

MEMORIAL: DONALD P. KOMMERS – A MEMORIAL COLLECTION

## Reflections on Donald Kommers’ “Prolegomenon”

By Peter E. Quint\*

In 1991, the year after German unification, Donald Kommers published a masterful introduction to German constitutionalism in the *Emory Law Journal* entitled “German Constitutionalism: A Prolegomenon.”<sup>1</sup> In the following decades, the contours of German constitutional law have naturally undergone substantial development, and changes wrought by unification itself have had their impact. Yet Kommers’ article of 1991, republished in this memorial collection, remains an important document in a field – the American study of German constitutional law – in which Donald Kommers was unquestionably the dean and pioneer.

In the “Prolegomenon,” Kommers emphasizes constitutional “features that represent significant departures from Germany’s past,” and of course the Basic Law itself was fundamentally conceived as a massive rejection of the barbarism of the Nazi regime. Of the significant departures from the past in the Basic Law, Kommers focuses on the Federal Constitutional Court – in Kommers’ words, “this remarkable body” – the first tribunal in German history that possessed extensive authority to invalidate legislation (and other governmental action) that exceeded the limits set down in the constitution.<sup>2</sup>

Kommers remarks on the broad jurisdiction of the Constitutional Court which, as he posits, lacks a “political question” doctrine and other “Bickelian” techniques of judicial restraint;<sup>3</sup> and he very perceptively implies that this drive for completeness seems to parallel the similar goal of universal coverage that animated the civilian legal codes of European private law.<sup>4</sup>

But the theoretical center of the “Prolegomenon” lies in the author’s elucidation of the broad substantive coverage of constitutional rights under the Basic Law. These include not only the negative “fencing out” rights familiar in American constitutional law;<sup>5</sup> they also include provisions for the promotion of social welfare and other “positive rights” and “institutional guarantees” that either were found in the German constitutional text or were created by treating apparently negative rights as establishing an “objective order of values” applicable to all areas of law.<sup>6</sup> The effect of these doctrines may be to create constitutional obligations of the state to act in favor of individuals, or even to create constitutional obligations of private individuals in favor of other private individuals. Certainly, provisions of this kind go well beyond anything that exists in the jurisprudence of the Supreme Court of the United States, as Donald Kommers shows in his telling discussion of the *DeShaney* case in the United States Supreme Court.<sup>7</sup> Viewed from

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<sup>1</sup>Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY LAW JOURNAL 837 (1991).

<sup>2</sup>*Id.* at 840.

<sup>3</sup>*Id.* at 842.

<sup>4</sup>*Id.* at 850.

<sup>5</sup>*Id.* at 859.

<sup>6</sup>*Id.* at 858–59.

<sup>7</sup>*Id.* at 867.

this perspective, the American Constitution seems to be an instrument that is limited to regulating the government itself, as well as certain relations of the individual to the state; in contrast the German Basic Law may be viewed as entering society and promoting certain substantive social and moral ends.

In the final section of the “Prolegomenon” Kommers argues that certain concepts of “community” are embodied in the German Basic Law,<sup>8</sup> in contrast with the more individualistic nature of American constitutional rights. Some of these claims may be controversial. But however these difficult issues are ultimately resolved, we must remain deeply grateful to Donald Kommers for his capacious and penetrating view of German constitutional law and for raising very important questions about the nature of constitutionalism.

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<sup>8</sup>*Id.* at 866-67, 872.