

February 23, 2005

**"The most extraordinarily powerful court of law the world has ever known"? -- Judicial Review in the United States and Germany**

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I. Introduction

The great teacher and scholar Alexander Bickel begins his classic study of the Supreme Court with a sentence that is at once resounding and paradoxical. According to Bickel, "The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known."<sup>1</sup> The force of this pronouncement lay in Bickel's ironic reference to Alexander Hamilton's view -- in the Federalist papers -- that the judiciary was the "least dangerous" of the branches. Certainly, in 1962 when

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Lectures based on earlier versions of this essay were delivered at Marbury 2003, University of Maryland School of Law, Baltimore, Maryland, February 2003; and at the Indian Law Institute, New Delhi, India, December 2004.

1. Alexander M. Bickel, The Least Dangerous Branch 1 (Indianapolis: Bobbs-Merrill 1962).

Bickel wrote, the status of the American Supreme Court as the world's "most extraordinarily powerful" tribunal was hardly in doubt.

But since Bickel published these lines more than forty years ago, new Constitutional Courts -- performing broad functions of review -- have been established in many countries of the world. Particularly after 1990, new democracies arising from the dissolution of the Soviet Union and its dependent states have enthusiastically established Constitutional Courts with wide powers. Constitutional Courts in Hungary, Poland and Russia, for example, have attracted particular attention for the sweep and importance of their judgments. After the end of apartheid, South Africa has also relied on a new Constitutional Court --- first to approve, and then to interpret, its recently adopted constitutional document.

Moreover, those constitutional tribunals that were already in existence when Bickel wrote have since greatly extended the range and scope of their jurisprudence. For example the French Conseil Constitutionnel, although still limited to abstract

review of statutes before promulgation, has developed far beyond the original view that it should function primarily as a protection for the French President against incursions by the Parliament. Indeed, the French tribunal has now become a guarantor of individual rights across a broad spectrum. The Israeli Supreme Court has also greatly expanded its authority in interpreting and enforcing its form of partially written and partially unwritten constitution. The Supreme Court of India has also attracted wide attention, particularly for its enforcement of affirmative action, social welfare and environmental provisions in the Indian Constitution.

Quite possibly the most influential of these Twentieth Century judicial organs is the Constitutional Court of the Federal Republic of Germany, created after World War II for the purpose of enforcing the provisions of the 1949 West German Constitution, the Basic Law. When this fledgling institution opened its doors in 1951, few had high expectations of such a tribunal in a country which, notwithstanding centuries of formidable legal development, had little experience with a judicial

organ whose purpose was to examine and sometimes overrule the decisions of the legislative and executive branches.

Moreover, of course, the immediate background of the Basic Law and the Constitutional Court was the baneful example of the dictatorial Nazi past. The new democratic institutions were an attempt to banish that past, but they also drew significantly on the example of the Weimar Constitution of 1919, whose weaknesses are often thought to have paved the way for the coming of the Nazi regime. Indeed, the German Basic Law of 1949 could be viewed as an attempt to adopt something like the Weimar Constitution -- purged of the weaknesses of the earlier document.

But notwithstanding modest expectations at the outset, the German Constitutional Court has created a complex and impressive jurisprudence over the decades, and it has developed a deepening confidence and authority. In numerous instances, the Court has had little reluctance to review the decisions of other branches, and to draw on the country's rich legal traditions to create a new judicial institution of formidable competence and power. Indeed, in light of

the scope of its judgments and the sweep of its jurisdiction, the contemporary observer might well ask whether the German Constitutional Court has surpassed even the American Supreme Court -- as well as other possible contenders -- to become "the most extraordinarily powerful court of law the world has ever known."

## II. Creation of the Constitutional Court.

When the West German Basic Law was adopted in 1949, it contained specific provisions creating the Constitutional Court and outlining its powers -- including exclusive authority to invalidate statutes of Parliament. There was thus absolutely no question as to the framers' intention to create a tribunal that would exercise the function of judicial review.<sup>2</sup>

Of course, this explicit adoption of judicial review in the constitution contrasts sharply with the origins of that institution in the United States. The American constitutional text does not explicitly provide for judicial review, although authorization for the institution may be teased out of language in

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2. See Articles 93, 100 GG;

Article III and Article VI, as highly respected commentators (including Bickel himself) have argued over the years.<sup>3</sup> A view from the historical perspective indicates that some of the American constitutional framers of 1787-1789 certainly anticipated that this power would be exercised, whereas others would most likely have sharply rejected any such possibility. In the great case of Marbury v. Madison<sup>4</sup>, the institution of judicial review was inferred by Chief Justice John Marshall -- although not primarily from the constitutional text itself, but from what Marshall considered to be the nature of a written constitution as well as the ordinary functions of courts. Other early judges and legislators drew similar conclusions.

This sharp difference in the origin of judicial review in the German and in the American constitutional systems has contributed -- in some cases clearly, in other cases more speculatively -- to a number of differences between the systems.

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3. See Bickel, *supra*; Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harvard Law Review* 1 (1959); but see Learned Hand, The Bill Of Rights (1958).

4. 1 Cranch (5 U.S.)137 (1803).

It may be worthwhile to comment briefly on some of these important contrasts.

### III. Jurisdiction of the German Constitutional Court.

The first difference arises from the fact that under the American Constitution the Supreme Court of the United States is, in important respects, just another court. It is supreme over all other American courts: the "inferior" federal courts authorized to be created by Congress in Article III, as well as the state courts -- as we know from *Martin v. Hunter's Lessee*, decided in 1816.<sup>5</sup> But, in the nature of its basic functions, the Supreme Court does not differ much from any other court. Indeed, Marshall in *Marbury* derives the institution of judicial review from the general nature of courts -- and not from any particular qualities of the Supreme Court itself.<sup>6</sup>

As a result, *Marbury v. Madison* implies that the institution of judicial review arises from the function of courts in ordinary cases -- ordinary law-

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5. 1 Wheat. (14 U.S.) 304.

6. See. e.g., *Marbury* at 177(emphasis added): "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect?" See also *id.* at 177-80.

suits of the garden variety -- in which it happens that, because of some aspect of the parties or the claims, a constitutional provision must be employed as one of the relevant sources of law.

Marbury therefore can be read to suggest that the federal courts have no authority to act outside of the scope of an ordinary law-suit -- outside, that is, of the scope of the famous "cases" or "controversies" referred to in Article III. This way of looking at Marbury has lent support to the doctrines of "standing" and "justiciability" which -- although they may have been to some extent diluted in recent decades -- still substantially limit the institution of American judicial review<sup>7</sup>.

In contrast, the Constitutional Court of Germany was not created as an "ordinary court" -- but was established for the specific purpose of enforcing the Constitution. Indeed, in a number of crucial ways, it is clearly set apart from the "ordinary" court system. As a result, there is not always the same focus on the imperatives of the ordinary law-suit and the ordinary

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7. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

"case" or "controversy" in the jurisprudence of the Constitutional Court.

In fact, the German Basic Law expressly sets forth forms of jurisdiction -- to be exercised by the Constitutional Court -- that lie well outside the authority of the Supreme Court of the United States.

A. Abstract Norm Control

For example, the German Basic Law permits one-third of the members of the Bundestag, the popular House of Parliament, to file an action directly in the Constitutional Court, challenging the constitutionality of a statute.<sup>8</sup> In effect, this provision allows a losing parliamentary minority -- if sufficiently strong and sufficiently enraged -- to proceed directly to the Constitutional Court after a statute is enacted. In contrast, as we have seen in recent American cases such as Raines v. Byrd,<sup>9</sup> the attempt to create so-called "congressperson standing" -- which might bear a rough analogy to this German counterpart -- has not been countenanced by the

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8. Art. 93(1)(2)GG. A State (Land) of the Federal Republic may also file such a petition.

9. 521 U.S. 811 (1997).

Supreme Court. Indeed, the sweeping breadth of this so-called "Abstract Norm Control" in Germany -- and its frequent use as a political tool -- have sometimes evoked calls for its abolition. Notwithstanding these doubts, however, this jurisdiction seems unlikely to be repealed.

On some occasions, the Abstract Norm Control grants jurisdiction under circumstances in which a traditional litigant -- in the American sense -- might be difficult to find or even to imagine. In 1974, for example, when the Social Democratic coalition relaxed criminal penalties on abortion, the losing minority of conservative members of Parliament (making up considerably more than one-third of the Bundestag) successfully petitioned the Constitutional Court to have the statute declared unconstitutional -- as falling short of the state's constitutional obligation to protect the life of the fetus.<sup>10</sup> In this proceeding, it might be difficult to imagine an individual litigant who presented a traditional "case" or "controversy", in the American sense. Certainly the individual parties most immediately affected by the

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10. 39 BVerfGE 1 (1975). The State of Bavaria was also a petitioner in this action.

statute -- a pregnant woman seeking an abortion, as well as her physician -- would not challenge the liberalization of the provisions; and the fetus itself does not ordinarily have legal capacity in American (or, for that matter, in German) law<sup>11</sup>.

B. Organstreit.

Another specific provision of the Basic Law allows one organ of the federal government to sue another organ -- directly in the Constitutional Court -- to contest any claimed infringement of its authority.<sup>12</sup> This form of jurisdiction should be compared with the American case of Goldwater v. Carter<sup>13</sup> in 1979. In this case, the Supreme Court (in

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11. In another case of the same era, the Social Democratic coalition enacted a statute easing the requirements for a potential army draftee to claim status as a conscientious objector. In response, the conservative minority in Parliament filed an Abstract Norm Control proceeding in the Constitutional Court, and the Court declared the statute unconstitutional. 48 BVerfGE 127(1978). As in the abortion case, a statute that provides a benefit to those directly affected -- instead of imposing a burden -- might not yield a traditional litigant in the American sense.

12. Article 93(1) (1)GG. This form of jurisdiction is known as "Organstreit", or "dispute between constitutional organs".

13. 444 U.S. 996.

a split decision) found that no justiciable controversy was presented when Senators and Representatives sued President Carter, arguing that his unilateral termination of the Taiwan Mutual Defense Treaty infringed the constitutional power of the Senate and the House. An analogous action, however, would almost certainly be justiciable in the German Constitutional Court.

In an interesting example of this jurisdiction -- which I will touch upon further below -- the parliamentary caucus (Fraktion) of the Social Democrats was allowed to represent the interest of the legislature in challenging the executive's decision to deploy German armed forces beyond the claimed constitutional limit of the NATO zone.<sup>14</sup>

### C. Concrete Norm Control.

Finally -- and to my mind very interestingly -- there is one way in which the German Basic Law narrows the constitutional jurisdiction of certain courts -- although not of the Constitutional Court itself. The German Basic Law makes clear that the Constitutional

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14. 90 BVerfGE 286 (1994).

Court is the only body that can declare a statute of Parliament unconstitutional. As a result, the constitution requires that if any other court (for example, one of the ordinary civil or criminal courts) should find that a relevant statute is unconstitutional -- that court must suspend the proceeding immediately and refer the question of constitutionality to the Constitutional Court.<sup>15</sup> Only after the Constitutional Court has decided this issue, may the proceeding resume its ordinary course.

But, in the United States, Marbury v. Madison implies quite a different role for the lower courts. As noted, Marshall in Marbury infers the power of judicial review from the nature of courts -- not from the particular nature of the Supreme Court. Indeed, there is nothing in Marbury that limits the force of its reasoning on judicial review to the Supreme Court alone. As a result judicial review of federal statutes can (and, indeed, must) be exercised by every American court -- by the lower federal courts, and by every state court also, pursuant to the supremacy clause.

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15. Art. 100(1)GG. This jurisdiction is known as "Concrete Norm Control" because, unlike the Abstract Norm Control discussed above, it arises in the context of a concrete case.

In almost all cases, therefore, the Supreme Court will have the benefit of extended discussion and holdings in the lower courts on the question that it is about to consider. Indeed, if the Supreme Court chooses not to hear such a case, a lower federal court (or even a state court) may have the last word -- at least for the moment -- on the question of constitutionality.

In Germany, in contrast, the Constitutional Court stands alone in determining the constitutionality of federal statutes -- without much assistance from debates in the lower judiciary on these questions. Only the specific lower court that believes a statute to be unconstitutional must present its reasons in a "submission" (Vorlage) to the Constitutional Court in the case of the Concrete Norm Control.

In contrast, however, the other courts in the German judicial system are required to pass upon the constitutionality of governmental actions other than statutes. In this respect, therefore, the two systems are not so far apart.

#### IV. The Doctrine of the German Constitutional Court.

As our examination shows, therefore, the jurisdiction of the German Constitutional Court is significantly broader than that of the Supreme Court of the United States. But that is not all. The issues and topics of adjudication examined by the German Court are also considerably more extensive than those that fall within the purview of its American counterpart. To some extent, this difference results from the broad coverage of the German Basic Law which, as a modern constitution, specifically addresses numerous issues that were unknown, or at least considered less pressing, in the great periods of American Constitution-making of the 18<sup>th</sup> and 19<sup>th</sup> Centuries. But the difference also arises from the German Court's greater willingness, in many areas, to extend its doctrine beyond limits that might be suggested by a narrower view of the text. Suffice it to say that I believe that the development of doctrine by the German Constitutional Court displays a confidence and sovereign reach that -- in some ways -- goes well beyond that of the Supreme Court of the United States.

I would like to offer a few brief examples of what I mean.

A. Review of Economic Regulation

First, the German Constitutional Court is much more willing to intervene in matters of economic regulation than the American Supreme Court has been since the New Deal revolution of the 1930s. Indeed, the Constitutional Court reviews these issues as a routine matter -- often employing concepts of equality, as well as a substantive right to the choice of occupations arising from Article 12 of the German Basic Law.<sup>16</sup>

In the process of German unification, for example, the Constitutional Court acted almost as a form of mediator or ombudsman, evening out disparities and apparently seeking to reconcile groups that it believed had been unduly harmed in the process.

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16. See generally, David P. Currie, "Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany," 1989 Supreme Court Review 333. Currie concludes that the Constitutional Court has become the "ultimate censor of the reasonableness of governmental actions" -- rather like the United States Supreme Court during the Lochner period. Id. at 336.

Employing ideas of equality, the Court accordingly required that one group of former property holders should not be completely excluded from the regime of compensation.<sup>17</sup> And in another case it required certain measures of social welfare in order to ease the burden on some of the Eastern public officials who lost their jobs when the inflated East German governmental system was merged with the West.<sup>18</sup>

The degree of detailed review exercised by the German Constitutional Court in economic matters is exemplified by a recent case in which the Court struck down a statutory rule providing lower regulated fees for certain eastern German lawyers in comparison with those in western Germany<sup>19</sup>. The Court acknowledged that in 1990 -- upon German unification -- it was constitutionally permissible for the Unification Treaty to impose lower regulated fees for East German lawyers, as a result of differing economic and legal

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17. 80 BVerfGE 90 (1991).

18. 84 BVerfGE 133 (1991). For a detailed discussion of these cases, see Peter E. Quint, The Imperfect Union: Constitutional Structures of German Unification (Princeton University Press 1997).

19. 107 BVerfGE 133 (2003).

circumstances in east and west<sup>20</sup>. But, the Court continued, intervening legal changes -- which have made it possible for eastern lawyers to secure western clients also -- have removed the economic basis for this distinction. Therefore in 2003 -- 13 years after unification -- this disparity of regulated fees is no longer constitutionally permissible.

B. Affirmative Obligations on the Government.

Secondly, the German Constitutional Court has not hesitated to impose significant affirmative obligations on the government when it finds that these are constitutionally required. In contrast, of course, the American Supreme Court has found that the Constitution does not impose affirmative obligations on the government -- unless the state has first itself violated individual rights and affirmative acts by the government are required as a remedy.<sup>21</sup>

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20. Id. at 145.

21. DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989). This fundamental position, most sharply expressed in the DeShaney opinion, distinguishes the Supreme Court from many other constitutional tribunals in the world today. See, e.g., Casper, "Changing Concepts of

In the area of education, for example, the German Constitutional Court has sometimes required affirmative action by the government to favor individuals. Under Article 7(4) of the Basic Law, parents have the right to establish private schools, apart from the state system. The Basic Law says nothing about the funding of these private schools. But the Constitutional Court has declared that the government must provide financial support to these schools, under certain circumstances, in order to make the parents' individual rights a reality. Moreover the Constitutional Court has declared that the government may well have a constitutional obligation to maintain university facilities to an extent necessary to accommodate the largest possible number of qualified applicants.<sup>22</sup>

But, on the other hand the German Constitutional Court has also required the government to impose significant burdens on individuals as a constitutional matter. Here, again, the Court's first abortion decision is an eminent example. In 1974, the Social

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Constitutionalism: 18<sup>th</sup> to 20<sup>th</sup> Century," 1989 Supreme Court Review 311, 328.

22 33 BVerfGE 303 (1972).

Democratic government enacted a statute that decriminalized abortion in the first three months of pregnancy. Acting upon the petition of conservative members of Parliament, the Constitutional Court found that the guarantees of life and human dignity in the Basic Law required that the government reinstate criminal penalties for abortion.

Not only that -- the Court in effect went on to draft its own criminal statute, setting forth what it thought was required, as well as including a number of important exceptions to criminal liability required by the countervailing personality rights of the pregnant woman. Needless to say, the court's "statute" -- which remained in effect until Parliament could act -- was also the model for Parliament's own subsequent legislation. That the Court itself relaxed this holding to some extent in 1993 does not detract from the sovereign quality of its approach in these cases.<sup>23</sup>

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23. 88 BVerfGE 203. Indeed, in the 1993 Abortion Case, the Court again imposed its own statute which remained in effect until the Parliament could act. *Id.* at 209-13. Cf. also Uwe Wesel, Der Gang nach Karlsruhe 201 (2004) (Constitutional Court in effect writes statute for state legislature in case on TV regulation).

C. Foreign Affairs.

Finally, in foreign affairs, the German Constitutional Court has also acted with great authority. When the German government sought to join its NATO allies in military enforcement of UN Security Council resolutions on Yugoslavia, German military participation was challenged in the Constitutional Court<sup>24</sup>. Opponents argued that the Basic Law only allowed the deployment of German armed forces for purposes of "defense".<sup>25</sup> According to this view, the Basic Law might permit German army actions within the NATO zone itself, but not within the territory of the former Yugoslavia, which lay beyond that zone.

In an opinion that was breathtaking in many ways, the Constitutional Court in effect rewrote the constitutional rules respecting the use of German armed forces.<sup>26</sup> The Court found that the German military could constitutionally engage in hostilities

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24. As noted above, this was an "Organstreit" action commenced by legislators who argued that parliamentary rights were being infringed by unconstitutional German government action.

25. See Art. 87a(2)GG.

26. 90 BVerfGE 286 (1994); see Quint, *supra*, at 290-96.

outside of the NATO zone -- so long as the action remained within the framework of a "system of mutual collective security"<sup>27</sup>, such as NATO or perhaps the United Nations. In this manner, the permissible scope of German army action was expanded, but in a way that required joint action and thus authorized no unilateral military action by the German government.

But that was not the only new development advanced in the opinion. Except in an immediate emergency -- the Court continued -- these military actions must be expressly approved in advance by a vote of the Parliament. The requirement of an express parliamentary vote for military deployments appears nowhere in the Basic Law -- nor is there any text that even suggests such a limitation -- nor does there appear to be anything in the drafting history of the Basic Law implying such a requirement.

But -- for evident reasons of political philosophy in light of German history -- the Constitutional Court thought that this was an essential safeguard, and imposed it. Interestingly, and for reasons perhaps related to the nature of a

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27. Art. 24(2)GG.

parliamentary system, there was no great outcry at this new imposed requirement. Indeed, new actions of the German military abroad are now routinely preceded by the requisite Parliamentary debate and vote<sup>28</sup>.

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These examples are just a few of the many decisions that testify to the power and authority of the Constitutional Court in the German governmental system. Over all, this exercise of a sort of sovereign prerogative has not damaged the popular status of the Court. Indeed, the Court stands highest in popular esteem among the various organs of the German government.

#### V. A Different Perspective

Thus, in light of its broad jurisdiction and the doctrinal reach of its judgments, the German

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28. For an illuminating assessment of this decision see, Isensee, "Bundesverfassungsgericht -- quo vadis?" 1996 JZ 1085, 1088: "When German foreign policy was hopelessly trapped in its self-made net of constitutional arguments...the Constitutional Court freed it and gave it back its flexibility... When called upon to help in a time of need, the Court filled the evident constitutional 'gap' and imposed a nontextual requirement of parliamentary approval -- in a move that even the process of constitutional amendment could not have performed more effectively. It was truly Solomonic wisdom -- which should not be subjected later to legalistic quibbling" (translation by author).

Constitutional Court seems to be exercising a breadth of judicial authority that goes significantly beyond that of the Supreme Court of the United States. Yet that is a result that arises from the comparison of doctrine against doctrine. In contrast, when we view the comparison from a rather different perspective, the result of this balance does not seem quite so clear. For the German Constitutional Court, though quite sweeping and even adventurous in its doctrine, often shows considerable caution in issuing orders that actually require major changes in governmental or social structures. Indeed, with respect to the practical impact on political and social institutions that result from its judgments, the actual effect of the decisions of the German Constitutional Court may still fall short of the impact of decisions of the Supreme Court of the United States in important areas.

Of course the German Constitutional Court has handed down decisions that have had important political and social implications. In a significant early decision, for example, the German Court confronted Chancellor Konrad Adenauer and annulled his plans for a centralized television network, thereby

setting the general framework for a decentralized (and presumably less politicized) television system that has continued up to the present.<sup>29</sup> At a somewhat later point, the Court invalidated sweeping plans of Willy Brandt and Social Democratic state governments to reform the 19<sup>th</sup> Century structure of Germany's public universities; accordingly, that traditional system was granted a new lease of life.<sup>30</sup> The Constitutional Court also invalidated plans for a nationwide census, on the grounds that certain questions invaded the privacy of those being canvassed.<sup>31</sup>

Yet none of these important decisions, nor indeed any other decisions of the Constitutional Court, seem to approach, in the magnitude of their social or political impact, the decisions of the American Supreme Court in Brown v. Board of Education<sup>32</sup> (and subsequent cases), and in the reapportionment decisions of Baker v. Carr<sup>33</sup> and Reynolds v. Sims<sup>34</sup>. The

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29 12 BVerfGE 201 (1961).

30 35 BVerfGE 79 (1973).

31 65 BVerfGE 1 (1983).

32 347 U.S. 483 (1954).

33 369 U.S. 186 (1962).

Brown decision eventually initiated a great social revolution -- not only in education but also in many other areas of American society; and the Reynolds case effected great political and social changes by decreasing the electoral power of rural areas and increasing the influence of the cities and the suburbs across the nation.

The German Abortion decision of 1975<sup>35</sup> did indeed curtail to some extent an enacted legislative liberalization of abortion. Yet exceptions to the Court's restrictive doctrine -- within the opinion of the case itself -- significantly diminished the actual social impact of this ruling. Indeed, it seems pretty clear that the American case of Roe v. Wade<sup>36</sup> -- by suddenly opening up a broad right to abortion where none had previously existed (except in a handful of states) -- created a much greater social and institutional change within the United States than any of the German abortion decisions did within Germany.

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34 377 U.S. 533 (1964).

35 39 BVerfGE 1.

36 410 U.S. 113 (1973).

In some well-known instances, moreover, the German Constitutional Court seems to have gone out of its way to avoid confrontation with the government even though it clearly had serious constitutional doubts about the measures at issue. Thus in three of the most important cases in its history, the Court ultimately upheld the government's action, but sought to limit its support through narrow interpretation or monitory rhetoric. In 1973, the Court upheld the "Basic Treaty" with East Germany -- the capstone of Willy Brandt's policy of accommodation with the East -- although the Court insisted on a narrow interpretation of the treaty that would avoid the appearance of complete international recognition of the East German State.<sup>37</sup> More recently, the Court upheld the Maastricht Treaty on the European Union, which opened the way for the introduction of the Euro in Germany, but made it clear that further alienations of "sovereignty" to the Union would be subjected to the strictest scrutiny.<sup>38</sup> A similar opinion was handed down at the beginning of Chancellor Kohl's tenure of

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37 36 BVerfGE 1.

38 89 BVerfGE 113 (1993).

office when the Court approved a highly questionable dissolution of Parliament by the Chancellor but also emphasized that the action had reached the outer boundary of constitutional permissibility.<sup>39</sup>

It is also worth noting that although the German Court has clearly proclaimed that it has the authority to strike down constitutional amendments if they are inconsistent with certain fundamental characteristics of the Basic Law,<sup>40</sup> the Court has never actually exercised this authority. Its reluctance may be contrasted with the record of the Supreme Court of India which claims a similar authority and which has actually struck down constitutional amendments on this basis.<sup>41</sup>

In the area of national security, it is often claimed that German constitutional law contains no "political question" doctrine, which would withdraw certain areas of inquiry from scrutiny of the German Constitutional Court. Yet, as a practical matter, the

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39 62 BVerfGE 1 (1984).

40 See 30 BVerfGE 1 (1970); Article 79 (3) GG.

41 See, e.g., *Kesavananda Bharati v. State of Kerala*, (1973) SUPP. S.C.R.

Constitutional Court has been extremely cautious in the exercise of any actual power relating to national security. Indeed -- notwithstanding scholarly disclaimers -- the Constitutional Court clearly adopted a form of "political question" doctrine in upholding the stationing of Pershing II missiles in Germany during the Cold War<sup>42</sup>, and also in a slightly later case in which the Court refused to interfere with the stationing of NATO chemical weapons in Germany<sup>43</sup>. A noted German political scientist has also detected the "equivalent" of a "political question" doctrine in certain other areas -- in a decision that refused to interfere with government regulation of nuclear power plants and in the parliamentary dissolution case of 1983<sup>44</sup>.

As noted above, the German Constitutional Court did impose a requirement of parliamentary approval for

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42 66 BVerfGE 39 (1983).

43 77 BVerfGE 170 (1987).

44 See von Beyme, "The Genesis of Constitutional Review in Parliamentary Systems," in Christine Landfried (ed.), Constitutional Review and Legislation: An International Comparison 35 (Baden-Baden: Nomos 1988); 49 BVerfGE 89(1978) (Kalkar), 62 BVerfGE 1(1984) (Parliamentary Dissolution).

the stationing of German troops abroad in certain circumstances. As a matter of doctrine this decision is breathtaking. But from the point of view of its practical impact, it is actually not quite so dramatic. In order to remain in power in a parliamentary system, any German chancellor must also control a parliamentary majority. It seems clear, as a result, that the requirement of parliamentary approval for the executive's stationing of troops abroad would ordinarily not have a major impact -- because any chancellor possessing the parliamentary support to remain in office would ordinarily also have majority parliamentary support for his desired stationing of troops. Thus the requirement of parliamentary approval would have a serious impact only in exceptional cases -- for example, when the chancellor holds a precariously thin parliamentary majority or when coalition partners disagree on the use of troops and are willing to see the coalition break up over the issue.

In any event, there is nothing in the German jurisprudence like the great American case of

Youngstown Sheet and Tube v. Sawyer,<sup>45</sup> in which the Supreme Court struck down the seizure of steel mills by the executive branch -- a measure that the President considered essential for the effective conduct of an ongoing (albeit undeclared) war in Korea. In the national security area, in fact, the German court has rarely -- if ever -- actually ordered the government to do, or not to do, a specific thing. Thus there is also no German case that parallels the recent decision of the Israeli Supreme Court, requiring the government to change the route of the "security wall" being erected there. Nor is there any decision like the recent Hamdi<sup>46</sup> decision in the United States Supreme Court in which the American military was required to provide a hearing before a "neutral decisionmaker" on the question of whether a U.S. citizen, accused of fighting with the Taliban, was actually an "enemy combatant."

Thus, from the point of view of jurisdiction and doctrine, the authority of the Constitutional Court of Germany seems to extend significantly beyond that of

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45 343 U.S. 579 (1952).

46 Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004).

the Supreme Court of the United States. On the other hand, with respect to its willingness to effect actual changes in social and political institutions, the Supreme Court of the United States may still be playing the greater role. Thus, with respect to the extent of doctrinal authority, the German court may now have a better claim than the U.S. Supreme Court to be the "most extraordinarily powerful court of law the world has ever known." But from the point of view of actual impact on political and social institutions, the Supreme Court of the United States may well still justify Alexander Bickel's resounding claim of power made more than forty years ago.

#### VI. Roots of Judicial Power

But whether the recognition as "the most powerful court" should go to the United States Supreme Court or to the Constitutional Court of the Federal Republic of Germany -- or indeed to one of the other constitutional courts around the world such as those

of Hungary, South Africa or India, whose stature and authority have greatly increased in recent decades<sup>47</sup> -- it is clear that the German and the American tribunals are among those that have played the greatest of roles in the development of their respective systems. A full examination of the reasons for this extraordinary power -- verging, in some areas, on a form of hegemony -- could take us far afield into an examination of history, society, and culture, and at the end we probably would still not know the answer with any assurance. Yet there are two important factors -- with interesting parallels in Germany and the United States -- that must surely play some role. The first is the extraordinary omnipresence of law in the development of both societies. With respect to the United States, it is common to acknowledge the profound role played by law and lawyers in political controversies of 17<sup>th</sup> Century England and in the development of American politics and society in the 18<sup>th</sup> and 19<sup>th</sup> Centuries. In Germany, one cannot fail to

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47 Indeed as far back as 1980, the writer Rajeev Dhavan called the Indian Supreme Court "the most powerful court in the world," and an American commentator claims that India possesses "the world's most active judiciary." Charles R. Epp, The Rights Revolution at 5n.5 (1998).

be impressed by the centuries-old tradition of Roman Law in the German universities, and the extraordinary role of law in the construction of the Prussian Rechtsstaat, as well as the prominence of 19<sup>th</sup> century debates over the desirability of codification and the eventual adoption of the German Civil Code (BGE). Against this deeply legalistic background, the lawlessness of the Nazi state becomes even more striking.

But, beyond this, I would say that the cases of the United States and Germany suggest that there is another crucial factor that has supported the authority of these two constitutional courts in recent times -- and that is the powerful historical showing that electoral democracy has not avoided serious forms of tyranny, oppression or other abuse. These historical lessons have shown that some form of additional -- not exactly majoritarian -- moral control is essential. For various reasons -- including the lack of a better forum -- the exercise of this essential moral authority has fallen to the courts.

In the German case, of course, this point seems undeniable. As noted above, the German Basic Law and

the German Constitutional Court are responses to the unparalleled tyranny of the Nazi regime -- a regime that could be viewed as having come to power through the failure of majoritarian democratic institutions. Indeed, it could well be argued that Hitler and the NSDAP assumed office through the democratic forms of the Weimar Constitution, and it seems most likely that Hitler's tyranny enjoyed majority popular support in Germany until the end.

Thus the placement of the Basic Rights at the beginning of the German Basic Law -- as well as other constitutional devices, such as substantive limitations on constitutional amendments -- sought to make clear that certain values are so important that they may not be altered or impaired even by the strongest majoritarian vote. The German Constitutional Court was the institutional embodiment of that view. Although it may have taken some time, this position is now thoroughly endorsed, I believe, by the German population and electorate itself. Thus, although now only very few of the court's decisions can be viewed as preserving the political community from anything that even vaguely portends actual tyranny, I believe

that the political and moral foundation of the German Constitutional Court as a bulwark against the catastrophes of the past still works strongly to ensure its special authority and power today.

I believe that the extraordinary contemporary power of the American Supreme Court stems -- at least in some part -- from a similar basis. An institution in American history that might be viewed as resembling the European Holocaust of the 1930s and 1940s was the institution of slavery which existed for centuries in the United States, concentrated in the southern American states but supported by the national government, including the courts. This institution was officially expunged through Civil War and the Thirteenth Amendment in 1865. Yet, in the aftermath of slavery, numerous American states continued to support a system of hierarchy and oppression, reinforced through the institution of racial segregation. Naturally, the state legislatures, and indeed Congress, possessed the authority to abolish this system, but the American electoral structure -- including the widespread disenfranchisement of black

citizens in the South -- seemed to have made electoral change impossible.

For many decades (with a few enlightened exceptions) the judiciary also seemed unwilling to enforce the clear commands of the post Civil War constitutional amendments. Instead, the Court showed great vigor in enforcing its view of property rights and related constitutional provisions by invalidating certain measures of business regulation that favored workers or consumers. But by 1937, this line of cases had also been disavowed by the Supreme Court. If, therefore, one viewed the future of American constitutional law in 1940, one might well have predicted a long period of relative judicial inactivity.

But this prediction, of course, would have proven false, and I believe that it was the decision of the Supreme Court in Brown v. Board of Education in 1954 - - declaring segregation in the public schools unconstitutional -- that really opened the door to extraordinary forms of judicial activism and the exercise of heightened authority by the Supreme Court in the decades that followed. This decision ultimately

resulted in a great restructuring of social relations by the Supreme Court and the lower federal courts, followed later by the political branches. It also evoked reactions by the Southern states that called for vigorous judicial action in order to protect freedom of speech and association -- essential for the carrying out of desegregation and the dismantling of other racially-based hierarchies -- in related cases, such as New York Times v. Sullivan, NAACP v. Alabama, and NAACP v. Button. At the same time, the Court seemed to develop sensitivity to other forms of oppression -- often indirectly involving racial discrimination -- in such areas as criminal procedure (Miranda, Mapp v. Ohio, etc) and family law (Levy, etc) -- also areas in which the electoral system seemed slow to act. Indeed, the great Reapportionment Cases of the early 1960s -- which fundamentally shifted political power in the United States -- also responded to what was seen as a deep-seated injustice that could not be cured electorally because of the gridlock of the political system.

Although the American Supreme Court has shifted its political focus substantially since the great

cases of the 1950s and 1960s, I think that the present activism of the Court -- in whatever direction it may venture -- rests on the foundation of judicial self-confidence which, after the crisis of the New Deal period was reestablished in Brown v. Board of Education. It was that case, along with related cases of the Warren Court, that reminded American observers, also, that the electoral system -- while the fundamental basis of any democracy -- is not enough, and that a powerful moral oversight must be exercised by the constitutional judiciary.