Princess Soraya and Justice Scalia: A Mismatched Couple

1. Introduction

One of the most difficult questions in all of law is the extent to which the law embodies, or even should embody, certain substantive values. In the United States, this conflict is often posed in terms of the due process clause of the 14th Amendment and the tension between procedure and substance. The United States, however, is not alone in having to wrestle with this question, although the question may be posed in different ways in different places. One particularly dramatic example of this conflict involves how German courts have dealt with the effect of legal positivism’s exclusion of values from adjudication during the Nazi era.

This paper is an attempt to analyze this philosophical question through a comparative lens. It examines the decline of legal positivism as a tenable legal philosophy in Germany after World War II, and the shift toward natural law and common law perspectives, resulting in the strengthening of the judiciary and the “general right to personality” (allgemeines Persönlichkeitsrecht) in Germany. This use of such a broad notion can be compared with the US Supreme Court’s doctrine of “substantive due process.” In both countries, these doctrines have been used to strengthen the judiciary and individual rights. Because this is a vast topic, the discussion will focus on discrete cases or judges. In Germany the focus will be on the Princess Soraya case, which sounded the death knell of legal positivism in that country; in the U.S. the focus will be on Justice Antonin Scalia, whose judicial philosophy of textualism and originalism has contributed to an increased popularity in this country of a form of legal positivism, which is surprising given America’s status as a common-law country.
2. Background on Legal Positivism in Germany

Between the two world wars in Germany, both during the Weimar Republic and during the twelve years of totalitarian rule under the Nazis, the prevailing legal philosophy was a doctrine known as legal positivism. Legal positivism was embraced by most prominent German legal scholars, including Gustav Radbruch and Gerhard Anschütz.

Probably the leading theoretician of legal positivism, though, was the Austrian Hans Kelsen. Kelsen was one of the primary architects of the inter-war Austrian constitution, and the influential bifurcation of the highest courts into a civil law court and a constitutional court. Kelsen tried to construct a “pure theory of law” in his treatise of the same name. At the very beginning of Pure Theory of Law, he gives perhaps the clearest description of what he was aiming to develop: “a theory of law [that is] purified of all political ideology and all elements of natural science and conscious of its own particular nature because [it is] conscious of the autonomy of its object.”¹ Kelsen’s goal was to achieve “objectivity and exactness” and to save legal reasoning from entanglement with political considerations.² Kelsen established as the foundation of his entire system of legal positivism a rigid distinction between the “ought” and the “is.”³ One consequence that Kelsen drew from this rigid distinction was that “[t]here are no mala in se, but only mala prohibita.”⁴ Legal positivism, in the hands of its ablest theoretician, leads to a complete divorce between law and ethical or moral considerations. Law, for Kelsen, is not founded on any kind of pre-existing natural law, but on the will of the legislator. In his somewhat convoluted terminology, Kelsen declares his voluntarism, that is, his belief that law depends on the will of the legislator: “The legislative act, which subjectively has the meaning of

¹ Hans Kelsen, Reine Rechtslehre (Vienna: Franz Deuticke, 1960) iii. This definition of the pure theory of law comes from the foreword to the 1st edition of 1934, but was retained by Kelsen in the 2d edition of 1960.
² Id.
⁴ Id. at 112.
ought, also has the objective meaning—that is, the meaning of a valid norm—because the constitution has conferred this objective meaning upon the legislative act.” In other words, a law has validity because the legislature has said so, and the legislature’s say-so has the force of law because a constitution has said so. There is no appeal beyond the constitution, which acts as a sort of “superstatute” that depends ultimately on the will of those who adopted it.

The practical effect of legal positivism’s strict separation of the “ought” and the “is” was twofold. First, courts had no power vis-à-vis the legislature, since legal positivism forbade any strong form of judicial review in Germany before World War II. The prevailing idea among German jurists was that judges were “automaton-like beings” who merely applied the law to a given set of facts. Judges did not even have any discretion to develop the law, as legal positivism presupposed that law could be written in a perfect statutory code free of any gaps. In German, this law was embodied in the German Civil Code (Bürgerliches Gesetzbuch). These positivist assumptions led to German courts’ complete abdication of responsibility to consider whether the legislature could err in its statutes. All that a court was supposed to consider was whether a statute had been properly enacted, not whether it was proper in substance. The German high court in the Weimar period (the Reichsgericht) even once explicitly declared in 1927 that “The legislator is absolutely autocratic, and bound by no limits save those he has set for himself either in the constitution or in some other laws.” In 1929, the same high court declined to hear case that asked it to “consider whether a law was compatible with supralegal standards” on the

5 Id. at 8.
grounds that the court lacked power to consider any “supralegal standards.”9 Legal positivism was designed to preserve the nation from the danger of “judicial absolutism” based on “value judgments”—and it certainly achieved that goal, but at the expense of an autocratic legislature.10

Second, individuals had no power vis-à-vis the legislature, since the existence of “individual rights against the legislature [is] unthinkable” in a positivist system.11 Provisions of the Weimar constitution that on their face guaranteed rights against the legislature, such as language rights for minorities, were interpreted by the courts to be mere directives for the legislature to follow, if it so wished.12 A decade later, at the same time that the U.S. Supreme Court was remaking itself as the institution responsible for upholding (certain) individual rights against government infringement,13 most German courts were meekly complying with any orders that came down from Hitler.

The great change in German jurisprudence and in German attitudes toward judicial review came as a result of Germany’s experience under Hitler and its defeat in World War II. The manifest injustices of the Nazi regime and the widespread complicity in them forced ordinary citizens and lawyers alike to ponder how they could have committed such horrible crimes while following the law and thus to reconsider the relationship between courts and the legislature.14 Before the German Basic Law (Grundgesetz) was promulgated in 1949, the constituent assemblies of the Western Länder were “almost unanimous” on the need to

---

11 Id. at 2.
12 Id.
13 See United States v. Carolene Products, Co., 304 U.S. 144, 152, n. 4 (1938)
strengthen their own local judiciaries. The federal courts found support for their agenda in certain key provisions of the Basic Law, particularly Article 100, which explicitly gave courts the power to declare statutes unconstitutional. Very soon after the Basic Law went into effect, though, Germany’s Federal Constitutional Court (Bundesverfassungsgericht) went beyond the language of Article 100 and asserted its right to examine not only statutory law in the light of the Basic Law but also the Basic Law in the light of a higher law, when it stated that “[b]lind adherence to the principle that the original framer of the Constitution may arrange everything to suit himself would be tantamount to a relapse into legal positivism, a way of thinking that jurists have long since abandoned, both in theory and in practice. It is not necessarily true that the original framers of the Constitution, in the very nature of things, will never overstep the absolute bounds of justice.” From the very founding of the Federal Republic, then, the Constitutional Court began to interpret the Basic Law as an attempt to embody an “objective order of values” and a “structure of substantive values.” What the Constitutional Court has cited as the foundation of that structure has not always been clear—in the early years under the leadership of Josef Wintrich, “an influential Catholic jurist with roots in the Thomistic tradition,” the court tended toward a medieval view of natural law, whereas in later years the court to speak more generally of “fundamental principles of justice” or of the autonomy of the individual as an “end in himself.” (What difference the foundation for the rights guaranteed by the Basic Law makes will be addressed in the discussion of the Soraya case.)

---

15 Id at 6.
17 1 BVerfGE 18 (1952), cited in Ernst von Hippel, Natural Law Forum 4 (1959): 112.
19 Id. at 48.
20 Currie at 314, citing the German Life Imprisonment case, 45 BVerfGE 187, 228 (1977).
21 This discussion might be too much to handle and might not be written—we’ll see.
The German courts, however, not only asserted their own authority under the new Basic Law, but they also brought to German law a new emphasis on individual rights. This emphasis appeared in the very first article of the Basic Law, which announced: “Human dignity is inviolable. To respect and protect it is the duty of all state authority.” Article 2(1) further entrenched individual rights: “Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.” These ringing declarations of the dignity of the individual were included in the Basic Law in order to prevent the state from treating “man as a mere building block in its structure of egotistical power.”

The German courts—led by the Federal Constitutional Court, which has the last word on questions of constitutional law, and the Federal Court of Justice (Bundesgerichtshof), which is the supreme court in most questions of private and criminal law—made use of the power of judicial review and the right to the free development of one’s personality to build flexibility into Germany’s (in)famously rigid legal system, and even started to embrace something resembling a more American-style common-law approach to adjudication. Not surprisingly, these courts initially used their power of judicial review and the right to the development of one’s personality in order to vindicate individuals who had suffered at the hands of the Nazis.

One of the first such cases, decided in the Court of Justice, held that a Volkssturm officer was liable in tort for the death of a German citizen who was found to be sheltering a non-Aryan,

---

22 Currie, at 343.
23 Id. at 344.
25 This bifurcation in Germany’s court system actually reflects the influence of Hans Kelsen. In addition to the Federal Constitutional Court and the Federal Court of Justice, Germany has more specialized courts such as the Federal Administrative Court (Bundesverwaltungsgericht), the Federal Finance Court (Bundesfinanzhof), the Federal Labor Court (Bundesarbeitsgericht), and the Federal Social Court (Bundessozialgericht), which are all supreme in their discrete area of the law.
when his driver shot the man. In so holding, the court rejected the officer’s defense, based on an explicit provision of the Civil Code, that the state was primarily liable for the torts of its civil servants.26

Another case involved a group of Gestapo members who helped arrest Jews and send them to death camps.27 The Gestapo members were initially found not guilty as accomplices to kidnapping and murder on the grounds that they could not be assumed to know that the ultimate purpose of their work was mass murder because they thought that they were following a valid law. The Court of Justice on appeal, however, rejected the Gestapo members’ defense, and explained that no one could be excused for not knowing “these few basic norms for human living together—these fundamental norms of justice related to the dignity of the human person.”28 In a third case, the Court of Justice also recognized the rights of those whose property had been confiscated by the Nazi regime to reclaim their property, even though the confiscations had been ordered by law; these unjust laws were “null and void” ab initio.29

Besides involving Nazis—for whom it is hard to feel sympathy—all three of these cases show the German Court of Justice exercising a strong form of judicial review and invoking notions of natural law or personal dignity in order to ensure justice. But, in all these cases the court, while it did not hesitate to strike defenses pleaded by individual defendants, nevertheless did not go so far as to develop new causes of action or to tell the current German Bundestag (rather than the dead and discredited Hitler) to amend its laws to provide remedies not already recognized by statutory law. These early cases display the origins of a strong judiciary and a more common-law approach, but further development was needed. That development would be

27 Id. at 11.
28 Id. at 12.
29 Id. at 14-15.
left to another area of law, completely separate from Nazi atrocities: the right to the free
development of one’s personality, guaranteed by Article 2 of the Basic Law. And that
development can best be seen in the *Soraya* case of 1973.

3. *Soraya* and the General Right to Personality

The facts of the *Soraya* case are straightforward enough. Princess Soraya was the ex-wife
of the Shah of Iran who, after her divorce from the Shah, left Iran and moved to Germany to
embark on a career as an actress. Her beauty, her royal connections, and her position in the
entertainment world inevitably made her a target of the tabloids. On April 29, 1961, the German
newspaper *Die Welt* published a purported interview with Princess Soraya in which she revealed
intimate and embarrassing details of her private life. It turned out, of course, that *Die Welt* had
never spoken to the princess, but instead paid a journalist to fabricate the entire interview. Soraya
sued *Die Welt* for damages for libel and, after taking her case all the way to the Court of Justice
and to the Constitutional Court, prevailed.30

Even in the United States, under the strict actual malice standard of *New York Times v. Sullivan*,31 which makes it extremely difficult for public figures to recover for defamation, any
court would award damages to a plaintiff who could prove that a newspaper with a national
circulation had made up an interview out of whole cloth. Furthermore, even though under
*Masson v. New Yorker Magazine, Inc.* a journalist’s false quotation of a public figure must effect
a “material change in meaning” before it can constitute defamation,32 there was no real doubt in
Princess Soraya’s case that what *Die Welt* had done constituted defamation.

30 These facts come from section B1 of the Constitutional Court’s opinion: 34 BVerfGE 269. German cases are not
named after their parties, as they are in the United States, but are simply cited by their positions in the official law
reports. Some German cases, however, have achieved such fame that they have received informal names, like
*Soraya*.
31 376 U.S. 254 (1964)
What provoked such heated discussion in Germany—besides the public’s prurient interest in sensationalistic stories about a beautiful princess, a phenomenon familiar to Americans from the press’s morbid fascination with the late Princess Diana—was the legal grounds on which the case was decided. The thorniest problem in Soraya was not the limitation the court was imposing on the freedom of the press, as it would be under the First Amendment of the United States Constitution. Article 5(2) of the Basic Law expressly states that freedom of press and freedom of expression “find their limits in the provisions of general statutes…in the right to respect for personal honor.”33 Rather, the central problem in German law was that § 253 of the Civil Code, which governed libel actions, did not provide for monetary damages; the only remedy was an injunction against the publisher.34

In order to recognize a libel action for damages, the Constitutional Court had to thoroughly revise the relevant section of the Civil Code. Rather than reading § 253 to forbid monetary damages—as it had been read by German courts ever since the enactment of the Civil Code in 1900—the court decided to read the statute as simply containing a gap (lückenhaft). The court then faced the key question of what it was to do about a gap in the statute, and answered that “Where th[e written law fails], the judge’s decision fills the existing gap by using common sense and ‘general concepts of justice established by the community.’”35 No statute specifically granted the Constitutional Court authority to fill gaps in statutes. Instead, the court relied on the distinction between statutory law (Gesetz) and justice (Recht) in Article 20(3) of the Basic Law,36 when it stated that “[j]ustice is not identical with the aggregate of the written laws.”37 The Civil Code had become outdated, and it was the Constitutional Court’s duty to “explore what

33 Currie at 344.
34 Currie at 198, n. 95. See also Kommers at 124.
35 Kommers at 125 (this is a quotation from the decision).
36 See Currie at 198, n. 95, and 351.
37 Kommers at 125.
reasonable function the [norm] initially served,” and to update it accordingly in accord with contemporary social conditions.

These kinds of statements would not shock most American lawyers trained in the common-law method of adjudication. They only prove difficult for textualists and originalists, such as Justice Scalia.

In Germany, on the other hand, these statements were controversial because they represented the final break with the tradition of legal positivism. The Constitutional Court’s summary of Die Welt’s position in the litigation could also stand as a summary of what many scholars thought of the decision: “In the instant case, the complainants object not only to the result of the civil courts’ decisions; they object above all to the way the courts reached the result.” The court, though, apparently was fully conscious of the gravity of its decision, but felt that it was necessary to renounce legal positivism in order to maintain fidelity to the Basic Law’s call for judges to “honor and respect” the individual’s right to the development of his personality.

One intriguing fact surrounding Soraya is that it took the Constitutional Court over eight years to decide the case. The Court for Justice announced its decision in December 1964, but the Constitutional Court did not decide the appeal until February 1973. Shortly before the Court of Justice’s decision came down, the Bundestag had considered and rejected a proposal to allow monetary damages in defamation cases, just as it had in 1959. It appears that the court wanted to give the Bundestag one last chance to change the law and thereby save face. But, because the Bundestag never acted on the proposed statutes, the court concluded that “to wait for legislative regulation [to amend the Civil Code] cannot be regarded as constitutionally mandated under the circumstances.”

---

38 Id. at 126.
39 C1 of Soraya, 34 BVerfGE 269 (1973) (my translation).
40 See section A4 of Soraya (not included in Kommers’ translation).
41 Kommers at 127.
beyond merely using notions of justice or natural law to prevent a former Nazi from claiming the
law as a shield against punishment for his wrongdoing, but actually insisting that the legislature
provide an adequate remedy for violations of the general right to personality. Perhaps more
importantly in the long run, however, was that in embracing a stronger form of judicial review
than Germany had ever known, the Constitutional Court moved away from the influence of
Wintrich and Rommen, who promoted natural law, and toward a more “sociological” approach
and toward a more Kantian approach, in their interpretation of human dignity and the right to the
free development of one’s personality. The Constitutional Court found a way to incorporate
values into the law through the emphasis on the freedom of personality.

The result achieved in Soraya, it must be noted, was in reality the end of a line of cases
interpreting Articles 1 and 2 of the Basic Law.42 Interestingly enough, the court that took the lead
in this development of constitutional jurisprudence was the Court for Justice, and not the
Constitutional Court,43 though it was the Constitutional Court that granted legitimacy to the
lower court’s approach to Articles 1 and 2 in the famous Lüth case.44 In Lüth the Constitutional
Court first developed the doctrine of “indirect horizontal effect.” This doctrine gives German
courts the authority to review decisions of private law to ensure that they accord with the basic
substantive values enshrined in the Basic Law, especially what came to be known as the general
right to personality.

The substance of this vague-sounding right turns out to be similar in many ways to the
rights that the United States Supreme Court has held are guaranteed by the due process clause of
the 14th Amendment. Some early cases decided by the Federal Court of Justice held that the
right to personality gave individuals control over the distribution of one’s own writings as well

43 Id.
44 7BVerfGE 198 (1958).
as access to one’s medical records. “[T]his ‘general right of personality’ includes, among other things, certain aspects of what is referred to as ‘privacy’ in American law; the prevailing view is that these rights—and a number of others—are emanations of a central core of human personality.” Professor Quint’s reference to “emanations” recalls the basis of the right to privacy formulated by Justice Douglas in *Griswold v. Connecticut*.

The second important effect of the general right to personality is that it forms one of the most important bases for judicial review in Germany, similar to the function fulfilled by the due process clause in the United States. The authority possessed by German courts to review laws for agreement with the Basic Law is usually characterized as being greater than the authority possessed by American courts to subject private law to Constitutional scrutiny under the state action doctrine because the state action doctrine permits American courts to apply the Constitution only when the alleged infraction on one’s personal rights is committed by a state actor. However, this distinction between the German and American doctrines is somewhat overstated. Indeed, in the area of libel suits between private citizens, the United States Supreme Court has been as willing to apply the First Amendment—despite the absence of truly recognizable state action—as the German Constitutional Court has been to apply Articles 1 and 2 of the Basic Law. The results have been the opposite—plaintiffs in the United States have a hard time, in Germany plaintiffs have a better chance—but the procedure the courts in each have used for altering the pre-existing libel law (common law in the United States and the Civil Code in Germany) has been quite similar. In the United States, the Supreme Court in *New York Times v. Sullivan* re-wrote the common law of libel to provide additional protection to 1st Amendment free speech rights, while in Germany the Constitutional Court essentially amended the Civil

---

45 Quint, *op. cit.*, at 279.
46 *Id.*
47 381 U.S. 479, 484 (1965).
Code to provide protection to the individual’s right to his personal honor and dignity. One more important difference must be noted. While in Germany the Constitutional Court speaks of the values of the Basic Law having an indirect effect on private law, in the United States the Supreme Court states that it is applying the substance of the First Amendment to the states through the due process clause of the 14th Amendment. This all-important clause, which is general almost to the point of vagueness, has played an analogous role in the expansion of judicial review in the United States as the general right to personality has in Germany.

4. The General Right to Personality Compared with Substantive Due Process

As American commentator David Currie has remarked, Article 2(1) of the Basic Law, which guarantees the right to the free development of one’s personality, “epitomizes substantive due process” and is the “ultimate guarantor of substantive due process in Germany.” As just seen, the “general right to personality” and “human dignity” are vague concepts in German constitutional jurisprudence, but have been extensively used to expand the scope of the judiciary’s power and even to establish new private causes of action in the same way that common-law courts have done throughout history. The important role these two articles have played in the development of German constitutional doctrine and in the strengthening of the German judiciary, despite their lack of a clear meaning, demonstrate the truth of the comparison Currie draws between them and “substantive due process,” an equally unclear yet equally crucial doctrine in American constitutional law. While in Germany the Constitutional Court has followed the Basic Law’s mandate to “respect and protect” human dignity and the right to the free development of one’s personality and established the legitimacy of their use in constitutional adjudication in *Soraya*, the United States Supreme Court has struggled with substantive due

---

48 Currie at 316.
49 Id. at 321.
process, from the doctrine’s first appearance in the infamous decision of *Dred Scott v. Sandford*, through its abuse during the *Lochner* era, and its prominence in the three cases at the heart of the contemporary culture wars: *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Lawrence v. Texas*. In this most recent case, this clause reached its most far-reaching effect, and became vaguer than ever, in Justice Kennedy’s ode to liberty.

For a brief period after the New Deal—especially after *West Coast Hotel Co. v. Parrish*—the Supreme Court, wishing to avoid the excesses of the *Lochner* era when it had struck down many economic regulations enacted by Congress and state legislatures, refrained from applying the theory of substantive due process in its decisions. However, the Court soon became more interested in social questions in the 1950’s, pursuant to the famous footnote four of *United States v. Carolene Products Co.*, and this interest only increased in the following decades. During the 1960’s, the Court found a right to privacy in the Constitution, but based that right on the “penumbras, formed by emanations from those guarantees” contained in the Bill of Rights. It was not until *Roe v. Wade*, decided in 1973, that the Court would openly assert its authority under the due process clause of the 14th Amendment to review morals legislation. Even in *Roe*, though, the Court failed to specify how exactly the right to privacy was found in the due process clause. This vagueness has remained a hallmark of the Supreme Court’s substantive due process jurisprudence. One good example of that is Justice Kennedy’s “sweet mystery of life” passage in *Casey*: “At the heart of liberty is the right to define one's own concept of

---

50 60 U.S. 393, 450 (1857).
52 410 U.S. 113 (1973).
55 300 U.S. 379 (1937).
56 304 U.S. 144, 152, n. 4 (1938).
57 381 U.S. 479, 484 (1965).
existence, of meaning, of the universe, and of the mystery of human life." Nevertheless, the one clear result of this substantive due process jurisprudence is that the Court has won for itself the authority to review a wide range of legislation, in the name of upholding individuals’ right to self-determination. Parties seeking to challenge social legislation now routinely file complaints in federal court.

5. Justice Scalia’s Version of Legal Positivism

The most vocal critic of the Court’s reliance on substantive due process, and the author of well-known dissents in the area of individual rights and laws based on morality, is Justice Antonin Scalia. The due process clause has become, for proponents of the “living Constitution,” the most reliable provision of the Constitution used for smuggling “new rights in, if all else fails.” He has attacked the very notion of “substantive due process” (his scare-quotes) as illegitimate, since the text of the 5th and 14th Amendments refers only to process and not to substance.

What is of primary interest from the perspective of comparative constitutional law is not so much Justice Scalia’s conclusions regarding the substance of these rights but how he reaches his conclusions. What Justice Scalia prefers over the idea of substantive due process is the two-part judicial philosophy of textualism and originalism. This philosophy bears a strong resemblance to the legal positivism that dominated German law before the promulgation of the Basic Law in 1949. While there are some important differences between Justice Scalia and the legal positivist it is not improper to group the two together, as time and time again Justice Scalia

Id. at 24.
has argued strenuously in favor of his own textualist and originalist legal philosophies and against the consideration of “supralegal obligations” by judges.

The first basic similarity lies in Justice Scalia’s marked preference for statutory codes over common-law methods of adjudication. Indeed, his essay in *A Matter of Interpretation*, which announced the need for American lawyers and judges to learn the art of statutory interpretation, bears the title “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws.” Justice Scalia’s argument in this essay is that federal judges, who must deal every day with complex statutory codes promulgated by Congress and relatively infrequently with the common-law causes of action bequeathed to America by England, should set aside their training in the common law and adopt the methodology of the continental European civil law judge. Although Justice Scalia does acknowledge that no statute can cover all contingencies and that some gaps in the law will need to be filled by judges, the basic tendency of his jurisprudence—with its emphasis on the interpretation of written law—is to try to transform statutes into fail-proof rules. This tendency does not differ greatly from how the legal positivists viewed statutory codes.

The “essence of the judicial craft,” Justice Scalia explains, is to give “even the most vague and general text” some “precise, principled content.” The word “principled” in Justice Scalia’s vocabulary, however, does not mean something like “implementing the proper values,” but rather “deducing the meaning of a text from the correct canons of interpretation.” Moreover, the word “precise” is roughly equivalent to “predictable.” Justice Scalia praises predictability as

---

62 *Id.* at 3-47.
64 See *supra*, p. 3.
the essence of the Rule of Law. One corollary to this praise of predictability, which he makes explicit, is that “[t]here are times when even a bad rule is better than no rule at all.” Every parent knows that arbitrary rules can work best in practice since they apply equally to all one’s children rather than distinguish according to the actual situation. What matters is that the rule is clear and predictable in its application.

Justice Scalia’s insistence on strict adherence to the letter of the text (as opposed to the “spirit of the law”) and the formulation of precise, predictable rules restrains judges’ discretion, as it is intended to do. This effect points to Justice Scalia’s second important point of agreement with the legal positivists: an overriding concern that encouraging judges to make “value judgments” will lead to judicial activism. For example, in his dissent in *Casey v. Planned Parenthood*, Justice Scalia protested that the Court should not even be addressing the question of abortion. His primary reason for so concluding was his argument that the Court was not applying legal reasoning or “reasoned judgment” in defining liberty, but “rattl[ing] off a collection of adjectives that simply decorate a value judgment and conceal a political choice,” which is equivalent only to the other justices’ “personal predilection.” The truth, though, is that “[t]he people know that their value judgments are quite as good as those taught in any law school—maybe better.” Indeed, this fear of “judicial absolutism” was one of the primary motivations behind Germany’s embrace of legal positivism.

---

66 Id. at 1179.  
67 Id.  
68 Id. at 1178.  
69 505 U.S. at 1002.  
70 Id. at 983.  
71 Id. at 984.  
72 Id. at 1001.  
73 Scalia may very well be right that unfettered judicial discretion can lead to tyranny, in certain historical circumstances. What is being argued in this paper, however, is that Scalia’s preference for judges who do not consider morality in their decisions is also problematic and can be conducive to tyranny, as the example of German history amply demonstrates.
Justice Scalia’s fear of judicial absolutism, however reasonable it may be in the present historical circumstances, degenerates at times from a justified formalism into a crude voluntarism, in which whatever the law is simply whatever legislatures enacts. This problem comes through most clearly in his criticism of judges who rely on legislative history in the interpretation of statutes. While many of his pragmatic objections to the practice of consulting legislative history are quite cogent (e.g., much of the legislative debate is artificial and purposely aimed at influencing judges), Justice Scalia goes so far as to say that a statute enacted by Congress is still the law, even if no one read it before voting on it. Justice Scalia’s main criterion for whether a statute enacted by Congress is constitutional, then, would seem to be whether it follows the procedure for passing laws laid out in Article I of the Constitution. This voluntaristic conception of law as whatever 535 legislators decide upon—provided it follows a certain procedure—turns the natural-law conception of law as an “ordinance of reason” on its head. It is also deeply at odds with the view behind the theory of substantive due process that some acts of the legislature, even if performed in accordance with the strictest legal procedures, are nevertheless illegitimate.

6. Justice Scalia’s Difference

The main difference between Justice Scalia and a more thoroughgoing legal positivist such as Kelsen points to the paradox in Justice Scalia’s jurisprudence. While Kelsen insisted that the “is” and the “ought” have nothing to do with each other, and thus denied any objective basis for morality in law and perhaps even in private life, it is quite clear from some of Justice Scalia’s spirited dissents that he has strongly-held moral beliefs. Indeed, one of the main tenets of his legal philosophy is that moral beliefs should be considered in the making of law, but by

---

74 Scalia, A Matter of Interpretation, 34.
75 Thomas Aquinas, Summa Theologiae, I-II, q. 90, art. 4: Law is “nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”
legislatures and not by courts. Whereas Kelsen insisted on strict adherence to legal rules in an effort to purify law of moral, political, and ideological considerations, Justice Scalia has developed textualism and originalism as a way of retaining certain moral values in American law. What Justice Scalia fails to realize, however, is that his claims to judicial neutrality will not safeguard the morality he seeks to preserve.

The impulse behind Justice Scalia’s quest to preserve traditional morality by means of a rigid textualism is the increasing distance he perceives between the legal profession’s progressive values and the conservative values of the majority of the country. He is afraid that the legal profession as a whole, and the federal courts in particular, are taking sides in the culture wars that have divided the United States since the 1960’s. This concern that the Court and the people have become estranged can be traced through a number of his dissents in controversial cases relating to the culture war. He first gave a hint of it in his 1992 dissent in *Casey*: “[I]f, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better.”76 In *Romer v. Evans* Justice Scalia would once again raise the specter of the culture wars, beginning his dissent with: “The Court has mistaken a Kulturkampf for a fit of spite…This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected.”77 The result of the majority ruling in *Romer* was to “frustrate Colorado’s reasonable effort to preserve traditional American moral values.”78 This theme of a nation divided between the elite and the people on moral questions appears again in *Lawrence v. Texas*, where Justice Scalia made perhaps his baldest

76 505 U.S. at 1000-1001.
78 Id. at 651.
statement about the direction the Court was taking in its jurisprudence: “Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”79 The Court should instead be a “neutral observer” in the culture wars,80 because it is “the premise of our system that those [value] judgments are to be made by the people, and not imposed by a governing caste that knows best.”81

Justice Scalia’s dissents in these major culture war cases reveal two closely connected concerns in his jurisprudence. The first concern, which is more generally political in nature, is the fact that the nation’s elites and the American people share widely differing worldviews. The second concern, which is more narrowly legal, is that the Court is doing something that is illegitimate on a legal level: imposing values. Justice Scalia believes that the best way to counteract the first problem is to attack the second problem: the best way to defend the traditional values of the people is to prevent the elites from imposing their values on the people by the use of a strict textualist and originalist interpretation of the laws.

That Justice Scalia supports traditional values can be seen not only from the tenor of his dissents in the controversial culture war cases, but also from his use of tradition as a supplement to the text. In Casey, for example, Justice Scalia looked to the “longstanding traditions of American society” to determine whether it was permissible to enact restrictions on abortion.82 His reliance on tradition becomes more obvious in cases in which he writes the controlling opinion, such as District of Columbia v. Heller, where he references firearm regulations in the

---

79 539 U.S. at 602.
80 Id.
81 Id. at 603-604.
82 505 U.S. at 980.
19th century to support his position that some restrictions on the right to bear arms are constitutional. Another example of an opinion that relies on tradition to interpret the meaning of substantive due process was not written by Justice Scalia, but rather by Chief Justice Rehnquist, is *Washington v. Glucksberg.* (Justice Scalia concurred in Chief Justice Rehnquist’s opinion and later explicitly approved of the *Glucksberg* method in his dissent in *Lawrence.* ) Nevertheless, for Justice Scalia tradition must never be considered apart from the text of the Constitution. In *Casey,* for example, before citing to tradition, the first place Justice Scalia looked for support was the text of the Constitution. Moreover, even in practical application of his textualist-originalist jurisprudence, Justice Scalia emphasizes text over tradition. In *Heller,* for instance, the detailed grammatical analysis of the Second Amendment takes up far more space than any discussion of American legal traditions.

Justice Scalia’s use of tradition shows the key difference between him and Kelsen. Both wanted to limit the discretion of judges to make value judgments, but whereas Kelsen developed positivism in order to prevent values from influencing the law in any way, Justice Scalia has devised his new jurisprudence in order to secure a place for traditional values within the law.

**7. Conclusion: The Failure of Kelsen’s Positivism and Justice Scalia’s Textualism**

Yet in the end both Kelsen’s positivism and Justice Scalia’s textualism fail because neither recognizes that values must be defended on their own ground; there is no way to exclude them *a priori* or defend them solely on “pure” legal grounds. They must be grounded on something more basic. They promise to purify law and adjudication of ideological content, but

---

85 539 U.S. at 588.
86 505 U.S. at 980.
cannot. Moreover, both desired to limit the power of judges, yet it is the role of judges to examine the various value judgments in controversy in every case.

Kelsen’s positivism represents an attempt to exclude values *a priori* from the law on the basis that they are completely unknowable. The complete separation of the “is” from the “ought” is an absolute assumption for Kelsen. (He does not attempt to prove it as Hume attempted.) Positivism failed in Kelsen’s “pure theory,” as well as in practice in the one specific jurisdiction where it gained wide acceptance, Germany between the two world wars. The reason is quite simple: in crisis situations, certain values become self-evident. In the case of Germany, that crisis was the twelve years of National Socialist rule from 1933 to 1945. The idea that there are no *mala in se*, but only *mala prohibita*, became absurd in the face of the long list of atrocities committed by the Nazis. To ask a judge to become complicit in *mala in se* is not to be tolerated.

Justice Scalia’s failure is more subtle, because unlike Kelsen, he does not deny the existence of objective values. His textualism and originalism instead represent an attempt to defend traditional values on “pure” legal grounds, to reserve values for the legislature. He delights, in dissents like in *Lawrence*, in exposing the non-neutrality of the other justices on the Court, but always claims to be neutral himself in deferring to the legislature or to the people. In this context, though, Justice Scalia’s exhortation to the Supreme Court to remain “neutral observers” in the culture wars is a call to remain agnostic as to the values chosen by the legislature. In the end, though, the respect due the legislature becomes absurd in the face of statutes that have not been read by the legislators.

This attempt to restrict values only to legislation leaves Justice Scalia in a bind: His criticism of his judges is obviously based on his adherence to traditional values, but because he excludes values from adjudication any appeal to tradition to justify them becomes a “told you
so.” In times of culture wars—in a true cultural crisis—these traditional values must be defended not merely by an appeal to tradition (as important as tradition is), but by an appeal to their intrinsic value. That appeal to intrinsic value is what is lacking in Justice Scalia’s jurisprudence, since neutrality with regard to fundamental values is not possible. An appeal to tradition, in Justice Scalia’s jurisprudence, becomes then not the “democracy of the dead” but the “voluntarism of the dead.” With his textualism and voluntarism Justice Scalia can only help traditional values to maintain the ground it already has, but not conquer any new ground. He is fighting a holding action—a very fierce holding action, but a holding action all the same.

In Germany, on the other hand, the Constitutional Court has concluded, due to its sad experience of positivism in the first half of the 20th century, that a value-free jurisprudence is neither possible nor desirable. The Constitutional Court has also concluded that judicial review can serve a positive role in the law. Recognizing the need for some grounding such as human dignity, the Constitutional Court has spoken of an “objective order of values” (objektive Werteordnung) established by the Basic Law. Such language of “an objective order of values” may sound foreign to American ears, used to thinking of courts as completely separate from legislatures, but it also speaks to some of the basic ideas of fundamental fairness and equal protection found in the 14th Amendment.

Soraya shows how a high court can respect the traditional values, yet acknowledge the failures of the past, and move forward, but not in an overly radical way. Indeed, Soraya offers a perfect example of the “essence of the judicial craft,” which according to Justice Scalia himself is to give “even the most vague and general text” some “precise, principled content.” Such language of “an objective order of values” may sound foreign to American ears, used to thinking of courts as completely separate from legislatures, but it also speaks to some of the basic ideas of
fundamental fairness and equal protection found in the 14th Amendment. The challenge then, as posed by Mary Ann Glendon, is whether the United States Supreme Court will find a way to do the same thing here: “Our legal culture also explains why many American friends of democratic and rule-of-law values have been driven to espouse what most civil lawyers would regard as excessively rigid forms of textualism. As Dawson put it, ‘We have much to learn from German law and should be willing to admire the German achievement. It does not follow that we have the means to emulate it.’”87

---