COMPARATIVE CONSTITUTIONALISM

Cases and Materials

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C.1. TYPOLOGY OF CONSTITUTIONAL ARGUMENTS

C.1.1. UNITED STATES

Richard H. Fallon, Jr., A CONSTRUCTIVIST COHERENCE THEORY OF CONSTITUTIONAL INTERPRETATION

100 Harv. L. Rev. 1189, 1189–1190, 1195–1196, 1198–1202, 1204–1206, 1208–1209 (1987).

Introduction

[M]ost judges, lawyers, and commentators recognize the relevance of at least five kinds of constitutional argument: arguments from the plain, necessary, or historical meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice or social policy.

* * *

A. Arguments from Text

Arguments from text play a universally accepted role in constitutional debate. If there is any surprise, it is how seldom the text is relied on directly, in comparison with arguments based on historical intent, precedent, and social policy or moral principle. But perhaps this situation only emphasizes the text's importance. The text, and its plain language, are taken for granted. Where the text speaks clearly and unambiguously—for example, when it says that the President must be at least thirty-five years old—its plain meaning is dispositive. Where the text is ambiguous or vague, other sources are consulted as guides to textual meaning.

If this account is accurate—as I believe that generally it is—then it will be helpful to recognize an important distinction between arguments *about* the text and arguments *from* the text. In one sense, all constitutional arguments—including, for example, arguments concerning precedent and the intent of the framers—are about the text and what it should be held to mean. It is, after all, a constitution we are interpreting. From arguments that are merely about the meaning of the text, we can distinguish arguments from the text: arguments that purport to resolve a question by direct appeal to the Constitution's plain language. These are arguments that the plain language of the Constitution either requires or forbids a certain conclusion, irrespective of what might be said about that conclusion on other grounds.

One reason we see relatively few arguments from the text is that the language of the Constitution, considered as a factor independent from the other kinds of argument familiar in constitutional debate, resolves so few hard questions. Nonetheless, arguments from text can fulfill three

functions. Occasionally, an argument from text will require a unique conclusion—for example, that the President must be at least thirty-five years old. More commonly, arguments from the text achieve the somewhat weaker but nontrivial result of excluding one or more positions that might be argued for on nontextual grounds. Thus, although the text of the eighth amendment may not tell us precisely what "cruel and unusual punishments" are, the language does require that the amendment's prohibition apply only to actions that can plausibly be described as "punishments." Finally, among the meanings that are not excluded by arguments from text, a narrowly text-focused reading will sometimes yield the conclusion that some are more plausible than others * * *

B. Arguments about the Framers' Intent

Searches for the meaning of a constitutional provision frequently involve inquiries into the intent of the framers and ratifiers. Controversy abounds concerning the weight that intent ought to have. Although "interpretivists" view the intent of the framers as controlling, most other constitutional lawyers regard intent as entitled to only some, not very clearly specified, weight. Moreover, several important scholars have recently argued that the intent of the framers generally has no justifiable place in constitutional argument. But this form of nonintentionalism is more plausibly viewed as a prescriptive proposal than as an account of existing practice. It is relatively uncontroversial that the Supreme Court regards the framers' intent as an important factor in constitutional adjudication.

Notoriously, searches for intent divide into several types. One helpful division distinguishes between "specific" or "concrete" and "general" or "abstract" intent. Specific intent involves the relatively precise intent of the framers to control the outcomes of particular types of cases * * * Abstract intent refers to aims that are defined at a higher level of generality, sometimes entailing consequences that the drafters did not specifically consider and that they might even have disapproved * * * It clearly is an interesting and important question how the choice is and ought to be made between the types of intent—especially between specific and abstract intent—that sometimes are resorted to in constitutional argument. * * *

C. Arguments of Constitutional Theory

A third familiar kind of argument involves the purposes, described in a general, functional, or theoretical sense, of the Constitution as a whole or of its provisions individually. Arguments of this kind push beyond what could plausibly be considered the plain meaning of constitutional language. Instead, they claim to understand the Constitution as a whole, or a particular provision of it, by providing an account of the values, purposes, or political theory in light of which the Constitution or certain elements of its language and structure are most intelligible. Arguments asserting that particular values or principles enjoy constitutional status because of their role in a theory of this kind I shall refer to as arguments of constitutional theory.

This category is, admittedly, rather loosely defined * * * A famous example of structural argument comes from Chief Justice Marshall's

opinion in *McCulloch v. Maryland,* [see Chapter 4] forbidding state taxation of federal entities on the ground that the power to tax is the power to destroy. With the state and national governments structured as they were under the Constitution, it would make no sense, Marshall reasoned, for the states to be able to frustrate constitutionally legitimate federal policies. Arguments of this kind can be viewed as ones of constitutional theory because, although they do not rely on either the precise linguistic meaning of particular constitutional provisions or on the historically identifiable intent of the framers, they are text focused * * *

D. Arguments from Precedent

Constitutional disputes frequently abound with analysis of the meanings of judicial precedents. Indeed, constitutional arguments sometimes address themselves almost entirely to the meanings of previously decided cases: read one way, precedent indicates one result * * * whereas if read another, it leads to a different conclusion. More commonly, however, prior judicial decisions form a patchwork into which a current problem must be fitted through a combination of analytical, analogical, and theoretical reasoning * * *

E. Value Arguments

Sometimes openly, sometimes guardedly, judges and lawyers make arguments that appeal directly to moral, political, or social values or policies. Every now and then, of course, courts assert that value choices are never for them to make but are solely the domain of the political branches. However, protestations of this kind are simply not credible. Indeed, at least occasionally they signal that the court is about to implement a value choice so controversial that denial is easier than explanation. Value arguments are even more prominent; indeed, they enjoy almost total predominance, in much of the most respected modern constitutional scholarship.

Although various other definitions would be possible, I shall use the term "value argument" to refer only to claims about the moral or political significance of facts or about the normative desirability of outcomes. Defined in this way, value arguments assert claims about what is good or bad, desirable or undesirable, as measured against some standard that is independent of what the constitutional text requires. Value arguments do not claim that the particular value judgments they assert are necessarily ones that the framers intended to constitutionalize, or that they express the best constitutional theory. Rather, value arguments advance conclusions about what is morally or politically correct, desirable, or expedient as measured against some standard.

To make these claims somewhat more concrete, it may help to posit a provisional distinction between two kinds of cases in which value arguments have a conventionally accepted role. One involves constitutional language whose meaning has a normative or evaluative component. Examples include the due process clauses, the equal protection clause, the fourth amendment's prohibition of "unreasonable" searches and seizures, and the eighth amendment's guarantee against "cruel and unusual punishments." These phrases constitutionalize particular concepts or values. But those values or concepts are, in the idiom of ordinary language philosophy, "essentially contestable." Although the evaluative judgments that the concepts are used to express are wholly intelligible even to those who disagree with them, consensus breaks down over the proper criteria for determining when such labels as "procedurally fair" or "unfair," "equal" or "unequal," "reasonable" or "unreasonable," and "cruel and unusual" are apt. Different people apply the terms differently, not because some misuse the language, but because the full meaning of each term depends upon a background network of philosophical values and assumptions that is itself disputable. To decide when an essentially contestable concept "properly" applies therefore requires the conscious or unconscious undertaking of moral and political commitments * * *

Within the category of arguments of value, a final distinction will prove helpful. It involves the sources of values to which a judge might appeal. One kind of value argument refers to some repository of values, outside of herself, that a judge or lawyer believes to be a legitimate source of authority in constitutional interpretation. That source might be traditional morality, consensus values, natural law, economic efficiency, or the original position liberal methodology of John Rawls. Another imaginable kind of value argument would be one in which a judge or theorist simply asserts her own values and claims their entitlement to constitutional weight. This second sort of argument may never be made explicitly, but critics frequently claim to find it only barely concealed in invocations of such sources of authority as traditional morality and natural law.

C.1.2. GERMANY

Winfried Brugger, LEGAL INTERPRETATION, SCHOOLS OF JURISPRUDENCE, AND ANTHROPOLOGY: SOME REMARKS FROM A GERMAN POINT OF VIEW

42 Am. J. Comp. L. 395, 396–401, 410–411, 415–416 (1994).

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I. The Canon of Interpretation in German Law

The classic method of interpretation in Germany was established by the founder of the 'historical school of jurisprudence', Friedrich Carl von Savigny, in an 1840 treatise on Roman law. Savigny distinguished, in modern parlance, textual, verbal or grammatical interpretation, systematic, structural or contextual interpretation, and historical interpretation. Later on, a fourth perspective was added: teleological interpretation, which might also be termed purposive interpretation.

In verbal or grammatical interpretation, philological methods are used to analyze the meaning of a particular word or sentence. In systematic interpretation, one attempts to clarify the meaning of a legal provision by reading it in conjunction with other, related provisions of

the same section, or title, of the legal text, or even other texts within or outside the given legal system; thus, this method relies upon the unity, or at least the consistency, of the legal world. In historical analysis, the interpreter attempts to identify what the founders of a legal document wanted to regulate when they used certain words and sentences; here, both the specific and the general declarations of intent are of crucial importance. In teleological analysis, the historical will of the framers is devalued: Instead of being accorded critical emphasis as to what was then willed, their declarations of intent are only deemed indicative, not determinative, of the contemporaneous purpose of the legal provision or document. The same holds for the weight of textual and systematic interpretation in teleological analysis: These methods suggest an outcome or a certain range of outcomes, but the decisive point of reference is the interpreter's notion of a result that, according to the "independent function"[3] or value of the pertinent legal provision, must be the correct one.

These four methods constitute the classic catalog of statutory interpretation in Germany. They also comprise the core of constitutional interpretation, as is evidenced by many cases decided by the Federal Constitutional Court (and, in the United States, by the Supreme Court.)

* * *

The prevailing view holds that the Constitution differs from statutes in that it is more political, more open-ended, and less complete. From that it follows, according to this view, that vague constitutional provisions cannot be 'construed' (*ausgelegt*) but must be 'actualized' (*aktualisiert*) or 'concretized' (*konkretisiert*); the difference being that a strict 'construction' reveals a solution already inherent in the text, whereas an 'actualization' or 'concretization' entails a dialectic process of creatively determining results in conformity with, but not determinable by, the Constitution. According to the most influential proponent of this view, Konrad Hesse, the goal of creating constitutional law while respecting the Constitution may be reached through adherence to five points of reference for constitutional interpretation, in addition to, and relativization of, the four classic methods of statutory interpretation: (1) Each interpretation must support the unity of the constitution. (2) In cases of tension or conflict, the principle of practical concordance (*praktische Konkordanz*) must be employed to harmonize conflicting provisions. (3) All governmental organs must respect the functional differentiation of the Constitution, that is, their respective tasks and powers in the separation of powers scheme. (4) Each interpretation must try to create an integrative effect with regard to both the various parties of a constitutional dispute as well as to social and political cohesion. (5) These points together lead to the legitimating function of the Constitution: Each interpretation shall attempt to optimize all the aforementioned elements.

* * *

3. This expression, taken from Justice Frankfurter's concurring opinion in *Adamson v. California*, 332 U.S. 46, 67 (1947), aptly captures the main characteristic of teleological interpretation.

Even if one assumes that the dissimilarities between the German Constitution and German legislation in general are so substantial as to create a qualitative difference between these two kinds of legal texts, one can argue that the additional methods of constitutional interpretation proposed by Konrad Hesse form a part of or can be viewed as an annex to the classic canon of statutory interpretation, especially the systematic and teleological perspectives: (1) It is the goal of systematic, respectively structural or contextual interpretation to clarify the meaning of a rule by reference to other related provisions, but this reference presupposes the unity or consistency of the legal order and implies (2) that if tensions arise, they may be alleviated by a reasonable accommodation of the pertinent provisions. (4) If one of the overarching aims of the legal system is the integration of the political community, then teleological interpretation clearly permits inclusion of this goal. Within the same approach it is also possible and perfectly reasonable to advocate the view that in order to (5) further the normative force of the legal text at hand, one must attempt to optimize all the aforementioned points. The only reference point remaining, then, is (3) adherence to the functional differentiation of the Constitution—meaning that judges should adjudicate, while legislators should adopt and administrators execute the law. This point, admittedly, plays a stronger role in constitutional adjudication than in statutory interpretation, but in the process of the former, respect for separation of powers concerns falls clearly under the auspices of a contextual analysis of the text of the Constitution.

* * *

First, each interpretation must respect the outer bounds of grammatical analysis. For example, if the constitutionality of a legal provision is in doubt, the judge should construe it in a way compatible with the constitutional command; however, this is not a license to manipulate the ordinary meaning of the language. Yet, with a closer look, one can identify decisions in which the courts have used systematic and teleological arguments in order to disregard the wording of a rule; usually these are instances in which the result reached by textual analysis is considered by the judges to be irrational or unjust.

Second, more importance must be placed on the 'objective' textual, systematic, and teleological methods than on the 'subjective' historical method.[12] Historical analysis, indeed, generally serves only as a secondary, supplementary way of clarifying a rule's meaning. But in some cases, courts place great emphasis on this type of argument, and it is the other methods which seem to be supplementary.

The designation of the textual, systematic, and teleological analyses as objective is meant to express the view that the text of the provision is used as an independent starting point. Once a law is adopted, according to German understanding, it becomes an independent entity, and is supposed to regulate not only the present, but the future as well. What the adopters said is paramount to what they willed. * * *

* * *

12. See 11 BVerfGE 126, 129–30 (1960) * * *.

Gerhard Leibholz, an influential former Justice of the German Federal Constitutional Court, has expressed this master ideal of interpretation as follows:

> "If the world as it is, i.e., political reality, is left out of account by the law, the lawyer becomes detached from life, from reality, and so from the law itself. If the value of the legal rule is overlooked because of an uncritically extended theory of the normative force of fact, the choice in favour of the ever-changing forces behind constitutional reality destroys the dignity and authority of the law. It must be the task of the constitutional lawyer to reconcile rules of law and constitutional reality in such a way that the existing dialectical conflict between rule and reality can be removed as far as possible by creative interpretation of the constitution without doing violence thereby either to reality in favour of the rule, or to the rule in favour of reality."[37]

Karl Llewellyn summarizes the same point as follows:

> "Thus it is ABC stuff that our appellate courts are interested in and do feel a duty to the production of a result that satisfies, placed upon a ground which also satisfies. One can indicate this crudely as the presence of a felt duty to Justice, a felt duty to The Law, and a third felt duty to satisfy both of the first two at once, if that be possible."[38]
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> * * *

Legal interpretation is the act of judging in a structured context. This structure stems from constitutional, statutory, and judicial pronouncements of law which, in each hard case, pose problems of indeterminacy. The starting point is the analysis of the relevant provision and its legal context. However, the interpretive result of this first step, in every hard case, must be affirmed or qualified—that is, broadened or narrowed—by taking additional reflective steps. These can be directed forward, backward, upward, and/or downward. Upward arguments rely upon either explicit or implicit constitutional ideals of the political community, such as 'justice for all.' Downward arguments are based on the perceived urgency of needs and interests. Or, to put it more crudely: Looking downward, what we want is what counts, while looking upwards, what we legitimately can and should expect or do is of greatest weight. These perspectives are intertwined with the backward and forward relationship of legal interpretation: The meaning of text and context always expresses past experiences of which the words themselves form a part; the past is constantly present in the meaning of the words. The past, however, does not necessarily determine and constrict their essence. Words possess open-ended significance; contemporary developments in the real or ideal world shape their past purport so that the traditional understanding of the word is affirmed, broadened or narrowed. These new speech conventions then in time become part of the modern 'tradition' of the words' meaning. This is the forward-looking perspective, in which contemporary goals and purposes become primary

37. Gerhard Leibholz, "Constitutional Law and Constitutional Reality," in Festschrift für Karl Loewenstein 305, 308 (Henry Steele Commager et al., eds. 1971).

38. Karl Llewellyn, The Common Law Tradition. Deciding Appeals (1960) at 59.

roots of reference. These four perspectives are critical to legal interpretation.

Any random reading of American legal literature confirms this statement: "[I]n a going life-situation, fairness, rightness, minimum decency, injustice look not only back but forward as well, and so infuse themselves not only with past practice but with good practice, right practice, right guidance of practice, i.e., with felt net values in and for the type of situation, and with policy for legal rules."[51] * * *

Wolfgang Zeidler, THE FEDERAL CONSTITUTIONAL COURT OF THE FEDERAL REPUBLIC OF GERMANY: DECISIONS ON THE CONSTITUTIONALITY OF LEGAL NORMS,

62 Notre Dame L. Rev. 504, 509–11 (1987).

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C. Interpretations which Conform with the Constitution

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If the wording of a law permits several interpretations, then the Federal Constitutional Court must choose the one which produces results harmonious with the Basic Law. There is no room for any interpretation that would lead to an unconstitutional result.[30] The constitutionally acceptable interpretation also must not conflict with the wording and the clearly expressed intent of the legislature. Accordingly, the normative content of the law to be interpreted must not be determined anew and the essential legislative goals must not be missed in the process. Admittedly, this applies only to those basic principles, determinations of value and regulative purpose, which are recognizably expressed by the law.

The statements by legislative committees or individual members of the legislative bodies concerning the significance of a normative component or concept (or scope of an individual provision), its handling, and result do not constitute binding guidelines for the courts, no matter how illuminating they might be in determining meaning. The existence of adverse legislative history, however, occasionally proves problematic. In 1980, such a quandary resulted in a fairly rare decision by the plenum session of the Federal Constitutional Court.[32] Rather briefly, the full

51. Llewellyn, *supra* n. 38, at 60.

30. One must distinguish from this the duty of all courts and appliers of the law to lend in a given case the greatest possible force to the fundamental rights established by the constitution. For example, courts must enforce freedom of speech while interpreting rules concerning civil law and professional rules and regulations. Occasionally, this is referred to as an interpretation which takes its cues from the constitution. See, e.g., Simon, in GENERAL REPORT FOR THE 2ND CONFERENCE, 1974 EuGRZ 85, 86.

32. The Federal Constitutional Court is divided into two chambers, called senates, which have exclusive memberships and exclusive jurisdiction over certain constitutional cases. The plenum, an en banc session of the Court, meets only to address matters concerning the internal administration of the Court as a whole, the disputes arising out of the wish of one senate to depart from a formal ruling by the other, or

court found that restricting the language of a statutory provision which revised the legal recourse to the Federal High Court of Justice in its function in civil matters as a Court of Appeals was proper, in light of the de minimus restriction on legislative intent.[33]

In another decision, the Federal Constitutional Court interpreted as constitutionally conforming, a provision in the tax laws which afforded unwed mothers and foster parents certain special benefits. The Court concluded that fathers of illegitimate children—who are not specifically covered by the wording of the law—could, in certain circumstances,[34] be considered " 'foster parents,' " in view of the constitutional requirement of equality of illegitimate children.[35] The Court premised its decision on the assumption that the legislature would have augmented the provision accordingly if it had recognized the omission.

By comparison, the Federal Constitutional Court rejected as an interpretation which did not conform with the constitution, a National Socialist administrative order—that is, an order that reflected a totalitarian administrative philosophy—which did not meet the constitutional requirement of definiteness. It was deemed impossible to reinterpret such a vague regulation without simultaneously examining whether the subsequent effect agreed at all with the intentions of the democratic legislature. A constitutionally conforming interpretation would have essentially redefined the normative content, and to do so would not have been within the purview of the Federal Constitutional Court.[36] Indeed, by employing a constitutionally acceptable interpretation one must not disregard the danger of shouldering the legislature with results it did not intend.

Equally, and only slightly less problematical, is the functional relationship between the Federal Constitutional Court and the specialized courts, especially the highest. In certain instances, the Federal Constitutional Court may prescribe a constitutionally conforming interpretation of a provision which a specialized court did not support in an earlier decision despite careful deliberations. Furthermore, the Federal Constitutional Court's specific mission authorizes it only to proclaim that a certain interpretation is incompatible with the Basic Law. To do so, the Court must demonstrate that an interpretation which is different from the one held unconstitutional is indeed possible. The Court, however, must leave undecided whether only the specified interpretation is possible or whether there is the possibility for additional constitutional interpretations. Also, the Federal Constitutional Court is not authorized to decide for the specialized courts whether only one of several differing interpretations is legitimate.

the transfer of jurisdiction from one senate to another.

33. 54 BVerfGE 277, 298.

34. 36 BVerfGE 126.

35. GRUNDGESETZ [Basic Law] art. 6(V).

36. 8 BVerfGE 71. See also 20 BVerfGE 150, 160.

Bernhard Schlink, GERMAN CONSTITUTIONAL CULTURE IN TRANSITION, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES

197, 199–201, 203, 204–06, 211–12 (Michel Rosenfeld ed., 1994).

* * *

Before we can describe and analyze the change in the view of fundamental rights as rights to the view of them as principles, we must ask what rights and principles are and what distinguishes them from each other. There are two answers in legal precedent and jurisprudence. On the one hand, we speak of subjective rights in contrast to objective principles, and, on the other hand, of rights as determinations, in contrast to principles as rules of optimization.[2]

The phrase "fundamental rights as subjective rights" means the characterization of fundamental rights as entitlements of the individual subject, the individual citizen, to be respected by the state in his individual freedoms, to participate as an individual in the practice of state power, or to be considered in the distribution of positions, means, and opportunities. On the other hand, when described as "objective principles," fundamental rights are maxims according to which social relationships, as well as the relationship between state and society, are to be ordered.

Freedom of the press and of broadcasting may illustrate the difference. As a subjective right, freedom of the press guarantees the individual citizen the freedom to print and publish, while freedom of broadcasting guarantees the right to run radio and television stations. As an objective principle, freedom of the press and freedom of broadcasting demand that the legislature regulate publications, radio, and television so as to allow as many citizens as possible to express, or see expressed, their opinions and inclinations, and to satisfy their need for information. In other words, freedom of the press and of broadcasting, as an objective principle, demands a system of press, radio, and television characterized by varied content and diverse supply?

The freedoms of the press and broadcasting can coexist harmoniously as a subjective right and an objective principle. If many make use of their subjective rights, the diversity of content that the principle demands can emerge by itself. However, the subjective right and objective principle can also conflict with one another. For example, diversity of content may only be achievable through the imposition of some limits on individual rights, such as regulation and control of the press and broadcasting markets. This might involve the breaking up of monopolies, the closing off of access to some citizens, the promoting of access to others, and perhaps the use of subsidies.

The other view of the difference between rights and principles differentiates fundamental rights as determinations from fundamental

2. ROBERT ALEXY, THEORIE DER GRUNDRECHTE 71–104 (1986); Robert Alexy, *Grundrechte als subjektive Rechte und als objektive Normen*, 29 STAAT 49 (1990).

rights as rules of optimization, and thereby juxtaposes a strict and a relative conception of fundamental rights? Viewing fundamental rights as determinations means that the citizen is entitled to have his freedom respected and to participate in the practice of state power and distribution of positions, means, and opportunities, although the entitlement may be denied to him in exceptional cases. The rule is that the citizen is entitled; the exception lies in the denial of the citizen's entitlements. The exception must be expressly admitted and must be particularly justified, as, for example, when one citizen's claim to his fundamental right conflicts with other citizens' claims to their fundamental rights, or when conflicts arise between fundamental rights and state interests and cannot be settled in any other way.

On the other hand, as rules of optimization, fundamental rights from the outset guarantee the citizen entitlements only in accordance with what is legally and actually possible. In this view, because conflicts are unavoidable among fundamental rights, as well as between fundamental rights and state interests, the entitlement to a fundamental right does not go beyond its enforcement in the conflict. The degree of enforcement will be more in one conflict, less in another; it is as much as possible and, to the extent possible, the optimum.

This second difference can also be illustrated with an example. Most constitutions, including the German Grundgesetz, guarantee each citizen a fundamental right to his dwelling; that is, the dwelling may not be entered and searched by state organs unless certain prerequisites are fulfilled, ranging from a judge's decree to the existence of certain clearly defined dangers. When the Bundesverfassungsgericht faced the question of whether protection of the fight to a dwelling included not only the home but also business premises, it answered positively. At the same time, for practical reasons, it permitted state entry onto business premises under conditions less strict than those for entry into the dwelling as specified in the Grundgesetz.

* * *

The two methods of characterizing the different conceptions of fundamental rights each employ differing sets of criteria. The rights/principles model uses a subjective/objective pair of criteria, while the determination/rule of optimization model uses a strict/relative pair of criteria. But they are related to each other from a practical point of view.

* * * When one speaks of fundamental rights as rights, in contrast to fundamental rights as principles, this does not mean that an interpretation of fundamental rights as rights would be possible without considerations of principle. It means that fundamental rights are not *themselves* principles. However, considerations of principle must be recognized in discussing how far protection of a fundamental right can reach and how intrusions in exceptional cases may be justified.

Let us take once again the right to a dwelling as an example. Whether business premises fall under the term "dwelling," and are

therefore encompassed by the fundamental right to a dwelling and its protections, is a question that creates issues of principle involving the function of the fundamental right to a dwelling, the relationship between social and spatial privacy, and the separation and categorization of privacy and the public sphere? In the German tradition of public law, whether or not an intrusion is actually permitted upon the fundamental right to a dwelling, whether narrowly or broadly defined, depends not only on the actual existence of the dangers listed in the constitution as conditions for an intrusion, but also on whether the intrusion is necessary and proper to repel the danger. It must be a means related to the ends sought—this principle of proportionality is decisive in the interpretation and treatment of fundamental rights. However, fundamental rights themselves do not need to become principles. They can remain subjective rights in the strict sense.

II

The consequences of interpreting and treating fundamental rights as rights or as principles become clear when one views the development of decision making by the Bundesverfassungsgericht. * * *

The cases themselves speak of fundamental rights as values and value decisions, as fundamental value-determining norms, objective fundamental rights—fundamental rights as objective principles.

* * *

[One of the issues] that furthered development from the subjective rights view to the objective principles view was the role of government in protecting fundamental rights: whether fundamental rights required the government to take only a passive role in protecting freedoms by not intruding on them, as per the traditional view, or whether the government had a duty to take an active role in protecting freedoms against intrusions by others. The issue arose during the 1970s in the struggle over the criminal treatment of abortion. The legislature had created a scheme that unconditionally legalized abortion in the first trimester, and then legalized it during the following months if certain indicators were present. The Bundesverfassungsgericht considered this insufficient protection of the unborn, who, according to the Court, were better protected by an indicator requirement that applied from the start of pregnancy. The Court considered this increased protection necessary to insure fundamental rights—the fundamental right to life, as a value-determinative fundamental norm and objective principle. Defined as such, this fundamental right required the government not only to refrain from intrusions, but also to support and protect life. Thus, the Court rejected the legislature's arrangement and obliged it to promulgate legislation that applied the criminally stricter indicator arrangement from the start of pregnancy. Two dissenting judges strongly criticized the decision and rejected the objective principle characterization of fundamental rights as a heading under which fundamental rights changed from individual freedoms to a governmental duty of punishment.

The Bundesverfassungsgericht has never again inferred a duty of punishment from a fundamental right. However, it also has never had another opportunity to do so.

* * *

In order to fulfill its activist role, the Bundesverfassungsgericht has driven forward the development from the understanding of fundamental rights as subjective rights to the understanding of them as objective principles. Has this been a negative development? What are, in fact, the fundamental rights of the Grundgesetz: subjective rights or objective principles?

Beyond question, the authors of the Grundgesetz considered its fundamental rights to be subjective rights—protections of personal freedoms through repulsion of state intrusions. After the unfortunate experience with the Weimar Constitution's programmatically broad fundamental rights, which tried and failed not only to secure freedoms through defense against intrusions but also to guarantee government services and the structuring of social relations, the creators of the Grundgesetz consciously limited themselves to guaranteeing fundamental freedoms. Naturally they were guided by principles—that is, maxims—for ordering social relations and the relationship between state and society. However, rather than principles, the Grundgesetz's authors considered fundamental rights to be guarantees of specific freedoms of citizens from specific state intrusions. They considered fundamental rights as necessary, but not sufficient, conditions for a satisfactory ordering of social relations.

Thus if it were simply a question of the authors' original intent, the question asked above would be easy to answer: Fundamental rights are not actually objective principles, but subjective rights. However, as the authors themselves know, original intent is only of relative significance. They know that their legal texts are introduced into a legal process where interpretations and reinterpretations, and constructions and deconstructions, alternate with one another. The outcome is open, constantly changing, and never more than temporary. The authors' awareness of this legal process overcomes their original intent. Thus, original intent cannot be contrary to textual interpretation because it has anticipated this interpretation. In other words, the authors know what they intend, but they also know that their original intent can only offer the limited authority conveyed by the text; they intend as much of their intentions as the text conveys.

So what does the text of the fundamental rights convey? The answer—and how could it be otherwise?—is ambiguous. According to traditional formulations, nearly all fundamental rights are formulated to repel government intrusions upon freedoms. However, the text of these fundamental rights includes formulations that are concerned not only with freedoms as attached to individuals, but with the freedoms themselves. "Each person has the right . . . freely to express and make known his opinion" [Basic Law, art. 5, para. 1, cl. 1]—this is a subjective rights formulation. "Freedom of the press and freedom of broadcasting . . . are guaranteed" [Basic Law, art. 5, para. 1, cl. 2.]—this can be understood as an objective principle formulation. * * *

C.1.3. FRANCE

Dominique Rousseau, THE CONSTITUTIONAL JUDGE: MASTER OR SLAVE OF THE CONSTITUTION?, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES

261, 263–67 (Michel Rosenfeld ed., 1994).

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1. THE CONSTITUTIONAL JUDGE'S INTERPRETATION AS THE PRODUCT OF MULTIPLE, COMPLEX INTERACTION

A. *The Techniques of Interpretation*

The main means of constitutional control is textual interpretation. When a statute is challenged in court, claimants always allege that the legislator misinterpreted constitutional principles and that the purpose or effects of the law, as interpreted by those who bring the action, are unconstitutional. In order to respond to these challenges, in a word to declare that a law is or is not consistent with a given constitutional principle, the Council must determine both the meaning of the right or liberty in question and the correct meaning of the disputed law. The interpretation of texts is thus a stake in a constitutional contest in which the interpretations of Parliament, of those bringing the action, and of the Council vie with one another. For the Council, interpretation is an inherently intellectual operation that is indispensable for its exercise of control. Thanks to constitutional interpretation and a meticulous analysis of the content of the statute, the Council can speak out about the consistency of its constitutional rulings. In order to accomplish this task, the Council has gradually evolved three specific interpretive techniques.

1. The Three Techniques of Interpretation

The first, the *limiting interpretation*, involves the Council's removing juridical effect from disputable legislative provisions or excluding from among possible interpretations those that would make it contradict the Constitution. Thus, for example, where, a claimant takes issue with certain provisions of a statute, the Council may reason that the "provisions are devoid of any legal effect"; by rendering the provisions inoperative, "there are no grounds to declare them inconsistent with the Constitution. Or, the Council may decide that a statute could not possibly have the unconstitutional effect ascribed to it by the claimants.

The second technique is *constructive interpretation*, in which the Council no longer curtails but adds provisions to the law that are designed to make it consistent with the Constitution or make a legal clause convey more meaning than is expressly provided in the text. Thus, when article twenty-nine of the law concerning the prevention of lay-off orders [provides] only that the labor union bringing suit on behalf of a wage-earner must give him notice "in a registered letter with acknowledgement of receipt," the Council assumes that this provision

"implies that the letter must contain all relevant details about the nature and purpose of the current lawsuit, about the full implication of his acceptance, and about his acknowledged right to stop the suit at any point * * * and that the tacit acceptance of the wage-earner may be considered granted only when the union can prove when it brings the suit that the wage-earner personally had thorough knowledge of the letter including the details mentioned above." [CC decision no. 89-257 of 25 July 1989.]

None of these specifications is delineated in the text of the law; the Council, through the task of interpretation, added them so that the law may be deemed consistent with the Constitution.

The third technique, *guideline interpretation*, consists of the Council defining and specifying for those authorities responsible for implementing the law, the modes of application necessary for conformity with the Constitution. Thus, in its decision issued on July 28, 1989, the Council first specified the rules of application in a case where several financial and penal sanctions could obtain against the perpetrators of stock exchange misdemeanors, by providing that the total amount of sanctions must not in these cases exceed "the highest amount of one of the sanctions incurred." The Council immediately added a directive of application by asking, "the competent administrative and legal authorities to pay careful heed to the fulfillment of his demand in the implementation of these provisions."

Whatever the technique, the Constitutional Council does exert its control through an interpretation of the statutes whose scope it limits, whose provisions it completes, and whose modes of application it specifies. Because of its judicial and political implications, this means of control raises many problems.

2. *The Clear Error* (l'erreur manifeste) *Standard*

The Council's use of "clear error" as a standard for control over the legislator's awareness of the facts, circumstances or situations forming the bases of a statute, appears for the first time implicitly in its decision issued on January 19-20, 1981 and explicitly in its decision issued on January 16, 1982: "[T]he legislator's assessment of the necessity of nationalizations decided by the law which is under examination by the Constitutional Council could not be challenged *in the absence of unmistakable error*". [CC decision no. 86-215.]

Since that decision, the Council has regularly used this means of control of facts both to underscore the legislator's awareness of the severity and need for disciplinary measures regarding the unacceptable features and the length of time during which valid provisions remain temporarily applicable; this means also helps the Council to find out whether Parlement has made an error in its weighing of contextual distinctions that might justify an infringement on the principle of equality. The Council ensures that decisions, such as where the threshold from which professional property is exempt from the surtax on great wealth belongs, or regarding the setting of different age limits for various classes of civil servants do not arise from obviously flawed judgments * * *

With the clear error standard, the Council thus introduces control of proportionality in disputed constitutional claims. This clearly springs from the wording of recent decisions in which the Council examined in turn whether statutes set up "an *obvious disproportion* between the offense and the punishment incurred," [CC decision no. 86-215] or create *excessively disproportionate* gaps in representation between election districts * * *

* * * As a general rule, the Council always ascertains whether the legislator's threats to a constitutional right are not so severe that its meaning and implication would be distorted. In other words, the clear error standard allows the Council to weigh, on one hand, the common interest sought by the statute and on the other hand, the threats to a given constitutional principle; depending on the result, whether or not the Council judges the threats to be disproportionate or excessive with respect to the interest sought by the legislator, the statute will be declared consistent or inconsistent with the Constitution * * *

With the evolution of such a method, isn't the control of constitutionality constrained by political exigencies?

Notes and Questions

1. With the exception of arguments from precedent, which have no place in German constitutional interpretation, the different types of constitutional arguments prevalent in the U.S. and Germany seem largely similar.

United States	Germany
Arguments from the text	Grammatical arguments
Arguments from framers' intent	Historical arguments
Arguments from constitutional theory	Systematic arguments
Value arguments	Teleological arguments

Furthermore, even though precedents do not figure in the German system of constitutional interpretation, functionally the GFCC's concern with institutional consistency and integrity leads it to treat its own past decisions as if they had the force of precedent. Both the USSC and the GFCC have occasionally deviated from past decisions, but the latter does not appear to have done so more freely or more frequently because it is unconstrained by precedents.

On the other hand the similarities noted above do not preclude important differences concerning the relative force or context of the respective types of arguments involved. Historical arguments, in Germany, do not have nearly the same importance as framers' intent arguments in the U.S. Is this because the German Basic Law is much younger than the U.S. Constitution? Or does it have more to do with the respective histories of constitution-making and ideologies of the two countries?

There also seem to be important differences between value arguments in the U.S. and teleological arguments in Germany. The principal differences are that whereas value arguments appear to be external to the U.S. Constitution, teleological arguments loom as internal to the German Basic Law. For example, as there is no explicit reference to abortion in the U.S.

Constitution, value arguments both in favor and against abortion rights tend to refer to general moral precepts debated within American society at large rather than clearly embedded in the U.S. Constitution. In Germany, in contrast, specific values, such as the paramountcy of human dignity enshrined in Article I of the Basic Law, provide a teleological framework for the Constitution taken as a whole. Accordingly, teleological arguments are supposed to guide the constitutional adjudicator toward vindication of the values and normative purposes explicitly embraced by the Basic Law. Does this make teleological arguments inherently different than value arguments? And, more generally, does the type or argument involved matter less than the institutional and ideological setting in which it is inserted?

2. The techniques of interpretation used by the French Constitutional Council described by Professor Rousseau seem altogether different than the types of arguments prevalent in Germany or the U.S. The French techniques appear less concerned with providing meaning to the constitutional text than with reshaping the challenged statutory text to make it consistent with the Constitution. Thus in "limiting interpretation," the Council weakens or renders ineffective statutory provisions; in "constructive interpretation," the Council adds to the statute; and in "guideline interpretation," the Council instructs the authorities on how to implement the statute. Does the French approach make the constitutional adjudicator more like a legislator than does the German or U.S. approach? Note, however, that, as Chief Justice Zeidler indicates, courts tend to provide the statutory text under review with constitution-conforming meaning. In *Ashwander v. T.V.A.*, 297 U.S. 288 (1936), Justice Brandeis gave a whole catalogue of techniques for avoiding unnecessary constitutional decisions. A similar attitude is present in Canada in the "reading-down" technique.

3. In contrast to the approaches discussed so far, the Supreme Court of India has advocated a far more sweeping and self-consciously more ideological way of engaging in constitutional adjudication. As stated in Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 Am. J. Comp. L. 495, 502 (1989):

> The former Chief Justice of the Supreme Court, writing in both the popular press and the academic journals, made quite clear his rejection of the "bureaucratic tradition" of mechanical and rule-bound adjudication.[36] He suggested that positivism is a myth, "deliberately constructed to insulate judges against vulnerability to public criticism, and to preserve their image of neutrality * * * It also helps judges to escape accountability for what they decide, because they can always plead helplessness." In interpreting the Constitution, the Supreme Court is neither bound by doctrines of literal meaning or original intent, nor constrained to read into it only formal rights and liberties. Instead, the text can be read as one which is "vibrant with a socio-economic ideology geared to the goal of social justice" and can be infused with principles that transcend mere equality, and transform legal rights into positive social entitlements.
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> The judges in India have asked themselves the question: can judges really escape addressing themselves to substantial questions of social justice? Can they * * * simply follow the legal text when they are aware that their actions will perpetuate inequality and injustice? Can they restrict their inquiry into law and life within the narrow confines of a narrowly defined rule of law?[38]

Is the approach in India more political and hence more objectionable than the other approaches discussed above? Or is it rather more open and honest? Does the answer depend on whether there can be objective interpretations of texts? Compare Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399 (1985) (arguing that some constitutional cases lead to a single obvious solution) with Michel Rosenfeld, *Just Interpretations: Law Between Ethics and Politics*, ch I (1998) (arguing that texts do not speak for themselves and that all interpretations are intersubjective and open-ended). Or, on whether the framers' intent can be established fully and unequivocally? See the discussion on originalism below.

36. Bhagwati, "Bureaucrats? Photographers? Creators?" The *Times of India*, 21–23 September 1986.

C.2. DILEMMAS OF CONSTITUTIONAL INTERPRETATION

C.2.1. TEXTUALISM AND BEYOND

Can the text of a constitution ever be determinative in any but the simplest of cases? In the U.S., the most often cited example of a straightforward constitutional provision making for a simple textual solution is that in Art II, Sec. 1, which requires, in part, that no person shall "be eligible to [the] office [of President] who shall not have attained the age of thirty five years." It is clear that if a fourteen-year-old were elected President he or she would not be constitutionally eligible to hold that office. But what about someone who had his or her thirty fifth birthday sometime between election day in November and inauguration in January of the next year? And what about a candidate who turns thirty five three months after the day of inauguration, but argues that age should be counted from conception, as it is in certain cultures, rather than from birth, as it is customarily done in the U.S.? Is there a textual solution to these last two hypothetical cases? More generally, consider the following cases.

AUSTRALIAN CAPITAL TELEVISION v. THE COMMONWEALTH OF AUSTRALIA

High Court (Australia).
(1992) 177 C.L.R. 106.

[The Political Broadcasts and Political Disclosures Act 1991, Part IIID introduced rules regarding the allocation of free television time in electoral campaigns, providing advantages to certain incumbent political parties. It also prohibited paid political advertisements during the run-up to state and federal elections.]

Mr. Justice Mason * * *

14. The effect of Pt IIID [of the statute] is, as the plaintiffs submit, to exclude the use of radio and television during election periods as a

38. Bhagwati, "Bureaucrats," *supra* n. 36.