Comment on "Deustchland: Das Bundesverfassungsgericht als eingenstaendiger Akteur in Verfassungsreformen" by Prof. Hans-Peter Schneider

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Constitutions provide the framework within which ordinary politics occurs. Like all "rules of the game," they are thus subject to two competing pressures. On the one hand, rules must be *stable,* and participants must *expect* them to be stable, in order to have the desired consequences in ordering behavior within the rules.[1] On the other hand, constitutional frameworks need to be sufficiently flexible to allow for adjustment as political, social, and legal conditions change. Writing in 1833, US Supreme Court Justice Joseph Story expressed this tension eloquently:

> It is obvious, that no human government can ever be perfect; and that it is impossible to foresee, or guard against all the exigencies, which may, in different ages, require different adaptations and modifications of powers to suit the various necessities of the people. A government, forever changing and changeable, is, indeed, in a state bordering upon anarchy and confusion. A government, which, in its own organization, provides no means of change, but assumes to be fixed and unalterable, must, after a while, become wholly unsuited to the circumstances of the nation; and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution. It is wise, therefore, in every government, and especially in a republic, to provide means for altering, and improving the fabric of government, as time and experience, or the new phases of human affairs, may render proper, to promote the happiness and safety of the people. The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory.[2]

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[1] As North and Weingast put it, "rules the sovereign can readily revise differ significantly in their implications for performance from exactly the same rules when not subject to revision." See Douglass North and Barry Weingast (1989). "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England;" *Journal of Economic History* 49: 803.

[2] Joseph Story (1833). Commentaries on the Constitution of the United States, § 1821. Available at http://press-pubs.uchicago.edu/founders/documents/a5s12.html.

The purpose of this conference is to explore this tension – in particular, to explore the process of *constitutional change*.[3] Within this broad subject area, Professor Schneider's excellent paper focuses on the impact of the Bundesverfassungsgericht on constitutional change in the Federal Republic of Germany. It draws a number of fundamental distinctions, and illustrates these powerfully with episodes drawn from the court's jurisprudence. Rather than comment on Professor Schneider's treatment of the BVG – a topic that he is much more qualified to discuss than I am – I focus on developing several themes that are implicit in the paper, but which bear more detailed treatment.

The lynchpin for Schneider's argument is the distinction between explicit, textual change of a constitution through the amendment process, and constitutional change that is accomplished without a modification of the text through an alteration of the *meaning* of constitutional provisions in day-to-day political practice. An obvious avenue for constitutional change in this second sense are changes in how specific constitutional provisions are interpreted by a constitutional court. Professor Schneider's treatment of the right to "informational self-determination," introduced by the BVG through an expansive reading of the Article 2 guarantee of the right to the free development of one's personality, provides a poignant example. Similarly, re-interpretations of the "necessary and proper" clause and the "due process" clause of the US Constitution by the US Supreme Court in the 19th and early 20th centuries led to a

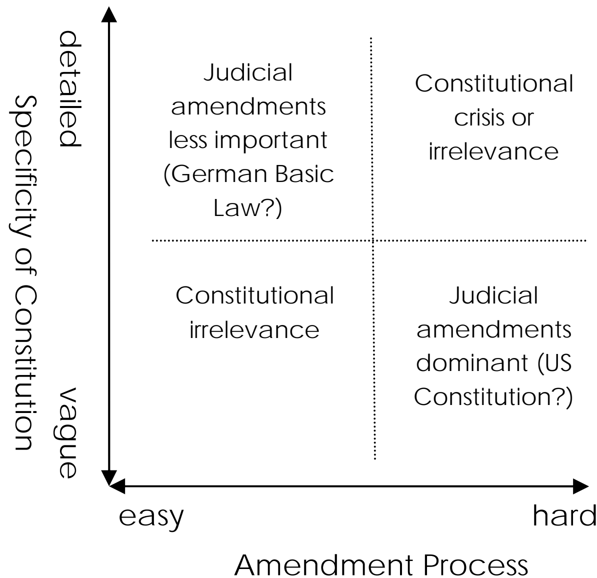
[3] Interestingly, John Locke, at least early in his career, appears to have been much less impressed with the need for constitutional change. His constitution for the colony of Carolina, written while he was working for the Earl of Shaftesbury in 1669, contains the following, remarkable, final article: "120. These fundamental constitutions, in number a hundred and twenty, and every part thereof, shall be and remain the sacred and unalterable form and rule of government of Carolina forever. "

dramatic expansion of Congressional powers despite the absence of any *textual* constitutional change. As Schneider points out (p.2), the balance between constitutional change by amendment and by interpretation depends, at least in part, on the amendment process. As the road to explicit textual change is filled with more hurdles, it becomes more and more attractive for those with an interest in constitutional change to attempt to alter constitutional reality through the courts.

While the burdens imposed by the amendment process are central, a second dimension of the balance between these forms of constitutional change that deserves attention turns on the *nature* of the constitutional document. Formal, textual amendments (with some exceptions to be discussed below) usually face few content restrictions. Generally, *any* change to the constitution can be pursued if the procedural hurdles of the amendment process can be cleared. In contrast, judicial "amendments by interpretation" are constrained. Judges, whose power generally rests on their ability to persuade others – most importantly, policymakers and citizens – that their decisions are legitimate, must be able to justify their conclusions. As a consequence, the ability of judges to reshape constitutional reality is restricted by the plausible interpretations that can be given to a constitutional provision. The more specific the constitutional text – that is, the more limited the interpretive maneuver room provided by the document – the more difficult it becomes for judges to "amend" the constitution by a shift in its meaning. In contrast, broad, vague provisions provide fertile ground for interpretations that provide judges with tremendous leverage in shaping constitutional reality. Naturally, the specificity or vagueness of a constitutional document varies within a given constitution. At the same time, comparing across countries, it is evident that constitutions as a whole differ in the precision of their language. The German Basic Law,

with more than 150 articles, a length of more than 20,000 words, and a host of highly detailed provisions is far more specific than the US Constitution, which focuses primarily on procedural issues, comprises fewer than 50 articles, and is just over 7,000 words long.

These two dimensions – the difficulty of the amendment process and the specificity of constitutional language – are central because they provide us with leverage in thinking about the relative importance of judges in the process of constitutional change from a comparative perspective. The following diagram, which plots the difficulty of the amendment process against the specificity of the constitutional text, helps to illustrate. Consider first the southeast corner of the diagram, representing a constitution that is relatively vague, but provides for a difficult formal amendment process. The US Constitution can serve as a real-world example. In such circumstances, political groups with an interest in constitutional change face a formal amendment process that holds out little hope of success. However, the constitutional text provides judges with considerable leeway to "deliver" constitutional amendments if they can be persuaded of a particular interpretation. Not surprisingly, we would therefore expect efforts at constitutional change to focus on pursuing such change through the courts. The result is that the process of constitutional change tends to be dominated by judicial amendments. The constitutional history of the US fits this ideal type well – most "amendments" of the US Constitution are not reflected in actual changes to the text, but are the product of Supreme Court decisions.



In contrast, in the northwest corner of the figure we find constitutions that provide for an amendment process that is easy to complete, combined with a highly specific constitutional document. This combination has two effects. First, judges face considerable hurdles in "amending" the constitution by interpretation – the constitutional text simply provides fewer interpretive possibilities. At the same time, those with an interest in constitutional change face fewer hurdles in pursuing such change through the formal amendment process. In consequence, constitutional change will tend to be concentrated in formal, textual changes to the document, rather than in judicial amendments by interpretation. Post-war German constitutional history – at least as compared to the American case – may provide a useful example. Much constitutional change has occurred through the formal amendment process with a more limited role played by the BVG.[4] In short, the structure of a constitutional document, including its specificity and the difficulty of textual amendment, is likely to have a significant impact on the importance of constitutional courts in the process of constitutional change, at least relative to the regular "political" amendment process.

Although the BVG may be less central than the US Supreme Court in the process of constitutional development, it nevertheless has had a significant impact – a point that Professor Schneider demonstrates convincingly. In addition to "amending" the constitution through interpretation, Schneider identifies two other avenues of BVG

[4] Although the focus of the analysis is not on the northeast and southwest corners of the diagram, it is useful to discuss these ideal types briefly. The northeast corner combines highly specific constitutional provisions with an amendment process that is hard to complete. The danger, alluded to by Justice Story, is a constitutional crisis or irrelevance as social and political developments overtake a constitution that provides few avenues for constitutional change, either through broad interpretations or changes to the text. The southwest corner, in contrast, illustrates constitutional irrelevance in the sense that a constitution that is easy to amend, and provides broad interpretive room for judges, is unlikely to constrain political action in a meaningful fashion.

influence. On occasion, politically unpopular decisions by the court can provoke a constitutional amendment designed to override the decision. The example of "Staatshaftung" provided by Schneider falls into this category. Similarly, several prominent decisions by the US Supreme Court, including a decision declaring the federal income tax unconstitutional, led to constitutional amendments. Significantly, while courts *affect* constitutional change in these cases, they do not *direct* it. In fact, judges largely loose control of the process, and the amendment adopted may often run contrary to their preferences. The final possibility for influencing constitutional change that Schneider focuses on is open to only small number of constitutional courts, including the BVG: The ability to block a constitutional amendment. The German Basic Law explicitly identifies several areas that are unalterable even by constitutional amendment. In addition, the BVG early in its jurisprudence (the Southwest Case of 1951) asserted an expansive theory of the "unconstitutional constitutional amendment," reserving to itself the right to review, and possibly reject, formal textual amendments of the Basic Law. Professor Schneider uses the controversy surrounding the Auslaenderwahlrecht to illustrate this possibility.[5]

The final issue I would like to explore in this comment relates directly to these three modes of affecting constitutional change. Taken together, these powers suggest – at least from a legal perspective – an expansive role for the BVG in shaping the constitutional reality of the Federal Republic. At the same time, constitutional review occurs within a political context, and the freedom enjoyed by judges of the BVG to exercise their powers, as well as the effects that flow from their decisions, depend on the interactions between judges, other policymakers, and citizens. As a result, it is

[5] Significantly, the notion of an unconstitutional amendment – which takes some issues "off the table" – is unknown to many constitutional traditions, including the American.

crucial to understand the *political* (as opposed to legal) conditions that allow the court to use its powers to influence constitutional change and to identify conditions that leave the court constrained in its ability to do so.

In this context, a striking feature of the examples Professor Schneider uses to illustrate his argument is that many of the most prominent instances in which the BVG shaped constitutional developments occurred in circumstances that were politically favorable, usually because the court could exploit divisions among central political players to find "allies" for its position. For example, in disputes over the use of concurrent legislative powers by the federal and state governments (p.9f.), particularly in the context of the recent "federalism reforms," the court could usually rely on either the state governments or the federal government to favor its position. Similarly, in the dispute over the "Auslaenderwahlrecht," the court's position enjoyed the support not only of the Bavarian government, but of the CDU/CSU Bundestag delegation. In contrast, where the court has faced a relatively unified political landscape – for example in the decisions on privacy of postal/ telephone communications in the 1970's or the 1991 decision on compensation for property expropriated by the Soviet Union – it has been much more circumspect in its jurisprudence.

This pattern should not be surprising. Like constitutional courts more generally, in the final analysis, the BVG is dependent for its efficacy on the support of and compliance by citizens and policymakers. For policymakers, compliance is – at least in part – a function of the *political* costs of confronting the court. Conditions that raise the costs of doing so therefore create greater scope for the court to exercise its powers fully. Conditions that reduce these costs tend to limit the maneuver room of the court, even though its *legal* powers are not diminished. This comment does not allow a full

exploration of the conditions that affect the costs of defying the BVG.[6] But alongside such conditions as the salience of a particular issues and the constellation of relevant public attitudes , the presence (or absence) of powerful political "allies" – such as interest groups, parties, or state governments – generally favors (inhibits) more aggressive judicial interventions, and thus shapes the *de facto* ability of the BVG to intervene.

One conclusion that emerges from these considerations is that the ability of courts in general, and of the BVG in particular, to shape constitutional developments depends on the political context in which these institutions find themselves. Courts are not able to make equal use of their powers across all issue areas and at all points in time. The *normative* implications that follow from this conclusion are ambiguous. On the one hand, while I share some of the concerns raised by Professor Schneider about the legitimacy of "judicial meddling" in constitutional developments,[7] I am also convinced that the ability of courts to exercise truly countermajoritarian, "undemocratic" influence is far more constrained than typically acknowledged. On the other hand, this also implies that the ability of courts to act as "countermajoritarian bulwarks" that can protect political minorities in systems that favor majority control is limited. This "guardian" vision of the judicial role – expressed famously in footnote 4 of the US Supreme Court's Carolene Products decision (1938) – may rest on an unrealistic conception of judicial capabilities. Whether all of this is a "good" or a "bad" thing may, in the end, depend

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[6] For a full discussion of this line of argument, see Georg Vanberg (2005). The Politics of Constitutional Review in Germany. Cambridge: Cambridge University Press.

[7] Thus, Professor Schneider concludes (p.19): "In einem System, das Verfassungsaenderungen oder –ergaenzungen durch die gesetzgebenden Koerperschaften weder an praktisch unerfuellbare Bedingungen knuepft, noch ihnen unueberwindliche Verfahrenshinderninesse in den Weg stellt, ist es nicht Sache von Richtern, den ebenso unumgaenglichen wie unentbehrlichen Verfassungswandel selbst aktiv voranzutreiben."

largely on personal preferences over what it is that one thinks a court *ought* to do in particular circumstances.