"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, "[t]he least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known."[1] 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.[2] Certainly, in 1962 when 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 its original function as a

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1. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 1 (1962).

2. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

protection for the French President against incursions by the Parliament. Instead, the French tribunal has now become an important guarantor of individual rights as well. The Israeli Supreme Court has also greatly expanded its power of constitutional review, and the Supreme Court of India has 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 tribunals is the Constitutional Court of the Federal Republic of Germany, created after World War II for the purpose of enforcing the 1949 West German Constitution, the Basic Law. When this fledgling institution opened its doors in 1951, few could have had high hopes for such a tribunal in a country which, notwithstanding centuries of formidable legal development, had little experience with a judicial organ that was authorized to 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 designed to banish that past, but they also drew significantly on the example of the Weimar Constitution of 1919, whose weaknesses may 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 infirmities 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 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.[3]

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 Article III and Article VI, as eminent commentators have argued over the years.[4] 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*, 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.[5] 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.

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*,[6] decided in 1816. 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

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3. GG arts. 92-94, 100.

4. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 2-5 (1959); RAOUL BERGER, CONGRESS V. THE SUPREME COURT 198-284 (1969). *But see* LEARNED HAND, THE BILL OF RIGHTS 1-30 (1958).

5. 5 U.S. (1 Cranch) 137, 176-80 (1803).

6. 14 U.S. (1 Wheat.) 304 (1816).

from the general nature of *courts*–and not from any particular qualities of the Supreme Court itself.[7]

As a result, *Marbury* implies that the institution of judicial review arises from the function of courts in ordinary cases—ordinary lawsuits 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 exercise judicial review outside of the scope of an ordinary lawsuit—outside, that is, of the scope of the famous "cases" or "controversies" referred to in Article III.[8] 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.

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 lawsuit and the ordinary "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. These forms of extended judicial authority are in addition to the Constitutional Complaint, a form of petition that allows disputes resembling the American "cases" and "controversies" to come before the Constitutional Court.

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.[9] 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.

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7. *See Marbury*, 5 U.S. (1 Cranch) at 177: "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?" (emphasis added). *See generally id.* at 177-80.

8. U.S. CONST. art. III, § 2.

9. GG art. 93, § 1 cl. 2. A State (*Land*) of the Federal Republic may also file such a petition.

In contrast, the attempt to create so-called "congressperson standing"—which might bear a rough analogy to this German counterpart—has not been countenanced by the American Supreme Court.[10] Indeed, the striking 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.[11] 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 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.[12]

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.[13] This explicit grant of jurisdiction should be compared with the result in the American case of *Goldwater v. Carter*,[14] decided in 1979. In this case, the Supreme Court (in a split decision) declined to rule on the merits when Senators and Representatives sued President Carter, ar-

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10. Raines v. Byrd, 521 U.S. 811 (1997).

11. 39 BVerfGE 1 (1975). A number of German States were also petitioners in this action.

12. In other legislation of the same era, the Social Democratic coalition made it easier for an army inductee to claim status as a conscientious objector. In response, the conservative minority in Parliament filed an Abstract Norm Control proceeding, and the Constitutional 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.

13. GG art. 93, § 1 cl. 1. This form of jurisdiction is known as "*Organstreit*," or "dispute between constitutional organs."

14. 444 U.S. 996 (1979) (mem.).

guing that his unilateral termination of the Taiwan Mutual Defense Treaty infringed the constitutional power of the Senate and the House.[15] 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.[16]

C. Concrete Norm Control

Finally, 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 Court is the only tribunal 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.[17] 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 the state courts also, pursuant to the Supremacy Clause.[18]

In almost all cases, therefore, the Supreme Court will have the benefit of extended discussion and holdings in the lower courts on

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15. Four Justices found that the case presented a nonjusticiable "political" question. *Id.* at 1002-06 (Rehnquist, J., concurring in the judgment). A fifth Justice found that the case was "not ripe for judicial review." *Id.* at 997-1002 (Powell, J., concurring in the judgment).

16. 90 BVerfGE 286 (1994); *see also, e.g.*, 104 BVerfGE 151 (2001) (NATO Strategic Concept Case).

17. GG art. 100, § 1. 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.

18. U.S. CONST. art. VI, cl. 2; *see* Wechsler, *supra* note 4, at 3.

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, by 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 eighteenth and nineteenth 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.[19]

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. 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;[20] and in another case, the Court 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.[21] In a series of decisions related to social welfare more generally, the Court has found that the government is constitutionally required to exempt a certain basic level of income—the "existence minimum" for the family unit—from federal income taxation.[22] The Court has also been active in enforcing constitutional doctrines that require certain transfer payments from the federal government and the more prosperous states, in order to mitigate disparities experienced by states with lower per capita incomes.[23]

The degree of detailed review exercised by the German Constitutional Court in economic matters is exemplified by a recent case in which the Court declared the unconstitutionality of a rule requiring lower regulated fees for certain eastern German lawyers in comparison with those in western Germany.[24] The Court acknowledged that in 1990—upon German unification—it was constitutionally permissible for the Unification Treaty to set lower fees for East German lawyers, as a result of differing economic and legal circumstances in East

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19. *See generally* David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333. Currie concludes that the Constitutional Court has become the "ultimate censor of the reasonableness of governmental action"—rather like the United States Supreme Court during the period of *Lochner v. New York*. *Id.* at 336.

20. 84 BVerfGE 90 (1991).

21. 84 BVerfGE 133 (1991). For discussion of these cases, see PETER E. QUINT, THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION 134-38, 168-71 (1997).

22. 82 BVerfGE 60 (1990); 99 BVerfGE 216 (1998); *cf.* GG art. 20, § 1. For other cases in which the German Constitutional Court has reviewed the levels or conditions of taxation, see, e.g., DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 52-60 (1994).

23. CURRIE, *supra* note 22, at 80; Clifford Larsen, *States Federal, Financial, Sovereign and Social. A Critical Inquiry into an Alternative to American Financial Federalism*, 47 AM. J. COMP. L. 429 (1999).

24. 107 BVerfGE 133 (2003).

and West.[25] 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.[26] Therefore in 2003—thirteen 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.[27]

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, Section 4 of the Basic Law, parents have the right to establish private schools, apart from the state system. The Basic Law is silent 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.[28] 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 an appropriate number of qualified applicants.[29]

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 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 guar-

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25. *Id.* at 145.

26. *Id.* at 146-48.

27. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989). This fundamental position, most sharply expressed in the *DeShaney* opinion, distinguishes the American Supreme Court from many other constitutional tribunals in the world today. *See, e.g.*, Gerhard Casper, *Changing Concepts of Constitutionalism: 18th to 20th Century*, 1989 SUP. CT. REV. 311, 328.

28. 75 BVerfGE 40 (1987); *see* CURRIE, *supra* note 22, at 287-90.

29. 33 BVerfGE 303 (1972).

antees of life and human dignity in the Basic Law *required* that the government reinstate criminal penalties for abortion.[30]

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 mandated 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.[31]

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.[32] Opponents argued that the Basic Law only allowed the deployment of German armed forces for purposes of "defense."[33] 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 recast the doctrine respecting the use of German armed forces.[34] The Court found that the German military *could* constitutionally engage in hostilities outside of the NATO zone—so long as the action remained within the framework of a "system of mutual collective security," such as NATO or perhaps the United Nations.[35] Accordingly, the permissible scope of German army deployments was expanded—but in a way that required concerted international action

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30. 39 BVerfGE 1 (1975).

31. 88 BVerfGE 203 (1993). 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; *see also* UWE WESEL, DER GANG NACH KARLSRUHE 201 (2004) (noting that the Constitutional Court in effect wrote a statute for a state legislature in a case on TV regulation).

32. 90 BVerfGE 286 (1994). As noted above, this was an *Organstreit* action commenced by legislators who argued that parliamentary rights were being infringed by unconstitutional German government action.

33. *See* GG art. 87a, § 2.

34. 90 BVerfGE 286 (1994). For a discussion of this decision, see QUINT, *supra* note 21, at 290-96.

35. 90 BVerfGE at 344-55; *see* GG art. 24, § 2.

and thus did not authorize unilateral military steps by the German government alone.

But that was not the only startling 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.[36] The requirement of an express parliamentary vote for military deployments appears nowhere in the Basic Law—nor is there any constitutional text that could be interpreted to require such a limitation.

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 parliamentary system, there was no great outcry at this newly imposed requirement. Indeed, new actions of the German military abroad are now generally preceded by the requisite parliamentary debate and vote.[37]

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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. Overall, 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 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

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36. 90 BVerfGE at 381-90.

37. For an illuminating assessment of this decision see Josef Isensee, *Bundesverfassungsgericht—quo vadis?*, 1996 JURISTENZEITUNG 1085. Isensee writes:

> 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.

Id. at 1088 (translation by author).

result of this balance does not seem quite so clear. For the German Constitutional Court, though quite sweeping and even adventurous in its doctrine, is sometimes capable of 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 results 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 national television network, thereby setting the general framework for a decentralized (and presumably less politicized) television system that has continued up to the present.[38] At a somewhat later point, the Court invalidated sweeping plans of Willy Brandt and Social Democratic state governments to reform the nineteenth-century structure of Germany's public universities; accordingly, that traditional system was granted a new lease of life.[39] The Constitutional Court also invalidated plans for a nationwide census, on the grounds that certain of its provisions invaded the privacy of those being canvassed.[40] More generally, the Court's willingness to extend constitutional review to regulatory matters, noted above, has required a continuing readjustment of statutory programs in various areas of economic and social life.[41]

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*[42] (and subsequent cases)

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38. 12 BVerfGE 205 (1961); *see also* WESEL, *supra* note 31, at 120-27.

39. 35 BVerfGE 79 (1973). Moreover, the Court continues to exercise strict constitutional scrutiny over certain university functions, such as the admission of students. CURRIE, *supra* note 22, at 303-04.

40. 65 BVerfGE 1 (1983).

41. *See supra* note 19 and accompanying text. Moreover, as noted above, the Constitutional Court has issued important decisions relating to taxation. For example, the Court invalidated a significant property tax (*Vermögenssteuer*), finding that the tax violated rights of equality, and it has decreed that a certain minimum amount of family income must remain free of taxation. 93 BVerfGE 121 (1995); *see also supra* note 22 and accompanying text. Because these decisions removed or reduced important sources of governmental income, considerable legislative shuffling seems to have been necessary to make up the shortfall or otherwise accommodate these decisions. *See* WESEL, *supra* note 31, at 362-66.

42. 347 U.S. 483 (1954).

and in the reapportionment decisions of *Baker v. Carr*[43] and *Reynolds v. Sims*.[44] The *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. Moreover, in the 1960s, the American Supreme Court under Chief Justice Warren reformed the law of criminal procedure and police practice, in constitutional cases that—for a number of reasons—have no real parallel in Germany.[45]

The German Abortion decision of 1975[46] 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*[47]–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 the German abortion decisions did within Germany.

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

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43. 369 U.S. 186 (1962).

44. 377 U.S. 533 (1964).

45. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961). Many important decisions on criminal procedure in Germany have involved statutory interpretation by the Supreme Court for criminal matters (*Bundesgerichtshof*), rather than interpretation of the Basic Law by the Constitutional Court. *See generally* STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH (2002); *but see, e.g.*, Konrad Zweigert, *Duktus der Rechtsprechung des ersten Senats des Bundesverfassungsgerichts und einige Erinnerungen an seine Anfangszeit, in* DAS BUNDESVERFASSUNGSGERICHT 1951-1971, at 111-12 (1971) (noting early criminal procedure cases in the German Constitutional Court); *infra* note 52. Overall, however, these German decisions do not seem to have had the social or political impact of the criminal procedure cases of the United States Supreme Court.

46. 39 BVerfGE 1 (1975).

47. 410 U.S. 113 (1973).

complete recognition of the East German state in international law.[48] 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.[49] A similar opinion was handed down at the beginning of Chancellor Kohl's tenure of office when the Court approved a highly questionable dissolution of Parliament that was engineered by the Chancellor in order to achieve an early election. The Court upheld this maneuver, but it also indicated that the action had approached the outer boundary of constitutional permissibility.[50]

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,[51] the Court has never actually exercised this authority. In a recent decision, for example, the Court gave a very narrow interpretation to a constitutional amendment, which authorized electronic eavesdropping in serious criminal cases, for the purpose of saving the amendment from invalidity.[52] The Court's 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.[53]

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

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48. 36 BVerfGE 1 (1973).

49. 89 BVerfGE 155 (1993).

50. 62 BVerfGE 1 (1983). In the summer of 2005, the Court reaffirmed this decision when it upheld a similar questionable dissolution of Parliament by Chancellor Gerhard Schröder. BVerfGE, Decision of 25 August 2005, 2 BvE 4/05.

In some respects the acquiescence of the German Court in these important election cases might be contrasted with the dramatic intervention of the United States Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), in which the Court cut off the possibility of further recounts in Florida, a state that was essential for George Bush's electoral college majority in the 2000 presidential election. The decision in *Bush v. Gore* certainly represented an extraordinary assertion of judicial power—although whether the decision actually changed the result of the election is considerably less clear.

51. 30 BVerfGE 1 (1970); *see* GG art. 79, § 3.

52. 109 BVerfGE 275 (2004) ("*grosser Lauschangriff*"). The Court, however, did invalidate several related provisions of "ordinary" law in a decision that vigorously protected rights of privacy. *See* WESEL, *supra* note 31, at 344-48. For possible American parallels, see *Katz v. United States*, 389 U.S. 347 (1967); *United States v. United States Dist. Court*, 407 U.S. 297 (1972).

53. Kesavananda Bharati v. State of Kerala, (1973) S.C.R. Supp. 1; Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 107-33 (B.N. Kirpal et al. eds., 2000).

Constitutional Court.[54] Yet, as a practical matter, the Constitutional Court has been extremely cautious in the exercise of any actual power relating to national security. Indeed—notwithstanding scholarly disclaimers—the Constitutional Court did adopt a form of "political question" doctrine in upholding the deployment of Pershing II missiles in Germany during the Cold War,[55] and also in a slightly later case in which the Court refused to interfere with the stationing of NATO chemical weapons in Germany.[56] 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, mentioned above.[57]

As noted, the German Constitutional Court did impose a requirement of parliamentary approval for the deployment of German troops outside of the NATO zone in certain cases. 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 or her 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.[58]

In any event, there is nothing in the German jurisprudence like the great American case of *Youngstown Sheet & Tube Co. v. Sawyer*,[59] in

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54. *See* CURRIE, *supra* note 22, at 170-71 (commenting on these claims).

55. 66 BVerfGE 39 (1983).

56. 77 BVerfGE 170 (1987).

57. *See* Klaus von Beyme, *The Genesis of Constitutional Review in Parliamentary Systems, in* CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON 35 (Christine Landfried ed., 1988); 49 BVerfGE 89 (1978) (Kalkar nuclear power plant); *supra* note 50 and accompanying text.

58. Unsurprisingly, in later cases the Court has upheld government actions, relating to NATO military policies and missions, against constitutional attack. *See* 104 BVerfGE 151 (2001) (finding that the government's adherence to a significant change in NATO's "Strategic Concept" does not require parliamentary approval as a new treaty); 100 BVerfGE 266 (1999) (dismissing, essentially for lack of standing, claims that German participation in NATO air attacks against Serbia in 1999 violated international law).

59. 343 U.S. 579 (1952).

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 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 does there seem to be any case like the recent *Hamdi* 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."[60] Yet in the summer of 2005, the German Constitutional Court invalidated a statute enforcing a European Union rule that called for expedited extradition of a criminal suspect to another European Union country.[61] As this case involved an alleged terrorist, the decision may herald greater intervention by the German Court in national security matters.

Thus, overall, from the point of view of jurisdiction and doctrine, the authority of the Constitutional Court of Germany seems to extend significantly beyond that of 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 have played the greater role. Thus, with respect to the extent of doctrinal authority, the German Court may now have a better claim than the United States 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 still justify Alexander Bickel's resounding claim of power made more than forty years ago.

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60. Hamdi v. Rumsfeld, 542 U.S. 507 (2004). Moreover, a companion case in the Supreme Court may require such hearings for noncitizens held at Guantanamo Bay, as well. Rasul v. Bush, 542 U.S. 466 (2004); *see In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) (interpreting *Rasul* and *Hamdi* to require such hearings for noncitizens held at Guantanamo). *See generally* Reid v. Covert, 354 U.S. 1 (1957) (denying military jurisdiction over U.S. citizens in certain circumstances); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (same). *But see* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741-42 (2005) (purporting to withdraw jurisdiction of federal courts to consider habeas corpus and certain other relief for detainees at Guantanamo Bay).

61. BVerfGE, Decision of 18 July 2005, 2 BvR 2236/04.

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 eminent constitutional courts around the world, such as those of Hungary, South Africa, or India, whose stature and authority have greatly increased in recent years[62]—it is clear that the German and the American tribunals are among those that have played the greatest roles in the development of their respective political 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 ubiquity 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 influential political controversies of seventeenth-century England and in the development of American politics and society in the eighteenth and nineteenth centuries. In Germany, one cannot fail to 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 nineteenth-century debates over the desirability of codification and the eventual adoption of the German Civil Code (BGB). 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.

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62. Indeed as far back as 1980, the writer Rajeev Dhavan called the Indian Supreme Court "the most powerful court in the world," and another commentator claims that India possesses "the world's most active judiciary." CHARLES R. EPP, THE RIGHTS REVOLUTION 72 & n.5 (1998) (citing RAJEEV DHAVAN, JUSTICE ON TRIAL (1980) and Carl Baar, *Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary*, *in* COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY (Donald W. Jackson & C. Neal Tate eds., 1992)).

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 Nazi Party 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—were intended 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 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, it seems clear 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 Supreme 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 foreseen a long period of relative judicial inactivity.[63]

But this prediction, of course, would have proven false, and 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, as well as 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 Co. v. Sullivan*,[64] *NAACP v. Alabama*,[65] and *NAACP v. Button*.[66] At the same time, the Supreme Court seemed to develop sensitivity to other forms of oppression, often indirectly involving racial discrimination, in such areas as criminal procedure[67] and family law[68]—also areas in which the electoral system seemed slow to act. Indeed, the great Reapportionment Cases of the early 1960s[69]—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.

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63. *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 121 (4th ed., revised by Sanford Levinson 2005).

64. 376 U.S. 254 (1964).

65. 357 U.S. 449 (1958).

66. 371 U.S. 415 (1963).

67. *See supra* note 45 and accompanying text.

68. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968).

69. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).