

"New" (German) Constitutionalism

Constitutionalism v. 2.0.

But first: <http://existentialcomics.com/comic/211>

Evolution of Constitutionalism

- Constitutionalism 1.0. "U.S."
- Constitutionalism 2.0. "German"
- Constitutionalism 3.0. "Peer review"
- Differences between 1.0 and 2.0. (U.S. and German)
- Alexander Somek, *The Cosmopolitan Constitution*: "The constitution is no longer deemed to originate from the free choice of of a people. Rather, it originates from an act of reasonable recognition concerning the supreme value and authority of human dignity and human rights."

Basic, but specific, features of the "new constitutionalism"

- Strong centralized constitutional court
- Supremacy of the constitution and the Eternity Clause
- Human dignity and supremacy of rights, plus different understanding of human rights
- Objective order of values
- Possibly also "guarded (militant) democracy,,
- Substantive Rechtsstaat, incl. values, public reason etc.
- *Constitutional patriotism? The identity of people and their constitution, its values, (Habermas, Müller, cf. also Masaryk's emphasis on humanity, not ethnicity).*

Constitutional courts in the "new constitutionalism"

- Centralized nature (why?)
- Interpretation of rights connected to the notion of "moral necessity" the discovery of what is morally and constitutionally necessary is "rational", thus the judges are understood to discover, almost as scientists, some objective order of values
- Key position of proportionality, practical concordance

Eternity Clause

- *Pouvoir constituant* and *pouvoir constitué*
- Even "a people" within the constitution is not sovereign: the sovereign sleeps, it is dormant
- Rather, the "objective order of values" and the rational discovery of moral and constitutional necessity must prevail (cf., as mentioned by Kommers, the "*unwritten*" or "*supra-positive*" norms that presumably govern the entire constitutional order.)
- RP: "On what grounds do we consider our democracy to be the best solution?"

Human dignity and primacy of rights

- Human dignity at the top of the "objective order of values"
- Human rights as positive and negative rights (vs. the defensive conception)
- Human rights as values (Drittwirkung, cf. Positive obligations under ECHR, *Deshaney*, 489 U.S. 189 (1989))

Guarded democracy

- Proactive defence of the existing system
- Limitation of political rights (speech, assembly, association)
- Different understanding of the "causal link" vs. USA