12-1-1997

Judicial Review: The United States Supreme Court Versus the German Constitutional Court

Danielle E. Finck

Follow this and additional works at: http://lawdigitalcommons.bc.edu/iclr

Part of the Comparative and Foreign Law Commons, Constitutional Law Commons, and the Judges Commons

Recommended Citation
Danielle E. Finck, Judicial Review: The United States Supreme Court Versus the German Constitutional Court, 20 B.C. Int'l & Comp. L. Rev. 123 (1997), http://lawdigitalcommons.bc.edu/iclr/vol20/iss1/5

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
Judicial Review: The United States Supreme Court Versus the German Constitutional Court

INTRODUCTION

Judicial review is the means by which a court determines the acceptability of a given law or other official action on grounds of compatibility with constitutional forms.¹ The German Constitutional Court ("Constitutional Court") and the United States Supreme Court ("Supreme Court") differ significantly, and this disparity is most evident in their respective roles of judicial review. Since the nature and scope of judicial review inevitably varies from one system to another, a comparative framework must allow for all pertinent distinctions.² This framework includes an examination of the interpretive tasks faced by the Supreme Court and the Constitutional Court in the context of their relations with other domestic political institutions.³ Such an examination requires an evaluation of the actual political characteristics and practices of the Supreme Court and the Constitutional Court and of the domestic institutions to which these courts are related.⁴

The ability of each of these Courts to interpret and develop their respective constitutions, and thus to utilize judicial review, depends on certain factors inherent in a comparative analysis.⁵ First, the extent of the Court’s own jurisdiction is important in this determination.⁶ Second, the doctrines and attitudes concerning judicial decisions over certain kinds of political questions have implications on the roles of the Courts.⁷ Third, the Courts are affected by the prevailing philosophy

³ See id.
⁴ See id.
⁶ See id.
⁷ See id.
regarding the methods of legal interpretation. Fourth, the nature of the constitution which the Court is called upon to interpret influences the role of the Court.

This Note compares the Constitutional Court and the Supreme Court with a specific focus on their judicial review functions. In order to provide an adequate comparison, this Note examines the system of judicial review in each country and the Courts’ roles within their respective governmental frameworks. Part I defines judicial review and examines its importance in modern society. Part II provides an overview of the American and German systems of judicial review, and it focuses on the differences between centralized and decentralized systems. Part III reviews the respective histories of the Courts and judicial review in Germany and the United States. Part IV discusses and compares the roles of the United States Supreme Court and the German Constitutional Court. Finally, this Note concludes with an analysis of the two systems of judicial review. This includes an examination of the benefits and detriments of both systems in light of their respective political foundations and backgrounds.

I. JUDICIAL REVIEW GENERALLY

Judicial review is the power of the courts to decide upon the constitutionality of legislative acts. A comparative analysis of judicial review demonstrates that the institution can be implemented in many ways, and the notion of judicial review represents a fascinating synthesis of contradictory schools of thought. The different means by which judicial review is employed also contributes to an amplified understanding of our own psychological responses to the tyrannies of our time.

The written constitutions and the subordination of statutory law to those constitutions by courts represent innovations with deep historical and philosophical roots. From the earliest times, men have sought to create or discover a hierarchy of laws and to ensure observance of this hierarchy. This search is essentially a perpetual human attempt to find something immutable in the continuous change that constitutes des-

---

8 See id.
9 See id.
12 See id.
13 See id.
14 Id.
tiny. Laws will inevitably change, but the Higher Law, which reflects society's fundamental values, must remain. A law that contravenes this Higher Law cannot be a law, and judicial review is a way to ensure that such laws cease to exist. The doctrine of judicial review lies at the root of natural law theories, and it implies the right to disobey the unjust law, whatever sacrifice disobedience may entail. Judicial review provides the means to restrain the arbitrary exercise of governmental power.

The judicial review of the constitutionality of legislation requires at least three conditions for it to function in a given constitutional system. First, it requires the existence of a written constitution which is conceived as a superior and fundamental law with clear supremacy over all other laws. Second, the constitution must be of a rigid character; the amendments or reforms that may be introduced can only be put into practice by means of a particular process. Third, the constitution must establish the judicial means for guaranteeing the supremacy of the constitution over legislative acts.

II. AN OVERVIEW OF JUDICIAL REVIEW IN GERMANY AND THE UNITED STATES: CENTRALIZED vs. DECENTRALIZED SYSTEMS

Judicial review in a centralized system reflects a different conception of the separation of powers and is based upon a doctrine radically different from that upon which decentralized review is founded. The centralized system of judicial review, favored by civil law countries, confines the power to determine the constitutionality of legislation to

15 See id.
16 See Cappelletti, supra note 11, at 117.
17 See id.
18 See id. Americans, who first effectively implemented judicial review, were willing to admit the theoretical primacy of certain kinds of law and were ready to provide a judicial means for enforcing that primacy. Mauro Cappelletti, Judicial Review in the Contemporary World 25 (1971).
19 See id. at 1.
20 Brewer-Carias, supra note 10, at 1.
21 Id.
22 Id.
23 Id. Administrative judicial review occurs when the courts consider whether the actions of government agencies (other than the courts) are legally appropriate and proper or represent an abuse of discretion beyond what the law allows. Tate, supra note 1, at 5. Relevant laws, including constitutions, may provide a definition of what is an appropriate exercise of bureaucratic discretion. Id. This Note will not specifically address administrative judicial review.
24 Cappelletti, supra note 11, at 137.
25 The archetype of the centralized system of judicial review is found in the Austrian Constitu-
a single judicial organ. The countries preferring this system of judicial review tend to adhere more rigidly to the doctrine of separation of powers and the supremacy of statutory law. Because many people feel that any judicial interpretation or invalidation of statutes is essentially a political act, it is sometimes viewed as an encroachment on the exclusive power of the legislative branch to make law. The centralized systems thus refuse to grant this power to the judiciary generally. Rather, the ordinary judges must accept and apply the law as it is written.

On the other hand, the decentralized system of review, which had its origin in the United States, gives all the judicial organs within it the power to determine the constitutionality of legislation. The rationale behind giving the entire judiciary the duty of constitutional control is, on its face, both logical and simple. It is precisely the function of the judiciary to interpret the laws and apply them in concrete cases. A constitutional norm prevails over an ordinary legislative norm with which it conflicts. Any judge in a decentralized system, deciding a case where an applicable legislative norm conflicts with the constitution, must disregard the former and apply the latter.

---

26 Id. at 133. Three principal reasons account for adoption of a centralized system of review in a growing number of civil law countries. Id. at 137. First, the conception in civil law countries of a rigid separation of powers between branches of government partially explains the centralized system of review. Cappelletti, supra note 11, at 137. Second, the absence of a principle comparable to stare decisis in civil law jurisprudence does not enable consistent decisions, and this explains the need for one constitutional court. See id. Third, the unsuitability of the civil law judiciary undoubtedly establishes the need for only one court to handle important constitutional questions. Id. The traditional highest courts of most civil law countries were found to lack the structure, procedures, and mentality required for effective constitutional adjudication. Id. at 142–43.

27 Id. at 137.

28 See Cappelletti, supra note 11, at 137.

29 Id.

30 See id.

31 Id. at 132–33. The decentralized model remains a characteristic and unique institution in the United States. Id. at 133. It is found primarily in several of Britain’s former colonies, including Canada, Australia, and India. Cappelletti, supra note 11, at 133.

32 Id. at 135.

33 Id.

34 Id.

35 Id.
A. Germany: A Centralized System of Judicial Review

In Germany, the Constitutional Court has virtually comprehensive competence for all questions of constitutional law. When a party raises a constitutional objection to a statute involved in any civil, criminal, or administrative case, the court hearing the case will refer the question to the Constitutional Court (the Bundesverfassungsgericht) for decision if it thinks that the statute is unconstitutional. When the decision of the Constitutional Court is issued, the original proceeding is resumed. The Constitutional Court has a monopoly position in that it alone can declare statutes invalid.

Moreover, the Court’s decisions are not merely binding upon all the litigants in the actual case, but in so far as they apply and interpret constitutional law, they generally bind all constitutional organs, courts, and authorities of Germany. The binding effect extends to the holding and its essential reasoning, but not to every single statement made by the Court in its often lengthy explanations. The decisions of the Constitutional Court, however, are not binding on the Court it-

---

36 Blair, supra note 5, at 27.
37 Mary Ann Glendon et al., Comparative Legal Traditions 92-93 (2d ed. 1994). The judge is not entitled to leave the statute which he regards as unconstitutional unconsidered in the course of the actual case. Dr. Jorn Ipsen, Constitutional Review of Laws, in Main Principles of the German Basic Law 107, 112 (Christian Starck ed., 1983). According to Article 100(1) of the Grundgesetz, or the Basic Law, he is obliged to suspend the case and submit the question to the German Constitutional Court. See id.
38 Glendon, supra note 37, at 93. While the lower courts do not make the ultimate decisions regarding constitutionality, they do play an important role in the judicial process. See id. at 92-93. They determine whether a statute is unconstitutional, warranting review by the Constitutional Court. See id. If they do not think a statute is unconstitutional, then the issue will not go to the Constitutional Court for its decision. See id.
39 Ipsen, supra note 37, at 112. It has a monopoly of constitutional jurisdiction because the other German courts lack the rights assumed by federal and state courts in the United States to invalidate, or at least refuse to apply, legislation on the grounds of unconstitutionality. Blair, supra note 5, at 27. Although German courts, in the course of adversary proceedings, have the unrestricted competence of accessory or incidental judicial review, they do not have authority to declare statutes invalid. Ipsen, supra note 37, at 112. This procedure is commonly described in legal literature as the right of an individual judge to review but not repeal statutes. Id.
40 Blair, supra note 5, at 27. In an early decision, for example, the Court held that the principles governing the allocation of air time by radio and television stations for political campaigns are binding on all stations—not merely those in the original lawsuit—and with respect to all political parties. Wolfgang Zeidler, The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms, 62 Notre Dame L. Rev. 504, 520 (1987). Once the Court declares a norm unconstitutional, the legislature is prevented from repromulgating the same provision. Id.
41 Id.
The Court has explicitly declared that it is permitted to dismiss legal opinions stated in earlier decisions, regardless of its importance to the earlier decision.\footnote{Id. at 521.}

Four well-known constitutional principles which partially comprise the “Rule of Law” lend explanation for judicial review in Germany.\footnote{Id. Realistically, however, the Court departs from its own precedent only with great reluctance. Zeidler, supra note 40, at 521. Because of its unique ability to establish binding interpretations of the Basic Law, the Federal Constitutional Court, as the highest court, must be authorized to correct legal opinions which are later found to be inappropriate, excessively far-reaching, or based on false precepts. Id. In accord with this authority, the Court recently corrected fixed guidelines for building development plans which were too general. Id. (citing 70 BVerfGE 35, 53). After a detailed analysis of the res judicata effect in each individual case, the Court arrived at a more differentiating solution, stating it would no longer adhere to the earlier case law. Id.}

First, the separation of powers is explicitly maintained in the German Constitution, and it is implicitly maintained in the provisions that govern judicial competency.\footnote{Id. at 521.} Second, the independence of the courts and judges is stipulated by the German Constitution which states that “the judges shall be independent and subject only to the law.”\footnote{See id.} Third, the binding force of statutory law upon judges and executive officers is primarily an interpretive, not a political or institutional, problem.\footnote{Id. (citing GRUNDEGESETZ [Constitution] [GG] art. 97, para. 1). Paragraph 3 of Article 1 of the Basic Law provides that fundamental rights shall bind the legislature, the executive, and the judiciary as “directly enforceable law.” GG art. 1, para. 3. Furthermore, Article 20, paragraph 3 of the Basic Law states that the executive and the judiciary shall be bound by “Gesetz und Recht,” which means “law and justice.” Id. art. 20, para. 3.}

Whenever the meaning of a statutory rule is clear and precise, the judge will feel bound by it and will accordingly give deference to the statute.\footnote{Denninger, supra note 44, at 1015–16.} Problems arise in those areas of the law where the meaning of the rule is not clear and precise.\footnote{Id. at 1016.} Fourth, the large and comprehensive jurisdiction of the Federal Constitutional Court allows for judicial review.\footnote{Id.} Although the Constitutional Court has no appellate jurisdiction, when a conflict exists between state and federal law and when the Federal Constitution is at stake, the Court has jurisdiction.\footnote{Id. Such comprehensive jurisdiction includes, among other powers, the right to conduct abstract judicial review, concrete judicial review, and rule on legislative omissions. See Zeidler, supra note 40, at 505–07.}

Such jurisdiction necessarily allows for judicial review because it allows...
the Court to strike down laws inconsistent with the Federal Constitution.52

1. Means the Constitutional Court Employs to Determine Constitutionality

In Germany, the Court uses "constitutional textualism" to interpret the Constitution.53 According to this method, the Court strictly adheres to the constitutional text.54 However, the Court also utilizes systematic and teleological modes of inquiry.55 The focus is on the text as a whole, and the judges ascertain the theme, or telos, of the Constitution.56 In order to confirm judgments based on teleological reasoning, the Court employs historical and functional considerations.57

The Court has invoked theories of its own creation, including the notion of the "objective order of values."58 According to this concept, the Constitution incorporates the "basic value decisions" of the founding fathers, the most basic of which is their choice of a free democratic basic order, including a liberal, representative, federal, parliamentary democracy, buttressed and reinforced by basic rights and liberties.59 These basic values are objective because they have an independent reality under the Constitution, imposing upon all organs of government an affirmative duty to see that they are realized in practice.60 The Constitutional Court incorporates this concept by interpreting the Basic Law (Grundgesetz) in terms of its overall structural unity and by envisioning the Basic Law as a unified structure of substantive values.61 In one case, for example, the Constitutional Court held that a provision in the tax laws which afforded unwed mothers and foster parents certain benefits was constitutionally conforming.62 The Court concluded that fathers of illegitimate children—who are not specifically

52 See id.
54 See id.
55 Id.
56 Id. The Basic Law must not only be understood as the sum total of individual guarantees and organizational regulations, but also as a unity which is characterized by certain value judgments, especially those concerning basic human rights and the principles of constitutionality and democracy. Zeidler, supra note 40, at 507.
57 See Koomers, supra note 53, at 844–45.
58 See id. at 858.
59 Id. at 858–59.
60 Id. at 859.
61 See id. at 858.
62 See Zeidler, supra note 40, at 510.
covered by the wording of the law—could in certain circumstances be considered “foster parents” in view of the constitutional requirement of equality for illegitimate children. 63 The Court premised its decision on the assumption that the legislature would have included such a definition if it had recognized the omission. 64

In addition to postulating an objective order of values, the Justices of the Federal Constitutional Court have also arranged these values in a hierarchical order crowned by the principle of human dignity. 65 It was precisely this principle of human dignity that compelled the Court to strike down a liberalized abortion statute in 1975. 66 In its opinion, the Court stated: “That interruptions of pregnancy are neither legally condemned nor subject to punishment is not compatible with the duty incumbent upon the legislature to protect life, if the interruptions are a result of reasons which are not recognized in the value order of the Basic Law.” 67

2. Criticisms and Defenses of Judicial Review as Exercised by the Constitutional Court

The Constitutional Court is often criticized for its political role. 68 Many government agencies and party leaders resort to constitutional litigation for essentially political ends. 69 When the Court appears to cooperate in the achievement of these ends, it is sometimes rebuked by German citizens. 70 Also, the Court invites objections when it creates value theories, thus imposing its own values on the nation as a whole. 71 For example, in 1993, the Court again asserted an unlimited duty of the state to protect nascent life following the enactment of The Pregnancy and Family Assistance Law of July 27, 1992. 72 Therefore, unless

63 Id.
64 Id.
65 Kommers, supra note 53, at 860.
66 Abortion Case, 39 BVerfGE 1, 1–2 (1975).
67 See Kommers, supra note 53, at 843.
68 See id.
69 See id.
70 See id. Criticism is usually directed against the government agencies or party leaders who would resort to constitutional litigation for essentially political ends. Id.
71 See id.
72 Glendom, supra note 37, at 116; Rainer Frank, Federal Republic of Germany: Three Decisions of the Federal Constitutional Court, 33 J. Fam. L. 353, 355–56 (1994–95). The Pregnancy and Family Assistance Law maintained that a termination of pregnancy within the first twelve weeks was to remain nonpunishable if the pregnant women consulted a recognized office before the abortion.
one of the exceptions already listed in the law is not present, a termi­
nation of pregnancy is fundamentally an unlawful act.\footnote{73}{Frank, supra note 72, at 356.}

The difficult problems of judicial review in Germany cannot be
resolved by mere resort to statutory or constitutional interpretation
because they are caused by functional and political realities.\footnote{74}{Denninger, supra note 44, at 1016.}
The German Constitution’s supremacy clause entirely disregards all ques­
tions of federal or state competence or jurisdiction.\footnote{75}{Id. The Supremacy Clause asserts that the Basic Law controls the entire German legal order. Kommers, supra note 53, at 846. Article 1, paragraph 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.” Id. Article 20 reinforces this provision by subjecting the legislature to the constitutional order and by binding the executive and judiciary to law and justice. Id. Article 19, paragraph 2 carries the principle of the Basic Law’s supremacy even further; it bans any law or governmental action that invades “the essential content of [any] basic right.” Id. Moreover, Article 79, paragraph 3—known as the “eternity clause”—bars any amendment to the Basic Law that would tamper with the principle of federalism or impinge on the state an affirmative duty to respect and protect it. Id.}

The German Constitution means the abstract ranking of rules.\footnote{76}{Denninger, supra note 44, at 1016.} Constitutional rules override all other kinds of rules, including parliamentary statutory law, executive orders, regulations and administrative rulings having the force of law, bylaws of corporations and municipalities, and common law.\footnote{77}{Id. In German, this rule is translated as: “Bundesrecht bricht Landesrecht.” Id.}
The relationship between federal and state law is briefly covered by a rule within the German Constitution which maintains that federal law shall override state law.\footnote{78}{Id.}

\subsection*{B. The United States of America: A Decentralized System of Judicial Review}

The United States has a decentralized system of judicial review which
gives all judicial organs within it the power to determine the constitu­
tionality of legislation. Any judge deciding a case where an applicable legislative norm conflicts with the Constitution must disregard the former and apply the latter. This would certainly lead to inconsistent results on close questions because of differing modes of interpretation, but the doctrine of stare decisis resolves this. According to this doctrine, courts are bound to follow their own prior decisions and the precedents of higher courts in the same jurisdiction. The existence of the single Supreme Court, combined with the lower courts' duty to follow superior precedents, ensures the uniformity of constitutional adjudication.

1. Means By Which the Supreme Court Applies Judicial Review

There are several different ways in which the Supreme Court reviews the constitutionality of statutes. Textualism is one constitutional methodology used by Chief Justice Marshall in Marbury v. Madison. However, a major problem with textualism is that the text may not be clear. A second method used by the Supreme Court for constitutional interpretation is "originalism." This is the view that the Court should strike down legislation only if it violates the original intent of the Framers of the Constitution. For the open-textured provisions and for modern problems not specifically targeted by the text, originalism offers some concrete guidance and constraint. A third method em-

79 Cappelletti, supra note 11, at 132–33. This differs from the centralized system which confines the power to a single, judicial organ. Id. at 133.
80 Id. at 135. Generally, a constitutional norm, if the constitution is rigid, prevails over an ordinary legislative norm in conflict with it. Id.
81 Id. at 138.
82 Cappelletti, supra note 11, at 139.
83 Id.
84 See Daniel A. Farber et al., Constitutional Law 77 (1993).
85 See id.; see also Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). This case was the first Supreme Court opinion to assert the power of judicial review. See infra notes 158–73.
86 See Farber, supra note 84, at 77.
87 Id. at 78.
88 Id. Interpretation, therefore, depends on history. John Arthur, Words That Bind 23 (1995). The question to be asked in interpreting vague constitutional language is how those who originally wrote the words understood them; the limits imposed on elected officials by the Constitution are exactly the limits that the Framers had in mind to impose. Id.
89 Farber, supra note 84, at 78. However, originalism has its own problems. Id. at 79. First, the Framers of most of the provisions of the Constitution failed to discuss the issues in which we are interested today. Id. Also, even when the Framers addressed specific issues in clear terms, there remains the problem of aggregating individual views into the collective views of a diverse group of individuals. Id. These practical problems with originalism make it practically impossible to
ployed by the Court to determine the scope of a provision is to refer to tradition and the Court’s own precedents. Under this approach, constitutional interpretation operates as a form of common law, developing over time but constrained by the past.

A fourth method, advocated by Professor John Hart Ely, is the representation-reinforcing approach to judicial review. Essentially, Ely argues that certain provisions of the Constitution are too elastic to constrain the Supreme Court and are open-textured as to invite dynamic interpretation over time. To provide meaning to these clauses, Ely concludes that judges should supply answers that derive from the general themes of the entire constitutional document and not from a source beyond the Constitution.

A fifth approach to constitutional interpretation is a normative approach. Normativists argue that the indeterminacy of law is liberating rather than debilitating, because it frees judges to consider arguments of justice and norms. It also requires judges to take responsibility for their actions, and to approach their task in a more humble manner. Under this mode of interpretation, the Supreme Court, when interpreting the Constitution, is speaking to a current audience, seeking to persuade them that their vision is morally justifiable.

figure out the specific intentions of the Framers about any current constitutional issue. A deeper problem with originalism is that the Framers may have realized the futility of writing many specific answers in the Constitution. Perhaps their specific intention was to provide no concrete answers, but to let the answers develop over time in a common law fashion.


Id.

FARBER, supra note 84, at 79. Perhaps their specific intention was to provide no concrete answers, but to let the answers develop over time in a common law fashion.

Id.

Id. In this way, dynamic judicial review would be consistent with the consent of the governed.

Id. The generation of the Framers gave future judges expansive language, but those judges would be constrained by the themes of the overall Constitution. Id.; see also infra notes 99–123 and accompanying text (addressing the countermajoritarian difficulty).

See FARBER, supra note 84, at 114.

Id. An open-ended constitutional provision might be given content by referring to prevailing morality or to some form of consensus. STONE, supra note 90, at 41. But this possibility raises two questions. Id. First, it is hardly clear that judges are better than legislators as registers of social consensus. Id. Second, in light of the fact that the Constitution, including the Bill of Rights, is often regarded as a shield against social consensus, it might be inconsistent to suggest that its content derives from that consensus.

Id. at 41–42.

See FARBER, supra note 84, at 114.

Id.
2. Criticisms and Defenses of Judicial Review in the United States

Most objections to American judicial review are based on its countermajoritarian nature. The countermajoritarian difficulty arises because the power of judicial review is in tension with our fundamental commitment to representative democracy. For many, it is troubling that nine unelected judges with life tenure have the power of judicial review. Legislation has legitimate coercive force; it has been adopted by majority votes of representatives elected by the people. These representatives are accountable to the people because of their limited terms. The coercive force of decisions invalidating legislated statutes, when made by unelected judges who cannot be removed from office, however, requires more elaborate justification—this is the countermajoritarian difficulty.

There are many defenses to the countermajoritarian argument. First, the countermajoritarian difficulty seems irrelevant when the legislature itself authorizes review. Section 25 of the Judiciary Act of 1789, which is itself a legislative act, gives the Supreme Court jurisdiction to review a final judgment in the highest court in which it determines the validity of a treaty or statute of the United States.

Second, the most typical defense against the countermajoritarian difficulty attempts to illustrate that judicial review is consistent with popular consent. There are four elements to this approach. The first step is to conceptualize the Constitution as a consent-based document. It was ratified through state conventions, and subsequent generations of Americans have been born into this arrangement and implicitly consent by taking advantage of the opportunities offered by our polity and by retaining their citizenship. The second step is to conceptualize the Constitution as not just any majoritarian document,

---

99 See id. at 74.
100 See id. at 75.
101 Id. at 74.
102 See Fafer, supra note 84, at 97.
103 Id.
104 See id. at 97.
105 See id. at 75.
106 Id. at 74.
107 Fafer, supra note 84, at 74.
108 Id. at 75.
109 Id.
110 Id.
111 Id.
but one of supervening authority.\textsuperscript{112} The Supremacy Clause states that the Constitution "trumps" federal and state laws inconsistent with it.\textsuperscript{113} Thus, any current expression of majority preferences, through legislation and elected representatives, is subject to the ongoing limits expressed in the Constitution.\textsuperscript{114} The third step is to demonstrate that, in a given case, the federal or state law is actually inconsistent with the Constitution.\textsuperscript{115} The fourth step is to conclude that the Supreme Court has the authority to strike down a federal or state law that is inconsistent with the Constitution.\textsuperscript{116}

Under this approach, the Supreme Court is merely imposing the limits set by the original supermajority upon the current preferences of perhaps a temporary majority.\textsuperscript{117} Thus, the Court is only enforcing the original Constitution, and its action is neither countermajoritarian nor violative of the consent of the governed.\textsuperscript{118} If Congress or a state legislature enacts a statute which is directly inconsistent with the text of a provision of the Constitution, then the Court is on its strongest ground in overriding current majorities.\textsuperscript{119}

Another defense of the countermajoritarian difficulty is that it seems necessary as a way to protect minorities from a potentially tyrannical majority.\textsuperscript{120} The role of the Court is to protect certain rights indispensable to politics and certain groups that are for one reason or another

\textsuperscript{112} Farber, supra note 84, at 75.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Farber, supra note 84, at 75.
\textsuperscript{118} Id. There are many difficulties with such a formalist, consent-based theory of judicial review. Id. at 76. It may not be appropriate for the major premise to assume that we have an ongoing implicit consent to the original Constitution, which was negotiated and ratified by only a tiny minority of the population who could not possibly have envisioned what the world would be like. See id. Also, there is a central problem with constitutional indeterminacy. Id. After all, you could read the constitutional provision in question to be consistent with the statute. Farber, supra note 84, at 76. The problem is particularly large for consent-based theories, for if they are unable to avoid indeterminacy in constitutional interpretation—and they cannot provide "objective" answers—they are unable to provide the interpretive closure necessary to escape the countermajoritarian difficulty. Id.
\textsuperscript{119} Id. at 77. Textualism is the methodology deployed by Chief Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Id. Chief Justice Marshall contended that the mandamus provision was inconsistent with Article III, Section 2, Clause 2 of the Constitution. Id. The constitutional provisions providing details for the structure are generally much easier to apply than the broader provisions defining limits on governmental action, such as the Equal Protection Clause and the Due Process Clause. Farber, supra note 84, at 77-78.
\textsuperscript{120} See Stone, supra note 90, at 43.
excluded from or unable fully to participate in politics. The relative inability of such groups to participate in or be represented by the political process is said to justify a judicial role designed to bring about a better democracy. The Court, which is not directly accountable to the public, can better withstand the pressures of the majority than the legislature, and this will actually promote the democratic order.

### III. History of Judicial Review in Germany and the United States

#### A. The History of German Judicial Review and the Federal Constitutional Court

The German Constitution of 1949 (Basic Law) was drafted in the aftermath of the nation’s shocking experience with a totalitarian regime. After the demise of the Third Reich, many Germans became aware of the fact that it was the “Staat,” the government and all its staff, that had committed the most atrocious crimes. They realized that their legal order from 1933–1945, instead of fostering justice, had permitted brutal inhumanity and immorality. As a result, legal positivism did not influence governmental action for many years. Despite skepticism towards any kind of legislation, there was at the time an intense demand for legal rules and for establishing positions of justice, along with a strong tendency toward the promotion of judicial review.
The judiciary’s power increased as a result of these social changes and the average citizen’s rising expectation that the administration operate as a modern democratic welfare state.\textsuperscript{129}

Judicial power is deeply rooted in Germany’s Basic Law—in the Constitution of the Federal Republic of Germany.\textsuperscript{130} It is not the constitutional commitment to a social welfare state that strengthens the judicial branch at the expense of the legislative branch, but rather several principles which constitute the “Rule of Law.”\textsuperscript{131}

From 1949–1968, the Basic Law provided a federal supreme court in order to preserve the uniformity of the federal law.\textsuperscript{132} In 1968, several provisions of this law were amended.\textsuperscript{133} The federal supreme court was abolished not because there was a fear of too powerful a judiciary, but because the envisaged integrating function of a federal supreme court was unnecessary.\textsuperscript{134} This function has always been exercised by the Constitutional Court.\textsuperscript{135} The Act on the Federal Constitutional Court of February 3, 1971 expressly acknowledged the Constitutional Court’s dual function as a court of justice and a “warden of the constitution.”\textsuperscript{136}

The political character of the Constitutional Court is logically implied by its preoccupation with constitutional law.\textsuperscript{137} The political nature of a constitutional court is, in essence, the subjection of legislature and executive to the judgment of a court, and the attendant rejection of the unrestricted rule of the majority limited only by its self-restraint.\textsuperscript{138} The new readiness in post-war Germany to accept such subjection of the political branches to the judicial branch is not surprising.\textsuperscript{139} Many Germans claim that the respect enjoyed by the Constitutional Court is a corollary of the distrust of the legislature, and they no longer believe that the political interests of the current majority are set aside when the Constitution requires.\textsuperscript{140}

\textsuperscript{129} See Denninger, \textit{supra} note 44, at 1014.

\textsuperscript{130} \textit{Id.} at 1014–15.

\textsuperscript{131} \textit{Id.} at 1015. This is also known as “Rechtsstaatprinzip.” \textit{Id.}

\textsuperscript{132} \textit{Id.} at 1025.

\textsuperscript{133} Denninger, \textit{supra} note 44, at 1025.

\textsuperscript{134} \textit{See id.}

\textsuperscript{135} \textit{Id.} At present, five high courts of the five branches of jurisdiction are ranked as highest courts. \textit{Id.} Some of their members have been designated to constitute a joint panel in order to preserve uniformity of the law. \textit{Id.}

\textsuperscript{136} Act on the Federal Constitutional Court, art. 1, 1971 Bundesgesetzblatt [BGBl], Teil I 297 (F.R.G.).

\textsuperscript{137} Blair, \textit{supra} note 5, at 25.

\textsuperscript{138} \textit{Id.}

\textsuperscript{139} \textit{Id.} at 25–26.

\textsuperscript{140} \textit{Id.} at 26.
During the 1970s, the Constitutional Court frequently acted as a brake on the progressive or reform-minded activities of the liberal-social democratic majority in Parliament.\textsuperscript{141} The Constitutional Court was rebuked severely and repeatedly for offending the doctrine of the separation of powers.\textsuperscript{142} Apart from politically-motivated criticisms, numerous competent voices, including former judges and justices then in office, charged that the Constitutional Court had impermissibly intruded into the political sphere.\textsuperscript{143} These critics warned their colleagues that the Constitutional Court could abuse its powers by making political choices between competing legislative programs because basic rights are not solely subjective, but they also include objective decisions.\textsuperscript{144} The critics believed that the concept of objective value decision-making should not become a vehicle for shifting essentially legislative functions regarding the formation of the social order to the Constitutional Court.\textsuperscript{145} But despite the substantial opposition to its functioning in the political system, it is significant that the Constitutional Court has not been hampered in its activities.\textsuperscript{146}

B. \textit{The History of United States Judicial Review and the Role of the Supreme Court}

To understand judicial review in the United States, one must understand that in 1787, there was widespread fear of oppression by a remote federal government, centered largely in dread of "legislative despotism."\textsuperscript{147} After the Articles of Confederation,\textsuperscript{148} however, some believed

\begin{enumerate}
\item Denninger, \textit{supra} note 44, at 1023.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 1023–24 (citing the 1975 Abortion Case, 39 BVerfGE 1, and the University Reform Case, 35 BVerfGE 79). In the dissenting opinion of the \textit{Abortion Case}, one justice remarked that "the Federal Constitutional Court is unwarily falling in this case into the position of a political arbitration board to be used for the choice between competing legislative projects." Glendon, \textit{supra} note 37, at 110.
\item Blair, \textit{supra} note 5, at 26.
\item Raoul Berger, \textit{Congress v. the Supreme Court} 8 (1969). Americans, after gaining their independence from Britain, did not want to make the same mistakes in their government that they believed Britain had made. \textit{Id.}
\item The Articles of Confederation were adopted shortly after the Revolution in order to ensure some unification of the states for common foreign and domestic problems, but the overriding understanding was that the states would remain sovereign. Stone, \textit{supra} note 90, at 2. By modern standards, however, there were conspicuous gaps. \textit{Id.} The power to tax and the power to regulate commerce were missing. \textit{Id.} Also, two of the three branches of the national government—the executive and the judicial branches—were nonexistent. \textit{Id.}
\end{enumerate}
that only despotism could effectively govern the vast land mass.\textsuperscript{149} When work of the Constitutional Convention was finally completed and the proposed Constitution published, it produced widespread controversy.\textsuperscript{150} Answers to many governmental questions and political concerns could not be found within the Constitution itself because it did little to specify the powers it conferred or the relationships among the branches it created.\textsuperscript{151} It is this vagueness, however, that allowed for the establishment of judicial review.\textsuperscript{152}

The judiciary, established in Article III of the Constitution, is the least well-defined of the three branches of government.\textsuperscript{153} Article III speaks of judicial power that is vested in a Supreme Court and of the power of the Court to hear cases arising under the Constitution of the United States.\textsuperscript{154} The nature and limits of judicial power are not delineated, nor is it explained which cases arise under the Constitution.\textsuperscript{155} Indeed, the Constitution neither explicitly gives the federal courts authority to overturn statutes passed by Congress and state legislatures nor asserts that judicial review is not among the Court’s functions.\textsuperscript{156} Yet despite the lack of a clear mandate for judicial review, the Supreme Court has exercised that power and left a clear mark on American history.\textsuperscript{157}

1. Marbury v. Madison—The First Sign of Judicial Review

The 1803 decision of Marbury v. Madison\textsuperscript{158} was the first Supreme Court opinion explicitly asserting the power of judicial review, or the

\textsuperscript{149} BERGER, supra note 147, at 8--9. In Federalist No. 10, Madison wrote that “among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.” THE FEDERALIST No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

\textsuperscript{150} ARTHUR, supra note 88, at 8.

\textsuperscript{151} Id.

\textsuperscript{152} See id. “[I]t is clear as such matters can be that the Framers of the Constitution specifically, if tacitly, expected that the federal courts would assume a power—of whatever exact dimensions—to pass on the constitutionality of actions of the Congress and the President, as well as of the several states.” ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 15 (1962).

\textsuperscript{153} ARTHUR, supra note 88, at 8.

\textsuperscript{154} Id.

\textsuperscript{155} Id.

\textsuperscript{156} Id.

\textsuperscript{157} Id.; see also Brown v. Board of Educ. of Topeka, No. 1, 347 U.S. 483 (1954); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{158} The plaintiff, William Marbury, brought suit in the Supreme Court without first bringing suit in a lower court. See Marbury, 5 U.S. (1 Cranch) at 153–58. He asked the Court to determine that Secretary of State James Madison had unlawfully refused to deliver Marbury’s commission,
power to strike down federal statutes that violate the Constitution.\textsuperscript{159} According to Chief Justice Marshall, Article III of the Constitution gives the Court the power to exercise original jurisdiction in cases affecting ambassadors and other consuls or where a state is a party.\textsuperscript{160} Otherwise, the Supreme Court is to exercise appellate jurisdiction.\textsuperscript{161} In the last part of his opinion, Marshall considers why the Court, rather than another branch of government, should have the power to pass on the constitutionality of enactments, and he provides several justifications for judicial review.\textsuperscript{162} First, he asserts that the Constitution controls any legislative act repugnant to it, and the fact that the constitution is written requires judicial review.\textsuperscript{163} He states, "The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."\textsuperscript{164}

Second, Marshall maintains that because judges take an oath to uphold the Constitution, they should be given the power of judicial review.\textsuperscript{165} Although all government officials take such an oath, Marshall claims that this oath applies in a special manner to the conduct of judges in their official capacity.\textsuperscript{166} A judge cannot swear to discharge his duties properly to the Constitution of the United States if the Constitution forms no rule for the judiciary and if the Constitution cannot be interpreted by the judiciary.\textsuperscript{167}

Third, Marshall bases his argument on Article III, Section 2 of the Constitution, and he concludes, "It is emphatically the province and duty of the judicial department to say what the law is."\textsuperscript{168} According to

\textsuperscript{159} Id. The Marshall Court held, in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 304 (1816), that the Supreme Court also had the power to review state court statutes to determine whether the state statutes violated federal law. Farber, supra note 84, at 8. This Note, however, will concentrate mostly on the judicial review of federal statutes in the United States, and it will not discuss issues of federalism.

\textsuperscript{160} See Marbury, 5 U.S. (1 Cranch) at 173.
\textsuperscript{161} See id. at 173–75.
\textsuperscript{162} See generally id. at 175–80.
\textsuperscript{163} See id. at 176.
\textsuperscript{164} Id. at 176–77.
\textsuperscript{165} See Marbury, 5 U.S. (1 Cranch) at 180.
\textsuperscript{166} See id.
\textsuperscript{167} See id.
\textsuperscript{168} See id. at 177.
Marshall, Article III extends the judicial power of the United States to all cases arising under the Constitution.\(^{169}\) Marshall argues that this grant of jurisdiction would be meaningless if the courts did not have authority to examine the constitutionality of Congressional acts.\(^{170}\)

Fourth, Marshall focuses on notions of judicial roles, asserting that it is the ordinary role of courts to interpret the law.\(^{171}\) That role, Marshall claims, requires judges to construe the Constitution in the ordinary course of conducting business.\(^{172}\) Finally, Marshall contends that the Supremacy Clause lends credence to the existence of judicial review.\(^{173}\) Laws shall be made in pursuance of the Constitution, and an act repugnant to the Constitution must not be given effect.\(^{174}\)

2. Judicial Review After *Marbury*

The Supreme Court’s responsibility to undertake decisions in cases satisfying the proper jurisdictional requirements has changed dramatically since John Marshall was Chief Justice.\(^{175}\) The Judiciary Act of 1925, which still remains in effect, placed the question of judicial review almost entirely within the discretion of the Supreme Court.\(^{176}\) With the Judiciary Act, almost all cases become reviewable only by the discretionary writ of certiorari.\(^{177}\) The Court retains some formally obligatory jurisdiction, but even this small portion of its work has taken on

---

\(^{169}\) See id.

\(^{170}\) See *Marbury*, 5 U.S. (1 Cranch) at 177.

\(^{171}\) See id. at 177–78.

\(^{172}\) See id. at 177–79.

\(^{173}\) *Id*. The Supremacy Clause provides that the “Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land.” U.S. Const. art. VI, cl. 2.

\(^{174}\) STONE, supra note 90, at 32. It is clear, however, that the supremacy clause itself cannot be the clear textual basis for a claim by the judiciary that the right to determine the repugnancy of a law belongs to it. *Id*.

\(^{175}\) DORIS M. PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 1 (1980).

\(^{176}\) *Id*.

\(^{177}\) *Id*. at 1. In the U.S. Supreme Court, a review on writ of certiorari is not a matter of right, but of judicial discretion, and it will only be granted when there are special and important reasons. BLACK’S LAW DICTIONARY 1609 (6th ed. 1990). The Court’s single published guide to its criteria in case selection is Rule 19 of the Supreme Court Rules. PROVINE, supra note 175, at 3. This rule only cites the character of reasons which will be considered in the review decision. *Id*. The principal grounds for review that are mentioned in Rule 19 are conflicts among lower federal courts and important federal questions. *Id*. The Court has not released any official commentary on this vague rule, and justices have not given it precise meaning in any decisions. *Id*. Consequently, when the Court refuses to hear a case, the only certainty is that the case did not receive the four affirmative votes necessary for review. *Id*. 
discretionary characteristics as its caseload has grown increasingly burdensome. The typical issue the Court now faces is not whether the Court has jurisdiction to decide, but whether it will choose to decide a case on the merits.

The decision to decide has become more crucial because the Court’s capacity to hear and resolve cases has not kept pace with the increasing volume of petitions. While the Court claims that case selection is not a decision on the merits, the denial of review is the end of the road for most petitioners. Therefore, the case-selection process has immense practical importance for litigants.

The acceptance of judicial review was tested by the Court’s decision in Dred Scott v. Sandford. Until that decision, the Court had overturned only one federal statute, the minor law involved in Marbury v. Madison. In Dred Scott, however, Chief Justice Roger Taney held for the Court that Congress had exceeded its constitutional powers in adopting the Missouri Compromise prohibiting slavery in some territories. That decision was intended to resolve the legal controversy over slavery. Instead, the level of controversy increased and the Court was criticized in the North. Yet, although the Court’s prestige suffered dramatically, the Court itself and its basic powers survived without serious challenge. This survival demonstrated the success of the assertion of power that Marshall had undertaken. Whatever the legal and philosophical merits of Marshall’s Marbury opinion and those opinions subsequent to it, judicial review of Congress is no longer seriously questioned. Relying on judicial review, courts have gone on to strike down a vast array of laws as unconstitutional.

---

178 Provine, supra note 175, at 1.
179 Id.
180 Id. The Court currently turns down more than ninety percent of the petitions that fulfill jurisdictional requirements. Id.
181 Id.
182 Provine, supra note 175, at 1.
183 Lawrence Baum, The Supreme Court 19 (2d ed. 1985); see also Dred Scott v. Sandford, 60 U.S. (How. 19) 393 (1857).
184 See Dred Scott, 60 U.S. (How. 19) at 393–400.
185 Dred Scott, 60 U.S. (How. 19) at 393–400; Baum, supra note 183, at 19.
186 Dred Scott, 60 U.S. (How. 19) at 393–400; Baum, supra note 183, at 19.
187 Dred Scott, 60 U.S. (How. 19) at 393–400; Baum, supra note 183, at 19.
188 Dred Scott, 60 U.S. (How. 19) at 393–400; Baum, supra note 183, at 19.
189 Dred Scott, 60 U.S. (How. 19) at 393–400; Baum, supra note 183, at 19.
190 See Arthur, supra note 88, at 16.
191 Id.; see generally Cooper v. Aaron, 358 U.S. 1 (1958) (providing the major judicial support for the view that the interpretation of the Constitution by the Supreme Court is supreme and
IV. THE GERMAN CONSTITUTIONAL COURT AND THE UNITED STATES SUPREME COURT

A. The German Constitutional Court

The Constitutional Court is a specialized constitutional tribunal; it is the "supreme guardian of the Constitution." It is autonomous with respect to all other supreme constitutional bodies, and it is an independent court of the federation. The Court's role is to decide constitutional issues, not to avoid them or to resolve them as a matter of last resort.

1. The Structure of the Constitutional Court

The Constitutional Court has two chambers, or senates, each composed of eight judges. The senates are independent of one another; each acts as the Constitutional Court. There is no appeal to the plenum by the litigants, but if one senate, in deciding a legal question, disagrees with the opinion of the other senate, the question has to be referred to the plenum of the Court. In spite of the character of the final); Brown v. Board of Educ. of Topeka, No. 1, 347 U.S. 483 (1954) (declaring segregation in the school systems of Topeka, Kansas and other schools to violate the Fourteenth Amendment); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (striking down a New York monopoly law and upholding the power of Congress to regulate interstate commerce as enumerated in the Constitution); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (holding that the Judiciary Act authorized, and the Constitution permitted, Supreme Court review of state court decisions in criminal cases where federal issues were properly presented).

192 Kommers, supra note 53, at 840.
193 Id. The preservation of the constitutional state in all of its particulars is the function of the Federal Constitutional Court. Id. at 848.
194 Denninger, supra note 44, at 1025.
195 Kommers, supra note 53, at 848.
196 GLENDON, supra note 37, at 93.
197 Id. Each Senate has its own separate jurisdiction and is administratively separate from the other. Alan N. Katz, Federal Republic of Germany, in LEGAL TRADITIONS AND SYSTEMS—AN INTERNATIONAL HANDBOOK 85, 90 (Alan N. Katz ed., 1986). There is a clear demarcation of responsibilities between the two Senates. Blair, supra note 5, at 11. The first Senate retains jurisdiction in cases of concrete judicial review or constitutional complaints. Id. Thus, it deals with the basic liberties located in Articles 1–20 of the Basic Law. Katz, supra, at 90. The second Senate is responsible for deciding the majority of significant federal cases. Blair, supra note 5, at 12. It is charged with handling conflicts between the various levels of government, as well as election disputes, disagreements involving international law, and questions related to the constitutionality of political parties. Katz, supra, at 90.
198 GLENDON, supra note 37, at 93.
Constitutional Court as a “twin court,” the uniformity of constitutional law can be maintained. 199

The justices of the Constitutional Court regard themselves as “the guardians of the Constitution.” 200 The Parliament elects the justices by a two-thirds vote for a single, non-renewable term of twelve years. 201 An effort is made to ensure that the Court’s membership reflects all major political groupings. 202 But there is little sign that Constitutional Court judges are chosen with an eye toward their views on federalism. 203 The Court retains a relatively collegial and anonymous character, and the views on federalism of most of the judges cannot be specified with certainty. 204 The evidence of the values and the influences of individual judges is incomplete, and conclusions based on such an inquiry have little value. 205

The Constitutional Court judges differ from ordinary German judges in several important respects. 206 First, while the judge of an ordinary state or federal court resorts primarily to interpretation of simple statutes in reaching decisions, a justice of the Constitutional Court uses the text of the Constitution as his yardstick. 207 Second, the judge is bound to observe rules regularly enacted, but the Constitutional Court justice may declare legislation null and void. 208 Third, some of the Constitutional Court’s decisions pass into law, and its holdings are published in the Federal Gazette. 209 As a consequence, the Court’s decisions bind all federal and state organs of government and all other German courts and public officials. 210 The decisions of the Constitutional Court, however, are not binding on the Court itself. 211

199 Id.
200 Denninger, supra note 44, at 1017.
201 Kommers, supra note 53, at 844. This regulation exists because there was an awareness of the risk of an inhibited judicial behavior toward those with influence over the re-seletion process. See Blair, supra note 5, at 13.
202 Cappelletti, supra note 11, at 138.
203 Blair, supra note 5, at 22.
204 See id.
205 See id. at 24.
206 Denninger, supra note 44, at 1017.
207 Id.
208 Id.
209 Id.
210 Kommers, supra note 53, at 842.
211 Zeidler, supra note 40, at 521.
2. Jurisdiction

The decisions of the Constitutional Court are final and binding on all other courts.\textsuperscript{212} No other court, not even a high federal court, is empowered to declare a statute unconstitutional; this power is reserved exclusively for the Constitutional Court.\textsuperscript{213} Unlike the United States Supreme Court, the Constitutional Court has no appellate jurisdiction.\textsuperscript{214} When, however, a conflict exists between state and federal law and when the integrity of the German Constitution is at stake, the Federal Constitutional Court has jurisdiction.\textsuperscript{215} The Court’s jurisdiction is compulsory; it may not avoid decision in a case properly before it by invoking a “political question” doctrine or other “passive virtues.”\textsuperscript{216}

3. The Functions of the Constitutional Court

The Constitutional Court has several functions which signify major facets of constitutional jurisdiction in Germany.\textsuperscript{217} The wide-ranging jurisdiction of the Constitutional Court has its basis in many different articles of the Basic Law.\textsuperscript{218} The relevant items are listed together in Section 13 of the detailed Federal Constitutional Court Act by which the Constitutional Court was established.\textsuperscript{219} First, the court has the power to determine and apply the hierarchy of legal norms.\textsuperscript{220} Second, the Constitutional Court is responsible for the protection of federalism.\textsuperscript{221} Third, the Court has the power to intervene in disputes between the constitutional organs of the Federal Republic which necessitate an

\textsuperscript{212} Kommers, \textit{supra} note 53, at 840.
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} Denninger, \textit{supra} note 44, at 1016.
\textsuperscript{215} \textit{Id.}
\textsuperscript{216} Kommers, \textit{supra} note 53, at 842. The Supreme Court, for prudential reasons, may decline to exercise jurisdiction that it possesses. \textit{Id.} at 842 n.16. This difference between the United States and German tribunals should not be exaggerated. \textit{Id.} Even though the Constitutional Court may not formally decline jurisdiction that it possesses, it has, in highly charged “political” cases, delayed handing down its decision, even for years, in the hope that the moving party will eventually withdraw the case. \textit{Id.}
\textsuperscript{217} See Glendon, \textit{supra} note 37, at 94.
\textsuperscript{218} Blair, \textit{supra} note 5, at 10.
\textsuperscript{219} \textit{Id.}
\textsuperscript{220} See Glendon, \textit{supra} note 37, at 94. The Constitution is the supreme law, followed by federal law which supersedes state law. \textit{Id.}
\textsuperscript{221} See \textit{id.} at 95.
interpretation of the Basic Law ensuring the separation of powers. Any person who claims that one of his basic rights has been violated by public authority may file a complaint of unconstitutionality. Fifth, the Court has “concrete norm control” (konkrete Normenkontrolle) jurisdiction. Judges presiding over the regular judiciary may not declare laws unconstitutional, but if they regard as unconstitutional a law which is relevant to their decision, they shall refer the constitutional issue to the Constitutional Court. Once the latter decides the issue, the lower court may proceed with the case. Sixth, the Court is authorized to declare political parties unconstitutional if they seek to impair the democratic order or endanger the existence of the Federal Republic of Germany.

4. Roles and Restrictions of the Constitutional Court

The dual role of the Constitutional Court as both a political body and a court of justice, expressly acknowledged in the Act on the Federal Constitutional Court, arises from the nature of its duties. First, judicial review by a constitutional court is unavoidably, necessarily, and legitimately a task burdened with political implications and effects. Because politics and law are complementary functions, it follows that there can be no such thing as a complete separation of judicial and political power. Second, the members of the court perceive their role as requiring them to apply the law and not to make it. Third, the Constitutional Court is specifically and exclusively a constitutional court, not an integral part of the ordinary judicial system.

222 See id. This is known as “Organstreit.” Id.
223 See GLENDON, supra note 37, at 95.
224 See id.
225 Kommers, supra note 53, at 841.
226 Id.
227 Id.
228 Id.
229 See Denninger, supra note 44, at 1024–25.
230 Id. at 1024.
231 See id.
232 See id. Problems arise when the court decides an issue that does not concern the essence of the case. Id. Whenever it does so, the court produces substantial dicta, the legal status of which remains ambiguous under German law. Denninger, supra note 44, at 1024.
233 Id. at 1024–25.
The Federal Constitutional Court functions more as a political body than the United States Supreme Court. The United States would have denied review in nearly all of the important cases which the German Constitutional Court heard through a specific procedure called the “abstract review of statutes.” This review is used when there are divergent opinions about the compatibility of federal or state law with the Basic Law or the compatibility of state law with other federal law. This proceeding does not involve adversarial litigation because there is no injury in fact to ensure standing and justiciability. The potential applicants are limited to the federal government, the state government, or one-third of the members of the federal Parliament. Thus, the function of this procedure is to provide a weapon for the defeated parliamentary minority because it permits the political opposition to continue to oppose legislation before the court, even after its adoption by the majority, signature by the Federal President, and official promulgation.

Like the United States Supreme Court, the German Constitutional Court will not render merely advisory opinions. Passionately disputed political issues have come before the court through the “abstract review” procedure, and this has resulted in serious public repercussions. The public’s image of the court as a political arbiter has been reinforced by these events.

B. **The United States Supreme Court**

1. The Structure of the Supreme Court

The Supreme Court consists of nine justices. Ordinarily, formal Court decisions are made by the full nine members, but on occasion,
fewer than nine justices sit on a case. When only eight justices participate in a decision on the merits of a case, the Court may divide four to four. In the case of a tie vote, the decision of the lower court is left standing. A quorum for a decision on a case is six members. The Court seldom fails to achieve a quorum, but this failure, like a tie vote, results in affirmance of the lower court decisions.

The Constitution requires that members of the Supreme Court be nominated by the President and confirmed by a majority of the Senate. It also establishes that they will hold office "during good behavior." Thus, they serve for life unless they relinquish their posts voluntarily or are removed by impeachment proceedings. Beyond these basic rules, such issues as the number of justices, their qualifications and their duties have been settled by law and tradition, rather than specified in the Constitution.

2. The Jurisdiction of the Supreme Court

The jurisdiction of the Supreme Court can be divided into two parts. First, the Constitution gives the Supreme Court original jurisdiction over certain specified classes of cases as a trial court. The Court's original jurisdiction includes some cases to which a state is a party and cases involving ambassadors. Second, under its appellate jurisdiction, the Court may hear cases brought by parties dissatisfied with decisions of the federal courts of appeals and the specialized appellate courts in the federal system. The Court may hear cases

the Court's first century. BAUM, supra note 183, at 13. The final change to nine members was made in 1869, and the Court has remained at that size; any further changes appear unlikely. Id.

244 Id.; BAUM, supra note 183, at 14.

245 Id., at 14.

246 Id., at 14.

247 BAUM, supra note 183, at 14.


249 U.S. CONST. art. II, § 2, cl. 2; BAUM, supra note 183, at 13.

250 U.S. CONST., art. III, § 1; BAUM, supra note 183, at 13.

251 BAUM, supra note 183, at 13.

252 Id.

253 Id., at 9.

254 Id.

255 Id. Relatively few cases come to the Supreme Court in this way. BAUM, supra note 183, at 9.

256 Id.
brought directly from the district courts in certain cases in which an act of Congress was held unconstitutional.257

3. The Roles and Restrictions of the Supreme Court

The Supreme Court is bound by the principle of *stare decisis*.258 Under this principle, once the Supreme Court has made a decision, it will follow that decision in future cases and not overrule it.259 In *Federalist* No. 78, Alexander Hamilton provided a rationale for this principle.260 He stated, "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."261

But *stare decisis* is not an absolute rule, and in constitutional cases in this century, the Supreme Court has adopted a relaxed approach.262 The Supreme Court generally believes that *stare decisis* is a wise policy; but, in constitutional cases where correction through legislative action is practically impossible, the Court has often overruled its earlier decisions.263

V. A COMPARISON OF THE GERMAN SYSTEM OF JUDICIAL REVIEW WITH THAT OF THE UNITED STATES

A realistic comparison of the laws of Germany and the United States cannot be effected simply by contrasting the meanings of a couple of rules or the operations of different institutions.264 Similarly, the institutions of judicial review cannot be adequately compared without analyzing the respective social and political frameworks.265 The German Constitutional Court is more reluctant to test the outer limits of its power than the United States Supreme Court, which essentially established its own power of judicial review.266 The history of Germany has

---

257 Id.
258 *See* Farber, *supra* note 84, at 57. This is Latin for "let the decisions stand." Id.
259 Id.
261 Id.
262 Id.
263 *See* id. (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting)).
265 *See* id.
266 *See* Gleendon, *supra* note 37, at 117.
furnished the Germans with a commitment to the Rule of Law as the best protection against tyranny, and judicial power is deeply rooted in Germany’s Basic Law.\textsuperscript{267}

The system of judicial review in the United States is distinguished from that of Germany by several factors.\textsuperscript{268} First, the U.S. Constitution can be and is enforced by the Supreme Court and ordinary courts as part of the everyday process of adjudication of disputes.\textsuperscript{269} Second, the Supreme Court and other courts are granted power at all levels to decide questions that require the kind of choice among policies and values, or the kind of commitment of public funds, that other countries prefer to leave to the democratic alternative—majority rule as expressed through many imperfectly representative assemblies.\textsuperscript{270}

Third, the “constitutionalization” of a great many legal issues often halts the legislative process for resolving these issues.\textsuperscript{271} Once the Supreme Court has decided that certain rights are constitutionally protected, the underlying social controversy does not come to an end.\textsuperscript{272} But it can no longer proceed along the lines of bargaining and persuasion within the state legislatures and among citizens.\textsuperscript{273}

It is difficult to overturn decisions based on constitutional interpretation.\textsuperscript{274} Nonetheless, Congress has two avenues with which to reverse a constitutional decision or at least reduce its effects.\textsuperscript{275} First, if the Court has nullified a statute on constitutional grounds, Congress can write a second statute to try to meet the Court’s objectives.\textsuperscript{276} Second, Congress can overturn decisions directly by constitutional amendment.\textsuperscript{277} The constitutional decisions that Congress has acted to over-

\textsuperscript{267} See id.; Denninger, supra note 44, at 1014–15.
\textsuperscript{268} GLENDON, supra note 37, at 117.
\textsuperscript{269} Id.
\textsuperscript{270} Id.
\textsuperscript{271} Id.
\textsuperscript{272} Id.
\textsuperscript{273} GLENDON, supra note 37, at 117.
\textsuperscript{274} See BAUM, supra note 183, at 215.
\textsuperscript{275} Id.
\textsuperscript{276} Id. For example, in 1916 Congress used its power over interstate commerce to limit the employment of child labor. Id. In Hammer v. Dagenhart, 247 U.S. 251 (1918), the Court held that the commerce power was inadequate for this purpose. Id. In response, Congress adopted a new child labor statute in 1919 based on the taxing power. BAUM, supra note 183, at 215. The Court rejected this reasoning as well in Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922), and the effort to prohibit child labor failed. Id. In another example, after the Supreme Court struck down six major New Deal statutes in 1935 and 1936, Congress rewrote five of the laws. Id. at 215–16. Four of the five were upheld by the Court after its collective change of heart in 1937, and the fifth was not challenged. Id. at 216.
\textsuperscript{277} Id. Congress formally has proposed and sent to the states amendments to reverse Supreme
turn are only a small proportion of those that aroused congressional displeasure; this small proportion reflects the difficulty of the amendment process. The law in the area can also possibly change through reversal or gradual erosion of the Supreme Court’s decision. Such reversal or gradual erosion is more likely to occur in the German Constitutional Courts because judges serve fixed terms, and they are not bound by their own decisions.

In the American federal context, judicial review occurs exclusively after the law or action has been promulgated or taken effect (a posteriori) and only as a result of the involvement of litigants in a concrete case or controversy. But, in Germany, judicial review can be exercised in the abstract, in the absence of an actual case or controversy stimulating its exercise. It seems that the Constitutional Court, which can engage in a priori review, would appear to have the maximum potential for policy influence using constitutional review. On the other hand, a posteriori concrete review has hardly relegated the United States Supreme Court to a minor policy role.

Court decisions at least five times. BAUM, supra note 183, at 216. The Eleventh Amendment, which broadened state immunity from lawsuits, overturned Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). Id. The Fourteenth Amendment, which upheld the right of citizenship for black persons, nullified part of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Id. The Sixteenth Amendment, allowing a federal income tax, reversed Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429 (1894). Id. In 1924, Congress proposed the Child Labor Amendment to overcome the Court’s rulings that Congress lacked the power to regulate child labor. Id. This amendment, however, was not ratified by the states. BAUM, supra note 183, at 216. Finally, the Twenty-Sixth Amendment nullified the Court’s limitation on congressional power to reduce the legal voting age in Oregon v. Mitchell, 400 U.S. 112 (1970). Id.

278 Id. Members of Congress are hesitant to tamper with the Constitution, especially to limit the protections of civil liberties in the Bill of Rights, and the requirement of a two-thirds majority in each house presents a formidable obstacle to action. Id.

279 GLENDON, supra note 37, at 117. This rarely happens because the Court is bound by the principle of stare decisis. See FARBER, supra note 84, at 57.

280 See Zeidler, supra note 40, at 521.

281 Tate, supra note 1, at 6.

282 See id.

283 Id.

284 Id. at 7. The Supreme Court has, throughout its history, made major policy decisions in many controversial areas. See BAUM, supra note 183, at 197. For example, in 1954, the Supreme Court decided Brown v. Board of Educ. of Topeka, No. 1, which abolished separate schools for black and white students. 347 U.S. 483, 486–88 (1954). In Abington Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963), and Engel v. Vitale, 370 U.S. 421, 422–25 (1962), the Supreme Court ruled that public schools could not hold prayer and Bible-reading exercises for their students. Finally, in search and seizure cases, Mapp v. Ohio applied to the states the “exclusionary rule,” under which evidence illegally seized by the police could not be used against a defendant in state courts. See 367 U.S. 643, 658–60 (1961).
Another distinction important to understanding judicial review involves the extensiveness of the practice. The United States employs the “all courts” model. Any court may exercise judicial review, and a declaration of unconstitutionality on the part of a lower court judge need not be approved by any higher authority to be effective. Although cases can be appealed to the Supreme Court, the policy influence of the judiciary is maximized in the United States because all courts can review constitutional questions. In Germany, judicial review is exercised only by a specially designated court. This is the constitutional court model. Restricting the power to declare legislation and regulations unconstitutional to a constitutional court might increase the breadth of the typical constitutional questions posed to the courts, but it also sharply reduces the number of occasions and range of policy issues on which the courts can exercise judicial review.

The competence of the Constitutional Court in federal matters is, in some respects, wider than that of the Supreme Court. It has many roles that the Supreme Court does not assume in that it can determine political questions as well as engage in abstract review. But, in another respect, the jurisdiction is much narrower. It is solely a constitutional court. It is designed to adjudicate upon all constitutional questions, but only upon constitutional questions. It is not a general court of final appeal, like the Supreme Court.

The source and authority of the Federal Constitutional Court are relatively undisputed. In the United States, by contrast, the main task of constitutional theory is to find and establish the source and the limits of judicial review. Marbury v. Madison inaugurated this effort, but the glaring deficiencies of Marshall’s reasoning have prompted a

285 Tate, supra note 1, at 7.
286 Id.
287 Id. However, the judgment may be appealed. Id.
288 Id.
289 Tate, supra note 1, at 7.
290 Id.
291 Id.
292 See Blair, supra note 5, at 11.
293 See id.
294 Id.
295 Id.
296 Id.
297 See Blair, supra note 5, at 11.
298 Kommers, supra note 53, at 842.
299 Id.
perennial search in the United States for a more convincing theory of when and why the judiciary should invalidate the acts of elected officials.300 This situation presents a dramatic irony.301 On the one hand, judicial review is one of the hallmarks of American constitutionalism.302 On the other hand, there is no convincing theoretical explanation of where the Supreme Court’s power comes from and how it should be used.303 The Supreme Court asserted its own power of judicial review, and although it engages in such review without objection, there is no concrete source in the Constitution that grants this power explicitly. Supplying the explanation for judicial review has become one focus of American constitutional theory.304

Even with an explicit granting of the power of judicial review, there is still some controversy in Germany over the role of the Federal Constitutional Court.305 Judicial nullification of majoritarian policy draws as much fire in Germany as in the United States.306 The difference is that the fire in Germany is directed against government agencies or party leaders who would resort to constitutional litigation for essentially political ends.307 The Court is vilified only when it appears to cooperate in the achievement of these ends.308 Nevertheless, the countermajoritarian difficulty, a problem of judicial review in America, is not a major problem in Germany.309 The Basic Law itself resolves the difficulty, for no reliance on a theory of judicial review is necessary to justify the exercise of judicial power.310

The countermajoritarian difficulty does arise in Germany to the extent that the Federal Constitutional Court decides cases on the basis of historical and functional considerations.311 The Court has invoked theories of its own creation, including the notion of an “objective order of values.”312 This is the basis on which the Court has struck down a
number of important statutes, including a liberal abortion law. Some of these decisions have invited the objection, familiar to Americans, that justices are doing little more than imposing their own personal values on the nation as a whole.

The exercise of judicial review in Germany is somewhat less problematic than in the United States. First, the Parliament, not the executive, elects each justice by a two-thirds vote for a single nonrenewable term of twelve years. This averts the rise of an aging judicial oligarchy out of touch with the modern world. Supreme Court justices, on the other hand, serve a life term, and this often prevents the Supreme Court from growing and changing.

Second, in Germany, there is a set of generally agreed-upon approaches to constitutional interpretation. These approaches might be brought together under the general heading of “constitutional textualism.” The code law tradition, with its emphasis on specific norms and structures, leads to legal positivism in adjudication, and the Constitutional Court often talks as if it is strictly adhering to the constitutional text. But the Court also employs systematic and teleological modes of inquiry. The focus is often on the text as a whole from which judges are to ascertain the aims and objects, or telos, of the Constitution, a style of reasoning that allows judges to incorporate broad value judgments into their decisions.

The Constitutional Court uses history to confirm judgments arrived at on the basis of teleological reasoning. Original intent, on the other hand, or the subjective understanding of the Framers, plays no sig-

314 Kommers, supra note 53, at 844. Today, the Court is more inclined to speak of the value system inherent in the Basic Law. Id. at 861. The objective values of the Basic Law define a way of life to which the German people, as a nation, are committed. Id. The task of the Court in adjudicating constitutional controversies is one of integrating these objective values into the common culture and common conscientiousness of the German people. Id.
315 Id.
316 Kommers, supra note 53, at 844.
317 Id.
318 See Baum, supra note 183, at 13.
319 Kommers, supra note 53, at 844.
320 Id.
321 Id.
322 Id.
323 Id. These judgments resemble the Supreme Court’s substantive due process decisions. Kommers, supra note 53, at 844.
324 See id. at 845.
nificant role in German constitutional interpretation. In the United States, on the other hand, original intent and the weight it should be given in constitutional adjudication is a hotly contested issue. This leads to more uncertainty when reaching decisions. In both courts, however, it seems that judges are often able to impose their value judgments on the decisions rendered because they can usually interpret the law in accordance with these values.

The Constitutional Court, unlike the Supreme Court, is not bound by the rule of stare decisis. In the culture of Germany’s code law world, with the exception of decisions of the Constitutional Court, judicial decisions do not enjoy the status of law as in the common law world. While the Constitutional Court has spun a complicated web of doctrine around the Basic Law, and while opinions cite many earlier cases, judges can more easily maintain the fiction that they are interpreting the documentary text rather than building upon their own precedents. Moreover, the Constitutional Court is not bound by its own decisions.

Some people have suggested that constitutional review by the United States Supreme Court has harmful consequences for “normal politics.” The claim is that the institution of judicial review tends to remove questions of principle from the political process. The existence of judicial review may cause legislatures to more readily shed the consideration of constitutional restraints. Because the Supreme Court has allocated to itself the power of judicial review, Congress does not need to scrutinize whether or not it is violating the Constitution. Despite such an opportunity, it is unrealistic to assume that judicial review has a significant adverse impact on Congress’ sense of moral responsibility and adherence to the Constitution.

325 See id.
326 See id.
327 See id.
328 See Kommers, supra note 53, at 845.
329 Id.
330 Id. In reality, courts usually do follow their own decisions. See id.
331 Id.
332 Zeidler, supra note 40, at 521.
333 Stone, supra note 90, at 37.
334 Id.
335 Id.
336 See id.
337 See id.
The Supreme Court differs from the Constitutional Court in that the capacity of the Supreme Court to hear and resolve cases has not kept pace with the increasing volume of petitions.\footnote{See Provine, supra note 175, at 1.} This results in discretionary case selection which allows the Court to decide for itself the degree to which it will become involved in confrontations among the various branches and levels of government.\footnote{Id. at 1–2.} The prominence of the Supreme Court means that its case-selection decisions will either add to or detract from its public image.\footnote{See id. at 2.} The possibility of refusing decision can protect the Court from issuing politically damaging decisions on the merits.\footnote{See id.} However, this opportunity for sidestepping conflict must be exercised with circumspection.\footnote{See id.} If the Court is perceived as ducking issues by denying review, its popular acceptance will suffer.\footnote{See Provine, supra note 175, at 2–3.}

VII. CONCLUSION

The systems of judicial review employed by the Supreme Court and the Constitutional Court differ significantly. It cannot be stated that one system is better than the other because each serves an important role within its own governmental framework. Both systems have their positive and negative attributes.

The power of judicial review, as exercised by the Supreme Court, does not have a specific and concrete source. But this power is essential because it enables the Court to declare invalid that legislation which conflicts with the Constitution. There is a danger, however, that because the justices are not elected, they will not conform to society’s values. And because it is very difficult to overturn a Supreme Court decision, unwanted values may be imposed on American citizens.

Also, the role of the German Constitutional Court in developing a stable republic based on law and justice is important.\footnote{Denninger, supra note 44, at 1031.} Although the Court’s role is positive, some risks remain.\footnote{Id.} The most serious risk is that an autocratic administration of justice might dangerously narrow the concept of pluralism to a monistic view of civic values.\footnote{Id.} Such a
constricted perception of values, if practiced by the Constitutional Court, might suffocate the delicate flowering of democracy, of freedom of speech, and of active citizenship, which in Germany needs more intense care than in the democracy of the United States. 347

Although there are risks in the powers of judicial review that are exercised by the Supreme Court and the German Constitutional Court, there are dangers inherent in the notion of judicial review itself. Germany and the United States both implemented systems of judicial review based on their respective histories and governments. To say that the system in Germany should be replaced by the decentralized system of judicial review would be inaccurate and implausible. Granting the power of judicial review to a court will inevitably carry with it certain risks in any country. But judicial review in both Germany and the United States arose out of historical fears, and these fears enabled the countries to develop systems of judicial review that were best suited for their citizens.

Danielle E. Finck

347 Id.