Constitutional Change and Constitutional Legitimation: The Example of German Unification

Paul M. Schwartz

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CONSTITUTIONAL CHANGE AND CONSTITUTIONAL LEGITIMATION: THE EXAMPLE OF GERMAN UNIFICATION

Paul M. Schwartz

Table of Contents

I. ACKERMAN ON CONSTITUTIONAL CHANGE ...... 1032
   A. Liberal Constitutionalism in America ...... 1033
   B. Liberal Constitutionalism in Eastern Europe .................................................. 1036

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Unless otherwise noted, I am responsible for all translations.

1027
II. THE GERMAN DEMOCRATIC REPUBLIC'S CONSTITUTIONAL ORDER ................ 1039
A. Constitutional Totalitarianism ............. 1040
C. Radical Uncertainty and its Repression ... 1047

III. REVOLUTIONARY CHANGE IN THE GERMAN DEMOCRATIC REPUBLIC ............ 1054
A. The End of Constitutional Totalitarianism ..... 1055
B. The Round Table .......................... 1060
C. The Round Table's Draft Constitution ....... 1065
1. Direct Democracy and Limits on Constitutional Change ........ 1065
2. Additional Rights, State Goals, State Activism and Constitutional Uncertainty ........ 1069

IV. UNIFICATION WITHOUT CONSTITUTIONAL TRANSFORMATION .................. 1071
A. The End of the Revolution .................. 1071
1. The Round Table's Difficulties in Constitutional Promulgation ........ 1073
2. East Germans and a New Constitution for the GDR ........ 1074
B. The Basic Law and German Unification .... 1079
C. Constitutional Change and Constitutional Amendment .................. 1086
1. The Structural Amendment .................. 1087
2. The United States' Constitutional Dualism ........ 1091
3. The Federal Republic's Constitutional Triad ........ 1095
D. Constitutional Promulgation and the German Experience ........ 1097

V. CONCLUSION .................................. 1102

A constitution expresses the historical identity of a state and provides a structure for changing this identity. The two roles are equally important: a state's survival depends on both its sense of the past and its capacity for development and even transformation. In this sense, a constitution can provide a framework for a dialogue concerning continuity and change. This discussion concerns no less than the past, present, and future of a people.
American legal scholars have begun the 1990s with a renewed appreciation for the tension between constitutional continuity and constitutional change.¹ One particularly important exploration of this topic has been made by Bruce Ackerman. His recent work examining the role of constitutional law during periods of historical transformation reflects a deep concern for the ways in which higher law can structure forces for change.² According to Ackerman, a constitution’s role as a “living language for self-government” requires it to be part of a national dialogue about the need for reform and the way that this change is to be accomplished.³ The nature and form of this dialogue will, in turn, affect the legitimacy of the reformation of any constitution.

This American interest in transformative constitutional law occurs at a time of upheaval throughout Eastern Europe, where repressive regimes have been overthrown or have changed the conditions of their rule.⁴ The Eastern European upheaval of the last decade has already begun to influence constitutional law in that part of the world. This influence will be commensurate with the importance of these historical events. Indeed, these revolutions⁵ might also contribute to how Americans view their own constitutional heritage. The significance of Eastern European events has not been lost on Ackerman, whose most recent work, The Future of Liberal Revolution, is devoted to a reinterpretation of liberal

1. See, e.g., Akhil R. Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1200-05 (1991) (suggesting that the Bill of Rights be read as a single document, as one structure, but with careful attention to the meaning of later amendments); Cass R. Sunstein, Constitutionalism and Secession, 58 U. CHI. L. REV. 633, 633 (1991) (stating that the creation of a right to secede in a founding document undermines its spirit and encourages the development of constitutional provisions that defeat the underlying enterprise).


3. FOUNDATIONS, supra note 2, at 32.

4. Craig R. Whitney, East Europe's Hard Path to New Day, N.Y. TIMES, Sept. 30, 1994, at A1, A10 (describing the changes in Eastern Europe that have occurred since the fall of communism in 1989). Since the late 1980s all of the former Eastern Bloc countries have shaken off communism and moved toward capitalist economies. Id.

5. This Article will borrow Ackerman’s definition of revolution, “[a] revolution is a successful effort to transform the governing principles and practices of a basic aspect of life through an act of collective and self-conscious mobilization.” LIBERAL REVOLUTION, supra note 2, at 5-6.
constitutionalism in light of the revolutions of 1989.6

This Article considers the ramifications of the recent up-
heaval in Eastern Europe in light of Ackerman’s theory of
constitutional transformation. It will concentrate on one partic-
ular movement of revolutionary reform: the East German. The
entire world saw the celebration in the streets of Berlin when
the Wall fell in November 1989.7 Less familiar, however, are
the constitutional background of the years of repression and
the constitutional debate that followed the celebration. This
Article will use these events to explore Ackerman’s central
concerns: the expression in a constitution of a nation’s identity
and the complex aspects of legitimating constitutional change.

The first Part of this Article sets out Bruce Ackerman’s
model of constitutional change. Rather than viewing constitu-
tional change in the United States as channeled entirely by
Article V,8 Ackerman believes that during certain critical mo-
ments, Americans have consented to new constitutional solu-
tions without reliance on the formalities of this provision.9 In
the aftermath of revolution in Eastern Europe, Ackerman finds
that constitutionalism once more has a critical role to play.10
Indeed, he terms constitutionalism the single most important
liberal idea following a revolution.11 Ackerman argues that
without the promulgation of a new constitution, a movement
for revolutionary change will never achieve its promise.12 In
this context, liberal constitutionalism requires the calling of a
national convention to draft a new constitution and the sub-
mission of the resulting document to the People for ratifica-
tion.13

This approach to the constitutional significance of
"jurisgenerative" events14 provides an intriguing perspective

6. Id. at 3.
7. HENRY A. TURNER JR., GERMANY FROM PARTITION TO REUNIFICATION 234
8. Article V provides the means for amending the United States Constitution.
   Refer to note 33 infra for the text of Article V.
9. See FOUNDATIONS, supra note 2, at 266-69 (describing the process of “higher
   lawmaking” that allows for constitutional change motivated by popular support).
10. Id. at 288-89 (arguing that codification of revolutionary ideas is essential
    while public attention is focused on the constitutional solution).
11. Id. at 288.
12. Id. at 206.
13. See LIBERAL REVOLUTION, supra note 2, at 55-56 (discussing the necessity
    for this process in the context of Poland).
14. FOUNDATIONS, supra note 2, at 40; see Robert M. Cover, The Supreme Court
    1982 Term—Foreword: Nemos and Narrative, 97 HARV. L. REV. 4, 11 (1983) (defin-
    ing a jurisgenerative event as one that creates a legal meaning through a creative,
    collective, and social process).
for viewing German unification. Indeed, by offering a touchstone for deciding the successfulness of an incipient democratic movement, Ackerman’s perspective may have urgent political ramifications. More generally, if Ackerman’s complaint about the dominance of European thought and experience in the study of the United States Constitution is correct, poetic justice would be served by application abroad of a model based on American constitutionalism.

With Ackerman’s model of constitutional change in mind, this Article’s second Part will analyze the constitutional structure of the late German Democratic Republic (GDR). The GDR had a nonconsensual constitution. At no point in its history did the East German people consent to the constitutional structure imposed on them. Rather, the constitution sought to protect the rule of the dominant party, the Sozialistische Einheitspartei Deutschlands, the Socialist Unity Party of Germany (SED), by preventing the People from having a role in the development of the higher law. This Article will refer to the SED’s approach to constitutional law as “constitutional totalitarianism.” Constitutional totalitarianism led, however, to the establishment of a brittle framework for government. The absence of a structure that allowed popular involvement to alter the terms of the constitutional agreement increased the uncertainty felt throughout society.

This Article’s third Part concerns the East German uprising of 1989 and 1990. The jurisgenerative aspect of this moment of revolutionary change will be examined through a study of the constitution drafted under the auspices of the Round Table. The Round Table was a cooperative undertaking between opposition groups and the then-ruling East German Socialist Party. Its Draft Constitution attempted to draw conclusions for higher law from this revolutionary moment. The people of the GDR did not, however, want the Round Table’s new constitution or any other newly-drafted

15. See FOUNDATIONS, supra note 2, at 4 (noting that American lawyers and judges have not escaped the influence of European constitutional theory in their practices).
16. See TURNER, supra note 7, at 50-51 (explaining that the GDR’s first constitution was unanimously adopted by the People’s Congress, which was elected by a Soviet-style election using deceptive ballots).
17. See id. at 51 (noting that the SED became the dominant political party in East Germany).
18. Refer to Part II(A) infra.
19. TURNER, supra note 7, at 240 (describing the Round Table as an informal group convened in December 1989 in East Berlin under the auspices of church authorities and dedicated to the preservation and democratization of the GDR).
constitution. Rather, they desired an immediate end to the GDR and membership in the West German state, the Federal Republic of Germany (FRG).

The constitution of the Federal Republic, the Grundgesetz or Basic Law, had been open for accession by the people of East Germany since its promulgation in 1949.20 This Article’s fourth Part will examine a unique situation: the dissolution of a state by its people through acceptance of another country’s constitution. It will find that a different constitutional dynamic existed in Germany than the one that Ackerman wishes to impose on all liberal revolutionaries. Although East Germans viewed themselves as forming a People with sovereign power during their revolution, they did not seek to promulgate a new constitution. East Germans wanted to be part of the same state as West Germans, and acceptance of the West German constitution, the Basic Law, seemed the surest path to this goal.

This Article will argue that Ackerman’s faith in constitutional promulgation rests too heavily on an interpretation of one culture’s experience at one historical moment. Indeed, Ackerman’s interpretation of the events of Philadelphia in 1787 removes them from their own historical context. Of more utility, however, is Ackerman’s notion of different lawmaking tracks. This Article will build on his model by contrasting the dualism of the United States Constitution with the triad of the Basic Law. It will find that in both systems, a creative tension is created through an interplay between higher law and normal politics. From this comparative perspective, much of the constitutional dialogue in the United States can be seen as taking the form of a debate about the track upon which law-making activity should proceed.

I. ACKERMAN ON CONSTITUTIONAL CHANGE

Bruce Ackerman’s analysis of the role of popular mobilization in higher lawmaking offers a powerful perspective for our age. In two important books, We the People: Foundations and The Future of Liberal Revolution, he has made a forceful case for the continuing importance of popular sovereignty in constructing an enduring constitutional order.21 According to Ackerman, only the influence of the People allows a

21. See Foundations, supra note 2, at 3-57; Liberal Revolution, supra note 2, at 1-46.
constitutional text to "become a potent political symbol of national identity, not another bit of legalistic mumbo jumbo." Ackerman’s interpretation of the role of the People in American constitutionalism is consistent with his approach to a different People’s role in a Europe newly freed from the tyranny of communism. In fact, to the extent that his work aspires to develop constitutional theory that is applicable beyond the United States, Ackerman must carry out a comparative analysis. This Part of the Article discusses Ackerman’s development of a model of popular sovereignty within the American context and considers its application to recent events in Eastern Europe.

A. Liberal Constitutionalism in America

For Ackerman, the entire text of the United States Constitution provides “an evolving language of politics . . . through which Americans have learned to talk to one another in the course of their centuries-long struggle over their national identity.” Generations of constitutional dialogue have shaped the constitutional regime, which is “the matrix of institutional relationships and fundamental values.” Drawing on this understanding of a constitution as a framework for debate about a nation’s identity and its future, Ackerman describes the format of American constitutional dialogue.

In Ackerman’s view, debate and decisions about the United States Constitution take place within a distinctive two-track structure. This structure is said to create a “dualist” form of liberal constitutionalism. The first track, which Ackerman calls “the lower lawmaking track,” registers the conclusions of pluralistic democratic politics. This is where normal political decisionmaking takes place. The second track, the “higher lawmaking track,” offers an opportunity for would-be revolutionaries to transform established, fundamental principles of

22. LIBERAL REVOLUTION, supra note 2, at 47.
23. FOUNDATIONS, supra note 2, at 22.
24. Id. at 59.
25. Id. at 230-32.
26. See id. at 299 (describing the “normal” lawmaking track as the one that requires the lowest level of deliberative activity by the People).
27. See id. at 243-51 (describing the process of normal politics as driven by private interest groups, bureaucratic interests, public interest groups, the media, and political patronage).
28. Id. at 299-300 (describing the higher lawmaking track as the one that requires an elevated level of deliberative activity by the People and is motivated toward constitutional change).
the nation's political life. In contrast to the normal politics that take place on the first track, the higher lawmaking of the second track requires the fulfillment of challenging institutional obstacles before the People can be said to have accepted changes in fundamental constitutional principles. Meeting these obstacles allows would-be revolutionaries to claim that a mobilized majority of Americans have given their support to the movement. It allows them to change the Constitution.

Assigned prominent roles in Ackerman's pantheon of successful American constitutional revolutionaries are Franklin Roosevelt and Martin Luther King, Jr. Lesser legal luminaries might pause at just this moment. Whatever their importance, these two great Americans are not usually considered to have changed the Constitution. Ackerman explains the constitutional importance of Roosevelt and King by development of an ingenious idea: the "structural constitutional amendment."

A structural amendment does not occur through application of Article V, which spells out the Constitution's formal amendment process, but emerges during certain transformative moments in American history. Ackerman argues that the outcome of such popular mobilizations can change the constitutional order outside the Article V process, as is said to have occurred during the New Deal, or

29. See id. at 266-69. Ackerman envisions higher lawmaking as a process that occurs when a movement gains broad-based support from the public and the Supreme Court begins the task of translating constitutional politics into constitutional law, thereby legalizing the movement. Id.

30. See id. at 288-89.

31. Id. at 105-08 (explaining that Roosevelt and King were successful revolutionaries because of their popular appeal and ability to mobilize the people); LIBERAL REVOLUTION, supra note 2, at 17 (same).

32. See FOUNDATIONS, supra note 2, at 92. Ackerman actually refers to this category of change as transformative amendments. Id.

33. Article V of the Constitution states:
The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

U.S. CONST. art. V.

34. See FOUNDATIONS, supra note 2, at 92-94, 107-08, 127-29 (arguing that transformative amendments have been adopted during certain eras in American history, such as Reconstruction and the New Deal, and have altered the Constitution to reflect the current generation's critique of the status quo).

35. Id. at 127-29 (describing the Supreme Court's role in codifying the constitu-
can modify the meaning of an Article V amendment, as is said to have happened to the Fourteenth Amendment during the Civil Rights era of the 1960s. During these periods of structural constitutional amendment, political movements have mobilized popular consent to new constitutional solutions. Such constitutional consent is indicated through a different process than the Framers of the Constitution established for constitutional amendment. In contrast to Article V, structural amendments to the Constitution take place during constitutional impasses between branches of the federal government. At this time, decisive action by the People in an important national election allows the electoral winners to challenge the legitimacy of the dissenting branch. Should the dissenting branch capitulate at this moment, the People have, according to Ackerman, put their seal on the constitutional movement and transformed the Constitution.

In viewing the Constitution as having been transformed by structural amendments, Ackerman assigns an important role to popular sovereignty in an ongoing process of dramatic constitutional change throughout America's twentieth century. Rather than seeing a decline in the "constitutionally generative capacities of the American people," Ackerman believes that Americans have continued to adapt the constitutional order given to them by the Founders. Revolutions in Eastern Europe have also raised issues regarding constitutional change. These events suggest important avenues for analysis of the relationship between constitutional law and normal politics. Ackerman started this task with his recent book, The Future of Liberal Revolution. This work attempts to reconsider the significance of popular sovereignty and constitutionalism after the historic Eastern European revolutions of 1989.

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36. See id. at 127-30 (discussing the influence of the Carolene footnote on the development of constitutional law).
37. See id. at 48-49 (stating that upon an interbranch impasse, one branch will ultimately receive a mandate from the People after a decisive election and forge ahead with its ideas for constitutional change).
38. See id. at 48.
39. See id. at 48-49.
40. FOUNDATIONS, supra note 2, at 43. This approach to constitutional transformation is not without its weaknesses. This Article will explore those weaknesses as part of its discussion of how different constitutional models treat issues of change and conflict. Refer to Part IV(c)(1) infra.
41. See generally LIBERAL REVOLUTION, supra note 2, at 25-68.
B. Liberal Constitutionalism in Eastern Europe

The opening words of the United States Constitution, “We the People,” indicate the importance of popular sovereignty in the establishment of the American government. During the recent upheaval in Eastern Europe, this idea of the Enlightenment, that government derives its power from the consent of the governed, found renewed meaning. Indeed, direct reference to the idea of popular sovereignty was made on many signs that appeared during the mass protests within East Germany in 1989. Printed on these signs were the simple and eloquent words, “We are the people” ("Wir sind das Volk"). This message indicates that the People of East Germany intended to speak in their collective voice. Their rallying cry, “We are the people,” was a powerful, self-conscious challenge to the ruling power that claimed to speak for them.

For Ackerman, popular revolutions in Eastern Europe not only have changed the status quo in these lands, but also offer a challenge to modern liberal thought in the West. In his view, the events of 1989 mark both the end of the Cold War and the start of a new, positive struggle. This struggle is over the role of liberal ideas in a renewed attempt to realize freedom and equality in Eastern Europe and the United States alike.

Of the liberal ideas suitable for a significant role in this struggle, Ackerman views constitutionalism as the most important. In the aftermath of dramatic popular change, constitutionalism's role in Eastern Europe.

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42. U.S. CONST. pmbl.
43. See GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 100 (1992) (observing that "[i]n essence republicanism was the ideology of the Enlightenment"). The most striking expression of this idea in American history was made by Thomas Jefferson at the start of the struggle for independence. According to Jefferson, a government derives its "just powers from the consent of the governed," who retain the right "to alter or abolish it." the DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
44. TURNER, supra note 7, at 242. This expression became the title of a collection of East German pamphlets and proclamations from this period. See generally "WIR SIND DAS VOLK!": FLUGSCHRIFTEN, AUFRUFE UND TEXTE EINER DEUTSCHEN REVOLUTION (Charles Schüddelkopf ed., 1990) [hereinafter WE ARE THE PEOPLE].
45. LIBERAL REVOLUTION, supra note 2, at 2.
46. See id. (stating that it would be a “tragic mistake” to view 1989 as merely the end of the Cold War and that the year’s events “should instead be seen as part of a larger challenge”).
47. See id. at 1 (explaining the world’s sudden rethinking of modern liberal thought in light of the recent democratic revolutions in Eastern Europe).
48. See id. at 3 (discussing constitutionalism’s importance and Ackerman’s fear that it will be underestimated by liberal revolutionaries in Eastern Europe).
constitutionalism should be used to safeguard the success of revolution.\textsuperscript{49} By relying on constitutionalism, revolutionary liberals can "make the most of their opportunities and construct \textit{enduring} forms of political order."\textsuperscript{50} Ackerman worries, however, that liberals are not fully exploiting the "creative role of constitutionalism."\textsuperscript{51} The construction of a liberal constitution requires that the iron be struck while hot. As Ackerman argues:

For a short time, successful revolutions characteristically generate a political constellation that allows for the mobilization of deep and broad support for a liberal constitution. If a postrevolutionary leadership takes advantage of this opportunity, its new constitution can shape the terms of political development for a long time to come. Without decisive leadership, the constitutional moment passes in vain.\textsuperscript{52}

Liberal revolution functions best if it turns its attention within a tight time frame to transforming constitutional law.

Ackerman's expectations for Eastern European revolutionaries are quite specific: they are to create a liberal constitution. As Ackerman states, "[s]uccessful liberal revolutions ought to culminate in the democratic adoption of considered constitutions."\textsuperscript{53} This critical activity should be undertaken when the promise of revolutionary renewal is strongest, which is when the ancient regime is overthrown.\textsuperscript{54} Moreover, this effort requires revolutionaries to resist their thirst for revenge against the dictators who ruled them. Ackerman advises that "[a]n emphasis on corrective justice will divide the citizenry into two groups—evildoers and innocent victims."\textsuperscript{55} Ignoring the "mirage of corrective justice," revolutionaries should concentrate on translating their revolution into constitutional terms.\textsuperscript{56} The adoption of a constitution should take a form that readers of Ackerman's earlier book, \textit{We the People: Foundations}, will find familiar.\textsuperscript{57} The prescribed form is that of a liberal

\begin{itemize}
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id. at 69.
\item \textsuperscript{54} Id. at 3.
\item \textsuperscript{55} Id. at 71. Ackerman argues that this division "squander[s] \[the\] moral capital" of successful revolutionaries in "an ineffective effort to right past wrongs." Id. at 72.
\item \textsuperscript{56} See id. at 72-73 (discussing the waste of "moral capital" that occurs when revolutionaries attempt to vindicate past wrongs of the previous government and the futility of so doing).
\item \textsuperscript{57} \textit{FOUNDATIONS, supra} note 2, at 230-94.
\end{itemize}
constitutionalism based on popular sovereignty.

As previously explained in this Article, the essence of Ackerman’s idea of liberal constitutionalism is the notion of two tracks for lawmaking. When Ackerman applies this approach to Eastern Europe, he urges that revolutionaries convokve a national constitutional assembly, independent of their parliament, and submit the constitutional document that this body produces to a national referendum.\(^{58}\) Requiring this activity of Eastern European revolutionaries appears to be a logical enough consequence of dualism. Since lesser political and legal changes can only occupy the lower lawmaking track of normal pluralistic politics, would-be revolutionaries must head for the higher track. Only a moment of constitutional promulgation can make “a clean break with the past”\(^ {59}\) and successfully complete an Eastern European revolution.

This approach is far more formalistic than Ackerman’s analysis of American constitutionalism in the twentieth century. Ackerman does not even whisper the term “structural amendment” in his analysis of Eastern European constitutionalism. One might wonder whether this sudden formalism represents a playing of favorites; Professor Ackerman appears to be far stricter with Eastern European revolutionaries than with certain cherished American students.\(^ {60}\) To claim the sustained support of a substantial majority and enshrine their beliefs in constitutional law, Eastern European revolutionaries are not to improvise new transformative solutions but must traverse the obstacle course of higher lawmaking. Ackerman concludes that “[u]ntil the next successful revolution, the new principles will serve as higher law and will trump the outcomes of normal politics.”\(^ {61}\)

Despite the precise nature of Ackerman’s instructions, revolutionaries in Eastern Europe have chosen a different path. With notable exceptions, including activists in the new nations

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*58.* See Liberal Revolution, supra note 2, at 50-54 (outlining the primary constitutional mechanisms of the American experience and urging that they be used in Eastern Europe to “take advantage of their constitutional moment”).

*59.* Id. at 62.

*60.* Ackerman writes: “Neither Franklin Roosevelt nor Martin Luther King, Jr. aimed to destroy the legal system to mobilize public support for the transformation from laissez-faire to the welfare state or from Jim Crow to interracial equality. The dualist constitution provided them with the legal resources to consolidate their peaceful revolutions.” Id. at 17.

Omitted from this discussion is any mention that neither Roosevelt nor King drew on dualism’s higher lawmaking system with its “onerous tests” for revolutionaries, but relied on the easier, not to mention amorphous, test of the structural amendment. Id. at 18.

*61.* Id. at 15.
formed from the former Soviet Union, revolutionaries have tended either to make partial overhauls of existing communist-era documents or merely to submit new, more complete constitutions to the parliament for approval. In East Germany, once such partial changes were approved by the parliament, the GDR's Constitution was entirely scrapped and West Germany's Constitution, the Basic Law, was accepted. Thus, Ackerman's directions for revolutionaries in Eastern Europe have not generally been followed.

The rest of this Article will consider the constitutional path of only one Eastern European country. The focus on one land follows from an appreciation of the vast cultural and historical differences found throughout Eastern Europe. These differences suggest that specific case studies are necessary to form a new comprehension of transformative constitutional solutions. Indeed, Ackerman himself speaks of the necessity for a generation of work to revitalize "the revolutionary promise of the constitutional tradition." This Article will discuss the constitutional transformation of the German Democratic Republic.

In examining the constitutional path actually taken by East German revolutionaries, this Article will first consider the constitutional structure that existed at the time of revolution as a framework for dialogue. Although the People had never assented to the East German Constitution, it provided the only official structure for constitutional debate. This Article will explore the dialogue carried out around this nonconsensual constitution and consider how the document was applied to issues of social continuity and social change in the GDR.

II. THE GERMAN DEMOCRATIC REPUBLIC'S CONSTITUTIONAL ORDER

As a focus of national identity and as a framework for future development, a constitution can allow for both continuity and evolution. These functions can only be fulfilled, however, when certain conditions are met. Perhaps the most important of these conditions is that a constitution be based on a social consensus as to the goals and forms of state power. Through

64. TURNER, supra note 7, at 252.
65. FOUNDATIONS, supra note 2, at 318.
66. See Walter Dellinger, The Legitimacy of Constitutional Change: Rethinking
reliance on this foundation of underlying agreement, a constitu-
tion sets in place premises that establish borders for communal
life. These borders authorize the exercise of what Ackerman
calls "normal politics." The extent of the blessing of normal
politics can be illustrated by considering East Germany's
nonconsensual constitution and its effects.

A. Constitutional Totalitarianism

The GDR was founded in the aftermath of the world ca-
tastrophe caused by Nazism, and its development was a direct
result of the Cold War. This state was formed within the ter-
ritory of the Soviet Occupation Zone under the oversight of the
Soviet Military Administration. Soviet oversight as well as
conflict between Western powers during the Cold War would
continue to shape the GDR's development. In addition, its his-
tory was significantly affected by the GDR's complex interaction
with the Soviet Union, other Eastern European nations, and
the other German state. At different times during the four
decades of this country's existence, various experiments in so-
cial and economic reform were conducted within it. The
GDR's officially stated justification for existence was, after all,
a desire both to reject German fascism and to find a better
path for human development than that offered by capitalism.

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67. See FOUNDATIONS, supra note 2, at 230-65 (describing normal politics as the
lower track of constitutionalism that occurs when private citizens become involved in
the political process by voting, joining private interest groups, and paying attention
to mass media coverage of candidates and issues).

68. TURNER, supra note 7, at 22-23.

69. See HERMANN WEBER, GESCHICHTE DER DDR 32-79 (1985) (describing the
formation of the GDR with special attention to the role of the Soviet Military Ad-
ministration in the East German government).

70. See generally A. JAMES McADAMS, GERMANY DIVIDED: FROM THE WALL TO
REUNIFICATION 3-133 (1993) (providing a masterful recent treatment of German-Ger-
man relations within the context of the Cold War).

71. Following the initial concentration of power in the SED's hands, these ex-
periments would sometimes lead to an ostensible relaxing of the SED's control over
various aspects of social, economic or even political life. Especially after the uprising
by workers on June 17, 1953, the party would attempt to leaven its rule with a
measure of flexibility and by the 1970s, the ideology of "real, existing socialism"
appeared to accept the existence of social niches to which individuals might retreat.
See WEBER, supra note 69, at 297 (explaining the seemingly flexible attitude of the
SED with its more consumer-friendly economic strategy).

72. See id. at 71; "Ich bin unbelehrbar": Der Literarhistoriker Hans Mayer über
die verpaßten Chancen der DDR und die Zukunft des Marxismus, DER SPIEGEL,
Nevertheless, consistent throughout the history of the East German state was the SED’s insistence on its ultimate power to rule the GDR. The constitutional law of the GDR was an integral element of the SED’s structuring of its control of the nation.

The SED used constitutional law as a device to protect its authority within the GDR. Rather than structuring the People’s role in a process of constitutional continuity and change, the SED’s constitutionalism anchored an orthodoxy that limited the role of popular sovereignty. The three constitutions of the nation, promulgated successively in 1949, 1968, and 1974, were not based on any basic societal agreement and never became the source of one. They were imposed upon the nation by one political party, the SED, under the watchful eye of the Soviet Union. The GDR’s nonconsensual constitutionalism rested on an approach that this Article calls constitutional totalitarianism. The forty-year history of the GDR provides a melancholy illustration of the effects of constitutional totalitarianism.

As a form of higher law, constitutional totalitarianism is based on a total value, a single concept to be felt in all areas of life, and a call for total allegiance. It is a means towards the domination of individuals. Constitutional totalitarianism was critical not because full use was made of it, but because it provided a seemingly ironclad guarantee of the SED’s claim to leadership, or Führungsanspruch. The SED’s constitutional totalitarianism has a textual basis, but finding it requires that one look beyond the window dressing in the successive constitutions of the GDR. These constitutions had many provisions that did not propose a binding plan for the workings of anything. Consistent with socialist legal theory, these provisions were viewed as an expression of general objectives that the State might or might not apply to further its goals.


73. VERFASSUNG [VERF] art. 3(1) (GDR) (1949).

74. VERF (GDR) (1968).

75. VERF (GDR) (1974).

76. For application of this term, see STARITZ, supra note 72, at 40, and WEBER, supra note 69, at 133.

77. See Inga Markovits, Socialist vs. Bourgeois Rights—An East-West German Comparison, 45 U. CHI. L. REV. 612, 617 (1978) (arguing that socialist constitutional rights do not serve to provide enforceable bourgeois rights, but to facilitate state intrusion “by serving as a funnel through which official standards can be infused into individual lives”).
examining the organization of constitutional totalitarianism, this Article will briefly pause to analyze these declarations of policy.

The window dressing in the three successive East German constitutions is conspicuous. The GDR was a police state. It combined spying and repression with a ruling party whose secret motto might have been that some were more equal than others. Yet the Constitution of 1949 proclaims that “[a]ll power of the State emanates from the people.”\(^7\) It even specifies that “[t]he power of the State must serve the well-being of the people, freedom, peace and the democratic process.”\(^7\) This language may reflect early, idealistic aspirations of some of the GDR’s founders or, viewed more cynically, may simply indicate paper concessions by the SED at a time when its power was far from solidified.\(^8\) But even the later constitutions of 1968 and 1974, which are more explicit regarding the significance of the SED’s political role, promise freedom of religion, freedom of congregation, freedom of speech, and freedom to form political parties and social organizations.\(^8\) These later documents also claim to protect the independence of the judiciary and to set in place a democratic parliamentary system based on open elections.\(^8\)

These constitutional promises were never honored. At the same time, the promulgators of these constitutions sometimes expressed their desire to safeguard the SED’s rule. Because each of these documents is somewhat more frank than the last, this Article will now focus on the text of East Germany’s final constitution, promulgated in 1974.

B. The Constitution of 1974

Discussion is not compatible with domination, and a constitution that seeks to command will, most suitably, be imposed on the public. In this sense, it is sadly appropriate that the

\(^{78}\) VERF art. 3(1) (GDR) (1949).

\(^{79}\) Id. art. 3(5).

\(^{80}\) See HERWIG ROGGEMANN, DIE DDR-VERFASSUNGEN: EINFÜHRUNG IN DAS VERFASSUNGSRECHT DER DDR 41 (4th ed. 1989) (finding that the SED was still dependent on the cooperation of other domestic forces within the territory of the Soviet Occupation Zone in 1949, and that the first constitution of the GDR reflects this need).

\(^{81}\) VERF arts. 39, 28, 27, 29 (GDR) (1974) (guaranteeing freedom of religion, congregation, speech, and freedom to form political parties and social organizations, respectively); VERF arts. 39, 28, 27, 29 (GDR) (1968) (same).

\(^{82}\) See VERF arts. 96, 48-65 (GDR) (1974) (promising the independence of the judiciary and the establishment of a parliamentary system).
East German public found out about the Constitution of 1974 only after it had been created. Without advance notice, let alone public participation, the First Secretary of the SED, Erich Honecker, announced the passage of a law to modify the Constitution of the GDR on September 28, 1974. This announcement came one day after the legislature's unanimous approval of this law.

East Germany's constitutional totalitarianism sought to protect the SED's rule by demanding absolute allegiance to an absolute truth. Although willing to accept less than this absolute domination, the SED used constitutional law to safeguard its claim to leadership. Examination of the Constitution of 1974 reveals the structuring of this scheme in a three-step process: (1) the urging of loyalty to the single concept of socialism, (2) the insistence that this concept expressed a central value, which was to be realized in all aspects of life, and (3) the granting of an exclusive right to define this value to one organization, namely the SED.

When the passage of the Constitution of 1974 was announced, Secretary Honecker delivered a short message that provided an official explanation for the change in the Constitution. Of the reasons offered, the most important justification was the need "to raise the profile of the GDR as a socialist state and to anchor it firmly in the brotherhood of socialist lands." Although the preceding Constitution of 1968 had already begun to emphasize the importance of socialism in higher law, this new document raised that tribute to a higher pitch. Both Constitutions, especially that of 1974, reveal the presence of the first element in the SED's constitutional totalitarianism: its urging of loyalty to the concept of socialism.

Understanding the significance of the use of the term socialism in this context requires a consideration of Hannah Arendt's insights regarding totalitarianism. Arendt believes that totalitarian movements consider loyalty to be a value unto itself. This loyalty is to be offered, if possible, not to a

83. See Roggemann, supra note 80, at 60.
84. Id. at 61-62.
85. Id. at 60.
87. Hannah Arendt, THE ORIGINS OF TOTALITARIANISM 312-15 (1973) (discussing the way that totalitarianism isolates the individual and transforms classes into masses).
88. Id. at 324; see Inga Markovits, Last Days, 80 CALIF. L. REV. 55, 98 (1992) ("Socialist law liked dependent people. It also liked people to remain dependent.")
program or political ideal but to the totalitarian movement itself. True to this approach, East Germany’s constitutionalism urged loyalty to a single, somewhat open-ended concept, namely socialism. The first step of constitutional totalitarianism, the notion of loyalty to socialism, is present in both the Preamble and the first section of the Constitution of 1974. These initial parts of the Constitution sought to establish general foundations for social and governmental order. In so doing, they formalized the centrality of socialism. Thus, the Preamble began by speaking of the People’s formation of “the developed socialistic society.” Continuing in this tone, the Preamble’s second sentence spoke of the People’s establishment of “this socialistic Constitution.” The centrality of socialism was developed further in the Constitution’s first section, which was labeled, “Foundations of the socialistic social and governmental order.” This section proclaimed that “[t]he German Democratic Republic is a socialist state of workers and farmers.” This language perfected the identification of the state and its constitution with socialism. Loyalty to the constitution, to the state, and to the social order meant loyalty to socialism.

The second element of the GDR’s constitutional totalitarianism is found in the Constitution’s insistence that socialism be realized in all aspects of life, no matter how routine or exceptional. The 1974 Constitution expressed a critical anchoring for the SED’s rule by subjecting all elements of life to socialism. Section after section of this Constitution emphasized the importance of socialism. It spoke, for example, of “social and governmental oversight of the adherence to socialistic law.” Not only was the social order and the state to insure obedience to this standard, but science, research and education were to be united with the “advancement of socialism.” The Constitution of 1974 also commanded that “socialistic culture” be encouraged and protected. Elements of the socialistic cultural life that the state was to oversee included physical education, sport and tourism, which were to serve “the all-around physical and

89. ARENDT, supra note 87, at 324-25. Arendt adds that “[t]otal loyalty is possible only when fidelity is emptied of all concrete content.” Id. at 324.
91. Id.
92. Id. Abschnitt I. arts. 1-18.
93. Id.
94. Id. art. 1.
95. Id. art. 87.
96. Id. art. 17(1).
97. Id. art. 18(1).
According to the East German Constitution, all life and all institutions—legal, political, and social—were to serve socialism. All citizens were to develop a form of existence that the Constitution of 1974 calls "the socialistic way of life." This document may have proclaimed, "Valid is the principle, 'Collaborate, help plan, help govern!'" Yet, the outcome of such participation was never in doubt; it was the result that socialism required. Although the SED did not seek total social engineering by the time of "real, existing socialism" in the 1970s, this constitutional language reminded everyone of the central value to which obedience was owed. It identified, clearly and definitively, the chief value of society.

The final step in the creation of East Germany's constitutional totalitarianism was the granting of exclusive power to the SED to define and interpret the meaning of socialism. Having required loyalty to a single concept, the SED put the final part of its constitutional plan in place by granting itself the exclusive right to define the concept to which fidelity is owed. At this moment, the SED fixed in its hands the power to define the identity of the People and the State.

Understanding the basis of this power, however, requires one to look beyond constitutional law. The SED's power to decide the meaning of socialism, the single critical concept that was to be reflected in all areas of life, is not set out in explicit detail in the Constitution of 1974. Indeed, Article 106 states that only the Parliament could change the Constitution. It could do so by passing a law by a mere majority vote. The 1974 Constitution required only that this law explicitly state its intention to alter the constitutional text.

As a result of the SED's domination of the entire political system, including the other parties present in the Parliament, Article 106 assured this party's control over any actual changes to the text of the constitution. Even more critical

98. Id. art. 18(3).
99. Id. art. 4.
100. Id. art. 21.
101. STARITZ, supra note 72, at 203. By this time, a West German observer had described the GDR as a "society of niches," or areas of relative degrees of freedom formed within the SED's socialism. GÜNTHER GAUS, WO DEUTSCHLAND LIEGT 115 (1983).
103. Id.
104. The SED allowed other political parties to exist, but it also engaged in election fraud, intimidation of voters and members of the other parties, and the creation of important SED satellite parties. See WEBER, supra note 69, at 115-33.
than this provision, however, was the 1974 Constitution's brief, albeit prominent, mention of the leadership of the "Marxist-Le
ninist Party" in the second sentence of its Article I.\textsuperscript{105} This section declared the GDR to be "the political organization of the working population in city and country under the leadership of the working class and its Marxist-Leninist Party."\textsuperscript{106} Although the Constitution did not contain further provisions regarding the leadership of the Marxist-Leninist Party, this language provided a critical basis for the SED's authority to interpret and enforce socialism.\textsuperscript{107} It placed the party at the head of the socialist state. Reinforcement and elaboration of the SED's central role is found in statutory law, namely in the SED Statute of 1976.\textsuperscript{108}

The Constitution of 1974 demanded loyalty to socialism, and the SED's authority enabled it to empty this term of independent meaning. Socialism was not a value that the People could develop in a dialogue about their Constitution. The SED could change the meaning of this term with or without passage of a law—sometimes a party decree would be enough.\textsuperscript{109} Even if the SED would occasionally allow some involvement in defining this concept by such subgroups within the general population as workers, farmers, intellectuals, and economists, the SED ultimately decided the terms of their participation. In fact, the SED was able to use Article 6 of the Constitution as a basis for criminalizing any independent efforts at social debate.\textsuperscript{110} This provision declared as crimes activities such as "military and revengeful propaganda in every form, war-mongering and the manifestation of hatred toward religions, races and nations."\textsuperscript{111} Through a highly expansive reading of this language, the SED punished a wide variety of speech and behavior.\textsuperscript{112} The SED stood beyond the requirements of either constitutional law or normal politics.\textsuperscript{113} Its power allowed it to overrule the

\textsuperscript{105} Verf art. 1 (GDR) (1974).
\textsuperscript{106} Id.
\textsuperscript{107} Roggemann, supra note 80, at 107.
\textsuperscript{109} Roggemann, supra note 80, at 220.
\textsuperscript{110} Verf art. 6(6) (GDR) (1974).
\textsuperscript{111} Id. The Constitution of 1968 contained the exact same provision, and the Constitution of 1949 had a similar provision. See Verf art. 6(5) (GDR) (1968); Verf art. 6(2) (GDR) (1949).
\textsuperscript{112} See generally Gilbert Furian, Der Richter und sein Lenker (1992) (containing a collection of reports and documents relating to "political justice" in the GDR); Markovits, supra note 88, at 81 (discussing "telephone justice"—the meddling of party bosses in the decisions of courts).
\textsuperscript{113} See Markovits, supra note 77, at 619 (stating that socialist law is not
guarantees that these two tracks of law offer.

An infamous example of the SED's subordination of constitutional law to its own wishes occurred when the party ordered a series of building projects at the East German border. After initially establishing a blockaded zone miles from East Germany's western border in 1952, the undertaking culminated in 1961 with the construction of a wall around the portion of Berlin controlled by England, France, and the United States after World War II.\(^{114}\) The construction went on despite a constitutional guarantee of the right to emigrate.\(^{115}\)

The sealing of East Germany's borders reveals even more than the superiority of the SED's will over constitutional law. It demonstrates that a necessary complement to the constitutional demand of complete allegiance to imposed beliefs is the construction of a closed society. The SED built a wall around the nation's borders to make such a society at least theoretically possible. It sought both to prevent the test population from leaving and to reduce the population's exposure to outside influences.

C. Radical Uncertainty and its Repression

The East German Constitution was not a document that provided a framework for dialogue about continuity and change. The goal of the SED's constitutional totalitarianism was to secure its claim to power. Enormous differences exist between this model's approach towards constitutional change and that of the dualist order Ackerman describes in the United States.\(^{116}\) The differences are further reflected in the ability of these two kinds of constitutionalism to legitimize social change.

In contrast to the dualism of constitutional law and normal politics, the East German constitutional order did not set up a

\(^{114}\) See TURNER, supra note 7, at 87-95 (discussing the erection of the Berlin Wall, the numerous escape attempts made by East German men and women, and the East German government's efforts to prevent emigration); McADAMS, supra note 70, at 49-55 (analyzing the reaction of Western powers and Soviet Union to the construction of the Berlin Wall).

\(^{115}\) VERF art. 10(3) (GDR) (1949) (stating that "[t]his right [to emigrate] can only be limited by a law of the republic"). No such law was in place at the time of the construction of the Berlin Wall. In contrast, the Constitution of 1974 protects only a right to "freedom of movement" within the territory of the GDR. VERF art. 32 (GDR) (1974).

\(^{116}\) See FOUNDATIONS, supra note 2, at 3-33, 230-32.
higher lawmaking track providing challenging institutional obstacles to be met before changes could be made to fundamental principles. Unlike a dualistic order, it did not use a special process to insulate important rules for shared social life. Indeed, the East German Constitution allowed the Parliament to change its text through passage of a law by a mere majority. More importantly, constitutional totalitarianism established the rule of one party, whose decisions could overturn constitutional law and normal politics. In East Germany, higher lawmaking was not applied to protect fundamental principles of shared life. Hence, there could be no great benefit derived from a differentiation between constitutional law and normal politics.

Constitutional totalitarianism collapses higher and normal law. By failing both to place fundamental principles of shared life on a higher lawmaking track and to permit exploration by the People of the border between constitutional law and normal politics, the SED's constitutional totalitarianism led to a condition that this Article will call "radical uncertainty." Radical uncertainty refers to two kinds of doubt. The first relates to uncertainty about the comparative tasks of constitutional law and normal politics. There was no discussion in the GDR of the areas protected by higher law and those intended to be shaped through the ordinary practice of politics. In the GDR, this division could have no meaning due to the changing whims of the SED, which demanded the People's allegiance to its decisions. Constitutional totalitarianism robs the border between constitutional law and normal politics of significance. As if this uncertainty about the difference between constitutional law and normal politics was not bad enough, it was accompanied by a second, related kind of doubt. In East Germany, there was no consensus about the meaning, or contents, of higher law or ordinary politics.

East Germany's radical uncertainty reflected a profound absence of agreement among different social groups as to the premises of communal life. The consequences of this lack of agreement were significant. The absence of consensus about normal politics, which was reflected in the GDR's lack of representative democracy, hurt any chance for development of higher law. As for the higher law, the Constitution could not offer disputants any assurance that conflict would stay within safe borders. It created no basis for majoritarian politics or higher law. Indeed, as a nonconsensual document, the Constitution was itself a perfect symbol of the lack of agreement. Since

117. VERF art. 63(2) (GDR) (1974).
different groups had never agreed upon a basis for shared life, any side that momentarily gained the state’s authority could feel free to take any measures that it wished.

East Germany’s system offers a clear contrast to constitutional dualism, a system that protects fundamental constitutional principles, establishes a basis for normal politics, and encourages the People to engage in debate. The radical uncertainty of constitutional totalitarianism is unlikely to encourage social peace. Constitutional totalitarianism sets up the most brittle of frameworks for government. In this legal order, no past or present generation has agreed to the terms of the constitution. Instead, a constitution that serves as a tool for domination has been imposed on the People. Moreover, as crises arise, this document provides scant room for exploration of its principles, let alone for discussions of whether and how to alter these rules. Its framework is rigid; its terms are not open to development in either the present or the future.

The result of such rigidity is either constant internal warfare or a dominant group that seeks to terrify all others into silence. The SED sought silence. Uncertain of being able to obtain popular agreement to the terms of its rule and unwilling to attempt to develop such consent, the SED could only dread discussions with the People. Yet, the silence imposed by the SED’s constitutional totalitarianism did not eliminate the risk of social disorder. Even when the dominant party withdraws such a brittle constitution from the proof of debate, the possibility for disorder continues. In the absence of agreement regarding the conditions of social life, which permits the establishment of institutions for resolving conflict, any disorder could spiral out of control at any moment. In fact, on one noteworthy occasion the death of a stray dog was considered to raise the risk of dangerous social disorder in East Germany. This incident, which became the focal point of activity within the highest political and judicial circles, illustrates that almost no conflict is trivial in a system based on constitutional totalitarianism.

118. See FOUNDATIONS, supra note 2, at 6-7.
119. These institutions should include a democratically established, representative political system and an independent judiciary.
The stray dog in question was killed in Mühlhausen in October 1953. Its death was caused by a loyal SED party member who claimed that the dog had lunged at him while he was guarding a state-owned industrial plant. Indeed, both the stray dog and the plant guard’s own watchdog had turned upon him. The plant guard then hunted the stray dog down with the help of others and beat it to death with a board.

Local sentiment ran strongly against the plant guard, who was widely viewed as a torturer of animals. Hostile letters poured into the local newspaper, and crowds gathered in front of the courthouse where the trial was held. When the local court found the guard guilty of “unlawful destruction of property in conjunction with an intentional act of cruelty to animals,” the dog killer lost his job in the plant, was expelled from the SED, and was sentenced to one year in jail. On appeal, the district court affirmed the verdict, but converted the prison term into a fine.

The highest officials of the SED in East Berlin viewed the death of the stray dog in a far different light. They believed that plant workers had plotted against a loyal party member and that local party leaders had decided to go along with his persecution. The top of the party pyramid believed that the local branch of the party was using a dog’s death as a pretext for an attack on its leadership. It responded to this perceived challenge with firm action. At the national SED convention, less than six months after the death of the dog, then chief of the SED Walter Ulbricht denounced the verdict and criticized local party officials. Ulbricht claimed that local officials “had made themselves the tools of reactionary forces.”

121. 3 OGSt at 228; KIRCHHEIMER, supra note 120, at 261.
122. 3 OGSt at 228.
123. Id.
124. Id.
125. KIRCHHEIMER, supra note 120, at 261.
126. Id. at 261-62.
127. 3 OGSt at 227 (citations omitted).
128. Id at 228.
129. Id.
130. Id.
131. Id.
132. Id. The plant guard had appealed to the highest party officials. Id.
133. Werkentin, supra note 120, at 496-97.
134. KIRCHHEIMER, supra note 120, at 262.
135. Id. Three years after this national SED convention, the Minister of the Justice of the GDR returned to the topic of controversy. Hilde Benjamin, Vom IV. zum V. Parteitag der Sozialistischen Einheitspartei Deutschlands, 12 NEUE JUSTIZ 437 (1958). The Minister termed the incident as “one that under the catchword ‘the dog of Mühlhausen’ has become known to all judges and state attorneys.” Id.
Not surprisingly, even before Ulbricht’s speech, the East German Supreme Court for Criminal Matters had reversed the lower court’s verdict. The Supreme Court noted that the lower court should have been aware of “the diverse methods that the enemy of our order applied in attempting to block our construction and our social development.” One of these methods was “to paralyze our publicly owned enterprises through acts of diversion.” A stray dog roaming about a plant would “distract the guard dog from his duty to watch that no foreign person intruded into the working area.” Due to this threat, the plant guard had not only a justification to remove this danger, but a duty to do so that extended to the use of force.

The first error of the lower court was its failure to consider the full danger posed by this stray dog. According to the East German Supreme Court for Criminal Matters, its second failure was in ignoring “the personality” of the defendant. This oversight led to a “legally and politically false judgment.” The defendant was a devoted and active long-term member of the SED. The enemies of the GDR had used the incident with the dog as a pretext to set in motion a systematic, virulent campaign against him. According to the East German Supreme Court for Criminal Matters, the lower court should have recognized that this case was not really about property damage or torturing of an animal, but represented an attack on the defendant, who was a “fighter for our order.” After this decision, the central party leadership saw to it that the plant guard was not only readmitted to the local branch of the SED, but promoted in its hierarchy. It also had local officials arrested or demoted and investigated the local dog breeding club for the presence of enemy agents.

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136. 3 OGSt at 227.
137. Id. at 229.
138. Id.
139. Id.
140. Id.
141. Id. at 230.
142. Id. at 231.
143. Id.
144. Id.
145. Id. at 232.
146. Werkentin, supra note 120, at 497-99.
147. Id. at 498-500.
This incident should have resonance even for those who are not fond of animals. In the absence of agreement as to conditions of communal existence, every realm of life becomes infused with doubt, and any strife can threaten the dominant group's rule. To be sure, even liberal democracies have not been free from repressive behavior by a ruling power.\textsuperscript{148} Constitutional dualism can, however, limit this tendency by providing institutional checks on the government and by structuring mechanisms for dialogue.\textsuperscript{149} In contrast, constitutional totalitarianism leads to the imposition of silence, which, in turn, requires complete surveillance of the population to discover whether silence is being observed. To speak plainly, a claim to authority anchored in a constitution that attempts to regulate all aspects of life is only possible with the assistance of a secret police force. The SED did create such a force, called the State's Security Service (\textit{Staatsicherheitsdienst}), or Stasi.\textsuperscript{150} Thus, the SED sought to control the inherent instability of a state based on constitutional totalitarianism by creating a thorough means of shaping legal, political, and social developments.

The Stasi's task was to safeguard the rule of the SED.\textsuperscript{151} In a land where even the death of a dog could represent a threat to the government, the dominant party felt obliged to establish a dense system of oversight. Enforcing constitutional totalitarianism was an undertaking of enormous magnitude.

\textsuperscript{148} See generally CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 389-90 (1991) (stating that the FBI not only maintained extensive secret files on the population, but altered original documents stored in the National Archives and the Library of Congress); JOAN M. JENSEN, ARMY SURVEILLANCE IN AMERICA, 1776-1980 (1991) (containing a survey of extensive spying carried out by the Army within the United States during its entire history—including observation of political demonstrations and infiltration of college campuses in the 1960s and 1970s); HERBERT MITGANG, DANGEROUS DOSSIERS (1989) (containing excerpts from secret files that the FBI and CIA maintained on nobel laureates, poets, publishers, and painters).

\textsuperscript{149} Among the most important institutional checks is an independent judiciary. The interplay of this institution with a legislatively created attempt to protect social dialogue can be seen in the case law developing the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1988), which allows citizens to gain information kept by the government. See, e.g., United States Dep't of Justice v. Landano, 113 S. Ct. 2014, 2019-23 (1993) (finding that the government is not entitled to a presumption that all sources supplying information to the FBI in the course of a criminal investigation are confidential sources within meaning of Exemption 7(D) of the FOIA); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (stating that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed").

\textsuperscript{150} See generally JOACHIM GAUCK, DIE STASI-AKTEN: DAS UNHEIMLICHE ERBE DER DDR (1991) (concerning the activities of the Stasi in East Germany).

\textsuperscript{151} \textit{Id.} at 13; see also DAVID GILL & ULRICH SCHROTER, DAS MINISTERIUM FÜR STAATSSICHERHEIT: ANATOMIE DES MIELKE-IMPERIUMS 17-28 (1991).
Some statistics provide a sense of the scale of the task. In a nation of 17 million, the Stasi had 96,000 full-time employees. The number of “unofficial coworkers,” its part-time spies among the people, was certainly greater and may have numbered up to 500,000. The Stasi created a network of snooping in which virtually no neighborhood or apartment complex was without coverage. This density was by no means related to the number of identified opponents of the regime. In one thinly populated district with a mere 288 citizens officially declared to be “subversives,” the Stasi had approximately 5000 “unofficial coworkers.”

In the hands of the SED, the constitutional order of the GDR became the basis of a reign of repression and terror. This same order also encouraged corruption within the SED itself. Having claimed the exclusive right to determine the content of socialist truth, the SED had no reason to carry out discussions with the GDR’s population and, indeed, began to shun it. The most important members of the SED lived under conditions of self-segregation in a protected enclave in Wandlitz, a village outside of Berlin. Their homes were stocked with Western

152. Gauck, supra note 150, at 27; Gill & Schröter, supra note 151, at 95.
153. Gill & Schröter, supra note 151, at 96; see also Dan Stets, Files Give Germans Hidden Part of Lives, DETROIT FREE PRESS, Jan. 20, 1992, at 3A (reporting that the Stasi had 100,000 regular employees and several hundred thousand collaborators).
154. The Stasi sought adults and minors alike as “unofficial coworkers.” See Stets, supra note 153, at 3A (providing examples of Stasi tactics, including the use of elementary school children to spy on a dissident through his children). It organized professional failures to soften selected persons for its approaches and closely observed mail and telephone conversations within, and sometimes outside of, East Germany. See Reiner Kunze, Deckname “Lyrik” (1990) (containing excerpts from an East German poet’s Stasi file).

A special section within the Stasi carried out one of its most important jobs. The task of this unit, the so-called “Administration 2000,” was to spy on the border troops who patrolled the Berlin Wall and the other borders of the country. “Wir machen alles gründlich”: Die Todesgrenze der Deutschen (1): Schreibtischdichter aus Wandlitz, DER SPIEGEL, 26/1991, at 58, 75. Thus, the Stasi not only spied on the general population, but also kept close watch on those who prevented the population from escaping. This organization also employed married individuals to spy on their spouses and recruited children to spy on their parents. See Roy Gutman, East Germany’s Internal Insecurity Force: How Country Spied on 800,000 of its Own (Unmasked Spies Face Their Victims 2/26/92), NEWSDAY, Feb. 23, 1992, at 3 (providing examples of Stasi spy techniques); Stets, supra note 153, at 3A (same). Within East Germany, the Stasi’s activities created a sense of mistrust that pervaded even intimate moments. Moreover, the Stasi did not stop short of torture and murder. Indeed, it supported terrorist organizations, such as the Red Army Faction, that were active in Western Europe. Gauck, supra note 150, at 64.
156. Id. at 150-52 (describing the privileges provided to high-ranking SED officials living in Wandlitz).
goods that had been seized at the East German borders, stolen from the mail, or purchased by a special state agency, the Commercial Coordination (Kommerzielle Koordinierung) or KoKo.

The next phase of constitutionalism in East Germany, which began in revolution and ended in unification, is tied to the efforts of one institution: the Round Table. This period resulted in a draft constitution for the long-suffering land. The Round Table is the closest that East Germans came to creating a new constitution and to following Ackerman’s path for popular revolutionaries. This Article will now analyze this rebellion, which ended without promulgation of a new constitution.

III. REVOLUTIONARY CHANGE IN THE GERMAN DEMOCRATIC REPUBLIC

According to Bruce Ackerman, the route for all Eastern Europeans, including East Germans, is unmistakable. He believes that in their liberation from Communism, Eastern Europeans should “channel the political energies released by . . . [their revolutionary] movement and seize the moment to mobilize popular support for a liberal constitution.” Seizing the moment requires several activities: (1) the selection of a national constitutional assembly to prepare a constitution, (2) the submission of the resulting document to Parliament for its


158. The KoKo agency engaged in a number of secret activities on behalf of the top members of the SED. See PRZYBYLSKI, supra note 155, at 126-49. It raised money to meet the needs of party members from sources that included the release of political prisoners from the East to the West in exchange for cash payments. It also invested money outright in the West. Id. at 136-50. Although the Constitution of 1974 explicitly established a socialist, planned economy within East Germany, see VERFASSUNGSWESEN ART. 9-16 (GDR) (1974), the SED determined that capitalist techniques were the best way to insure its own standard of living. A recent study concluded that “[a]s the planned economy and its often miserable products were proposed to the people, so the market economy, which was caressed within the KoKo empire, was to satisfy the growing needs of the royal household in Wandlitz.” PRZYBYLSKI, supra note 155, at 152.

The benefits that the top members of the SED reserved for themselves did not escape the rest of the population. According to one East German joke:

Honecker received a letter from his old mommy in the Saarland (in West Germany). She asked him how he was doing. Erich answered that he was now Chairman of the GDR's Council of State, which made him something like a King. Everything was great: he had a villa, an automobile with a chauffeur and so on.

Worried, his mother wrote back, “Just be careful that the evil Communists don’t take everything away from you.”


159. LIBERAL REVOLUTION, supra note 2, at 112.
approval, and (3) the decision by the People to accept or reject this constitution in a national referendum.\textsuperscript{160} Acceptance of this constitution means that a victorious revolutionary movement will have shaped its guiding principles into “an enduring form that will shape political action in the years ahead.”\textsuperscript{161}

Although East Germans did not take this path, they began a process that somewhat resembles Ackerman’s ideal. Their most significant attempt at constitution-making took place as part of the activities of the Round Table, which was an improvised institution that met during the period of uncertainty and potential violence from late 1989 to the spring of 1990.\textsuperscript{162} At the Round Table, important protest groups faced the SED and the previously authorized political parties and mass organizations. The moderators of the meetings were church leaders.\textsuperscript{163} As part of its activities, the Round Table prepared a draft constitution for East Germany.\textsuperscript{164} Understanding the Round Table, however, requires an awareness of the conditions under which this institution came into being. Before describing the activities of the Round Table, this Article will consider the end of the SED’s constitutional totalitarianism.

A. The End of Constitutional Totalitarianism

As late as 1987, the rule of the SED seemed secure. During that year, the head of the SED, Erich Honecker, paid an official visit to West Germany where his reception ranged from business-like to fawning.\textsuperscript{165} The West German rock star Udo
Lindenberg even composed a jubilant anthem, "The General Secretary," in Honecker's honor.\footnote{UDO LINDBERG, Der Generalsekretär, on FEUERLAND (Polydor 1987).} Two short years later, however, hundreds of thousands of East Germans marched in protest in the streets, and even more surprising, by October 1990, the state that the SED dominated had ceased to exist. A number of critical forces emerged during this period that doomed the SED's constitutional totalitarianism.

The first such force was directed by the Soviet Union. Soviet troops, tanks and economic support provided the ultimate basis for the SED's authority within the GDR.\footnote{WEBER, supra note 69, at 334.} For this reason, the highest instance for resolving internal conflicts of the SED's Politburo had generally been at the apex of the Soviet Politburo.\footnote{Id.} Mikhail Gorbachev's reforms of Perestroika and Glasnost had, however, reduced Soviet support for the SED's more rigid line.\footnote{See HUGH, RUSSIA AND THE WEST: GORBACHEV AND THE POLITICS OF REFORM 234 (2d ed. 1990) (observing that "[t]he essence of Gorbachev's revolution was a rejection of the Iron Curtain against western culture and western market forces").} This disharmony was particularly ironic in light of the 1974 Constitution's firm and detailed expression of the GDR's "eternal and irrevocable alliance with the Soviet Union."\footnote{See generally JERRY HOUGH, RUSSIA AND THE WEST: GORBACHEV AND THE POLITICS OF REFORM 234 (2d ed. 1990) (observing that "[t]he essence of Gorbachev's revolution was a rejection of the Iron Curtain against western culture and western market forces").} The SED claimed to be able to discern the higher truth of socialism and asserted a monopoly on the exercise of this ability, but the Soviet bigger brother had begun to take a different approach. On one memorable occasion, Gorbachev warned the head of the East German state, Erich Honecker, that "life punishes those who are too late."\footnote{VERF art. 6(2) (GDR) (1974).}

Change within other Soviet bloc nations opened a second path for pressure on the SED. Since fairly unrestricted travel had long been possible within the Soviet bloc, the iron curtain could only be as strong as the borders of these nations. Once reform movements in other Eastern European nations, particularly in Hungary and Czechoslovakia, led to free travel for their own citizens and unrestricted transit for East Germans to the West, a simple and safe escape route out of the SED's closed system appeared.\footnote{Rainer Wolf, Die Verfassung eines gesellschaftlichen Konkurses, 23 KRITISCHE JUSTIZ 397, 400 (1990).} These changes in Eastern Europe started
a period of mass flight from the GDR in 1989. The silent jeers of empty classrooms and abandoned jobs in factories and other places of work were directed towards the SED's constitutional plan.

Mass flight refuted the SED's constitutional totalitarianism in another way. The SED's definitions of socialism were intended to be the basis of a system capable of providing for the needs of the people. As the Constitution of 1974 stated, a “decisive duty of the developed socialistic society” is to increase the “material level of life.” The SED's socialism was supposed to lead to prosperity, but, in fact, caused economic difficulties. After forty years of socialistic rule, provision of food was problematic, consumer goods were shoddy, and buildings throughout the country were falling apart. According to one popular aphorism in the country, the true motto of the GDR was “[make ruins without weapons.” The economic situation in East Germany was a large factor in the mass exodus from the country, which further worsened the economic conditions. If the waves of emigration continued, the last worker might one day leave the worker’s state.

A third kind of pressure on the SED arose in the fall of 1989. At this time, the signs of unrest within the country grew increasingly visible. The vigor of the mass protest was particularly evident when compared to the sterile celebration of the GDR's fortieth anniversary. On one occasion during this crucial period, the protest took the form of citizens grasping


174. Slevin, supra note 173, at 10A.

175. VERF art. 2 (GDR) (1974). For detailed constitutional provisions that establish the basis of a socialistic economy, see id. arts. 9-16.

176. Slevin, supra note 173, at 10A.


179. Slevin, supra note 173, at 10A.

180. See TURNER, supra note 7, at 232 (noting the enormous increase in protests in late October and early November, culminating in the largest protest to that date in East Berlin); WE ARE THE PEOPLE, supra note 44, at 183-85. During mid-October 1989, the Stasi counted 24 separate protest demonstrations. TURNER, supra note 7, at 232.

181. The anniversary celebrations were marked by sympathetic remarks offered by Gorbachev to reformists in the GDR and by brutal East German attempts to control peaceful protests. See WE ARE THE PEOPLE, supra note 44, at 71-118.
hands to form a human chain across most of the nation. These mass demonstrations gave substance to the simple and elegant rallying cry of the protest movement: “We are the people.” With this appeal to the idea of popular sovereignty, the citizens of East Germany sought to refute the SED’s constitutional claim to lead the “working population in city and country.”

In the fall of 1989, the Soviet Union was distancing itself from the SED, thousands were fleeing the GDR each week, and hundreds of thousands were marching in protest in the streets. The SED was quickly losing control of the country. It responded to the situation with both repressive and conciliatory gestures. Demonstrators were attacked by the police, and the party leadership alluded to the brutal attack on the protestors in Tiananmen Square and the possibility of a “Chinese solution” to their own problems. At the same time, a process of change was beginning within the SED. Erich Honecker was ousted as the head of the party by Egon Krenz, whose government announced its intention to continue to make modifications in its restrictions on travel and on November 6, 1989 presented a draft of a new law that would regulate travel and emigration to the West. Then, on November 9th, the SED “suffered a self-inflicted wound from which it never recovered.” East German party boss Schabowski made some ambiguous remarks to the press implying that anyone could obtain an exit visa at the East German

182. Thayser, supra note 162, at 182.
183. See Dirk Philipsen, We Were the People: Voices from East Germany’s Revolutionary Autumn of 1989, at 397 (1993) (noting that the slogan, “We are the people” first appeared in the mass protests of November 1989).
185. See Turner, supra note 7, at 230 (reporting that at the GDR’s fortieth anniversary celebration in October 1989, Soviet President Mikhail Gorbachev expressed to the audience that each Soviet bloc country must work out its own policies because the days of the monolithic Soviet bloc were over).
186. See Dieter Grosser, The Dynamics of German Reunification, in German Unification: The Unexpected Challenge 1, 14-15 (Dieter Grosser, ed. 1992) (noting a mass exodus from East Germany beginning in September of 1989).
187. See id. at 14-16 (describing the growing trend of protest that culminated in the participation of millions of East German citizens in protests in the large cities).
188. We Are The People, supra note 44, at 17.
189. See Grosser, supra note 186, at 16 (observing that Honecker was forced to resign and was replaced by Krenz in an attempt by the SED to show that it was willing to follow Gorbachev’s lead).
190. See Turner, supra note 7, at 233 (explaining that the draft of a new travel law was “too little, too late” and backfired, increasing the flood of emigration from East Germany and spurring angry protest).
191. Id. at 234.
GERMAN UNIFICATION

border. The guards at the checkpoints were met by a mass rush to the Berlin Wall and the world witnessed joyous scenes as that monument became superfluous. By this time, Hans Modrow, the SED's reformist First Secretary in Dresden, was chosen to be the Prime Minister of the GDR.

The dramatic changes within East Germany that began during the fall of 1989 continued through the winter. The East German pseudo-parliament, the Volkskammer, began to show signs of independence. The first indication of this new spirit was the abandonment of the SED-dominated ruling coalition by the other political parties, the so-called "Democratic Block." This expression of independence continued with the Volkskammer striking at the very basis of the SED's constitutional totalitarianism. The parliament did so by removing the language from Article 1 of the East German Constitution that established the SED's claim to leadership of the nation. This critical legislative act took place on December 1, 1989.

In the following eight months, the Constitution would be amended on four other occasions.

Without Article 1's protection of the special leadership role of the Marxist-Leninist Party, the GDR was confronted with an entirely new situation. For the first time in its history, the People of this state faced a chance to build their own identity. This opportunity was accompanied by considerable risk. The collapse of the framework for rule meant that repression of social dialogue was no longer possible. Yet, there was no legal structure capable of guaranteeing adequate conditions for this dialogue and no proven political institutions in which it could be carried out. At the level of higher law, for example, the

192. Id.
193. Id. at 233-34. For a contemporary West German account, see Eine friedliche Revolution, DER SPIEGEL, 46/1989, at 18.
194. THAYSEN, supra note 162, at 138-40.
198. See Peter E. Quint, The Constitutional Law of German Unification, 50 Md. L. Rev. 475, 498-502 (1991) (providing a comprehensive and insightful analysis of these constitutional changes). For protocols of the critical debates in the Volkskammer concerning these amendments, see FROM ROUND TABLE TO PARLIAMENT, supra note 162, at 343-475.
Constitution of 1974 remained tainted, even with its amendments, because of the way it had been imposed on the nation and its past role in repressing social dialogue. Perception of this taint led to the refusal of the first freely elected Minister President of the GDR to take an oath of office that included swearing allegiance to the Constitution of 1974. Moreover, no state governments existed within the GDR. The SED had abolished them in 1952 as part of its concentration of power. In the absence of new legal and political institutions, disputes might lead to violence, and violence might escalate into civil war.

A potentially dangerous power vacuum was created once the constitutional basis for the SED's rule vanished. In response to this threat to social peace, opposition groups sought to meet the SED around a "round table." A new stage in the East German revolution began with these meetings in Berlin.

B. The Round Table

At the Round Table, the SED and the other forces of the status quo faced important opposition groups. These groups had quickly formed during the political ferment of the fall of 1989. The SED viewed these discussions as a way to prop up its power. Indeed, a month after the fall of the Berlin Wall and six days after the SED's claim to leadership had been stricken from the Constitution, few other alternatives were available to it. As for the opposition organizations, they had already been secretly meeting with each other on a weekly basis since October 30, 1989. As the period of crisis continued, they sought to encounter the established political forces

199. FROM ROUND TABLE TO PARLIAMENT, supra note 162, at 381-82, 431-41. In April 1990, the Constitution of 1974 was amended to contain an oath of office that did not require swearing allegiance to the Constitution itself. Gesetz zur Änderung und Ergänzung der Verfassung der DDR [act amending the Constitution] of Apr. 12, 1990, GBII 1 229.


201. See Grosser, supra note 186, at 18 (observing that Protestant and Catholic clergy, fearing a crackdown on the reform process by the SED, invited the SED and opposition groups to a "Round Table Discussion" on December 7, 1989).

202. See Thaysen, supra note 162, at 31.

203. See Grosser, supra note 177, at 99-44.

204. THAYSEN, supra note 162, at 76.

205. See TURNER, supra note 7, at 234 (reporting that the breach of the Berlin Wall on November 9, 1989 proved to be permanent).

206. THAYSEN, supra note 162, at 29.
within the framework of a new institution—the Round Table.

This assembly had two critical organizational principles. The first was dialogue between political forces. The second was the exercise of oversight or, as the Round Table put it, "public control." To underscore the notion of dialogue, representatives from the Lutheran and Catholic churches, two of the few relatively untarnished institutions of East German life, issued the invitations to the Round Table and moderated the meetings. The clerical moderators viewed their task as leading a forum that would stabilize political conditions until free elections could be held. Like the other participants at the Round Table, they were worried about the danger of civil war. The risk of violence was real—the Round Table received more than ten bomb threats over the course of its meetings.

The second organizational principle of the Round Table, the exercise of public control, was made possible by its decision to grant an equal number of votes to the establishment and opposition. At the Round Table, the nineteen votes of the old status quo were divided among seven established groups: the SED, two of the SED-dominated "mass organizations," and four of the "block parties," which had been represented in the Volkskammer throughout the GDR's history. The nineteen votes of the resistance were divided among nine organizations: the Social Democratic Party, the New Forum, the Initiative for Peace and Human Rights, Democracy Now, the Green Party, Democratic Uprising, the Green League, the Independent Women's Association, and the United Leftists. This organized parity allowed the Round Table to become not just a forum for talk, but an official institution capable of independent decisions. The voting system also played a critical role in increasing the institution's legitimacy.

Nevertheless, the opposition's participation at the Round Table did not cure a certain democratic deficiency inherent

208. See FROM ROUND TABLE TO PARLIAMENT, supra note 162, at 23 (reprinting the First Resolution of the Round Table, Aug. 7-8, 1989). Excerpts from the text of this resolution are reprinted in the Appendix to this Article.
209. See id.
210. See RALF G. REUTH, IM "SEKRETÄR": DIE "GAUCK-RECHERCHE" UND DIE DOKUMENTE ZUM "FALL STOLPE" (1992) (providing details regarding the participation of important church members in the Stasi).
211. THAYSEN, supra note 162, at 36-38.
212. FROM ROUND TABLE TO PARLIAMENT, supra note 162, at 325-28, 331-36.
213. THAYSEN, supra note 162, at 37.
214. The two forces each had nineteen votes. Id. at 39-49.
215. Id. at 45 (Figure 2).
216. Id.
within that institution. A number of factors contributed to this deficiency. To begin with, no free election had validated the existence of the oppositional groups. This led to uncertainty regarding the extent to which these groups represented any given portion of the population. Indeed, as a result of the conspiratorial conditions of their formation, the oppositional forces were unable to develop close links to the public. Moreover, the leadership of the East German protest groups was comparatively elite. The oppositional leaders at the Round Table were members of the medical and legal professions, university professors, artists, and natural scientists. In East Germany, there was no equivalent of the Polish Solidarity movement, a broadly based organized resistance of Polish workers. A final element of the Round Table's democratic deficiency was the refusal of both oppositional and established forces to let new groups have voting rights. This decision could hardly validate the Round Table's claim to speak for the East German populace.

The Round Table's lack of full democratic legitimacy did not, however, prevent it from playing a decisive role in East Germany's peaceful transition to democracy. In the words of Uwe Thaysen, a West German political scientist who observed it firsthand, the Round Table changed during the course of its short institutional life from a "veto organ to a steering authority." From December 1989 to May 1990, it organized the first free elections in East Germany since the end of the Weimar Republic, oversaw the dismantling of the Stasi, provided a brake on the possibility of social violence by creating a national forum for democratic change, and gradually assumed the role of lawgiver. Among its most important goals as

217. Id. at 28-29, 174-78.
220. See FROM ROUND TABLE TO PARLIAMENT, supra note 162, at 27, 34, 37, 54 (discussing petitions from groups wishing to join the Round Table that were denied).
221. Refer to Part IV(A)(I) infra (addressing the constitutional implications of this democratic deficiency).
222. THAYSEN, supra note 162, at 76-98.
223. See id. at 71-116 (discussing the Round Table's achievements during its short life); see also FROM ROUND TABLE TO PARLIAMENT, supra note 162, at 104-05, 187-88 (concerning the critical actions of the Round Table regarding the Stasi); id. at 126-48 (dealing with the Round Table's work in preparing a law to govern the first free election in the history of the GDR).
lawgiver was the drafting of a new constitution for the GDR.

The Round Table considered the promulgation of a new constitution as the best way to form a social contract among the inhabitants of East Germany.\(^\text{224}\) For those who worried that the SED might regain control of the GDR, constitutional promulgation also offered a chance to establish the lessons of the German revolution of 1989 in higher law.\(^\text{225}\) An eagerness to ensure that something positive came of these dramatic events was magnified by the uncertainty surrounding Gorbachev’s position as the head of the Soviet Union. A military coup ending his rule might also end Soviet tolerance of any attempt to democratize the GDR.\(^\text{226}\)

Here is how the Round Table viewed its constitution-giving function. At its first meeting, the Round Table passed a resolution forming a working group to draft a constitution and urging this committee to begin its work immediately.\(^\text{227}\) The working group consisted of representatives of all the parties and citizen groups found at the Round Table.\(^\text{228}\) It was assisted by a number of legal experts, some of whom came from West Germany.\(^\text{229}\) Once the working group had completed its task, it was to present the draft document to the Round Table to be debated, and perhaps modified, before being presented to the East German nation.\(^\text{230}\) At some time after the first free national election, which the Round Table had initially planned for May 6, 1990, the People were to participate in a referendum on the new constitution.\(^\text{231}\) The national election would end the

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\(^{226}\) But see Erich Honecker, The Times, May 30, 1994, available in LEXIS, News library, TIMES file (reporting that following a failed coup against Gorbachev, Russian authorities under Yeltsin proved even more supportive of East German democracy, forcing Honecker to take refuge in Moscow’s Chilean embassy).

\(^{227}\) From Round Table to Parliament, supra note 162, at 23-24. An excerpt from this resolution is included in the Appendix to this Article.

\(^{228}\) Id. at 24; see Erich Fischer, Verfassungsgeschichte der DDR 1990, 23 Kritische Justiz 413, 416 (1990) (listing the party representatives that participated in drafting the new constitution).

\(^{229}\) See Fischer, supra note 228, at 416; Wolfgang Tempelin, Der Verfassungsentwurf des Runden Tisches. Hintergründe und Entstehungsbedingungen, in Die Verfassungsdiskussion im Jahr der deutschen Einheit 350 (Bernd Guggenberger & Tine Stein eds., 1991) [hereinafter CONSTITUTIONAL DISCUSSION]; see also “Ist das Volk untergegangen?”, Der Spiegel, 20/1990, at 80, 82 (criticizing the role that these leftist advisors from the Federal Republic played and the notable absence of “mainstream” constitutional law professors from the drafting table).

\(^{230}\) Tempelin, supra note 229, at 352.

\(^{231}\) See From Round Table to Parliament, supra note 162, at 24-25 (contain-
existence of the Round Table and replace it with a democratically elected parliament. The resulting plebiscite would then construct a new higher law.

The Round Table's vision for promulgation of a new constitution for the GDR and establishment of a new government was not fulfilled. Due to continuing mass demonstrations, an unabated stream of emigration to West Germany, a collapsing economy, and a perceived potential for social violence, the Round Table decided to hold national elections almost two months earlier than planned, on March 18, 1990. The new date meant that the Round Table could not receive a completed draft of the constitution before its last meeting. As a result of this truncated time table, the necessary institutional debate could not take place within the Round Table. Moreover, the Round Table could make no formal presentation of the document to the nation. Accordingly, it needed to revise its plan for constitution-giving.

At its last meeting on March 12, 1989, the Round Table resolved that the working group on the constitution should present its completed draft to the public and to the newly elected Parliament for discussion. Following a period of national reflection, the Volkskammer would then supervise a referendum on the constitution. The Round Table proposed June 17, 1990 as the date for this plebiscite. This date was chosen with care: it was the thirty-seventh anniversary of the unsuccessful worker's revolt against the SED. Looking further into the future, the Round Table urged that its Draft Constitution be consulted in the debate concerning a new, joint constitution for the unified Germany. The Round Table could only suggest how either its Draft Constitution or any joint constitution should be promulgated. The matter was now out of its hands. Its proposed constitution, a national image forged in revolution and cast into the form of higher law, would have to find its own way to promulgation.

232. Id.
233. Id.
234. See FROM ROUND TABLE TO PARLIAMENT, supra note 162, at 102 (recording the resolution taken at the Round Table's 10th meeting on January 29, 1990).
235. See THAYSEN, supra note 162, at 142-44.
236. See FROM ROUND TABLE TO PARLIAMENT, supra note 162, at 301.
237. Id.
238. Id.
239. Id.; see WEBER, supra note 69, at 232-44 (discussing the workers' revolt).
240. Id.
C. The Round Table’s Draft Constitution

The broad outlines of the Round Table’s Draft Constitution should be familiar to students of comparative constitutional law. It adopts and adapts many elements of the West German Basic Law. The Draft Constitution establishes a democratically-elected parliament; a governing cabinet headed by a Minister President whose powers are checked by separation of powers and federalism; and an independent judiciary that, among its duties, is to review the constitutionality of laws and government acts. In addition to these familiar elements, the Draft Constitution also seeks to improve on this heritage. Its attempted constitutional improvements include an introduction of direct democratic elements that are limited by forbidding changes to a small group of critical constitutional articles. Among its other important characteristics are its extensive catalogue of rights and its articulation of numerous goals for the government.

1. Direct Democracy and Limits on Constitutional Change.

The period of revolutionary change in the GDR was marked by peaceful mass demonstrations that dramatically reaffirmed the power of popular sovereignty. The drafters of the Round Table’s Constitution responded to this situation by structuring elements of direct democracy within their new order. At the same time, they balanced this expression of faith in the People by limiting the possibility of amendment to certain core constitutional values.

The Round Table’s Draft Constitution contains several direct democratic elements. Perhaps the most significant of these elements is a role for plebiscites in both normal and constitutional lawmaking. Normal law can be made either by the legislative branch or through the direct participation of the populace. Article 89 of the Draft Constitution states: “Laws will be

241. Schlink, supra note 225, at 165. Selective elements of the Constitutional Court’s case law interpreting the Basic Law were even written into the Draft Constitution. See Gerd Roellecke, Dritter Weg zum zweiten Fall: Der Verfassungsentwurf des Runden Tisches würde zum Scheitern des Staates führen, in CONSTITUTIONAL DISCUSSION, supra note 229, at 367, 368-69.

242. ROUND TABLE DRAFT CONSTITUTION, supra note 164, arts. 51-64.

243. Id. arts. 69-77.

244. Id. arts. 107, 113. The Draft Constitution devotes considerable detail to the tasks and composition of a Constitutional Court. See id. arts. 109-12.

245. Id. art. 100.
determined by the Volkskammer or by plebiscite.\textsuperscript{246} Article 98 contains further provisions as to the role of the People in normal lawmakers.\textsuperscript{247} When 750,000 voters support a detailed proposal for a law, its text is to be transmitted to the Volkskammer, which can either pass or refuse it.\textsuperscript{248} Should the legislature reject the proposed law, a referendum must be held.\textsuperscript{249} During the period of consideration before the plebiscite, the People's official representatives, who are to be named in the proposed law, were to be given an opportunity to campaign on behalf of the law in public broadcasting media.\textsuperscript{250}

The direct role of the People in normal lawmaking is supported by other constitutional provisions. The first of these is a constitutional right to form political organizations. This right extends not only to political parties, but to citizens' movements and workers' unions.\textsuperscript{251} These organizations are intended to support the People's role in governance. They allow the individual, who might otherwise become ineffectual and isolated, to become part of the body politic.\textsuperscript{252} In addition, the Draft Constitution provides for commissioners and ombudsmen who work independently of the government and the legislature. Article 65 establishes a "Citizens' Lawyer" and commissioners to assist foreigners and oversee questions of gender equality.\textsuperscript{253} Like the citizens' movements, these officers are meant to help individuals participate in society.\textsuperscript{254} Finally, the Draft Constitution protects a right of access to governmental data and creates a personal right of informational privacy.\textsuperscript{255} Access to governmental information allows citizens to participate in political life in an informed manner. Limits on the application of personal data prevent the kind of intimidation that the Stasi practiced through data collection.

The Draft Constitution creates a democracy in which the People's participation in normal politics receives careful

\begin{itemize}
  \item \textsuperscript{246} Id. art. 89.
  \item \textsuperscript{247} See id. art. 98.
  \item \textsuperscript{248} See id. art. 98(1).
  \item \textsuperscript{249} See id. art. 98(2).
  \item \textsuperscript{250} Id. art. 98(4).
  \item \textsuperscript{251} See id. arts. 35-39.
  \item \textsuperscript{252} See Preuß, \textit{supra} note 224, at 87 (supporting the constitutional anchoring of these citizen groups). \textit{But see} Roellecke, \textit{supra} note 241, at 375 (bitterly attacking these provisions as the creation of undemocratic privileges).
  \item \textsuperscript{253} \textit{ ROUND TABLE DRAFT CONSTITUTION, supra} note 164, art. 65.
  \item \textsuperscript{254} See Tatjana Ansbach, \textit{Die Institutionalisierung eines "Bürgeranwalts" im Verfassungsentwurf des Runden Tisches der DDR, in CONSTITUTIONAL DISCUSSION, supra} note 229, at 388, 389 (praising this provision for advancing the realization of human rights).
  \item \textsuperscript{255} \textit{ ROUND TABLE DRAFT CONSTITUTION, supra} note 164, arts. 8, 15, 33(3), 35.
\end{itemize}
GERMAN UNIFICATION

This Constitution also provides the People with a direct role in higher lawmaking. The key to the draft's approach to constitutional change is found in Article 100, which both permits and limits the People's ability to change the higher law. These limits on constitutional amendment represent an important modification of the dualist approach of constitutional law and normal politics.

Article 100 establishes two tracks for higher lawmaking. In the lower track, it requires that amendments to the Round Table's Constitution be passed by two-thirds of the Volkskammer and confirmed in a national referendum. Article 100 also forbids changes to a small group of constitutional articles. This group of core values is entrenched upon the higher law's second track. A shorthand expression of this model would be: entrenched rights/ "normal" constitutional law/ "normal" politics. Thus, the Draft Constitution replaces constitutional dualism with a triad.

The Round Table's Draft Constitution places certain constitutional rights beyond the reach of "normal" constitutional politics. The most important of the Round Table's entrenched rights concern the protection of human worth and other human rights; the establishment of the People's sovereignty; the direct applicability of the general rules of international law; the guarantee of the judiciary's independence; and the structuring of the Parliament's lawmaking ability and the People's participation in lawmaking.

This entrenchment reflects a tempered approach to constitutional change. Just as constitutional law places certain issues beyond the reach of "normal" politics, the constitutional entrenchment of certain decisions within the higher law places them beyond "normal" constitutional politics. Similarly, the constitution of the Federal Republic of Germany, the Basic Law, protects a series of individual rights and core values from constitutional amendment. Indeed, elements of entrenchment

256. Id. art. 100(1).
257. Id. art. 100(2).
258. Id. art. 1(1).
259. Id. art. 40.
260. Id. art. 42(3).
261. Id. art. 107.
262. Id. art. 89.
263. The Basic Law's entrenchment is even stronger than the Round Table's. It provides for a "right to resist" anyone who would try to abolish the "democratic and social federal" constitutional order. GG art. 20(4) (FRG). On the other hand, the Basic Law makes it relatively easy to change "normal" constitutional law. Those changes are made through a law passed by two-thirds of both houses of the German
exist even within the generally dualistic model of the United States Constitution. The U.S. Constitution’s entrenchment served to forbid Congress from restricting the states’ ability to allow the importation of slaves before 1808.\textsuperscript{264} It continues to protect the equal suffrage of the states in the Senate.\textsuperscript{265}

In contrast to both the German and Round Table models, the dualism of the United States Constitution allows change to virtually any part of the Constitution. Article V places the same hurdles before these changes. The challenges include not only a supermajority requirement,\textsuperscript{266} but also political involvement on the state as well as federal level.\textsuperscript{267} Almost everything is up for grabs for American constitutional disputants. In such an order, one must trust one’s fellow citizen and rely on the art of compromise. Alexander Bickel offered a particularly cogent affirmation of the value of trust and compromise. He writes that “[n]o society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through.”\textsuperscript{268}

German constitutional entrenchment expresses disbelief in the likely merits of “muddling through.” It attempts to limit the potential for majoritarianism to lead to an abandonment of democratic values. In the Round Table’s model, the People remain the source of the state’s power, and their power is heightened through the Draft Constitution’s support for direct democratic elements. At the same time, however, the People’s ability to make certain radical changes is circumscribed by this document’s prohibition of amendment to its core provisions. Alteration of these provisions is possible only by the promulgation of a new constitution. Both the Basic Law and Round Table Constitution were written after harrowing experiences with totalitarian systems. Their limitations on radical, antidemocratic change reflect an awareness that majoritarianism is not incompatible with evil.

\begin{itemize}
  \item \textsuperscript{264} See U.S. Const. art. V. Refer to note 33 supra.
  \item \textsuperscript{265} See id. (stating that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate”).
  \item \textsuperscript{266} See id. (requiring the consent of two-thirds of both Houses of Congress, or two-thirds of the states, for proposing a constitutional amendment, and requiring ratification by three-fourths of the states).
  \item \textsuperscript{267} See id.
  \item \textsuperscript{268} ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 64 (1962).
\end{itemize}
2. Additional Rights, State Goals, State Activism and Constitutional Uncertainty. The triadic model used by the Round Table's Draft Constitution has greater specificity than the U. S. Constitution, which allows an ongoing discovery of the simpler border between constitutional law and normal politics. The U.S. Constitution merely outlines the objects reserved to the higher lawmakers and opens everything else to normal politics. The Draft Constitution's greater specificity is reflected not only in its triadic model, but also in the enumeration of extensive rights and state goals and the requirement that the State take active measures to protect these important norms.

Included among the Draft Constitution's extensive rights are such traditional values of higher law as free speech and freedom of the press. As noted above, the Draft Constitution also safeguards citizens' groups and spells out rights to freedom of information and data protection. Other protected rights include dignity in death and a woman's "self-determination in pregnancy." These extensive rights are accompanied by a series of broad social goals towards which the state is obliged to work. These goals concern areas such as equal access to education and a natural environment protected from danger and damage. Sometimes rights and social goals blend together; thus, the Draft Constitution contains provisions that protect employment, social security, unemployment insurance, and old age pensions.

In the United States, constitutional rights protect individuals against state action. These rights allow the individual to defend herself against the government, but generally do not impose affirmative duties on the State. Like the Federal

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269. ROUND TABLE DRAFT CONSTITUTION, supra note 164, arts. 15, 18, 21.
270. Id. arts. 8, 15, 33(3), 35.
271. Id. arts. 4(1), 4(2).
272. Id. arts. 24, 33.
273. Id. arts. 23(2), 23(3), 27. See Preuß, supra note 224, at 86 (praising this detail as reflecting a "constitution not only for a government, but for a society"). But see Karl-Heinz Ladeur, Verfassungsgebung als Katharsis: Der Entwurf des "Runden Tisches," in CONSTITUTIONAL DISCUSSION, supra note 229, at 376, 380-81 (criticizing these extensive constitutional provisions as failing both to concentrate on the essential and to set an emphasis on the most important priorities).
274. See, e.g., DeShaney v. Winnebago County Dept of Social Servs., 489 U.S. 189, 196 (1989) (finding that the Due Process Clause is designed to "protect the people from the State, not to ensure that the State protected them from each other"); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) ("The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them."). But see Akhil R.
Republic of Germany's Basic Law, the Round Table's Draft Constitution takes another approach: it grants not merely rights of defense against the State, but also rights that compel state action. This approach obliges lawmaking that will create constitutional conditions by allocating burdens and benefits among members of society. Thus, the specificity of this document extends beyond its entrenchment of rights to a description of the State's required activity in "normal" constitutional law and "normal" politics. Here, the Draft Constitution is more detailed than the Basic Law in its expression of constitutionally mandated social goals. It requires more state activity in a broader range of areas. For example, it does not merely limit property rights, but obliges the State to create extensive land use plans that regulate the use of real property. It also contains details regarding the constitutional requirements of landlord and tenant law.

The Round Table's Draft Constitution reflects a different attitude than that of the United States Constitution towards the amount of uncertainty that a constitutional order should permit. In this context, one is reminded of Chief Justice John Marshall's warning that a constitution containing too much detail "would partake of the prolixity of a legal code." Despite the dangers of constitutional prolixity, the Draft Constitution chooses to describe an extensive list of civil rights and State duties.

This specificity is made for a different reason, however, than the entrenchment of core values on a special track above

Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney, 105 HARV. L. REV. 1359, 1360 (1992) (finding that the Thirteenth Amendment imposes an affirmative obligation on the state to protect children from abuse because child abuse is similar to slavery); Steven J. Heyman, The First Duty of Government: Protection, Liberty and the Fourteenth Amendment, 41 DUKE L.J. 507, 509 (1992) (explaining that one of the central purposes of the Fourteenth Amendment was to establish a federal constitutional right to protection by the government); David A. Strauss, Due Process, Government Inaction, and Private Wrongs, 1989 SUP. CT. REV. 53, 59 (criticizing reliance on the distinction between government action and inaction).

275. See Gerhard Casper, Changing Concepts of Constitutionalism, 1989 SUP. CT. REV. 311, 331-32 (discussing a European constitutional concept that "acknowledges common causes and responsibilities of the political community toward its less fortunate members"); see also Peter E. Quint, Free Speech and Private Law in German Constitutional Theory, 48 MD. L. REV. 247, 339-47 (1989) (analyzing the Basic Law's requirement of the creation of constitutional conditions).

276. ROUND TABLE DRAFT CONSTITUTION, supra note 164, arts. 29, 32.

277. Id. art. 25.

that of "normal" or nonentrenched higher law. Entrenchment reflects a certain pessimism regarding the merits of radical constitutional change. In contrast, the Draft Constitution spells out extensive rights and fixes state goals because of its conviction regarding the necessity of a democratic government's continuing involvement in the creation of the conditions for communal life. Rather than leaving governmental tasks open to the ebb and flow of normal politics, the drafters believed that a modern constitution must put in place a detailed structure that will shape the State's activism. In their view, a constitution should organize and encourage the appropriate state policies.279

A phase in East Germany's revolution ended with the drafting of the Round Table's Constitution. The working group then faced the next stage in constitution-making: presentment of this text to the newly elected East German Volkskammer. This body, the first freely elected parliament in the history of the German Democratic Republic, would decide the fate of the Draft Constitution.

IV. UNIFICATION WITHOUT CONSTITUTIONAL TRANSFORMATION

A. The End of the Revolution

The East German parliament made a decision regarding the Round Table's Draft Constitution without much fuss. When the working group presented the finished text to the Volkskammer, the parliament refused to place the Draft Constitution on its official agenda.280 The document was simply referred to the parliament's own constitutional commission, which more or less ignored it.281 This burial within the parliament's bureaucracy reflected more than institutional jealousy.282 Indeed, the Volkskammer's own commission proved equally unsuccessful in its attempt to write a new constitution.283 Within both the new parliament and East Germany as a whole, the idea of promulgating a new constitution for the

279. See Casper, supra note 275, at 327 (finding that European constitutions in the twentieth century increasingly translated "issues of social ordering" into constitutional terms).
280. Fischer, supra note 228, at 413.
281. See id. at 419-21.
282. For more on the relations between the Round Table's working group for a new constitution and the Volkskammer's constitutional committee, see Templin, supra note 229, at 350-51.
283. Fischer, supra note 228, at 419-21.
GDR became increasingly viewed as an exercise in futility that would only slow down unification with West Germany.\textsuperscript{284}

Instead of making use of the Draft Constitution, the Volkskammer passed a law that further amended the Constitution of 1974.\textsuperscript{285} Passage of this law was considered necessary because the Federal Republic’s Basic Law required certain attributes of democracy to be in existence before accession to it could take place.\textsuperscript{286} In a study of the constitutional law of German unification, Peter Quint perceptively terms these East German constitutional amendments, “a conceptual bridge to unification.”\textsuperscript{287} The tack of this hastily drafted law was simply to offer a list of new constitutional provisions and to declare void any part of the Constitution of 1974 that violated them.\textsuperscript{288} The focus of these amendments was less the constitutional expression of a new East German identity than the execution of a formality in order to end the GDR’s existence. Passage of these measures was part of the Volkskammer’s search for the quickest path to unification.\textsuperscript{289} The amendments took effect on June 17, 1990—the day the Round Table had suggested for a plebiscite on a new constitution and the thirty-seventh anniversary of the failed workers’ revolt.\textsuperscript{290}

The revolution in the GDR led not to a new constitution for the nation, but to amendment of an existing, discredited constitution. This result falls far short of Ackerman’s advice to revolutionaries. Indeed, if liberal constitutionalism begins with a national constitutional assembly preparing a constitutional document, East German revolutionaries did not even fulfill the first necessary step. In considering their failure to create a new constitution for the GDR, two issues must be examined. The first concerns the Round Table’s difficulties in the role of constitution-maker. The second involves the lack of public support for a new constitution.

\textsuperscript{284} See PHILIPSEN, supra note 183, at 348-49 (noting that the East Germans abandoned their drive to develop a new society in lieu of simply adopting the well-established West German legal, political, and economic systems).

\textsuperscript{285} Quint, supra note 198, at 502.

\textsuperscript{286} See 2 GRUNDGESETZ-KOMMENTAR 95 (Ingo von Münch ed., 2d ed. 1983) [hereinafter BASIC LAW TREATISE].

\textsuperscript{287} Quint, supra note 198, at 505.

\textsuperscript{288} Gesetz zur Änderung und Ergänzung der Verfassung der DDR (Verfassungsgrundsätze), of June 17, 1990, GBl. I 299 (GDR).

\textsuperscript{289} See MCADAMS, supra note 70, at 208.

\textsuperscript{290} See WEBER, supra note 69, at 232-44 (discussing the events leading to the workers’ revolt and the revolt itself).
1. The Round Table's Difficulties in Constitutional Promulgation. This Article has examined the efforts of the Round Table because it was the closest that East Germans came to forming a constitutional assembly. The Round Table was, however, ill-suited to fulfill this task. It defined itself as a component of the "public control," and it claimed to speak for the People during a period of crisis in a land without democratically chosen representatives. But this claim was narrow. No group at the Round Table had been selected through free national elections. Indeed, even the forces of the opposition had relatively nonrepresentative leadership and loose ties to the population. The Round Table's limited legitimacy was further decreased by its refusal to grant voting rights to any new groups, including other oppositional groups, after its first meeting. Just as the Round Table could not definitively replace a legislative and executive branch selected through free elections, it could not take the place of a democratically formed constitutional convention.

Drafting a constitution stretched the Round Table's legitimacy to its limits. This lack of legitimacy had two consequences for the Round Table's attempt to create a new constitution. The first consequence was that the assembly could not control the schedule for its constitution writing. Promulgation of a constitution takes time, but the Round Table's obligation was to make itself unnecessary as soon as possible. At its first meeting, this improvised institution resolved that its activities would continue "until the carrying out of free, democratic and secret elections." Thus, from its start, the Round Table's plan for its own expiration hinged not on its proposal of a constitution, but on the open election of an East German parliament. In determining when these elections were to take place, the Round Table was obliged to respond to the exigencies of the period and not to its own need for internal debate and discussion of the drafting committee's work.

In addition to its inability to control the time table, the Round Table faced a second difficulty in promulgating a constitution. Without formation through a democratic process, a national constitution committee has, at best, a questionable connection to the People. Due to its problematic status as a constitutional assembly, the Round Table faced a latent risk of

291.  FROM ROUND TABLE TO PARLIAMENT, supra note 162, at 23. A translation of this Round Table resolution is included in the Appendix to this Article.
292.  Refer to the Appendix, infra.
outright rejection of its work. Two months before the free elections of March 1990, a demonstration outside the Palace of the Republic, the seat of the Volkskammer, featured signs that read, "Who elected you? Get out of our house."293 The longer the Round Table met and the more important the decisions that it considered, the greater the risk that its work might be rejected.

2. East Germans and a New Constitution for the GDR. These flaws of the Round Table do not, however, account for the notable lack of interest among East Germans in creating a more legitimate body to draft a constitution. One ground for this lack of interest might have been the difficulty that East Germans faced in building a constitutional consensus. A mere desire or perceived need to promulgate a constitution cannot create agreement out of thin air. Indeed, East Germans seemed unlikely candidates for arriving at such a consensus because of their low level of trust in each other.

This Article has shown that the SED's constitutional totalitarianism first imposed silence on the nation and then carried out extensive surveillance to discover if silence was being observed. Removing the SED's constitutional totalitarianism would not by itself exorcise the sense of distrust present in human relations. Indeed, the Round Table's Draft Constitution demonstrates how such a sense of distrust might develop. The prestigious task of writing its Preamble had been entrusted to prominent East German writer and party dissident, Christa Wolf.294 Yet, later events revealed that Wolf had collaborated with the Stasi from 1959 to 1962.295 During this period, Wolf filed reports under a code name.296 Perhaps even more disturbingly, Wolf later claimed that she had entirely forgotten about this period of her life.297 The aftermath of constitutional

293. THAYSEN, supra note 162, at 112.
296. Id.
297. The collaboration itself was found by many to be less disturbing than the combination of Wolf's self-representation as a victim of the Stasi and her amnesia about her collaboration with the organization. See generally CHRISTA WOLF, WAS BLEIBT (1990) (relating her oppressed life under the constant surveillance of the Stasi), translated in CHRISTA WOLF, WHAT REMAINS AND OTHER STORIES 231 (Heike Schwarz Bauer & Rick Takvorian trans., 1993); Hage, supra note 295, at 198 (ex-
totalitarianism was a population in which a staggering number had participated in Stasi spying, and an even greater number of individuals were tainted because of data stored in the files of the secret police.

Despite these obstacles to consensus building, East Germans might have been able to arrive at the required constitutional agreement. Their conditions for the creation of a constitution in 1989 were certainly no worse than those of West Germans in 1949. Indeed, their revolution had one positive element that had been absent from the experience of the other Germany following the end of World War II. At that time, democracy was imposed on a population that had supported Adolf Hitler until Allied forces fought through their streets to his fortified bunker. In East Germany, on the other hand, the population had risen up against its oppressors. The People's peaceful protest provided an important schooling in democracy for the entire nation. The popular nature of their uprising is reflected in the Round Table's Draft Constitution. This document protected citizen groups, provided for national referendums in both normal lawmaking and "normal" or nonentrenched constitutional lawmaking, and required that the Draft Constitution itself be submitted to the People for ratification.

The failure of East Germans to create a new constitution was not primarily due to problems in consensus building, but rather to their lack of interest in prolonging the life of any East German nation. Once the Wall fell and their revolution progressed, the goal of East Germans was to be citizens of the Federal Republic. The SED was overthrown by the defiant claim, "We are the People," but by the time of the first free Volkskammer election, demonstrations featured signs that read, "We are one people" ("Wir sind ein Volk"). One demonstration even featured East Germans marching with suitcases in hand in the direction of their western border. The message was clear: if the Federal Republic would not come to them via unification, they were ready to go to it.

plainting her amnesia regarding her collaboration with the Stasi, Wolf calls it "[a] classic operation of repression [of memory], one which gives me something to think about").

298. There was, however, a noble effort by a small number of Germans to resist the Nazi regime. Today, some conservative German politicians have attempted to separate the members of the "good" resistance, such as conservative members of the German army, from the "bad," such as members of the Communist party. See Dieter Wild, Helmut Kohl and Georg Elser, DER SPIEGEL, 30/1994, at 32.

299. PHILIPSEN, supra note 183, at 248-49.

300. Fischer, supra note 228, at 414.

301. THAYSEN, supra note 162, at 183.
There were a number of reasons why the East Germans did not want any kind of East German state. To begin with, they had never built a strong identification with the GDR. Most often, their sense of homeland was connected to a region or town. This absence of strong East German identity was largely the SED's fault. Not only had the SED been unable to create a sense of association with the State in the GDR's forty year history, but its behavior did much to prevent the formation of such an identity. The SED's repression of any constitutional dialogue played a significant part in the People's failure to identify with the GDR. Even the events of 1989 to 1990 did not create such a connection. In this sense, the revolution was over too soon. By contrast, constitution-making at Philadelphia in 1789 came after a lengthy process of American self-definition and discovery that had begun in the mid-eighteenth century.

While the East Germans failed to develop a significant national identity, they had a positive example directly across their border. As one East German saying had it, "The folks in the West have no ideals. The folks in the East have one—the West." Indeed, in the spring of 1990, an East German church leader related the following anecdote. Upon his asking a school class about their most wonderful recent experience, a girl responded, "When someone thought I was a West German." The FRG's attractiveness also contributed to the


303. Ferene A. Váli, The Quest for a United Germany 176-80 (1967) (explaining that although East German officials used much propaganda aimed at blaming the West Germans for delaying unification, most East Germans refused to develop a sense of solidarity with their own government—"their jailors").

304. See Donald S. Lutz, The Origins of American Constitutionalism 69 (1988) (opining that by 1774, the colonists had evolved from being British to becoming American). For a description of the events that led to American self-determination and the subsequent claim of independence, see Richard B. Bernstein, Are We to Be a Nation?: The Making of the Constitution 12-21 (1987). As historian Gordon Wood has observed, the American Revolution was about far more than the destruction of bonds with England. In place of a rigidly organized hierarchy, it created a new society—one of "plain, ordinary people" interested in equality in pursuit of their workaday interests. Wood, supra note 43, at 358-59.

305. See Váli, supra note 303, at 176 (noting that West Germany's prosperity and freer society strengthened divisive forces within the East German population).


East German lack of interest in a new constitutional form for the GDR. From the East German perspective, the FRG offered two special attractions. The first was its economic success; the second, its political success, which was anchored in the Basic Law.

Although the GDR was one of the most prosperous countries in the Soviet bloc, the point of reference for East Germans was not the states to its east, but the FRG, one of the richest lands in the world. The standard of living in the GDR lagged decades behind that of West Germany. East Germany's desire to share in Western prosperity has been summed up in the expression, "deutsche mark nationalism." These economic considerations also increased the appeal of the Basic Law as opposed to that of any new GDR constitution. In this view, the Basic Law had been tested and proven by its creation of the conditions for the Federal Republic's prosperous economy.

Yet, the Basic Law's contribution to German social wealth hardly exhausted its merit. Since its promulgation in 1949, this constitution had proven capable of structuring an impressive dialogue within the Federal Republic about the identity of the nation and its future. Despite occasional shortcomings in the West German rule of law, the Basic Law played a decisive, positive role in the development of democracy and was widely viewed as the most successful constitution in the history of Germany. Despite the argument that creation of a temporary East German constitution would improve the terms of unification with West Germany, East Germans might well have wondered why they should try their hand at creating a new constitution when the results of such a highly successful experiment were readily available.

An additional and final disincentive for constitutional

309. See Uwe Andersen, Economic Unification, in German Unification: The Unexpected Challenge, supra note 186, at 107, 109-11, Table 1 (comparing certain economic indicators for East and West Germany in 1988).
310. Jürgen Habermas, Die Nachholende Revolution 205 (1990). See generally William Pfaff, Reflections: The Absence of Empire, The New Yorker, Aug. 10, 1992, at 59, 62 (stating that "German pride in West Germany’s economic accomplishments is . . . a form of nationalism, and has not lacked an edge of condescension toward those of Germany’s postwar allies who are its economic competitors and have not done so well").
311. See, e.g., The Democratic Tradition: Four German Constitutions 76 (Elmar M. Hucko ed., 1987) (noting the Basic Law’s success in establishing a sound democracy by adopting the merits of previous constitutions and rejecting their weaknesses).
312. Preuß, supra note 224, at 85.
promulgation was the uncertainty surrounding Gorbachev's rule in the USSR.\textsuperscript{313} Soviet unpredictability had encouraged the Round Table's eagerness to establish the gains of popular rebellion in constitutional law. Yet, this instability also supported a call for rapid unification. Just as Soviet troops had been deployed in Hungary in 1956\textsuperscript{314} and in Czechoslovakia in 1968,\textsuperscript{315} they might again be used to crush the attempt to democratize the GDR in 1989. The troops were, in fact, already there. As part of the Warsaw Pact alliance, the Soviet Union had 380,000 soldiers and 220,000 civilians stationed throughout East Germany.\textsuperscript{316}

Thus, East Germany's failure to create a new constitution was not due to difficulties in consensus building, but to a lack of desire for an East German nation. The first—and last—free election in the history of the GDR\textsuperscript{317} supports this view. It rewarded parties who were unlikely, and later proved unwilling, to create a new constitution for the GDR.\textsuperscript{318} Almost seventy percent of the votes cast in this election went to the so-called "sister parties" of established West German political parties.\textsuperscript{319} Indeed, forty-eight percent of the votes cast went to the East German Christian Democratic Union (CDU) and the two parties associated with it.\textsuperscript{320} These conservative parties seemed to offer a particular advantage for those eager for speedy unification: the CDU was at the head of the coalition governing West Germany.\textsuperscript{321} With branches of the CDU leading the two German states, shared politics and party allegiance would

\begin{itemize}
\item \textsuperscript{313} See ROBERT G. KAISER, WHY GORBACHEV HAPPENED 314-22 (1991) (noting the political turbulence in the U.S.S.R. in early 1990, including the Lithuanian claim of independence and the Azerbaijani-Armenian conflicts, which led to calls for Gorbachev's removal from power by numerous Soviet officials).
\item \textsuperscript{314} See LANE, supra note 239, at 92-94 (describing the events in Hungary that climaxed with an invasion by 15 Soviet divisions and 6000 tanks on November 4, 1956).
\item \textsuperscript{315} Id. at 99.
\item \textsuperscript{316} Karl Kaiser, Germany's Unification, 70 FOREIGN AFF. 179, 196 (1991). In a bilateral treaty with the Soviet Union signed on October 9, 1990, Germany agreed to contribute 13.5 billion deutsche marks to the cost of stationing and withdrawing these troops. \textit{Id.} at 197.
\item \textsuperscript{317} Uwe Thaysen, The GDR on its Way to Democracy, in GERMAN UNIFICATION: THE UNEXPECTED CHALLENGE, supra note 186, at 72, 86.
\item \textsuperscript{318} See Grosser, supra note 186, at 29 (noting that the newly elected Volkskammer opted for Article 23’s accession method instead of writing a new constitution).
\item \textsuperscript{319} THAYSEN, supra note 162, at 214.
\item \textsuperscript{320} Id.
\item \textsuperscript{321} See TURNER, supra note 7, at 189-90 (noting that although the CDU had lost a number of seats in the West German Parliament in 1987, it still led the ruling coalition).
\end{itemize}
presumably simplify the necessary negotiations. Far less successful than the sister parties in this election were the former SED, now renamed the Party of Democratic Socialism, and the citizen organizations that led the revolution. At this time, these citizen groups were the only voice that advocated a third path for the GDR. That path was intended to avoid the shortcomings of both the SED's socialism and the market economy of the Federal Republic.

By the time that the first democratically elected government of the GDR was chosen, East German interest in constitutional creation had already passed its high water mark. The goal of the new East German government was not to write a new constitution, but to negotiate unification. The East German People never formed themselves into a constitution-giving body. They never created a constitution as “We the East German People.” They wished to be part of the Federal Republic and to share in the blessings of its constitution. After the democratic election in the GDR, the constitutional debate about unification became a German-German discussion. Here, too, the critical question was whether change would best be expressed through constitutional promulgation. East and West Germans could together create a new constitution for the Federal Republic, or East Germans could simply accede to the Basic Law.

The Basic Law left both possibilities open.

B. The Basic Law and German Unification

On February 20, 1990, Wolfgang Schäuble, the German Interior Minister, met in Washington, D.C. with James Baker, then the Secretary of State of the United States. In his description of this meeting, Schäuble notes his wonderment when

322. See THAYSEN, supra note 162, at 214. For a list of the organizations participating in the revolution, see Thaysen, supra note 317, at 75-77.

323. See Thaysen, supra note 317, at 86 (stating that these groups advocated a slow reunification to preserve East German social achievements).

324. The head of this government, Minister President Lothar de Maizière, explained to the Volkskammer that “unification must occur as quickly as possible” under conditions that were “as good, as reasonable, as fit for the future as was necessary.” Lothar de Maizière, Regierungserklärung des Ministerpräsidenten der Deutschen Demokratischen Republik 19 April 1990 [Declaration of the Government], reprinted in FROM ROUND TABLE TO PARLIAMENT, supra note 162, at 447, 453.

325. See GG arts. 23, 146 (FRG) (presenting the option of applying the extant Basic Law to East German states as they accede to West Germany or of a united Germany adopting a new constitution abolishing the Basic Law). Refer to notes 330-35 infra and accompanying text.

Baker asked him about Article 23 of the Basic Law. Schäuble was surprised at Baker’s question because he did not expect the Secretary of State of a foreign country to be so well-informed about German constitutional law. In retrospect, Baker’s question, which was raised in the specific context of a discussion of Germany’s eastern border, is surprising for another reason. He identified the constitutional provision that would play a critical role in unification.

The Basic Law was not intended to be a permanent German constitution. Instead, it was only to serve as the constitution for the western half of a partitioned land. The temporary nature of this document is indicated by its name, Basic Law (Grundgesetz) rather than Constitution (Verfassung), and its Preamble, which called on the German People “to achieve in free self-determination the unity and freedom of Germany.”

According to the Basic Law, the unification of the western and eastern parts of Germany could take place in one of two ways: through the promulgation of a new constitution or through accession to the Basic Law. The two critical provisions of the Basic Law that regulate the matter are Article 23 and Article 146.

Article 146 provides that the Basic Law would lose its validity on the day that the German People choose a new constitution in a free decision making process. The Basic Law does not provide many additional details as to the nature of this process, but some interpreters of Article 146 have argued that it requires some sort of national plebiscite. Indeed, some commentators believed that a referendum would correct an apparent shortcoming in the promulgation of the Basic Law: it had never been presented directly to the People for ratification. Instead, this constitution had been ratified by state
legislatures.\textsuperscript{333}

In contrast to Article 146, Article 23 provides a mechanism for unification without the creation of a new constitution. After describing the territorial coverage of the Basic Law at the time of its promulgation, Article 23 states that this document would be set into force in "other parts of Germany . . . on their accession."\textsuperscript{334} Here, too, the Basic Law does not provide many details. Its language was interpreted to mean that accession to the constitution could either be made by a plebiscite of the East German People or by a decision of a democratic government in East Germany.\textsuperscript{335}

In describing these options for unification, the founders of the FRG showed a significant amount of trust in a group that we can term, "We the Entire German People." Rather than plotting a detailed plan for unification, they sketched two broad constitutional provisions, Article 146 and Article 23, and left open a great many questions.\textsuperscript{336} By so doing, they expressed optimism about the ability of the "Entire German People" to solve the problems that would arise at the time of unification. Yet, these founders also showed a certain skepticism regarding the role to be played by "We the West German People." As the Basic Law's Preamble makes clear, the West German People were obliged to seek unification.\textsuperscript{337} More importantly, the

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\textsuperscript{333} Heinrich Böll Foundation eds., 1990) [hereinafter CONSTITUTION WITH REFERENDUM].
\textsuperscript{334} BOLDT, supra note 200, at 311-12.
\textsuperscript{335} See Judgment of July 31, 1973, 36 Entscheidungen des Bundesverfassungsgerichts [Constitutional Court] [BVerfGE] 1, 28.
\textsuperscript{336} Prominent among these issues is how these two provisions relate to each other. Article 23 might be subordinate to Article 146; accession might require simultaneous promulgation of a new constitution under Article 146. On the other hand, the two provisions might offer alternatives between which the "Entire German People" were free to choose. See Peter Häberle, Verfassungspolitik für die Freiheit und Einheit Deutschlands, 45 JURISTEN ZEITUNG 358, 358 (1990).
\textsuperscript{337} Even a choice of Article 23 would not, however, resolve all constitutional questions. In the case of unification through accession, "We the Entire German People" might still wish to have the opportunity to promulgate a new constitution at a later date. In this case, Article 146 would remain in the Basic Law with continuing validity.
\end{flushright}
German founders wrote Article 23 so that the West German People could not reject accession by their Eastern relatives. The Basic Law was to be set in force over “other parts of Germany” once those parts acceded to it.\(^{338}\)

In 1949 the promulgators of the Basic Law made a decision in favor of unification. Forty years later, its two key provisions regarding unification became the focal point of the discussion about how this process should take place. In this debate, most Germans seemed to favor accession through Article 23 rather than promulgation of a new constitution through Article 146.\(^{339}\) Those in favor of Article 146 did, however, offer a number of arguments in favor of their position and attempted to engage the public in their cause. One organization, the Trustees for a Democratically Constituted Federation of German States, even prepared a draft constitution that could be voted upon in an Article 146 plebiscite.\(^{340}\)

An especially articulate advocate of unification through creation of a new constitution was Jürgen Habermas, a prominent philosopher. Central to Habermas’ approach was a belief that Auschwitz makes it impossible for Germans to depend on the continuity of any part of their history.\(^{341}\) He reminded Germans that the Federal Republic’s democratic orientation occurred only after their worst defeat and that their Western


\(^{340}\) Kuratorium für einen demokratisch verfassten Bund deutscher Länder, Verfassungsentwurf (1991). For a collection of articles in support of Article 146 and a national referendum edited by this organization, see in Freier Selbstbestimmung: Für eine Gesamtdeutsche Verfassung mit Volksentscheid (Trustees for a Democratically Constituted Federation of German States & The Heinrich Böll Foundation eds., 1990). This organization also held a conference devoted to their draft constitution in the St. Paul’s Church in Frankfurt-am-Main. The meeting’s location was chosen with care. It had been the site of the 1848 convention that prepared the first complete constitution for a German nation. James J. Sheehan, German History: 1770-1866, at 677-78 (1989). See also Constitution with Referendum, supra note 322 (collecting speeches delivered at a meeting held in Weimar by this organization).

\(^{341}\) Habermas, supra note 310, at 219.
character was therefore not free of a certain opportunism. In his words, part of the sense of identification with the Basic Law's liberal institutions was due to a "process of adoption" rather than "the expression of a conscious decision for the republican tradition of the West." In the place of "an administratively executed annexation [Anschluß]," Habermas wished to see a public act that indicated a reflective decision of East and West Germans. He urged the German People to use their chance to improve the Basic Law and to complete their unification with a clear act of political consciousness. Habermas asked, "If not now, when should the day have come to which Article 146 looked forward?" Unification represented an opportunity for Germans to affirm and develop their commitment to democracy, and a failure to take advantage of this chance could only burden the FRG's "inner condition."

These arguments reflect an attempt to derive a role for constitutionalism within the specific context of the German experience. Yet, these and other appeals did not find great resonance with the public. East Germans had marched in the streets to overthrow the SED and West Germans had matched their enthusiasm when the Wall fell, but no such great excitement accompanied the constitutional discussion in the year of German unity. At this time, many of the considerations that had kept East Germans from writing a new constitution resurfaced. For example, admiration of the Basic Law was accompanied by concern that no new constitution would be better than the one that the FRG already had. Moreover, many in

342. Id. at 162.
343. Id. Habermas had already explored the meaning of Germany's past in a series of important essays during the so-called "quarrel of the historians" (Historikerstreit) in the mid-1980s. See generally JÜRGEN HABERMAS, EINE ART SCHADENSABWICKLUNG: KLEINE POLITISCHE SCHRIFten VI (1987). At this time, West Germans debated "the meaning of the Nazi period and its use as [an] historical example within contemporary Germany." Paul M. Schwartz, Recent Public Trends in West Germany, 1987 PARTISAN REV. 235, 235; see also "HISTORIKERSTREIT": DIE DOKUMENTATION DER KONTOVERSE UM DIE EINZIGARTICKEIT DER NATIONALSOZIALISTISCHEN JUDENVERNICHTUNG (Ernst Piper ed., 1987) (containing a collection of German essays on this topic).
344. HABERMAS, supra note 310, at 216.
345. Id. at 221.
346. Id. at 162.
347. See, e.g., Gert-Joachim Glaßner, Am Ende des Staatssozialismus—Zu den Ursachen des Umbruchs in der DDR, in COLLAPSE OF THE GDR, supra note 173, at 70, 89 (stating that the East German people did not pay much attention to constitutional questions during the time of upheaval); Schlink, supra note 225, at 176 (finding that the will to change the Basic Law was absent in both West and East Germany).
348. Robert Leicht, Einheit durch Beitritt: Eine neue Verfassung kann nur
the east and west alike felt that the creation of a new German constitution would take too much time and cause too much uncertainty. The eastern and western branches of the CDU were adamant in this view. Here, too, nervousness about the longevity of Gorbachev's regime counseled against a lengthy process.

To some extent, West Germans had some disincentives against constitution-making that were peculiar to them. They felt uneasy at the thought of constructing a new constitution with relatives whom they no longer knew. In addition, unification without a new constitution would itself reflect the West German legal culture's skepticism about the idea of the People playing too direct a role in constitutional law. Both the failure of the Weimar Constitution, which contained direct democratic elements, and the horrors of Nazism, which were made possible by the active or passive participation of most Germans and ended only because of invading foreign armies, contributed to the skeptical West German attitude. For the West German founders, a shattered society whose central values led to Auschwitz did not offer a compelling argument for excessive reliance on the People. As a result of this approach, the German population did not directly participate in the creation of the Basic Law. Finally, at the time of unification West Germans wished to retain the legal stability provided not only by the Basic Law, but also by the developed case law of the Constitutional Court interpreting it.

schlechter werden, in CONSTITUTIONAL DISCUSSION, supra note 229, at 186.

349. SCHÄUBLE, supra note 325, at 25, 55, 64.

350. In 1990, in response to the later rallying cry of the East Germans, “We are one people,” an East German journalist and a West German journalist jointly published an anthology by East Germans reporting on West Germany and vice versa entitled, Are We One People? (Sind wir ein volk?), supra note 178. For a later collection of essays exploring the difficulties of “life together” (Zusammenleben) for East and West Germans, see DEUTSCHE ENTFREMUNG: ZUM BEFINDE IN OST UND WEST (Wolfgang Hardtwig & Heinrich A. Winkler eds., 1994).

351. See, e.g., MANN, supra note 329, at 988 (stating that “[t]he constitution, all in all, was a good one, better than the Weimar constitution, more careful, more skeptical”).

352. See BOLDT, supra note 200, at 311-12 (explaining the creation of the Basic Law). First, the Allied Forces supervised the election of new state parliaments. Id. In 1948, these parliaments selected a council to write a new constitution. Id. This body, which was called the Parliamentary Council, decided that state legislatures—not a national plebiscite—would ratify the Basic Law. Id. By May 23, 1949, the required two-thirds of the participating German state legislatures had ratified the new German constitution, and the Parliamentary Council proclaimed the Basic Law’s passage. Id.

"We the Entire German People" never produced enough political pressure to lead to a new constitution's creation. In the absence of this pressure, their representatives in the West and East German parliaments decided to negotiate a series of treaties that would lead to unification via Article 23. By this time, the Volkskammer had already indicated its support for this path by amending the GDR's Constitution of 1974 to create the necessary attributes of democracy. Of the treaties that the two states negotiated, the second, the Unification Treaty, contained the most critical provisions for the East German People's accession to the Basic Law.

The Unification Treaty explicitly extended the Basic Law to the five new states created within the territory of the GDR. It also made a number of necessary amendments to the Basic Law itself. The Unification Treaty's alterations to the Basic Law did not, however, represent a reconsideration of the FRG's constitutional form. Instead, those amendments tied up loose ends. For example, the Basic Law now explicitly indicates that unification ended any possibility for further territorial expansion of the Federal Republic. Other changes included alterations in the language of Article 146 of the Basic Law, which remained in the constitution as a reminder that the "Entire German People" could still one day decide to replace their constitution. In addition, a new article was added to the Basic Law to structure the dates on which various parts of this constitution would become binding law in the new German states. Finally, the Unification Treaty also recommended that within the next two years the legislature consider constitutional questions "raised in connection with German unification." The resulting joint Constitutional Commission of the two houses of the German congress has refused almost every constitutional amendment proposed to it.

354. The Volkskammer passed the primary amendment necessary for unification on June 17, 1990. Gesetz zur Änderung und Ergänzung der Verfassung der DDR (Verfassungsgrundsätze), of June 17, 1990, GBl. I 299 (GDR); see also Quint, supra note 198, at 502.


356. Id. art. 1.
357. Id. arts. 1, 4.
358. Id. art. 1.
359. Id. art. 4(5).
360. Id. art. 4(5).
361. Id. art. 5.
amendments concerned such topics as social goals for the State, a more powerful right of petition, data protection law, and the creation of a national ecological council.\textsuperscript{363}

As a law changing the German constitution, the Unification Treaty required passage by the same means as any other constitutional amendment. A two-thirds majority was necessary in both the West and East German legislatures.\textsuperscript{364} Passage of the Unification Treaty by these bodies and signature of it by representatives of the two countries was the final chapter in the constitutional story of German unification. The Basic Law took effect in the five new states on October 3, 1990, which is now a legal holiday commemorating the official day of German unity. As part of the celebration that marked this new day, a copy of Philadelphia's Liberty Bell was sounded in front of the Reichstag in Berlin.\textsuperscript{365}

C. Constitutional Change and Constitutional Amendment

German revolution and unification between 1989 and 1990 offer valuable perspectives for the discussion about the role that constitutional law can play in maintaining and changing the historical identity of a nation. Present in this debate are two sets of issues. The first is the role that an already established constitutional dialogue can play in this process. The second is the place for the creation of a new dialogue, that is, the role of constitutional promulgation. This Article will examine the first issue by comparing the kind of constitutional dialogue that takes place under Ackerman's structural amendment with both East Germany's constitutional totalitarianism and the United States Constitution's Article V. Article V forms the critical basis of American dualism, which this Article will contrast with the triadic model of the Federal Republic's Basic Law.

\textsuperscript{363} REP. OF THE JOINT CONSTITUTIONAL COMM', supra note 362, at 119, 148, 185, 190.

\textsuperscript{364} GG art. 79(2) (FRG).

\textsuperscript{365} Kaiser, supra note 316, at 203.
1. **The Structural Amendment.** Bruce Ackerman has developed an ingenious account of constitutional change in the United States. Through the idea of the structural amendment, he has attempted to reinfuse popular sovereignty into American constitutional law. According to Ackerman, a structural amendment is made by a four-step process: (1) different branches of the federal government disagree with each other about a critical issue of the higher law and cause a constitutional impasse,\(^{366}\) (2) the People give the Government a decisive signal by voting in an important national election (the "triggering" election),\(^{367}\) (3) the electoral winners challenge the institutional legitimacy of the dissenting branch of the federal government,\(^{368}\) and (4) the dissenting branch decides that further resistance will lead only to its institutional death (the "switch in time").\(^{369}\)

The structural amendment assigns a leading role to the People in shaping transformative constitutional solutions. Their role in this process is carried out through their behavior in national elections, which ultimately influences the resolution of the constitutional debate.\(^{370}\) Thus, the structural amendment is based on a belief that all constitutional power ultimately derives from the People. This view offers a clear contrast to constitutional totalitarianism. In the GDR, the People did not participate in the process of constitutional change. On one occasion, the SED even replaced the entire constitution and only told the People about it after the fact.\(^{371}\) The SED made decisions about the constitution and the meaning of socialism, the central constitutional value, and expected the People's obedience.\(^{372}\)

The structural amendment reflects not only a belief in popular sovereignty, but also the constitutional division of this power among three different branches of government. Building on the United States Constitution's system of checks and balances of power within government, the structural amendment

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367. *Id.* at 509.
368. *Id.*
369. *Id.*
370. *See* id. at 268 (arguing that electoral losers in national elections will retreat from their opposition to electoral winners, viewing their opponent's strong national support as a signal or mandate from the People).
371. ROGGEMANN, supra note 80, at 60.
372. Refer to notes 86-115 supra and accompanying text (discussing the SED's expectation of obedience and loyalty to socialism).
allows the People to play a decisive role in resolving impasses between branches. In contrast, constitutional totalitarianism was based on a doctrine of the concentration of powers that increase despotism's feasibility. This concentration was given a constitutional basis through the East German Constitution’s establishment of socialism as the central value of the nation and its affirmation of the leadership of one party.

Compared to constitutional totalitarianism, the structural amendment’s application of the notions of popular sovereignty and separation of powers is at least a creditable approach to constitutional change. Yet, the structural amendment has at least three shortcomings that strain a constitution’s ability to legitimize change. First, the United States Constitution does not provide for the structural amendment. Second, it follows a process with indistinct contours. Finally, it leaves no textual record in the Constitution itself. To demonstrate these shortcomings, let us first consider Article V, the (seemingly) exclusive mechanism that the United States Constitution provides for amendment, and then consider each of the structural amendment’s weaknesses in turn.

Article V sets out a relatively straightforward process for changing the Constitution. It first requires that the People propose amendments through their elected representatives in Congress or through their delegates to a constitutional convention. The People must then indicate approval of new constitutional solutions through their elected representatives in Congress. There are, of course, ambiguities that may arise during the Article V process and the possible procedures for resolving these ambiguities are not entirely free from controversy. Compare Coleman v. Miller, 307 U.S. 433, 472 (1939) (finding that Congress is empowered to resolve issues arising in the ratification process) and Laurence H. Tribe, A Constitution We Are Amending: In Defense of a Restrained Judicial Role, 97 HARV. L. REV. 433, 434-35 (1983) (explaining that the amendment process raises political issues that are better resolved by Congress) with Dellinger, supra note 66, at 411-17 (1983) (arguing that, despite some drawbacks, judicial review of the amendment process advances the larger goals of certainty and predictability in the resolution of constitutional amendment issues).

My point is simply that these ambiguities and controversies about the process of Article V pale in comparison to the kinds of uncertainties that a structural amendment raises.

373. See Sunstein, supra note 1, at 639 (arguing that “[i]f no branch of government is actually ‘the people,’ a system of separation of powers can allow the citizenry to monitor and constrain their inevitably imperfect agents”).

374. Throughout its text, the East German constitution emphasized the centrality of socialism in all aspects of life. See, e.g., VERF pmbl., arts. 1, 4, 17, 18, 87 (GDR) (1974).

375. See U.S. CONST. art. V. Refer to note 33 supra. There are, of course, ambiguities that may arise during the Article V process and the possible procedures for resolving these ambiguities are not entirely free from controversy. Compare Coleman v. Miller, 307 U.S. 433, 472 (1939) (finding that Congress is empowered to resolve issues arising in the ratification process) and Laurence H. Tribe, A Constitution We Are Amending: In Defense of a Restrained Judicial Role, 97 HARV. L. REV. 433, 434-35 (1983) (explaining that the amendment process raises political issues that are better resolved by Congress) with Dellinger, supra note 66, at 411-17 (1983) (arguing that, despite some drawbacks, judicial review of the amendment process advances the larger goals of certainty and predictability in the resolution of constitutional amendment issues).

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376. See U.S. CONST. art. V.
state legislatures or their delegates to state constitutional conventions.\textsuperscript{377} The Article V process allows the nation to know when the People have spoken in their constitution-amending voice.\textsuperscript{378} The People's speech is indicated when a transformative movement meets the hurdles that the constitutional text provides.

In contrast to the Article V process, the structural amendment is not explicitly provided by the Constitution. Ackerman justifies this novel path of constitutional amendment by arguing that the Founders expressed approval of such outbreaks of higher lawmaking and that the People have, in fact, followed this path.\textsuperscript{379} This argument is, however, troublingly extra-constitutional. By permitting constitutional amendment outside of the explicit mechanism provided by the Constitution, the structural amendment reduces the importance of this document. It makes the Constitution less a text setting out the structure of higher law than a simulacrum of such a document. Moreover, to the extent that the structural amendment is not presented as normative (i.e., something that the Founders intended to be part of the constitutional structure), but simply as descriptive (i.e., something the People have done in the past and can do again in the future), the second shortcoming of this process becomes acute. This shortcoming is that the open-ended procedures of the structural amendment make it difficult to know whether or not the People have utilized it.

In any national election, the People's behavior is likely to be open to different interpretations. As David Dow has pointed out, different and highly plausible readings can be given to the national elections that Ackerman believes "triggered" structural amendments to the Constitution.\textsuperscript{380} As a result, one person's structural amendment can be another's (mere) electoral

\textsuperscript{377} See id.

\textsuperscript{378} In the words of Walter Dellinger:

The formal amendment process set forth in Article V represents a domestication of the right to revolution. Article V maintains the spirit of 1776—the right of the people to alter or abolish an inadequate government. But the manner of the right's exercise is circumscribed. Change is permitted, but only through the modes specifically sanctioned in the charter of government itself.

Dellinger, supra note 66, at 431.

\textsuperscript{379} FOUNDATIONS, supra note 2, at 40-57, 175-99. Ackerman notes, for instance that the Constitutional Convention was acting illegally by not following the ratification process set forth in the Articles of Confederation. Id. at 41.

\textsuperscript{380} See David R. Dow, When Words Mean What We Believe They Say: The Case of Article V, 76 IOWA L. REV. 1, 46-51 (1990) (arguing that it is nearly impossible and is highly speculative at best to draw inferences as to the content of voters' constitutional beliefs based upon who wins and loses in a given election).
Justice Stewart once offered this now famous definition of hard core pornography, "I know it when I see it." Like this approach to obscenity, Ackerman's structural amendment also ultimately relies on the eye of the beholder.

The difficulty of knowing when the People have spoken in their constitutional-amending voice via the structural amendment is heightened by the structural amendment's third weakness—its failure to result in a change to the text of the Constitution. Here, too, a contrast with Article V is helpful. When the Constitution is altered through application of Article V, this process not only follows the procedure that the Constitution sets forth, but also results in a change to the Constitution's text. The Article V amendment adds to or subtracts from the written terms of the Constitution. These changes help indicate the perceived shortcomings of the previous constitutional provisions or practices. In comparison, the structural amendment does not result in a text that formally amends the Constitution. It reflects a decision of the People that is nowhere expressed in a fixed number of words. As a result of the absence of textual change to the Constitution, ambiguity will exist as to the elements of the constitutional order that the People intended to affect or to leave unaffected. This ambiguity is likely to have an unfortunate effect on the Constitution's ability to channel reform and revolution.

Ackerman sees the structural amendment's reintroduction of popular sovereignty into constitutional history as a way of

381. As Dow puts it with characteristic verve, "Professor Ackerman's theory is an example of bad history being used for questionable reasons." Id. at 51.

382. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt to further define [hard core pornography] . . . and perhaps I could never succeed in intelligibly doing so. . . . But I know it when I see it . . . .").

383. Cf. Akhil R. Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043, 1095 (1988) (stressing the textual character of the Constitutional Convention's efforts by observing that the establishment of a written Constitution was one of the founders' most important achievements).

384. As Henry Monaghan has written, "Any serious effort to mark some boundary between law and politics must take into account the constitutional text. A textual exegesis at least confines judgment—the judicial construction must be capable of being related to the text and to the structure it creates." Henry P. Monaghan, Of "Liberty" and "Property," 62 CORNELL L. REV. 405, 415 (1977).

385. It is, of course, possible to have ambiguities within the language of a constitutional text, and even clear texts will present questions concerning meaning at the margins. See, e.g., Dow, supra note 380, at 1 (observing that some of our constitutional texts, such as the equal protection clause, invite unending debates about their meaning); Frederick Schauer, Easy Cases, 58 S. CAL. L. REV. 399, 414-16 (1985) (discussing various factors that cause a text to seem ambiguous).
legitimizing constitutional change. Yet, the model's indeterminate contours seem far more likely to encourage resistance. Let us consider how this resistance may be bred. In the aftermath of a structural amendment, it is unlikely that all citizens will agree that the People have, in fact, spoken. For the part of the populace that fails to hear the People's voice, no obligation exists for obedience. Since this group argues that no change has been made to the Constitution, its qualms do not have to be qualified as resistance. When this point has been reached, a basis for a constructive exchange of views has vanished. Constitutional dialogue is likely to grind to a standstill when one side claims victory while the other insists that nothing has happened. The polarized disputants may even be tempted to break this deadlock by escalating their conflict, perhaps by resorting to the use of force.

If we care about a constitution's role in legitimizing change, the structural amendment offers a path fraught with danger. On the other hand, the constitutional totalitarianism of the GDR is even more problematic. In East Germany, the People were allowed to play no role in constitutional transformations. The constitutional law established the rule of one party and commanded the People's obedience. There are, however, two models that are equipped for a role in the structuring of continuity and change. The first is the American constitutional approach, which Ackerman argues is a dualism based on a differentiation of constitutional law and normal politics. The second is the German triadic model, in which constitutional law itself has two tracks.

2. The United States' Constitutional Dualism. The structural amendment is best viewed as a variation on constitutional dualism. It attempts to provide an additional way for changes to be made within the higher lawmaking track. Unlike constitutional totalitarianism or the structural amendment, a liberal constitutional order based on a dualistic system offers tremendous potential for legitimizing constitutional change. In this order, there is a higher track with challenging institutional barriers to constitutional change, and a lower lawmaking track open to the give-and-take of the ordinary political process.

386. FOUNDATIONS, supra note 2, at 285-90.
387. See generally ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 271-310, 353-75 (1992) (analyzing the Supreme Court's role in the resolution of intensely polarized issues such as desegregation, abortion, and the death penalty).
388. See FOUNDATIONS, supra note 2, at 230-32.
389. See id. at 266-69.
This system fixes rules for shared social life and places the most important of these rules on the higher track, where changes require completion of a more difficult process of lawmaking. Revolutionaries can change these rules, but only after mobilizing a majority of the People through the settled, deliberate institutional process required by Article V. Within the dualistic order, the subtle interplay that takes place between the two lawmaking levels can contribute to the peaceful resolution of social conflict.

In the dualistic model, the relationship of the two tracks of lawmaking is one of mutual benefit and dependence. The higher track of lawmaking fixes a national consensus as to the premises of communal life. Once this agreement is established in the higher law and insulated from mere majoritarian assault, normal politics can fulfill its promise for deciding policy questions and resolving conflicts within the public. Once a constitution has set rules about shared social life, those who disagree with one another can expect their conflict to stay within safe borders.\(^{391}\)

In the dualistic system, a symbiosis between the tracks of constitutional law and normal politics is possible. This condition can be called "creative uncertainty." Creative uncertainty exists when a constitution's expression of the areas reserved to constitutional law and those open to normal politics is made in terms of basic principles rather than through detailed rules and regulations. In the United States, the founding generation's cartography of the borders of constitutional law and normal politics was made in this fashion. The Constitution sets out only a "great outline" of the "important objects" reserved to the higher lawmaking track.\(^{392}\) It leaves everything else to the lower lawmaking track.\(^{393}\) The U.S. Constitution sets out a basic assignment and then encourages testing the extent to which activities have been reserved to the higher lawmaking track or are open

\(^{390}\) See id. at 243-51.

\(^{391}\) See Sunstein, supra note 1, at 642 (stating that the decision to use constitutionalism to remove certain issues from the political agenda can reduce the ability of highly controversial questions to cause "hostilities so serious and fundamental as to endanger the governmental process itself").

\(^{392}\) McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819) (Marshall, C.J.) (opining that the framers of the Constitution believed that the proper nature of a constitution should be that of a great outline, designating only the important objects).

\(^{393}\) Justice Marshall also stated that the minor details left unenumerated in the Constitution are to be "deduced from the nature of the [important] objects themselves." Id. This suggests that Justice Marshall believed that these minor details should be debated and resolved within the realm of normal politics as opposed to the higher lawmaking track.
to the more flexible, lower lawmaking track. Part of the ongoing discovery of the meaning of constitutional principles concerns how they set a border between constitutional law and normal politics.

A suggestive example of a failure to make full application of creative uncertainty is offered by the Supreme Court's role in the abortion debate. Before the Court's decision in *Roe v. Wade*, abortion was considered to be an issue open to normal politics. At the time of the decision, the state legislative trend was to broaden the conditions under which an abortion could be granted. The effect of *Roe* was to place many aspects of the abortion decision beyond the reach of normal politics. After first stating that "[t]he pregnant woman cannot be isolated in her privacy," the *Roe* Court did, in fact, attempt to insulate the pregnant woman from at least some kinds of interference in her decisionmaking. It did so by declaring that a constitutional guarantee of a "right of privacy" was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." This right to privacy was intended to protect aspects of the abortion decision from legislative control. This constitutional protection removed many issues regarding abortion from the realm of normal politics and raised them to the higher lawmaking track.

Interestingly enough, the Supreme Court's removal of much of the creative uncertainty about the borders of constitutional law and normal politics regarding abortion did not lead to social peace. *Roe* left too little ground for a fruitful constitutional dialogue between those who viewed themselves as being on opposing sides of this issue. As Robert Burt has written, "The Court's intervention drastically narrowed the participants' perspectives and truncated their educative efforts."

If *Roe* narrowed the debate about abortion, then seventeen years later, a Supreme Court with a significantly different membership again narrowed the debate by upholding an administrative regulation preventing physicians at federally funded clinics from even mentioning the possibility of abortion to

396. *Id.* at 159.
397. *Id.* at 153.
398. *See id.* at 116 (Blackmun, J.) ("Our task, of course, is to resolve the issue by Constitutional measurements free of emotion and of prediction.").
399. BURT, *supra* note 387, at 358. Burt believes that this decision reduced social deliberation about the issue to a crucial audience of one person: "Justice Sandra Day O'Connor, the swing vote regarding *Roe* on the reconstituted Reagan Court." *Id.* at 359.
any patient.\(^{400}\) \textit{Rust} raised serious First Amendment issues that the Court largely ignored.\(^{401}\) The government-sponsored "gag-rule" gave the state a powerful role in discouraging physicians from discussing certain constitutionally-protected conduct with their patients. A decision in \textit{Roe} insulating less of the abortion decision from normal politics might have been more constructive. Similarly, a decision in \textit{Rust} prohibiting state-imposed silence about the abortion decision might have prevented the government from strongly encouraging the public to favor certain conduct. These decisions might even have forced contending parties to search for common ground in a debate about the meaning of constitutional principles.\(^{402}\)

Viewed in light of \textit{Roe} and its progeny,\(^{403}\) much of the American constitutional dialogue takes the form of a debate about which track lawmaker activity should proceed upon. In the United States, this debate receives important constitutional protection in the First Amendment, which guarantees freedom of speech.\(^{404}\) This protection exists because of an abhorrence for government-imposed orthodoxy. Rather than the State determining the truth of any idea, this judgment is to be made in the "marketplace" of competing ideas.\(^{405}\) In the words of Owen


\(^{401}\) \textit{Id.} at 1780 (Blackmun, J., dissenting) (arguing that the majority was clearly upholding viewpoint-based suppression of speech). \textit{Contra} \textit{id.} at 1772 (dismissing petitioner's contention that the regulations violated their First Amendment right of free speech).

\(^{402}\) \textit{See} BURT, \textit{ supra} note 387, at 344-52 (suggesting that if the Court had relied on a doctrine of "constitutional equality" in \textit{Roe} instead of the right to privacy, it could have facilitated the result that the federal system might have yielded).

\(^{403}\) Despite the Court's intention, \textit{Roe} has not put the abortion issue to rest. \textit{See}, \textit{e.g.}, Planned Parenthood of Southeastern Pennsylvania \textit{v. Casey}, 112 S. Ct. 2791, 2817-21 (1992) (reaffirming a woman's right to choose abortion before viability, but abandoning \textit{Roe}'s trimester framework in favor of an undue burden test and recognizing the state's legitimate interest in potential life); \textit{Webster v. Reproductive Health Servs.}, 492 U.S. 490 (1989) (upholding Missouri's statutory restrictions on the use of public employees and facilities in performing nontherapeutic abortions and approving the requirement of viability testing for fetuses of 20 or more weeks gestational age before abortions can be performed).

\(^{404}\) The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." \textit{U.S. Const. amend. I.}

\(^{405}\) In the words of Justice Holmes:

\[\text{[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.} \]

Fiss, "The First Amendment is a guarantee of collective self-determination, a method for making certain that the people know all that they must to exercise their sovereign prerogative . . . ." Protection of speech reflects a recognition that notions of the truth can change and that social transformation will depend on these shifts.

Perhaps the greatest benefit of creative uncertainty between the borders of constitutional law and normal politics occurs when it leads disputants of socially polarized issues to a search for common ground. It does so by encouraging the realization that any constitutional arrangement can provide only provisory social peace. Mutual exploration of the implications of this arrangement will still be needed for the present and for the future. A constitution's fixing of rules about shared social life depends on the exploration by constitutional disputants of the present implications of any past consensus. To put it another way, uncertainty is a condition for which most of us have a limited capacity. In the constitutional context, as in others, it becomes bearable only if a foundation of trust can be developed. In this dialogue, current constitutional winners will engage in discussions with constitutional losers. These ongoing debates should explore the constitutional coordinates of social issues on the partially charted map of constitutional law and normal politics.

3. The Federal Republic's Constitutional Triad. Constitutional dualism creates a framework that can lead to a fruitful dialogue about continuity and change. There are, however, other possible structures for such discussions. At the end of the revolution in the GDR, the East Germans acceded to the West German Basic Law. This document presents Germans with a different model for constitutional dialogue than is present in the United States. Instead of constitutional dualism, the Basic

406. Owen M. Fiss, State Activism and State Censorship, 100 YALE L.J. 2087, 2100 (1991); see also Stanley Ingber, Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts, 69 TEX. L. REV. 1, 43-44 (1990) (finding that freedom of speech is an essential part of the tradition of a democratic community).

407. See LEE C. BOLLINGER, THE TOLERANT SOCIETY 8-11 (1986) (implying that the social urge to suppress speech is tied to the urge to suppress unpopular beliefs and behavior); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 579 (2d ed. 1978) (concluding that the First Amendment is intended "to protect a rich variety of expressionual modes"). In addition to the First Amendment, the United States Constitution contains other important measures that seek to empower the People. See Amar, supra note 1, at 1132 (stating that the original Bill of Rights puts in place not only substantive rights, but structural considerations that seek to empower popular majorities against the oppression of the State).
Law sets up the same kind of constitutional triad that the Round Table's Draft Constitution proposed. The Basic Law prohibits any amendments to a small group of critical values. Its model is one of "entrenched" constitutional rights/"normal" constitutional law/"normal" politics. As was the case in the Draft Constitution, the Basic Law's entrenched constitutional rights limit the possibility of majoritarianism leading to an abandonment of certain core values. This model has not, however, resulted in constitutional rigidity. In fact, its entrenchment is accompanied by flexibility elsewhere in the Basic Law. At the same time that the German approach preserves a small group of entrenched rights, it allows for change to the rest of the constitution through a less rigorous process than is found, for example, in the United States Constitution.

In the American model, even minor tinkering with the Constitution is as difficult as the most major modification. Not only are supermajorities in Congress required, but political involvement must take place on the state as well as federal level. As a result, it is relatively difficult to change the United States Constitution, which has been altered only twenty-seven times in over two hundred years. In the last two decades, the only amendment that has been made to the Constitution, the Twenty-seventh Amendment, was one originally proposed by James Madison in the First Congress. In contrast, those parts of the Basic Law that deal with "normal" constitutional law can be altered merely by a two-thirds majority of both houses of the German legislature. The Basic Law has been amended forty times in forty-four years.

When the provisions of a constitution are open to change, the document can evolve and respond to the demands of a new age. The legitimation of such a constitutional order is based upon the consent of a previous generation and the opportunity

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408. Refer to Part III(C) supra (discussing the Round Table Draft Constitution).
409. GG art. 79(3) (FRG).
410. See U.S. CONST. art. V.
411. See id.
412. See David R. Dow & Richard A. Westin, What We Should Learn From the Hill vs. Thomas Fiasco, 7 ST. JOHN'S J. LEGAL COMMENT. 81, 82-83 (1991) (arguing that the difficulty of amending the Constitution squeezes issues off the political agenda and inserts them into inappropriate forums such as the judicial confirmation process).
414. GG art. 79(2) (FRG).
of a present generation to alter the terms of the agreement. This kind of constitution combines the continuity of a fixed governing norm with the flexibility that the possibility of change brings with it. After unification, the Basic Law offers just such a chance for a constructive social dialogue. The Basic Law's constitutional triad creates a possibility for a creative tension between continuity and transformation. Like the United States Constitution, it does this through an expression in basic principles of agreement as to the areas reserved to constitutional law and those open to normal politics. This openness creates the chance for a fruitful social discussion of the track on which lawmaking activity is to proceed. As in the Round Table's Draft Constitution, however, this notion of basic principles is limited by a specificity unknown in the United States. Entrenchment itself provides some of this specificity. In addition, to a lesser degree than the Draft Constitution, but to a greater one than in the United States Constitution, the Basic Law creates additional rights and state goals. It obliges the State to play an active role in this land.

In contrast to these two constitutional orders, East Germany's Constitution now occupies a prominent place on the scrap heap of legal history—a reminder that a constitution leads only an artificial existence if it does not speak for the People and allow the People to shape it. Such a document will expire as soon as the dominant party cannot maintain it.

D. Constitutional Promulgation and the German Experience

Both American dualism and the German triadic model establish a constitutional order in which a creative tension exists between higher law and normal politics. In both systems, this tension is created through an interplay between the different lawmaking tracks. Like American dualism, the German constitutional model can structure a dialogue about the State's identity. If the German experience displays the usefulness of an interplay between the different kinds of lawmaking, it casts doubt on Ackerman's enthusiasm for constitutional promulgation as a necessary, even exclusive vehicle for national transformation. The German revolution took a different course than Ackerman's suggested model. The People did not convene to write a new

416. See, e.g., GG art. 1 (FRG) (expressing that the goal of all governmental power must be the protection of human dignity); id. art. 2 (recognizing the right to free development of the personality); id. art. 6 (placing the family under the special protection of the governmental order); id. art. 12 (granting the freedom to choose a profession).
constitution in either East or West Germany. No national plebiscite was held, and no new constitution was promulgated. From Ackerman’s perspective, a critical historical moment passed in vain.

This Article’s study of the German revolution of 1989 has, however, revealed a far different dynamic than Ackerman’s favored approach. During their revolt against the SED, East Germans viewed themselves as forming a People with sovereign power. Yet, this power did not lead them to promulgate a new constitution. East Germans wanted to be part of the same state as West Germans, and the speediest and best path to this end seemed to be acceptance of the Basic Law.

German unification offers a number of important lessons regarding the role of constitutional promulgation. The first is that no single constitutional response of the People to revolutionary transformation deserves normative status. Any number of constitutional approaches are possible depending on a given culture’s historical, political and legal circumstances. Jürgen Habermas and other supporters of Article 146 put forth good reasons in the German context for promulgation of a new constitution. An outside observer might even regard these as the better arguments. Yet, in the German revolution of 1989, a desire for unification within the form of an existing nation played a more important part than any desire to create a new constitution.

The historical, political and legal elements that helped form the German experience suggest that Ackerman’s faith in constitutional promulgation rests heavily on an interpretation of one culture’s experience at one historical moment. A fondness for the Philadelphia story will not, however, justify or summon forth similar behavior in another country. Indeed, Ackerman’s interpretation of the events in Philadelphia in the summer of 1787 does much to remove them from their own historical context.

417. Article 146 of the Basic Law provides for East German accession to the Basic Law. GG art. 146 (FRG).

418. Habermas has recently expressed disappointment about the Unification Treaty being used as a substitute for a “social contract” negotiated between the citizens of the two German states. See Jürgen Habermas, Gelähmte Politik, DER SPIEGEL, 28/1993, at 50.

419. See Dow, supra note 380, at 47-51 (commenting that “the basic problem with postulating a theory whereby the political climate yields constitutional text is that reading electoral politics is only sightly less fatuous than reading tea leaves”).

420. See TRIBE, supra note 407, at 321 (observing that the Articles of Confeder-
had been created not merely during the American Revolution’s armed struggle, but during long decades of political, social and physical isolation from England. As part of this creation of a national identity, individual American states had the successful experience of promulgating state constitutions by the time the delegates met in Philadelphia in 1787. Finally, the Founders invented the modern role of a constitution at a time “in the then infancy of the science, of constitutions, and of confederacies.”421 In 1989, when the German-German constitutional debate occurred, a successful constitution was already in place in the Federal Republic, no new East German national identity had been formed, no states existed in East Germany to promulgate state constitutions, and the East Germans knew the benefits of a constitution, such as the Basic Law, based on different lawmaking tracks.

Not only does German unification indicate a different historical, political and legal dynamic from that of the United States at the time of its independence, it also demonstrates a second, perhaps more universal lesson. This point is that the creation of a new constitution is not eagerly embarked upon. West and East Germans were reluctant to respond to upheaval with promulgation of a new federal constitution, but this hesitation is not unique. Americans have been no more eager during their own history to undertake the task of constitutional promulgation. This hesitation about constitutional promulgation has been present since the beginning of the American republic. In fact, James Madison believed that constitution-making required almost miraculous conditions to be successful. As Madison observes in Federalist 49, the lessons of history stretching back to ancient Greece warn of the hazards and difficulties

atation failed in large part because of discriminatory, self-protective, and retaliatory state actions resulting in interstate economic competition being conducted more through political processes than through the marketplace); see also SPEECH OF JOHN RANDOLPH (May 29, 1787) (reported by James Madison), in THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18 (Max Farrand ed., 1966) [hereinafter THE RECORDS] (enumerating the perceived defects of the Articles of Confederation).

421. The cited language, which belongs to John Randolph, is worth quoting in full:

In speaking of the defects of the confederation he professed a high respect for its authors, and considered, them as having done all that patriots could do, in the then infancy of the science, of constitutions, & of confederacies—when the inefficiency of requisitions was unknown—no commercial discord had arisen among any states—no rebellion had appeared as in Massats.—foreign debts had not become urgent—the havoc of paper money had not been foreseen—treaties had not been violated—and perhaps nothing better could be obtained from the jealousy of the states with regard to their sovereignty.

THE RECORDS, supra note 420, at 18.
incident to this activity. He writes that these “experiments are often of too ticklish a nature to be unnecessarily multiplied.” Keeping these difficulties in mind, Madison thought that the merits of the United States Constitution should evoke “astonishment” as well as the perception by “the man of pious reflection [of] . . . a finger of that Almighty hand . . . .” For Madison, promulgation of a successful constitution called for no less than divine intervention.

Americans have embarked on exactly one bout of constitutional promulgation in over two hundred years. Such critical, transformative events as the Civil War and Reconstruction led not to the creation of a new constitution but to constitutional amendment. Even the notion of extensive amendments to the Constitution makes Americans nervous today. In fact, the interest in “limited” constitutional conventions reflects an attempt to allay these fears by rehabilitating these assemblies as amendment-proposing vehicles. In both the American and German contexts, constitutional promulgation seems unattractive because of the uncertainty to which it may lead and other risks associated with creating a new governing document.

If constitutional creation is often shirked, Germans have been willing to carry it out when absolutely necessary. After unification, such necessity existed on the state level. The SED

423. The Federalist No. 37, at 230 (James Madison) (Clinton Rossiter ed., 1961). Near the end of his long life, Thomas Jefferson argued in favor of frequent constitutional change. He wanted the Virginia Constitution to provide “for its revision at stated periods.” Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in The Writings of Thomas Jefferson 37, 43 (Paul L. Ford ed., 1899). In this letter, rather than a process in which new constitutions are to be promulgated at stated intervals, Jefferson appears to have in mind a regular, fixed chance for delegates of the People to meet to make extensive amendments to an existing constitution. See id. at 43-44.


424. See, e.g., Walter E. Dellinger, The Recurring Question of the “Limited” Constitutional Convention, 88 Yale L.J. 1623, 1623-24 (1979) (proposing that the states should be allowed to call constitutional conventions that are limited to the consideration of single issues, but that the suggested limitation is only to be considered a recommendation and not binding on the convention); Note, Proposed Legislation on the Convention Method of Amending the United States Constitution, 85 Harv. L. Rev. 1612, 1627-33 (1972) (supporting legislation that provides detail regarding structure of a limited constitutional convention); see also Charles L. Black, Jr., Amending the Constitution: A Letter to a Congressman, 82 Yale L.J. 189, 196-99 (1972) (arguing that a limited constitutional convention is not inconsistent with the plain language of Article V).
had abolished state governments as part of its maintenance of control over East Germany. As part of the unification process, five new states have been created. Important constitution-making has taken place on this level. The legacy of the Round Table's Draft Constitution survives to some extent in these new state constitutions, which include direct democratic elements, extensive state goals, and extensive catalogues of rights.

In her survey of constitutionalism and revolution, Hannah Arendt found much about which to be pessimistic. She observed that "[m]ost so-called revolutions . . . have not been able to produce constitutional guarantees of civil rights and civil liberties." Arendt argues that only the creation of these guarantees allows a revolution to be deemed a success. The goal of revolutionary activity must be "the foundation of freedom, that is, the foundation of a body politic which guarantees the space where freedom can appear." At the end of the East German revolution of 1989, East Germans obtained these necessary guarantees of freedom. They now have the chance to develop a body politic with West Germans and to build on the political legacy of the Federal Republic. Their revolution has the chance to have a happy ending.

425. See JARAUSCH, supra note 177, at 188-89 (noting difficulties in "[b]uilding state government from scratch" as part of the unification process).


427. VERFASSUNG DES LANDES BRANDENBURG [VERF. BRANDENBURG] (FRG); VERFASSUNG DES FREISTAATS SACHSEN [VERF. SACHSEN] (FRG); VERFASSUNG DES LANDES SACHSEN-ANHALT [VERF. SACHSEN-ANHALT] (FRG); VERFASSUNG MECKLENBURG-VORPOMMERN [VERF. MECKLENBURG-VORPOMMERN] (FRG); VERFASSUNG DES FREISTAATS THÜRINGEN [VERF. THÜRINGEN] (FRG).

428. VERF. BRANDENBURG arts. 2(4), 75 (FRG); VERF. SACHSEN arts. 71-72, 74 (FRG); VERF. SACHSEN-ANHALT art. 82 (FRG); VERF. THÜRINGEN art. 81-83 (FRG).

429. VERF. BRANDENBURG arts. 14, 28-35 (FRG); VERF. SACHSEN art. 13 (FRG); VERF. SACHSEN-ANHALT arts. 34-40 (FRG); VERF. THÜRINGEN arts. 1-43 (FRG).

430. VERF. BRANDENBURG arts. 7-25 (FRG); VERF. SACHSEN arts. 14-38 (FRG); VERF. SACHSEN-ANHALT arts. 4-23 (FRG); VERF. THÜRINGEN arts. 1-16 (FRG). See generally Uwe Berlit, Verfassunggebung in den fünf neuen Ländern - ein Zwischenbericht, 25 KRITISCHE JUSTIZ 437, 439 (1992) (describing the influence of the Round Table Draft Constitution on the five new state constitutions).

Some of the proposals for amendment to the Basic Law that the Federal Constitutional Commission refused were included in the new state constitutions. See, e.g., VERF. BRANDENBURG art. 11 (FRG) (providing for the rights of data protection and of access to governmental information).

431. ARENDT, supra note 423, at 218.

432. Id. at 125.
This Article has used Bruce Ackerman's ideas about constitutional transformation as a starting point for study of the East German revolution of 1989. Ackerman believes that the text of a constitution can establish a language for a national political dialogue. His description of the American constitutional dialogue describes a two-track structure. The first track sets up a lower lawmaking track upon which the conclusions of pluralistic, democratic politics are registered. The second track, the higher lawmaking track, offers an opportunity for transformation of a nation's political life—even of its identity. Ackerman calls this two-track structure, "constitutional dualism."

In his analysis of the ways in which transformation of the higher law takes place in the United States, Ackerman adapts the idea of dualism. His new concept is the structural constitutional amendment. Rather than following the formal provisions for constitutional amendment, which are spelled out in the United States Constitution's Article V, the American People are said to have made use of the structural amendment at certain moments of popular mobilization during their history.

When Ackerman turns his attention to the popular revolutions in Eastern Europe, he returns, however, to a more formalistic approach. In Eastern Europe, Ackerman sees not only the end of the Cold War but the chance to start a new transformation. In the struggle over the meaning of modern liberal thought throughout the West, Ackerman views constitutionalism as the most important idea. He urges Eastern European revolutionaries to make the most of constitutionalism by using it to create new frameworks for their lands at the very moment they defeat the established order. National constitutional assemblies are to write a new constitution and submit the document that they produce to a plebiscite. This approach reflects constitutional dualism. To make changes in the higher law, revolutionaries cannot employ normal politics but must act on the higher track.

This path was not taken by the East Germans. The revolt in East Germany did, however, contain one element that resembled Ackerman's ideal approach to constitutional transformation. This element was the work of the Round Table, which was an improvised institution that was able to provide a violence-free forum for political decision-making and a public example of

433. FOUNDATIONS, supra note 2, at 230-32.
a rapprochement with democratic practices. The Round Table drafted a constitution that was to be submitted to a national referendum for adoption.

Despite the Round Table’s attempt to give expression to the lessons of the East German revolution, this institution was notably unsuccessful at constitutional promulgation. The Round Table faced difficulties in this role due to its limited legitimacy. Yet, East Germans also showed no great interest in creating a democratic body to draft a new constitution for the GDR. This lack of interest was due to their identification with the Federal Republic of Germany and their interest in unification with it. Their election to the Volkskammer of sister organizations of leading West German parties marked the end of the possibility that a new constitution would be created for a separate East German state. At this time, East and West Germans decided together that East Germany would accede to the West German Basic Law as opposed to creating a new constitution for the Federal Republic. The end of the German revolution of 1989-90 found the East Germans with the Basic Law’s important guarantees of freedom in place.

The historical event of German unification offers insights into how different kinds of constitutionalism approach change and transformation. This Article has examined the GDR’s constitutional totalitarianism, Ackerman’s idea of the structural amendment, the United States’ constitutional dualism, and the Federal Republic’s constitutional triad. These four models present different frameworks for a political dialogue about continuity and change.

German unification appears to validate Ackerman’s insight as to the contribution to the development of a national identity that a constitution based on different lawmaking tracks can make. As for his belief in the normative force of constitutional promulgation, German unification indicates that the nature of national experience may be more important than any abstract model of constitutional change. A final lesson of the German experience of unification is that constitutional promulgation is an inherently difficult task and raises issues of a different magnitude than constitutional amendment. A reluctance to engage in promulgation of a new constitution is more than a German trait, however, as Americans have shown a similar reluctance after their successful experience in Philadelphia.
APPENDIX

A Resolution of the Round Table
(From the 1st Session (December 7 and 8, 1989))

I. Self-definition (Selbstverständnis)

The members of the Round Table meet out of deep concern for our crisis-stricken land, its independence and its long-term development.

They demand the disclosure of the ecological, economic and financial situation in our land.

Although the Round Table cannot exercise a parliamentary or governing function, it will consult with the public for suggestions as to the overcoming of the crisis. It demands to be informed and included by the Parliament and government in a timely fashion before important legal, economic and financial decisions are made.

It understands itself as a component of the public control in our land.

It plans to continue its activity until the carrying out of free, democratic and secret elections.

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III. Elaboration of a Draft of a New Constitution

1. The members of the Round Table agree to begin at once with an elaboration of a draft of a new constitution.

2. For this purpose, they convene a proportionately composed working group, which is to begin immediately with its work and include, if necessary, additional citizens, male and female (Bürger und Bürgerinnen).

3. The members of the Round Table agree that the confirmation of this new constitution will take place in a referendum after new elections to the Parliament.

4. The changes in the constitution that are necessary for the realization of the new elections are immediately to be elaborated.

5. The members of the Round Table acknowledge the offer to participate in a corresponding committee of the parliament and will independently decide upon their participation.