.).

114. Paulson, *supra* note 106, at 491.

any doubt, the Constitutional Court explicitly invoked Radbruch's formula when it denied East German leaders and border guards the benefit of a formalistic and positivistic application of the Basic Law's prohibition on the ex post facto application of criminal law.<sup>115</sup> After reunification, the complainants were convicted of murder for the shooting deaths of East Germans attempting to flee across the border to West Germany during the Cold War. Of course, the mortal defense of East Germany's "anti-fascist barrier" was legal under — and in fact was mandated by — East German law.<sup>116</sup> The defendants could be convicted by courts in a newly unified Germany that were applying old West German criminal law only if they were to reject the formalist civilian tenet providing that "a law is a law." That is what the ordinary courts did.<sup>117</sup> And that is how the Constitutional Court upheld the convictions in the *Wall Shooting Case*.<sup>118</sup> The Constitutional Court explained that the lesson of the Radbruch formula was that the "fundamental principle of legal certainty," which is the promise of civilian formalism and positivism, "can be given less weight than material justice if the law would otherwise lead to an intolerable violation of justice."<sup>119</sup> The Constitutional Court's *Wall Shooting Case* decision was regarded as a profound victory for justice over civilian legal formalism and positivism. At the same time, it was a victory for the justices and the common law tradition that gives them priority.

The myth has no less force with respect to more commonplace jurisprudence that does not involve the constitutional reckoning with Germany's totalitarian pasts. The mere exercise of unexceptional judicial review is a species of the same common law judicial power, and it is a significant departure from the formalist and positivist tradition in the German legal culture that has long given priority to the *Gesetzgeber* (the

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115. GRUNDGESETZ [GG] [Basic Law] art. 103(2).

116. See A. JAMES MCADAMS, JUDGING THE PAST IN UNIFIED GERMANY 23 (2001); Kif Augustine Adams, *What Is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 STAN. J. INT'L L. 271, 289–93 (1993); Peter E. Quint, *Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command*, 61 REV. POL. 303 (1999); Peter E. Quint, *The Border Guard Trials and the East German Past—Seven Arguments*, 48 AM. J. COMP. L. 541 (2000).

117. Adams, *supra* note 116, at 297 ("Judge Seidel held that shooting to kill was authorized under East German law. Nonetheless, he concluded, the order infringed a higher moral law. Although the defendants were 'at the end of a long chain of responsibility,' they violated 'a basic human right' by shooting at someone whose only crime was trying to emigrate.' Judge Seidel applied natural law when he argued that 'not everything that is legal is right: There is a central area of justice, which no law can encroach upon. The legal maxim, 'whoever flees will be shot to death' deserves no obedience.' Consequently, '[a]t the end of the 20th century, no one has the right to ignore his conscience when it comes to killing people on behalf of the power structure.'")

118. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 24, 1996, 95 BVerfGE 96 (1996).

119. *Id.* at 134–35 (1996) (Russell Miller trans.).

“legislator”).<sup>120</sup> The German Constitutional Court has assumed this new role with great enthusiasm and confidence. It is no exaggeration when scholars characterize the German Federal Constitutional Court as the “most powerful constitutional court in the world.”<sup>121</sup> Elsewhere, I have remarked that the “Court’s decision-making record might suggest a tribunal embarked on a path of relentless activism.”<sup>122</sup> Others have simply taken to calling reunified, post-war Germany the “Karlsruhe Republic.”<sup>123</sup> A former Federal Justice Minister concludes that “in Germany, all power issues have become constitutional issues,” to be resolved by the Court.<sup>124</sup> And true to the myth, the Court is not seen as meddlesome or overreaching. To the contrary, the Court consistently is the most respected social institution in the country.<sup>125</sup> In fact, the Court is widely credited with having established democracy, the rule of law, rights protections, and general prosperity for what seemed to be an ungovernable and treacherously unruly German nation. As one comparative law scholar puts it: “[T]he stability and prosperity . . . Germany enjoyed over the last half of the 20th Century bespeaks the integrity and efficacy of the *Bundesverfassungsgericht*.”<sup>126</sup>

Some now believe that constitutional law (with its common law character) has supplanted the civil law tradition as Germany’s dominant jurisprudential frame. Donald Kommers concludes that much of the Basic Law’s regime derives from “the gloss the Federal Constitutional Court has put on the text of the Basic Law,” implying a nature and style of judicial decision-making that is much more closely attuned to the common law’s vision of judging and that is far removed from the judicial restraint typical of the civil law tradition.<sup>127</sup> In a commemoration written on the two-hundredth anniversary of the United States Supreme Court’s seminal decision *Marbury v. Madison*,<sup>128</sup> former Federal Constitutional Court Justice

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120. KOMMERS & MILLER, *supra* note 13, at 5 (“The doctrine of judicial review . . . was alien to the theory of judicial power in Germany. A judge’s only duty under the traditional German doctrine of separation of powers was to enforce the law as written.”).

121. Kommers & Miller, *supra* note 8, at 210 (quoting UWE WESLE, DER GANG NACH KARLSRUHE 7 (2004)).

122. KOMMERS & MILLER, *supra* note 13, at 35.

123. Gerhard Casper, *The “Karlsruhe Republic” — Keynote Address at the State Ceremony Celebrating the 50th Anniversary of the Federal Constitutional Court*, 2 GER. L.J., no. 18, 2001, at para. 4, <http://www.germanlawjournal.com/volume-02-no-18>.

124. Brigitte Zypries, *The Basic Law at 60 — Politics and the Federal Constitutional Court*, 11 GER. L.J. 87 (2010) (citing Heinrich Wefing, *Der Bonner Reflex*, DIE ZEIT, Apr. 30, 2009, at 19).

125. See Peter E. Quint, *Leading a Constitutional Court: Perspectives from the Federal Republic of Germany*, 154 U. PA. L. REV. 1853, 1870 (2006); KOMMERS & MILLER, *supra* note 13, at 39–40.

126. See Donald P. Kommers, *An Introduction to the Federal Constitutional Court*, 2 GER. L.J. 30, no. 9, 2001, at para. 1, [http://www.germanlawjournal.com/s/GLJ\\_Vol\\_02\\_No\\_09\\_Kommers.pdf](http://www.germanlawjournal.com/s/GLJ_Vol_02_No_09_Kommers.pdf); see also Kommers, *supra* note 13; Kommers & Miller, *supra* note 8.

127. KOMMERS & MILLER, *supra* note 13, at 57.

128. *Marbury v. Madison*, 5 U.S. 137 (1803).

Wolfgang Hoffmann-Riem underscores the importance of constitutional law's counter-civilian influence in post-war German legal culture. With the supremacy of the post-war Basic Law, as interpreted and enforced by the Federal Constitutional Court's justices, Hoffmann-Riem concludes that this paradigm shift had finally and decisively overtaken Germany. Hoffmann-Riem confirms the prominent role played by the Federal Constitutional Court when he states that "the jurisdiction of this court is particularly wide-ranging" and considerably greater than the review jurisdiction of the U.S. Supreme Court.<sup>129</sup> The Federal Constitutional Court, Hoffmann-Riem says, "has been proactive" and has "continually expanded its identity."<sup>130</sup> This has placed it, unbending, in conflict with the high federal courts.

Nörr concludes that, with the dawning of Germany's post-war (common law) constitutional order, "the Basic Law became the point of reference for the [West German] legal system and in this function superseded the Codification: for good, it seems."<sup>131</sup> In his estimation, and in the estimation of our tour guide at the Constitutional Court, this has been a definitive and irreversible paradigm shift.

### III. GERMANY'S CIVILIAN CONSTITUTION

The encounter between the civil law tradition and the common law tradition in the German legal system has not been a one-way street. It is not just Germany's old civilian approach to the law that has been touched by the common law tradition; the civil law tradition has also had an influence on German constitutional law. The gravitational pull of the civil law tradition in Germany is simply too strong for it to have been otherwise.

The evidence of the persistent civilian orientation of German law — even German constitutional law — can be seen, *inter alia*, in the code-like text of the Basic Law, in some theories about constitutional law in Germany, in the jurisdiction of the Constitutional Court, and in the Constitutional Court's judicial style.

#### *A. The Basic Law as Code*

In many places the text of the Basic Law has the characteristics of a civilian code. Some provisions are famously short and open-textured, such

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129. Wolfgang Hoffmann-Riem, *Two Hundred Years of Marbury v. Madison: The Struggle for Judicial Review of Constitutional Questions in the United States and Europe*, 5 GER. L.J. 685, 697 (2004).

130. *Id.*

131. Nörr, *supra* note 99, at 152.

as the terse promise in Article 1 that “human dignity shall be inviolable.”<sup>132</sup> These provisions naturally demand a rambling, unfettered interpretive role from the Constitutional Court. And in those places, German constitutional law lurches decisively in the direction of the common law tradition with its confidence in the judiciary. But many other provisions in the Basic Law are long, detailed, and systematic, exceeding even the depth and scope of many paragraphs of the Civil Code. These provisions, in their precision, seem designed to prescribe a very specific constitutional result rather than map the stars of constitutional values. These code-like constitutional provisions necessarily limit the Constitutional Court’s interpretive room to maneuver. The so-called “Financial Constitution,” among the Basic Law’s other structural provisions, is especially exemplary of the Basic Law’s civilian orientation. Article 106, as just one example, covers the “apportionment of tax revenue” in ten subparagraphs and more than 1000 words.<sup>133</sup> This is not a framework of broad principles to be interpreted by the Constitutional Court in the style of the common law. It is a detailed and definitive arrangement for revenue distribution, involving all sources and attributable across all levels of German government. The federation, the Basic Law tells us, is entitled to revenues generated by “the road freight tax;”<sup>134</sup> the states are entitled to the revenues generated by the “motor-vehicle tax.”<sup>135</sup> The Basic Law’s specific accounting of all tax revenues proceeds in the same amount of detail in the rest of Article 106 and across a number of other provisions. This feels more like legislation than constitutional law.

Several basic rights provisions also contain nearly definitive detail. Article 7, for example, addresses the “school system” in six subparagraphs and more than 250 words.<sup>136</sup> Article 12a, speaking to “compulsory military service,” involves six subparagraphs and 500 words.<sup>137</sup> Article 13, which provides constitutional protection for the “inviolability of the home,” consists of seven subparagraphs and more than 400 words.<sup>138</sup> It is a detailed text that very clearly aspires to a systematic and comprehensive solution to the issues involved. Article 13 is patently deductive in its content and structure. It begins with the broad principle that the home is

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132. GRUNDGESETZ [GG] [Basic Law] art. 1(1).

133. *Id.* art. 106.

134. *Id.* art. 106(1)[3].

135. *Id.* art. 106(2)[3].

136. *Id.* art. 7.

137. Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], June 24, 1968, BGBl. I art. 12a.

138. [GRUNDGESETZ] [GG] [Basic Law] art. 13.

sacrosanct.<sup>139</sup> It then descends through a series of ever-more-precise exceptions and their accompanying procedural requirements.<sup>140</sup>

American constitutional law may offer similar protection for the sanctity of the home,<sup>141</sup> but it does not build from a similarly concrete textual commitment.<sup>142</sup> The extensive regime of exceptions to that protection have been mapped through generations of the Supreme Court's decisions, which mold the constitution's meaning at its joints and in its ambiguities.<sup>143</sup> It would not have dawned on the drafters of the American Fourth Amendment, steeped as they were in the common law's judicial suppleness, that they might have aspired to anything like the rigid and comprehensive constitutional codification found in Article 13 of the Basic Law.<sup>144</sup>

### B. *Constitutional Theory and Constitutional Codification*

Theorists in Germany have embraced this codified understanding of the constitution. Peter Unruh has explained that some constitutional theory in Germany, under the influence of the civil law tradition, has sought to treat the Basic Law as part of the civil law tradition.<sup>145</sup> This theoretical approach accepts that constitutions are not a classical example of codification. But it insists that there is no reason why constitutions must be treated as antithetical to civilian codification. In particular, Unruh notes, the Basic Law creates a closed constitutional system that is similar to the comprehensive and complete order framed by the Civil Code.<sup>146</sup> On the one hand, the Basic Law requires that all constitutional change occurs through constitutional amendment. On the other hand, the Basic Law

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139. *Id.*

140. *Id.*

141. U.S. CONST. amends. III, IV.

142. See, e.g., Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 555–56 (1996) (“Fourth Amendment theory is in tatters at the end of the twentieth century. The disarray in the Supreme Court's recent case law has been explored in numerous scholarly articles and judicial dissents. Two of the most common complaints are that these opinions lack any unifying theory and fail to preserve the rights embodied in the Amendment.”) (citations omitted).

143. Helen J. Knowles, *From a Value to a Right: The Supreme Court's Oh-So Conscious Move From 'Privacy' to 'Liberty'*, 33 OHIO N.U. L. REV. 595 (2007).

144. See Stanley N. Katz, *Looking Backward: The Early History of American Law [Review]*, 33 U. CHI. L. REV. 867, 872 (1966) (“If one examines the actual substance of colonial law, however, it seems difficult not to conclude that early American law was a quite sophisticated combination of English and indigenous ideas which evolved in response to the changed conditions of life in the New World. To notice that the common law was not transported in totality to Massachusetts does not demonstrate that English law had no influence there. It was out of the familiar English local law that the Puritans framed their own system.”).

145. PETER UNRUH, *DER VERFASSUNGSBEGRIFF DES GRUNDGESETZE* (2002).

146. *Id.*

prohibits some constitutional changes.<sup>147</sup> The result of this arrangement is the suggestion that there is no constitutional law beyond the written text of the Basic Law. This is not a place for judicially-conceived penumbras.

A constitution can claim to be a comprehensive and systematic regime addressing the state's organization as well as the relation between the citizen and the state.<sup>148</sup> A constitution can be civilian. In fact, the Basic Law's extensive coverage of the state's financial competences in Articles 104a-115 (its more than 2000 words seeking to completely enclose the subject) suggests that the German constitution comprehensively defines and demarcates all state power, in the same way that a code aspires to definitively occupy the field it governs. This is a possible reading of the whole Basic Law, which objectively defines the individual and citizen,<sup>149</sup> frames the boundaries for and roles of the states and the federation,<sup>150</sup> provides for the legislative power,<sup>151</sup> establishes the executive power,<sup>152</sup> and institutes the judicial power.<sup>153</sup> Very little relating to state power, and its relationship with individuals, is left unwritten.

Similar to other codes, the Basic Law seeks to establish a reasonable, consistent, and permanent legal order. Historically, constitutionalism originates from the same era of Enlightenment rationality as the classical codification in France, when Napoleon sought to give the legal system — and society with it — a rational basis in the code.<sup>154</sup>

The Basic Law is a code in all of these respects and, consequently, is often treated as a codification in German jurisprudence. This also involves the approach scholars take toward constitutional law. Similar to the way the other codes are studied, German constitutional law scholars write

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147. GRUNDGESETZ [GG] [Basic Law] art. 79(3) (“Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”).

148. Ruth Gavison, *What Belongs in a Constitution?*, 13 CONST. POL. ECON. 89, 89–90 (2002) (“There are three standard candidates for inclusion in a constitution: basic governmental structures and the relations between the main powers and functions of government; basic values and commitments; and human rights. Some constitutions describe language and flags and other symbols. These may either be seen as an additional group, or be seen as a part of the main commitments of the state. In addition, a constitution usually specifies the mechanisms for its own amendment and enforcement, and proposed constitutions often contain provisions about the mechanisms of their adoption . . . . The main purpose and functions of constitutions are at least three. First, to both authorize, and to create limits on, the powers of political authorities. Second, to enhance the legitimacy and the stability of the political order. Third, to institutionalize a distinction between ‘regular politics’ and ‘the rules of the game’ and other constraints (such as human rights) within which ordinary politics must be played.”).

149. GRUNDGESETZ [GG] [Basic Law] art. 116.

150. *Id.* arts. 20–37.

151. *Id.* arts. 70–82.

152. *Id.* arts. 54–69.

153. *Id.* arts. 92–104.

154. MERRYMAN & PÉREZ-PERDOMO, *supra* note 6, at 27–31.

commentaries on the Basic Law.<sup>155</sup> These commentaries pursue a systematic exegesis of each article in the constitution. This tradition, a distinct part of the civil law culture, has no equivalent in the United States' common law-oriented constitutional scholarship and practice.<sup>156</sup> Of course, casebooks are almost unknown in Germany.<sup>157</sup>

Werner Heun explains that, in technical terms, constitutional law in Germany has been treated as if it were codified civil law.<sup>158</sup> Constitutional law, Heun notes, is assessed in almost complete accordance with the conditions of the dogmatic science that dominates the practice and study of the codes. This can be seen in several ways. First, “the Constitution is regarded as a predetermined normative decision, which is beyond criticism within the system.”<sup>159</sup> Second, constitutional analysis aims for the “systematization of all written and unwritten rules, their interpretation and development.”<sup>160</sup> Third, “the interpretation of the Basic Law essentially follows the commonly accepted classical rules and methods that were established already by Friedrich Carl von Savigny in the early nineteenth century.”<sup>161</sup> This interpretive canon, similar to civilian statutory interpretation, gives priority to text, system, structure, and teleology. Heun explains that original intent, with its practice of divining meaning from the ether of history and far afield from the constitutional code, “plays only a minor role.”<sup>162</sup> Finally, Heun notes that the “Constitutional Court, affirmed by the overwhelming majority of scholars, has always stressed the ‘objective meaning’ of a provision.”<sup>163</sup> This, of course, is the abstract and conceptual approach taken to interpreting comprehensive codes.<sup>164</sup>

### C. *The Basic Law's Deference to Statutory Law*

The Basic Law's civilian orientation is also evident in its preference for legislative resolution of its interpretive ambiguities. Especially with respect to the protection of basic rights, where the constitutional text might never have achieved code-like detail and precision, the Basic Law often assigns the task of rounding out the meaning of the enumerated rights to the

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155. KOMMERS & MILLER, *supra* note 13, at 73.

156. *See, e.g.*, MERRYMAN & PÉREZ-PERDOMO, *supra* note 6, at 61.

157. *See* Basil Markesinis, *Judicial Style and Judicial Reasoning in England and Germany*, 59 CAMBRIDGE L.J. 294, 298–99 (2000). *But see* CHRISTIAM BUMKE & ANDREAS VOSSKUHLE, CASEBOOK VERFASSUNGSRECHT (7th ed. 2017).

158. WERNER HEUN, THE CONSTITUTION OF GERMANY: A CONTEXTUAL ANALYSIS 5 (2010).

159. *Id.* at 6.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Markesinis, *supra* note 157, at 296–99.

legislature. The common law solution to these uncertainties is to entrust the matter to the courts. The approach adopted by the Basic Law, however, denies the Constitutional Court the fullest possible authority over the Basic Law's meaning. The civil law's confidence in legislation — and its distrust for the judiciary — is unmistakable in this arrangement.<sup>165</sup>

The Constitutional Court is not troubled by its subordination: “The Court has . . . stated on numerous occasions that it will not substitute its judgment of sound or wise public policy for that of the legislature.”<sup>166</sup> Thus, the Court exercises significant restraint when reviewing legislation that is enacted pursuant to the legislature's authority to define and limit constitutional law, despite the fact that the legislation directly touches upon the enjoyment of a basic right. One example of this framework can be found in Article 5, which provides for “[f]reedom of expression, arts, and sciences.”<sup>167</sup> The freedom of expression, information, and press that is unequivocally asserted by the article's first subparagraph is framed by the second subparagraph, which gives the legislature the central role in defining the scope of the right: “These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.”<sup>168</sup> The Court's role when reviewing these constitutionally ordained legislative limits on the freedom of expression is largely to assess them for their proportionality.<sup>169</sup> That, however, is not the same thing as judging the substance of the parliament's decisions about the scope of and limits on the freedom of expression. In terms that simply radiate with the residual ethos of the civil law tradition, Hans Jarass explains that, “for the exercise of basic rights, fundamental questions must be settled by the parliament.”<sup>170</sup>

#### *D. The Nature of the Constitutional Court's Jurisdiction*

The civilian orientation of German constitutional law is also apparent in the Constitutional Court's jurisdiction. First, that the Court does not have discretion to select the cases it will review suggests that its decisions — although profoundly influential — do not formally establish precedent.<sup>171</sup> Precedential authority, however, is a central feature of the

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165. *See, e.g.*, GRUNDGESETZ [GG] [Basic Law], arts. 2(2), 4(3), 5(2), 8(2), 10(2), 11(2), 14(1). *But see id.* art. 19(2).

166. KOMMERS & MILLER, *supra* note 13, at 34–35.

167. GRUNDGESETZ [GG] [Basic Law] art. 5.

168. *Id.* art. 5(2).

169. Hans Jarass, *Art. 5, in* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND — KOMMENTAR margin no. 57 (Hans Jarass & Bodo Pieroth eds., 10th ed. 2009).

170. *Id.* at margin no. 55.

171. Kommers, *supra* note 13, at 845 (“[T]he Federal Constitutional Court is not formally bound to the rule of stare decisis. In the culture of Germany's code law world . . . judicial decisions do not enjoy the status of law as in the common law world.”).

common law's embrace of judicial law-making.<sup>172</sup> Second, the Court's abstract review jurisdiction anticipates constitutional judgments that will be taken wholly on the basis of the abstract legal principles involved and without reference to the specific facts of a discrete and actual controversy.<sup>173</sup> This is the civil law's deductive approach to law and not the common law's inductive, case-specific orientation.

*E. The Constitutional Court's Civilian Decisional Style*

The Constitutional Court's decisional style also suggests the strong influence the civil law tradition maintains over German constitutional law. Maybe this should not be surprising. After all, the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*) provides that eight of the Court's justices must have served as judges at the federal high courts, such as the Federal Court of Justice.<sup>174</sup> These federal high courts sit as the last instance of review in disputes arising out of distinct code regimes, including the Civil Code. Judges reach these prestigious ranks of the judiciary by having demonstrated mastery over the civilian application and interpretation of codified law.

The Constitutional Court's decisions unwaveringly hew to a formulaic structure that seems to yearn for the systematic and orderly nature of the civil law, even in the midst of the chaos and liberty that judges confront in the constitutional common law. Every one of the Constitutional Court's judgments follows the same pattern: In Section A., the Court provides an objective presentation of the relevant law, facts, and procedural background, as well as the arguments of complainants. In Section B., the Court provides an objective presentation of the respondents' arguments and the presentations made at a hearing (if one was held), including the contributions to the proceeding from experts in the relevant facts and law. In Section C., the Court announces and justifies its decisions regarding admissibility and the merits of the case. Anyone familiar with the rambling, unsystematic, facts-heavy judicial style of the United States Supreme Court's judgments is immediately struck by the systematic, abstract, and rational structure of the Constitutional Court's decisions.

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172. See, e.g., Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 5 (1936) ("Distinguishing characteristics are [the common law's] development of law by a system of judicial precedent, its use of the jury to decide issues of fact, and its all-pervading doctrine of the supremacy of law . . .").

173. GRUNDGESETZ [GG] [Basic Law], art. 93(1)[2]; see also CHRISTIAN HILLGRUBER & CHRISTOPH GOOS, VERFASSUNGSPROZESSRECHT 207–37 (4th ed. 2015).

174. GRUNDGESETZ [GG] [Basic Law], art. 94(1); see also KOMMERS & MILLER, *supra* note 13, at 22–24; Rudolf Streinz, *The Role of the German Federal Constitutional Court: Law and Politics*, 31 RITSUMEIKAN L. REV. 95, 102 (2014).

The following practices also confirm the Constitutional Court's civilian understanding of constitutional law because they reinforce the law's abstract or conceptual nature. First, the Court almost always reaches its decisions by unanimous judgments.<sup>175</sup> This helps to avoid the impression that constitutional decision-making is a matter of the justices' personal or political preferences. Constitutional law is presented as a coherent and objective normative framework. It does not appear, as is often the case in the judgments of the United States Supreme Court, as a pluralistic and disputed enterprise that lurches toward results only through sometimes-fragile majorities of the justices. The Constitutional Court justices have had a right to publish dissenting opinions since the early 1970s, but, in keeping with the civil law's principled conceptualism, they rarely do so.<sup>176</sup>

Second, the Court has developed highly systematized approaches to its practice in the areas of constitutional interpretation that otherwise would have demanded the greatest discretion and flexibility. In this way, the Court has sought to limit and restrain its role in ways that resonate with the civil law tradition's suspicion of judicial power.

The Court invariably approaches the review of alleged basic rights violations by resorting to a formula prominently promoted by the scholars Bodo Pieroth and Bernhard Schlink (now joined by Thorsten Kingreen and Ralf Poscher).<sup>177</sup> Adjudicating the constitution's basic rights might have involved a nearly unbounded jurisprudential practice, especially when one considers that the broad textual framing rights, such as dignity, personality, and equality, must be given. But the Court has yoked itself to a three-part formula that gives its work in this context the feeling of objectivity and scientific inquiry. In the first step, the Court begins by defining the scope of the asserted constitutional protection. This, for example, requires the Court to answer the question "to whom or what does the basic right apply?" In the second step, the Court assesses whether there has been a direct or indirect encroachment upon the protectable scope of the basic right. In the third step, the Court determines whether an encroachment on the basic right has been justified. This, in turn, requires the Court to follow one of two systematic paths: one for rights that can be limited by statute<sup>178</sup> and another for rights that are absolute.<sup>179</sup> Each of these tracks involves a distinct, systematized assessment.

175. See KOMMERS & MILLER, *supra* note 13, at 28–29.

176. See *id.*; see also Bundesverfassungsgerichts [BverfG], Jahresstatistik [Yearly Statistics] 2016—Senatsentscheidungen mit oder ohne Sondervotum in der amtlichen Sammlung [Senate Judgments in the Official Reports with or without Dissenting Opinions], BVERFGE, Bände 30–140 (1971–2016), [http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2016/gb2016/A-I-7.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2016/gb2016/A-I-7.pdf?__blob=publicationFile&v=2) (listing 162 dissents in forty-five years).

177. BODO PIEROTH ET AL., GRUNDRECHTE — STAATSRICHT II (30th ed. 2014).

178. See Kommers, *supra* note 13, at 857 ("A close look at the Basic Law discloses an interesting hierarchy of rights. Some are cast in unqualified language . . .").

The central component of step three (the determination whether an encroachment is justified) is the application of the proportionality principle for which the Court is well-known.<sup>180</sup> The proportionality principle might be characterized as an open-ended balancing test that gives the justices unchecked and dangerously subjective discretion to assign “weight” to competing interests and to reach conclusions on the basis of an unsystematic balancing exercise.<sup>181</sup> There is some truth in this critique, but the criticism should grapple with the Constitutional Court’s highly methodical approach to proportionality analysis. In fact, in the system developed by the Court, the proportionality principle involves balancing or weighing only as the last of four steps in the analysis.<sup>182</sup> Before determining whether measures that encroach upon basic rights are proportional to the benefits they are intended to produce, the Court must first examine whether the measures are legitimate, suitable, and necessary. The Court faithfully resolves each of these threshold standards before taking up the less-bounded challenge of balancing or weighing interests.<sup>183</sup>

#### IV. CONCLUSION

My American law students were relieved to hear the tour guide’s claim that the German Constitutional Court was the country’s common law tribunal. Implied in the claim was the idea that the entire German legal culture was now keyed to the common law. After all, whatever else the American students might have understood about their visit to the Court in Karlsruhe, they knew that the Constitutional Court is Germany’s most powerful and important judicial organ. The common law — the tour guide

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179. *See id.* (“All other rights are conditional, and they fall into three categories. First are those rights which can only be limited by the terms of the Basic Law itself . . . . The second category of conditional rights are those whose contours are to be defined by law . . . . Finally, certain rights may be restricted by the ‘general laws.’ The reference here is to the general provisions of the civil and criminal code.”).

180. *See, e.g.,* Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007).

181. *See* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality,” Rights, and Federalism*, 1 J. CONST. L. 583, 603–04 (1999) (quoting William Stuntz as asserting, “There is no nonarbitrary way to arrive at the proper legal rules, no way to get to sensible bottom lines by something that looks and feels like legal analysis. Whether proportionality review is lodged in appellate or trial courts, the only way to do it is to do it, to decide that this sentence is too great but not that one. There is no metric for determining right answers, no set of analytical tools that defines what a given sentence ought to be”).

182. *See* Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS 131, 135 (2003).

183. *See* Grimm, *supra* note 180, at 387 (“Only a legitimate purpose can justify a limitation of a fundamental right . . . . [T]he German Court asks whether the law is suitable to reach its end[,], whether the law is necessary to reach its end or whether a less intrusive means exists that will likewise reach the end[,], and [t]he third step . . . is a cost-benefit analysis, which requires a balancing between the fundamental rights interests and the good in whose interest the right is limited.”).

wanted them to believe — now radiates across all German law. This put the young American jurists on stable and familiar ground. It was a different country and a different legal tradition, the sentiment ran, but at least when it comes to constitutional law we speak the same (common law) language. It must have been the familiarity that the tour guide sought to engender with her remark that emboldened that group of too-often-reluctant students to join the discussion about the Court with real interest and vigor. The questions they raised quickly exposed the problems with the tour guide's claim about the Constitutional Court's common law orientation. "Who is the best known justice?" one of the students asked. The tour guide explained that the Court's President often has a significant public profile. But she noted that the Constitutional Court's justices, mostly working anonymously and unanimously, do not enjoy anything like the celebrity of the United States Supreme Court justices. "What was her favorite dissenting opinion?" another student asked. The justices of the Constitutional Court are rarely divided in their votes, the tour guide explained. And when they are, it is even rarer for the dissenters to write a separate opinion. "What is the Court's process for deciding which cases it will consider?" a third student asked. The tour guide explained that the Constitutional Court doesn't select the cases on its docket, but must decide all admissible cases. Another student asked, "What are the standards the Court follows if it wants to abandon its own precedent?" The tour guide explained that the Constitutional Court does not follow the common law doctrine of *stare decisis*. The magic of the earlier moment, stirred when the tour guide declared the Court to be Germany's only common law tribunal, was waning. Maybe it was the bank of clouds that had crept in front of the sun and muted the glow of the Constitutional Court's hearing chamber. But one of my students put it more bluntly. "Well," she said, "this doesn't sound like any common law court I'm familiar with."

Constitutional law has not only been the vehicle for the common law's triumph over civilian formalism and positivism in the post-War German legal culture as the prevailing myth would suggest. German constitutional law has also been colored by the still-predominant civil law tradition. In fact, German constitutional law is distinctly and significantly civilian in character and style. This is nothing more than the symbiotic interchange between legal traditions that H. Patrick Glenn envisioned. The continuously evolving mix of these traditions — as well as of history, politics, and culture — leaves us undeniably with Germany's uniquely German constitutional law. It suggests that any credible study of German constitutional law must account for the German constitutional regime's

civilian orientation and a potentially infinite array of other “traces.”<sup>184</sup> More broadly, my thesis serves as a warning for comparative lawyers who might be tempted to neglect a particular constitutional culture’s unique socio-legal frame in pursuit of comparisons that rely on generalized or universal notions of constitutionalism. It is all marvelously more complex than that.

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184. *See* Legrand, *supra* note 20.

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