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The Role of the Federal Judiciary in the Development of Federalism in West Germany and the United States

by Richard Davis*
D. Jeffrey Burnham**

I. INTRODUCTION

Federalism has been defined as a division of powers between two levels of government.¹ Conflict resolution between these two levels has become the role of the judiciary in many federal systems. The role of the judiciary in resolving conflicts between the federal and state or provincial governments, however, may differ across national systems according to historical, political, and legal factors. If that role can be generalized, it would be useful in explaining and predicting the role of courts in the development of federalism in other federal states.

This article examines the role of the federal judiciary in the early development of federalism in two systems—the Federal Republic of Germany and the United States—and assesses the similarity or dissimilarity in roles. Additionally, this article seeks to demonstrate the effect of these roles on the nature of decisions concerning federalism.

These two systems have been selected because in both nations the federal judiciary was called upon to help define the federal relationship. Major decisions on federalism during the respective early periods were offered by the respective supreme judicial tribunals, which strongly impacted the evolution of the federal relationship. Emphasis is placed on the early period because of the presumption that reliance on precedent gives early decisions greater importance in defining the new and malleable federal relationship. The period under study for the United States consists of a time span from 1789 to the 1820s. For the Federal

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Republic, the period is the decade from 1951 to 1961—the initial years of the Federal Republic and the Federal Constitutional Court.

II. The United States

Article III of the Constitution extends judicial power to "one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish" to settle controversies between states and, indirectly, between the states and the national government. This provision, by implication, empowered the Supreme Court to review and refine the nature of federalism on an ongoing basis. The conceptualization and implementation of federalism has been highly influenced by the decisions of the Court.

Article I, section 8 of the Constitution details the powers of the Congress, including the necessary and proper clause. Section 9 of the same article lists powers denied to the national government, while section 10 enumerates those functions denied to the states. The reserve clause in the tenth amendment expressly reserves all unnamed areas of governance to the states or to the people. By the early nineteenth century, this demarcation of powers was being challenged by the national government and the states. In case after case the Supreme Court was called upon to adjudicate these disputes. The concept of judicial review, asserted by the Court in Marbury v. Madison, forms the basis for the Court’s ability to review the constitutionality of a statute and establishes the judicial branch as the court of last resort for the settlement of federal disputes.

Four areas of state-national conflict, or what James Madison referred to as "federal" areas, have been selected for review. In each, a major early decision will be analyzed. The right of the national judiciary to review and reverse decisions from state courts is the subject of Martin v. Hunter's Lessee. The preeminence of the Constitution's contract clause is represented by Trustees of

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2 U.S. Const. art. III, § 2. The Constitution states in pertinent part: "The judicial Power shall extend... to Controversies to which the United States shall be a Party;—to Controversies between two or more States... ."

3 U.S. Const. art. I, § 8. The Constitution states in pertinent part: "The Congress shall have Power... To regulate Commerce... among the several States... And... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers... ."

4 U.S. Const. art. I, §§ 9, 10. Section 9 states in pertinent part: "No Bill of Attainder or ex post facto Law shall be passed... No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another...." Section 10 states in pertinent part: "No State shall enter into any Treaty... ; coin Money; emit Bills of Credit...."

5 U.S. Const. amend. X. The Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

6 5 U.S. (1 Cranch) 137 (1803).

7 The Federalist No. 39 (J. Madison).

8 14 U.S. (1 Wheat.) 304 (1816).
Dartmouth College v. Woodward. The impact of the necessary and proper clause upon the activities of the states is the primary issue in the case of McCulloch v. Maryland. The case of Gibbons v. Ogden deals with the scope and application of the commerce clause. These cases provide an overriding theme in regard to the Court and the early development of federalism.

A. Martin v. Hunter's Lessee

Following the death of Lord Fairfax in 1781, lands belonging to him in Virginia were left to his nephew, Denny Martin, an English citizen. The Commonwealth of Virginia, however, refused to grant Martin title, in conflict with a U.S.-Great Britain treaty, and, instead, leased portions of the property to David Hunter. The case proceeded slowly through the Virginia state court system until 1812 when the state's court of appeals ruled in favor of Hunter. The following year, under article 25 of the 1789 Judiciary Act, the Supreme Court accepted the case. In Fairfax's Devisee v. Hunter's Lessee, the Court reversed the Virginia decision ordering the title turned over to Martin. The state court of appeals, guided by Spencer Roane, rejected the decision and the validity of article 25. In his opinion, Roane declined obedience to the writ as issued. The case reappeared before the Marshall Court three years later as Martin v. Hunter's Lessee.

Not surprisingly, the Court defended its right to interpret fully the Constitution and all associated laws or decisions. In reference to the lack of clear authority for the Court within the text of the Constitution, Justice Story wrote: "It did not suit the purposes of the people ... to provide for minute specifications of powers, or to declare the means by which those powers should be carried into execution." The Court declared that, due to the vagueness of the Constitution and the inability of the Framers to enumerate minute specifications, the Court held the burden of interpreting the powers provided to the federal government by the Constitution. Also, this responsibility to interpret national powers included authority over state legislatures when they conflict with the supreme law of the land, in this case treaty law. Because "public mischief" would arise if each state legislated without deference to national powers, Story concluded that the Court's appellate jurisdiction extended to state tribunals.

10 17 U.S. (4 Wheat.) 316 (1819).
15 Id. at 326.
16 Id. at 348.
The Court's rationale for this decision was twofold. First, the Court saw the need for "uniformity of decisions" across all the state courts. Second, the Constitution was created "for the common and equal benefit of all the people." Those goals would not be possible if the Court did not have the power to accept such cases from the state courts.

The matter, however, was not put to rest. In *Cohens v. Virginia*, the Court reaffirmed *Martin v. Hunter's Lessee*. According to Schmidhauser, the *Cohens* decision probably provided more support to the pro-nationalists because Justice Marshall, the decision's author, effectively countered the arguments of the active states' rights movement of the day.

**B. Trustees of Dartmouth College v. Woodward**

In 1769, the British Crown granted to Eleazer Wheelock a charter to operate a private learning institution, Dartmouth College. The charter allowed Wheelock, by will, to appoint his own successor at Dartmouth. His son, John Wheelock, assumed the presidency of Dartmouth in 1779. By 1812, open conflict between Wheelock and the trustees resulted in his removal from office. In 1816, the New Hampshire legislature passed measures rendering the old board of trustees powerless and converting Dartmouth into a quasi-public institution.

The former trustees sued the state to recover corporate property. The trustees sought to have the state laws invalidated and the original charter upheld based upon the provisions of the 1783 Treaty of Paris with Great Britain. They lost before the state court of appeals. The case was brought before the Supreme Court in 1816. Marshall wrote the decision in favor of the old board of trustees and the federal government's right to protect the viability of all contracts.

In the decision, Marshall first defended the Court's right under the Constitution to address the issue of contractual obligations and state law. Marshall then narrowed the scope of the case to two critical questions: whether the Dartmouth College charter was protected by the Constitution, and whether it was further "impaired" by the acts of the state legislature.

Marshall concluded that the College was indeed "eleemosynary" and a "private corporation" and that the grant "was plainly a contract" and a "contract for the security and disposition of property." Therefore, this contract was valid. 

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17 Id. at 347–48.
18 See id. at 351–53.
19 19 U.S. (6 Wheat.) 264, 310 (1821).
22 Id. at 654.
23 See id. at 651–52.
24 Id. at 640, 643–44.
protected from state action under the contract clause of the Constitution, which prohibits states from making laws which impair the obligation of contracts. Marshall added that the legislation clearly substituted the “will of the state” for the “will of the donors,” thereby altering the obligations created by the grant contract. The Court overturned the statutes and ordered control of the institution reverted to the original trustees. This case represents a clear impairment of the state’s regulatory authority over economic activity, which was reinforced in subsequent Marshall Court decisions.

C. *McCulloch v. Maryland*

Following the establishment of the second Bank of the United States, Maryland attempted to interfere with the bank’s operation by placing a heavy annual tax on the bank’s branches within its borders. McCulloch, an officer of the U.S. bank in Maryland, refused to comply and forced the matter to the Supreme Court.

Writing for the Court, Marshall defended the right of the Congress to establish a national bank through a loose interpretation of the necessary and proper clause in conjunction with provisions in article I, section 8. This decision formalized the principle of implied powers and was defended on the grounds that the Congress could not fulfill its expressed powers if denied the choice of means for execution of those powers. The Court then turned to the state’s right to tax the bank and ruled that the state could not engage in activities, such as taxation, when the exercise of such power would have the effect of impairing the operation of the federal government in carrying out its assigned powers.

The official acceptance of the doctrine of implied powers paved the way for a significant expansion of the national government’s ability to exercise its powers unfettered by state actions. Moreover, the Court opened the door for limiting state activities by clearly asserting the supremacy of the federal government in fulfilling its powers and rejecting the concurrent nature of state powers when state and national laws are in opposition.

D. *Gibbons v. Ogden*

Another landmark decision concerning the development of federalism was the case of *Gibbons v. Ogden*. In 1818, under congressional authorization,
Thomas Gibbons began operating a steamboat service between New Jersey and New York. Aaron Ogden, who had earlier purchased a license for the route under New York law, sought an injunction against the operation of Gibbons's service. The New York Court of Appeals upheld the injunction and ordered Gibbons to cease operations. Gibbons appealed to the Supreme Court, which granted certiorari in 1824.

The Court saw this case as a clear test of the commerce clause. Like its decisions in other cases, the Court rejected any strict construction of the Constitution. Marshall wrote: "We cannot perceive the propriety of this strict construction, nor adopt it as a rule by which the Constitution is to be expounded." Critical to the decision was the Court's effort to settle on the meaning of the word "commerce." The Court interpreted commerce to include navigation between the states. Congress, therefore, had the right to regulate any commerce that affects or concerns people of more than one state or "nations and parts of nations," including the steamboat trade between the states.

Marshall sidestepped the issue of exclusivity in regulation of commerce. In the later case of Wilson v. Blackbird Creek Marsh Co., however, Marshall upheld the right of state action in the absence of any act by the national government. This decision was a departure from the Marshall Court's ideological direction because it did not expand national power. The decision, however, did not substantially tilt in the direction of states' rights either, since the supremacy of national action, if undertaken, was reinforced.

These cases provided the foundation for the national government's clear right to regulate commerce among the states for the benefit of the nation as a whole. Through the Gibbons decision, the Supreme Court continued to expound the supremacy of national government powers and resulting legislation over state government powers and corresponding legislation.

E. Summary

These early decisions demonstrate that the Supreme Court was being called upon to play a major role in conflict resolution involving federalism and that the Court acted to formalize the interpretation of the relationship between the states and the national government.

III. The Federal Republic of Germany

The Federal Republic of Germany is a federal form of government established in 1949. The Basic Law, the constitution of the Federal Republic, decreed a
rediscovered democracy, dividing powers and functions between the Bund (the federal government) and the Länder (regional governments). Under the Basic Law, the Federal Constitutional Court (FCC) was created as the arbitral power to resolve disputes concerning constitutional questions. The FCC functions independently of the general jurisdiction courts, in particular the Bundesgerichtshof, and of the special jurisdiction courts.36

The FCC embodies a unique institution which handles only cases involving a constitutional issue. Constitutional review comes to the Court either through an individual constitutional complaint37 or from lower courts that refer constitutional questions to the Court whenever such issues arise during the litigation.38 In addition, the Basic Law stipulates that the Bund, a Land, or one-third of the Bundestag can request that the FCC settle a constitutional dispute. The exercise of jurisdiction over such issues is obligatory, and the Court has been very detailed injustifying its duty to resolve such disputes and execute its opinions.39

"By institutionalizing the concept of norm control," states one scholar, "the Federal Constitutional Court has broken up [past] rigid interpretation and assumed an important directive role vis-à-vis the other powers, notably the legislature."40

The FCC's major decisions on federalism must be analyzed in light of three central legal concepts. First, the supremacy clause in article 31 of the Basic Law is fundamental. This states that "[f]ederal law overrides Länd law."41 Though somewhat weaker than the U.S. Constitution's supremacy clause, the West German supremacy clause, nonetheless, is vital. The significant weakness is the absence of any reference in article 31 to treaties made under federal authority.42 An example of the effect of this circumstance is the Concordat Case, where the FCC held that treaties involving matters over which the federal government has no competence are not necessarily binding on the Länders.43

The second important concept is that involving the great forces of governmental centralization, which take power away from the Länders; here, the FCC acts as the system's most important "federalizer."44 As the Länders fail to bring

38 Von Mehren, Constitutionalism in Germany—The First Decision of the New Constitutional Court, 1 AM. J. COMP. L. 70, 75 (1952).
40 Weiler, supra note 36, at 70.
42 Compare GG art. 31 with U.S. CONST. art. IV.
about needed reforms in areas where they have traditionally held competence, there emerges an "inexorable push toward the center of Bonn." The FCC maintains, however, a guarded awareness of this trend, recognizing its duty to uphold Basic Law notions of federalism. With its greater judicial activism, the Court is recognized as a necessary means of maintaining a federalized balance.

Third, the fundamental concept of judicial restraint embodies the theory that the FCC should strictly apply the Basic Law with no deviations. The FCC, being still a young institution, has felt a constant need to prove its legitimacy and usefulness. It was thought that as the Court followed a rigid set of exclusive norms, with little progressiveness, it would receive the necessary respect from other political actors.

This concept of judicial restraint would seem dichotomous, at first glance, to the opposing concept of judicial activism in its role as a "federalizer," but a synthesis is meant here. Judicial restraint expresses an unwillingness to go outside the bounds that the Basic Law has set, whereas judicial activism implies ardent and uncompromising support of the Basic Law within those bounds. In order to understand these concepts as seen in case law, it is necessary to understand the judicial influence on federalism in West Germany.

A. The FCC's Influence on Federalism

The Basic Law explicitly recognizes judicial review of legislation and of constitutional questions arising out of ordinary litigation. The FCC indeed decides the disputes about the rights, duties, and laws of the Bund and the Länder. The provision that allows this function constitutes an express written expansion of the American notion of judicial review.

Judicial review in the West German system can be separated into several categories. First, controversies between the national government and states or units of the national government can be resolved by the FCC if brought to the court by an eligible federal organ or a state government. The FCC can enter the dispute only if there is real conflict and an interpretation of the Basic Law.

45 Id. at 326.
46 Id. at 329.
48 See, e.g., K. Von Beyme, supra note 41, at 185–89.
51 GG arts. 93, 100.
52 GG art. 93(1), §§ 2–4.
is needed. The Court additionally gives "concrete judicial review," that is, a lower court may request the FCC's ruling on a constitutional question while the case is still pending in the lower court. The Court also is empowered to provide abstract judicial review, which is a decision initiated if there exist differences of opinion concerning a law's validity. The decision is not advisory in nature, but weighs equally with decisions made through the process of concrete review. The FCC can be approached only by official agencies of government, with the exception of constitutional complaints by individuals.

With such authority, the Court tried to fulfill the purpose of its establishment. One of those purposes was to defend the Basic Law, which included the defense of federalism. As the Court pursued this course during this early period, "vertical separation of powers" [Bund-Länder] as well as "the guarantee of the cultural identity and autonomy of the Länder" were preserved. Scholars considered the Court a major defense against federal extension into Länder rights.

B. Southwest State Case

The Southwest State Case in 1951 represented the first time the power of the Court was used to set aside legislation. By holding one law unconstitutional and another partially constitutional, the Court presented itself as a legitimate protector of the rights of the Länder.

The case arose prior to the Basic Law when three Länder drew up their own constitutions and proceeded to act like states. When a reorganization provision was included in the Basic Law, the Länder could not agree on how to organize themselves. The federal government, in accordance with provisions of the Basic Law, stepped in and passed reorganization laws for the three Länder. The first law provided an extension of existing terms upon which the Länder operated until the problem was settled, and the second created reorganization laws. One of the Länder, Baden, contested both laws and took the matter to the FCC.

The Court held that the extension of the terms was unconstitutional because the problem could have been handled by the Länder. The Court ruled that the statutes cannot be interpreted to negate fundamental constitutional principles of the Basic Law. One of the two principles involved was federalism. Federal

53 KOMMERS, supra note 39, at 104.
54 See Benda, Constitutional Jurisdiction in Western Germany, 19 COLUM. J. TRANSNAT'L L. 1, 3 (1981).
55 KOMMERS, supra note 39, at 106.
56 Id. at 105.
57 Id.
59 See Von Mehren, supra note 38, at 70–91.
60 1 BVerfGE at 20–24.
61 Id. at 18. See also Von Mehren, supra note 38, at 86–87.
action violated this legal principle of the Basic Law because the Länders, though in disarray, continued to function constitutionally. Under article 72 of the Basic Law, the federal government can intervene, but only if the matter is beyond the competence of the Länders.62

The Court also held that the reorganization laws were in part constitutional. The difference, in summary, between the constitutional and unconstitutional laws lay in the extent of infringement upon the rights of the Länders. Where the laws were necessary to aid the Länders, the laws were constitutional. Where the provisions forced the Länders to implement federal procedures, an excessive delegation of powers occurred, thus violating article 80.

One scholar summarized the case as follows:

The language and reasoning of the decision suggest that the court is consciously setting about to demonstrate its authority and provide the judicial ingredients needed for the development of a tradition of judicial review. . . . [T]he court did not limit itself to a discussion of whether territorial reorganization contemplated by article 118 of the Basic Law had begun so that federal action was authorized by that article. Instead, the court used the first law as a jumping off point for a discussion of two basic constitutional principles—democracy and federalism. In this the court’s decision may suggest to the student of American constitutional law a certain parallelism with the approach and tone of Marshall’s decision in Marbury v. Madison.63

This case indeed set the tone for judicial review of Bund-Länder disputes. Federalism was defined as the concurrent use of power as outlined in the Basic Law. The significance of the FCC’s concept of shared powers represented the Court’s interpretation of a federation in more than name only, where the federal government acknowledges that the Länders are endowed with separate autonomy.64

The case thus exemplifies not only that the FCC could interpret the meaning of federal supremacy over the Länders, but also that the Court envisioned an active federal structure within the borders of the Basic Law. This first case also showed the FCC as a legitimate constitutional organ within the federal structure.

C. Concordat Case

The Concordat Case in 1957 is another example of the FCC’s role as a defender of the Länders.65 The dispute arose over the concordat between Hitler and the

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62 1 BVerfGE at 17.
63 Von Mehren, supra note 38, at 90.
64 Leibholz, The Federal Constitutional Court in Germany and the “Southwest Case,” 46 AM. POL. SCI. REV. 723, 726 (1952).
Vatican allowing Catholic children to receive religious instruction in German schools. The agreement was called into question by the Länd of Niedersachsen when it established a nondenominational educational system. The question before the Court was whether the Länder’s jurisdiction over this area of competence was subordinate to a treaty signed by the federal government.66

The FCC upheld the Niedersachsen statute providing for equal education.67 First, it held that educational responsibilities belonged to the Länder, and the federal government could not enter into a treaty involving the competence or obligations of the Länder. Next, the Court felt that the important “principle of federal comity [Bundestreue] must be relied upon to secure fulfillment, at the municipal level, of the obligations of the Bund at the international level.”68 The Court further suggested that federal comity was the best answer for such problems in the future.69

The impact of the decision was to strengthen the role of the Länder and force the Bund to cooperate with the Länder rather than impose treaty provisions on them. At the same time, the FCC “seems to have taken pains to limit the ensuing embarrassment for the Bund government in its conduct of foreign affairs generally . . . .”70 The Court’s reasoning was that the Bund could not extend its power into situations where it had no authority. Since it had no authority over education, the Länder, the Court ruled, had no obligation to abide by the Bund’s treaties.71 The Court thus defined federalism here in terms of authority over certain functions and obligations. If the authority did not exist, the governmental level could not extend itself to an area outside of its competence. Even at the expense of international embarrassment and perceived weakness in international relations, the Court was ready to enforce meticulously the vertical separation of powers.

D. The Television Case

Perhaps no case on federalism showed the FCC’s strident effort to uphold what it interpreted as a main purpose of the Basic Law as did the Television Case of 1961.72 This was the first time the Court made a decision which could potentially bring it into direct conflict with the policy of an executive. By deciding against the Adenauer government, the Court took on the challenge

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66 6 BVerfGE at 310.
67 6 BVerfGE at 311. This case should be contrasted with the earlier analysis of Martin v. Hunter’s Lessee. See supra notes 12-18 and accompanying text.
69 Id. at 24–25.
70 McWhinney, supra note 68, at 22.
71 Kauper, supra note 43, at 1149.
admirably. The decision checkmated the endeavors of the federal government to gain control over television.74

The dispute arose when the federal government created a private corporation for the purpose of gaining a controlling interest in West German television. Chancellor Konrad Adenauer attempted to get Länder approval by offering them shares in the company, but then proceeded without their approval. Several of the Länder took the matter to the FCC. The Länder argued, first, that all rights not expressly given to the federal government remained in the states, according to article 30. Second, the Länder argued that article 5 allowed for freedom of information from a “generally accessible source.”75 The Bund argued in reply that under article 73, paragraph 7, which gives the Bund exclusive authority to legislate on telecommunication matters, the proposed corporation was constitutional.76

The FCC narrowly interpreted article 73 by concluding that it referred only to technical requirements of television stations and not to their establishment.77 It further held that there was a violation of the two principles raised by the Länder because the Basic Law does not provide for such activities by the federal government and, in fact, guards against it.78

Federalism, in the sense formulated by this case, necessarily included obligations on the part of the Länder and the Bund. The Bund could not legislate in the areas of competence belonging to the Länder, and the Bund had an obligation to restrain itself from attempting to do so. The Court stressed a sense of political morality involved in the federal relationship: “[T]he obligation of self-restraint in a federal society is a reciprocal one, involving both [the federal government] and the Länder.”79

The Television Case showed the FCC’s judicial activism in defining its interpretation of the Basic Law and rejecting a loose interpretation which approved of the national government’s attempted expansion of powers. Once again the Court was giving “continuing judicial recognition of the importance of the states in the Federal system.”80

E. Summary

In each of the previous cases, the FCC consistently adhered to its purpose of interpreting the Basic Law to protect the federal structure. While recognizing

73 McWhinney, supra note 68, at 30.
75 12 BVerfGE at 207-10.
76 Id. at 213.
77 Id. at 207.
78 Rupp, supra note 74, at 380.
79 McWhinney, supra note 68, at 33.
80 Cole, supra note 44, at 333.
the supremacy of federal law, the Court's contribution was to protect the rights and responsibilities of the Länder and interpret federal supremacy in a narrow manner when such rights and responsibilities were in danger of encroachment. The case law discussed provides support for the proposition that the FCC protected the Länder's rights during this early period. The Southwest State Case laid the foundation for a fertile concept of federalism and legitimized the Court in the process. The Concordat Case allowed federalism to branch out into obligations on the part of the Bund and the Länder, especially the Bund, to exercise self-restraint and preserve the federal structure. Finally, in the Television Case, the FCC withstood the attempts of an active national government and upheld the Länder's areas of competence with a more narrow interpretation of the Bund's powers.

IV. Analysis

These two case studies of the role of the federal judiciary in the early development of federalism indicate some similarity of roles, but with varying effects on the development of federalism. In the case of the Federal Republic, the FCC sought to limit the power of the national government vis-à-vis the Länder. In the United States, the Supreme Court's decisions were designed to expand such a role. The question, then, must be asked: what factors in the contexts of these two systems affected the two Courts' roles in the development of federalism to produce similar judicial activist roles, but diverging directions in the federal relationship?

A. Judicial Review

One factor may be the distinct approaches of the two political systems with regard to the principle of judicial review. The principle of judicial review was generally accepted by the Framers of the Constitution. Their experience with the doctrine dated from Coke's statement in Bonham's case that an act of Parliament can be voided.81 By 1787, actions of some state legislatures had made the Framers wary of legislative omnipotence, especially in a national legislative body.82 The Framers also were aware of decisions of several state courts in the 1780s declaring state acts to be unconstitutional.83 In The Federalist, Hamilton wrote that the Supreme Court would have the power to decide between contradictory laws and invalidate those in conflict with the Constitution.84 Berger has concluded that the delegates to the state ratifying convention took for granted the possession of the power by the new federal courts.85

82 Id. at 31–34.
83 Id. at 38–46.
84 THE FEDERALIST No. 78 (A. Hamilton).
85 See R. BERGER, supra note 81, at 120–33.
In contrast, the concept of judicial review familiar to the Framers had a much more brief historical development in the Federal Republic of Germany. Judicial review was not formally granted to a German court until 1949.86 During the Reich confederation under Bismarck, disputes between the national and sub-national governments were to be arbitrated by the Bundesrat.87 During the Weimar Republic, that task was assigned to a newly established High Court of State, the Staatsgerichtshof, but without the authority to question a statute's constitutionality. The German Supreme Court, the Reichsgericht, during the Weimar Republic did assume the power of judicial review in 1925 on the reasoning that the constitution nowhere expressly prohibited it. The Court, however, remained independent for only eight more years, and the right of appeal on a constitutional issue to the Reichsgericht was limited.88 Hence, judicial review in the German judicial system is more a product of non-German thinking than native historical development. The authors of the Basic Law reviewed the powers and activities of other supreme judicial bodies, especially those of the U.S. Supreme Court.89

Grafting the concept of judicial review into the West German system, which was largely unfamiliar with it, was more problematic than anticipated. The justices of the FCC realized this problem and used more restraint because of the novelty of their role. Though judicial review clearly lay within its power, only three federal statutes were ruled unconstitutional during the first six years of the Court's existence.90 In the Concordat Case, for example, the FCC overturned neither the treaty nor the Länder statute, but acted cautiously to avoid embarrassing the Bund in its foreign affairs conduct.91

In the cases involving federalism, the FCC exercised more restraint in its judicial review than its American counterpart. In the United States, the Supreme Court was willing to make broad use of vague constitutional clauses to overturn state legislation and, on one occasion during this period, federal legislation. The FCC, in contrast, interpreted the already specific Basic Law narrowly, not only in determining its own role in judicial review, but also in deciding the merits of cases. Consequently, in cases relating to federalism, the FCC pursued a more cautious approach, focusing on maintenance of the Basic Law and prevention of imbalance by expansion of powers on the part of either the Bund or the Länder. Since the Bund actively sought such expansion, the FCC's caution more often restrained the central government. The more general acceptance

87 Id.
88 Leibholz, supra note 64, at 731.
90 Id. at 289.
91 McWhinney, supra note 68, at 22.
of judicial review within the American system, on the other hand, enabled the Supreme Court to take bolder action in maintaining and expanding federal powers.

B. Specificity of the Written Constitution

The specificity of the written constitution also affected the roles of the two Courts in the development of federalism. The Constitution, a vaguely worded document compared to the more specific and more detailed Basic Law, provided the Supreme Court with greater flexibility in interpretation than that accorded to the FCC. The Supreme Court was impelled to interpret and apply vague clauses to changing conditions. Thus, the Supreme Court was able to play a larger role in providing flesh and blood to those clauses referring to federalism. Given the Court’s propensity toward the central government, this capability fostered the expansion of federal powers at the expense of the more powerful states.

The FCC, on the other hand, was less able to affix broad interpretations to specific phrases and was not required to interpret the document in light of substantially changed conditions. For example, there is no provision for implied powers given in favor of the Bund, such as the necessary and proper clause found in the Constitution. The FCC, therefore, was less willing to confer any unwritten power on the Bund or the Länder because the Basic Law is so specific otherwise.

C. Constitutional Amendment Process

The constitutional amendment process in the Federal Republic also limited the role of the FCC in adjudicating and broadly interpreting clauses concerning federalism. Amendments to the Basic Law need only a two-thirds majority of the Bundestag and Bundesrat for ratification. The Constitution specifies a two-thirds majority in Congress plus the approval of three-fourths of the state legislatures. The relative ease of the West German amendment procedure has made it a feasible alternative to the judicial system for settling disputes between the Länder and the Bund. In the first thirty years of the Federal Republic of Germany, the Basic Law was amended thirty-four times, mostly to settle Bund-Länder disputes. In this early period, in only one instance was the Constitution amended in response to a Supreme Court decision related to federalism. The case, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), involved the federal judicial power over suits against a state commenced by citizens of another state. The decision upholding such power was overturned by the eleventh amendment to the Constitution, ratified in 1798.

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92 P. Blair, supra note 86, at 34.
93 Id. at 114, 117.
94 Id. at 211.
95 The case, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), involved the federal judicial power over suits against a state commenced by citizens of another state. The decision upholding such power was overturned by the eleventh amendment to the Constitution, ratified in 1798.
difficult U.S. amendment process and general public unwillingness to tamper with the document have increased dependence on the Supreme Court for conflict resolution.

The ready availability of the constitutional amendment process also may have led the FCC to more narrowly based interpretations under the reasoning that its decisions could more easily be overturned through the amendment process. For example, the FCC's decision in the *Residence Tax Case* was later overturned by a 1969 amendment.\(^{96}\) The frequent occurrence of such reversals threatened to diminish the prestige of the FCC. The Supreme Court's decisions, on the other hand, have rarely been overturned by the constitutional amendment process.

D. *Relative Strength of the National-Subnational Governments*

Another contextual factor explaining the differences in the roles of the Courts is the relative strength of the national and subnational governments in the federal relationship. During its early years, the U.S. national government was viewed as the lesser partner in the federal relationship.\(^{97}\) The states had older, more established governments. They were more strongly identified with the people.\(^{98}\) In sum, they acted in their own spheres largely separate from the central government and each other in a structure commonly referred to as dual federalism.\(^{99}\) The new federal government even had to rely on the states for certain of its own functions, such as the election of Senators and the President.\(^{100}\)

Marshall and others on the Supreme Court envisioned a strong, effective national government possessing the power to act decisively and directly on the people. Marshall saw the Supreme Court's role as one of fulfilling the Framers' intent, expanding and solidifying the national government's power vis-à-vis the states to overcome the national government's weakness.\(^{101}\) The Supreme Court's decisions on federalism issues reflected this frame of mind.

In West Germany, the national government was not in need of strengthening relative to the *Länder*. The Basic Law provided for a strong *Bund* clearly superior to the *Länder*.\(^{102}\) The first Chancellor of the Federal Republic of Germany, Konrad Adenauer, was a strong executive who used his personal influence and

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\(^{96}\) P. Blair, *supra* note 86, at 252.

\(^{97}\) *The Federalist* No. 46 (J. Madison).

\(^{98}\) *The Federalist* No. 45 (J. Madison).


\(^{100}\) U.S. Const. art. I, § 3; U.S. Const. art. II, § 1.


\(^{102}\) GG art. 31.
the machinery of the Christian Democratic Union (CDU) to expand Bonn’s power throughout the nation and the Chancellor’s power within the Bund. 105

Unlike the Supreme Court, the FCC did not face a situation where the national government was widely perceived as needing increased strength vis-à-vis the subnational governments. On the contrary, the FCC saw its role as protector and defender of the Basic Law, including the federal structure which it had created.

Since the encroachment by the Bund would reduce the powers of the Länder and violate the Basic Law’s federal design, the FCC saw its role as defender of the Länder’s rights as inviolate under the Basic Law. The Court became, in the words of one scholar, a “federalizer.” 104 In fact, the FCC’s decisions made federal politicians hesitant even to approach the FCC to resolve their differences with the Länder. 105

E. The Court in National Government

Not only were both Courts concerned about the balance of the federal relationship in their respective systems, but also they sought to vivify the constitutional powers assigned to their respective institutions. For both the FCC and the Supreme Court, the early periods of their respective histories were crucial to their development as equal branches of the national government.

Both Courts were recognized as historically the weakest branches of their respective national governments. In The Federalist, Hamilton wrote that of the three branches of the national government, the Supreme Court “will be the least in a capacity to annoy or injure [political rights].” 106 An appointment to the Supreme Court in its first years was not a highly desired post. The FCC’s weakness grew from the novelty of a powerful judiciary and the subordinate role West German courts had played in the past. 107 Moreover, the FCC was subject to the administrative and budgetary authority of the Ministry of Justice. The FCC spent its first decade successfully asserting its administrative and budgetary independence. 108

Therefore, both Courts needed to assert their authority to gain respect as equal organs in the national government. Each, however, employed unique means to achieve that common goal. The Supreme Court asserted its authority by establishing its power of judicial review, in Marbury v. Madison, and its role

106 Cole, supra note 44, at 333.
107 D. KOMMERS, supra note 39, at 164.
109 See Lowenstein, supra note 49, at 838.
110 D. KOMMERS, supra note 39, at 83–85.
as arbitrator of national-state disputes, in *McCulloch v. Maryland*. By abandoning a strict constructionist role and asserting its power to invalidate state and federal laws, the Supreme Court made clear that it would not play merely a limited role in relation to the other two branches and the states.

While the Supreme Court gradually gained respect from the public and political leaders by broadly interpreting its own role, such a method had less utility for the FCC. The powers of the FCC were more clearly defined. Early on, however, the FCC was compelled to assert itself as a legitimate constitutional organ alongside the executive and the legislature. The Basic Law did not grant it such a role, but the implementing legislation of 1951 stipulated that the FCC was "an autonomous court of the Federation independent of all other institutional organs." The FCC, however, had to fight for autonomy from the Ministry of Justice and control over its own budget. The FCC had to gain the public acceptance and recognition of its role as the arbitral power between the other constitutional organs and between the Bund and the Länder.

The FCC sought that respect through defending the provisions of the Basic Law and by exercising caution and avoiding political issues as much as possible. Indeed, the FCC's caution is evident in the case involving the legality of the Communist Party, which was delayed for five years with the hope of avoiding the Court's decision. The FCC sought to increase respect for itself by exercising judicial restraint and enhancing the image of a fair, impartial, and cautious body. Judicial activism was to be used only in defense of the provisions of the Basic Law, not to go beyond it.

Since the Supreme Court favored expansion of the national government, the assertion of the Court's authority produced decisions increasing its role in federal conflict resolution and in cases involving the power of the national government vis-à-vis the states. The FCC asserted its authority by affirming its independence from the Adenauer government and defending the Basic Law from encroachment by the active national government.

F. Federal Comity

A final difference between the FCC and the Supreme Court is the presence of national-subnational cooperation and respect in the political culture. Though not specifically defined in the Basic Law, the concept of federal comity has been a guiding principle in FCC decisions. The FCC has derived federal comity from the nature of the political system and has concluded that even a lawful power may be restricted if found to be in conflict with the rights of the Länder.

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109 Id. at 83.
110 McWhinney, supra note 68, at 12.
111 Id. at 12–13.
112 D. KOMMERS, supra note 39, at 210, 236.
Federal comity denotes cooperation between the government levels in the form of concern for each other's interests and negotiation to resolve differences. Federal comity mandates a cooperative rather than conflicting relationship between the two governmental levels.\footnote{P. Blair, supra note 86, at 164–65.}

Since 1949, in the spirit of federal comity, the Bund and the Länder have signed agreements over disputed areas of jurisdiction under the Basic Law. Some of these agreements have included temporary transfers of powers from the Bund to a Land or vice versa. One example is the 1957 agreement between the Bund and North-Rhine Westphalia on Bund performance of Land responsibilities for Bund waterways.\footnote{Id. at 221.}

Federal comity was not a legal principle known in early American political culture or legal thought, as it was not part of the common law. The two governmental levels were seen as governors over two separate spheres.\footnote{K. Wheare, supra note 1, at 4–5.} The national government was intended to carry out tasks that the states could not perform or that clearly did not belong within their sphere. The Constitution was designed to allow the federal government to be effective in its own sphere, not to establish cooperation between the federal government and the states. The conflict or adversarial relationship was assumed quickly and dominated the early period of American federalism.

In the Federal Republic, the presence of federal comity was important in determining the FCC's role because it legitimized Bund-Länder negotiations and reduced the number of disputes actually taken to the Court. The absence of a federal comity concept in the United States may have had the opposite result. The lack of comity channeled conflict through the legal process, enhancing the Supreme Court's role.

This concept also affected the nature of both Courts' decisions on federalism. The FCC sided with the Länder, thus forcing the Bonn government to cooperate with the Länder rather than to act independently. In the Television Case, for example, the Bund was prevented from violating federal comity by proceeding with the network alone and was forced to cooperate with the Länder in the establishment of another network.\footnote{P. Blair, supra note 86, at 202–04.} The FCC decision was designed to maintain comity rather than displace it.

In the United States, the Supreme Court was faced with an either-or decision without the benefit of being able to follow the general principle of federal comity. The Supreme Court was compelled to choose sides. Given the danger of centrifugation through strengthening of state powers during this early period, the Court sided with the national government time after time. The exis-
tence of federal comity in the U.S. system probably would have advantaged the states since the federal government constituted the weaker partner and the states would have been treated as equal partners in cooperation. The establishment of federal supremacy probably would have developed over a more lengthy period.

V. Subsequent Developments

The influence of the FCC and the Supreme Court did not remain unchanged within their respective federal systems beyond these early periods. A brief discussion of the development of federalism and the two Courts' roles subsequent to these early periods may shed light on the continuance of the divergences and similarities between the two systems.

Subsequent to this early period, the Supreme Court continued to exercise judicial review, albeit with caution, for a century. The Marshall Court invalidated only eighteen state laws. Though the justices employed judicial review to weigh the constitutionality of state actions, only infrequently did they actually void state law. The Marshall Court acted with prudence in asserting its power in the face of intense criticism of its decisions, particularly by Republicans. The practice of judicial review, however, was not seriously challenged subsequent to this period. In fact, the Supreme Court successfully asserted its authority. For example, from 1836 to 1910 the Court overturned 152 state laws.\(^1\) An explosion occurred following the adoption of a significant doctrine concerning state law laid down by the Court in Mugler v. Kansas and other related cases.\(^2\)

If ... a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to these subjects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution.\(^3\)

The decision allowed subsequent courts to use the due process clause as a substantive as well as a procedural brake on state power.\(^4\) Between 1910 and 1980, the Court voided 721 state laws.\(^5\) As judicial review has expanded in scope generally, it has extended the Supreme Court’s ability to act as arbiter in federalism-related cases.

The FCC's early period was primarily a period of judicial caution in exercising its power of review on constitutional issues. Subsequently, however, the FCC

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\(^1\) D. O'Brien, Storm Center: The Supreme Court in American Politics 43 (1986).


\(^3\) Id. at 661.

\(^4\) J. Schmidhauser, supra note 20, at 102–03.

\(^5\) D. O'Brien, supra note 117, at 43.
became more active in invalidating statutory provisions. Kommers has documented a significant increase in invalidations of statutory provisions at the national and subnational levels by the FCC in concrete judicial review cases during the 1960s. The FCC also has been more willing to substitute its own judgment for that of other governmental bodies. For example, the Bundestag approved a statute providing state subsidies for any party receiving at least 2.5 percent of the federal vote. The FCC, in a later decision, ruled that the figure of 0.5 percent was more equitable. The FCC also has indicated to legislators beforehand the type of legislation it would approve. Additionally, the FCC has been bold enough to impose time limits within which the Bund must resubmit legislation the FCC has disapproved.

The FCC’s period of adjustment to the application of judicial review was much briefer than that of the Supreme Court and allowed the FCC to acquire an activist role more rapidly in the development of federalism. In both systems, subsequent practice of judicial review achieved a nationalizing effect.

The Basic Law in West Germany contains a more detailed base from which to begin judicial review, thus also creating barriers for broad interpretation. This is not the case in the United States. The ambiguous phraseology of some sections of the Constitution, which enabled the Supreme Court in the early years to play the role of interpreter, also secured the role as reviser for the Court in subsequent years. Armed with the power to interpret the Constitution, the Supreme Court has been allowed, even encouraged in some circles, to reinterpret the Constitution in order to meet changing social, economic, and political conditions. The most dramatic example is the shift of the Supreme Court’s direction in 1937 when the Justices redefined the federal power over commerce, taxing, and spending. The continuation of the debate over whether the Justices should determine the Framers’ intent, however, is evidence of the lack of consensus on this issue.

Nevertheless, in relation to federalism, the effect of such vagueness has been a continuation of the Supreme Court’s role of defining and redefining the federal relationship. The shifts from dual federalism to cooperative federalism to creative federalism have been upheld by a Supreme Court restructuring intergovernmental relations to fit current needs.

As discussed earlier, the vague wording of the Constitution and the Supreme Court’s favoritism towards the central government resulted in pro-national

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123 Id. at 215.
125 Id.
126 Id.
127 Kauper, supra note 43, at 1100.
decisions during the early period. The Supreme Court did subsequently tilt somewhat toward state autonomy in the middle of the nineteenth century. In the long term, however, the equivocal nature of constitutional phrasing has increased the power and role of the central government. Not only has history demonstrated such a bias, but the inherent role of the Supreme Court as interpreter mandates such a bias. In other words, the expectation that the Supreme Court will redefine the Constitution to meet existing situations has preempted the alternative role of an arbiter expected to enforce rigidly the terms of the original document. Such an alternative would have advantaged the states since the states held greater power at the time of the framing of the document.

The specificity of the Basic Law limits broad interpretation of the document, but the differences between the West German and U.S. judicial systems in their reliance on precedent and agreement on the state of the law favor broader interpretive ability by the FCC. These differences also have influenced the federal relationship. The West German system places relatively less emphasis on the principle of stare decisis. The decisions of the FCC follow closely the precedents set earlier. This behavior is probably attributable to the sense of federal comity that exists in the West German judicial psyche and, as Kommers suggests, the FCC is not likely to survive by initiating constitutional revolutions through dramatic changes in doctrine.128 The FCC, however, possesses more flexibility than the Supreme Court.

The FCC, moreover, is permitted to look to the state of society in deciding constitutional questions.129 Thus, West German courts tend to create a picture of the present state of the law. Specifically, the FCC can look to principles of practical reason, recognized general ideas of justice, interpretation of statutory norms, social conditions, and sociopolitical views.130

The impact on federalism stems from the FCC’s ability to consider additional factors beyond the intent of the Basic Law in serving as judicial arbiter. In more recent times, the movement of domestic public policy problems to the central government has eroded the role of the Ländere. The FCC has been cognizant of this nationalization process and has not acted as a reactionary body to suppress it.

The difficulty of the U.S. amendment process, which increased dependence on the Supreme Court for conflict resolution during the early period, has remained unchanged and has provided the Supreme Court with a high degree of safety from being overruled by amendment. The failure of the attempt in

128 D. KOMMERS, supra note 39, at 208–09.
the early 1960s to nullify the reapportionment cases serves as an example. The continued difficulty of the amendment process has maintained the Supreme Court's role as arbiter of federalism and reduced the states' ability to blunt pro-national Court decisions. In West Germany, on the other hand, the breadth of the Basic Law and the relative ease with which amendments to the Basic Law are passed have continued to make the FCC less of a force politically than its U.S. counterpart.

The Marshall Court attempted to effect a balance in favor of the weaker partner in the federal partnership. Subsequently, the Supreme Court reacted to federalism questions cognizant of the relative strength of the federal partners. After Marshall, the Court attempted to shift the pendulum back towards the states to offset the pro-national Marshall Court decisions. The Supreme Court, however, never overruled the broad dicta laid down by the Marshall Court in the significant federalism cases of the early period. By the 1930s, in light of the severe economic crisis and the ensuing political crisis for the institutions, the Supreme Court tipped the balance in favor of the national government.

In the Federal Republic, the relative strength of the national and subnational governments affected the FCC's decisions regarding federalism. Primarily, the perceived need for Bonn to be empowered to address the nation's economic and social problems influenced the FCC's subsequent nationalistic decisions.

The Supreme Court's role in the national government continued to affect the Court's role as arbiter of federalism. The Dred Scott decision and its aftermath diminished the Supreme Court's role in national government. The unequivocal rejection of that decision politically and militarily through the Civil War and constitutionally by means of the Civil War Amendments lessened the Supreme Court's authority in political conflict resolution.

The Supreme Court's weakness resulted in judicial caution in the exercise of its federal arbiter role. The Supreme Court moved cautiously to restore the role of the states in the federal system. This caution is reflected in the inconsistency of the Court's decisions on federalism issues immediately following the Civil War. Had the Court not been so restrained, however, perhaps the federal arbiter role could have been dispatched with more vigor. Perhaps the Court could have acted more forcefully in parrying congressional intrusions on state autonomy.

133 See J. Schmidhauser, supra note 20, at 80-94.
134 Id. at 94-96.
The next major challenge to the Supreme Court’s role in national government was the infamous court-packing attempt in 1937. With apparent popular support for New Deal legislation among political leaders and the general public, the Supreme Court faced the prospect of institutional decline if the Congress and the President had succeeded in altering the composition and, more importantly, the philosophical direction of the Court by legislative fiat. Two of the Justices, particularly, took steps to reduce the tension between political institutions and preserve the independent role of the Court. The effect of their actions on federalism was to broaden federal power and slacken judicial fetters on the states’ powers of economic regulation.

Even when the Supreme Court has not been faced with a direct threat to its role as a coequal institution in national government, the potential of such a challenge constrains the Justices’ reaction to federalism issues. Too much deviation from public opinion on the federal partnership may prompt negative reaction and efforts to limit the Supreme Court’s role. Avoidance of such deviation is not an entirely passive phenomenon, as indicated by the 1937 shift. Recent attempts to limit the Court’s jurisdiction on busing cases and to overturn the abortion decisions, though currently unsuccessful, illustrate the continued tenuousness of the Court’s position in national government.

The FCC, on the other hand, has not experienced such crises in its role as an organ of national government. There have been no threats to overhaul the FCC and its powers. Indeed, one West German scholar termed conflict similar to the 1930s fight over the American court “unthinkable” in West Germany. Moreover, noncompliance with FCC rulings by the Bund or the Länder is quite rare. The FCC, in fact, has probably enhanced its role where various parties have turned political questions into constitutional ones. Also, since the early period, the FCC has been the beneficiary of legislation and amendments to the Basic Law recognizing its special status in the West German political system. For example, in a state of national emergency, the FCC’s functions cannot be impaired. According to Kommers, “no other judicial tribunal in German history has achieved the status or measure of independence that the Federal Constitutional Court currently enjoys.”

Thus, the FCC’s decisions concerning federalism are affected by a greater authoritative weight than was enjoyed by past German courts or by the Supreme Court. The FCC can speak with greater confidence on federalism issues knowing

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137 G. Smith, supra note 124, at 189.
138 D. Kommers, supra note 39, at 277.
139 Id. at 85.
140 Id. at 86.
that resistance is rare and respect for the Court within the political system is high. Ironically, the Supreme Court's inability to avoid political questions actually carries with it the potential of diminishing respect as it is dragged into political battles. The combination of law and politics, however, has worked successfully in the West German system and has not resulted in a diminished constitutional court.

As stated earlier, federal comity was not a feature of the political culture during the early period of the U.S. federal system. Federal comity, however, has emerged as a significant element of the federal relationship in the United States. This intergovernmental respect and cooperation has emerged from several gradual developments: the growth of grant programs, an increased federal role in economic and social regulation that has led to shared responsibility, the formation of subnational lobbying groups to affect national legislation, and the creation of various intergovernmental organizations.

The acceptance of comity has been reflected in Supreme Court decisions. The Supreme Court, particularly since 1937, has generally supported federal-state cooperative efforts. Elazar contends that such support existed even in the nineteenth century. Federal-state cooperation in the form of federal grants-in-aid to states was approved by the Court in 1923. The Supreme Court, however, has not returned to pre-1937 limitations on federal policy powers to encourage comity. Rather, the Supreme Court has been more willing to expand concurrent jurisdiction when it is not explicitly denied in the Constitution.

Significant change has not occurred in federal comity as a legal concept in the West German system. The existence of federal comity has limited the need for the FCC to intervene in federalism issues. The Bund and the Länder perform an increasing number of joint tasks. Agencies from both levels of government cooperate to develop programs on policy in areas such as urban and regional economic development, education, and scientific research. This intergovernmental respect and cooperation between the Bund and the Länder serves to reduce the number of cases referred to the FCC for conflict resolution.

VI. Conclusion

The purpose of this study has been to demonstrate the effect of contextual factors on two constitutional courts' roles as judicial arbiters of the federal

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141 See Law and Politics, supra note 136, at 352–62.
142 Two examples of the latter are the Delaware River Basin Commission and the Appalachian Regional Commission. For a discussion of some of these organizations, see M. DERTHICK, BETWEEN STATE AND NATION: REGIONAL ORGANIZATIONS OF THE UNITED STATES 46–107 (1974).
relationship. This research indicates that in the early periods the two courts displayed divergent behavior on federalism. On some points, the two institutions reacted similarly. Both institutions were required to establish roles as coequal branches with other national bodies and assert roles as judicial arbiters of federalism. Both attempted to put into practice judicial review, though the Supreme Court faced an easier task. Both sought to provide power for the weaker partner in the federal relationship. Each of these similarities, however, resulted in contrasting policy on federalism.

On other measures, the systemic features such as the difficulty of the amendment process, the specificity of the constitution, and federal comity heightened divergences in the two Courts' roles and policies. A discussion of subsequent developments indicates these divergences became less pronounced. There still exist, however, uniquely West German and American characteristics in the role of the two Courts in the development of federalism.