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The Impact of Legal Systems on Constitutional Interpretation: A Comparative Analysis: The U.S. Supreme Court and the German Federal Constitutional Court

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The central purpose of this paper is to show that there are no major differences in the methods of constitutional interpretation in countries with varying degrees of judicial review. Despite the fact that legal culture and traditions, underlying political theories, and values all affect methods of interpretation, there is no big gap in constitutional interpretation in practice in view of wide interpretive discretion. Obviously all legal systems require compliance with some fundamental interpretive standards irrespective of the legal system, and in a democratic society judicial decisions should be justified at least to avoid arbitrariness. The question is what are the limits beyond which judges cannot go in constitutional democracies? Hence, the style and method of legal argumentation that are used to justify the decision may differ in the countries belonging to different legal systems. Whether there are significant differences between the common law and civil law, constitutional interpretation will be assessed through the comparative analysis of the United States Supreme Court and the German Federal Constitutional Court.

The point of departure in any comparative analysis is what is to be compared and whether the chosen objects are comparable at all. In this context, the comparison of the courts and their adjudication processes are not immune from invoking such questions. In order to understand the adjudication processes in different countries, initially one should know in which legal system and political context they operate, how the courts dealing with constitutional issues are composed, and whether the courts are performing such different functions that their comparison will become an unwise and useless exercise.

Historical and political peculiarities of countries have crucial impacts on both the organization and mission of the constitutional courts. Despite the similarities in political culture of western democracies, the comparison of the U.S. Supreme Court and the German Federal Constitutional Court will help to understand their adjudication processes and methods of interpretation by illustrating the existing differences between them. One criticism of this comparison is that the two courts are not comparable because they do not fulfill the same function. For example, continental constitutional courts are designed to

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address only constitutional issues and basically function as courts of first instance rather than as appellate courts.[1] The core of these functions includes the judicial review of legislation and individual constitutional complaints about the violations of fundamental rights. As opposed to Federal Constitutional Court, the U.S. Supreme Court, occupying the top of judicial hierarchy, hears mostly appeals from the federal courts and state supreme courts. However, the U.S. Supreme Court is the constitutional court of the United States. Constitutional issues constitute half of its docket and in that sense it is comparable to the German Federal Constitutional Court in that they perform the same function of adjudicating constitutional issues. In particular, this paper will focus on the methods of legal reasoning and argumentation derived from the nature of the legal systems in which the courts operate.

After a brief description of the general features of the two courts, I will focus on the inherent characteristics of common law and civil law legal traditions and their influence on American and German constitutional interpretation. I will first identify the underlying theories of the common law legal system in terms of application of precedent and the modes of legal thinking. Understanding the sources and modes of legal reasoning will facilitate the comprehension of theoretical and practical aspects of constitutional interpretation of the United States and Germany. The American written Constitution and its interpretation are informed by social changes and common law legal tradition whereas Germany is home to a civil law system. For this reason, the need to conduct theoretical and practical analysis of these legal traditions in terms of legal reasoning becomes apparent.

A. The General Differences Between the Two Courts

Both the Federal Constitutional Court and the Supreme Court played crucial roles during their nations' formative periods by addressing issues related to federalism.[2] From the commencement of its activities, the U.S. Supreme Court asserted the authority of judicial review of legislation in the landmark decision *Marbury v. Madison,*[3] a power that was mentioned nowhere in the constitutional text. In *Cooper v. Aaron,*[4] the Court went further to claim that governors and state legislatures are bound by the Court's interpretation of

[1] *See* Ralf Rogowski & Thomas Gawron, *Constitutional Litigation as Dispute Processing, Comparing the U.S. Supreme Court and the German Federal Constitutional Court*, *in* CONSTITUTIONAL COURTS IN COMPARISON: THE US SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT 1, 2 (2002). Mauro Cappelletti argues that "The Supreme Court . . . should be compared not to the special constitutional courts, but rather to highest courts of appeal on the continent."

[2] *See id.* at 4.

[3] *See* Marbury v. Madison, 5 U.S. 137 (1803).

[4] *See* Cooper v. Aaron, 358 U.S. 1 (1958).

the Constitution. Furthermore, a remarkable difference between the German Federal Constitutional Court and the U.S. Supreme Court is that the interpretation of the U.S. Constitution is not the prerogative of the Supreme Court but constitutional issues can be dealt with by any court at the state or federal level.[5] In contrast, the power of judicial review of legislation was bestowed on the German Federal Constitutional Court by the Basic Law which also stipulates that all other branches are bound by the Constitutional Court's interpretation.[6]

A distinguishing feature of the courts is the scope and width of their judicial review. In the United States, constitutional adjudication is concrete and *a posteriori*, while the German Federal Constitutional Court is bestowed an abstract review (both *a priori* and *a posteriori*) power which allocates the Court an important policy making function.[7] This mechanism is often used by political minorities who oppose the adoption of a law by parliament as their last chance to hinder the promulgation of the law. In contrast, in the United States the Court can act only in cases of genuine controversy between real rivals and judicial review is fact-driven as opposed to an abstract review. This does not mean that the U.S. Supreme Court abstains from policy making.[8] The Supreme Court interprets this requirement very strictly and limits the standing to a certain class of litigants "to raise constitutional questions."[9] It grants certiorari only to "a small fraction of the several thousand petitions."[10]

In contrast to strict standing and certiorari requirements set by the U.S. Supreme Court, the Federal Constitutional Court does not enjoy discretionary power to reject correctly filed applications. Rather, the Federal Constitutional Court Act (FCCA) established two senates within the German Federal Constitutional Court to accelerate the decision-making process by creating preliminary examining chambers of three judges "to filter out frivolous constitutional complaints."[11] This was necessitated by the fact that the German Federal Constitutional Court must admit all constitutional complaints. Only if one of the three justices, however, thinks that the complaint should be accepted will it be forwarded to the

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[5] *See* Rogowski & Gawron, *supra* note 1, at 5.

[6] *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW], May 23, 1949, BGBL. I at art. 93(1) (Ger.).

[7] *See* Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT'L J. CONST. L. 633, 665 (2004).

[8] *See id.* at 634.

[9] Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism, in* 7 INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 13 (2006).

[10] *Id.*

[11] Rosenfeld, *supra* note 7, at 634.

full Senate. In 1986, the three justice chamber was empowered to decide on the merits of the case if the three justices are unanimous about the result and "the decision clearly lies within standards already laid down in a case decided by a full senate."[12] Only a full senate can invalidate a statute or federal law on the ground of its unconstitutionality.[13]

However, the U.S. Supreme Court has been criticized for being more "unduly political" than the Federal Constitutional Court.[14] The distinction between concrete and abstract review in terms of interpretive discretion is not of great importance. Even if U.S. courts do not exercise abstract review, the common law tradition enables them "to develop and adapt legal rules through interpretation, expansion, or limitation of precedents."[15] Despite the fact that U.S. courts are restrained to deciding a constitutional issue between two parties of the case, the *stare decisis* doctrine allows the decision to serve as guidance for future cases, though in a more limited sense than the decisions of specialized constitutional courts. This problem of rule of law's ability to provide predictability has been occasionally solved by the U.S. Court which "tended to cast its opinions in broader strokes than strictly necessary to resolve the concrete case before it," e.g. *Roe v. Wade.*[16]

B. Common Law Tradition and American Constitutional Interpretation

There is no agreement among constitutional scholars about any single mode of constitutional interpretation. Nonetheless, all the debate in scholastic circles focuses around these issues: (1) the meaning of words in the Constitution; (2) the intentions of the authors of the Constitutions; (3) precedents set by judges; and (4) value judgments. Apparently, the common law legal tradition provides answers to some constitutional questions: whether common law implies a judge-made law and, if so, whether judges impose their personal values through interpretation which in turn reflects social changes;

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[12] Donald P. Kommers & Russell A. Miller, *Germany: Das Bundsverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court*, *in* CONSTITUTIONAL COURTS: A COMPARATIVE STUDY 102, 108 (2009).

[13] *See id.*; *see also* Bundesverfassungsgerichts-Gesetz [BVerfGG][Federal Constitutional Court Act], Mar. 12, 1951, BUNDESGESETZBLATT [BGBL] at § 93c (1)(Ger.).

[14] *See* Rosenfeld, *supra* note 7, at 634.

[15] NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM 129 (2003).

[16] *See id.*; Roe v. Wade, 410 U.S. 113 (1973). The Court had before it a challenge by a woman seeking an abortion against a Texas law that made abortion a crime, except if necessary to save the life of the mother. The woman who contested the law in question did not claim that her life would be in danger if she did not abort. Accordingly, the Court, strictly speaking, should have limited its decision to a determination of whether the Texas abortion law was unconstitutional as applied against a woman in the circumstances of the woman who raised the challenge. Instead, the court divided pregnancy into three trimesters and provided standards for when abortions could or could not be criminalized.

and whether the judges are given significant discretion by applying the precedent which eventually amounts to judicial law making.

Traditionally, the common law aimed to regulate social and commercial relationships and solve disputes by addressing the changes and developments in each field respectively.[17] However, the core of common law theory or concept is "justice in the individual case."[18] That is followed as a rule in later decisions by the court involving similar factual situations through the doctrine of *stare decisis*. Indeed, this concept facilitates stability, uniformity, efficiency, and, to some extent, prevents the imposition of judicial value judgments. It allows people to know the legal consequences of their actions and thereby makes the legal expectations more stable. Douglas Edlin argues that, "for the common law, judgments are individual statements of normative evaluation placed within an existing and evolving system, which are claimed as a contribution to ongoing public debate and to the articulation of public standards of governance."[19]

Another distinctive feature of the common law that has been a topic of ongoing debates among legal and political scholars is whether judges make law through interpretation. Cohen argues that judges do make law and rebuts the illusion that they do not. The judge-made law is reflected not only in the common law but also in statutes where the decision is significantly affected by the interpretation. A number of issues are regulated by judge-made law as a matter of common law, which weakens the real value of the separation of power principle.[20] The arguments of opponents of judge-made law would be convincing if the law were self-sufficient enough to cover the future unpredictable situations that the legislature did not and could not have foreseen. However, the reality suggests a different conclusion when the judge-made law comes into play through "finding, interpreting, and applying the law."[21]

To find a law, as the term itself suggests, restricts the power of judges to finding laws rather than making them. But, as previously mentioned, the distinction between finding and making is artificial, taking into account the fact that judges often supply the content of a law by reference to the principle of justice when the issue is not regulated by "clear precedent."[22] Cohen argues that these principles embody both moral and political considerations. Even though they do not have binding force, they are transformed to legal

[17] *See* PATRICK H. GLENN, LEGAL TRADITIONS OF THE WORLD, 224–48 (3rd ed. 2007).

[18] Bell v. Thompson, 545 U.S. 794, 830 (2005).

[19] Douglas E. Edlin, *Introduction*, *in* COMMON LAW THEORY 1 (2007).

[20] *See* MORRIS COHEN, LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY 114–15 (2001).

[21] *Id.* at 121.

[22] *Id.* at 122.

rule by judges.[23] "A great deal of judicial legislation also takes place under the guise of deciding what is 'reasonable' under particular circumstances."[24] Another example of judicial legislation can be found in the decisions based on analogical argument though "under the guise of following precedent."[25]

Generally, judges do this under the cover of distinguishing and making exceptions to the existing rule. However, this exercise should not imply that judges routinely change the established law but they do so "when compelled by overpowering considerations and then only in gradual and piecemeal fashion."[26]

One could argue that there can hardly be any case that is not covered by clear precedents in view of the increasing volume of case law. This point is defeated on the ground that unsolved issues depend not so much on the bulk of case law but on the "rapidity with which conditions of life are changing."[27] Furthermore, with the increasing number of precedents, "skillful counsels can and do all the more readily find precedents on both sides, so that the process of judicial decision is, as a matter of fact, determined consciously or unconsciously by the judges' views of fair play, public policy, and the general nature and fitness of things."[28]

The most striking characteristics of common law adjudication deserve special consideration: the outstanding place given to reason, the determination of appropriate precedent for the resolution of a case, and the use of analogy if the matter is not covered either by statute or precedent. Furthermore, it presents some important questions for consideration regarding the choice made by judges: Which case is similar or different for precedential application through analogical reasoning? Are there any standards to regulate this judicial discretion, or whether imposition of judicial value choices is unavoidable?

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[23] *See id.* at 122 (contending that many bodies of law such as quasi-contract, the law of boycott, etc. are developed by direct judicial legislation).

[24] *Id*. at 122.

[25] *Id.* at 124.

[26] *Id*. at 125 ("[I]nstances of change in the law by the process of stretching old terms are to be found in the law of conspiracy and the way the old law of common carriers has been applied to modern railways, telegraphs, express companies, etc.").

[27] *Id*. at 123.

[28] *Id.* at 122.

I. Precedent and Common Law Reasoning

1. Ratio Decidendi

The point of departure for the discussion of the common law reasoning starts at the proper understanding of *ratio decidendi*—Latin meaning the reason or the rationale for the decision. The proper understanding of the rationale of a precedent is crucial in the sense that an attorney can successfully convince the court to adopt decision that is in line with the principle established by the precedent case. The determination of the *ratio decidendi* reveals what the court decided on the legal points of the case. This process is called "establishing the principle" or the *ratio decidendi* of the case. All other statements that are not part of the court's rulings on the issues actually decided in that particular case are *obiter dicta*, and are not rules for which that particular case stands.

However, the determination of the *ratio decidendi* presents some difficulties. To determine whether the previous decision stands for precedent, it is necessary to dispose of unnecessary case facts and present the main reasons for the court's decision. Jurists have tried to develop some standards to accurately perform this task but they have not come up with an "entirely satisfactory" result.[29] For example, according to Arthur L. Goodhart, the following rules elaborate how the *ratio decidendi* of the case should not be found: "1) The principle of a case is not found in the reasons given in the opinion, and 2) the principle is not found in the rule of law set forth in the opinion."[30] These two rules imply that what the judge said is not enough unless there is sufficient relationship between the facts of the case and the decision. The other rules suggest which facts are relevant for establishing the principle or *ratio* of the decision:

> 1. The principle is not necessarily found by a consideration of all the ascertainable facts of the case and the judge's decision.
> 2. The principle of the case is found by taking into account (a) the facts treated by the judge as material and (b) his or her decision as based on them.
> 3. In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, because the principle may depend as much on exclusion as it does on inclusion.[31]

[29] *See* WALTER F. MURPHY ET AL., COURTS, JUDGES, & POLITICS: AN INTRODUCTION TO THE JUDICIAL Process 440 (6th ed. 2006).

[30] *Id*. at 441; *see* Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).

[31] MURPHY, *supra* note 29, at 441.

The third rule relates to dicta—generally referring to any expression in the opinion that is immaterial to the decision or that is related to a factual situation other than the one before the court. Declaring some part of the opinion dicta enables the judges and lawyers to bypass earlier rulings. It is also argued that "judges might deliberately plant dicta in their opinions, hoping that they themselves or those who come after them will cite these words as authority for changing the law."[32] When Justice Hugo Black in *Korematsu*[33] said "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," no one could have imagined at that time that this expression that was once dicta would be used as a key libertarian principle in future cases.[34]

2. Precedent

The core of common law method of adjudication is the argument of precedent which is followed by the U.S. Supreme Court in deciding constitutional issues. Sometimes the Court reconsiders the precedent by restating the doctrine in the earlier opinion either in a more limited or extended way. A decade after the Court decided *Brown v. Board of Education*,[35] it cited the decision to strike down laws requiring racial separation in non-educational settings without any further elaboration on the adverse effects of segregation. The Court overruled about 32 previous decisions in the course of its activity from 1937 to 1947. Most of these decisions "turned on issues of constitutional interpretation."[36]

Despite that fact that the Court expressed its willingness to reconsider its interpretations of the Constitution, it is rare that the Court opts for "clean reversal."[37] Hence, where many people stick to "the framework of an earlier decision" in good faith, judges are unwilling to disturb that precedent in spite of their conviction about the "ill-advised" and inconsistent rule. "Judges have the obvious—and realistic—fear that a sudden switch to a different rule will create chaos."[38] However, James Spriggs and Thomas Hansford argue that it is more probable that the court will overrule precedents which have been more frequently distinguished and limited.[39] Knight and Epstein argue that even justices who are

[32] *Id.* at 443.

[33] *See* Korematsu v. United States, 323 U.S. 214 (1944).

[34] *See id.* at 215.

[35] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[36] MURPHY, *supra* note 29, at 446.

[37] *Id*.

[38] *Id*.

[39] *See id*; *see also* James Spriggs & Thomas Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. OF POL. 1091 (2001).

unenthusiastic about being tightly constrained by past decisions "will take precedent into account because they are concerned with protecting the integrity of their institution and with establishing rules that will engender public compliance."[40]

Indeed precedents constrain judges in their search for legal choices "but they never provide complete certainty,"[41] taking into account that a skilled lawyer can always find cases that support both sides of the same conflict. This vision is supported by Jeffrey Segal and Harold Spaeth who argue that the doctrine of *stare decisis* is nothing more than "a trivial concept." In their study, Jeffrey Segal and Harold Spaeth revealed that in the landmark cases 90.8% of the votes of dissenting justices conform to their preferences while only 9.2% of votes followed an established precedent.[42] Furthermore, Carter argues that:

> Our inability to predict with total accuracy how a judge will use his fact freedom is the major source of uncertainty in law. Thus we cannot say that "the law" applies known or given rules to diverse factual situations, because we don't know the applicable rules until after the judge uses his fact freedom to choose the precedent.[43]

Despite these critical remarks about the doctrine of *stare decisis* and the lack of principled standards of its application, it should be noted that the Supreme Court adheres to this doctrine at least to maintain "the fundamental legitimacy" of the Court. The joint opinion in *Casey* written by Justices O'Connor, Kennedy, and Souter reaffirmed the central holding of *Roe* on this ground.[44] Baum rightly observed that:

> The Court adheres to precedents far more often than it overturns them, either explicitly or implicitly . . . . Certainly most justices accept the principle that "any departure from the doctrine of *stare decisis* demands special justification." Like the law in

[40] MURPHY, *supra* note 29, at 449.

[41] Leif H. Carter, *Reason in Law*, *in* COURTS, JUDGES, & POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 454 (6th ed. 2006).

[42] *See* Jaffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, *in* COURTS, JUDGES, & POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 477, 971 (6th ed. 2006).

[43] Carter, *supra* note 41, at 456; *see also* LEIF H. CARTER, REASON IN LAW (4th ed. 1988). The fact freedom of a judge is used to emphasize his discretion to choose those facts that he believes are material for the case.

[44] *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

> general, the rule of adhering to precedent hardly controls the Court's decisions, but it does structure and influence them.[45]

Larry Alexander and Emily Sherwin identified four types of precedents or theories on how to apply a precedent: (1) *The Natural Model* of Precedent; (2) *The Rule Model* of Precedent; (3) *The Result Model* of Precedent; and (4) *The Model of Principles*.[46] The Natural Model approach explains the application of a precedent in a way that includes not only the reasonable expectations of the parties to the dispute but also the expectations of the society as a whole as a matter of predictability to arrange their affairs in line with already decided cases.

The second view, Rule Model of Precedent, presents somewhat strict rules that courts are obliged to follow regardless of the actual outcome of the case. This is different from the Natural Model in the sense that it restricts judges from imposing value judgments through moral reasoning considering various factors. Judges are supposed to identify the rule from the precedent and apply it without any further considerations.[47] According to Larry Alexander and Emily Sherwin, the rationale for this view is that it enhances the ability of individuals to rely on court decisions. The rules extracted from precedent are usually general and can apply to a set of future cases—if judges refrain from moral reasoning and from modifying the precedent and instead "follow the rule universally," fewer errors are likely to occur in the adjudication process. This approach suggests that, even though in some cases a "good precedent" might yield bad outcome, judges should avoid modifying precedent because it is not guaranteed that judges will not make it worse.

The next account of precedent developed as an alternative to the first two theories discussed above. The Result Model approach admits the binding force of precedent with some reservations in differing factual situations. Admired mostly by American legal realists, this theory suggests that judges are free to decide on a case that is not analogous to a previous case.[48] Thus, the court shall follow the prior cases with the power "to modify them by narrowing their scope."[49] For example, a precedent involving factual pattern of a, b, c and d will be followed as long as it strictly corresponds to the factual situation of a

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[45] Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, *in* COURTS, JUDGES, & POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 483 (6th ed., 2006); *see also* Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996).

[46] *See* Larry Alexander & Emily Sherwin, *Judges as Rule Makers*, *in* COMMON LAW THEORY, 27, 30–40 (2007).

[47] *See id*. at 32.

[48] *See id*. at 35.

[49] *Id.*

later case. If the later case, however, faces with facts a, b, c and f, the court will narrow the scope of precedent to facts a, b and c and distinguish the case on fact f.[50]

Larry Alexander and Emily Sherwin criticize this view as significantly underestimating the role of precedent. They argue:

> In fact, however, the reference to rules is misleading because, under the approach we are now discussing, rules laid down in prior cases play in reality no part in the reasoning of later courts. No precedent rule can be at once determinate enough to dictate results and comprehensive enough to encompass all the circumstances of any given dispute. It follows that every new case will present some fact that is not specified by the predicate of the precedent rule and that, accordingly, can serve as a distinguishing fact. If every later court is free to distinguish every precedent rule, then the authority of precedent decisions, if any, must lie in their facts and results, not in any rules announced by the precedent court.[51]

Larry Alexander and Emily Sherwin argue that employing this approach of precedent can hardly constrain judges in deciding later cases except when the reasons of outcome of the precedent case will be as strong for a later case as it was for the precedent.[52] This process inevitably engages judges in weighing the relative weights of facts which, in turn, poses difficult problems in terms of chosen criteria for measurement. Thus, this model of precedent places more weight on the discovered facts and outcomes of prior cases than on the precedential rule itself.[53]

The fourth approach of precedent is called the Model of Principles, which means that the court facing a problem should solve it by reference to a principle or even conflicting principles extracted from previous decisions. The central purpose of this theory, advocated by Dworkin, is to bring coherence and integrity to law by connecting previous and current

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[50] *See* JOSEPH RAZ, AUTHORITY OF LAW 183-89 (1983).

[51] Alexander & Sherwin, *supra* note 46, at 36.

[52] *See id*. at 37; *see also* John F. Horty, *The Result Model of Precedent,* 10 LEGAL THEORY 23, 27. *But see* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 at 29, 30 (1989).

[53] *See id*. at 37; *see also* John F. Horty, *The Result Model of Precedent,* 10 LEGAL THEORY 23, 27. *But see* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 at 29, 30 (1989).

decisions through a set of legal principles.[54] According to this model, the judge would utilize moral reasoning to arrive at the best possible decision while constrained by coherence that precedent affords.[55] Hence, judges employing moral reasoning will choose the most suitable principle among the conflicting principles by assigning relevant weight to them. "Thus, law can evolve with society, but the pace of change is controlled because past and present are linked by common principles."[56]

Larry Alexander and Emily Sherwin argue that this approach makes the law "less determinate than precedent rule" which is prone to judicial value imposition both in terms of general and conflicting principles. Therefore, the best way of application of the precedent is precedent rule method for the reasons mentioned above.

However, Larry Alexander and Emily Sherwin miss the critical point of constitutional adjudication. If judges adopt the precedent rule approach for every single issue of constitutional adjudication, the flawed rule in *Plessy v. Ferguson*[57] would have been followed and racial desegregation under *Brown v. Board of Education*[58] would not have occurred. The task of drawing analogies and distinguishing or overruling is not simple because judges must analyze a bulk of case law and extract a general rule through the process of synthesis. Obviously, the judge will not always be able to extract a single general rule from the group of precedents, and it is quite obvious that there can be many conflicting principles especially in the Constitution, e.g. the privacy and freedom of expression. Moreover, there is always a possibility that the rules may conflict taking into account the abstract nature of many constitutional provisions.

As demonstrated above, it is often hard to identify the *ratio* of the case taking into account the very discursive nature of judgments. Because the later courts enjoy some discretion in determining the *ratio* of the earlier decision, it is hardly possible to constrain later courts. Judges here are to make value judgments because they should justify their choice on the ground that the other ones were not chosen because of their unreasonable or irrelevant nature. The choice becomes even burdensome when all the principles or rules seem to be reasonable. Thus, not only the precedent rule method but also the groups of precedents as a whole cannot always be sufficient source for the judge's decision in constitutional adjudication.[59]

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[54] *See* RONALD DWORKIN, LAW'S EMPIRE 243 (1986).

[55] *See* Alexander & Sherwin, *supra* note 46, at 42.

[56] *Id.* at 43.

[57] *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

[58] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[59] *See* Susan J. Brison & Walter Sinnott-Armstrong, *A Philosophical Introduction to Constitutional Law*, in CONTEMPORARY PERSPECTIVES ON CONSTITUTIONAL INTERPRETATION 1, 14 (1993).

Hence, any rule or principle that comes out from a precedent will be elaborated on in a process of continual review regarding its applicability in future cases in terms of factual situations and conflict with other legal concepts and principles. But most importantly, the Court will be focused upon reaching a decision that will satisfy the demands of policy, ethics, justice, and expediency for what the law is believed to have been created.[60]

It is quite obvious that to decide what is fair or just and expedient will often pass on the value preferences of judges. Moreover, there is no commonly shared or unanimous opinion so far on what justice is. For example, Dworkin argues that "justice is a matter of the correct or best theory of moral and political rights, and anyone's perception of justice is own theory, imposed by own personal convictions, of what these rights actually are."[61]

Therefore, it is possible that the notion of the justice may change not only upon the passage of time or social changes but due to the composition of the Court. Gerald Gunther considers it normal that constitutional values change with the composition of the court. Notably, this has been the case with President Jackson's, Roosevelt's and Nixon's appointees who tried to enforce their liberal or conservative policy choices through the composition of the Supreme Court.[62] However, the Court in transition meets the problems of changing constitutional directions successfully and with high standards of constitutional adjudication without damaging the fabric of its predecessors.[63] The Burger Court, composed mostly of conservative justices, was unwilling to further extend the list of fundamental interests in the equal protection clause espoused by the Warren Court. However, it adhered to a well-established line of equal protection precedent. Constitutional interpretation is not a mechanical process and goes beyond the constitutional text supplying it with value choices of the interpreters. Therefore, the composition of any constitutional court considerably affects the interpretation of very abstract constitutional provisions.

3. Common Law Legal Reasoning

Having discussed the role and different theories of application of precedent this section will focus on the arguments from precedent and analogy as the major forms of reasoning in common law legal systems. The central question is what form of reasoning precedent

[60] *See* JULIUS STONE, LEGAL SYSTEM AND LAWYERS' REASONING, 284 (1964).

[61] RONALD DWORKIN, LAW'S EMPIRE 97 (1986).

[62] *See* Gerald Gunther, *The Supreme Court 1971 Term*, 68 HARV. L. REV. 1, 6 (1972).

[63] *See id.*

involves. As a rule, arguments from precedent involve the following modes of legal reasoning: distinguishing, overruling, analogy, and from principle.[64]

It is critical to determine which precedent controls or should be distinguished in a given case under the bulk of case law that judges are bound to follow based on the doctrine of *stare decisis*. Indeed, there are diverse ways of applying the precedent: By analogy, by extracting principles, and through tests and formulas. For example, the statute at hand will be declared unconstitutional if a similar provision was declared unconstitutional in another case with the same factual situation. There can always be some differences between the cases but the only grounds for not following precedent should be an important difference between the two cases.

Another way of applying arguments of precedent is through tests or formulas.[65] "Such tests or interpretations are supposed to elaborate the meaning or purpose of the constitutional provision and to provide guidance in deciding subsequent cases."[66] These formulas come not only from the holding of a previous case, but also from a dissent, dicta, and footnotes. However, there are some important differences between following an analogical argument and formula. Hence, applying the formula from a previous case does not necessarily mean that the cases are analogous.[67]

However, the formulas are also subject to interpretation if they are stated in a general language. This means that the formulas can be further elaborated in future cases. This process aims at adjusting the constitution to the changing circumstances and on many occasions amounts to making a new legislation.[68] This issue leads to the distribution of political power, and begs the question how much power should be given to judges in precedent applying cases. Furthermore, in using arguments of precedents, judges rely in many respects on their own value judgments. This is unavoidable when judges decide which similarities or differences are significant to apply the precedent or to overrule it, which general rule best fits the present case, and which formulas apply in a given case.

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[64] *See* Melvin A. Eisenberg, *The Principles of Legal Reasoning in Common Law*, *in* COMMON LAW THEORY 81, 87 (2007).

[65] Likewise, these arguments are used in German constitutional practice.

[66] Susan J. Brinson & Walter Sinnott-Armstrong, *supra* note 59, at 14.

[67] For example, in the *Bakke* decision on affirmative action, Justice Powell quoted the majority opinion in *Korematsu*: "All legal restrictions which curtail the rights of a single racial group are immediately suspect. That is not to say that courts must subject them to the most rigid scrutiny." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (quoting Korematsu v. U.S., 323 U.S. 214, 216 (1944)).

[68] *See* Susan J. Brinson & Walter Sinnott-Armstrong, *supra* note 59, at 15.

Melvin Eisenberg argues that the judge-made law in common law legal tradition mirrors the moral standards "'rooted in aspirations for the community' and legal rules can be justified as long as they comply with 'social propositions.'"[69] Eisenberg distinguishes between two types of justifications in legal reasoning, one that justifies the legal rule itself by invoking social propositions, and one that is invoked by judges regarding the choice of the legal rule for a specific case. Finally, the consistency in legal reasoning rests more heavily on "'social propositions' rather than on 'formal logic.'"[70] Formal logic will fail to provide consistency between precedents for the simple reason that it cannot determine the relevant facts and spot the differences that count for different results.

> For the purposes of legal reasoning, two precedents are consistent if they reach the same result on the same relevant facts, and inconsistent if they reach different results on the same relevant facts. What facts are relevant turns on social propositions?[71]

The argument of social proposition is also true for consistency between the rule and its exception(s). The exception will be consistent with the rule as long as "there is a good social reason" to justify it.[72] Thus, Eisenberg argues that, as a matter of principle, not only rules that are fully congruent, but also those that are substantially congruent with social propositions will be considered good rules for the sake of consistency. In other words, the rule should be consistently applied if it is good enough to reflect social propositions. "This principle is descriptive of legal reasoning in the common law, although it is typically implicit rather than explicit."[73]

As it was illustrated above, the court using the reasoning from precedent basically would choose to follow either the adopted-rule or the result-based approach.[74] According to Eisenberg, the difference between these two approaches is the following: The adopted-rule or precedent rule approach is concerned what the precedent court said whereas under the result-based approach the court counts what the precedent court did.[75]

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[69] Eisenberg, *supra* note 64, at 83.

[70] *Id*. at 84.

[71] *Id*. (arguing that what counts, for example, in determining liability in a car accident is whether the driver was intoxicated, not the fact that in two cases the drivers wear red hats).

[72] *Id*. at 85–87.

[73] *Id*. at 86–87.

[74] *See id*. at 88.

[75] *See id.*

Eisenberg prefers the first approach because it provides more consistency and relatively easy to follow than the result-based approach because it allows the facts to be "characterized at vastly different levels of generality" and invoke a number of rules from different precedents that will eventually transform the precedent.[76]

A good example of result-based approach was Justice Cardozo's opinion in *MacPherson v. Buick Motor Co.*.[77] In that case, the plaintiff bought a car from a retail dealer and was injured when a defective wheel collapsed. The plaintiff sued the defendant, the original manufacturer of the car, on an action for negligence. The precedent rule to be followed by the court was that the manufacturer of the negligently made product was liable only to its immediate buyer unless the product was some type of dangerous substance, like poison. The court in *MacPherson* reformulated the issue. Instead of looking to "whether a product is of type that is inherently or imminently dangerous," the court looked to "whether a product is dangerous if negligently made."[78] Thus, Eisenberg argues that instead of overruling the precedent, Cardozo reformulated the rule, which "transformed the previous rule by a radical construction of the precedents."[79] As Sinnot argues, "one common problem is being unable to find and agree on an appropriate description of the issue in a present case."[80]

In general, the outcome of the decision will depend on the choice of application of a certain mode of precedent. Eisenberg concludes that "the availability of a choice between these two approaches might appear to allow courts almost unlimited discretion to establish the rule for which a precedent stands" subject to some institutional and other constraint of "basic principle of legal reasoning."[81] That principle suggests that the court should follow the rule "explicitly adopted in a precedent" if the rule is a good rule, in order to fit the demands of social propositions as discussed above. Thus, a precedent rule cannot be followed in a case like *Brown* if it does not conform with social propositions which means that the Court should either distinguish or overrule the case.

The distinguishing mode of legal reasoning is usually employed by the court when the court makes exceptions to the otherwise applicable precedent. Eisenberg argues that the distinguishing mode of reasoning will be consistent if it satisfies the following conditions: "1) the social propositions that support the adopted rule do not apply to the case at hand,

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[76] *See id*. at 89.

[77] *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[78] Eisenberg, *supra* note 64, at 91.

[79] *Id.*

[80] Susan J. Brinson & Walter Sinnott-Armstrong, *supra* note 59, at 16.

[81] Eisenberg, *supra* note 64, at 92.

2) The case at hand implicates a social proposition that does not apply to the typical case covered by the adopted rule."[82]

This mode of legal reasoning incorporates features from the adopted rule and result-based approaches in the sense that the court does not overrule the precedent, but creates an exception that was overlooked by the previous decision, and it does not contradict but goes in line with the precedent rule.[83] Thus, if distinguishing mode of reasoning as specified by Eisenberg applied in *Brown*, the precedent vindicating the racial segregation would still be valid unless it was overruled. Deciding whether or not social propositions justify distinguishing or overruling the precedent leaves substantial discretion to judges.

Regarding reasoning by analogy, Eisenberg contends that it is the mirror image of the distinguishing mode of legal reasoning in the sense that an exception is made by the court to cover unregulated matter demanded by social propositions. In a case distinguishing mode of reasoning, the rule literally applies to the case at hand but the social propositions require modification or reformulation to comply with unregulated social phenomenon, whereas analogical reasoning implies that the precedent rule is not literally applicable. By analogy, the court broadens or narrows the rule from precedent to cover the issue at stake because "there is not a good social reason to treat the case at hand differently."[84]

Another explanation of analogical reasoning is offered by Gerald Postema. Postema distinguishes the classical common law conception of analogical reasoning from two other modes of analogical reasoning called *particularism* and *rule-rationalist*. Postema advocates the classical mode of analogical reasoning because he argues that particularism and rule-oriented approaches suffer from inherent defects in their methodology. Particularism suggests that the core of analogical reasoning is "the identification of shared particular qualities between two cases," which is done either through intuition or disposition.[85] He criticizes this account of analogical reasoning because it fails to offer both valid substantive and methodological arguments in support of this theory. It fails substantively because shared particulars cannot yield valid decision unless supported or guided by some general rule that determines the relevant criteria for appropriate action.[86]

Regarding the methodological deficiency, Postema argues that the similarities should not be determined through intuition or disposition, but rather through discursive method,

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[82] *Id*. at 93.

[83] *See id*. at 94.

[84] *Id*. at 97.

[85] *See* Gerald J. Postema, *A Similibus and Similia: Analogical Thinking in Law*, *in* COMMON LAW THEORY 102, 103–33 (2007).

[86] According to Postema, a prior rule is needed to determine relevant similarities.

which is the characteristic feature of classical method of reasoning. According to Postema, discursive method means "[d]etermining relevant similarities between cases [which] depends, in classical common law conception, upon reasoned argument rather than on a feeling or a perception."[87]

As opposed to particularism, the rule-rationalism theory of analogical reasoning requires a prior rule to determine relevant similarities. However, Postema argues that this theory poses another problem. "If the judgment that two cases are relatively similar necessitates a preexisting rule to guide that judgment, then there must also be another rule that tells us which rule to apply when determining the relevant similarity between cases. And this goes on forever."[88] Additionally, the foundation of this theory is based on deductive method—top-down reasoning—which is far beyond the common law analogical reasoning. "The fact that the conclusion follows from premises does not necessarily mean that the conclusion is correct . . . . As a result, common law analogical reasoning demands constant evaluation of an argument's premises and conclusions."[89]

Postema offers two levels of classical mode of common law reasoning—analogical reasoning and analogy assessment. The first level requires the identification of analogues whereas analogy assessment refers to the evaluation of the relevant analogues. These two levels can work together either simultaneously or sequentially. Thus judgments that are supported by "articulated reasons" and arrived at through identification and evaluation are "the defining features of the common law method of analogical reasoning."[90] Hence, in order to treat like cases alike, one should determine "the existing category of like cases, the relevant criteria of likeness in a given case, and a proper method of articulating likenesses."[91]

Thus, analogical reasoning is invoked by judges when the matter is not covered by the applicable law. In this case, the reasoning that is employed to yield a decision can hardly be described as deductive or syllogistic, but rather it is about identification of relevant similarity which "necessarily involves advertence to factors of justice and social policy."[92] The judges in many cases are guided not simply by the logic or syllogistic form of reasoning

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] STONE, *supra* note 60, at 316.

but clues to the decisions are provided by the judges' experience and "necessities of the time, the prevalent moral and political theories."[93]

Julius Stone argues:

> For the working out of legal rules, as we see it in the history of the common law, is not merely a result of deductive techniques as applied to existing principles of law. It is rather a continuous creative adaptation of the law to changing social conditions. In this adaptation, of course, deduction from existing principles of law plays some part, but deduction from non-legal premises found by judicial experience, and choice among competing legal principles and non-legal premises, or choices within a range of indeterminacy, play far more decisive ones.[94]

Thus, the core of common law legal tradition is the doctrine of *stare decisis* that requires the courts to follow a precedent or judge-made rule in later decisions involving similar factual situations through common law reasoning. The American constitutional provisions are written at such a high level of abstraction that most of constitutional law in the United States is judge-made law which finds its theoretical justification in common law tradition.[95]

II. Theoretical Aspects of American Constitutional Interpretation

The most important question about judicial review is not the question about its legitimacy, but rather about what the proper methods of constitutional interpretation are. In this context, one should decide whether a constitution is static or if it evolves. Then, if the constitution evolves to address social changes, the next logical question should be how the evolution should be reflected in the document—through interpretation or amendment process? Chemerinsky argues that the answer to this question depends on the awareness of significance of the constitution for serving its two basic purposes: Safeguarding fundamental values and unifying the nation.[96] These objectives of the constitution can be achieved only if the Constitution evolves through interpretation.[97] If the constitution

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[93] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1, 35 (1881).

[94] STONE, *supra* note 60, at 323.

[95] *See* Robert A. Kagan, *Constitutional Litigation in the United States*, *in* CONSTITUTIONAL COURTS IN COMPARISON 25, 39 (2002).

[96] *See* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987).

[97] *See id.*

evolves through judicial interpretation it means that judges will supply a meaning to the constitutional text.

Then, if the constitution evolves through interpretation, should there be any limits or restraints on interpretation process that tend to supply the meaning in addition to what the framers have intended? Chemerinsky argues that any attempt to define limits on interpretation process or "find an interpretation model" for this reason will eventually fail because, by its very nature, constitutional interpretation is indeterminate which means that "there is no single correct answer to the vast majority of constitutional questions presented to the court."[98] Moreover, Chemerinsky argues that "if the Constitution is to serve its functions of protecting fundamental values and unifying society, the judiciary should have substantial discretion in determining the meaning of specific constitutional provisions."[99] The general provisions of the Constitution will be supplied by judges based on contemporary values, which raises another important question as to which values should be protected.

Shaman argues that constitutional interpretation is only about creativity and judges' value choices.[100] The mechanical jurisprudence has no longer the dominant role in the legal thought. This approach is advocated now by many scholars who think that it is a traditional myth and has nothing to do with reality.[101] "Although the Court has always been reluctant to admit it, constitutional interpretation is a process that requires the exercise of imagination and discretion."[102] The new doctrine of legal realism that came about a century ago discredited the value of pure logic and the formalistic method of adjudication in legal reasoning and paved a way for judicial value choices.[103] Indeed, this is not to suggest that this method of adjudication is entirely neglected. However, over the second half of the twentieth century, the Court was mostly engaged in creative activity by developing a doctrine of different tiers of judicial review—strict, intermediate, and minimal scrutiny.[104]

Posner argues that legal formalism and realism go hand in hand with common law. Realism is used to furnish the major premises of syllogistic analysis whereas the formalism is used

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[98] *Id.*

[99] *Id.*

[100] *See* JEFFERY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY, 7 (2003).

[101] *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

[102] SHAMAN, *supra* note 100, at XV.

[103] *See id.*

[104] *See id.*

to deduct a conclusion through logic. However, Posner contends that this method cannot be used for statutory or constitutional text because, no matter how precise the text is, it is interpretation, which is neither policy analysis nor logical deduction. Posner associates the realist with policy analysis and the formalist with logical deduction. He argues that although these two components are used by judges in common law adjudication they differ from statutory or constitutional interpretation.[105] Additionally, in statutory or constitutional interpretation, the judges cannot revise the language of the text or rewrite the concepts as they do for common law.[106]

According to Posner interpretation is a method that acquires knowledge because it goes beyond the text while the conclusion in syllogistic deduction can be found in premises. Posner argues that despite the fact that logical deduction and policy arguments are not relevant for statutory and constitutional interpretation, and policy considerations, however, can be used in case of unclear provisions in the statutes and the Constitution. Unclear means that the "linguistic and cultural" environment fails to provide an uncontested meaning which often comes from the disputes over policy.[107] Because of this controversy over the meaning of unclear provision the interpretation falls short of achieving sufficient certainty like that which is usually attained by logical reasoning.[108]

Thus, for some scholars the Constitution evolves through interpretation, which, is far from being a mechanical process, goes beyond the constitutional text supplying it with the value choices of the interpreters. This vision is opposed by more conservative theories that view the sole purpose of constitutional interpretation is determining the meaning of the constitutional provisions through finding the framers' intent. Consequently, according to this originalist approach, the judicial creativity and policy making should be excluded in the adjudication process. The champion and advocate of this approach currently on bench is Justice Antonin Scalia, whose views are reflected in his essay "A Matter of Interpretation."[109]

David Strauss appealed to the common law method to find theoretical justifications for American constitutional practices. Strauss contends that originalism and textualism alone cannot be a reliable source of interpretation. As current constitutional practice shows, in many occasions the text and original intent were abandoned to reach sound constitutional

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[105] *See* Richard Posner, *Legal Formalism, Legal Realism, and Interpretation of the Constitution and Statue*, 37 CASE W. Res. L. Rev. 179, 187 (1987).

[106] *See id*. at 187.

[107] *See id*. at 213.

[108] *See id*.

[109] *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).

interpretation. Moreover, the underlying theory of originalism connects the law to some authoritative source or command theory—either framers or the people.[110] As opposed to this, the authoritative source approach seeks justifications for the decisions in the text or original intent, and the common law approach attempts to justify a decision by the evolution of practices over time. Strauss grounds his common law approach of constitutional interpretation on two basic components—rational traditionalism and conventionalism. "But our written constitution has, by now, become part of an evolutionary common law system, and the common law—rather than any model based on the interpretation of codified law—provides the best way to understand the practices of American constitutional law."[111]

The core of common law tradition is the precedent which offers a clue for understanding the central questions of American constitutional interpretation—how to restrain judges and at the same time allow some innovation.[112] However, Strauss contends that, as a matter of common law, constitutional interpretation should be distinguished from statutory interpretation in some important respects. First, statutes, as compared with constitutions, are relatively new and reflect the command theory by reference to the "authoritative command of the sovereign" or the peoples' representatives.[113] Additionally, Strauss supports the common law method of constitutional adjudication for the American Constitution in the sense that it resembles more English unwritten constitutional tradition than those that lack "established constitutional traditions."[114]

According to Strauss, the first component of common law constitutional interpretation is rational traditionalism. Traditionalism is the point of departure for constitutional adjudication which suggests taking seriously the collective wisdom and experience of the framers but at the same time departing from the text if there is a good reason to do so. Rational traditionalism in this sense attempts to dispose of morally unacceptable tradition as was done in *Brown*, and provide adequate flexibility for innovation, e.g. gender equality.[115] Indeed, the evolutionary and gradual mode of change is the preferred form in

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[110] *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U CHI L. REV. 879 (1996) ("The currently prevailing theories of constitutional interpretation are rooted in a different tradition: implicitly or explicitly, they rest on the view that the Constitution is binding because someone with authority adopted it. This view derives from a tradition-that of Austin and Bentham, and ultimately Hobbes-that historically has been the great opponent of the common law tradition. This authoritative tradition sees the law as the command of a sovereign.").

[111] *Id*. at 885.

[112] *See id*. at 887.

[113] *See id*. at 889.

[114] *See id*. at 890.

[115] *See id*. at 894-95.

common law tradition, "but revolutionary change remains possible, and tradition is not to be venerated beyond the point where the reasons for venerating it apply."[116]

The common law judge ought to balance and weigh the claims of tradition in terms of certainty and unity by following the precedent on the one hand and a "current assessment of the justice" on the other hand.[117] Strauss argues

> Moral judgments—judgments about fairness, good policy, or social utility—have always played a role in the common law, and have generally been recognized as a legitimate part of common law judging. At the same time, it has always been part of the common law that judges are not free to do whatever they think is right. Precedent limits them in significant ways.[118]

The second component of common law constitutional interpretation is conventionalism, which requires adherence to constitutional text despite the fact that it could be imperfect and some disagreement may exist among people on its scope and meaning.[119] Strauss argues that this component supplies the deficiency of traditionalist component which allowed some divergence from the text. "Conventionalism, understood in this way—as an allegiance to the text of the Constitution, justified as a way of avoiding costly and risky disputes and of expressing respect for fellow citizens—helps explain the deference given to the text more fully than traditionalism standing alone."[120] Thus, the two components of common law constitutional interpretation provide a sound theoretical explanation of current interpretive practices.

Thus, Shaman and Strauss agree that for the most part textual and intentional interpretation alone will not be sufficient for sound interpretation. They argue that the balancing mode is the most viable means of constitutional adjudication, which is the main feature of common law theory. Judges are not only to balance between the certainty in terms of obsolete traditions and justice or fairness but in many occasions also between competing principles, which inevitably involve the judges' value choices of social utility and justice.

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[116] *Id.*

[117] *See id*.

[118] *Id.* at 900; *see also* BENJAMIN N. CARDOZO, NATURE OF THE JUDICIAL PROCESS 94–97 (1960).

[119] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 900 (Amy Gutmann ed., 1997).

[120] *Id.* at 911.

C. The Influence of Positivistic Legal Thought on German Legal Culture

It was demonstrated above that the common law legal tradition could serve as a theoretical justification for adjudication of broad constitutional provisions. Even though the difference between civil law and common law countries has been established on the basis of private law as these legal systems historically originate in their respective private law, I argue that comparing civil law and common law can also be useful for constitutional laws. However, in order to understand whether there are significant differences between common law and civil law constitutional adjudication, one needs to assess the impact of civil law tradition on German constitutional interpretation. The origins of contemporary German legal culture can be traced back to 1871 when Germany became a modern state after uniting North German Federation with South German States under Bismarck rule.[121] However, "the tradition of German constitutions laid down in constitutional charter goes back to the National Assembly of 1848 (*Paulskirche*)."[122] Both the German Empire and the Weimar Republic adopted written constitutions. In 1919, after World War I, the Weimer Constitution replaced the 1871 Constitution by establishing a semi-parliamentary federal republic.[123] Despite being rooted in the civil law tradition with predominated inclination towards the positive law approach, the legitimacy of judge-made law is widely accepted by legal academia.[124] The current Basic Law incorporating many features from its earlier predecessors has many code-like provisions regulating both the structural issues and some fundamental rights.[125]

Despite the domination of the positivist approach among German lawyers, the natural law revived in 1950 after the appalling experience of the Third Reich.[126] The positive theory of law was perceived in this darkest period mostly based on its formal aspects leading to doctrinal exegeses where unjust law should have been obeyed.[127] Legal positivism, advocated by prominent scholars such as John Austin, Hans Kelsen, Alf Ross, H. L. A. Hart, Joseph Raz, Neil MacCormick, and Ota Weinberger, is generally perceived as a descriptive

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[121] *See* Reinhard Zimmermann, *Characteristic Aspects of German Legal Culture*, *in* INTRODUCTION TO GERMAN LAW, 1 (Tuğrul Ansay & Don Wallace Jr. eds., 2005).

[122] *Id.* at 9.

[123] *See* SABINE MICHALOWSKI AND LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 3 (1999).

[124] *See* Zimmermann, *supra* note 121, at 25.

[125] *See* Donald P. Kommers, *Germany: Balancing Rights and Duties*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 161, 167 (Jeffrey Goldsworthy ed., 2006) [hereinafter Kommers, INTERPRETING CONSTITUTIONS].

[126] *See* Zimmermann, *supra* note 121, at 27.

[127] *See id*.

theory of law rather than as "a theory telling the judge how he should decide hard cases or when civil disobedience is justified."[128] As a rule, legal positivists exclude moral aspects from the study of law by describing it "in terms of formal features, saying for example that it is a specific social technique of a coercive order."[129] H. L. A. Hart offered an influential theory of legal positivism that conceived of law as a "primary duty-imposing rules and secondary rules of change, adjudication and recognition."[130] The rule of recognition in turn "identifies and ranks the sources of law: legislation, precedent, custom, etc."[131]

The reappearance of natural law significantly influenced the decisions of the German Federal Supreme Court in terms of drawing "fundamental distinctions between good and evil and between law and justice."[132] A prominent legal scholar and advocate of positivist approach of law, Gustav Radbruch, having witnessed the atrocities committed by the nationalist regime, offered the formula which was later associated to his name. "Where the injustice wrought by the positive law reaches so far that legal certainty, as a value safeguarded by the positive law, can no longer be regarded as a significant consideration, the unjust positive law will have to yield to the precepts of justice."[133]

As an influential representative of the civil law tradition, the principles of legal positivism are rooted in the German legal system. According to Kommers, the following propositions generally describe the idea of positive law that are typical to continental civil law systems: (1) the only legitimate authority for law making is the sovereign legislature; (2) law is a closed system of logically arranged and internally coherent rules; (3) the judiciary, as an independent authority is to interpret and apply the written law only by reference to the existing body of such rules while solving disputes "and in strict accordance with legislature's will."[134] While the second statement is applicable to the German legal system, the first statement fails to reflect the legal tradition because judge-made law became an accepted practice.

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[128] Torben Spaak, *Kelsen and Hart on the Normativity of Law*, Stockholm Institute for Scandianvian Law 398, 399 (March 20, 2012) http://www.scandinavianlaw.se/pdf/48-24.pdf.

[129] *Id.*

[130] *Id.* at 407; *see* H. L. A. HART, THE CONCEPT OF LAW 91 (1961).

[131] Torben Spaak, *Kelsen and Hart on the Normativity of Law*, in 48 STOCKHOLM INSTITUTE FOR SCANDIANVIAN LAW 398, 408 n. 86 (2012), *available at* http://www.scandinavianlaw.se/pdf/48-24.pdf; *see* H. L. A. HART, THE CONCEPT OF LAW 97-107 (1961).

[132] Zimmermann, *supra* note 121, at 28.

[133] *Id.* at 28 n.132 (quoting Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, SÜDDEUTSCHE JURISTENZEITUNG 105 (1946)).

[134] DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 124 (2d ed. 1997) [hereinafter KOMMERS, CONSTITUTIONAL JURISPRUDENCE].

Nevertheless, German legal thought finds its roots in the tradition of legal positivism which claims the law to be a "self-contained, rational, deductive system of rules and norms."[135] The underlying principles of positivism are that law should be separated from morals and other field of politics, psychology, and sociology. Instead, the law should be grounded in reason and logic.[136] The function of a court in this type of legal system is nothing more than mechanical application of legal rules. In contrast, the American vision of law is embedded in the common law legal tradition that is well illustrated in Oliver Wendell Holmes's aphorism "the life of the law has not been the logic, it has been experience."[137] The judicial decision making for Americans is more creative than simple mechanical process which ought to reflect the social reality.

Although the *stare decisis* doctrine does not formally exist in Germany, the higher courts' judgments have more worth than simply being persuasive authority for the lower courts. Even the higher courts, which are not formally bound by their previous decisions, tend to follow them for quite obvious reasons.[138] An important characteristic of German legal culture is the role of the scholarly writings in the court decisions.[139] Additionally, the style of a German judicial decision should look like an objective interpretation "without personal flavor" of individual judges.[140]

The typical German judgment, like its French counterpart, strives for the ideal of deductive reasoning. But like its English counterpart, it is discursive in character, which means that all legal problems raised by the facts of the case are comprehensively discussed. The pertinent case law and academic literature are thoroughly considered. A German decision at the regional, appellate, or Federal Supreme Court level addresses itself as much to the scholarly legal community as to the parties of the individual case.[141]

The methods of constitutional interpretation in Germany should be viewed in context of its legal culture. However, one can argue that the basic law departs from the positivist legal methodology in the sense that the validity of the positive law should be evaluated in light of fundamental human rights and values. Furthermore, the Basic Law distinguishes

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[135] *Id.* at 40.

[136] *See id*.

[137] *Id.*

[138] *See* Zimmermann, *supra* note 121, at 26.

[139] *See id.* at 27.

[140] *See id*. at 26.

[141] *Id.* at 27

between law and statute where the natural law is included within the ambit of law. In this way it recognizes the legitimacy of natural law that is inferred from a number of constitutional provisions.[142] In any case, one should not forget that the legal reasoning in Germany is still influenced by the positivist mode. Hence, both the German legal scholars and the Federal Constitutional Court often tended to "build a theory of judicial decision based on reason and logic."[143]

The theoretical debates about the proper role of a judge as a lawmaker through constitutional interpretation have also attracted the attention of German constitutional scholarship. For example, a former Constitutional Court Justice Ernst Friesenhahn said, "the Court can only unfold what already is contained . . . in the Constitution."[144] However, the justices have long understood the limit of this theory. A prominent justice of the Second Senate, Leibholz once observed that it would be "an illusion and . . . inadmissible formalistic positivism, to suppose that it would be possible or permissible to apply . . . general constitutional principles . . . without at the same time attempting to put them into a reasonable relationship with a given political order."[145] Also, Leibholz acknowledged that "the existing conflict between constitution and constitutional reality does not admit either a purely legalistic solution in favor of the constitution or of an exclusively sociological solution in favor of constitutional reality. Rather this conflict must be viewed as [a dialectical one] between normativity and existentiality."[146]

Despite the conceptual differences in the common law and the civil Law traditions regarding the methods and style of judicial decision making and sources of the law, the *Princess Soraya*[147] case, for example, shows that the continental positivist legal tradition is not the only legitimate basis of German constitutional adjudication. The Court reasoned that the law reflects social and sociopolitical views at the time of its adoption, and when those conditions change the judges have to address "a changed society's substantive notions of justice" by adjusting the old law to the current situation.[148] Whenever the written law fails to yield just solution, the judges fill the gap by their common sense and

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[142] *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949,BGBL. I at art. (3),1 (2) (Ger.).

[143] KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 134, at 41.

[144] *Id.*

[145] *Id.* at 44.

[146] *Id.*

[147] *See id*; *see* Bundesverfassungsgericht [BVerwG - Federal Constitutional Court] Case No. 1 BvR 112/65, 34 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 269 (Feb. 14, 1973), http://www.servat.unibe.ch/dfr/bv034269.html.

[148] *See* KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 134, at 125.

"general concepts of justice established by the community."[149] However, the judges must be aware of the dangers of arbitrariness while performing this function and provide rational arguments for their decisions.[150] Because the legislature cannot keep up with the "rapid pace of social development"' in specific fields of law the courts are responsible "for further development of law."[151]

What then are the limits of creative judicial making? The Court answered that those limits cannot be distilled into formulas that can be equally applicable to each area of law. For example, in cases dealing with private law, judicial creativity increases with the "aging of the codification."[152] The older the legal rule, the greater the need for judicial creativity because "the norm cannot always or for unlimited period remain tied to the meaning the norm had at the time of its enactment."[153]

D. Constitutional Interpretation v. Statutory Interpretation

As it was demonstrated above, the difference between the common law and civil law traditions regarding legal reasoning is not crucial to constitutional interpretation because both German and U.S. constitutional adjudicators supply a meaning to abstract constitutional provisions based on their value choices. In this context, German constitutional interpretation has more similarities than differences with its U.S. counterpart. Furthermore, while the formalistic and deductive mode of reasoning is more relevant to statutory interpretation, it cannot be a viable method of constitutional interpretation. For this reason, one needs to know whether there are theoretical or practical differences between constitutional and statutory interpretation in light of interpretive techniques and methods of argumentation.

It is generally accepted among legal scholars that constitutional interpretation has some unique characteristics, unlike statutory interpretation because statutes are written in a relatively clear and specific language.[154] It is assumed that the conceptual construction of statutes consists of "[if-then] structure which connects factual situation to legal consequence, and not of mere statements of goals."[155] Conversely, "the constitution, in its

[149] *Id.*

[150] *See id*.

[151] *Id.*

[152] *Id.* at 126.

[153] *Id.*

[154] *See* Christian Starck, *Constitutional Interpretation*, *in* STUDIES IN GERMAN CONSTITUTIONALISM 47, 49 (1995).

[155] *Id.*

normative content, is fragmentary and piecemeal."[156] Therefore, Starck argues that as far as methodology of interpretation is concerned, "there can be no structural equality of the constitution with statute."[157]

However, it should be noted that a constitution may contain very specific and clear norms while statutes may have norms which are written with high level of generality by setting general goals. Despite the fact that generally the statutes are written in a more detailed way than constitutions, Starck contends that the words such as "fragmentary" and "piecemeal" are not the appropriate way to describe the distinctive features of constitutions.[158] Rather the constitution should be described as a framework because it "forms a well-structured unity" which leaves considerable room for action of political bodies and "ensures a distinct freedom of action for the democratically elected Parliament."[159] This description of constitution as a framework giving freedom for political action inevitably leads to the notion of judicial self-restraint as an essential element of constitutional adjudication.

Furthermore, some constitutional scholars argue that the constitutional interpretation differs from the statutory interpretation not only because of the constitution's hierarchical position in a legal order, but also because of the very abstract nature of most of the constitutional provisions. Hence, the main difference between statues and constitution, correctly invoked by scholars, is the political nature of constitutional provisions. Because constitutional provisions are not specific enough and more political in nature they cannot be construed. They should instead be concretized, which would offer creative activity. In a case of construction the solution can be found in the text, while concretization needs a result that merely complies with the constitution.[160] However, this argument is refuted on the ground that an ordinary law may equally contain general provisions of an abstract and political nature.[161] Furthermore, Andras Jakab argues that "a sharp difference in terms of nature is thus rather a myth and, moreover, a harmful one, as it would place constitutional

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[156] *Id.* at 50.

[157] *Id.*

[158] *See id.*

[159] *Id.*

[160] *See* Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks From a German Point of View*, *in* COMPARATIVE CONSTITUTIONALISM 143, 144 (2003).

[161] *See* Andras Jakab, *Judicial Reasoning in the Constitutional Courts: A European Perspective*, Max Planck Institute for Comparative Public Law and International Law 5 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1956657.

review beyond the traditional limits of *Verfassungsdogmatik*, thus making it more difficult to control."[162]

In view of those theoretical differences, scholars argue about to what extent the traditional methods of statutory interpretation can be used for constitutional interpretation. In particular, whether grammatical, systematic, historical, and teleological interpretive canons enable the courts objectively reach the only right outcome instead of subjective arbitrariness has been the central issue for debate.[163] The constitutional practice has shown that any notion of mathematical-logical or quantitatively calculable procedure of interpretation is mere illusion.[164] Magiera argues that "instead of perspicuity and consistency which could be expected according to traditional doctrine, observers find a far-reaching lack of orientation and arbitrariness in the interpretive efforts of the court, whose procedure on the whole is labeled as 'pragmatic, flexible and undogmatic.'"[165]

However, in practice the traditional canons of statutory interpretation such as verbal meaning, grammatical construction, statutory context, and teleological aspects are the main techniques used to determine the meaning of constitutional provisions apart from the intention of the original legislator that is used relatively scarcely by the Court.

Constitutional interpretation has been regarded as a special case of statutory interpretation from the beginning of the twentieth century.[166] As opposed to Magiera's approach, Starck argues that there is no need for another method of constitutional interpretation that is radically different from statutory interpretation because constitutional law is not formulated in a very vague way, and public law is not less important than private law, and as such it needs to be as clear and workable as private law.[167]

There is not also any specified order regarding the application of any canon of interpretation. Rather canons of interpretation can support each other or at times contradict each other when used in determining the meaning of a constitutional provision. Starck argues that "the rationality and perspicuity of particular decisions rests on the use

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[162] *Id.*

[163] *See* Siegfried Magiera, *The Interpretation of the Basic Law*, *in* MAIN PRINCIPLES OF THE GERMAN BASIC LAW 89, 93 (1983).

[164] *See id*.

[165] *Id.*

[166] *See* Starck, *supra* note 154, at 55.

[167] *See id*.

of these canons in the argument published in the judgments."[168] In case the use of different interpretive canons leads to different results, cannons should be chosen whose application will arrive at a decision that is coherent with precedent in view of its underlying value of legal certainty and predictability.[169] Canons of interpretation are tools to provide better justification for decisions and thereby reinforce their persuasive power.[170] Furthermore, the legitimacy of constitutional review is conditioned on the existence of predictable criteria for its exercise.[171]

E. Constitutional Argumentation

Despite the differences in theoretical debates about constitutional interpretation, there are both considerable similarities and differences also in constitutional argumentation. As far as the techniques and methods of constitutional interpretation are concerned, one can mark some difference in the reasoning and style between the two countries. The German Constitutional Court focuses more on the text of the document than the U.S. Supreme Court does. Perhaps this phenomenon could be explained by three factors: (1) the positivistic civil law legal culture; (2) the more detailed provisions of the Constitutional text; and (3) the relatively easy amendment process.

Whether the constitution should be amended or developed through interpretation to adjust to social changes has always been a hot topic for discussion among American constitutional scholars. In order to understand the difference between the two countries regarding constitutional interpretation, one needs to spot the characteristic features of their constitutions. The U.S. Constitution is characterized by the following attributes: It is relatively old, it requires difficult amendment procedure, and many of its provisions are written in very general terms. Because it is old, the social and economic changes and technological developments necessitate the constitution's adjustment to current needs.

In this context, the proponents of broad interpretation argue that because of the cumbersome amendment procedure required by the U.S. constitution, the Supreme Court should have some leeway to adjust broad constitutional provisions to current situations. Therefore, it is the judges who are to supply meaning to abstract constitutional provisions. Tushnet confirms that "[t]he traditions of constitutional interpretation in the United States make it possible, and indeed relatively easy, to use interpretation as a vehicle for constitutional adaptation."[172] The U.S. Constitution has only been amended 27 times, 10 of

[168] *Id.* at 56.

[169] *See id*.

[170] *See id*.

[171] *See id*. at 59.

[172] Tushnet, *supra* note 9, at 7.

which (the Bill of Rights) occurred in 1791. Since then only 17 amendments have been adopted.

Conversely, the amendment procedure of the Basic Law of Germany is not as strict as that of its U.S. counterpart. As opposed to the American procedure[173] of two-third majority vote in both the House of Representatives and Senate to propose an amendment which should be further ratified by three-fourths of the states, Article 79(2)[174] of the Basic Law requires only a two-third vote of both Bundestag and Bundesrat. In about sixty years, the Basic Law has been amended more than 50 times. Kommers argues that the many detailed and code-like provisions of the Basic Law "make the formal procedure of amendment a principal mode of constitutional change."[175]

As far as the reasoning of the two Courts, the typical U.S. Supreme Court decision deals almost entirely with its precedents, only initially referring to the Constitution's text.[176] As Tushnet puts it "the Court's precedents serve as glosses on the text."[177] The difference between the interpretation of statutes and precedents lies in the fact that incorrect interpretation of statutes can be remedied by adopting another statute, while flawed constitutional interpretation can be repaired only by the cumbersome amendment process. The notion of judicial restraint is equally present in German and American constitutional interpretation. In Germany, the court adheres to the concept *verfassungskonforme Auslegung*, which means that the Court will strive to interpret the statutory provision in the best possible way to conform to the constitution.[178]

The living instrument notion of a constitution is widely accepted in both Germany and the United States. However, Germans are keen to leave the main changes to the amendment process. This is not to suggest that the Federal Constitutional Court has less discretion than the U.S. Supreme Court.[179] The dual nature of the fundamental rights of the Basic Law in terms of positive and negative dimensions is an integral part of German constitutional theory granting the Court an additional source for judicial discretion. As W. Cole Durham argues, "it is natural for the state to assume a more affirmative role in actualizing specific

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[173] *See* U.S. CONST. art. V.

[174] *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBL. I at art. 79(2) (Ger.).

[175] Kommers, INTERPRETING CONSTITUTIONS, *supra* note 125, at 171.

[176] *See* Tushnet, *supra* note 9, at 40.

[177] *Id.*

[178] *See* Kommers, INTERPRETING CONSTITUTIONS, *supra* note 125, at 204.

[179] *See id*. at 179.

constitutional rights."[180] In contrast, in the United States generally affirmative action is not an accepted theory of constitutional adjudication.

As opposed to the German Constitutional Court, the U.S. Supreme Court has hardly ever referred to academic writings to support its core argument.[181] Only at the end of 20th century did it become an established practice to accept amicus curiae briefs written by legal academics in most important cases of public interest.[182] In contrast, academic writings have substantial weight in German constitutional interpretation.[183] As to the proportionality principle, some scholars argue that it is not an interpretive technique but general principle of law constituting the core of the German Legal system.[184] However, it plays the role of an interpretive tool to provide good reasons for limiting fundamental rights.

German constitutional interpretation is distinguished by its reliance on such interpretive techniques as practical concordance "with its emphasis on unity, systematization, and logic in striving to build an internally consistent, complete system of law."[185] As Konrad Hesse put it:

> The principle of the Constitutions unity requires the optimization of [two conflicting values]: Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values.[186]

Regarding the structural interpretation, the Court in the *Southwest State Case* held that "[n]o single constitutional provision may be taken out of its context and interpreted by

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[180] *Id.* at 183 n. 81; W. Cole Durham, *General Assessment of the Basic Law: An American View*, *in* GERMANY AND ITS BASIC LAW 45 (1993).

[181] *See* Tushnet*, supra* note 9*,* at 44.

[182] *See id*. at 45.

[183] *See* Kommers, INTERPRETING CONSTITUTIONS, *supra* note 125, at 193.

[184] *See id*. at 201.

[185] EDWARD J. EBERLE, DIGNITY AND LIBERTY, CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 33 (2002).

[186] Kommers, INTERPRETING CONSTITUTIONS, *supra* note 125, at 203 n. 45 (quoting KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 27 (16th ed. 1988)).

itself."[187] It should be mentioned that the systematic or law as a unity argument is not merely a German prerogative. It was used by the U.S. Supreme Court from the beginning of its activity. A good example is *McCulloch v. Maryland,* where Chief Justice Marshal tried to determine the meaning of the Necessary and Proper Clause by appealing to the entire text of the Constitution.[188] But, the difference between the two courts' use of structural arguments is their frequency and candor. While structural arguments are deeply ingrained in German constitutional interpretation, they are irregular or occasional in the U.S. Supreme Court's jurisprudence.[189] This type of reasoning is generally used in dealing with both horizontal and vertical separation of power. As opposed to the detailed regulation of this relationship by the Basic Law, in the United States it is mostly left to the political process.[190]

The Federal Constitutional Court often employs teleological reasoning. Kommers argues that teleological argument today mostly focuses on "the function of a rule, structure, or practice" trying to find a clue from "the history and spirit" of the Basic Law. Kommers also argues that the *Parliamentary Dissolution Case* is illustrative of this tendency when "functionalism emphasizes practical utility over abstract analysis and efficiency over textual literalism." [191]

Tushnet contends that the U.S. Supreme Court's opinions rarely admit openly that a conflict between different interpretive techniques can suggest equally valid but contradictory outcomes. Those apparent conflicts, if any, are resolved not by any hierarchical structure of interpretive canons, "but by some sort of all things considered balancing."[192] The Court's practice suggests that it will use whatever seems to work.[193] Tushnet refutes the argument that methods of constitutional interpretation can constrain constitutional interpretation by hindering the judicial imposition of their value choices. Because judges are free to choose whatever interpretive method they think best fits the resolution of the case, they will opt for a method that supports their desired outcome.[194]

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[187] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court] Case No. 2 BvG 1/51, 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 14, 32 (Oct. 23, 1951), http://www.servat.unibe.ch/dfr/bv001014.html.

[188] *See* McCulloch v. Maryland, 17 U.S. 316 (1819).

[189] *See* Kommers, INTERPRETING CONSTITUTIONS, *supra* note 125, at 199.

[190] *See id*. at 187.

[191] *Id.* at 200; *see* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court] Case Nos. 2 be 1, 2, 3, 4/83, 62 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1 (1984) (Ger.).

[192] Tushnet, *supra* note 9, at 48.

[193] *See id*, at 49.

[194] *See id*. at 50-51.

Despite the fact that both Courts employ the same techniques for constitutional reasoning including text, purposive, and other canons "the reasoning process of the courts is not the same."[195] In particular the heavy reliance on precedential argument is absent in the German legal system. Having said this, one should not underestimate the role of precedent in German adjudication process. Despite the fact that German courts are not formally bound to follow the previous decisions based on the *stare decisis* doctrine, the precedent functionally plays the same role in Germany, at least for the sake of consistency and equality. Furthermore, all state organs are bound by the Federal Constitutional Court's decisions which enjoy the status of general law.

Historical and intentional arguments are another source of difference in the reasoning process between the Federal Constitutional Court and U.S. Supreme Court. For the German Constitutional Court the historical or intentional argument is only a supplementary or supportive source of interpretation for strengthening the other reasoning techniques.[196] The Federal Constitutional Court said that "the original history of a particular provision of the Basic Law has no decisive importance" in constitutional interpretation.[197]

Instead, the Federal Constitutional Court favors dynamic interpretation. This is well illustrated by the interpretation of the human dignity provision, in which the Court said that "[a]ny decision defining human dignity in concrete terms must be based on our present understanding of it and not on any claim to a conception of timeless validity."[198] Likewise, this line of argumentation can be seen in the opinions of the U.S. Supreme Court. It can be found in living constitution doctrine, which is a characterization associated with various non-originalist theories of interpretation rather than a specific method of interpretation.[199] A good example is *Missouri v. Holland*[200] where Justice Holmes held that "[t]he case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."[201]

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[195] EBERLE, *supra* note 185, at 33.

[196] *See* EBERLE, *supra* note 185, at 34.

[197] *Id.*; *see* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court] Case No. 1 BvR 550/52, 6 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 389, 431 (May 10, 1957) http://www.servat.unibe.ch/dfr/bv006389.html.

[198] *Id.*; *see* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court] Case No. 1 BvL 14/76, 45 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 187, 229 (June 21, 1977) http://www.servat.unibe.ch/dfr/bv045187.html.

[199] *See* William H. Rehnquist, *The Notion of a Living Constitution,* 54 TEX L. REV. 693 (1976) [hereafter Rehnquist].

[200] *See* Missouri v. Holland, 252 U.S. 416 (1920); *see* Rehnquist, *supra* note 199.

[201] *Id.*

In contrast, the Federal Constitutional Court centers mostly on the text, purpose and structure of the Basic Law and "its applicability to current social and economic conditions."[202] The Court takes the words of the constitutional text seriously and "rarely interprets constitutional language in a way radically different from the common understanding of the text."[203] The Court often examines the abstract textual provisions through the lenses of the underlying constitutional principles of rule of law, social state and human dignity.[204] On the other hand, the U.S. Supreme Court, apart from textual and systematic arguments, also employs intentional and precedential arguments. While the Constitutional Court uses dynamic interpretation by excavating "a deeper meaning to the Basic Law, trying to capture the spirit as well as the letter of the basic charter," the U.S. Supreme Court feels uncomfortable digging into the deeper meaning of abstract constitutional provisions and prefers "the letter of the text or, if necessary, history or tradition."[205]

However, the practical consequences of these differences are rather limited. For example, arguments of intent "have very rarely been decisive in major American constitutional cases."[206] One could even see similarities between the German teleological and American value arguments in sense that they pursue some constitutional objectives with the only difference being that while in the German case the values can be found in the Basic law, e.g. human dignity, they are external to the U.S. Constitution. However, whether the values are internal or external to the constitution is not of decisive importance in legitimate constitutional interpretation. These general observations seem less important in view of the two Courts' imposition of the judicial value judgments through whatever techniques they choose to employ for their reasoning.

The style of the Federal Constitutional Court's decisions reflects the doctrinal elaboration which is "heavily oriented toward normative theorizing and definitional refinement."[207] As a practical matter, the German Constitutional Court does not follow the deductive method of interpretation as is typical in civil law countries, and therefore its practice is not much different from that of the U.S. Supreme Court, especially when exercising the balancing method of interpretation. Rosenfeld said that:

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[202] EBERLE, *supra* note 185, at 264.

[203] Kommers, INTERPRETING CONSTITUTIONS, *supra* note 125, at 190.

[204] *See* EBERLE, *supra* note 185, at 264.

[205] *Id.* at 265.

[206] Rosenfeld, *supra* note 7, at 661.

[207] Kommers, INTERPRETING CONSTITUTIONS, *supra* note 125, at 210.

> Indeed, as European constitutional judges must apply broad values, like human dignity, or interpret general and open-ended constitutional liberty or equality provisions, they cannot rely on the kind of syllogistic reasoning that may be appropriate in the application of a concrete and detailed provision of the civil code. In short, the more that European constitutional judge must look to history, values, and broad principles to resolve constitutional cases, the more their actual work of interpretation is likely to resemble that of their American counterparts.[208]

The striking difference between the Courts is that, while German constitutional adjudication is mostly inclined to the balancing mode, constitutional interpretation in the United States is generally a categorical type of reasoning.[209] Judges are aware that they are imposing their preferences while deciding cases, "but yet [they] are reluctant to admit publicly that they are doing anything other than engaging in objective constitutional interpretation."[210] However, it is clear to any constitutional lawyer that judicial discretion is inevitable in the adjudication process, especially in hard cases.[211]

F. Conclusion

Traditionally, the civil law judicial process was associated with the deductive syllogistic mode of adjudication where the law serves as a major premise and the facts of the case as minor premise.[212] "Inasmuch as adjudication remained deductive and syllogistic, moreover, the judge's role would seem clearly beyond the realm of politics."[213] The judges' role was technical one, applying the rules to the facts through deductive method. However, constitutional adjudication differs significantly from the presumed ordinary role of the judiciary in civil law system. First, the constitution is far less specific than the codes and therefore the syllogistic reasoning cannot be employed by the constitutional adjudicator, at least not in the same way as it is in ordinary civil proceedings. Furthermore, the role of the constitutional judge invalidating the legislature is obviously not the same as that of the

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[208] Rosenfeld, *supra* note 7, at 663.

[209] *See* Kommers, INTERPRETING CONSTITUTIONS, *supra* note 125, at 214.

[210] *Id.* at 213.

[211] *See id*.

[212] *See* Rosenfeld, *supra* note 7, at 635.

[213] *Id*.

ordinary civil law judge.[214] The special role of constitutional adjudicator in Kelsen's sense of negative legislator was to invalidate the laws only if they failed to meet formal constitutional requirements. However, practice showed that judges didn't hesitate to invalidate laws based on substantive grounds by deviating from Kelsen's conception of negative legislator.[215] They instead act as positive legislators.[216]

Common law adjudication, however, seems not to strike a sharp distinction between ordinary and constitutional adjudication. "To the extent that it involves an inductive rather than a deductive process, it allows for greater variations than civil law adjudication."[217] Formally, the American judge is bound by previous constitutional decisions while the German constitutional adjudicator seems to have more interpretive freedom because he is not bound by precedent and may "extract any plausible legal rule or standard from an applicable constitutional provision."[218] In spite of these theoretical differences, there is no big gap in constitutional interpretation in practice between the two constitutional adjudicators in terms of their interpretive latitude despite the fact that they belong to different legal systems. Both in the application of precedent and balancing method the judges enjoy wide discretion and often impose their own values.

One could also argue that common law judges enjoy more interpretive latitude than their civil law counterparts. However, the interpretive discretion of the Federal Constitutional Court is not less than that of the U.S. Supreme Court. For example, the political question doctrine does not exist in German constitutional adjudication. However, wide judicial interpretation has invoked a lot of criticism in the United Stated than in Germany.[219] The issue of the legitimacy of constitutional adjudication seems less controversial in Germany than in the United States, partly because of Germany's involvement in such supranational institutions as ECHR and ECJ. Being bound by the judgments of these courts makes constitutional interpretation less contentious by shifting the focus from the Constitutional Court to ECHR and ECJ judgments.

Furthermore, Kagan argues that the legal culture of a particular country has a crucial influence on judges' and lawyers' attitudes toward challenging the law. By legal culture Kagan means the beliefs and attitudes of people and lawyers about the nature and authority of law and identifies two visions of law. Under the first vision of law the law is

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[214] *See id*.

[215] *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE, 263-69 (Anders Wedberg trans., 2009).

[216] *See* Rosenfeld, *supra* note 7, at 636.

[217] *Id*.

[218] *Id*. at 637.

[219] *See id*.

viewed by society as an "authoritative ideal," which means that the rules of positive law are generally considered just or necessary.[220] This implies that the society tends to comply with those rules and challenges to the validity of laws are not generally considered an acceptable practice. As opposed to this vision of law, the second approach looks at law as the "outcome of political struggle" between different social and political groups. Therefore, the shift in balance among these groups and social changes necessitate the need to challenge the law. [221] Kagan argues that no of the modern society "conforms fully to either ideal-type," and the elements of both types can be found in all democratic legal cultures.[222] However, the American legal system, largely influenced by legal realists, stands close to the vision of law as "outcome of political struggle" where the law students are trained and encouraged to challenge the law as early as they embark on their journey into the legal profession.[223] Hence, Kagan argues that "the American judicial system, in short, recruits judges with political experience and strong policy views. Many agree to enter the judiciary because they see it as an opportunity to put their personal stamp on the development of the law."[224]

In Germany generally legal education has a theoretical focus where law students learn how to apply a code while the American law students master both theoretical and practical skills.[225] German law students start the practical period of their training after the first bar exam.[226] Kommers argues that "the emphasis in legal education generally is on theory, conceptual clarification, deductive reasoning, and systematization; an approach reflected in general commentaries on the Basic Law."[227] As opposed to standardized commentaries, American hornbooks are focused on case studies and heavily analytical.[228] Thus, the legal education of both countries has influenced significantly the structure, style and conception of judicial review. However, the contrast between the German "formalism" approach to legal education and American "realism" are not very relevant for constitutional interpretation.[229]

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[220] *See* Robert A. Kagan, *Constitutional Litigation in the United States*, in CONSTITUTIONAL COURTS IN COMPARISON: THE U.S. SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT 46 (Ralf Rogowski & Thomas Gawron eds., 2002).

[221] *See id*.

[222] *See id*. at 47.

[223] *See id*.

[224] *Id.* at 48.

[225] *See* Kommers, INTERPRETING CONSTITUTIONS, *supra* note 125, at 209.

[226] *See id*.

[227] *Id.*

[228] *See id*.

[229] *See id*.