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MEMORIAL:  
DAVID CURRIE AND GERMAN CONSTITUTIONAL LAW

## German Equal Protection: Substantive Review of Economic Measures

By Edward J. Eberle\*

*“Denn nur durch Vergleichung unterscheidet man sich und erfährt, was man ist, um ganz zu werden, was man sein soll.” – Thomas Mann\*\**

### A. Introduction

David Currie devoted a substantial part of his scholarly work to exploring the intricacies of constitutional law, focusing intently on the United States and German constitutional orders. Along with Donald Kommers, Currie was among the first to closely examine the German constitutional system in a search for elucidation. As the quote by Thomas Mann (which he used in his seminal book, *The Constitution of the Federal Republic of Germany*) illustrates, if we truly want to aspire to realize our talents and ambitions, it is important to look outside national borders to see how things are done elsewhere to discover if there are ways in which we can improve. Staying within the “City upon a Hill,”<sup>1</sup> as many Americans identify the United States, may lead to insularity or, even, a sense of false confidence. Which is why the task of comparative law is so important: looking outside national borders to see what other perspectives are out there, and then comparing and contrasting the foreign and domestic to learn which, upon consideration, is better or worse and for what reasons.

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\*Distinguished Research Professor of Law, Roger Williams University School of Law. Copyright by Edward J. Eberle, 2007. All rights reserved. All translations are mine unless otherwise noted. Email: eberle@rwu.edu.

\*\*“For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be.” THOMAS MANN, JOSEPH IN AEGYPTEN (1933) (quoted and translated in DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* (1994)).

<sup>1</sup> John Winthrop, *The City Upon a Hill; the Covenant; The New Israel and the Separated Garden, Sermon on Christian Charity (1630)*, in *RELIGIOUS FREEDOM, HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 122-23* (John Noonan, Jr. and Edward McGlynn Gaffney, Jr. eds., 2001).

That is what David Currie did in his work, focusing on the German constitutional order in comparison to the American in a search for illumination and perspective. Currie observed a number of notable differences between the two systems. These included the idea of positive as well as negative rights.<sup>2</sup> Negative rights, of course, mean a fount of personal freedoms that individuals can exercise to delimit state power. Both the United States and Germany share this conception of rights. A difference in the two constitutional orders, however, is that the German system contains a positive dimension to rights as well, obliging the state to act proactively to protect its citizens. In substantial part, this idea is grounded in the *Sozialstaat* (social justice) principle of article 20(1) of the German *Grundgesetz* (GG - Basic Law), which obligates the state to provide a measure of social justice for all people.<sup>3</sup> The commitment of Germany to a constitution of human dignity plays a significant role as well, as it is the obligation of the state to guarantee a certain minimum of material and mental security so that all citizens can realize their potential.<sup>4</sup>

The social justice principle influences a number of other provisions of the Basic Law. For example, Article 6(1) provides marriage and family rights, stating that "Marriage and family shall enjoy the special protection of the state." Article 6(2) provides that "The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The State shall watch over them in the performance of this duty." Article 6(4) states that "Every mother shall be entitled to the protection and care of the community." Article 6(5) provides that "Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage." Article 7(1) provides that "The entire school system shall be under the supervision of the state." Article 14(2) recognizes a communal obligation to property, establishing that "Property entails obligations. Its use shall also serve the public good." And Article 15 constitutionalizes the principle of socialization (that is, state control of resources), should the need arise: "Land, natural resources, and means of production may for the purpose of socialization be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation." Such positive state obligations are largely absent from the American constitutional

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<sup>2</sup> See DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 13-17 (1994).

<sup>3</sup> GRUNDGESETZ (GG - Basic Law/Constitution) art. 20(1), translated by Christian Tomuschat and David Currie and published by the Press and Information Office of the Federal Republic of Germany. "The Federal Republic of Germany is a democratic and social federal state."

<sup>4</sup> GRUNDGESETZ (GG- Basic Law/Constitution) art. 1(1) ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.").

order.<sup>5</sup>

Other notable characteristic differences present in the German constitutional order include the idea of *Drittwirkung* (third party effect), pursuant to which the values of the Basic Law radiate out and influence the interpretation of private law. The effect also can flow in the other direction; private law norms can influence the interpretation of constitutional norms. This is known as the theory of *Wechselwirkung* (reciprocal effect).<sup>6</sup> Under religious freedoms, rights extend to secular philosophical beliefs as well as faith-based beliefs, and “No person shall be compelled against his conscience to render military service involving the use of arms.”<sup>7</sup> And, as observed by Currie in his book, “Among the more startling aspects of the Basic Law to an observer from the other side of the Atlantic is a set of provisions that appear to embody Milton’s view that the enemies of freedom are not entitled to its blessings.”<sup>8</sup> This, of course, is the concept of *streitbare Demokratie* (militant democracy) whereby the state and its citizens can take measures to fight the enemies of democracy.<sup>9</sup> Applying the concept of militant democracy, the German Constitutional Court has twice banned political parties.<sup>10</sup>

Another intriguing aspect of German constitutional law is the Constitutional

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<sup>5</sup> See, e.g., *DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189 (1989) (refusing to recognize any positive obligation of government to intervene to protect the life and well-being of a child who the state knew was being abused by his father.).

<sup>6</sup> The decisive case is *Lüth* (BVerfGE 7, 198 (1957)), which involved a communication rights dispute over the right of a film director formerly closely associated with the Nazis to show his new films at a Hamburg film festival. In overturning an injunction prohibiting Lüth from continuing his call for a boycott of the film, the Court delineated the value order of the GG. “This value-system, which centers upon human dignity and the free unfolding of the human personality within the social community, must be looked upon as a fundamental constitutional decision affecting all areas of law, public and private. . . . Thus, basic rights obviously influence civil law too.” BVerfGE 7, 198 (205). By interpreting basic rights as establishing an “objective” ordering of values, the Court was stating that those values are so important that they must exist “objectively”—as an independent force, separate from their specific manifestation in a concrete legal relationship. So conceived, objective rights form part of the legal order, the *orde public*, and thereby possess significance for all legal relationships. For further consideration of the “Third Party Effect Theory,” see Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 811-12 (1997); Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 261 (1989).

<sup>7</sup> GRUNDGESETZ (GG- Basic Law/Constitution) art. 4(1) and 4(3).

<sup>8</sup> CURRIE, *supra* note 2, at 213.

<sup>9</sup> GRUNDGESETZ (GG- Basic Law/Constitution) art. 21(2).

<sup>10</sup> See BVerfGE 5, 85 (1956) (outlawing the Communist Party); see also BVerfGE 2, 1 (1952) (outlawing the Socialist Reich Party, successor to the Nazis).

Court's serious consideration of economic measures, a particular interest of Currie's. As he observes, "the Constitutional Court has achieved results reminiscent of those reached by the Supreme Court during the *Lochner* period."<sup>11</sup> The Constitutional Court judged the reasonableness of economic measures to see if they passed constitutional muster in a manner not unlike the Supreme Court during the *Lochner* period (1905-1936) where it invoked the due process clause to invalidate state measures<sup>12</sup> and applied a restrictive view of the Commerce Clause to invalidate federal measures.<sup>13</sup> Under German law, the Constitutional Court has invoked Article 2 (personality freedoms), Article 3 (equality freedoms), Article 12 (occupational freedoms), and Article 14 (property freedoms) to scrutinize with care the reasonableness of state measures that affect economic matters along the lines of the *Lochner* Court.<sup>14</sup>

In this short article commemorating the life and work of David Currie, I will examine one aspect of the *Lochnerian* approach of the German Constitutional Court: the careful scrutiny of economic measures under the equality norms of Article 3. The article will proceed by laying out the judicial standards the Court applies to equality and then demonstrating how it applies them to economic measures. Standard socio-economic measures can be subject to a probing form of review if they present overt inequalities among similarly situated groups. That is, disparate treatment of different groups can only be justified by a convincing rationale. If no such disparity is present, the measure will be presumptively upheld if an evident reason is present. This is not unlike the low-level deferential standard of review of rational basis under United States law. So, let us pick up the threads of a piece of the fine work left by David Currie.

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<sup>11</sup> David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333, 348. ("Lochner Abroad"). Republished in this issue of the *German Law Journal*.

<sup>12</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>13</sup> See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>14</sup> See Currie, *supra* note 11, at 339-52.

## B. German Equality Norms

The German Basic Law is quite concrete as to what equality means, providing much textual guidance to the German courts and legislatures, as is typical of post World War II constitutions. Article 3 of the Basic Law provides:

- (1) All persons shall be equal before the law.
- (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
- (3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.<sup>15</sup>

As is apparent from the text of the German charter there are a fairly substantial number of personal traits demarcated as special equality norms, including gender, "sex, parentage, race, language, homeland and origin, faith, or religious or political opinions." All of these traits are immutable, except for those involving language, faith, religion or political opinion, over which a person can exert control. The wide number of demarcated personal traits present in the Basic Law contrasts with the open ended text of the United States Fourteenth Amendment, which provides "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." As with much of American constitutional jurisprudence, it is up to the Supreme Court to identify traits it would regard as suspect. So far, despite over 60 years of Supreme Court jurisprudence, American equality jurisprudence recognizes only race or national origin<sup>16</sup> and alienage as suspect classes.<sup>17</sup>

In spite of the difference in the textual foundations with which they have to work, both Courts employ a sliding scale of judicial scrutiny with the degree of scrutiny varying with the trait or personal interest affected by the governmental measure. Strict or extremely intensive scrutiny applies to measures targeting personal traits

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<sup>15</sup> GRUNDGESETZ (GG- Basic Law/Constitution) art. 3. Much of the discussion on equality is derived from Edward J. Eberle, *Equality in Germany and the United States*, San Diego Int'l L. J. (forthcoming).

<sup>16</sup> See *Korematsu v. United States* 323 U.S. 214 (1944).

<sup>17</sup> See *Sugerman v. Dougall*, 413 U.S. 634 (1973)(suspect class treatment for alienage status applies only to state governmental actions, and not federal governmental, and only when state governmental measures cannot be justified under public function doctrine.).

that affect especially a person's identity. Again, under U.S. law this includes race, national heritage or alienage in United States law. Under German law it includes race, sex, gender, language, national origin, disability or faith, religion and political opinion in German law.<sup>18</sup> More deferential judicial review is reserved for matters involving socio-economic measures with an important difference present in German law. The German Constitutional Court probes rigorously even matters of a socio-economic dimension if the law under review affects different groups of people unequally and no persuasive justification for the disparity is evident. Let us turn now to examine the Constitutional Court's approach to enforcing the principle of equality to socio-economic measures.

### C. Socio-Economic Measures

In socio-economic matters the level of review varies under German law. First, if the measure triggers a fundamental right other than equality and/or it results in disparate treatment of similarly situated groups, the Constitutional Court will intensify the degree of its scrutiny and sustain the measure only if quite convincing reasons are present; in essence, this is a form of intensive scrutiny. The closest parallel in United States equal protection jurisprudence to this heightened form of review might be the intermediate scrutiny it applies to gender-based discrimination. With regard to the German context I will refer to it as heightened review. It is a more rigorous examination of the state's justifications for drawing distinctions in socio-economic matters than the more standard form of rational basis review typically applied and pursuant to which the Constitutional Court probes the inequality resulting from the measure and sustains it if there is a sound reason to justify the difference. If neither a dramatic inequality exists nor any other right or group differential is present, the Constitutional Court will sustain the measure if there is a sound explanation.<sup>19</sup> What these different levels of review applied to inequalities in socio-economic policy indicate is that the Court varies its scrutiny based on the degree of inequality present. Even review of socio-economic matters can be rigorous. We will now turn to an examination and explanation of the sliding scale variety of review applied to socio-economic matters, starting with heightened review.

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<sup>18</sup> See GRUNDGESETZ (GG- Basic Law/Constitution) art. 3.

<sup>19</sup> See the *Transsexual II Case* (BVerfGE 88, 87 (96-97) (1993)) ("When only the simple prohibition against arbitrariness (*Willkuerverbot*) comes into play, a violation of article 3(1) can be established only when the lack of substantiation of the difference in treatment evident is."). This is generally known as the arbitrariness or evident standard, meaning that an evident reason must be present to justify the measure. It is the lowest level of review under German law. Its equivalent in United States law would be rational basis review.



The *Retirement Benefits Case*<sup>20</sup> concerned the formula for allocating retirement benefits between public employees and employees who previously had worked in the public sector but had then left to work in the private sector. The Court found the measure unconstitutional because the formula resulted in higher retirement income for public employees as compared to employees who had moved into the private sector. Even though this was a socio-economic regulation the Court nevertheless probed the measure quite intensely based on the unequal treatment of the two generally similarly situated groups and the implication of the policy for Article 12 occupational choice freedoms.

Another case involving heightened scrutiny concerned the computation of income levels of a separated married couple for purposes of obtaining state financial aid for university education.<sup>21</sup> In the *Separated Couple University Aid Case* the couple had been separated for a long time. Under German law the couple's income in such cases ordinarily is counted separately, not jointly. That was not the case here. The applicant for state aid was denied a state grant based on the joint income of both spouses, notwithstanding that they long had been separated. The Constitutional Court invalidated the provision as a violation of Article 3 equality; the measure discriminated against a group of people, here separated couples, without a sound justification. The measure was especially dubious, the Court explained, because most other aspects of German law gave separate treatment to the incomes of long separated couples for purposes of qualifying for benefits. This was the case in areas like welfare or unemployment benefits, or salary or tax matters.<sup>22</sup>

Heightened concern with the disparate treatment of essentially similarly situated groups of people led the Court to declare another socio-economic policy unconstitutional in the *Employee Termination Case*.<sup>23</sup> The case involved disparity in

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<sup>20</sup> BVerfGE 98, 365 (1998).

<sup>21</sup> See the *Separated Couple University Aid Case* (BVerfGE 91, 389 (1995)). Under German law, citizens are entitled to state subsidized support for university education when they do not have adequate financial means to support the costs of university education. The law is known as the federal education support law or *Bundesausbildungsfoerderungsgesetz*. The law is part of the social welfare net.

<sup>22</sup> See BVerfGE 91, 335 (402-03) (1994). In another case, BVerfGE 99, 165 (1998), involving similar concerns regarding state funding of university education, the Constitutional Court found it unconstitutional to deny a student access to state grants for higher education when the student claimed a status independent of his parents, but the parents' income was nevertheless used as part of the calculation to see if the student would qualify for the state grant. In the case, the student was seeking a second education and, under the formula for calculating benefits, the parents' income was not high enough to cover the costs of the education. The Court found no justifiable reason for the difference in treatment of parent dependent and parent independent students. *Id.* at 178, 181.

<sup>23</sup> BVerfGE 82, 126 (1990).

length of notice of termination between physical (or blue collar) and nonphysical or mentally skilled workers (or white collar). Blue collar workers were entitled to two weeks' notice of termination; white collar workers received six weeks' notice of termination. The longer an employee's tenure with an employer the more the minimum length of notice of termination increased. For blue collar employees, ten years employment triggered two months' notice of termination and twenty years employment required three months' notice. For white collar workers, five years employment triggered three months' notice and ten years employment required five months' notice.<sup>24</sup> In the case that reached the Constitutional Court a woman worked as a tailor in an apparel store for fifteen years. The employer terminated her employment with eight weeks' notice, the length of termination having been established by a collective bargaining agreement. Under the collective bargaining agreement white collar employees employed for fifteen years received six months' notice.<sup>25</sup> Because of the differential in treatment of the two groups of employees the Court applied, again, heightened scrutiny.

An unequal treatment of several groups under the same norms is consistent with the general equality norm of Article 3(1) only when the difference between the groups can be justified by reasons of sufficient nature and weight. Disparity in treatment and justifiable grounds must stand in a proportionate relationship to one another. Thereby also to be considered in the balance is whether the inequality will have an effect on basic protected freedoms.<sup>26</sup>

Perhaps a disparity in treatment might be justified when a "generalization impacts negatively only on a small group of people and the inequality is not very severe."<sup>27</sup> In this case there was no adequate justification for the disparate treatment. For example, the idea that white collar workers merit a longer notice of termination period because they are better educated, having invested more time in building a career, is simply not sufficient as a basis for the differential in treatment.<sup>28</sup> The

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<sup>24</sup> *Id.* at 128-29 (citing BGB § 622).

<sup>25</sup> For coverage of the case, see Susanne Baer, *Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L. 249, 250 (1998-99).

<sup>26</sup> BVerfGE 82, 126 (146) (1990).

<sup>27</sup> *Id.* at 152.

<sup>28</sup> *Id.* at 148-49.

Court concluded that this justification may have worked in the past, but no longer.<sup>29</sup> The measure affected a large, not small, group of people; hence, it could not be justified on the second rationale either.

As David Currie observed,

the Constitutional Court has found fault with the exclusion of unemployment benefits for students and for persons formerly employed by their parents, limitations on aid for the blind or disabled, and the denial of retirement benefits to persons living abroad. Some of these decisions may be explainable on the ground that the classification impinged upon some other fundamental right; but the overall impression is that the Constitutional Court is rather strict in scrutinizing classifications in the distribution of welfare benefits as such.<sup>30</sup>

Currie further observed that matters involving tax law also received heightened scrutiny from the Court when the law impacts disparately on people.

[C]lassifications made in tax laws require special justification because of the severity of their impact. A surprising number of such distinctions have been found wanting: discriminatory taxation of chain stores, preferential treatment of vertically integrated firms under the value-added tax, nondeductibility of partners' salaries and of child-care expenses, to name only a few. These decisions stand in sharp contrast to modern decisions in the United States; the Supreme Court has not scrutinized classifications in tax laws with much care since the New Deal Revolution.<sup>31</sup>

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<sup>29</sup> *Id.* at 153.

<sup>30</sup> Currie, *supra* note 11, at 369. For citations to the German cases, *see id.*

<sup>31</sup> Currie, *supra* note 11, at 368-69. For citations to the German cases, *see id.*

Furthermore, Currie noted that “the Constitutional Court has also applied the general equality clause of Article 3(1) to strike down an impressive variety of measures.”<sup>32</sup> He went on, remarking that often the Court will invoke substantive provisions of other rights

to give content to the general prohibition of Article 3(1). Thus, the Court has been quick to condemn discrimination against married people or families with children under Article 3(1) in conjunction with the applicable paragraphs of Article 6. It has done the same in cases respecting inequalities affecting the academic and occupational freedoms guaranteed by Articles 5(3) and 12 (1), the traditional rights of civil servants under Article 33(5), the right to operate private schools under Article 7(4), and above all the right to participate in elections.<sup>33</sup>

So, what we see under German equality jurisprudence is that mere economic matters may merit a more searching scrutiny than simple rational basis when either the measure impacts disproportionately on two relatively similar groups or when a fundamental right is impacted. In these cases the Court will uphold the measure only in the face of a demonstrable, convincing justification for the difference in treatment. It seems clear that German law possesses a degree of rigor that is more broadly applied than that of United States law. As Currie observes, “without intimating that the distinctions either embodied suspect classifications or impinged upon fundamental rights, for example, the Constitutional Court conjured up memories of the vigorous way in which the Equal Protection Clause was enforced in economic cases during the *Lochner* era in this country.”<sup>34</sup>

By contrast, when no suspect class trait is involved or when no obvious disparity in treatment among groups of people is present, the Constitutional Court will apply the conventional, low-level review of rational basis to ascertain whether the measure in question is constitutional or not. Even here, however, the Court will require a convincing reason to justify disparate treatment of groups of people. The standard of rational basis review, therefore, is somewhat more demanding than the

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<sup>32</sup> *Id.* at 367.

<sup>33</sup> *Id.* at 367. For citations to the German cases, *see id.*

<sup>34</sup> *Id.* at 370.

conventional United States approach that calls for, simply, any plausible reason<sup>35</sup> or where “the question is at least debatable.”<sup>36</sup>

A few cases will suffice to demonstrate the more rigorous nature of German rational basis review. In a case involving a pharmacy that wanted to continue operating in a railroad station, the Constitutional Court found that officials were justified in shutting down the pharmacy because it dealt in the dispersal of medicines and, therefore, was subject to more stringent pharmaceutical regulations. Other businesses that operated in the railroad station were not subject to this additional regulatory oversight.<sup>37</sup> The Court found this to be a sound reason for the difference in treatment among the businesses. In a case involving fees for children attending *kindergarten* the Constitutional Court ruled that a municipality was justified in applying a sliding scale of fees based on parental income levels.<sup>38</sup> Income levels were used in other social programs, the Court explained, such as social welfare benefits or income tax rates; thus, they could also be used for determining *kindergarten* fees.<sup>39</sup> In a case involving a 15 year old boy wanted to soup-up his bicycle by adding a motor so that he could travel as fast as 25 kilometers per hour, the Court determined that it was permissible for authorities to cite the boy under the criminal law, in contrast to the civil law that handles most traffic violations, because the boy did not qualify yet for a driver’s license, posing dangers to other moving vehicles and pedestrians.<sup>40</sup> In another case a veterinarian sued claiming that he was entitled to exemption from being required to testify under oath on the ground that he, like physicians and lawyers, needed to protect confidential information acquired in his practice. The Constitutional Court denied the claim, reasoning that veterinarians simply do not trade in sensitive personal matters like physicians and lawyers.<sup>41</sup> This made eminent sense, after all, because veterinarians treat animals, not people. Thus, there are good reasons for the different treatment of veterinarians as compared to legal and medical professionals.<sup>42</sup> In yet another case, this time involving the reunification of

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<sup>35</sup> See, e.g., *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972).

<sup>36</sup> *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)).

<sup>37</sup> See BVerfGE 13, 225 (1961).

<sup>38</sup> See BVerfGE 97, 332 (1998).

<sup>39</sup> See *Id.* at 344.

<sup>40</sup> See BVerfGE 51, 60 (1979).

<sup>41</sup> See BVerfGE 312 (1975).

<sup>42</sup> See *Id.* at 323.

Germany, the Court ruled that a difference in treatment of the debt burden of a former East German company as compared to a West German company could be justified by the difference in economic standards between the then two Germanies.<sup>43</sup>

#### D. Conclusion

In this short survey of German equality norms as they apply to socio-economic measures, another difference between the German and American constitutional orders is revealed. German equality norms play a central role in society. The Constitutional Court strives to apply the principle of equality uniformly and consistently to all members of society. What comes to matter is evaluating whether different people or organizations are treated fairly. While those especially vulnerable within society get special judicial solicitude, equality matters for all people, even when it is just a run-of-the-mill socio-economic measure. The Court is in search of an “egalitarian notion of equality.”<sup>44</sup> “For better or worse, the German Constitutional Court is in the business of determining the reasonableness of governmental action—and, to a significant degree, of inaction as well.”<sup>45</sup> As this substantive notion of equality impinges upon economic interests, it is, as Currie observed, a bit reminiscent of the Supreme Court’s jurisprudence in the *Lochner* era.

What this means for U.S. constitutional law is a question to be debated. Does the German Court’s approach provide a model for the reintroduction of the *Lochner*-era jurisprudence?<sup>46</sup> Perhaps. The German Court’s approach has the advantage of promoting consistency in the application of equality across the board and to all those affected. This bespeaks a commitment to fundamental fairness in society: All people should have a fundamental claim to equality. But perhaps not. The *Lochner*-era jurisprudence focused primarily on the underlying ideology of *laissez faire* capitalism, using constitutional doctrines to favor private employers over those more vulnerable within society. German equality jurisprudence is, in fact, more concerned with protecting the most vulnerable.<sup>47</sup> But the German law is interested in the fair treatment of economic actors as well.

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<sup>43</sup> See BVerfGE 95, 267 (1997).

<sup>44</sup> William B. Barker, *The Three Faces of Equality: Constitutional Requirements in Taxation*, 57 CASE W. RES. L. REV. 1, 49 (2006).

<sup>45</sup> Currie, *supra* note 11, at 371-72 (“More important for us is what the German decisions have to say about the desirability of empowering politically insulated judges to make open-ended judgments about the reasonableness of government action. Some may find in the German experience confirmation of the dangers of unchecked judicial intervention, others proof of the need for broad judicial review.”).

<sup>47</sup> See Edward J. Eberle, *Equality in Germany and the United States* (forthcoming 2009).

Thus we return to the mission of comparative law: evaluating, assessing and considering different patterns of legal orders, looking beyond our borders, in order to determine whether a domestic system works or whether it might be improved by learning lessons from abroad. That debate, of course, is one to be resolved by each society, often from one generation to another. But that is just what David Currie would have wanted, as his work continues to inspire us.

