

Who Celebrates What? A Response to Professor Levinson

*By Claudia E. Haupt**

* Associate Professor of Law and Political Science, Northeastern University. Many thanks to Jack Balkin, Michael Tolley, and Dan Urman for helpful comments and conversations, and to Cam Haigh for valuable research assistance. Thanks also to the editors of the Northeastern University Law Review for their kind invitation to respond to Professor Levinson.

In his 2019 Constitution Day remarks, Sanford Levinson sets out to “explain what [he is] willing to celebrate and what, in contrast, [he] increasingly wish[es] to question.”¹ He is willing to celebrate the Framers who, in his assessment, “were truly concerned citizens of a new and extremely vulnerable United States of America.”² He cautions, however, against “thoughtless praise of our founding document,” and he encourages deeper thinking about what it means to celebrate founders and innovators.³ In so doing, Levinson contrasts Constitution Day remarks by President Barack Obama, who struck an unmistakably reverent tone, with Justice Thurgood Marshall’s famously critical assessment on the occasion of the bicentennial in 1987.⁴

A related broader question might be this: what is it about constitutions, or constitutionalism, that is worth celebrating? A look abroad is instructive. I will limit myself to considering a non-exhaustive sample of contributions by scholars, judges, and politicians on the occasions of the 50th, 60th, and 70th anniversaries of the German Basic Law (*Grundgesetz*), Germany’s constitution. I choose this particular timeframe (1999-2019) not only to cabin the scope of my inquiry for purposes of this response, but also because it encompasses the Basic Law’s significant post-reunification anniversaries. Celebrations of the Basic Law focus on neither the text of the document itself nor on the framers, making comparison with the United States particularly interesting. In celebrating the Basic Law, rather, the existence of a stable constitutional democracy and its values and institutions is the object of celebration. And, indeed, the idea of “constitutional patriotism” encapsulates much of what is deemed celebration-worthy.⁵

The origins of what became the German Basic Law were initially drafted by an expert commission at Herrenchiemsee in Bavaria.⁶ The Parliamentary Council (*Parlamentarischer Rat*), whose dele-

1 Sanford Levinson, *Celebrating the Founders or Celebrating the Constitution: Reflections on Constitution Day, 2019*, 12 NE. U. L. REV. 375, 379 (2020).

2 *Id.* at 380.

3 *Id.* at 383.

4 Thurgood Marshall, *The Constitution’s Bicentennial: Commemorating the Wrong Document?* 40 VAND. L. REV. 1337 (1987).

5 See *infra* notes 62–68 and accompanying text.

6 DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 9 (1994); see also DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 7–8 (2d ed. 2012).

gates were elected by the new state parliaments, then met in Bonn in 1948 to debate the Basic Law.⁷ The Basic Law entered into effect as the provisional constitutional document for West Germany in 1949.⁸ On October 3, 1990, German unity was achieved through accession of the Eastern states pursuant to (now-superseded) Article 23 of the Basic Law.⁹ Despite its original design as a provisional charter, the Basic Law “had come to assume the character of a document framed to last in perpetuity.”¹⁰ Although reunification would have provided an opportunity for revisions to account for legal, social, and economic differences in East and West, no major changes occurred.¹¹

In 1999, ten years after the fall of the Berlin Wall, the Basic Law turned 50. The *SMU Law Review* published a symposium issue to commemorate the anniversary with contributions by German judges and German and American scholars.¹² Indeed, with respect to the process of reunification under the Basic Law, and particularly the role of the Federal Constitutional Court itself, Federal Constitutional Court Judge Udo Steiner took a somewhat critical view. He quoted a prominent member of the former East German civil rights movement, who “once said,: ‘[With Reunification] we expected to get justice, but what we got was the rule of law.’”¹³

Donald Kommers, a preeminent American scholar of German constitutional law, offered “a fifty year assessment.”¹⁴ He quoted John Quincy Adams on the fiftieth anniversary of the United States Constitution, who “was able to report that the Constitution had indeed survived the test of time and that ‘its results have surpassed the most sanguine anticipations of its friends.’”¹⁵ Kommers concluded that “[t]he same judgment could be made about the Basic Law in 1999, fifty years after its birth.”¹⁶ Kommers focused primarily on the distinctions between the Basic Law and the Wei-

7 CURRIE, *supra* note 6, at 9.

8 KOMMERS & MILLER, *supra* note 6, at 42.

9 *Id.*

10 *Id.*

11 *Id.*; see also Udo Steiner, *The Basic Law and the Process of Reunification*, 53 SMU L. REV. 461, 461 (2000).

12 Symposium, *Fifty Years of German Basic Law: The New Departure for Germany*, 53 SMU L. REV. 427 (2000).

13 Steiner, *supra* note 11, at 463 (alternations in original).

14 Donald P. Kommers, *The Basic Law: A Fifty Year Assessment*, 53 SMU L. REV. 477, 477 (2000).

15 *Id.* at 492.

16 *Id.*

mar constitution, particularly the structural provisions as well as inclusion of a bill of rights.¹⁷ He identified as “[p]erhaps the most daring institutional innovation of the Basic Law . . . the creation of the Federal Constitutional Court, a judicial tribunal empowered to resolve constitutional disputes between branches and levels of government and to review the constitutionality of federal and state law.”¹⁸ (This assessment supports Michael Tolley’s focus on judicial review as a celebration-worthy feature.)¹⁹ Likewise, then-President of the Federal Constitutional Court, Jutta Limbach, noted that “[i]n speeches and articles regarding the Basic Law’s fiftieth anniversary, the Federal Constitutional Court has been praised sumptuously.”²⁰ Indeed, Limbach concluded, “The history of the Federal Constitutional Court’s impact is a story of success.”²¹ With respect to the role of the Court, Steiner was somewhat more skeptical, especially in light of the process of reunification, the topic of his contribution. Ultimately, Steiner concluded that the jurisprudence of the Federal Constitutional Court might have contributed to “the inner unification of Germany.”²² However, he ended his observations on a critical note, “quoting the Minister of Finance of one of the new Länder: ‘Next time we have a Reunification, we’ll make a better job of it.’”²³

Ernst Benda, former President of the Federal Constitutional Court, examined the Basic Law’s break with the past through the lens of the human dignity provision of Article 1.²⁴ He noted that questions arose regarding the Basic Law’s continued relevance upon reunification.²⁵ “If the constitution is to answer the needs not only of the past but of the present and of the future as well,” he assert-

17 *Id.* at 478–81.

18 *Id.* at 481.

19 Michael C. Tolley, *Celebrating the “Idea” of a Written Constitution: A Response to Sanford Levinson’s Constitution Day Lecture 2019*, 12 NE. U. L. REV. 392 (2020).

20 Jutta Limbach, *The Role of the Federal Constitutional Court*, 53 SMU L. REV. 429, 429 (2000).

21 *Id.* at 441. The Federal Constitutional Court was created by enabling statute after the Basic Law was adopted and commenced its work in 1951. See KOMMERS & MILLER, *supra* note 6, at 9–41 (discussing the enabling statute and the Court’s institutional structure and procedure).

22 Steiner, *supra* note 11, at 476.

23 *Id.*

24 See Ernst Benda, *The Protection of Human Dignity (Article 1 of the Basic Law)*, 53 SMU L. REV. 443 (2000).

25 *Id.* at 451 (“When unification came in 1990, it was said that the Basic Law, forty years old at the time, would be ‘too old’ to serve as the constitution of the united country.”).

ed, “it must be flexible. It should be able to adapt to the changing circumstances.”²⁶ Interestingly from a comparative perspective, he proceeded to reject United States-style “original intent” and, citing Justice Brandeis, instead insisted on the ability of the constitution to evolve.²⁷ He explained that, “Article 1 was the answer to the violations of human dignity known during the time of the Nazi regime. These dangers do not exist anymore, at least in principle, and hopefully they will not reappear.”²⁸ In order to ensure the continued enforcement of Article 1’s goals, however, he demanded consideration of “future risks . . . no matter whether the creators of the Basic Law have, or could have, foreseen them in 1949.”²⁹ To do so, he suggested, it is necessary “to re-examine what the object of protection is in Article 1.”³⁰

Ten years later, in a special issue of the *German Law Journal* on the occasion of the Basic Law’s 60th anniversary in 2009, another illustrious set of authors contributed their reflections.³¹ The starting point was a uniformly positive reception: “Today, not only the political establishment is united in praising the *Grundgesetz*. The scholarly assessment also has been mostly positive.”³² By contrast, “the political system based on the Basic Law, and the jurisprudence of

26 *Id.*

27 *Id.* at 451–52 (“The idea of ‘original intent’ discussed in the United States during the Reagan administration misunderstands the idea of the Constitution as a ‘living organism.’ The Constitution, in the words of Justice Brandeis, is ‘capable of growth, of expansion and of adaptation to new conditions. Growth implies changes . . . political, economic, and social. . . . Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever-developing people.”).

28 *Id.* at 452.

29 *Id.* Of special importance to Benda were “the completely new questions concerning the manipulation of human genes.” *Id.* These questions could not have been foreseen by the framers of the Basic Law, hence “it was not their ‘original intent’ to answer these problems.” *Id.* Nonetheless, he argued against leaving the answer to the political process. Rather, he suggested that it is irrelevant for the application of Article 1 “whether any particular form of danger existed in 1949.” *Id.*

30 *Id.*

31 See Susanne Baer, Christian Boulanger, Alexander Klose and Rosemarie Will, *The Basic Law at 60 – Introduction to the Special Issue*, 11 GER. L.J. 1, 1 (2010). In addition to the Basic Law’s 60th anniversary, “the first democratic constitution (Paulskirchenverfassung of 1849) was promulgated 160 years ago; the 1919 Weimar Constitution would have turned 90.” *Id.*

32 *Id.*

the Constitutional Court . . . has often met with intense criticism.”³³ Despite such criticism, the interaction between the Federal Constitutional Court and the political branches was also deemed generally successful, as described by a former federal Minister of Justice.³⁴

The Basic Law itself was declared “in historical perspective, a remarkable success.”³⁵ Among the praiseworthy aspects this group of commentators chose to highlight were the resilience of the Basic Law, based on “various features that distinguish it from other examples of modern constitutionalism,”³⁶ including the federalism and separation of powers design, as well as the social state principle, militant democracy, the constitutional understanding of religious neutrality, and the Basic Law’s open posture toward international as well as European Union (EU) law. Of special import, as already seen in the comments on the Basic Law’s 50th anniversary, remained the constitution’s commitment to fundamental rights, which one scholar called “the normative heart of the Basic Law.”³⁷ Contributions to the 60th anniversary collection particularly praised Basic Law’s protections of human dignity in Article 1 and equality in Article 3.³⁸

Some authors—such as, notably, former Federal Constitutional Court Justice Dieter Grimm—attributed the longevity and success of the Basic Law to the ease with which the constitution can be amended.³⁹ Indeed, as Grimm noted, the Basic Law of 2009 “is not identical with the Constitution that was enacted on 23 May 1949. In the sixty years of its existence, it has been amended fifty-four times.”⁴⁰ And if it is the text of a constitution that determines its identity, “then Germany today has a constitution different from the one adopted in 1949.”⁴¹ In Grimm’s assessment, constitutions must change to remain relevant, and considering the identity of the con-

33 *Id.*

34 See Brigitte Zypries, *The Basic Law at 60 – Politics and the Federal Constitutional Court*, 11 GER. L.J. 87, 97–98 (2010).

35 Matthias Mahlmann, *The Basic Law at 60 – Human Dignity and the Culture of Republicanism*, 11 GER. L.J. 9, 9 (2010).

36 *Id.*

37 *Id.*

38 See *id.* (commending the Basic Law’s commitment to human dignity); Susanne Baer, *The Basic Law at 60 – Equality and Difference: A Proposal for the Guest List to the Birthday Party*, 11 GER. L.J. 67, 67 (2010) (commending the Basic Law’s commitment to equality).

39 See Dieter Grimm, *The Basic Law at 60 – Identity and Change*, 11 GER. L.J. 33, 33 (2010).

40 *Id.*

41 *Id.*

stitution also means considering its ability to change.⁴² In addition to textual amendments, Grimm noted, changes by interpretation that occur outside of textual change must be considered as well.⁴³

In 2019, the German Basic Law turned 70 years old. The International Association of Constitutional Law Blog published an online symposium to mark the occasion.⁴⁴ As in previous years, the themes covered included praise for the constitution's federalism and separation of powers design,⁴⁵ the importance of fundamental rights,⁴⁶ and the Basic Law's relationship to European integration.⁴⁷ Interestingly, after noting the Basic Law's general success,⁴⁸ the introductory post asked the same question this Constitution Day collection poses: "What is being celebrated and why?"⁴⁹ The answer

42 *Id.* ("Constitutions that resist such adaptations are in danger of losing their legal relevance and of being circumvented. This is why the possibility of change must be recognized when the identity of constitutions is considered.").

43 *Id.* at 34.

44 Symposium, *70 Years of the German Basic Law*, IACL-AIDC BLOG, <https://blog-iacl-aidc.org/70-years-of-the-german-basic-law> (last visited Mar. 1, 2020).

45 Nathalie Behnke, *Consensual Governance – The German Governmental System*, IACL-AIDC BLOG (Oct. 3, 2019), <https://blog-iacl-aidc.org/70-years-of-the-german-basic-law/2019/10/3/consensual-governance-the-german-governmental-system>; Jens Woelk, *The Federal Council: The Secret to the Institutional Success of the German Federal System*, IACL-AIDC BLOG (Oct. 8, 2019), <https://blog-iacl-aidc.org/70-years-of-the-german-basic-law/2019/10/8/the-federal-council-the-secret-to-the-institutional-success-of-the-german-federal-system>; Gregor Kirchhof, *The Financial Constitution of the Basic Law*, IACL-AIDC BLOG (Sept. 26, 2019), <https://blog-iacl-aidc.org/70-years-of-the-german-basic-law/2019/9/26/the-financial-constitution-of-the-basic-law>.

46 Michael Goldhammer, *More Than Just Rights – The Basic Law and Its Fundamental Rights Chapter*, IACL-AIDC BLOG (Oct. 1, 2019), <https://blog-iacl-aidc.org/70-years-of-the-german-basic-law/2019/10/1/more-than-just-rights-the-basic-law-and-its-fundamental-rights-chapter>.

47 Annegret Eppler, *The German Basic Law and the Process of European Integration*, IACL-AIDC BLOG (Oct. 10, 2019), <https://blog-iacl-aidc.org/70-years-of-the-german-basic-law/2019/10/10/the-german-basic-law-and-the-process-of-european-integration>.

48 Francesco Palermo, *Editorial – '70 Years of the German Basic Law' Symposium*, IACL-AIDC BLOG (Sept. 24, 2019), <https://blog-iacl-aidc.org/70-years-of-the-german-basic-law/2019/9/24/editorial-70-years-of-the-german-basic-law-symposium> ("For seven decades the Basic Law has accompanied the democratic, social, political, economic and legal development of Germany. As the constitution of a successful country, it is rightly commended for its achievements. And in fact, this anniversary has been widely celebrated, in Germany and abroad. . . . Over seven decades, the performance of the Basic Law has been exceptionally good.").

49 *Id.*

combined the expectations of the Basic Law's framers with the promise of constitutionalism more broadly: "It has achieved all the main goals the fathers and mothers of the constitution wanted to produce: a stable government, a social liberal democracy, the highest protection of fundamental rights, a cohesive federal system and a sound economy."⁵⁰ Moreover, in light of current pressures on constitutions,⁵¹ the Basic Law is considered to be of "an extraordinary comparative significance, being looked at with interest by scholars and constitution-makers from all over the world."⁵²

In a way, the German experience combines optimism placed in the constitutional project with deep skepticism: of the power of constitutions to constrain political power,⁵³ of the ability to find common ground within a constitutional framework,⁵⁴ and of the ability to break with the past in a meaningful way through constitutional means,⁵⁵ to only name a few examples. Despite its assertedly successful performance in light of this skepticism, neither the text of the original document itself nor its framers are typically the object of veneration.

Extended treatment of the "mothers and fathers of the Basic Law" is notably absent in the small sample of contributions surveyed. And in German legal, and certainly public, discourse, they are a largely obscure cast of characters.⁵⁶ The most notable exception is, perhaps, Konrad Adenauer, erstwhile mayor of Cologne, who, after serving as chair of the Parliamentary Council, became the first Chancellor of the Federal Republic of Germany.⁵⁷ Even scholars such

50 *Id.*

51 *See generally* CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018) (examining worldwide current threats to constitutional democracy).

52 Palermo, *supra* note 48.

53 *See, e.g.*, Grimm, *supra* note 39, at 33–34 (discussing the Weimar Constitution).

54 *See* KOMMERS & MILLER, *supra* note 6, at 47 ("German constitutional scholars often speak of the steering, integrating, and legitimizing functions of the constitution, as if to suggest a more perfect bonding between text and polity.").

55 *Id.* at 43 ("The Basic Law marks a radical break with Germany's past."); Baer et al., *supra* note 31, at 3 (noting that the Basic Law "was a symbolic document, an ostentatious break with the past, which included a failed democracy – the Weimar Republic – and a morally repugnant political regime – National Socialism – from which the nascent state had to distance itself.").

56 *See, e.g.*, Kim Lane Scheppele, *Jack Balkin Is An American*, 25 YALE J. L. & HUMAN. 23, 38 (2013) (noting that "those who participated in the Parliamentary Council are rarely referred to by name at all.").

57 *Id.*

as Kommers who want to draw attention to the framers of the Basic Law do so in vague terms, speaking of “[t]he sixty-one men and four women who framed the Basic Law.”⁵⁸ Only rarely do their names appear, and even more seldom are their intentions examined when assessing current developments.⁵⁹ Of course, one reason there might be less emphasis on the framers is that the Allies had a not insignificant hand in the drafting of the Basic Law.⁶⁰ Nonetheless, “[a]llied intervention did not succeed in branding the Basic Law with the stain of an instrument imposed by the occupying powers.”⁶¹

One distinctive aspect in the German context involves the idea of “constitutional patriotism” (*Verfassungspatriotismus*), an idea that Kim Lane Scheppele and Jan-Werner Müller have called “one of the most attractive yet ill-defined ideas in modern political theory.”⁶² Scheppele and Müller explain that “the concept of constitutional patriotism designates the idea that political attachment ought to center on the norms, the values, and more indirectly, the procedures of a liberal democratic constitution.”⁶³ So understood, it “promises a form of solidarity distinct from both nationalism and cosmopolitanism.”⁶⁴ On the occasion of the Basic Law’s 50th anniversary, former Constitutional Court President Limbach asked, “Does Germany’s pride in the Basic Law already show its people are patriots of the constitution?”⁶⁵ In a slightly different inflection—in the context of discussing the Basic Law’s relationship to EU law—Grimm asserted

58 Kommers, *supra* note 14, at 477.

59 For a rare exception, see Juliane Kokott, *The Basic Law at 60 – From 1949 to 2009: The Basic Law and Supranational Integration*, 11 GER. L.J. 99, 99 (2010) (juxtaposing the view of the “founding fathers and mothers” on European integration with contemporary constitutional jurisprudence). Moreover, Kokott quotes Carlo Schmid on the importance of supranational engagement. *Id.* at 113–14. Likewise, Baer, *supra* note 38, at 70, mentions the four female members of the Parliamentary Council, Elisabeth Selbert, Friederike Nadig, Helene Wessel, and Helene Weber, focusing in particular on the contributions of Selbert in connection with Article 3, *passim*.

60 Currie, *supra* note 6, at 10; see also Kommers, *supra* note 14, at 477 (noting that the Basic Law was drafted “with the consent of the three occupying powers”).

61 Currie, *supra* note 6, at 10 (quoting former Constitutional Court Justice Helmut Steinberger); see also Baer et al. *supra* note 31, at 1 (noting that “the Allies gave the effort an additional nudge.”).

62 Kim Lane Scheppele & Jan-Werner Müller, *Constitutional Patriotism: An Introduction*, 6 INT’L J. CONST. L. 67, 67 (2008).

63 *Id.*

64 *Id.*

65 Limbach, *supra* note 20, at 430.

that “‘Constitutional Patriotism’ is a German phenomenon.”⁶⁶ On the occasion of the 70th anniversary, one scholar of comparative constitutional law noted “The Basic Law replaced the nationalistic pride with a constitutional patriotism, following the formula coined by Dolf Sternberger and made popular by Jürgen Habermas.”⁶⁷ Former German President Joachim Gauck noted in his farewell address in 2017 that his own constitutional patriotism does not only stem from intellectual insight, but equally from emotional connection.⁶⁸

What is celebrated when a constitution is celebrated, then, is deeply contextual. This, of course, comes as no surprise to students of comparative constitutional law. In Germany, it turns out, neither the original text of the constitutional document itself nor the framers are at the center of celebration. In this regard, the German experience illustrates a third option in addition to Levinson’s alternatives of celebrating the document or celebrating the founders.

66 Grimm, *supra* note 39, at 45. Grimm uses the term to explain the limits EU law imposes limits on the Basic Law. He asserts that while EU law limits all member states’ national constitutions, the effect “may be more noticeable in Germany than elsewhere since no other member state has attributed a similar level of importance to its constitution.” *Id.* at 44–45.

67 Palermo, *supra* note 48. As Scheppele & Müller, *supra* note 62, at 68, explain: “The idea was born in postwar West Germany. The political philosopher Dolf Sternberger, a pupil of Hannah Arendt’s, coined it in the late 1970s; it was subsequently taken up by Jürgen Habermas, and through his work became better known in the English-speaking world.”

68 Joachim Gauck, Ger. President, What Should Our Country Be Like? (Mar. 23, 2012) (transcript available online at <http://www.bundespraesident.de/SharedDocs/Reden/EN/JoachimGauck/Reden/2017/170118-What-should-our-country-be-like.html>).