creates what the Basic Law describes as the "free democratic order" in which individual liberties, majority rule, responsible and competitive party government, separation of powers, the constitutional state principle, and the observance by citizens of certain principles of political obligation play a central role. The Constitutional Court's function in Germany's juridical democracy is to define, protect, and reconcile these various and often conflicting constitutional values. In performing this task, as the cases featured in Parts II and III show, the Court has been a crucial player in German constitutional politics.

1

The Federal Constitutional Court

The jurisdiction of the U.S. Supreme Court extends to cases and controversies arising under the constitution and federal law. Its authority reaches even to private law when the parties in dispute are citizens of different states. By contrast, Germany's Federal Constitutional Court (Bundesverfassungsgericht), as guardian of the constitutional order, is a specialized tribunal empowered to decide only constitutional questions and a limited set of public-law controversies. Thus, Germany ranks among those civil-law countries with a centralized system of judicial review.[1] The deeply ingrained Continental belief that judicial review is a political act, following the assumption that "constitutional law—like international law—is genuine political law, in contrast, for example, to civil and criminal law,"[2] prompted Germans to vest the power to declare laws unconstitutional in a special tribunal staffed with judges elected by Parliament and widely representative of the political community rather than in a multi-jurisdictional high court of justice dominated by appointed legal technicians.

Another factor that encouraged the framers of West Germany's Constitution, known as the Basic Law (Grundgesetz), to assign the function of constitutional judicial review to a single court was the traditional structure of the German judiciary and the unfamiliarity of its judges with constitutional adjudication. The German judiciary includes separate hierarchies of administrative, labor, fiscal, and social courts, while civil and criminal jurisdiction is vested in another, much larger, system of ordinary courts.[3] All trial and intermediate courts of appeal are state (Land) tribunals; federal courts serve as courts of last resort. The federal courts, divided by subject matter, are at the apex of their respective judicial hierarchies. These tribunals include the Federal Court of Justice (Bundesgerichtshof) with jurisdiction over civil and criminal matters, the Federal Administrative Court (Bundesverwaltungsgericht), the Federal Finance Court (Bundesfinanzhof), the Federal Labor Court (Bundesarbeitsgericht), and the Federal Social Court (Bundessozialgericht). Like the appellate courts generally, these tribunals are staffed by a host of judges (more than one hundred on the Federal Court of Justice alone) who sit in panels of five. The complexity of this structure and the lack of any tradition of stare decisis would have rendered an American-style, decentralized system of judicial review, in which all courts may declare laws unconstitutional, unworkable in Germany.

Judicial attitudes toward constitutional review also militated against a decentralized system. The background and professional training of the 20,101 career judges (as of 31 December 2008)[4] who staff the German judiciary are unlikely to produce the independence of mind typical of judges in the Anglo-American tradition. German

judges usually enter the judiciary immediately after the conclusion of their legal training,[5] and success is denoted by promotion within the ranks of the judicial bureaucracy. In contrast, most American judges are appointed at a later stage of their careers, usually after achieving success in public office or as private lawyers. German judges have been characterized as seeking to clothe themselves in anonymity and to insist that it is the court and not the judge who decides; moreover, the judicial task is to apply the law as written and with exacting objectivity.[6] Although this portrayal of the typical German judge is less true today than it was fifty years ago, the conservative reputation and public distrust of the regular judiciary at the time the Basic Law was created were sufficient to ensure that the power of judicial review would be concentrated in a single and independent tribunal.[7]

ORIGIN

German legal scholars have traditionally distinguished between constitutional review (Verfassungsgerichtsbarkeit) and judicial review (richterliches Prüfungsrecht). Judicial review, the more inclusive term, signifies the authority of judges to rule on the constitutionality of law. Constitutional review, which in Germany antedates judicial review, is associated with Germany's tradition of monarchical constitutionalism, stretching from the German Confederation of 1815 through the Constitution of 1867 (establishing the North German Confederation) and up to and including the Imperial Constitution of 1871. During this period (1815–1918) when German constitutional thought pivoted on the concepts of state and sovereignty,[8] constitutional review provided the mechanism for defining the rights of sovereign states and their relationship to the larger union into which they were incorporated. Judicial review, on the other hand—a device for protecting individual rights—is associated with Germany's republican tradition, beginning roughly with the abortive Frankfurt Constitution of 1849, continuing with the Weimar Constitution of 1919, and relaunched with the Basic Law of 1949.

Constitutional Review. Constitutional review appeared in embryonic form during the Holy Roman Empire. The need for unity among the principalities of the empire and peace among their warring princes prompted Maximilian I in 1495 to create the Imperial Chamber Court (Reichskammergericht), before which the German princes resolved their differences. By the seventeenth century the Imperial Chamber Court and some local courts occasionally enforced the "constitutional" rights of estates against crown princes. Compacts or treaties governed their mutual rights and obligations. Constitutional review commenced when these tribunals enforced—to the extent that their rulings could be enforced—the corporate rights of estates under these documents.[9]

Constitutional review in its modern form emerged in the nineteenth century.[10] Again, it served as a principal tool for the resolution of constitutional disputes among

and within the individual states of the German Empire and often between the states and the national governments.[11] Under Germany's monarchical constitutions, the forum for the resolution of such disputes was usually the parliamentary chamber in which the states were corporately represented. Under Germany's republican constitutions, on the other hand, the forum was usually a specialized constitutional tribunal, the most notable of which, prior to the creation of the Federal Constitutional Court, was the Weimar Republic's State High Court (Staatsgerichtshof). As major agencies of public law commissioned to decide sensitive political issues, these courts were independent of the regular judiciary and were staffed with judges selected by legislators.

Like most constitutional courts at the state level before and after the Nazi period, the State High Court was a part-time tribunal whose members convened periodically to decide constitutional disputes. Its jurisdiction included 1) the trial of impeachments brought by the Parliament (Reichstag) against the president, chancellor, or federal ministers for any willful violation of the constitution; 2) the resolution of differences of opinion concerning a state's administration of national law; and 3) the settlement of constitutional conflicts within and among the separate states as well as between states and the Reich. The State High Court's membership varied according to the nature of the dispute before it; the more "political" the dispute the more insistent was Parliament on having elected its members.[12]

These structures and powers, which influenced the shape of the Federal Constitutional Court, highlight three salient features of constitutional review in German history. First, as just noted, an institution independent of the regular judiciary exercises such review. Second, it takes cases on original jurisdiction, deciding them in response to a simple complaint or petition, unfettered by the technicalities of an ordinary lawsuit. Finally, it settles constitutional disputes between and within governments. Constitutional review is thus a means of protecting the government from itself and also from the excesses of administrative power. But constitutional review as described here does not contemplate "judges intervening on behalf of citizens against the executive branch of government."[13] The German legal order has always distinguished sharply between administrative and constitutional law. The juridical basis of the distinction, according to Franz Jerusalem, is that the former concerns the execution of the state's will once it is translated into law, whereas the latter concerns those organs of government constitutionally obligated to form the state's will.[14] These organs—the constitutionally prescribed units of the political system—and these alone are the subjects of constitutional review.

Judicial Review. The doctrine of judicial review, unlike constitutional review, was alien to the theory of judicial power in Germany.[15] A judge's only duty under the traditional German doctrine of separation of powers was to enforce the law as written. About mid-nineteenth century, however, some German legal scholars and judges sought to cultivate ground in which judicial review might blossom. In 1860 Robert von Mohl, who was acquainted with the *Federalist Papers* and the work of the U.S.

Supreme Court, published a major legal treatise in defense of judicial review.[16] Two years later an association of German jurists, with Rudolf von Ihering emerging as its chief spokesman, went on record in favor of judicial review. Jurists attending the meeting recalled that the Frankfurt Constitution called for the creation of an Imperial Court of Justice (Reichsgericht). This court would have had the authority to hear complaints by a state against national laws allegedly in violation of the constitution and even by ordinary citizens claiming a governmental invasion of their fundamental rights, foreshadowing by a century similar authority conferred on the Federal Constitutional Court. Their views, however, like the Frankfurt Constitution itself, failed to take root in the legal soil of monarchical Germany (1871–1918).[17]

The Weimar Republic provided a climate more sympathetic to judicial review. Inspired by the Frankfurt Constitution of 1849, the Weimar Constitution of 1919 established a constitutional democracy undergirded by a bill of rights. The Weimar period also witnessed the continuing influence of the "free law" school (Freirechtsschule) of judicial interpretation,[18] marking a significant challenge to the dominant tradition of legal positivism. And although the Weimar Constitution remained silent with respect to the power of the courts to review the constitutionality of law,[19] judicial review as a principle of limited government enjoyed strong support in the Weimar National Assembly.

As Hugo Preuss predicted—and warned—the Weimar Constitution's failure to expressly ban judicial review prompted courts to arrogate this power to themselves.[20] In the early 1920s several federal high courts, including the Imperial Court of Justice (which was established under the monarchical regime in 1879 and survived the republican revolution of 1918 with its jurisdiction—and name—intact), suggested in dicta that they possessed the power to examine the constitutionality of laws.[21] On 15 January 1924, deeply disturbed by the swelling controversy over the revaluation of debts, the Association of German Judges confidently announced that courts of law were indeed empowered to protect the right of contract and, if necessary, to strike down national laws and other state actions—or inactions that failed to safeguard property rights—on substantive constitutional grounds.[22] Several months later, the Imperial Court of Justice announced that "in principle courts of law are authorized to examine the formal and material validity of laws and ordinances."[23]

State courts during the Weimar period held firm to the German tradition that judges are subject to law and have the duty to apply it even in the face of conflicting constitutional norms. Yet even here, differing postures toward judicial review were beginning to emerge. Although most state constitutions said nothing about judicial review, some courts followed the lead of the Imperial Court of Justice by accepting judicial review in principle; however, they seldom invoked it to nullify legislation. Only the Bavarian Constitution expressly authorized courts to review laws in light of both state and national constitutions. The Schaumburg-Lippe Constitution, echoing the still-dominant German view, expressly denied this power to the courts.[24]

When the German states (Länder) reemerged as viable political entities after World War II, judicial review appeared once more, this time as an express principle

in several Land constitutions. Perhaps because of the Weimar experience, however, these documents did not authorize the ordinary courts (with civil and criminal jurisdiction) and the specialized courts (including administrative, social, labor, and tax jurisdiction) to review the constitutionality of laws. Once again, consistent with the older and more fully established tradition of constitutional review, this authority was vested in specialized courts staffed with judges chosen by the state parliaments from a variety of courts or constituencies. In any event, as this survey of German constitutional review demonstrates, the framers of the Basic Law had plenty of precedents on which to draw in constructing their own version of constitutional democracy.

Herrenchiemsee Conference. It should now be clear that judicial review in Germany did not spring full-blown from the Basic Law of 1949. It was adopted with German precedents in mind. The Allied powers did, of course, concern themselves with the reorganization of the judicial system.[25] They insisted that any future government of Germany must be federal, democratic, and constitutional. A *constitutional* government, in the American view at least, implied the judicial power to assess the constitutionality of laws and other official acts. Judicial review was certainly implicit in the American understanding of an independent judiciary. The military governors, however, did not impose judicial review on a reluctant nation. The Germans decided on their own to establish a constitutional court, to vest it with authority to nullify laws contrary to the constitution, and to elevate this authority into an express principle of constitutional governance.[26] While they were familiar with the American system of judicial review and were guided by the American experience in shaping their constitutional democracy,[27] Germans relied mainly on their own tradition of constitutional review.

The groundwork for the Basic Law was prepared in a resplendent nineteenth-century castle on an island in the Chiemsee—a vast Bavarian lake—during August 1948. On the initiative of Bavaria's state governor, Minister-President Hans Ehard, the Länder in the Allied zones of occupation called on a group of constitutional law experts to produce a first draft of a constitution to expedite the work of the ensuing constitutional convention known as the Parliamentary Council.[28] The Herrenchiemsee proposals, which included provisions for a national constitutional tribunal,[29] followed the recommendations of Professor Hans Nawiasky, commonly regarded as the father of the postwar Bavarian Constitution. Like many other state constitutions drafted in 1946 and 1947, the Bavarian charter provided for a state constitutional court. In cooperation with Hans Kelsen, Nawiasky had prepared a working paper proposing the establishment of a constitutional tribunal modeled after the Weimar Republic's State High Court. Nawiasky was a strong advocate of judicial review during the Weimar period, and Kelsen was well known as the founder of the Austrian Constitutional Court.[30] Claus Leusser, an Ehard associate and later a justice of the Federal Constitutional Court, also helped to draft the Herrenchiemsee judicial proposals.

As a practical model for defining the powers of the proposed constitutional court, the Herrenchiemsee drafters relied mainly on the Weimar era's State High Court.[31]

The draft plan envisioned a tribunal vested with both the competence of the State High Court (i.e., its constitutional review jurisdiction) and the authority to hear the complaint of any person alleging that any public agency had violated his or her constitutional rights. Aware of the potential power of the proposed court, the conferees recommended a plan of judicial recruitment that would broaden the court's political support. The plan included proposals for 1) the election of justices in equal numbers by the Parliament (Bundestag) and the Federal Council of States (Bundesrat), 2) the participation of both of these bodies in selecting the court's presiding justice (president), and 3) the selection of one-half of the justices from the high federal courts of appeal and the highest state courts.[32] But the drafters were at odds over how the new court should be structured; the discord centered on whether it should be organized as a tribunal separate from and independent of all other courts or carved out of one of the federal high courts of appeal.[33]

Parliamentary Council. The debate over the proposed court's structure continued in the constitutional assembly, officially known as the Parliamentary Council (Parlamentarischer Rat).[34] It all boiled down to a dispute over the nature of the new tribunal. Should it be like Weimar's State High Court and serve mainly as an organ for resolving conflicts between branches and levels of government (i.e., a court of *constitutional* review)? Or should it combine such jurisdiction with the general power to review the constitutionality of legislation (i.e., a court of *judicial* review)? In line with the Herrenchiemsee plan, the framers finally agreed to create a constitutional tribunal independent of other public-law courts, but they disagreed over how much of the constitutional jurisdiction listed in the proposed constitution should be conferred on it as opposed to other high federal courts.

The controversy centered on the distinction between what some delegates regarded as the "political" role of a constitutional court and the more "objective" law-interpreting role of the regular judiciary. Some delegates preferred two separate courts—one to review the constitutionality of laws (judicial review) and the other to decide essentially political disputes among branches and levels of government (constitutional review). Others favored one grand, multipurpose tribunal divided into several panels, each specializing in a particular area of public or constitutional law. The latter proposal was strenuously opposed by many German judges, who were alarmed by any such mixing of law and politics in a single institution.[35] The upshot was a compromise resulting in a separate constitutional tribunal with exclusive jurisdiction over all constitutional disputes, including the authority to review the constitutionality of laws.

The final version of the Basic Law extended the newly created Federal Constitutional Court's jurisdiction to twelve specific categories of disputes (Article 93 (1)) and "such other cases as are assigned to it by federal legislation" (Article 93 (2)). Originally the Court's jurisdiction could be invoked only by federal and state governments (i.e., the chancellor or a Land minister-president and his or her cabinet), parliamentary political parties, and, in certain circumstances, regular courts of law.

The framers rejected the Herrenchiemsee proposal to confer on private parties standing to petition the Court in defense of their constitutional rights, a decision in line with the general practice of constitutional review in Weimar Germany and Austria. (As noted below, however, the individual right to petition the constitutional court was restored by legislation in 1951 and incorporated into the Basic Law in 1969.) The two main parties in the Parliamentary Council favored these limited rules of access, the Social Democratic Party of Germany (SPD) because the limitations would protect political minorities in and out of the Parliament, and the Christian Democratic Union (CDU) because its members saw the limitations as equally useful in preserving German federalism.[36]

The interests of both political parties were also reflected in judicial selection clauses specifying that the Federal Constitutional Court shall consist of "federal judges and other members," half "to be elected by the Bundestag and half by the Bundesrat" (Article 94). Christian Democrats were thus assured of a strong "federal" presence on the Court, just as Social Democrats could take comfort in knowing that the Court would not be dominated by professional judges drawn wholly from a conservative judiciary. Impatient to get on with the work of producing a constitution, the framers stopped there, leaving other details of the Constitutional Court's organization and procedure to later legislation. But the Court had been given a breathtaking mandate, both in scope and in depth; its jurisdiction was unlike any German court that had preceded it and at the time was unique in comparison with other high courts of judicial review around the world.

Legislative Phase. Another two years of parliamentary debate were necessary after the promulgation of the Basic Law to produce the enabling statute creating the Federal Constitutional Court. As had been the case in the Parliamentary Council, the shape of the new tribunal represented compromises between the conflicting perspectives of the CDU-led federal government, the SPD opposition, and the states (represented in the Bundesrat) on such matters as judicial selection and tenure, the ratio of career judges to "other members," the qualifications of judicial nominees, the Court's size and structure, and the degree of control over the Court to be exercised by the Federal Ministry of Justice (Bundesministerium der Justiz).[37] All participants in the debate recognized that the Court's political acceptance would depend on broad agreement on these matters across party and institutional lines. Finally, after months of intense negotiation within and between the Bundestag and the Bundesrat, a bill emerged with the overwhelming support of the major parliamentary parties and all branches of government. The result was the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz) of 12 March 1951 (hereafter referred to as the FCCA).[38]

In its current version, the FCCA includes 121 operative sections that codify and flesh out the Basic Law's provisions relating to the Court's organization, powers, and procedures, important features of which are discussed below. Representing numerous political compromises, the FCCA 1) lays down the qualifications and tenure of the

Court's members, 2) specifies the procedures of judicial selection, 3) provides for a two-senate tribunal, 4) enumerates the jurisdiction of each senate, 5) prescribes the rules of access under each jurisdictional category, 6) defines the authority of the plenum (both senates sitting together), and 7) establishes the conditions for the removal or retirement of the Court's members.

JURISDICTION

The U.S. Constitution contains no express reference to any judicial power to pass upon the constitutional validity of legislative or executive decisions. In the seminal case *Marbury v. Madison* (1803) Chief Justice John Marshall derived the doctrine of judicial review by inference from the nature of a written constitution and the role of the judiciary.[39] The Basic Law, by contrast, leaves nothing to inference. It enumerates all of the Constitutional Court's jurisdiction. The Court is authorized to hear cases involving the following actions:

Forfeiture of basic rights (Article 18)
Constitutionality of political parties (Article 21 (2))
Review of election results (Article 41 (2))
Impeachment of the federal president (Article 61)
Disputes between high state organs (Article 93 (1) [1])
Abstract judicial review (Article 93 (1) [2])
Federal-state conflicts (Articles 93 (1) [3] and 84 (4))
Individual constitutional complaints (Article 93 (1) [4a])
Municipal constitutional complaints (Article 93 (1) [4b])
Other disputes specified by law (Article 93 (2))
Removal of judges (Article 98)
Intrastate constitutional disputes (Article 99)
Concrete judicial review (Article 100 (1))
Public international law actions (Article 100 (2))
State constitutional court references (Article 100 (3))
Applicability of federal law (Article 126)

The Court thus has the authority not only to settle conventional constitutional controversies but also to try impeachments of the federal president (Bundespräsident), to review decisions of the Bundestag relating to the validity of an election, and to decide questions critical to the definition and administration of federal law. To these constitutionally articulated responsibilities the Bundestag has added another prominent jurisdictional power; Article 32 of the FCCA permits the Court to issue a temporary injunction in particular circumstances.

Each of the jurisdictional categories listed above is assigned to either the First or Second Senate. The most important of these categories involve the constitutional complaints brought by ordinary citizens, concrete judicial review, requests for temporary

TABLE 1. Federal Constitutional Court Cases, 1951–2011

Proceeding	Docketed	Decided
Constitutional Complaints	188,187	166,608*
Concrete Judicial Review	3,511	1,261**
Requests for Temporary Injunction	2,370	1,847
Disputes between Federal Organs	180	97
Abstract Judicial Review	172	109
Federal-State Conflicts	45	27
Unconstitutional Parties	8	5
Other Proceedings	545	291
Totals	195,018	170,245

* Constitutional complaints decided by the senates: 4,034. The remainder were decided by three-justice committees/chambers.

** Concrete judicial review cases decided by the senates: 1,043. The remainder were decided by the three-justice chambers.

Sources: "Docketed": Bundesverfassungsgericht, "Aufgaben, Verfahren und Organisation—Statistik für das Geschäftsjahr 2011—Eingänge nach Verfahrensarten," available at www.bundesverfassungsgericht.de/organisation/gb2011/A-I-4.html; "Decided": Bundesverfassungsgericht, "Aufgaben, Verfahren und Organisation—Statistik für das Geschäftsjahr 2011—Erledigungen nach Verfahrensarten," available at www.bundesverfassungsgericht.de/organisation/gb2011/A-I-5.html.

injunctions, disputes between high organs of the national government, abstract judicial review, federal-state conflicts, and challenges to the constitutionality of political parties—importance here being measured by the number of cases filed in each category. As Table 1 shows, constitutional complaints make up about 96 percent of the Court's caseload. As we shall see, however, some of the Court's most politically important work arises in other jurisdictional areas.

Constitutional Complaints. A constitutional complaint may be brought by individuals and entities vested with particular rights under the constitution. In this sense the constitutional complaint differs from all other proceedings before the Court (except applications for temporary injunctions), because the other proceedings are limited to governmental entities, certain parliamentary groups, and judicial tribunals. After exhausting all available means to find relief in the other courts,[40] persons who claim that the state has violated one or more of their rights under the Basic Law may file a constitutional complaint with the Federal Constitutional Court. Constitutional complaints must be lodged within a certain time, identify the offending action or omission and the institution of public authority responsible, and specify

the constitutional right that has been violated.[41] The FCCA requires the Court to accept for decision any complaint if it is constitutionally significant or if the failure to accept it would work a grave hardship on the complainant.[42]

The right of an individual to file a constitutional complaint was originally bestowed by legislation, and German citizens took advantage of this statutory right in increasing numbers over the years. By the mid-1960s the Court was awash in such complaints. Germans had come to regard the constitutional complaint as an important prerogative. From the beginning, these complaints have constituted the Court's major source of business. In response, and with the Court's backing, federal legislators anchored the right to file constitutional complaints in the Basic Law itself (Article 93 (1) [4a]). A companion amendment ratified in the same year (1969) vested municipalities with the right to file a constitutional complaint if a law violates their right to self-government under Article 28.[43] The constitutional complaint was so popular that no responsible public official opposed these amendments. Years later a president of the Federal Constitutional Court was moved to say that the "administration of justice in the Federal Republic of Germany would be unthinkable without the complaint of unconstitutionality."[44]

According to Article 93 (1) [4a] of the Basic Law, any person may submit a complaint of unconstitutionality to the Court if one of his or her fundamental substantive or procedural rights under the constitution has been violated by "public authority." "Any person" within the meaning of this provision includes natural persons with the legal capacity to sue as well as corporate bodies and other "legal persons" possessing rights under the Basic Law. As a general rule, only domestic legal persons are permitted to file constitutional complaints, although the Court has ruled that foreign corporations are entitled to file complaints alleging a violation of the procedural rights secured by Articles 101 (1) [2] and 103. The public authority clause of Article 93 (1) [4a] permits constitutional complaints to be brought against any governmental action, including judicial decisions, administrative decrees, and legislative acts. No ordinary judicial remedy is available against legislative acts. If, however, such an act is likely to cause a person serious and irreversible harm, he or she may file the complaint against the act without exhausting other remedies. Finally, over and above these basic threshold requirements, a complaint must be offensichtlich begründet or "clearly justified" (obviously stating a legally justifiable claim) if it is to be accepted and decided on its merits by one of the Court's three-justice chambers (an internal process described later in this chapter).[45]

The procedure for filing complaints in the Constitutional Court is relatively easy and inexpensive. No filing fees or formal papers are required. Increasingly, complaints are prepared with the aid of a lawyer,[46] even though no legal assistance is required at any stage of the complaint proceeding.[47] As a consequence of these rather permissive submission rules the Court has been flooded with complaints, which have swelled in number from well under 1,000 per year in the 1950s, to around 3,500 per year in the mid-1980s, and rising from around 5,000 per year in the 1990s to a peak of more than 6,300 in 2009. The number of constitutional complaints filed with the Court

in recent years rivals the number of cases on the appellate docket of the U.S. Supreme Court. Although the Constitutional Court fully reviews all incoming complaints, slightly fewer than 2 percent are successful on the merits. Nevertheless, such complaints result in some of the Court's most significant decisions and make up more than 50 percent of its published opinions.

Concrete Judicial Review. Concrete, or collateral, judicial review arises from an ordinary lawsuit. If an ordinary German court is convinced that a relevant federal or state law under which a case has arisen violates the Basic Law, it must refer the constitutional question to the Federal Constitutional Court before the case can be decided. Judicial referrals do not depend on the issue of constitutionality having been raised by one of the parties. If a collegial court is involved, a majority of its members must vote to refer the question. The petition must be signed by the judges who vote in favor of referral and must be accompanied by a statement of the legal provision at issue, the provision of the Basic Law implicated, and the extent to which a constitutional ruling is necessary to decide the dispute.[48] The Federal Constitutional Court will dismiss the case if the referring judges demonstrate less than a genuine conviction that a law or provision of law is unconstitutional or if the case can be decided without settling the constitutional question.[49] As a procedural matter, the Court must permit the highest federal organs or a state government to enter the case and must also afford the parties involved in the underlying proceeding an opportunity to be heard. The parties make their representations mainly through written briefs.

Temporary Injunctions. Over the Court's first sixty years its docket has been dominated by constitutional complaints and concrete judicial review proceedings. In recent years, however, applications for temporary injunctions (Einstweilige Anordnungen) have overtaken concrete judicial review proceedings as the Court's second largest docket item. Alone among the jurisdictional provisions discussed here, applications for temporary injunctions have their basis in a statutory provision (Article 32 of the FCCA enacted pursuant to Article 93 (2) of the Basic Law) and not the Basic Law itself. Temporary injunction proceedings differ from all others before the Court in one other important respect: they do not involve the resolution of a substantive constitutional question but, rather, invest the Court with the procedural authority to stay actions or measures if its ability to render a substantive ruling is threatened. Thus, temporary injunction proceedings serve to protect the power of the Court and the public's interest in having it fulfill its role as protector of the constitution.

In part, the rising number of temporary injunction proceedings can be attributed to the rising number of constitutional complaints. The Court's very heavy workload is one reason for what some observers view as an overly slow resolution of its cases. It naturally follows that the length of time a complainant faces in obtaining relief from the Court factors heavily in his or her decision to pursue provisional measures. As one commentator noted, a party willing to bear the costs of bringing a constitutional

complaint in the first place is likely to feel an urgent need for relief as well.[50] Viewed from this perspective, even the one year it takes the Court to resolve 70 percent of all constitutional complaints might seem too long a wait.[51]

Political strategy, as much as a concern for delayed relief from the Court, plays an equal role in the relatively large number of temporary injunction applications. Laws, executive actions, or judicial orders with time-sensitive objectives can be undermined effectively with a successful temporary injunction application regardless of the outcome in the substantive constitutional challenge, the results of which might be reached long after the fact. This kind of political brinksmanship is often on display in temporary injunction proceedings connected with constitutional challenges to foreign policy questions.[52] This dynamic also highlights the fact that applications for temporary injunctions are not limited to constitutional complainants but are available in all disputes subject to the Court's jurisdiction, including those disputes featuring entities of public authority in Organstreit proceedings or abstract judicial review proceedings.

Article 32 of the FCCA provides that "[i]n a dispute the Federal Constitutional Court may deal with a matter provisionally by means of a temporary injunction if this is urgently needed to avert serious detriment, ward off imminent force or for any other important reason for the common weal." The Court applies a strict standard and usually exercises considerable reserve when confronted with requests for temporary injunctions. The requisite urgency exists only if the Court cannot act on the underlying substantive dispute in time to avoid detriment. The alleged harm will not be regarded as "serious," the Court has said, if it is slight, temporary, correctable, or compensable. In deciding whether to issue a temporary injunction the Court invokes the so-called double hypothesis in a "weighing model." In principle, wholly blind to the possible outcome of the underlying substantive constitutional dispute, the Court weighs two concerns: 1) the harm that would result if no injunction is issued but the challenged measures are later declared unconstitutional in the underlying substantive proceeding; and 2) the harm that would result if an injunction is issued but the challenged measures are later found to be constitutional in the underlying substantive proceeding.[53] The factors to be weighed, however, obviously require the Court to give some consideration to the possible outcome in the underlying substantive constitutional dispute. For this reason it should not be surprising that, despite the Court's repeated insistence to the contrary, its decision on an application for a temporary injunction very frequently is indicative of the outcome in the underlying substantive constitutional matter.

Disputes between High Federal Organs. Conflicts known as Organstreit proceedings involve constitutional disputes between the highest "organs" or branches of the Federal Republic. The Court's function here is to supervise the operation and internal procedures of these executive and legislative organs and to maintain the proper institutional balance between them.[54] The governmental organs qualified to bring cases under this jurisdiction are the federal president, Bundesrat, federal government, Bundestag, and units of these organs vested with independent rights by their rules of procedure or the Basic Law.[55] Included among these entities are individual members of Parliament, any one of whom may initiate an Organstreit proceeding to vindicate his or her status as a parliamentary representative.[56] The parliamentary party blocs (Fraktionen) also may avail themselves of the Court's Organstreit jurisdiction.[57] Early on, the Court's plenum ruled that even nonparliamentary political parties may invoke this jurisdiction.[58] They may do so in their capacity as agencies that attract votes during elections or organizers of the electoral process because, in fulfilling these tasks, political parties function as "constitutional" or federal organs within the meaning of the Basic Law (Article 93 (1) [1]).[59] If a political party is denied a place on the ballot, or if its right to mount electoral activity is infringed by one of the high organs of the Federal Republic, it can initiate an Organstreit proceeding against the federal organ in question. An Organstreit proceeding is not available, however, to administrative agencies, governmental corporations, churches, or other corporate bodies with quasi-public status.[60]

Abstract Judicial Review. Whereas the U.S. Supreme Court requires a real controversy and adverse parties in order to decide a constitutional question, the Federal Constitutional Court may decide *differences of opinion* or *doubts* about a federal or state law's compatibility with the Basic Law on the mere request of the federal or a state government or of one-fourth of the members of the Bundestag.[61] Oral argument before the Court, a rarity in most cases, is always permitted in abstract review proceedings. The question of the law's validity is squarely before the Court in these proceedings and a decision against validity renders the law null and void.[62]

When deciding cases on abstract review, the Court is said to be engaged in the "objective" determination of the validity or invalidity of a legal norm or statute.[63] The proceeding is described as objective because it is intended to vindicate neither an individual's subjective right nor the claim of the official entity petitioning for review; the sole purpose of abstract review is to determine what the constitution means. In so doing, the Court is free to consider any and every argument and any and every fact bearing on any and every aspect of a statute or legal norm under examination. Indeed, once the federal government, a Land government, or one-fourth of the Bundestag's members place a statute or legal norm before the Court on abstract review, the case cannot be withdrawn without the Court's permission, a condition that reinforces the principle of judicial independence, which in turn allows the Court to speak in the public interest when necessity demands it.

Federal-State Conflicts. Constitutional disputes between a Land and the federation (Bund, which consists of the national sovereign as opposed to the state sovereigns) ordinarily arise out of conflicts involving a Land's administration of federal law or the federal government's supervision of Land administration. Proceedings may be brought only by a Land government or by the federal government. In addition, the Court may hear "other public law disputes" between the federation and the Länder,

between different states, or within a state if no other legal recourse is provided. Here again, only the respective governments in question are authorized to bring such suits. As in Organstreit proceedings, the complaining party must assert that the act or omission complained of has resulted in a direct infringement of a right or duty assigned by the Basic Law. For its part, the Constitutional Court is obligated by law to declare whether the act or omission infringes the Basic Law and to specify the provision violated. In the process of deciding such a case the Court "may also decide a point of law relevant to the interpretation of the [applicable] provision of the Basic Law."[64]

Prohibiting Political Parties. The Federal Constitutional Court's function as guardian of the constitutional order finds its most vivid expression in Article 21 (2) of the Basic Law. Under this provision, political parties seeking "to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional." The article goes on to declare that only the Federal Constitutional Court may declare parties unconstitutional. To minimize any abuse of this provision, the FCCA authorizes only the Bundestag, the Bundesrat, and the federal government (Bundesregierung; i.e., the chancellor and his or her cabinet) to initiate an Article 21 action against a party. A Land government may apply to have a party declared unconstitutional if that party's organization is confined to the applicant's territory. This jurisdiction, as with most of the other proceedings before the Court, is compulsory. Unless the moving party withdraws its petition, the Court is obligated to decide the case, even if it takes its time in doing so.

As Table 1 indicates, the Court has received only eight such petitions and decided five. In two of the cases, decided early on, the Court sustained the petitions: in 1952 when it banned the neo-Nazi Socialist Reich Party (SRP), and in 1956 when it ruled the Communist Party of Germany (KPD) unconstitutional.[65] In 1994 the Court rejected the petitions of the Bundesrat and the federal government to have the Free German Workers Party (Freiheitliche Deutsche Arbeiterpartei; hereafter referred to as the FAP) declared unconstitutional as well as Hamburg's petition to ban the National List (hereafter referred to as the NL) from operating in its territory. The Court ruled that although the FAP and the NL advanced views hostile to political democracy, neither group qualified as a political party within the meaning of the law or the constitution.[66] In 2003 the petitions of the Bundestag, Bundesrat, and federal government, seeking a ban of the far-right National Democratic Party of Germany (Nationaldemokratische Partei Deutschlands; hereafter referred to as the NPD), were dismissed because of the extensive, covert involvement of government security agents in the leadership of the party.

INSTITUTION

Status. When the Constitutional Court opened its doors for business in Karlsruhe on 28 September 1951, its status within the governmental framework of separated powers, and even its relationship to the other federal courts, remained an unsettled issue. The Basic Law itself was ambivalent on the matter of the Court's status. On the one hand, the wide-ranging powers of the Court laid down in the Basic Law and the FCCA pointed to a tribunal commensurate in status with the other independent constitutional organs (Bundesrat, Bundestag, federal president, and federal government) created by the constitution. On the other hand, the Basic Law authorized Parliament to regulate the Court's organization and procedure. Initially, the new tribunal was placed under the authority of the Federal Ministry of Justice, a situation that irritated several justices, including the Court's first president, Hermann Höpker-Aschoff. As a consequence, the justices boldly set out, in their first year of operation, to defend the Court's autonomy, foreshadowing the fierce independence they would later exercise in adjudicating constitutional disputes.[67]

On 27 June 1952, after months of planning, the Court released a memorandum originally drafted by Justice Gerhard Leibholz, one of its most renowned and respected members, that called for an end to any supervisory authority by the Ministry of Justice, complete budgetary autonomy, and the Court's full control over its internal administration, including the power to appoint its own officials and law clerks. The memorandum concluded that the Federal Constitutional Court is a supreme constitutional organ that is coordinate in rank with the Bundestag, Bundesrat, federal chancellor, and federal president. Its members, then, are in no sense civil servants or ordinary federal judges but rather supreme guardians of the Basic Law entrusted with the execution of its grand purposes, no less than other high constitutional organs of the Federal Republic of Germany. Indeed, the memorandum continued, the Court has the even greater duty to ensure that other constitutional organs observe the limits of the Basic Law.[68]

The memorandum from Karlsruhe generated a strong tremor in Bonn, the capital of West Germany during the years when Germany was divided between the western Federal Republic and the eastern German Democratic Republic; it startled the government, angered the Ministry of Justice, and set off several years of skirmishing that yielded alignments almost identical to those that had formed in the early stages of the parliamentary debate on the structure of the proposed tribunal. Social Democrats and the Bundesrat generally supported the justices' demands, while the CDU and its coalition parties in the Bundestag generally opposed them. The real tangle, however, was between the Ministry of Justice and the Constitutional Court, and it featured an occasional unseemly public exchange between two members of the liberal Free Democratic Party (FDP) who, as members of the Parliamentary Council, had played major roles in drafting the Basic Law. The two figures were Thomas Dehler, federal minister of justice, and Justice Hermann Höpker-Aschoff, the stately and highly respected president or "chief justice"[69] of the Federal Constitutional Court.

In 1953 the Bundestag severed the Court's ties to the Ministry of Justice, and by 1960, with the gradual growth of the Court's prestige and influence, all of the "demands" articulated in the Leibholz memorandum had been met.[70] In Germany's official ranking order, the Court's president now enjoys the fifth-highest position in the Federal Republic, following the federal president, the federal chancellor, and the presidents of the two legislative organs (Bundestag and Bundesrat). As "supreme guardians of the constitution" the remaining justices follow behind. Eventually the justices of the Federal Constitutional Court were exempted from the disciplinary code regulating all other German judges.[71] The Court's hard-won constitutional status was best symbolized by a 1968 amendment to the Basic Law providing that the "function of the Federal Constitutional Court and its justices must not be impaired" even in a state of emergency. During such a time, the special body responsible for acting on behalf of the Bundestag and the Bundesrat is barred from amending the FCCA unless such an amendment is required, "in the opinion of the Federal Constitutional Court, to maintain the Court's ability to function."[72]

Two-Senate Structure. The most important structural feature of the Constitutional Court is its division into two senates with mutually exclusive jurisdiction and personnel.[73] Justices are elected to either the First or Second Senate, with the Court's president presiding over one senate and the Court's vice president presiding over the other. Both "chief justices" are wholly independent with respect to judicial matters before their respective senates. Finally, each senate is equipped with its own administrative office for the organization and distribution of its workload.

The twin-senate idea was a compromise between legislators who preferred a fluid system of twenty-four justices rotating on smaller panels and those who preferred a fixed body like that of the U.S. Supreme Court. More important, the bifurcation was the institutional expression of the old debate between those who viewed the Court in conventional legal terms and those who saw it in political terms. The original division of jurisdiction showed that the senates were intended to fulfill very different functions. The Second Senate was designed to function much like Weimar's State High Court; it would decide political disputes between branches and levels of government, settle contested elections, rule on the constitutionality of political parties,[74] preside over impeachment proceedings, and decide abstract questions of constitutional law. The First Senate was vested with the authority to review the constitutionality of laws and to resolve constitutional doubts arising out of ordinary litigation. More concerned with the "nonpolitical" side of the Court's docket and the "objective" process of constitutional interpretation, the First Senate would hear the constitutional complaints of ordinary citizens as well as referrals from other courts. As already noted, an ordinary court that seriously doubts the constitutionality of a statute under which an actual case arises is obliged, before deciding the case, to refer the constitutional issue to the Constitutional Court for its decision.[75]

This division of labor resulted initially in a huge imbalance between the workloads of the two panels. The Second Senate decided only a handful of political cases, while

the First Senate found itself flooded with constitutional complaints and concrete review cases. As a consequence, the Bundestag amended the FCCA in 1956 to distribute the caseload more evenly between the senates. Much of the First Senate's work was transferred to the Second Senate, thus eroding the original rationale of the two-senate system. The Second Senate, while retaining its "political" docket, would henceforth decide all constitutional complaints and concrete judicial review cases dealing with issues of civil and criminal procedure. The First Senate would continue to decide all such cases involving issues of substantive law. In addition, the plenum—the two senates sitting together—was authorized by law to reallocate jurisdiction in a manner that would maintain relatively equal caseloads between the senates.[76]

The number of justices serving on the two senates has also changed over the years. The FCCA originally provided for twelve members per senate. In 1956 the number was reduced to ten; in 1962 it was further reduced to eight, fixing the Court's total membership at sixteen (see Appendix A).[77] Considerations of efficiency, coupled with the politics of judicial recruitment,[78] prompted these reductions. For all practical purposes, then, the Constitutional Court comprises two independent tribunals, although each functions in the name of the Court as a whole. Since the 1980s, however, the Bundestag has modified the ironclad rule against any intersenate service by justices in two ways. First, if one senate is unable to convene because of the incapacity or unavailability of one or more of its justices—a quorum consists of six justices—a justice from the other senate may be chosen by lot to serve temporarily in the understaffed senate. The presiding justices of the two senates (the Court's president and vice president) are excluded from serving in this substitute capacity.[79] Second, upon the disqualification of a justice from participating in a particular case—even if such disqualification does not destroy the respective senate's quorum—a replacement justice is to be chosen by lot from the other senate.[80]

The two senates are thoroughly independent of one another. Each senate *is* the Federal Constitutional Court.[81] Yet this strict separation has administrative and doctrinal limits. All sixteen of the Court's justices periodically convene as the plenum to address administrative matters relevant to the Court as a whole. The plenum, for example, issues rules on the Court's procedure and judicial administration.[82] The plenum, as noted earlier, also fairly allocates the senates' jurisdictional assignments in order to avoid an imbalanced docket.[83] As regards constitutional doctrine, the senates frequently have developed distinct approaches to common questions. But only the plenum can decide a case in the event that one senate seeks to deviate from the "legal opinion contained in a decision of the other senate."[84] Resort to the plenum in these circumstances is a matter to be decided by the senate that was originally responsible for the case, that is, the senate that wants to disregard the other senate's jurisprudence. Nevertheless, the opposite senate decides whether its existing jurisprudence has, in fact, been implicated. It would seem, based on these rules, that one senate can compel the other to call for the plenum's intervention.[85] But the senates jealously guard against such meddling. In the *Unwanted Child Case* (1997; no. 4.3), for instance, the First Senate refused to heed the Second Senate's call for the

plenum by arguing that resort to the plenum is necessary only if an intentional departure from a decisive facet of the other senate's reasoning in a similar case is implicated. The First Senate explained that a senate's "legal opinion" is decisive if retracting it would undermine the concrete holding of the case.[86] In a rare public display of tension at the Court, the Second Senate published an accompanying order objecting to the First Senate's assertion of this very narrow standard and its conclusion that the standard had not been met in the case at hand.[87]

Intrasenate Chamber System. To speed up the Court's decision-making process and ease the burden of an increasing number of cases, the internal structure of the two senates was changed in 1956 by authorizing each senate to set up three or more preliminary examining committees, each consisting of three justices, to filter out frivolous constitutional complaints.[88] This was made necessary by the fact that, except under distinct circumstances, the FCCA obliges the Court to admit all constitutional complaints for decision.[89] As a consequence of this reform, at the beginning of each business year the senates established committees, limited however by the rule that no three justices could serve together on the same committee for more than three years.[90] The Court's president and vice president served as chairs of the respective committees to which they were assigned, as did the senior justice on each of the remaining committees. A committee could dismiss a complaint if all three of its members considered it to be "inadmissible or to offer no prospect of success for other reasons."[91] Under current procedure, if one of the three justices votes to accept a complaint—that is, if he or she thinks it has some chance of success—it is forwarded to the full senate for ordinary consideration of its admissibility.[92] At this second stage, the "rule of three" controls; if at least three justices in the full senate are convinced that the complaint raises a question of constitutional law likely to be clarified by a judicial decision, or that the complainant will suffer serious harm in the absence of a decision, the complaint will be accepted for review.[93] Thereafter, and on the basis of more detailed examination, a senate majority could still reject the complaint as inadmissible or trivial.[94]

In 1986, on the Constitutional Court's recommendation, the Bundestag enhanced the power of the three-justice committees and renamed them chambers (Kammern). In addition to the normal screening function they had been performing, the three-justice chambers are now empowered to rule on the merits of a constitutional complaint if all three justices agree with the result and the decision clearly lies within standards already laid down in a case decided by the full senate.[95] The authority to declare a statute unconstitutional or in conflict with federal law is still reserved to the full senate.[96] A chamber is not required to file a formal opinion justifying its refusal to accept a complaint for a decision on the merits.[97] As a matter of practice, however, whether deciding a complaint on the merits or on the question of admissibility (Zulässigkeit), a chamber often accompanies its decision with an opinion that can be as short as one page and as long as several pages. Most of these decisions remain unpublished, and they are catalogued in the Court's files for internal use and reference. In the past, on rare occasions and in consultation with the full senate, chamber

decisions were published in the Court's official reports. Other chamber opinions that served to clarify points of law laid down in previous cases or that were likely to command public attention might be released for publication in major legal periodicals such as the *Neue Juristische Wochenschrift* and the *Juristenzeitung*.[98] In the last decade the chamber process has benefited from greater transparency. Since 1999 most chamber decisions are available at the Court's website and, since 2003, the Court has published a limited and perhaps necessarily eclectic selection of chamber decisions in a new set of official reports.

As yet another mechanism for easing the Court's overwhelming caseload, the FCCA authorizes the Court to fine petitioners who "abuse" the constitutional complaint procedure. Currently the Court may level a fine of up to € 2,600 on abusers, but it rarely does so.[99] In 1986 the chambers were given the additional authority to impose a fee on any petitioner whose complaint they refused to accept because it was either clearly inadmissible or wholly unlikely to succeed. This practice, however, failed to decrease the number of complaints arriving at the Court, and it was eventually abandoned.

By separating the wheat from the chaff, the chambers dispose of more than 95 percent of all constitutional complaints, relieving the full senates of what would otherwise be an impossible task. As useful as the chamber review system is for helping control the Court's docket, it is not without problems. It has been the subject of several constitutional challenges, the complainant having argued in each case that a chamber's dismissal of his or her complaint constituted a denial of the right to "the jurisdiction of his lawful judge" under Article 101 (1) [2] of the Basic Law. Since the Basic Law provides for one Constitutional Court, argued the complainants, the full senate is constitutionally required to decide every case. In the three *Three-Justice Committee* cases[100] involving decisions by both senates, the Court ruled against the complainants on the basis of its original statutory authority to establish internal committees. In one instance, seemingly piqued by the audacity of the complainant who challenged its decision-making procedures, the Second Senate slapped a nominal fine on the complainant for "abusing the constitutional complaint procedure."[101] These decisions, all rendered before the right to file a constitutional complaint was entrenched in the Basic Law, underscored the finality of committee decisions unanimously rejecting complaints. In short, if a complaint is unanimously rejected, no "appeal" lay to the full senate, its sister senate, or the plenum. The constitutionalization of the complaint procedure in 1969 appeared to erode the foundation of the *Three-Justice Committee* cases. In recent years, however, no challenge has been hurled against the chamber system on constitutional grounds, "and in any event it is rather hard to imagine the Court undermining its own protective ramparts."[102]

Other problems shadow the chamber review system. There is the chance that different standards may exist from one chamber to the next, undermining the uniformity of the Court's jurisprudence. There has also been criticism of the quality of the chamber decisions and expressions of concern that the chambers have informally replaced the senates.[103] Finally, there is some reason to wonder if the flexibility and opacity of the

chamber system has led to the informal establishment of discretionary review at the Court, opening the possibility for the strategic development of jurisprudence and the erosion of subjective rights guarantees, both of which the FCCA sought to avoid.[104]

Despite these concerns, it is clear that some form of gatekeeping procedure involving less than full senate review is necessary as a practical matter if the Court is to cope with a system that "entitles [anyone] to complain to it about virtually anything."[105]

Qualifications and Tenure. To qualify for a seat on the Constitutional Court, persons must be forty years of age, be eligible for election to the Bundestag, and possess the qualifications for judicial office specified in the German Judiciary Act (Deutsches Richtergesetz). This means that prospective justices must have normally passed the first and second major state bar examinations. Additionally, justices may not simultaneously hold office in the legislative or executive branch of the federal or a state government. Finally, the FCCA provides that the "functions of a justice shall preclude any other professional occupation except that of a professor of law at a German institution of higher education" and that the justice's judicial functions must take precedence over any and all professorial duties.[106]

The FCCA originally provided lifetime terms for the justices of each senate who had been selected from the federal courts. The other members of the Court—justices not required to be chosen from the federal courts—were limited to renewable eight-year terms of office. The recruitment of a certain number of judges from the federal courts for the duration of their terms on those courts was expected to bring judicial experience and continuity to the Constitutional Court's work. Parliament amended the FCCA in 1970, however, to provide for single twelve-year terms for all justices, with no possibility of reelection.[107] Three of the eight justices serving in each senate must, as before, be elected from the federal judiciary. All justices on the Constitutional Court—federal judges and other members—must retire at age sixty-eight, even if they have not yet completed their twelve-year term.

The debate on judicial tenure prior to the 1970 change in the law was entangled with the question of whether justices should be authorized to publish dissenting opinions.[108] As early as 1968, lawmakers, supported by a majority of the justices, seemed prepared to sanction signed dissenting opinions. But the feeling was widespread that the justices could not be expected to speak their minds if their tenure depended on the continuing pleasure of the Bundestag or Bundesrat. The justices themselves favored lifetime appointments. The government in turn responded with a bill that provided for both dissenting opinions and a twelve-year term with the possibility of reelection for a single second term of twelve years. Social Democrats, however, insisted on a single fixed term of twelve years, conditioning their support of the dissenting opinion largely on the acceptance of this proposal. The question was not hotly contested among the political parties. A single twelve-year term, combined with the dissenting opinion, was generally thought to be an adequate solution to both the problem of judicial independence and the need for a greater measure of judicial openness on the Constitutional Court.[109]

Machinery of Judicial Selection. The Basic Law provides that half the Court's members be elected by the Bundestag and half by the Bundesrat. The participation of the Bundestag in the selection of the Court's justices underscores the significant role the Court plays in reviewing the content and procedural integrity of the decisions of the popularly elected Parliament. It seemed appropriate then that the Bundestag should play a major role in the Court's staffing.[110] Similarly, the Bundesrat's participation in the judicial selection process was meant to ensure that the Länder would have an equally significant voice on the Court.[111] Several of the Basic Law's framers assumed that preserving German federalism against centralizing tendencies would be the chief, if not exclusive, function of the Court.[112]

The Bundestag elects eight justices indirectly through a twelve-person Judicial Selection Committee (Wahlmännerausschuss). Party representation on the Judicial Selection Committee is proportionate to each party's strength in the Bundestag; eight votes—a two-thirds supermajority—are required to elect.[113] The Bundesrat votes as a whole for its eight justices, a two-thirds vote also being required to elect.[114] Although each legislative organ elects four members of each senate, the FCCA stipulates that, of the three justices in each senate "selected from among the judges of the highest federal courts, one shall be elected by one [house] and two by the other, and of the remaining five justices, three shall be elected by one [house] and two by the other."[115] Which house elects each combination is a matter of informal agreement. The Bundestag and Bundesrat alternate in selecting the Court's president and vice president (the Bundestag was authorized to elect the first president and the Bundesrat the first vice president).

Prior to the selection process the minister of justice is required to compile a list of all the federal judges who meet the qualifications for appointment, as well as a list of the candidates submitted by the parliamentary parties, the federal government, or a state government. The minister delivers these lists at least one week before the Bundestag's Judicial Selection Committee or the full Bundesrat convene on the question of appointments to the Court. If either house fails to elect a new justice within two months of the expiration of a sitting justice's term, the chair of the Judicial Selection Committee—the oldest member of the committee—or the president of the Bundesrat (depending on which legislative organ is electing a new justice) asks the Constitutional Court itself to propose a list of three candidates; if several justices are to be elected simultaneously, the Court is required to "propose twice as many candidates as the number of justices to be elected."[116] The plenum selects the list by a simple majority vote. There is, however, no obligation on the part of the Judicial Selection Committee or the Bundesrat to choose the appointee from this or any other list.

The process of judicial selection is highly politicized. The Judicial Selection Committee, which consists of senior party officials and the top legal experts of each parliamentary party, conducts its proceedings behind closed doors and after extensive consultation with the Bundesrat.[117] Although the parliamentary parties may not legally instruct their representatives on the Judicial Selection Committee how to vote,

committee members do in fact speak for the leaders of their respective parties. The two-thirds majority required to elect a justice endows opposition parties in the Judicial Selection Committee with considerable leverage over appointments to the Constitutional Court. Germany's two main parties, the Social Democrats and the Christian Democrats, are in a position to veto each other's judicial nominees. The Free Democratic Party and the Green Party, traditionally smaller political blocs in the Parliament, also have won seats on the Court for their nominees. Compromise is a practical necessity in any case.

Compromise among contending interests and candidacies is equally necessary in the Bundesrat, where the interests of the various states, often independent of party affiliation, play a paramount role in the selection of the justices. An advisory commission consisting of the state justice ministers prepares a short list of potentially electable nominees. The justice ministers on the commission, like certain state governors (minister-presidents) and members of the Bundestag's Judicial Selection Committee, often are themselves leading candidates for seats on the Constitutional Court. Informal agreements emerge from the commission's proceedings, specifying which states shall choose prospective justices and in what order. Throughout this process the commission coordinates its work with the Bundestag's Judicial Selection Committee. It is important to avoid duplicate judicial selections, and the two chambers need to agree on the particular senate seats each is going to fill and which of these seats are to be filled with justices recruited from the federal courts.[118]

While the process for the selection of Federal Constitutional Court justices lacks the transparency of the process by which justices are seated on the U.S. Supreme Court, the spirit of compromise and cooperation that prevails in Germany has, thus far, avoided the sensationalism, scandal, and personalization that sometimes seem to dominate U.S. Supreme Court appointments.[119] Of course, lifelong tenure combines with the principle of stare decisis to raise, imperceptibly, the stakes in the U.S. appointment process. For all its opacity, the German process, largely as a consequence of the supermajority required for election, nonetheless has consistently produced a Constitutional Court that is reflective of Germany's most prominent political parties, regional divisions, and confessions.[120] In one respect, however, the Court has been less than representative of German society. The presidency of Jutta Limbach (1994–2002), the first woman to hold the position, draws attention to the fact that the Court continues to be dominated by men. In 1951 the remarkable Erna Scheffler, who participated in the Parliamentary Council, was appointed as one of the Court's first justices. In the subsequent sixty-one years, during which more than one hundred jurists have donned the Court's red robes and caps, only thirteen other women have found their way to Karlsruhe. In 2011 only five of the Court's sixteen justices were women.

PROCESS

Internal Administration. The Federal Constitutional Court achieved a major victory when it won the authority early on to administer its own internal affairs. Administrative autonomy had two notable consequences for the Court's institutional development. First, armed with the power to prepare its own budget in direct consultation with Parliament and the Ministry of Finance, the Court was able to plan its own future. In 1964 it even won approval for an ultramodern building designed by architects and engineers of its own choosing. Second, the administrative authority of the Court's president was substantially enlarged. While only *primus inter pares* in the judicial conference room, he or she is primus on all other matters of internal administration, a situation that once aggravated relations between the president and several associate justices.

In 1975, after years of discord between the Court's president and individual justices over their respective duties and powers, the Court's plenum enacted a set of standing rules of procedure governing the Court's internal operations that has been revised several times since.[121] The rules charge the plenum, over which the Court's president presides, with preparing the budget, deciding all questions pertaining to the justices' duties, and formulating general principles of judicial administration. They authorize the plenum to establish several standing committees for the purpose of recommending policies dealing with matters such as record-keeping, budgetary policy, personnel administration, and library administration. The rules require the president to carry out these policies and to represent the Court in its official relations with other government agencies and on ceremonial occasions. Overall judicial administration is the responsibility of the Constitutional Court's director, the highest administrative official at the Court. The director, like the justices themselves, must be a lawyer qualified for judicial office. Indeed, one previous director, Walter Rudi Wand, was elected to the Second Senate in 1970. Finally, each justice is entitled to four legal assistants of his or her own choosing. Legal assistants are not recent law school graduates like the law clerks that assist judges and justices in the United States. They have usually already embarked on legal careers as judges, civil servants, or professors of law. Most serve for two or three years, although some legal assistants have stayed on for longer periods.[122]

Decision-Making Procedure. The FCCA and the Constitutional Court's Rules of Procedure (Geschäftsordnung des Bundesverfassungsgerichts) set forth each senate's internal practices and procedures. For its part, the FCCA includes general and special provisions governing each category of jurisdiction. The Rules of Procedure deal with 1) conditions under which a justice may be excluded from a case; 2) procedures to be followed in various types of cases; 3) rights of the parties involved in litigation before the Court, including the qualifications of those legally entitled to represent them; 4) obligations of public officials and judges to cooperate with the Court in disposing

of certain cases; 5) special rules accompanying the issuance of temporary orders; and 6) the manner in which decisions are made and announced.[123]

The procedures on judicial removal require justices to recuse themselves from a case if they are related to one of the parties or have a personal interest in its outcome.[124] Recusal, however, is beyond the justices' personal discretion. Whether a justice initiates the recusal or resists a formal challenge of bias by one of the parties, the senate decides the matter in the justice's absence. A decision denying or upholding a voluntary recusal or a challenge to a justice's refusal to withdraw from a case must be supported in writing and included among the Court's published opinions.[125] A justice who wishes not to be recused in the face of a recusal motion must provide the senate with a formal statement in defense of his or her involvement in the case. The statement is included in the senate's formal opinion on the recusal. The critical issue in such cases is not whether the justice in question is in fact biased, but whether a party to the case has a sufficient reason for believing that the justice may be incapable of making an impartial judgment. These procedures have been invoked only rarely to exclude justices from participating in the decision of a case.[126]

The Constitutional Court's deliberations are secret, and the justices render their decisions on the basis of the official record. The rules require that each senate decision be justified by official opinions signed by all participating justices.[127] Recording the justices' participation is vastly different from confirming their unanimity; the FCCA grants the senates the discretion to disclose or withhold information about the number of votes for or against the final decision. Oral arguments are the exception; they are limited to cases of major political importance. In 2011 the Court held only seven oral arguments.[128] A decision handed down on the basis of an oral proceeding is known as a judgment (Urteil); a decision handed down in the absence of oral argument is labeled an order or ruling (Beschluss). The distinction seems to be little more than a formality, for all state authorities are bound by all of the Court's decisions. An oral argument leading to an Urteil obviously gives a case a more prominent public profile but a Beschluss is no less important or enforceable. All decisions having the force of general law—for example, most abstract and concrete judicial review cases—must be published in the *Federal Law Gazette*,[129] along with all parliamentary resolutions and laws.

Case Assignment. Specialization is a major feature of the judicial process within the Federal Constitutional Court. As noted earlier, each senate has a specified jurisdiction. Once incoming cases have been processed in the Office of the Director, they are channeled to the appropriate senate and then passed on to the various justices according to their areas of expertise.[130] Before the start of the business year, each senate establishes the ground rules for the assignment of cases. By mutual agreement, and in consultation with his or her senate's presiding justice, each justice serves as the rapporteur (Berichterstatter) in particular cases. The ground rules for the assignment of cases are designed to take into account the justices' interests and expertise. For example, it is typical that at least one justice of the Second Senate has a background in international law and European Union law. He or she serves as the rapporteur in cases involving international legal issues and, most prominently, Germany's participation in supranational organizations like the European Union (EU) and international organizations like the North Atlantic Treaty Organization (NATO). Another justice might take charge of cases involving tax and social security law, while still another might be assigned cases dealing with issues arising from family law. Despite this acknowledgment of particular justices' expertise in the assignment of cases, occasionally justices serve as rapporteurs in cases outside their specialties.

The rapporteur's job is to prepare a written document known as the Votum, the creation of which is a crucial stage in the decisional process. Aided by legal assistants, the rapporteur prepares what amounts to a major research report. The Votum describes the background and facts of the dispute, surveys the Court's previous decisions and the legal literature, presents fully documented arguments advanced on both sides of the question, and concludes with a personal view of how the case should be decided. A Votum, which may be well over a hundred pages long, can take weeks, even months, to prepare; often it forms the basis of the first draft of the Court's final opinion.[131] In any calendar year each justice prepares several major Voten, studies thirty to forty others authored by other justices, drafts shorter reports (Kurzvoten)—up to four hundred per year—for the two other justices serving on a particular three-justice chamber, writes the opinion in those cases over which he or she presides as rapporteur, and prepares for the weekly conferences.

Oral Argument. As already noted, formal hearings before the Court are rare, except in Organstreit and abstract judicial review cases, in which oral argument is mandatory unless waived by the major organs or entities of government bringing these cases. The rapporteur, who by this time has completed his or her Votum, usually dominates the questioning. The main function of the oral argument is less to refine legal issues than to uncover, if possible, additional facts bearing on them. For this reason the Court may hear from fact experts during the oral argument in order "to establish the truth,"[132] as well as from the lawyers, law professors, or public officials formally advocating for the parties. The public hearing also adds legitimacy to the decision-making process in cases of major political importance, particularly when minority political parties allege that the established parties have treated them unconstitutionally. The generous time allotted to oral proceedings—a full day, or more in exceptional cases—and the Court's readiness to hear the full gamut of argumentation on both sides of a disputed question are intended to generate goodwill and convey a sense of fairness and openness to winners and losers alike. In spite of this genuine commitment to transparency, openness, and inclusion, the Court's oral arguments cannot be taped or broadcast. The Court has upheld this rule over constitutional free speech and media freedom challenges with respect to all German courts.[133] The only exception to this rule is that the media are allowed to broadcast the first, dramatic moments of the Court's public proceedings when the justices take the bench in their resplendent red robes and caps, up to the moments just after the

presiding justice formally opens the proceedings by announcing the file number and briefly introduces the case at hand.

Conference. The presiding justice of each senate schedules weekly conferences to decide cases and dispose of other judicial business. Except for August and September, when the Court is not in session, conference sessions are normally held every Tuesday, frequently spilling over into Wednesday and Thursday. Voten and draft opinions of cases already decided dominate the agenda. In considering a Votum, the presiding justice calls on the rapporteur to summarize the case and justify the recommended solution. The rapporteur's role is crucial here, for a carefully drafted and well-organized Votum usually carries the day in conference. In addition, the pressure of time often prompts justices to defer to the rapporteur's expertise and judgment.[134]

Still, the rapporteur has to win the consent of his or her colleagues. It is the rapporteur's responsibility, along with that of the "chief justice," to marshal a majority or find a broad basis of agreement. In this process skill and personality are important. A successful rapporteur solicits the views of colleagues and negotiates artfully in order to prevail in conference. Justices who lack these gifts or the full confidence of their colleagues are unlikely to see their views command the resolution of cases. If, on the other hand, the rapporteur is in the minority—and even the most influential justices occasionally find themselves in this position—he or she does not necessarily lose all influence over the case; the rapporteur still has the task of writing the Court's opinion. If the rapporteur combines political sagacity with a deft literary hand, it is possible to leave a distinct imprint on the finished product. A rapporteur who plans to memorialize his or her strong dissenting views in a dissenting opinion may request that the writing of the opinion be assigned to another justice, but this rarely happens.[135] If the rapporteur understands the requisites of judicial statesmanship, he or she will draft an opinion broadly reflective of a wide common denominator of agreement, often representing a compromise among conflicting constitutional arguments.[136]

The production of such opinions—that is, opinions that reduce discord on the bench and preserve the Court's moral authority in the public mind—is likely to be a function of the presiding justice's capacity for leadership. The presiding justice's task is to guide discussion, frame the questions to which there is to be a vote, and marshal the largest majority possible behind judicial decisions. This leadership is particularly important in the sessions in which opinions undergo final and often meticulous editing.

The well-settled tradition of the Court is to speak as an institution and not as a panel of individual justices. There is a significant expectation of collegiality and consensus on the Court, much as in German society generally. Thus, despite the introduction of signed dissenting opinions in 1970, the Court continues to unanimously decide more than 90 percent of its reported cases. Although the FCCA requires the disclosure of the identities of the justices participating in every case, authorial

responsibility for unanimous and even majority opinions remains undisclosed. In the rare instances where the Court's institutional unanimity fractures, the Court is not required to identify which justices voted with the majority and which voted with the minority. Only the publication of a signed dissenting opinion, an even rarer departure from the Court's prized institutional unanimity, might provide formal insight into the Court's voting constellations. In spite of these measures, which strive to depersonalize the work of the justices, it is common knowledge among informed observers that the rapporteur in a unanimous decision is the principal author of the final opinion.

The institutional bias against personalized judicial opinions has tended to minimize published dissents. Since 1971, when they were first allowed, through the end of 2011, there have been only 146 published dissents.[137] Dissenting justices—even if they have circulated written dissents inside the Court—usually choose not to publish them or to be identified as dissenters, at least partly out of a sense of institutional loyalty. The prevailing norm seems to be that personalized dissenting opinions are proper only when prompted by deep personal convictions. As one commentator remarked, "In their justification, style and intent, dissenting opinions are a departure from the Court's unanimity. . . . [T]hey can draw attention to the dissenting justice as a public figure, who may dissent in order to highlight his or her ethical or jurisprudential differences with the majority. . . . Such dissenting opinions can endanger the Court's majority opinion."[138] Despite such concerns, there are signs that the Court's deeply rooted culture of collegiality and consensus may be changing. After a burst of dissenting opinions from the Court in the years immediately following German reunification (thirteen published dissents in 1994 and 1995), the Court seemed to return to its practice of relative unanimity (six published dissents between 1996 and 2001). Since 2001 the number of published dissents has again increased, to a steady rate of about three per year. There is also increasing concern about the public, and often intensely political, profile some sitting and retired justices have achieved. In 1994 the Court's president, Roman Herzog, led a successful campaign for the federal presidency, to which the Court raised no objection.[139] Two more recent examples may suggest a strengthening trend. On the one hand, retired Justice Paul Kirchhof played a sensational role with a brief performance as the "finance minister" in Angela Merkel's shadow cabinet during her 2006 campaign as the Christian Democratic candidate for the chancellorship. On the other hand, the dynamic Justice Udo Di Fabio drew attention for his respected but atypically outspoken scholarship and social commentary.

Caseload and Impact. Table 1 presents an overview of the Court's workload during its first six decades. These statistics, however, do not tell the full story of the business before the Court or its function in the German polity. In a given calendar year the Court receives eight to ten thousand letters, notes, or communications from individuals claiming to be unconstitutionally affected by German authorities. When these poorly articulated "constitutional complaints" are obviously inadmissible or

hopelessly trivial, they are provisionally assigned to the Court's General Register's Office, which reviews the submissions and responds on behalf of the Court with an explanation of the legal nature of the matter that was the subject of the submission and, in light of this clarification, the General Register's view on whether a judicial decision is at all necessary or appropriate.[140] Of course, if the General Register's Office finds that a judicial treatment of the submission is necessary, the case is lodged for review in the ordinary admissibility process of the appropriate senate. If, in response to the General Register's clarification, the petitioner writes back demanding to be heard, his or her submission is lodged with one of the senates.[141] This process highlights the fundamental aim of the General Register's review, which is to give the petitioner an informed characterization of the submission while underscoring the petitioner's ultimate responsibility for the "complaint." In 2011 the General Register's Office was confronted with 9,128 communications. It classified the great majority of these (5,983) as "petitions" or "constitutional complaints." In 2011 the General Register lodged 1,549 petitions or complaints with the senates for ordinary admissibility review after having corresponded with the parties. The General Register assigned another 2,977 submissions to the senates for admissibility review without the benefit of correspondence between the General Register and the parties. A final tranche of 4,505 submissions being handled by the General Register were closed in 2011 after its correspondence with the parties. These numbers do not necessarily add up to the total number of submissions assigned to the General Register in 2011. This is because the General Register's Office often is busy wrapping up communications received in a preceding year and, concomitantly, often is not able to resolve all the communications it receives in the same calendar year.[142]

The General Register thus serves as an important gatekeeper. Through it pass only the most insistent of complainants. This screening function is not unproblematic. Formally, the General Register's explanatory letters, which have the practical function of turning cases away, do not count as judicial decisions because they are not issued by judges. Nonetheless, they are often treated as judicial resolutions of the non-specific communications received by the Court, particularly by the less-sophisticated recipients of the letters and in the Court's statistics. These problems aside, the work of the General Register is remarkable in the following respect: through the General Register's explanatory letters the Court bestows the courtesy of a response on every person who appeals to it.

As Table 2 shows, constitutional complaints, requests for temporary injunctions, and concrete judicial review references have made up the bulk of the Constitutional Court's very heavy docket over the last several years. The General Register, along with the chamber review process described earlier, seems to have given the Court the flexibility it needs to cope with its caseload. Just as the General Register carries the burden for the Court generally, the chamber review process permits a range of more-or-less objective and frequently undisclosed criteria to influence the summary disposition of cases and, thus, the resolution of matters that formally lay within the full senate's competence.[143] The increased number of legal assistants each justice is able

TABLE 2. Federal Constitutional Court's Caseload

Jurisdictional Category	1951–2001	2009	2010	2011
Constitutional Complaints	126,962	6,308	6,251	6,036
Concrete Judicial Review	3,147	47	19	35
Requests for Temporary Injunction	1,157	148	132	103
Disputes between Federal Organs	130	2	3	9
Abstract Judicial Review	141	2	0	7
Federal State Conflicts	35	0	1	0
Election Disputes	144	1	16	17
Other Proceedings	451	0	0	1
Totals	136,647	6,508	6,422	6,208

Source: Bundesverfassungsgericht, "Aufgaben, Verfahren und Organisation—Statistik für das Geschäftsjahr 2011—Eingänge nach Verfahrensarten," available at www.bundesverfassungsgericht.de/organisation/gb2011/A-I-4.html.

to employ (now four) works in combination with the General Register's review and the chamber system to help manage the Court's docket. As Joachim Wieland remarked after his service as a legal assistant at the Constitutional Court, "the preparation of the decision concerning the admittance of a constitutional complaint forms, as a rule, one of the more central tasks of the legal assistants."[144] These summary processes were viewed as adequately responding to the Court's crushing workload, such that lawmakers were persuaded at the end of the 1990s, with the Court's blessing, to forgo granting the Court discretionary case selection authority (freies Annahmeverfahren) of the kind enjoyed by the U.S. Supreme Court.

The number of concrete review references has not added much to the Court's heavy docket. The number is surprisingly low in light of a judiciary consisting of more than twenty thousand judges. The apparent reluctance of judges to refer constitutional questions may be attributed to the strong tradition of legal positivism that continues to hold sway in the regular judiciary. Jealous of their own limited power of judicial review, judges usually resolve doubts about the constitutional validity of laws at issue in pending cases by upholding the laws or interpreting them so as to avoid questions of constitutionality, thus obviating the necessity of a referral to Karlsruhe.

The constitutional complaint procedure, on the other hand, has served as an escape hatch for litigants upset with the performance of the judiciary. More than 90 percent of all constitutional complaints are brought against judicial decisions (Table 3). The remainder are focused on legislative or executive infringements of basic rights.

TABLE 3. Sources of Constitutional Complaints, 2011

	Lodged With		
Filed Against	First Senate	Second Senate	Total
Ordinary Courts			
Civil	1,654	771	2,425
Criminal	59	1,412	1,471
Administrative Courts	439	352	791
Social Courts	516	1	517
Finance Courts	105	74	179
Labor Courts	102	0	102
Laws and Regulations	61	32	93
Parliamentary Omissions	12	5	17
European, Federal, State, and Local Administrative Actions	86	109	195

Sources: First Senate—Bundesverfassungsgericht, "Aufgaben, Verfahren und Organisation—Statistik für das Geschäftsjahr 2011—Erster Senat—Verfassungsbeschwerden," available at www.bundesverfassungsgericht.de/organisation/gb2011/B-II-2.html; Second Senate—Bundesverfassungsgericht, "Aufgaben, Verfahren und Organisation—Statistik für das Geschäftsjahr 2011—Zweiter Senat—Verfassungsbeschwerden," available at www.bundesverfassungsgericht.de/organisation/gb2011/C-II-2.html.

Nearly all complaints alleging that court decisions have violated the procedural guarantees of the Basic Law are disposed of by the Second Senate. The First Senate has jurisdiction over most complaints involving claims to substantive constitutional rights such as human dignity (Article 1); life, liberty, and personality (Article 2); equal protection (Article 3); the freedom to choose a trade or profession (Article 12); and property (Article 14).[145] Even though the full senates decide a mere handful of such cases—sixteen in 2011—the constitutional complaint procedure is now deeply rooted in Germany's legal culture. The right of any citizen to take a complaint to Karlsruhe is an important factor in the Court's high rating in public opinion polls and, perhaps, the chief reason for the development of a rising constitutional consciousness among Germans generally.

Most of the Court's political jurisprudence falls into other jurisdictional categories, particularly conflicts between branches of government, disputed elections, and federal-state controversies. Although few in number (see Table 1), the political impact of these cases is substantial.[146] In general, however, the Constitutional Court is most politically exposed when deciding cases on abstract judicial review. These cases are almost always initiated by a political party on the short end of a legislative vote in the Parliament or by the national or a state government challenging an action of another level of government

controlled by opposing political parties. The apparent manipulation of the judicial process for political purposes in these cases has led some observers to favor the abolition of abstract judicial review.[147] But those who decry the judicialization of politics—alternatively, the politicization of justice—have not gained much parliamentary support for the constitutional amendment that would be necessary to abolish abstract review. Equally disconcerting for those who would eliminate the thin line between law and politics trod by the Court in these cases is the failure of the justices themselves to mount any opposition to abstract judicial review. Indeed, the elimination of abstract review would run counter to the view of constitutionalism currently prevalent in the Federal Republic: the view that the Court, as guardian of the constitutional order, is to construe and enforce the constitution whenever statutes or other governmental actions raise major disputes over its interpretation. This observation clears the way for the following consideration of the Court's role in interpreting the Basic Law and its concomitant role in the German polity.

JUDICIAL REVIEW IN OPERATION

A major function of constitutional theory in Germany, as in the United States, is to resolve "the tension between representative democracy and constitutional review in a way that both justif[ies] and regulate[s] their coexistence."[148] Numerous commentators have sought to mark the boundary between legislation and constitutional adjudication and to comprehend the fine line that the Federal Constitutional Court has drawn between law and politics.[149] The following discussion summarizes the strategies devised to temper judicial activism with restraint, thus preserving the creative coexistence between democracy and constitutionalism.

Scope of Review. The Federal Constitutional Court renders its decisions largely in declaratory form. In cases of major importance it may issue a temporary injunction against a political department of the government, pending the clarification of a constitutional question. Yet, as will be more fully explained in the next chapter, the Court normally confines itself to declaring laws null and void or simply incompatible with some particular provision of the Basic Law. The Court is unbound by any case or controversy requirement, which permits it to remain on the high road of broad-ranging, principled declarations. In this sense, the Court elevates the status of the parties. As Justice Hans G. Rupp explained, "The only marshal there is to enforce the Court's ruling is its moral authority, the conscience of the parties concerned, and in the last resort, the people's respect for law and good government. It is mainly this limitation which renders it less objectionable to let a court settle legal issues which are closely connected with domestic or international politics."[150]

The Court's precious moral authority is supported by two pillars. First, the Court carefully observes the governing procedure described in the earlier sections of this chapter. Second, the Court follows a number of guidelines analogous to certain

maxims of judicial self-restraint advanced by Justice Brandeis in *Ashwander v. Tennessee Valley Authority* (1936).[151] For example, the rule that the U.S. Supreme Court will not pass upon the constitutionality of legislation in a nonadversarial proceeding has its equivalent in the Federal Constitutional Court's refusal to decide moot questions. We have seen that concrete judicial review references must arise within the framework of actual litigation. The justiciability of a constitutional complaint likewise depends on certain attributes of concreteness and particularity. Even cases coming before the Court on abstract judicial review require real conflicts of opinion within or among governing institutions.

The Court has also traditionally refrained from anticipating a question of constitutional law in advance of the necessity for deciding it. In short, while every case properly before the Court involves a constitutional question, the Court usually refrains from deciding ancillary constitutional issues not yet ripe for decision. For example, the Court may strike down a particular federal regulation interfering with a state's administration of federal law but decline to set forth the general conditions under which federal administrative control would prevail. The Court is also reluctant to issue temporary injunctions against government agencies about to engage in allegedly unconstitutional behavior, preferring as a matter of strategy to allow the challenged activity to proceed until the Court has had time to consider the matter on its merits.[152]

American legal scholars will recognize other *Ashwander* maxims in the Court's general approach to constitutional disputes. A leading principle of judicial review in Germany obliges the Court to interpret statutes, when possible, in conformity with the Basic Law (Pflicht zur verfassungskonformen Auslegung).[153] If a statute lends itself to alternative constructions for and against its constitutionality, the Court follows the reading that saves the statute, unless the saving construction distorts the meaning of its provisions. The Court has also stated on numerous occasions that it will not substitute its judgment of sound or wise public policy for that of the legislature. Nor will statutes be overturned simply because the legislature may have inaccurately predicted the consequences of social or economic policy. As the *Kalkar I Case* (1978; no. 4.6)[154] and the *Codetermination Case* (1979; no. 10.9)[155] make plain, the Court grants a generous margin of error to the legislature. It will uphold an ordinary statute unless the statute clearly violates the principle of proportionality (Verhältnismäßigkeit), the constitutional state principle (Rechtsstaat), or some related principle of justice such as legal security, clarity, or predictability.

The Court applies these same principles with respect to laws examined in the course of ordinary civil and criminal proceedings. In addition, the justices have developed several rules for limiting the number of concrete judicial review referrals from ordinary courts.[156] One such rule requires ordinary courts to certify statutes for review when they are convinced that the law under which a dispute arises is unconstitutional,[157] but only when a ruling of unconstitutionality would change the outcome of the case. Another is that only statutes passed since the ratification of the Basic Law qualify as subjects of concrete judicial review to be decided by the Constitutional Court. Any court

may review and nullify on constitutional grounds legislation, administrative regulations, and local ordinances enacted before 1949. These so-called preconstitutional laws rank lower than laws passed since 23 May 1949.[158] The Federal Constitutional Court has ruled, however, that such laws are within the scope of its concrete judicial review procedure when they have been reenacted or substantially amended under the Basic Law. The appropriate parties may nevertheless challenge an untouched preconstitutional law in an *abstract* judicial review proceeding.[159]

Finally, while the Court does not enjoy discretion akin to the certiorari power of the U.S. Supreme Court, it does have limited control over its docket through the three-justice chambers. As described earlier in this chapter, this admissibility review can, to no small degree, be instrumentalized to serve the Court's interests, including its interest in maintaining its stock of prestige and respect. Still, it would be improper to portray the Court as unswervingly modest and restrained. It can find its way into a dispute if it thinks it wise as a matter of constitutional politics. One example of this should suffice. In 1998 the Court dramatically disregarded the fundamental principle of self-restraint that holds that a party's withdrawal of a constitutional complaint removes the matter from the Court's jurisdiction. In the *German Spelling Reform Case* (1998) the Court noted that the general importance of a case might elevate the objective role of the constitutional complaint, making it more important to the broader interpretation and development of constitutional law than to the complainant's subjective, individual interest in the protection of his or her constitutional rights. Brushing aside the complainants' desire to avoid a ruling in the case, the Court seized the matter and upheld the reform. In so doing, the Court prompted scholarly criticism that raised concerns about effectively limiting the scope of judicial review in a democracy.[160]

Form and Effect of Decisions. Indeed, on first impression and contrary to the mechanisms of judicial restraint mentioned in the previous section, the Court's decision-making record might suggest a tribunal embarked on a path of relentless activism. By 31 December 2011, as noted in Table 4, the Court had invalidated 640 laws and administrative regulations (or particular provisions thereof) under the Basic Law. Of these negative rulings, the First Senate decided 372 and the Second Senate 268, more than 70 percent of which involved provisions of federal law, a percentage explained by the federation's predominant lawmaking role in nearly every major area of public policy. The large majority of these rulings admittedly involved minor legal provisions, but a fair number featured important public policies in fields such as education, taxation, employment, social insurance, and labor law.[161]

Table 4 does not capture the distinct means by which the Court invalidates laws and regulations. The Constitutional Court may hold laws or regulations to be either null and void (nichtig) or incompatible (unvereinbar) with the Basic Law. When held to be nichtig, the statute or legal norm immediately ceases to operate. When declared unvereinbar, the statute or legal norm is held to be unconstitutional but not void; it remains in force during a transition period pending its correction by the

TABLE 4. Invalidated Legal Provisions, 1951–2011

Filed Against	Federal	State	Total
First Senate	284	88	372
Second Senate	173	95	268
			640

Invalidated legal provisions include federal or state laws/regulations declared void, incompatible and void, or only incompatible and not voided.

Source: Bundesverfassungsgericht, "Vom Bundesverfassungsgericht in der Zeit von 1951 bis 31.12.2011 als verfassungswidrig beanstandete Normen (nichtig, unvereinbar und nichtig, nur unvereinbar—ohne Nichtigerklärung)," available at www.bundesverfassungsgericht.de/organisation/gb2011/A-VI.html.

legislature. The latter approach has been sanctioned by the legislature and is an option the Court frequently exercises.[162]

These overrulings, however, are dwarfed by the number of laws or statutory norms that the Court has sustained over the years. With respect to laws that are upheld, the Court distinguishes between so-called unobjectionable (unbeanstandete) norms and those held to be in conformity with the Basic Law. Unobjectionable norms are those the Court sustains in the normal course of deciding constitutional complaints. The other category includes statutory provisions questioned in concrete judicial review cases but sustained in accordance with the principle that requires the Court to interpret a norm consistent with the Basic Law.

The practice of declaring a legal provision unconstitutional but not void is one of two strategies used by the Court to soften the political impact of its decisions. This first strategy uses admonitory decisions (Appellentscheidungen) to tender advice to the Bundestag with respect to statutes or legislative omissions that run afoul of the Basic Law or are likely to do so.[163] This strategy of declaring a law or practice unconstitutional but not void is designed to prevent the greater hardship or inconvenience that would flow from the complete voidance of a statute. How long and under what conditions an unconstitutional but still-viable law can remain in force is a matter the Court reserves to itself to decide. The Court usually sets a deadline for corrective legislative action and occasionally directs the Bundestag to adopt a specific solution. More often the Court lays down the general guidelines within which the legislature is required to act.[164]

Under the second strategy, the Court actually sustains a challenged statute but warns the legislature that it will void it in the future unless the legislature acts to amend or repeal the law. Cases employing this decisional mode often involve equal protection claims arising out of statutes that deny benefits or privileges to some persons while conferring them on others.[165] Such decisions are prudential judgments designed

to give the legislature time to adjust to changing conditions or to avoid the political or economic chaos that might result from a declaration of unconstitutionality. By resorting to this procedure, the Court keeps the constitutional dialogue going and furnishes Parliament with the flexibility it needs to work out creative solutions to the problem under scrutiny.

In some situations, however, when the Court declares a statute unconstitutional and void, it tenders "advice" that leaves little discretion to lawmakers so that the Bundestag is not left in a quandary as to what alternative policy or program would survive constitutional analysis. In the important *Party Finance II Case* (1966; no. 5.12), for example, the Court went so far as to tell the Bundestag that federal funding would have to be provided to minor political parties securing 0.5 percent of all votes cast in a federal election instead of the 1.5 percent limit previously established by law.[166] In the well-known *Abortion I Case* (1975; no. 7.4), which invalidated a permissive abortion statute, the Court effectively rewrote the law, which Parliament subsequently felt obliged to pass.

These rulings, like all of the Court's decisions, including those that declare a statute or other legal provision compatible with the Basic Law, have the force of law, and as a consequence bind all branches and levels of government.[167] In the *Southwest State Case* (1951; no. 3.1) the Court made it clear that the binding effect of its decisions also bars the legislature from reenacting a law after it has been declared unconstitutional. The binding effect principle applies to the actual ruling of a case and to the "essential" reasoning or rationale on which it is based. What constitutes "essential" reasoning, however, is not always clear. It does not embrace all arguments marshaled in support of a given result, although it seems to include those basic standards of review in terms of which a law is sustained or nullified, for these standards bind courts of law in their own interpretation of ordinary law. The one exception to the binding effect rule is the Federal Constitutional Court itself. (The rule of stare decisis does not bind the German judiciary.) While reluctant to depart from principles laid down in its case law, the Court will readily do so if convinced that it erred in an earlier ruling. Indeed, as the *Census Act Case* (1983; no. 7.9) underscores, constitutional provisions may themselves take on new significance in the light of changing social conditions.

Whenever the Federal Constitutional Court strikes down a law in whole or in part, the effect is prospective (ex tunc). This rule is qualified, however, by a provision of the FCCA that permits new trials in criminal cases in which a court convicts a defendant under a subsequently voided statute.[168] Statutes declared incompatible with the Basic Law but not void may continue to be enforced, but only under conditions laid down by the Constitutional Court. The effect of such decisions on other courts is substantial; they may not proceed with pending cases arising under such statutes until the legislature has amended or corrected the statute in conformity with the guidelines set by the Federal Constitutional Court.

It is important to remember that the Constitutional Court's rulings are exclusively declaratory. The FCCA includes a provision that actually bars direct enforcement.[169] Its decisions are "enforceable" through ordinary legislation and judicial

proceedings. The Court's jurisdiction is also compulsory. It lacks a storehouse of "passive virtues" by which it might for prudential reasons avoid a ruling on a constitutional issue.[170] Moreover, the Court's declaratory authority is sweeping, for it is at liberty to range beyond the immediate issue before it and review the constitutionality of any part of a statute challenged in an abstract or concrete judicial review proceeding. To link judicial power of this character with direct executive implementation would pose an enormous threat to representative democracy in Germany. The Court's ultimate legitimacy in the German system, as noted earlier, rests on its moral authority and the willingness of the political arms of the government to follow its mandates.

But the Court is faced with a dilemma. If it is to perform its steering and integrative role in the German system, objectify the values of the Basic Law, and bring constitutional normativity into conformity with constitutional reality, it must rule, according to the modern German version of the constitutional state principle (Rechtsstaat), on a properly presented constitutional issue, even though such a ruling may thrust it headlong into a politically exposed position. The Court has learned to cope with this political exposure. For example, in cases involving disputes between high constitutional organs (i.e., separation of powers, or Organstreit, proceedings) or those brought by political minorities on abstract judicial review, the Court occasionally makes an ally of time, delaying decision until the controversy loses its urgency or is settled by political means, prompting the initiating party ultimately to withdraw the case. Largely because of this tactic, through 2011 the Court has resolved 168 of 180 Organstreit proceedings and 163 of 172 abstract judicial review proceedings.[171]

Judicial Review and the Polity. As this summary of constitutional review suggests, and as subsequent chapters show, the Federal Constitutional Court is at the epicenter of Germany's constitutional democracy. "The Basic Law is now virtually identical with its interpretation by the Federal Constitutional Court," remarked Professor Rudolf Smend on the Court's tenth anniversary.[172] By the 1990s Smend's view was conventional wisdom among German public lawyers and constitutional scholars. Most scholars and legal professionals accept the Court as a legitimate participant in the larger community decision-making process, a remarkable achievement of postwar institution building in the Federal Republic. Professor Christian Starck, one of the Basic Law's leading commentators, described this consensus when he referred to the Court as the "crowning completion of the constitutional state" and applauded its "decisive influence upon the development of our constitutional law."[173]

We may hazard some guesses as to why Germany's legal community accepts the Court as the final, authoritative interpreter of the Basic Law. First, and most obvious, the Court functions as a specialized constitutional tribunal with clear authority derived from the constitutional charter itself. Second, a democratic legislature chooses the members of the Court just as it controls the Court's organization and procedures. Constitutionally prescribed recruitment procedures all but guarantee that the Court

is staffed by justices who are acceptable to the established political parties and broadly representative of established political interests, including the interests of the states as corporate entities within the German system. Third, after years of experimentation with various terms of office, including life tenure for justices elected from the federal courts, Germans settled on a simple, nonrenewable term of twelve years for each justice, the effect of which is to secure both the Court's independence and a continuing membership profile not too unlike that of Parliament itself. Finally, the Bundestag permitted the introduction of dissenting opinions in 1971—a practice barred in all other German courts.

At the same time, the Federal Constitutional Court, like the U.S. Supreme Court, often finds itself in the eye of a political storm. Despite its democratic legitimacy, or perhaps because of it, the Court has developed into a fiercely independent institution and has struck down many statutory provisions and administrative regulations. A wave of public lectures, newspaper and television commentaries, articles in legal periodicals—some authored by former justices—and legal monographs have criticized the Court, although for the most part respectfully, for "judicializing politics" or "politicizing justice."[174] Some of these publications take the Court to task for many of its admonitory decisions, which, in the view of some critics, have turned the Court into a quasi-legislative institution. The previously mentioned *Abortion I*, *Party Finance II*, and *Census Act* cases, as well as the *East-West Basic Treaty Case* (1973; no. 6.1), *Numerus Clausus II Case* (1977), and the *Aviation Security Act Case* (2006) (discussed in Chapter 7) are examples of decisions faulted for improperly exceeding the limits of judicial power.[175] Even more devastating, other critics have charged the Court with dampening legislative confidence and flexibility. Some argue that the Parliament legislates too much in the shadow of the Court, fearful that its laws may run afoul of some judicial order, standard, or admonition.[176] These critics point to the tendency of legislators to tailor their work to anticipated Court decisions and to scrutinize constitutional cases for hints on how to shape public policy. If this tendency does prevail, the Court's role in the polity is not exhausted by an analysis simply of its formal powers or its case law. The mere presence of the Court would seem to inhibit certain kinds of legislative activity.

This criticism, harsh as it is, nevertheless is predicated on a shared commitment to the Court as an institution. There is another stream of commentary, however, identified mainly but not exclusively with neo-Marxist critics, that manifests far less sympathy for the Court's institutional role in German politics. In the eyes of these critics, the Court serves as a brake on social change and is the main force responsible for the imposition of a constitutional ideology that sanctifies consolidation and stability, defends the status quo, and promotes consensus politics. There may be some grounds for this criticism, for the Court has often used its power—with prominent exceptions duly noted in the following chapters—to invalidate reforms regarded as progressive and liberalizing by large segments of German society.[177]

Still, the Court's prestige remains high. A series of public opinion polls taken in recent years shows that it enjoys substantially more public trust than any other major

political or social institution, including the Bundestag, the military establishment, the regular judiciary, the television industry, and even churches and universities.[178] This public trust is also evident among former East Germans who have made appeals to the Federal Constitutional Court in significant numbers. The faith former East Germans have placed in the Court is, no doubt, grounded in the experience that, on a number of occasions mentioned in later chapters, the Court has vindicated constitutional claims originating in the new eastern states. The absence of any major political effort to curtail the Court's powers despite its location at the center of many political storms is perhaps another manifestation of its general support throughout Germany. Even proposals by respected academic figures to abolish the Court's controversial abstract judicial review jurisdiction,[179] which the Court could well do without in light of the political manipulation that often accompanies the invocation of this procedure, have fallen on deaf ears.

The Federal Constitutional Court's durability is traceable to more than general public support. The Court owes much to Germany's community of scholars, despite the acerbic pens of some writers. The literature on the Court, ranging from doctrinal controversy in professional journals to informed media accounts of particular cases, is comparable to the volume and sophistication of commentary on the U.S. Supreme Court. German commentators form an ever-widening interpretive community organized around a deepening interest in the Court's work. According to Professor Peter Häberle, among the most learned of Germany's judicial scholars, the commentators see themselves engaged in a common enterprise with the Federal Constitutional Court.[180] Their constructive criticism and increasing assertiveness have been stimulated in part by the use of the Court's own dissenting opinions.[181] The high-spirited give-and-take between the justices and the commentators is an important element of German constitutional law and consciousness. That both Court and commentators see themselves engaged in actualizing the constitution in the public life of the nation undoubtedly reflects the authoritative role of constitutional commentary in argumentation before the Court and in the general influence of the professoriat on and off the bench.

CONCLUSION

Karlsruhe was the capital city of the Grand Duchy of Baden (1806–1918). During the Weimar Republic, Karlsruhe continued as the capital of the Republic of Baden (1918–33). After the Hitler regime's defeat, the Allies reclaimed Karlsruhe as the hub of the Occupation Zone shared by American and French forces. Karlsruhe now has come to be known as "the capital of German justice" because it is the home of both the Federal Constitutional Court and the Federal Court of Justice. From its residence in Karlsruhe, the Federal Constitutional Court enjoys, as we have seen, a breathtaking mandate, both in scope and depth. Its jurisdiction is unlike any German court that preceded it and in the time since its creation it has come to be

regarded as one of the world's most important constitutional tribunals. Symbolic of the Court's prominence, it was not an exaggeration for Gerhard Casper to suggest in his keynote address at the state ceremony commemorating the Court's fiftieth anniversary that modern Germany might properly be called the "Karlsruhe Republic."[182]

2

The Basic Law and Its Interpretation

The Basic Law (Grundgesetz) of the Federal Republic of Germany entered into force on 23 May 1949. Under the circumstances of a divided nation, the founders decided to write a "basic law" rather than a "constitution" (Verfassung) just as they chose to call the assembly charged with framing a new constitutional charter a "parliamentary council" (Parlamentarischer Rat) instead of a "constitutional convention" (verfassunggebende Versammlung). The founders resolved, in the words of the preamble, "to give Germany a new order to political life for a *transitional* period" (emphasis added), one that would end with Germany's reunification. On that faraway day—or so it seemed at the time—the Basic Law would cease to exist. Accordingly, the Basic Law would expire "on the day on which a constitution freely adopted by [all] the German people takes effect" (Article 146).[1] When that day finally arrived on 3 October 1990, following a remarkable series of events, German unity took place by accession under a now-superseded version of Article 23—that is, within the framework of the Basic Law itself. The decision to retain the Basic Law as an all-German constitution and to continue its designation as the Grundgesetz was not unanticipated. Over the course of the preceding forty years, particularly in the light of the huge body of decisional law created by the Federal Constitutional Court (Bundesverfassungsgericht), the Basic Law had come to assume the character of a document framed to last in perpetuity.

The Basic Law has been amended dozens of times since 1949, but these alterations changed neither the basic structure of the political system nor the fundamental principles on which it was based. The most opportune moment for constitutional change occurred in 1990 when the Unity Treaty merged the two halves of Germany into a single nation-state. With their different legal, social, and economic systems, the two German states might have wished for a fresh constitutional start that would combine the freedoms of the Basic Law with cherished East German principles of solidarity. No such change took place, however, and no opportunity was granted to the German people as a whole to ratify the Basic Law.[2] Minor surgery was deemed sufficient to incorporate East Germany—the German Democratic Republic—into the existing West German Constitution. Accordingly, the Basic Law was amended to reflect certain structural and representational changes resulting from West Germany's absorption of East Germany and its eighteen million citizens.[3] To allow the new German states (Länder) that once constituted East Germany time to adjust their laws to the new governing charter, particularly laws relating to abortion, property rights, and federal-state relations, the treaty temporarily suspended the Basic Law's application to specified East German policies and procedures that would remain in force temporarily.

These changes, along with several other treaty provisions, including those permitting the dissolution of certain East German institutions, spawned a large body of constitutional case law. (Special attention will be given in Chapter 10 to decisions involving property rights and occupational freedom in the context of reunification.) Although these and other reunification cases represented an important chapter in Germany's postwar constitutional odyssey, they do not seem to have worked a change in the fundamental character or interpretation of the Basic Law.

NEW CONSTITUTIONALISM OF THE BASIC LAW

The Constitution as Supreme Law. The Basic Law marks a radical break with Germany's past. Previous constitutions in the democratic tradition were easily amended and judicially unenforceable. By contrast, the Basic Law defines itself as the supreme law of the land. As several of its provisions make clear, it controls the entire German legal order, and Articles 1, 19, 20, and 79 are, for present purposes, particularly relevant. Article 1 (3) declares that the fundamental rights listed in the Basic Law, including the inviolable principle of human dignity, "shall bind the legislature, the executive, and the judiciary as directly enforceable law." In reinforcing this provision, Article 20 subjects "legislation" to the "constitutional order" (verfassungsmäßige Ordnung) and binds "the executive and the judiciary to law and justice." In binding executive and judicial authority to "law" (Gesetz), the Basic Law's founders had recreated a formal Rechtsstaat—a constitutional state (i.e., a state based on the rule of positive law, in German known as Gesetz- or Rechtspositivismus)—but now, unlike in the past, law would subordinate itself to the suprapositive notion of justice or Recht (loosely translated as law, right, or justice), one that appeared to include unwritten norms of constitutional significance. In short, the Rechtsstaat, far from being an end in itself, would now encompass the broader principle of a constitutional state.

Articles 19 and 79 carry the principle of the Basic Law's supremacy even further. Article 19 (2) bans any law or governmental action that undermines "the essential content of [any] basic right." Article 79 (3), which contains the so-called eternity clause, bars any amendment to the Basic Law "affecting the division of the federation into Länder, their participation . . . in the [national] legislative process, or the basic principles laid down in Articles 1 and 20." Article 1, as noted, sets forth the principle of human dignity that the state is obliged "to respect and protect," whereas Article 20 specifies the nonamendable structural principles of the state, namely, the principles of the constitutional, federal, social, and democratic state. The Basic Law's framers believed that the best way to realize human dignity, then and in the future, was to endow the concept with the status of a judicially enforceable constitutional right and to freeze certain principles of governance into the constitutional structure itself.

Finally, the authority conferred upon the Federal Constitutional Court, as well as upon the judiciary as a whole, assures every person that the Basic Law will prevail over all legal rules or state actions that would subvert or offend it. Accordingly, Article

19 (4) grants a judicial hearing to any person whose rights the state violates. Indeed, "recourse shall be to the ordinary courts" in the event that some other judicial remedy is not specified by law. Article 80 (1) of the Basic Law—yet another pillar of the Rechtsstaat—helps to protect the constitutional state against the arbitrary decisions of executive officials. It requires any law delegating power to administrative officials to specify the "content, purpose, and scope of the authorization." In backing up this guarantee, moreover, any judge may refer questions to the Constitutional Court in cases where he or she seriously doubts the constitutionality of a statute or regulation.[4] Failing these protections, individuals have the further option, once their legal remedies have been exhausted, of filing a constitutional complaint with the Constitutional Court.[5]

Human Dignity and Basic Rights. Germany's new constitutionalism has placed human dignity at the core of its value system. Article 1 (1) declares: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." The principle of human dignity, as the Constitutional Court has repeatedly emphasized, is the highest value of the Basic Law, the ultimate basis of the constitutional order, and the foundation of all guaranteed rights.[6] Paragraph 2 continues: "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world." The personal freedoms set forth in Article 2 reinforce the principle of human dignity. These include the right enjoyed by "every person" to the "free development of his [or her] personality" and to the inviolability of the "freedom of the person," a freedom that includes the "right to life and physical integrity." As for human personality, its development can be limited only by the "rights of others," the "constitutional order," and the "moral law." Article 3 (1), the last of these general rights, secures to "all persons" equality before the law.

The remaining sixteen articles of the "bill of rights" cover a long list of guaranteed rights largely associated with the Western political tradition. Several of these articles are word-for-word reproductions of corresponding articles in the Weimar Constitution of 1919. The difference is that the Weimar Constitution recognized basic rights as aspirational rather than as judicially enforceable norms. The notion of "inviolable and inalienable" rights is also sharply at variance with the spirit of earlier German constitutions, for the Basic Law is Germany's first national constitution to recognize the preconstitutional existence of guaranteed rights. The Basic Law treats such rights, contrary to the legal positivism underlying the Weimar Constitution,[7] as vested in persons by nature and rooted in the universal concept of human dignity. General law (that is, positive law) may limit rights, but any such limitation would now be measured by the higher-law norms of the constitution.

The Basic Law's bill of rights traces its origin to the three major legal traditions that have shaped German life and law in the postwar era, namely, the traditions of social democratic, classical-liberal, and Christian natural-law thought. Each of these traditions has played a major formative role in German legal history; each had significant influence on the constitutional assembly of 1949; each finds many of its central values represented in the text of the Basic Law; and each continues its representation in German political life today. The Social Democratic Party (SPD) represents the socialist tradition; the Free Democratic Party (FDP) the classical-liberal tradition; and the Christian Democratic Union (CDU), together with its Bavarian affiliate, the Christian Social Union (CSU), the Christian natural law tradition. In drafting the Basic Law, the representatives of these parties shed their historical antagonisms and, in a remarkable display of concord, drew willingly from the humanistic content of each tradition to create a constitution that combines the main values of each in a workable if not always easy alliance.[8]

At the risk of oversimplifying, one could attribute specific protections to these traditions. The classical-liberal tradition, for example, was responsible for many of the *individual* freedoms listed in several articles of the bill of rights (e.g., the rights to life and physical integrity [Article 2], equality [Article 3], religious exercise [Article 4], freedom of expression [Article 5], assembly [Article 8], association [Article 9], privacy [Article 10], movement [Article 11], and property [Article 14]). The socialist tradition contributed certain *social welfare* clauses, including provisions concerning the duties of property (Article 14) and the socialization of economic resources (Article 15). Finally, the Christian tradition added *communal* guarantees explicitly favoring the protection of marriage and the family (Article 6 (1)), the natural right of parents to educate their children (Article 6 (2)), and the institutional prerogatives of the established churches (Article 140). Philosophically, these traditions might be said to represent conflicting visions of the common good, yet they converge in the Basic Law around a common core of beliefs about the nature of constitutionalism and the dignity of the human person.

The substantive values represented by these traditions are enormously important in the Federal Constitutional Court's jurisprudence, although in the aftermath of reunification the traditions of sociality and solidarity that prevailed in East Germany might be added as a fourth system of values having an influence on Germany's constitutional life. There is no debate in Germany, as there is in the United States, over whether the constitution is primarily procedural or value oriented. Germans no longer understand their constitution as the simple expression of an existential order of power. They commonly agree that the Basic Law is fundamentally a normative constitution embracing values, rights, and duties. That the Basic Law is a value-oriented document—indeed, one that establishes a hierarchical value order—is a familiar refrain in German constitutional case law.

State and Morality. The Federal Republic's constitutional system also differs from past regimes in its refusal to treat individual freedom as emanating from the state itself. The traditional theory of rights in Germany drew no clear distinction between state and society. The citizen was an organic part of the state and the state itself was an agent of human liberation.[9] The German Staat and the English "state" are not equivalent terms. Der Staat is more than the body politic. It represents in Kant the perfect synthesis between individual freedom and the objective authority of law[10] and in Hegel a moral organism in which individual liberty finds perfect realization in the

unified will of the people: not arbitrary will but rather "the power of reason actualizing itself in will."[11] In brief, the Staat is considered by Hegel to be a superior form of human association, a uniting of individuals and society in a higher synthesis, a reality "in which the individual has and enjoys his freedom, [albeit] on condition of his recognizing, believing in, and willing that which is common to the whole."[12] Some features of the Basic Law, particularly its communitarian values, lend themselves to greater understanding in the light of these traditional German notions of liberty and state, notions suggestive of aspects of the Aristotelian polis as well as the early American tradition of civic republicanism.[13] Nevertheless, as Leonard Krieger has pointed out, the founders of the Basic Law, mindful of the Nazi experience, discovered the "bankruptcy of the state as a liberalizing institution." In his monumental study of the German idea of freedom, Krieger concluded that an attitude now predominates "which views the state as a morally neutral, purely utilitarian organization of public power."[14]

Krieger's assessment, while generally correct, needs to be qualified. The Basic Law as a modern twentieth-century constitution is interesting precisely because it subjects positive law to a higher moral order. Under Article 2 (1) of the Basic Law, for example, the "free development" of the human personality must conform to the "moral law." To be sure, the Basic Law's list of fundamental rights protects the ideological pluralism and moral diversity of the German people. But the moral law, as just mentioned, limits some rights as do certain conceptions of the human person and society found by the Constitutional Court to be implicit in the constitutional value of human dignity. The Constitutional Court itself rejects the notion of a value-neutral state. Instead, it speaks of a constitutional polity deeply committed to an "objective order of values,"[15] although, as discussed later in this chapter, what this objective order means or from whence it derives is the subject of considerable disagreement on and off the Federal Constitutional Court.

Judicial Interpretive Supremacy. The new constitutionalism not only establishes the Basic Law as supreme law, it also places the last word as to its meaning in the hands of the Federal Constitutional Court. The judicially enforceable constitution may be said to consist of three "documents." The first, as already noted, is the unamendable constitution established in perpetuity by the eternity clause of Article 79 (3). Indeed, as noted later in this chapter, the Constitutional Court has declared that an amendment to the Basic Law that would undermine or corrode any of its core values would be an unconstitutional constitutional amendment. The second is the amendable constitution, namely, those parts of the written text that can be altered without affecting the Basic Law's core values. Finally, there are the unwritten or suprapositive principles implicit in such terms as *justice*, *dignity*, and the *moral law*, terms into which the Court has imported significant meaning. These governing principles, like the hierarchical value order the Constitutional Court has inferred from the text of the Basic Law, are an important part of Germany's constitutional order.

The judicial enforcement of constitutional values is a practice that departs measurably from the traditional judicial role in Germany. Germany's variant of judicial

review, however, differs from the American. The difference is at once subtle and profound, and it may be summarized as follows: Whereas American constitutionalism has historically entailed a creative interaction between the constitutional text and evolving political practice, German constitutionalism tends to place greater emphasis on the capacity of the formal text to influence political practice. Abstract judicial review, discussed in the previous chapter, is one manifestation of this tendency. Abstract review underscores the sovereignty and universality of constitutional norms and affirms the essential unity of the constitution, a concept of constitutionalism seemingly related to the old notion of the Rechtsstaat that envisioned the state or polity as a purely juristic construction.[16] In short, while judicial review under the Basic Law represents a major break with the legal tradition of the Rechtsstaat, it nevertheless continues to manifest elements of that tradition.

Perhaps the following remarks will help to clarify this point. The American Constitution has historically served as a framework for the process of government. While the constitutional text and the polity have influenced one another, the bond between them is far from perfect.[17] American pragmatism leaves a lot to chance and circumstance, shows little distress in constitutional ambiguity, and refuses to insist on the application of constitutional morality in all particulars. The Supreme Court has developed a battery of techniques to avoid constitutional decisions in certain cases and even to permit—under the aegis of the political question doctrine, the case or controversy requirement, and other devices for avoiding decision—contraconstitutional developments within the polity. The American legal mind is comfortable with the uncertainty that often prevails when, for prudential reasons, the Supreme Court declines to consider constitutional issues. Thus, the written constitution is far from coextensive with the American polity.

In Germany, on the other hand, the Basic Law was designed not only to create a system of governance but also to foster a secure and preferred way of life.[18] German constitutional scholars often speak of the steering, integrating, and legitimizing functions of the constitution, as if to suggest a more perfect bonding between text and polity.[19] They insist on the strict enforcement of the Basic Law in all particulars, for to do otherwise would be to sanction a lawless society. In brief, there is less tolerance of uncertainty or ambiguity in constitutional matters. Conflicts between text and polity cause crises in the German public mind and commotion among legal scholars and others concerned with the proper relationship between the "normativity" of the constitution and the "existentiality" of political reality.[20]

This complex of attitudes has implications for judicial review. Abstract questions of constitutional law matter in Germany, in contrast to the Holmesian view—a predominantly American perspective—that general propositions do not decide concrete cases. Questions of constitutionality that do arise in the course of enacting legislation must be confronted, not avoided; there is, thus, a tendency to have the constitutional correctness of every important and controversial statute scrutinized by the Constitutional Court in Karlsruhe. The feeling exists that if legislation, however trivial or noncontroversial, is unconstitutional, then it is contrary to the Rechtsstaat

and therefore bad for the body politic. In this spirit, Karl Heinrich Friauf has written that constitutional interpretation in Germany "forms a part of what we might call the eternal struggle for the self-realization of constitutional law in the life of the community."[21]

NATURE OF THE POLITY

Article 20, as already noted, sets forth the fundamental, nonamendable principles of the new republic. Beyond describing the polity as a "democratic and social federal state," paragraph 2 decrees that "all state authority emanates from the people" and "shall be exercised by the people through elections and voting and by specific legislative, executive, and judicial organs." The Basic Law thus creates a *representative* democracy undergirded by a system of separated powers. To ensure the realization of these values at all levels of government, Article 28 (1)—known as the homogeneity clause—declares that state and local governments "must conform to the principles of republican, democratic, and social government based on the rule of law."[22] Accordingly, Articles 20 and 28 advance several conceptions of the state that have achieved authoritative status in German constitutional law. These include the constitutional state (Rechtsstaat), the social state (Sozialstaat), the federal state (Bundesstaat), and the principle of democracy (Demokratieprinzip). The party state (Parteienstaat), a jurisprudential offshoot of the democratic principle, should be added to this mix.

Constitutional State (Rechtsstaat). The term Rechtsstaat has no exact equivalent in English. Although best translated as "constitutional state," this book also employs where appropriate the more common renderings of "law state," "rule of law," or "a state governed by law." In its older and newer incarnations the Rechtsstaat embodies more than the idea of a mere government of laws.[23] As developed originally in the nineteenth century, the Rechtsstaat was a "state governed by the law of reason," one that insisted on the freedom, equality, and autonomy of each individual within the framework of a unified legal order defined by legislation and administered by independent courts of law. The traditional Rechtsstaat, while emphasizing the importance of formal liberty, was indifferent to whether the government of the day, as opposed to the timeless Staat, was monarchical, aristocratic, or democratic. It was not until later, toward the end of the nineteenth century, when the constitutional theorists Otto von Gierke and Rudolf von Gneist exercised great influence, that the Rechtsstaat began to integrate state and society and to proclaim the unity of law and the state. Although bound by laws administered by independent courts, the state took on a life of its own, undermining the individualistic rationale of the earlier Rechtsstaat. Finally, in the early twentieth century and during the Weimar Republic, the concept of the Rechtsstaat was increasingly associated with legal positivism. Written law was supreme law because it reflected the popular will, which was the ultimate basis of the Rechtsstaat's traditional legitimacy. In this system, the courts had the duty to uphold the law as defined by statute

and to ensure that all state activity was conducted according to the supreme legislative will, leaving little room for the exercise of constitutional judicial review.

The Basic Law did not completely abandon the principles of the old Rechtsstaat. But the Basic Law now uses the term *law* (lex) in the sense of both Gesetz (statutory law) and Recht (law or right).[24] Recht, however, may also be translated as "justice." As stated in Article 20 (3), "the executive and the judiciary are bound by law and justice" (Gesetz und Recht), just as "legislation is subject to the constitutional order."[25] It bears repeating that the constitutional order of the Basic Law has been described as a value-oriented legal system. The Basic Law not only subjects law to the concept of justice; it also creates a fundamental system of values in terms of which all legislation or other official acts must be assessed. Ernst-Wolfgang Böckenförde, a former justice of the Federal Constitutional Court, puts it this way:

> The logic of thinking about values and justice demands that the constitution conceived along the lines of the material Rechtsstaat should lay claim to an absolute validity extending to all spheres of social life. It thus sanctions certain basic political-ethical convictions, giving them general legal validity, and discriminates against others that run counter to them. It no longer guarantees liberty unconditionally by way of formal legal demarcation; it does so only *within* the fundamental system of values [Wertgrundlage] embodied in the constitution.[26]

These values, like the concept of justice, as Böckenförde suggests, may trump liberty when they conflict. Under the U.S. Constitution, on the other hand, liberty would often trump values—for example, the value of human dignity. In short, the social Rechtsstaat is not only governed by law; it is also perceived as a substantive charter of justice. Positive law must conform to the Basic Law's order of values—as distinguished from guaranteed individual rights—informing the constitution as a whole.

As already indicated, this expanded notion of the Rechtsstaat includes the judicial review of the constitutionality of laws and other governmental actions. As the highest institutional expression of the constitutional state principle, the Constitutional Court serves as the ultimate guardian of the Basic Law. Thus, any branch or level of government that violates the constitution or refuses to carry out a constitutional duty can be called to account in a proper proceeding before the Constitutional Court. Additionally, the Basic Law authorizes the Court to review the constitutionality of laws and to hear complaints from ordinary citizens claiming a violation of their fundamental freedoms by any agency or branch of government. These powers, together with the ability of all other judges to refer constitutional questions to the Court for resolution, impart additional normative force to the constitution.

Social State (Sozialstaat). As judicially defined, the social state clause of Article 20 obligates the government to provide for the basic needs of all Germans. This commitment, however, does not mean that every social benefit conferred by law is mandated by the principle of the social state. Whether particular policies such as family allowances or educational benefits are constitutionally required by the principle of

the social state is a matter of dispute among constitutional scholars,[27] a dispute that has reached a new level of intensity in reunified Germany and under the impact of a globalized market economy. The concept of the social state, like that of the Rechtsstaat, has good pedigree in German constitutional thought.[28] Its roots lie deep in the old Lutheran notion that, while the people owe allegiance to the prince, the prince in turn is bound to see to the welfare of his subjects. This idea finds its most prominent modern expression in the extant social security and protective labor legislation of the Bismarckian era. Backed by strong socialist influences and supported by Christian democracy, the social state as a concept of political order found full expression in the Weimar Constitution. Today even neoliberal, market-oriented advocates, not to mention Christian Democrats schooled in Catholic social thought, regard the Sozialstaat as an important ingredient of Germany's constitutional tradition.[29]

If there was any doubt about this important ingredient of German constitutionalism, the Federal Constitutional Court put it to rest in the recent *Lisbon Treaty* and *Hartz IV* cases. In *Lisbon* (2009; no. 6.6), the Court described the social state as an *essential* part of what it described as Germany's "constitutional identity," a distinctiveness that cannot be sacrificed to any other value of the Basic Law. In *Hartz IV* (2010), the Court struck down a reform of the Federal Social Assistance Act because the Parliament (Bundestag) failed to consistently apply its methodology for establishing the "subsistence minimum," the level of public support necessary to be consistent with the principle of human dignity.[30]

Nevertheless, a lively academic debate over the relationship between the Sozialstaat and the Rechtsstaat continues to engage German constitutional theorists. Formally conceived, the Rechtsstaat emphasizes the crucial importance of individual liberty, the right to choose one's trade, and the right to acquire and dispose of one's property. At what point do the demands and arrangements of the Sozialstaat begin to undermine the Rechtsstaat's liberty-securing values and structures? German views range from the conservative perspective of Ernst Forsthoff, who argued that the Basic Law constitutionalizes an individualistically based, market-oriented, free enterprise economy, all the way to the left-wing view—one shared today by many former East Germans—that the Sozialstaat constitutionally requires major redistributive socioeconomic and tax policies.[31] The Federal Constitutional Court's perspective, covered at length in Chapter 10, falls between these poles.

Federal State (Bundesstaat). The Basic Law defines Germany as a *federal* state and, as Article 79 (3) [3] stipulates, federalism is an unamendable feature of the Basic Law. Federalism as a constitutional principle—and requirement—is taken up in Chapter 3. It suffices here merely to mention that, in accordance with Article 79, states may change their boundaries and even merge with one another but only when this is accomplished by a federal law and confirmed by referenda in the affected areas. Article 29 sets out these terms for territorial reorganization. Accordingly, Länder may be redefined or rearranged but not consolidated or transformed into a unitary polity. What is unamendable under Article 79 (3) is the division of Germany into territorial

units or Länder and their participation in the national legislative process. Federalism is part of Germany's ancestral heritage and arguably one of the roots of German democracy.

Prior to 1849, and unlike Britain, France, and Spain—all unitary nation-states—Germany consisted of a collection of territorial governments, principalities, and free cities with their distinctive political, cultural, and religious or secular traditions. Little wonder the national constitutions of 1849, 1871, and 1919 created federations. The Frankfurt Constitution of 1849 converted the kingdoms and estates of the old German Confederation into a federal constitutional monarchy. The Imperial Constitution of 1871, designed to overcome the particularism and fragmentation of the North German Federation in the wake of an emerging capitalist economy, consolidated twenty-five states and city-states under Prussian leadership. The Weimar Constitution, finally, after continuing territorial adjustments, established Germany's first democratic republic consisting of seventeen states. Given this history of federated governments—and the priority the Allies gave to reestablishing local and state governments in the immediate aftermath of the war—West Germany's constitution makers would surely have created a democratic *federal* republic even if the Allies had not insisted on it. But as the materials in Chapter 3 show, the precise nature of Germany's new federal union remains a matter of some dispute among constitutional scholars.

Democratic State (Demokratieprinzip). The Basic Law defines Germany's political system as "democratic" in no fewer than eight of its provisions. Beyond these provisions, the principle of democracy comes into play in articles and clauses relating to elections, voting rights, political parties, freedom of speech and press, parliamentary representation, and the right to form independent associations. Each of the constitutional provisions defining or protecting these values and institutions has been the subject of repeated disputes before the Federal Constitutional Court. (The cases featured in Chapter 5, "Political Representation and Democracy," incorporate the jurisprudence of democracy flowing from these disputes.) The democratic principle operates mainly through the institutions mentioned below in the section on state organization. It suffices here to note that the Basic Law provides for a system that is both parliamentary and representative, excluding all forms of direct democracy at the national level.

One distinctive feature of German democracy is its intolerance of activities or ideologies opposed to or subversive of the "free democratic basic order." These terms appear in no fewer than four articles of the Basic Law. Each permits restrictions on the exercise of certain rights if actively used to combat democracy. Article 21 (2) is among the most important of these provisions. It declares: "Political parties that, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional." Accordingly, Germany has been described as a "militant democracy" (streitbare Demokratie or wehrhafte Demokratie), terms adopted from the pre-war work of the exiled German jurist Karl Löwenstein by the

Federal Constitutional Court in the famous *Communist Party Case* (1956). Article 18 is yet another expression of the constitutional principle that democracy is entitled to defend itself against its internal enemies. According to this provision, any person who abuses the basic freedoms of speech, press, teaching, assembly, association, or property "in order to combat the free democratic basic order" forfeits these rights. Indeed, under Article 20 (4), even ordinary "Germans have the right to resist any person attempting to do away with this constitutional order, should no other remedy be possible."[32]

The notion of a militant democracy differs radically from what has been called the "value neutrality" of the Weimar Constitution. Freedom and democracy are paramount values of the "free, democratic, basic order" and their defense is the paramount duty of public officials and citizens alike. To minimize any abuse of power conferred by Articles 18 and 21, the Basic Law authorizes only the Federal Constitutional Court to order the forfeiture of rights or to declare parties unconstitutional. During the Weimar period the president of the Republic could ban parties and curtail rights on his authority under the emergency provisions of Article 48. Under the Basic Law, by contrast, the Constitutional Court retains its jurisdiction even during a state of emergency, including the authority to determine the forfeiture of basic rights under Article 18. In short, the Basic Law joins the protection of the Rechtsstaat to the principle that democracy is not helpless in defending itself against parties or political movements bent on using the constitution to undermine or destroy it.

Party State (Parteienstaat). The Basic Law does not explicitly describe the Federal Republic as a *party* democracy but the Federal Constitutional Court has done so. In a departure from tradition as radical as judicial review itself, Article 21 of the Basic Law permits the free establishment of political parties, virtually certifying them as the chief agencies of political representation. Additionally, and in language recalling an older German theory of the state, Article 21 (1) declares that "political parties shall participate in forming the political will of the people."[33] Popular sovereignty is to be achieved through political parties competing in free and equal elections. In an effort to secure genuine majority rule, the constitution requires parties to organize themselves democratically and to account publicly for the sources of their funds. By characterizing Germany's democracy as a Parteienstaat, the Constitutional Court has stamped political parties with a quasi-constitutional status. In particular, it treats parties as constitutional organs when engaged in election campaigns. Accordingly, as organs constitutionally empowered to form the people's will for representational purposes, they may vindicate their electoral rights in Organstreit proceedings before the Court. Their status as constitutional organs for electoral purposes prompted the Court early on to recommend the public funding of political parties, a suggestion the Parliament took up almost immediately, leading to a series of important party finance cases decided by the Court between 1966 and 1993, several of which are featured and discussed in Chapter 5.

Article 38, which provides for the "general, direct, free, equal and secret" election of parliamentary delegates, pulls in the opposite direction, namely toward an older, representative theory of democracy. Members of parliament, Article 38 declares, "shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience." Here a natural-law principle—conscience—intrudes to limit the party loyalty implied, perhaps even mandated, by Article 21. The federal structure, like the theory of party responsibility, also tempers majority rule, for Land governments enjoy a corporate right to participate in the national legislative process and often exercise that right to delay or refuse their consent to bills passed by the Bundestag. In the end, the constitution seems ordained not only to achieve, under the rubric of majority rule, some degree of correspondence between public policy and popular will, but also, as a consequence of its federal structure, to serve as an instrument of political conciliation, consensus, and cohesion.[34]

State Organization. Further details on the organization of the state in Germany will be discussed in Part II on governmental structures and relationships. It suffices here simply to say that the Basic Law recreates most of the governmental structures established by the Weimar Constitution except for eliminating those crippling defects that facilitated Hitler's rise to power. The Basic Law's major structural changes were designed to stabilize German democracy. As in the Weimar Republic, authority remains divided among executive, legislative, and judicial institutions, but their relationship—or better, the constitution's system of checks and balances—has changed. Executive authority is still shared by a federal president (Bundespräsident), a federal chancellor (Bundeskanzler), and a cabinet of federal ministers. Together, the chancellor and his or her cabinet are referred to as the federal government (Bundesregierung). The role of the president, however, is largely ceremonial. And since presidents are no longer popularly elected, as in the Weimar Republic, but rather indirectly elected by a federal convention, they are no longer in political competition with the chancellor.

The key executive official is the chancellor, the leader of the largest party in Parliament, who determines the general guidelines of public policy. In addition, the chancellor's position is far more secure than it was during the Weimar Republic. The popular legislative chamber, the Bundestag, whose members are elected for a four-year term, may not dissolve itself nor can it be dissolved by the chancellor. The Bundestag may dismiss the chancellor only by electing a successor, an innovation known as the constructive vote of no confidence. If a chancellor loses a vote of confidence on Parliament's initiative and Parliament fails simultaneously to elect his or her successor by the required majority vote, the chancellor remains in office as the head of a minority government. Article 68 provides the only path toward Parliament's dissolution. It authorizes the president to dissolve Parliament, but this power too is circumscribed. It requires that if the chancellor initiates a vote of no confidence and loses by a majority vote of Parliament's members, only then may the chancellor request that the president dissolve Parliament and call for new elections. But the latter may not do so if he or she independently concludes that the chancellor has engineered or orchestrated a no-confidence vote merely to hold a new election in the hope of increasing his or her parliamentary majority. What is more, each of these

political decisions is subject to review by the Federal Constitutional Court. (See Chapter 5 for a discussion of the two constitutional cases involving Article 68.)

The Basic Law vests legislative power in the Bundestag and the Federal Council of States (Bundesrat). But the two chambers are not equal. The popularly elected Bundestag is the main policy-making organ of the national government. The Bundesrat is the organ through which Land governments participate in the national legislative process. Constitutionally, the Bundestag must consult the Bundesrat on all the policies it enacts, but the latter's consent is required on proposed constitutional amendments, policies affecting the local administration of federal law, and other matters of special interest to the Länder, including laws on apportionment of expenditures and tax revenue. The Bundesrat also elects one-half the members of the Federal Constitutional Court. The two chambers are not comparable to the U.S. Senate and House of Representatives. First, the Länder do not have equal representation in the Bundesrat. Each state's representation, ranging from three to six members, depends on its population. Second, each Land's slate of votes in the Bundesrat must be cast as a block, a procedure that arguably gives the Länder as corporate entities much more leverage on certain issues than the American states enjoy in the U.S. Senate.

Given what has already been said about courts and judges in the previous chapter, we need not dwell in this space on the powers and organization of the judiciary, except to say, once again, that German judicial organization is very different from the American system. Germany, unlike some other federal systems, does not have a dual system of federal and Land courts. The German judicial system is specialized and unitary. It features separate hierarchies of administrative, social, finance, and labor courts as well as ordinary courts of civil and criminal jurisdiction. All courts of first instance and intermediate courts of appeal in each area of specialization are Land courts, whereas all final courts of review in each of the subject-specific hierarchies are federal tribunals. The Federal Court of Justice (Bundesgerichtshof), the successor to Weimar's Imperial Court of Justice (Reichsgericht), is the last court of appeal in ordinary civil and criminal matters. Although all first instance and intermediate courts are established and staffed by the Länder, federal law defines their structures and procedures along with the qualifications and legal status of their judges. Finally, the Federal Constitutional Court stands apart from and independent of all these courts, serving not only as *the* guardian of the constitution's values but also as the rudder that guides and directs the political system as a whole.

In sum, the Basic Law builds on and strengthens older structures and practices in Germany's constitutional tradition. Popular sovereignty, affirmed once again, now manifests itself in representative institutions rather than plebiscites; political parties, fortified by a new electoral system combining single-member districts with proportional representation, organize these institutions in the public interest; a strong chancellor, unremovable save by a constructive vote of no confidence,[35] stabilizes the government; the basic structure of federalism, now beyond the power of the people to amend, is established in perpetuity; separation of powers now includes the judicial

control of constitutionality; and, finally, majority rule is overlaid with a complex system of checks and balances, not to mention the indirect election of the federal president.

THEORIES OF THE CONSTITUTION

The Federal Constitutional Court's approach to constitutional interpretation needs to be understood within the context of Germany's civilian legal culture, one inviting brief comparison with the American common-law tradition. The following description of judicial decision making in Germany and the United States oversimplifies a more complex reality, but it nevertheless helps to capture the spirit of the judicial role in the two countries. The German legal mind, schooled historically in the tradition of conceptual jurisprudence (Begriffsjurisprudenz) or legal positivism, tends to envision law as a legislatively created, self-contained, rational, deductive system of rules and norms. Positing a sharp separation between law and morals—between the "is" and the "ought"—Begriffsjurisprudenz seeks to create a science of law marked by its own internal standards of validity. It strives to separate law from the domains of politics, psychology, and sociology.[36] Law, in short, rests on an independent foundation of reason and logic. In this mode of legal thought the judge does little more than mechanically apply fixed rules of law. Accordingly, fidelity to law as written is the judiciary's major commitment.[37]

The American conception of law, by contrast, derives its spirit from the common law, the essence of which is captured in Oliver Wendell Holmes's famous aphorism, "The life of the law has not been logic, it has been experience."[38] Like Holmes, Americans generally have understood law as a pragmatic enterprise. Correspondingly, they understand the concept of judicial decision making as an inductive process of reasoning open to extralegal influences and responsive to social change. Common-law judging, at least as it has emerged in the twentieth century under the influence of the realist school of jurisprudence, is more than simply applying the law as written. Its task is to solve problems, often by appealing to societal values and the perceived needs of public policy. Historically, common-law judges have understood themselves as engaged in a creative process, one driven, as Cardozo wrote, not only by the "directive force of precedent," but also by history and tradition.[39] Law, particularly in nineteenth-century America, was mainly judge-made law, and one of its main purposes was at once to limit the state and to promote the release of private entrepreneurial energy.[40] Code-law reasoning in Germany's civil-law tradition, like common-law reasoning in the United States, has exerted a powerful influence on the development of public law, including constitutional law. If the spirit of American public law is symbolized by figures like Holmes, Pound, Cardozo, Llewellyn, Frank, and Hand,[41] the spirit of German public law is personified by legal theorists such as Jellinek, Anschütz, Laband, Puchta, Radbruch, and Kelsen.[42] Similarly, if American constitutional jurisprudence locates its indigenous roots in the realism of Madison, Hamilton, and Wilson,[43]

German constitutional jurisprudence finds its compass in the idealistic rationalism of Hegel, Kant, and Fichte.[44] This remark may blur important distinctions among German schools of legal thought, yet the one notion that emerges relatively intact, in contrast to the United States, is the reality and ubiquity of the state. German legal theorists, sometimes to a calamitous degree, have commonly assumed that law and justice would thrive solely within the bosom of that near-perfect society known as the state.

The Basic Law represents a major break from this tradition. It does not regard the state as the source of fundamental rights. The core of individual freedom, like human dignity itself, is regarded as anterior to the state. Thus, law and justice, as we have seen, now measure the validity of governmental actions, including judicial decisions. Inalienable rights, justice, values, and other such notions arguably present in the Basic Law militate against the methodology of legal positivism. And yet, for all that, the analytical approach to judicial reasoning rooted in Begriffsjurisprudenz has had a lasting influence throughout Europe, including Germany.[45] German constitutional scholars, no less than the justices of the Federal Constitutional Court, have made significant attempts to build a theory of judicial decision based on reason and logic.

In discussing these contrasts between legal cultures, we should observe that in both Germany and the United States, countervailing theories of law have always challenged the dominant mode of legal thought. In Germany, for example, the extent to which judges were free to depart from the will of the legislature was a central issue in legal argument during much of the nineteenth century. Begriffsjurisprudenz, while it predominated during this period, had to defend itself against the historical school of jurisprudence.[46] By the same token, in the early years of the twentieth century the "free law" school of judicial interpretation and the Interessenjurisprudenz of Philipp Heck and Rudolf von Ihering assailed the prevailing school of legal positivism.[47] Then too, during the Weimar Republic—against the backdrop of the continuing revolt against legal positivism—neo-Hegelian, neo-Kantian, and phenomenological schools of legal thought were developing new theories of law and judicial interpretation in an effort to overcome the "is-ought" dichotomy at the heart of legal positivism.[48] Finally, after World War II, natural-law theory, breaking out afresh from both Catholic and Protestant sources, has endeavored to depose legal positivism.[49] In the United States, pragmatic jurisprudence had to face similar challenges, ranging from those of David Dudley Field, Christopher Langdell, and Owen Roberts, each of whom tried to build a true science of law or judging, to those of the value-oriented natural-law "moralists" and fundamental rights "objectivists" of our own time.[50]

Structural Unity of the Basic Law. In its first major decision—the *Southwest State Case* (1951; no. 3.1)—the Federal Constitutional Court underscored the internal coherence and structural unity of the Basic Law as a whole.[51] "No single constitutional provision may be taken out of its context and interpreted by itself," declared the Court. "Every constitutional provision must always be interpreted in such a way as to

render it compatible with the fundamental principles of the constitution and the intentions of its authors."[52] Justice Gerhard Leibholz, commenting on *Southwest State*, elaborated: "The Court holds that each constitutional clause is in a definite relationship with all other clauses, and that together they form an entity. It considers certain constitutional principles and basic concepts to have emerged from the whole of the Basic Law to which other constitutional regulations are subordinate."[53] In one important case the Court alluded to the "unity of the constitution as a logical-teleological entity," a concept traceable to Rudolf Smend's "integration" theory of the constitution.[54] Smend regarded the constitution as a living reality founded on and unified by the communal values embodied in the German nation. In Smend's theory, the constitution not only represents a unity of values, it also functions to further integrate and unify the nation around these values.[55]

Yet the unity the Court has found in the constitution does not imply a single grand theory of the polity that pervades the Basic Law as a whole. Nor does it imply the absence of competing interests or values. What it does imply is the need for reconciling these interests or values. The German state's constitutional design is multifaceted; as noted earlier, the Basic Law defines the political system as federal, social, and democratic, just as Germany's democracy has been judicially characterized as a liberal and militant party state. The liberalism and militancy of German democracy has in turn been linked to the Basic Law's principle of human dignity. The interpretive problem is to keep each of these visions of the state—federal, democratic, social, liberal, and party-directed—alive and in some kind of creative balance, so that a judicial emphasis on any one dimension within a particular context does not result in the erosion or neglect of another in some other context.

Objective Order of Values. As already noted, the Constitutional Court envisions the Basic Law as a unified structure of *substantive* values.[56] The centerpiece of this interpretive perspective is the concept of an "objective order of values," one that derives from the gloss the Constitutional Court has put on the constitutional text. The Court had originally emphasized the negative aspect of rights. But in one of its early decisions the Court remarked, "There is no doubt that the main purpose of basic rights is to protect the individual against the encroachment of public power . . . but it is equally true that the Basic Law erects an objective order of values in the section on basic rights. This system of values, which centers on the dignity of the freely developing person within society, must be seen as fundamental to all areas of law."[57] Accordingly, the constitution incorporates the basic value decisions of the founders, the most basic of which is their choice of a free democratic basic order buttressed and reinforced by basic rights and liberties, all of which are crowned and informed by the master principle of human dignity. These basic values are "objective" because they are said to have an independent reality under the constitution, imposing on all organs of government an affirmative duty to see that they are realized in practice.

The notion of an objective value order may be stated in another way. Every basic right in the constitution—for example, freedom of speech, press, religion, association,

and the right to property or the right to choose one's profession or occupation—has a corresponding value. A basic right is a negative right against the state, but this right also represents a value, and as a value it imposes a positive obligation on the state to ensure that it becomes an integral part of the general legal order.[58] One example may help illuminate this complex principle: The *right* to freedom of the press protects a newspaper against any action of the state that would encroach on its independence, but as an objective *value* applicable to society as a whole, the state is duty-bound to create the conditions that make freedom of the press both possible and effective. In practice, this means that the state may have to regulate the press to promote the value of democracy. For example, it might enact legislation to prevent the press from becoming the captive of any dominant group or interest.

In addition, the Court speaks of a ranked order of values, one in which human dignity tops the ranking with the general values of liberty, equality, personal inviolability, and physical integrity following close behind. The application of this value order to specific situations, however, has been a source of conflict on and off the bench.[59] For many of the critics, an appeal to objective values is little more than open-ended judicial decision making disingenuously posturing as rationality.[60] As Clarence Mann has written, "It harbors the illusions of determinate norms in the fact [*sic*] of unarticulated value premises and of judicial neutrality aloof from the creative search for normative content"; yet, in contrast to Begriffsjurisprudenz, it does "not necessarily exclude considerations of political reality in the construction and application of the constitution."[61] In short, it satisfies the traditional German yearning for objectivity in the sense of separating law from politics, yet tolerates the search for the social and moral purposes behind constitutional provisions.

Relatedly, the Constitutional Court has occasionally spoken of certain suprapositivist norms that presumably govern the entire constitutional order. In an early case, decided in 1953, the Court, recalling the Nazi experience, rejected "value-free legal positivism."[62] The First Senate, at the time presided over by President Josef Wintrich, an influential Catholic jurist with roots in the Thomistic tradition, appeared to accept natural law as an independent standard of review.[63] Since then, particularly when interpreting the Basic Law's equality clauses, the Court has tended to speak in terms of "justice" rather than in the language of natural rights.[64] Some constitutional cases, however, appear to defend such principles on a theory of legal positivism rooted in specified constitutional rights of lower and higher rank. In this reckoning, the value order of the Basic Law is an essential part of the positive legal order itself. Still, it is not altogether clear from the Court's jurisprudence whether the suprapositivist norms underlying the constitution exist outside the text, reflect the express values of the text, or account for the hierarchical order the Court has discerned among the values constitutionalized by the framers. Whatever the answer, the hierarchical system of values found to inhere in the Basic Law is itself largely a product of constitutional interpretation.

Unconstitutional Constitutional Amendments. As noted earlier in this chapter, the Federal Constitutional Court has empowered itself, under Article 79 (3), to review

the substance of constitutional amendments that impair or diminish the immutable principles of the Basic Law.[65] These essential elements include the principles of democracy, federalism, constitutional state, the social state, and the participation of the Länder in Germany's national legislative process. They also embrace the "inviolable" principle of human dignity that "all state authority," under the terms of Article 1 (1), has the "duty to respect and protect." As early as 1953 the Constitutional Court proclaimed its authority to overturn a constitutional amendment on the basis of Article 79 (3).[66] Since then, the Court has reviewed the substance of constitutional amendments allegedly infringing rights originally laid down in Articles 10 (privacy of correspondence and telecommunications), 16 (right to asylum), and 143 (suspending property rights under Article 14).[67]

More recently, in the *Lisbon Treaty Case* (2009; no. 6.6), the Second Senate of the Constitutional Court made the "constitutional identity" secured by Article 79 (3) a central interpretive device in its dicta expressing caution with respect to the Lisbon Treaty and the EU due to their democratic deficits. In one passage, the senate speaks of Germany's "inalienable constitutional identity," which it associates with the democratic or majoritarian parliamentary character of the governmental system created by the Basic Law.[68] Although the senate found the act ratifying the Lisbon Treaty compatible with the Basic Law, it held unconstitutional the accompanying statute reducing the roles of the Bundestag and Bundesrat in EU affairs, thereby breaking what the senate deemed as an essential link in the chain of German democracy. In the senate's view, there must be a direct relationship between the votes of the German people and national legislative policy. Accordingly, the senate ruled that, before the treaty could enter into force, a statute would have to be enacted granting to the Bundestag and Bundesrat sufficient rights of participation in the transfer of powers to EU institutions. The Basic Law permits the legislative transfer of sovereign powers to the EU, but it does not empower either parliamentary body to surrender any part of Germany's constituent power to govern its own affairs. In the Court's interpretation of Article 79 (3), the country's national constitutional identity—particularly in the form of the federal, democratic, social, and constitutional state—cannot be altered by any treaty or constitutional amendment that compromises the principle of national self-determination or the essence of Germany's sovereign statehood.[69] (See Chapter 6 for a further discussion of the *Lisbon Treaty Case*.)

THEORY OF BASIC RIGHTS

The theory underlying the interpretation of basic rights in Germany is complex. Actually, it would be more appropriate to speak of theories rather than a single theory of rights. These theories include the negative and positive character of basic rights, the horizontal application of basic rights in the interpretation of private law, and normative theories rooted in various conceptions of the polity as a whole. We consider each in the order indicated.

Dual Character of Rights. The Federal Constitutional Court has described guaranteed rights as both negative and positive as well as subjective and objective. A negative right is a subjective right to liberty. It protects individuals against the state, vindicating their right to unobstructed freedom and autonomy. A positive right, on the other hand, represents a claim the individual may have on the state. In the German understanding, positive rights embrace not only a right to certain social needs, such as a right to a minimum standard of living,[70] but also a right to the *effective* realization of certain personal liberties. For example, in the *Numerus Clausus I Case* (1972; no. 10.12)[71] universities were required to expand their facilities to make good on the basic right to choose one's occupation. Yet, as we have seen in our discussion of objective values, personal freedom and autonomy are limited by the requirements of human dignity—a principle the state is duty-bound to foster and respect. The best example here is the *Abortion I Case* (1975; no. 7.4) in which the Court directed the state, as a general principle, to protect the life of the fetus against the constitutionally guaranteed personality right of the mother. Another way of describing the German perspective is to suggest that the Basic Law embodies a "facilitative" model of freedom as opposed to the American "privatizing" model deeply rooted in Lockean political theory. The facilitative model, as W. Cole Durham defines it, "[reflects] a tradition in which freedom tends to be seen not as the polar opposite of community, but as a value that must be achieved in synthesis with community." In this setting, Durham continues, "it is natural for the state to assume a more affirmative role in actualizing specific constitutional rights."[72]

Although closely related, a positive right is not the same as an objective value. An objective value imposes a duty on the state. The state must create and maintain an environment conducive to the realization of basic values. In short, objective values speak to the organization of the state and society as a whole. A positive right, on the other hand, is an *individual* right or, perhaps more accurately, an entitlement that the individual may claim *from* the state. Reference to the positivity of rights implicates the particular situation of an individual, one who may need the state's help to enjoy a basic right effectively, such as, for example, the right to the development of one's personality. In this respect, the notion of a right under the Basic Law is broader than the concept of a right under the U.S. Constitution. A right in the German constitutionalist view embraces not only the right to be left alone, free of state interference, but also a claim to assistance in the enjoyment of the right.

Horizontality of Rights. In the seminal *Lüth Case* (1958; no. 8.1)—a free speech decision—the Constitutional Court remarked that the Basic Law's objective system of values "expresses and reinforces the validity of the [enumerated] basic rights."[73] The decision solidified the canonical status of the Basic Law as a hierarchy of objective values. The Court also spoke once again of the negative and positive character of rights. *Lüth* acknowledges that basic rights are indeed fundamentally negative rights against the state, suggesting that constitutional rights apply directly to public law. But *Lüth* goes on to say that the constitution's objective values "reinforce the effective power of these rights," extending their reach *indirectly* into the domain of private law, affecting the relation between private parties. The indirect reach of constitutional rights into private law—their horizontal or third-party effect (Drittwirkung)—means that fundamental rights, as the Court occasionally puts it, have a "radiating effect" upon private law, requiring the latter to be interpreted in conformity with the former. Constitutional law seldom overrides private law but, rather, transforms it. More precisely, constitutional law *influences* the interpretation. In short, a third party—that is, one involved in a private legal dispute—may effectively invoke a constitutional value in his or her defense when sued under a provision of ordinary law, the application of which devalue the importance or significance of the constitutional value.

The dispute in *Lüth* arose out of a lawsuit in which a popular film director, Veit Harlan, won a civil damage award from Erik Lüth, a public information official who publicly advocated a boycott of one of the director's films. Harlan, a favorite of Nazi leaders, had produced notoriously anti-Semitic films during the Third Reich. Exonerated after World War II, Harlan reemerged as a major film director. Lüth, an active member of an organization of Christians and Jews, was outraged and sought to convince theater owners not to show Harlan's films while enjoining the public not to see them. A court found for Harlan under a provision of the Civil Code (Bürgerliches Gesetzbuch) obligating a person to compensate another for intentionally causing him or her harm contrary to "good morals." In overturning the judgment, the Constitutional Court held that the ordinary court had given insufficient attention to the basic value of free speech, particularly in circumstances in which the community was being addressed on an important matter of general interest. In *Lüth*, the Court held that the ordinary court, by focusing exclusively on the director's private interest, had ignored the effect of basic rights on private law. In this case, the ordinary court had overlooked the importance of the "objective value" or "value decision" folded into the Basic Law's free speech provisions. Private legal arrangements, declared the Court, must be interpreted in the light of the special significance of free speech in a democratic state. The Court has taken the same view of other constitutionally cognizable rights, finding them equally applicable to third persons whose complaints arise out of private legal interactions like employment contracts or tortious conduct.[74]

There is little dispute in Germany over the acceptance of the horizontal effect doctrine. What is disputed is the *extent* to which a value decision or objective norm should influence the interpretation of private law. How much of a radiating effect the constitutional order of values should have in a particular dispute is to be determined by the judges of the ordinary courts. If a judge has adequately considered the significance of this order of values, the Federal Constitutional Court ordinarily allows his or her judgment to stand even if, in deciding the case de novo, the Court might have reached a different result. The Constitutional Court must be convinced that the ordinary court has not ignored the significance of the constitutional value.[75]

Substantive Rights Theories. The Constitutional Court's search for a coherent theory of basic rights (Grundsrechtstheorie) has also evolved out of the concept of an

objective system of values. Constructing such a theory, however, has not been easy. Drawing upon the broad and general language of the Basic Law, German constitutional theorists have advanced five normative theories of basic rights: liberal, institutional, democratic, value-oriented, and social.[76] Each finds some support in the literature of constitutional theory; each draws some support from particular decisions of the Federal Constitutional Court.[77] Liberal theory, based on postulates of economic liberty and enlightened self-determination, emphasizes the negative rights of the individual against the state. Institutional theory focuses on guaranteed rights associated with organizations or communities such as religious groups, the media, universities (research and teaching), and marriage and the family. Democratic theory is concerned with certain political functions incident to the rights of speech and association and the role of elections and political parties. Value-oriented theory places its emphasis on human dignity as it relates to rights flowing from the nature of personhood. Social theory, finally, highlights the importance of social justice, cultural rights, and economic security. Not surprisingly, scholars and judges have linked each of these theories to one or another of the conceptions of the state discussed earlier.

It is possible through interpretation to regard one of these five theories as dominant. Yet each, like each conception of the state, has some basis in the text of the Basic Law. Like their counterparts in the United States, many constitutional theorists expend considerable energy debating whether or not there is an "objectively" correct interpretation of the Basic Law's fundamental rights provisions. For its part, the Constitutional Court seems content to decide human rights disputes on a case-by-case basis, using what it regards as the most convincing argument or theory available in a given situation, an approach that is more acceptable in a system that does not abide by stare decisis. The justices can easily draw on the logic of any of the five theories because these theories are not wholly inconsistent with one another. Tensions between them do exist, and much of the work product of the Federal Constitutional Court described in this book is best understood as a playing out of these tensions.

INTERPRETIVE MODES AND TECHNIQUES

Constitutional interpretation as practiced today by the Federal Constitutional Court draws on several of Germany's competing traditions of law and judicial process. Thus, we observe styles of argument ranging from reliance on linguistic analysis to the invocation of suprapositivist norms purportedly underlying the Basic Law.[78] Like the U.S. Supreme Court, the Constitutional Court employs a variety of interpretive modes, including arguments based on history, structure, teleology, text, interest balancing, and natural law. The one technique that is not formally followed in German constitutional analysis is that of stare decisis—which is unknown in the judiciaries of code-law countries—although judicial opinions, especially those handed down by the Federal Constitutional Court, typically brim with citations to prior cases. These approaches or modes of analysis have generated a critical literature in Germany as

abundant as it is controversial. Like its equivalent in the United States, this literature is concerned largely with the legitimacy and justification of judicial decision making.[79]

Standard Interpretive Approaches. Any discussion of constitutional interpretation in Germany begins with the usual reference to the grammatical, systematic, teleological, and historical methods of analysis.[80] In resorting to one or more of these methods, the Constitutional Court draws on the conventional approach to judicial decision making in German statutory law that originated in the formalism of the nineteenth-century school of jurisprudence known as pandectology.[81] Grammatical, or textual, analysis, often the starting point of judicial interpretation, focuses on the ordinary or technical meaning of the words and phrases in a given constitutional provision. Occasionally, words and phrases are construed in a narrow legal sense, as in cases involving the rights of criminal defendants, to satisfy the technical requirements of the law. In other instances, they tend to be interpreted in terms of their plain meaning. Systematic—or structural—reasoning, by contrast, searches for the meaning of particular words and phrases by examining the constitution as a whole. This mode of reasoning stems from the Constitutional Court's view of the Basic Law as a unified structure of values and relationships. Rather than focusing on the meaning of isolated words and phrases—a clause-bound approach to constitutional interpretation—systematic reasoning centers on their location within the text and the normative structure of the Basic Law as a whole. Teleological interpretation, on the other hand—a favored form of judicial reasoning in Germany—represents a search for the goal, purpose, utility, or design behind the constitutional text. Here the Court seeks interpretive guidance from the history and spirit of the constitutional order. Historical analysis, finally, seeks to shed light on the language and purpose of the constitutional text by reference to the Basic Law's drafting history. History by itself, however, seldom dictates the meaning of the constitution.[82] At best, it performs the auxiliary function of lending support to a result arrived at by some other method of interpretation. Taken together, it is difficult to rank these approaches to interpretation in any fixed order of priority. Like the U.S. Supreme Court, the Constitutional Court uses whatever approach or combination of approaches seems suitable in a given situation, except that arguments grounded in text, structure, or teleology generally prevail over those based on history.[83]

Constitutional justices often portray these conventional canons of interpretation as ways of discovering the "objective will"—to be distinguished from the subjective intentions—of the Basic Law's framers. Teleological reasoning is even claimed to be objective in this sense, although the sources used in discovering the telos of the Basic Law are unclear. The constitution's drafting history is one source but, as just noted, history is mainly a supplementary aid to interpretation. In truth, the teleological approach is itself susceptible to the subjectivism that the canonical tradition would hope to avoid. Karl Heinrich Friauf observed that the teleological approach is a "gateway through which consideration of social policy and even the political philosophy of the justices flow into the interpretation of the constitution."[84] Justices and

scholars do not always so readily acknowledge the creative character of constitutional interpretation.

Nevertheless, most commentators are aware of the limits of these customary methods of interpretation. As Konrad Hesse, a former justice of the Constitutional Court, pointed out, the objective will thesis, so assiduously applied in statutory construction, is unsuited to constitutional interpretation.[85] For one thing, no order of priority among these methods exists when their application leads to different results. For another, as Friauf suggested, there is no mechanical way of applying these methods to the open-ended words and phrases of the Basic Law. When these methods fail or if the Court is faced with a dispute involving competing constitutional values, it often resorts to ad hoc balancing. Indeed, the rhetoric of conceptual jurisprudence belies the "pragmatic, flexible and undogmatic" approach to constitutional interpretation that often characterizes the Court's work.[86]

Competing Judicial Visions. The tension between objectivity and creativity that commentators have noticed in the Constitutional Court's work product reflects a larger conflict between competing visions of the judicial function. Two general approaches to judicial decision making emerge from the materials in this book. The first approach, which distinguishes sharply between the functions of judge and legislator, is as familiar to Americans as it is to Germans. In this view, *making* law is not the same as interpreting it. The justice is bound to the prescribed norms of the constitution; his or her task is to discover the content of these norms and then to apply them uncompromisingly, a process known as theory of binding norms (Normgebundenheitstheorie).[87] German no less than American justices have sought to perpetuate this traditional view of the judicial function. "The Court can only unfold what already is contained . . . in the constitution," wrote Professor Ernst Friesenhahn, a former Constitutional Court justice.[88] He continued, "As an independent, neutral body, which renders decisions solely in terms of law, [the Court] determines the law with binding effect when it is disputed, doubted or under attack. In doing so, [the Court] bears no political responsibility, though its decisions may have great political significance."[89] Justice Paul Kirchhof, whose twelve-year term on the Court expired in 2003, compared the judicial role to that of a soccer referee, one in which the justice merely enforces existing rules by throwing up red and yellow cards.[90]

Justice Gerhard Leibholz, an influential member of the Second Senate for twenty years—he served prior to the adoption of the twelve-year nonrenewable term of office—also drew a bright line between "politics" and the "political law" of the constitution.[91] He distinguished between disputes of a "legal-political character which can be placed under legal constitutional control" and disputes of a "purely political nature . . . which cannot be decided according to the rules of Law."[92] Consistent with the conventional German approach to constitutional review, the Constitutional Court, in Leibholz's view, is under a duty to explore every relevant fact and aspect of law in a case so as "to find the truth objectively."[93] In a similar vein, Justice Helmut Simon, a former member of the First Senate, said that the Federal Constitutional

Court "neither creates norms nor belongs to those political institutions responsible for the active structure of our common life or the future of the community. As an organ of the judiciary, its function, like that of other courts, is limited within the framework of a judicial proceeding, to the application and interpretation of laws originating in some other forum. . . . [It has no other power] except that of declaring acts of public authority constitutional or unconstitutional."[94]

Nevertheless, a number of justices and constitutional scholars have acknowledged the inherent limits of Normgebundenheitstheorie. Professor Konrad Hesse, appointed to the First Senate in 1975 and the author of a leading treatise on constitutional law, is openly critical of the judicial function conceived as an objective process of discovery upon the application of a given methodology.[95] For him, constitutional interpretation is an art flowing from the interplay between text and interpreter: the justice perceives the meaning of a constitutional text, as he or she reflects on the present, in the light of constitutional language drafted within a given historical context. In the view of Justice Ernst-Wolfgang Böckenförde, a former member of the Second Senate, constitutional interpretation requires a delicate balancing of competing values as well as competing theories of the polity expressed in such concepts as the liberal state, the social state, or the democratic state.[96] Justice Dieter Grimm, a former member of the First Senate, is even more candid: "There is no pre-established difference between courts and legislatures which a particular constitution has to adopt and which an interpreter has to enforce regardless of what the constitution says. In addition, constitutional courts inevitably cross the line between law and politics [because] the constitution does not offer an unambiguous and complete standard for [reviewing the validity of legislation]."[97] In Grimm's view, this reality argues for less rather than more judicial intervention by the Constitutional Court in the political and legislative arenas.[98]

After eleven years on the Court, even Justice Leibholz wrote that it would be "an illusion and . . . inadmissible formalistic positivism, to suppose that it would be possible or permissible to apply . . . general constitutional principles . . . without at the same time attempting to put them into a reasonable relationship with the given political order." Why? Because "[t]he constitutional judge cannot do anything except relate the rules [of the Basic Law] to political reality."[99] In 1971, as he was about to leave the Court, Leibholz remarked that "the existing conflict between constitution and constitutional reality does not admit either of a purely legalistic solution in favor of the constitution, or of an exclusively sociological solution in favor of constitutional reality. Rather, this conflict must be viewed as [a dialectical one] between normativity and existentiality."[100]

Several justices have readily acknowledged that constitutional decision making requires statesmanship or a keen sense of political reality.[101] Justice Leibholz, for example, conceded that the constitutional judge, "more than the 'ordinary judge,' [must] understand something of the essence of politics and of those social forces which determine political life."[102] Some of the justices have equated judicial statesmanship with the Court's capacity to achieve consensus. President Wolfgang Zeidler,

the presiding justice of the Second Senate from 1983 to 1987, during which time he served as the Court's vice president, even ventured to observe that objectivity in constitutional interpretation manifests itself most clearly when the justices of a given senate, who collectively represent diverse career backgrounds, ideologies, and political attachments, manage to surmount their differences and reach unanimous agreement.[103] Other justices see a dialectical process at work: the right answer in a given case is the product of collective decision making; a right or good decision is one that has banished disagreement in the solvent of group discussion and dialogue.[104]

Balancing and Optimization. Balancing rights and duties is a standard approach to constitutional interpretation in Germany, as it is in many other constitutional democracies, including the United States. Balancing is an attractive methodology. As Louis Henkin has written, it provides "bridges between the abstraction of principle and the life of facts. It bespeaks moderation and reasonableness, the Golden Mean."[105] Although the balancing approach to constitutional interpretation in the United States is controversial on and off the Supreme Court, it is the preferred approach of the Federal Constitutional Court, an early and dramatic example of which is the famous *Lüth Case* of 1958 (the seminal free speech decision featured in Chapter 8). In the hands of the Federal Constitutional Court, balancing implicates the so-called principle of optimality or optimization. As Robert Alexy, Germany's leading theorist of constitutional balancing, writes, it is "one aspect of what is required by [the] more comprehensive principle of proportionality (Verhältnismässigkeit)."[106] It is a matter of optimizing or maximizing competing constitutional rights or values. Alexy treats constitutional rights as "optimization requirements" that he identifies with principles instead of rules. As optimization requirements, he continues, "principles are norms requiring that something be realized [that is, competing rights] to the greatest extent possible, given the factual and legal possibilities."[107]

Alexy emphasizes that balancing, as an approach to constitutional interpretation, depends above all on viewing constitutional protections as expressions of broader values or principles and not as narrow, subjective rights held by an individual. As noted earlier in our discussion of rights theories, this is precisely how the Basic Law's fundamental rights principles have come to be understood. Interpreting rights as objective values or principles necessarily puts considerable discretion in the hands of the Federal Constitutional Court's justices, who have been liberated from the civil-law orientation of the judiciary, charged as it is with the narrow project of interpreting and applying doctrine found in legislation. Federal Constitutional Court justices decide upon several competing values in a particular case, a fact-finding undertaking that looks more like common-law judging. The Federal Constitutional Court's decisions bear the imprint of the common-law and civil-law traditions. Yet, the context-sensitive discretion that characterizes common-law judging leads to the concerns about democratic legitimacy that the restrained role played by civil-law judges is meant to address. These concerns are amplified by a balancing analysis, leading one commentator to conclude that a balancing analysis is "no more protective [of constitutional rights] than the judges who administer it."[108] Bernhard Schlink, perhaps the leading critic of Germany's tradition of balancing in constitutional law, argues that rights susceptible to balancing are not absolute protections at all.[109] But, from the perspective of the proponents of balancing on the Constitutional Court, this is the point: few rights under the Basic Law are absolute; most are qualified by reservation clauses, with the result that state infringements of these rights trigger the kind of proportionality review described next.

Principle of Proportionality. The principle of proportionality, like the concept of an objective order of values, is crucial to any understanding of German constitutional decision making. The Basic Law contains no explicit reference to proportionality but, as just noted, the Federal Constitutional Court has elevated proportionality to a high constitutional principle in its own right, serving as a major tool in assessing the validity of legislation impinging on fundamental rights. The Court has described proportionality reasoning as indispensable in a constitutional state. Accordingly, proportionality is not strictly an approach to *interpretation*; rather, the principle is employed to justify limits on democratic rights and fundamental freedoms. The Court applies what is essentially a means/ends test for determining whether a particular right has been overburdened in the light of a given set of facts. Except for the Constitutional Court's effort to optimize competing constitutional rights, the German approach is not unlike the methodology often employed by the U.S. Supreme Court in fundamental rights cases.

In its German version, proportionality reasoning is a three-step process. First, whenever Parliament enacts a law impinging on a basic right, the means used must be appropriate (Eignung) to the achievement of a legitimate end. Because rights in the Basic Law are circumscribed by duties and are often limited by objectives and values specified in the constitutional text, the Constitutional Court receives considerable guidance in determining the legitimacy of a state purpose. The sparse language of the U.S. Constitution, by contrast, often encourages the Supreme Court to rely on nontextual philosophical or policy arguments to determine the validity of a state purpose allegedly impairing a constitutional right. Second, the means used to achieve a valid purpose must have the least restrictive effect (Erforderlichkeit) on a constitutional right. This test is applied flexibly and must meet the general standard of rationality. As applied by the Constitutional Court, it is less than the "strict scrutiny" and more than the "minimum rationality" test of American constitutional law. Finally, the means used must be proportionate to the stipulated end. The burden on the right must not be excessive relative to the benefits secured by the state's objective (Zumutbarkeit).[110] This three-pronged test of proportionality seems fully compatible with, if not required by, the principle of practical concordance.

Practical Concordance. The canon that holds that protected constitutional values must be harmonized with one another when they conflict is known as the principle of practical concordance (praktische Konkordanz). Once again, it requires the

optimization of competing rights. In short, one constitutional value may not be realized at the expense of a competing constitutional value. In the German view, constitutional interpretation is not a zero-sum game. The value of free speech, for example, rarely attains total victory over a competing constitutional value such as the right to the development of one's personality. Both values must be preserved in creative unity. Professor Hesse wrote, "The principle of the constitution's unity requires the optimization of [values in conflict]: Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values."[111]

The application of the principle of practical concordance may be illustrated by reference to two religious freedom cases. In the *Classroom Crucifix II Case* (1995; no. 9.7) the Court announced that Article 7 (allowing religious instruction in the public schools) and Article 4 (securing freedom from religious indoctrination) "have to be seen together and reconciled with each other through interpretation, since it is only concordance of the aspects of legal protection under both articles that can do justice to the decisions contained in the Basic Law."[112] The Court sought to reconcile the conflicting values by requiring public schools to remove the crucifix from classrooms attended by objecting students but to permit its display in classrooms where such students are not present. The *Muslim Headscarf Case* (2003), by contrast, involved a challenge to a school regulation banning teachers from wearing headscarves. Here the positive freedom of a Muslim teacher to cover her head collided with the negative freedom of students who might object on the ground of their faith. The Court required Land legislatures to resolve the tension, saying that legislators "must seek a compromise reasonably acceptable to everyone. . . . [Constitutional] provisions must be seen together, and their interpretation and influence must be coordinated with each other." In this area, the Court noted, policies may differ from Land to Land, depending on "school traditions, the composition of the population by religion, and whether [the population] is more or less strongly rooted in religion."[113]

Passive Virtues and Dialogue. Alexander Bickel maintained that the U.S. Supreme Court is often at its best when it declines to exercise jurisdiction it clearly has. These evasive strategies, which he calls "passive virtues," include rules on standing, case and controversy requirements, the political question doctrine, and other prudential techniques for avoiding constitutional controversies.[114] There are no exact equivalents to these rules in Germany. As often noted in Chapter 1, the Court may not decline to decide cases properly before it. One of its functions in the German system is to resolve even doubtful questions of constitutionality, not to avoid them.

Yet, even while accepting jurisdiction, the Court adheres to canons of restraint that grant considerable latitude to legislative and executive decision makers.[115] One of these, familiar to Americans, is the Court's practice of upholding legislation when it can plausibly be interpreted to conform with the constitution (verfassungskonforme Auslegung) even when faced with an equally plausible argument against its

validity.[116] In addition, although the Court does not decline to resolve cases on their merits merely because they involve sensitive issues of foreign or military policy, it has tended to defer to the executive when the executive exercises its authority pursuant to international treaties. As a matter of principle, the Court has declared that the deployment of German soldiers in armed operations abroad requires parliamentary approval,[117] but even here the Court has broadly construed the executive's discretionary authority in military affairs. On the domestic front, finally, the Court has taken an equally broad view of the government's discretionary authority to regulate aspects of the economy when necessary under the terms of Article 72 (2). The Court's reluctance to invalidate laws passed under this provision is not unlike the Supreme Court's deferential review of socioeconomic legislation under the due process clauses of the U.S. Constitution.

In one significant development in the field of basic rights, however, the Court all but abdicated its authority to independently review secondary European Community laws. In a case known as *Solange I* (1974) the Court famously ruled that European Community law could be challenged in concrete judicial review proceedings if its compatibility with fundamental rights under the Basic Law was in doubt.[118] The Court took the position that such challenges were permissible so long as (*solange*) the protection of fundamental rights in the European Community was below the level of protection in Germany. Twelve years later, in *Solange II* (1986; no. 6.4), the Court ruled that fundamental rights "in conception, substance, and manner of implementation" in the European Community are essentially equal to the protection of basic rights in Germany.[119] For this reason the Court announced that it would no longer review Community regulations or directives in the light of these basic rights.

The Court reaffirmed *Solange II* in the *Banana Market Regulation Case* (2000), declaring as noncognizable—for the first time—an administrative court reference questioning the constitutionality of regulations on the marketing of bananas as a violation of occupational and property rights.[120] The Second Senate declared: "As long as the European Communities generally ensure the effective protection of fundamental rights and generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will . . . no longer review [European Community legislation] by the standard of fundamental rights contained in the Basic Law."[121] The admissibility of a challenge to secondary Community law would thus depend on a clear showing that the fundamental right allegedly violated "is not generally ensured" within the European Community. In the light of the *Maastricht Treaty Case* (1993; nos. 5.5 and 6.5) and the *Lisbon Treaty Case* (2009; no. 6.6), however, primary European Community or European Union law—the *treaties*—are still subject to constitutional review to assess whether they infringe or erode Germany's "constitutional identity" as specified by Article 79 (3).[122]

SOURCES OF INTERPRETATION

Unwritten Principles. Almost everything said so far about the nature of the Basic Law as a whole or of basic rights in particular raises profound problems of interpretation. Principles and theories such as the Basic Law's unity, its objective value dimension, its constitutionalization of private law, and the positivity and negativity of rights have served to confer substantial interpretive authority on the Federal Constitutional Court. These principles and theories have been judicially created, but not out of whole cloth. In the Court's view, as noted earlier in this chapter, they reflect the normative realities underlying the Basic Law, realities rooted in the dialectic between the liberal, socialist, and Christian natural-law traditions that shaped the original document, particularly the provision that subjects the legislature to the "constitutional order" and the executive and the judiciary to "law *and justice*" (emphasis added). Owing largely to neo-Thomist influences, the Court affirmed the existence of "supra-positive principles of law" (überpositive Rechtsgrundsätze) that bind legislators and other political decision makers.[123] But, as George Fletcher has pointed out, its later accents on individual autonomy, moral duty, and human rationality echo equally strong neo-Kantian influences,[124] just as the powerful strands of social welfare theory in its case law may be said to reflect socialist egalitarian thought.

These orientations have converged to produce a distinctive vision of the human person. In the *Life Imprisonment Case* (1977; no. 7.3) the Court defined the human person as a "spiritual-moral being" (vom Menschen als einem geistig-sittlichen Wesen) whose intrinsic dignity "depends on his [or her] status as an independent [personality]."[125] But the independence affirmed here is far from the autonomous individualism of American constitutional law. "The image of man in the Basic Law," the Court has declared, "is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value."[126] These words have been a constant refrain in the Court's jurisprudence. Similar lines of thought can be discerned in its view of the polity, one that rejects the self-regarding individualism of bourgeois liberalism as well as the collectivism of Marxism. Much of the Court's case law treated in the following chapters identifies a polity that reminds Americans of Lincoln's image of a fraternal democracy. As the abortion cases and many free speech decisions show, the social context in which men and women discover the source of their dignity—and human flourishing—cannot be ignored in a properly governed society. Accordingly, human dignity resides not only in individuality but in sociality as well.

Written Text. The major source of constitutional interpretation in Germany is the documentary text adopted by the Länder legislatures in 1949 along with fifty-nine amendatory acts ratified between 1951 and 2011. The words and phrases of the constitution mean what they say and the Court takes them seriously. It rarely interprets

constitutional language in a way radically different from the common understanding of the text. But as suggested in previous subsections, the Court has employed a wide range of interpretative approaches and guides to expound the meaning of the written text. These include legalistic modes of analysis along with an effort to determine the general purpose of textual provisions in the light of their historical, philosophical, and sociomoral determinants.

But the constitution includes more than the documentary text. What might be called the *working* text arguably extends to long-established practices whose attenuation would raise serious constitutional issues. These practices include, under Germany's system of proportional representation, the requirement that a political party garner at least 5 percent of the popular vote as a condition of entering national or state parliaments. Although the Court has never declared that proportional representation itself is constitutionally required,[127] its abolition after sixty years of unbroken observance—except for the first postreunification all-German election—could easily be contested on constitutional grounds, especially in the light of the Court's solicitude for the rights and representational value of minority parties. An unwritten norm previously unmentioned that is now a solid part of the working text is the principle of federal comity (Bundestreue), an innovative doctrine the Court has inferred from the Basic Law's federal structure. It requires more than the observance of formal constitutional legality; it also requires both levels of government to consult with each other when their interests conflict or overlap.[128] A 1992 change in the Basic Law actually formalized the principle of comity in the field of European affairs. When making policy in the context of the European Union, the federal government is required to keep the Bundesrat informed of its dealings.[129] Even when acting under one of the European Union's exclusive powers the federal government, according to Article 23 (4), "shall take the position of the Bundesrat into account." Given the Court's jurisprudence of federal comity, it seems likely that the Bundesrat would be able to validly petition the Court to hear a case when arguing that its position was not adequately taken into account by the national government.

Historical Materials. The Constitutional Court occasionally draws upon historical materials to illuminate the general purpose behind a constitutionally ordained concept, value, or institution. This inquiry into original purpose is not always clearly differentiated from an inquiry into original intent. When appealing to *purpose* the Court usually considers the background or circumstances out of which a particular constitutional provision emerged. Because so many of the Basic Law's words and phrases have been lifted from nineteenth- and twentieth-century constitutions, both state and national, the Court often finds it useful to explore the reasons for their incorporation into these earlier documents. For example, in determining whether the inviolability of the "home" (Wohnung) within the meaning of Article 13 (1) extends to business offices, the Court consulted the debates and commentaries on similar provisions incorporated into the Frankfurt Constitution of 1849, the Prussian Constitution of 1850, and the Weimar Constitution of 1919.[130]

While admissible as sources of interpretation, these older documents pale in comparison to the significance of the Basic Law's legislative history. This history includes the report of the Herrenchiemsee Conference, the body charged with preparing a working draft of the Basic Law.[131] The most fertile source for examining the background and purposes of the Basic Law, however, is the daily stenographic record of the debates and decisions of the Parliamentary Council. The protocols include the proceedings of all the council's specialized committees, together with the arguments, decisions, and voting records of its Main Committee and plenary sessions.[132] The *Bahá'í' Religious Community Case* (1991) is a prominent example of the supportive role the Basic Law's legislative history plays in the interpretation of particular provisions. The Court found in the deliberations of the Parliamentary Council that the right to associate for religious or ideological purposes was encompassed within the meaning of Article 4 (1), which guarantees "freedom of faith."[133]

The Court seems to find the Basic Law's legislative history particularly helpful in cases involving conflicts between levels and branches of government. For example, in the famous *Flick Case* (1984), which arose out of a notorious tax and party finance scandal, the Court invoked Parliamentary Council debates to show that a parliamentary investigative committee established under Article 44 of the Basic Law could require the executive to surrender all the relevant records in the case.[134] In the equally prominent *Parliamentary Dissolution I Case*, (1983) the Court's majority concluded that there was nothing in the Parliamentary Council's proceedings that contradicted its view that the federal president could dissolve Parliament on the request of the chancellor even though the latter had the backing of a slim parliamentary majority.[135] The dissenting opinion disputed the majority's view and relied on lengthy quotations from the Council's members.[136] This exchange illustrates, as in American constitutional debates, that legislative history can be invoked to support more than one side of an argument over the constitution's meaning.

Judicial Precedent. In Germany's codified legal system, judicial decisions do not qualify as official sources of law. But constitutional law is different. First, while judicial rulings apply only to the parties before them, the Federal Constitutional Court's decisions are binding on all courts and constitutional organs.[137] Second, all abstract and concrete review cases, along with decisions on whether a rule of public international law is an integral part of federal law, enjoy the force of general law. In fact, any decision declaring a law null and void or compatible or incompatible with the Basic Law must be published in the book of federal statutes known as the *Federal Law Gazette*,[138] a practice that underscores the Court's character as a negative legislator. Although it rejects the principle of stare decisis as such, its opinions, like those of other high courts, are studded with citations to its case law. In the *Muslim Headscarf Case* (2003), for example, the Court supported its reasoning by reference to no fewer than twenty-six decisions handed down between 1957 and 1999.[139] Formally, judicial precedents do not *bind* the Constitutional Court; rather, they are marshaled to show that a doctrinal outcome in a given case is consistent with its previous interpretations

of the Basic Law. The German understanding of the constitutional state principle—a central pillar of the Basic Law—requires a coherent body of judicial doctrine in the interest of legal certainty, predictability, and the necessity of creating a stable constitutional order. In actual practice, however, the similarities in the uses (or misuses) of precedent by the Court and other courts treated in this book are more striking than the differences.[140]

Academic Literature. The work of legal scholars carries as much if not more weight in the Basic Law's interpretation than do judicial precedents. The Court relies heavily on treatises and commentaries of established legal professionals. Here it must be remembered that in code-law countries such as Germany, enacted law was the work product of legal scholars, historians, and theorists. It is no surprise, therefore, that the "ruling opinion" (herrschende Meinung) in the literature takes pride of place in the interpretation of the Basic Law. The literature is published in highly reputable law journals such as *Neue Juristische Wochenschrift*, *Monatschrift für Deutsches Recht*, *Juristenzeitung*, and *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*. These and other German law journals are edited not by amateurs—that is, law students—as in the United States, but by leading practitioners, judges, and professors of law. (Student-authored notes in these journals would be unheard of in Germany's legal culture.) One highly regarded and often-cited commentary on the Basic Law is the loose-leaf edition of *Kommentar zum Grundgesetz* by Theodor Maunz, Günter Dürig, and Roman Herzog.[141] Herzog was president of the Federal Constitutional Court from 1987 to 1994 and president of the Federal Republic from 1994 to 1999.

Muslim Headscarf manifests the Court's dependence on the scholarship of the professoriat and other legal experts. In its closely reasoned opinion on the meaning of constitutional provisions relating to the free exercise of religion, the Court relied heavily on interpretive commentaries by major writers on the religion clauses such as Karl Brinkman, Axel von Campenhausen, Peter Badura, Christian Starck, Joseph Listl, Roman Herzog, and Ernst-Wolfgang Böckenförde.[142] (Böckenförde, like Herzog, was a former justice of the Federal Constitutional Court.) These authors are repeatedly cited as authoritative interpreters of the Basic Law. Perhaps a better measure of the importance of legal scholarship relative to judicial precedents is the standard practice of documentation in leading constitutional commentaries. For example, in the oft-cited commentary by Hermann v. Mangoldt, Friedrich Klein, and Christian Starck, only 90 of 374 footnotes in the paragraphs devoted to Article 4 (1) and 4 (2) on religious freedom include references to prior case law, and many of these precedents are employed to justify the basic orientation of the commentators.[143] By contrast, a comparative examination of two leading American commentaries shows an almost exclusive reliance on the case law of the Supreme Court.[144]

International and Comparative Materials. One of the Basic Law's main features, as the materials in Chapter 6 highlight, is Germany's commitment to peace and internationalism. This commitment is expressed in constitutional provisions that bind

Germany to participation in the development of the European Union (Article 23), permit the transfer of sovereign power to international institutions (Article 24), emphasize the primacy of international law (Article 25), and criminalize any preparation for a war of aggression (Article 26). Article 25 merits special attention. It declares that the "general rules of international law shall be an integral part of federal law [and] shall take precedence over [national] law and directly create rights and duties for the inhabitants of the federal territory." Accordingly, these rules are part of Germany's constitutional order and thus binding on all branches and levels of government. So important are these rules that the Basic Law itself requires any court to obtain a decision from the Federal Constitutional Court whenever, in the normal course of litigation, its judges doubt whether a general rule of international law is part of federal law or whether it directly creates rights and duties for individual persons.[145] Under this procedure the Court frequently reviews or consults treaties, international agreements, and the decisions of international tribunals.[146]

The Federal Constitutional Court's opinions contain far fewer references to the decisional materials of foreign constitutional tribunals, conveying the impression that the constitutional experience of other advanced democracies has little relevance to the interpretation of the Basic Law. It would be misleading, however, to conclude from this that the justices are oblivious to or uninfluenced by non-German constitutional materials. Many of the justices have studied or taught abroad, several in U.S. law schools, and have ready access within the Court to full sets of judicial reports from foreign and international tribunals, including the U.S. Supreme Court Reports. In particular, the Constitutional Court frequently cites the decisions of the European Court of Human Rights as an interpretive aid in defining the reach of constitutional rights in Germany. The European Convention on Human Rights does not have the status of constitutional law in Germany. Nevertheless, the Constitutional Court has adopted the view that "the content and state of development of the Convention are to be taken into consideration insofar as this does not lead to a restriction or derogation of basic rights protection under the Basic Law."[147] As with its decision in the *Görgülü Case* (2004; no. 6.3), the Constitutional Court also continues to remind ordinary courts of their obligation to follow, when and where applicable, the decisions of the Human Rights Court.

In addition, the Constitutional Court's jurisprudence now and then includes words, phrases, and sentences that suggest familiarity with the work product of other national courts of judicial review. In the famous *Lüth Case* (1958; no. 8.1), for example, Germany's seminal free speech decision, the Constitutional Court's First Senate quoted Justice Cardozo's celebrated line that speech is "the matrix, the indispensable condition of nearly every other form of freedom," but without citing *Palko v. Connecticut*, the source of the quote. In yet another free speech decision—the well-known and controversial *Spiegel Case* (1966; no. 8.10) four justices cited foreign constitutional case law on whether reporters can give evidence in criminal proceedings involving treason charges.[148] In the interpretation of the Basic Law, the Court seldom *relies* on foreign case law; rather, it deploys comparative references either as negative

examples of doctrines or practices that should be avoided or to support positions already arrived at through the standard methods of textual, systematic, teleological, or historical analysis.

Other examples of the Constitutional Court's use of foreign legal and decisional materials are readily available. A study published in 1974 recorded twenty-four cases in which the Constitutional Court drew upon foreign judicial cases, mainly from the United States, Switzerland, France, and England.[149] The Court is inclined to draw support from the constitutional practices and decisional materials of other advanced parliamentary governments facing related problems of governance under comparable constitutions,[150] or, alternatively, to cite foreign practices or constitutional judicial decisions it would not wish to follow. In the recent *Lisbon Treaty Case* (2009; no. 6.6) the Court looked to the positive and negative electoral experiences of several constitutional democracies in measuring the sufficiency of the European Union's system of political representation against the requirements of the Basic Law. Since 1971, when the Federal Constitutional Court Act was amended to permit dissenting opinions, dissenting justices in particular have found guidance in foreign constitutional case law. In their dissent from the Court's restrictive abortion decision of 1975, Justices Wiltraut Rupp-von Brünneck and Helmut Simon referred to *Roe v. Wade*; Justice Martin Hirsch cited *Vance v. Terrazas*, an American citizenship case, in dissenting from the Court's decision in the *Denaturalization II Case* (1980) (upholding the denial of citizenship to an expatriate); and Justice Ernst-Wolfgang Böckenförde in his *Party Finance V Case* (1986) dissent cited *Bob Jones University v. United States*, a case involving a tax deduction dispute and contributions to political parties from "charitable institutions."[151]

Other references by the Federal Constitutional Court to foreign judicial decisions could be cited, but in the light of its total workload these instances, as already noted, are infrequent. And whether such decisions are cited or discussed depends on whether the particular rapporteur (Berichterstatter) in the case is inclined to examine comparable foreign case law in the draft opinion that he or she prepares for the consideration of the full senate. Rarely, however, will a rapporteur pursue a full-scale engagement with the judicial reasoning of a foreign tribunal on a matter of constitutional interpretation under the Basic Law. Rather, he or she will cite an idea or ruling from another national court's constitutional case law mainly to reinforce the holding proposed in the Votum. But there is no serious debate in Germany, as there is in the United States, over the propriety of citing foreign constitutional case law, when and where feasible, in the decisions of the Federal Constitutional Court.[152]

CONCLUSION

This chapter began with a description of the new constitutionalism brought about by Germany's Basic Law. It continued with an account of the state's political organization along with a discussion of the various principles of the constitutional order, an

order that joins the Sozialstaat to the Rechtsstaat while enthroning federalism and a party democracy empowered to defend itself against its internal and external enemies. Other features of the Basic Law's moral framework include its elevation of human dignity into the constitution's master value, its corresponding limits on popular sovereignty, its list of individual rights and communal responsibilities, its submission of the legislature to the "constitutional order" and the judiciary and executive to "law and justice," and its prohibition of any formal amendment that would erode Germany's constitutional identity. In turn, the Federal Constitutional Court has adopted interpretive theories that reflect the deeper meaning of these factors. These theories embrace the concept of the constitution's unity, the subjective and positive character of guaranteed rights, the objective and hierarchical order of basic values, and modes of analysis that emphasize systematic and goal-oriented teleological reasoning largely independent of the intentions of the Basic Law's framers. Taken together, these features and theories underscore the absolute supremacy of the Basic Law over ordinary law. Finally, as subsequent chapters show, Germany's new constitutionalism has converted the principle of constitutional supremacy into one of judicial interpretive supremacy.

PART II
Constitutional Structures and Relationships

The cases featured and discussed in Part II highlight the relationships and tensions among levels and branches of government. The structural provisions of the Basic Law include the framers' most significant innovations, among them the general scheme of separated and divided powers, the constructive vote of no confidence, the limits on presidential authority, the creation of the Federal Constitutional Court (Bundesverfassungsgericht), and the ban on unconstitutional political parties. Later on, in the form of a general election law, German political leaders also introduced a new electoral system combining elements of majoritarian and proportional representation. Its combination of single-member constituencies and party-list voting is sometimes referred to as "personalized proportional representation." This careful attention to institutional structures and relationships is not surprising. After the Third Reich, Germans were primarily interested in creating a constitution they hoped would bring about stability, democracy, and limited government.

The Basic Law's framers sought to achieve stability by strengthening the position of the chancellor (Bundeskanzler), by doing away with plebiscitary institutions such as national referenda and the direct election of the federal president (Bundespräsident), and by establishing mechanisms designed to avoid the excessive fragmentation of the electorate and to keep splinter parties out of Parliament (Bundestag). They endeavored to bring about a more deliberative and accountable democracy through representative institutions; general, free, and equal elections; and a chancellor responsible to Parliament. But they also hoped to create a viable *federal* democracy. In doing so, they borrowed from their own past in authorizing the Federal Council of States (Bundesrat), in which state (Land) governments would be corporately represented, to participate in the national lawmaking process. Finally, they hoped to create a *constitutional* democracy by installing an entrenched bill of rights, limiting the power to amend the Basic Law (Grundgesetz), and establishing a supreme constitutional tribunal whose decisions would have the force of law.

Federalism and separation of powers are among the controlling features of German constitutionalism. Both features are deeply anchored in Germany's constitutional tradition. What is new about their reincarnation in the Basic Law is their linkage, in Article 20, to the ideas of democracy and justice as well as to the more traditional constitutional state principle (Rechtsstaat). The adoption of federalism as a mainstay of the new polity reflected postwar Germany's determination to avoid the extremes of particularism and authoritarianism. Too little power at the center would inhibit, as it did throughout much of German history, the full flowering of parliamentary democracy. But too much power at the center would retard the growth of constitutionalism.