THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY

SECOND EDITION

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Duke University Press Durham and London 1997

PART I

WEST GERMAN CONSTITUTIONALISM

The Federal Constitutional Court, with its sweeping powers of judicial review, is only as old as the Basic Law. To the surprise of many observers this tribunal has developed into an institution of major policy-making importance in the Federal Republic. Judicial review is a relatively new departure in German constitutional history. Postwar German leaders believed that the traditional parliamentary and judicial institutions that had failed to protect the Weimar Constitution were insufficient to safeguard the new liberal democratic order. They created a national constitutional tribunal to serve as a guardian of political democracy, to enforce a consistent reading of the Constitution on all branches and levels of government, and to protect the basic liberties of German citizens. With this decision, German constitution makers gave up the old positivist idea that law and morality are separate domains. Constitutional morality would now govern both law and politics.

Part 1 furnishes the backdrop to this treatment of German constitutional law and policy. It seems useful at the outset to introduce the reader to the powers and organization of the Federal Constitutional Court and to set forth, in one place, a systematic account of the Basic Law and the principles governing its interpretation. Accordingly, chapter 1 describes the Federal Constitutional Court's origin, structure, powers, and decisional procedures. It also includes an account of important organizational and staff changes that have taken place over the course of the court's forty-five years of operation.

Chapter 2 focuses on the main features of the Basic Law and the principles on which they are grounded. Unlike previous German constitutions, the Basic Law creates a binding order of values having the force of law and enforceable by judicial decision. It also creates a "free democratic basic order" based on individual liberties, equality, majority rule, responsible party government, separation of powers, the rule of law, and the observance by citizens of certain principles of political obligation. The Constitutional Court's function in Germany's judicial democracy is to define, protect, and reconcile these various and often conflicting constitutional values. In performing this task, the court has been a crucial player in German constitutional

politics. In some areas of constitutional adjudication, its role has been no less than transformative. Gravitating between the poles of judicial activism and restraint, the court has also developed a number of decision-making tools designed at least in part to resolve the ongoing tension between democracy and constitutionalism.

1

THE FEDERAL CONSTITUTIONAL COURT

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

Another factor that encouraged the framers of the Basic Law to assign the function of constitutional judicial review to a single court was the traditional structure of the German judiciary and the unfamiliarity of its judges with constitutional adjudication. The German judiciary includes separate hierarchies of administrative, labor, fiscal, and social courts, while ordinary civil and criminal jurisdiction is vested in another, much larger, system of regular courts.[3] All trial and intermediate courts of appeal are *Land* (state) tribunals; federal courts serve as courts of last resort. The Federal Administrative Court (Bundesverwaltungsgericht), Federal Labor Court (Bundesarbeitsgericht), Federal Finance Court (Bundesfinanzgericht), Federal Social Court (Bundessozialgericht), and Federal Court of Justice (Bundesgerichtshof) are at the respective apexes of these judicial hierarchies. Like the appellate courts generally, these tribunals are staffed by a host of judges (125 on the Federal Court of Justice alone) who sit in panels of five. The complexity of this structure and the lack of any tradition of *stare decisis* would have rendered an American-style decentralized system of judicial review, in which all courts may declare laws unconstitutional, unworkable in Germany.

Judicial attitudes toward constitutional review also militated against a de-

centralized system. The background and professional training of the 20,672 career judges (as of January 1, 1993) who staff the German judiciary are unlikely to produce the independence of mind typical of judges in the Anglo-American tradition. The typical German judge enters the judiciary at the conclusion of his or her legal training, and success is denoted by promotion within the ranks of the judicial bureaucracy. In contrast, the typical American judge is appointed at a later stage of his career, usually after achieving success in public office or as a private lawyer. German judges have been characterized as persons seeking to clothe themselves in anonymity and to insist that it is the court and not the judge who decides; moreover, the judicial task is to apply the law as written and with exacting objectivity.[4] Although this portrayal of the typical German judge is less true today than it was forty-five years ago, the conservative reputation and public distrust of the regular judiciary at the time the Basic Law was created were sufficient to ensure that the power of judicial review would be concentrated in a single and independent tribunal.

ORIGIN

Historical Antecedents

German legal scholars have traditionally distinguished between constitutional review (*Verfassungsstreitigkeit*) and judicial review (*richterliches Prüfungsrecht*). Judicial review, the more inclusive term, signifies the authority of judges to rule on the constitutionality of law. Constitutional review, which in Germany antedates judicial review, is associated with Germany's tradition of monarchical constitutionalism, stretching from the German Confederation of 1815 through the Constitution of 1867 (establishing the North German Confederation) and up to and including the Imperial Constitution of 1871. During this period (1815–1918), when German constitutional thought pivoted on the concepts of state and sovereignty,[5] constitutional review provided the mechanism for defining the rights of sovereign states and their relationship to the larger union incorporating them. Judicial review, on the other hand—a device for protecting individual rights—is associated with Germany's republican tradition, beginning roughly with the abortive Frankfurt Constitution of 1849, continuing with the Weimar Constitution of 1918, and ending with the Basic Law of 1949.

CONSTITUTIONAL REVIEW. Constitutional review appeared in embryonic form during the Holy Roman Empire. The need for unity among the principalities of the empire and peace among their warring princes prompted Maximilian I in 1495 to create the Reichskammergericht (Court of the Imperial Chamber), before which the monarchs resolved their differences. By the seventeenth century the Imperial Court and some local courts occasionally enforced the "constitutional" rights of estates against crown princes. Compacts or treaties governed their mutual rights and obligations. Constitutional review commenced when these tribunals enforced—to the extent that their rulings could be enforced—the corporate rights of estates under these documents.[6]

Constitutional review in its modern form emerged in the nineteenth century.[7] Again, it served as a principal tool for the resolution of constitutional disputes among and within the individual states of the German Empire and often between the states and the national government.[8] Under Germany's monarchical constitutions, the forum for the resolution of such disputes was usually the parliamentary chamber in which the states were corporately represented. Under Germany's republican constitutions, on the other hand, the forum was usually a specialized constitutional tribunal, the most notable of which, prior to the creation of the Federal Constitutional Court, was the Weimar Republic's Staatsgerichtshof. As major agencies of public law commissioned to decide sensitive political issues, these courts were independent of the regular judiciary and were staffed with judges selected by legislators.

Like most constitutional courts at the state level before and after the Nazi period, the Staatsgerichtshof was a part-time tribunal whose members convened periodically to decide constitutional disputes. Its jurisdiction included (1) the trial of impeachments brought by parliament (the Reichstag) against the president, chancellor, or federal ministers for any willful violation of the constitution; (2) the resolution of differences of opinion concerning a state's administration of national law; and (3) the settlement of constitutional conflicts within and among the separate states as well as between states and the Reich. The court's membership varied according to the nature of the dispute before it; the more "political" the dispute the more insistent was parliament on electing its members.[9]

These structures and powers, which influenced the shape of the Federal Constitutional Court, highlight three salient features of constitutional review in German history. First, as just noted, an institution independent of the regular judiciary exercises such review. Second, it takes cases on original jurisdiction, deciding them in response to a simple complaint or petition, unfettered by the technicalities of an ordinary lawsuit. Finally, it settles constitutional disputes between and within governments. Constitutional review is thus a means of protecting the government from itself and also from the excesses of administrative power, "but [it] would not have judges intervening on behalf of citizens against the executive branch of government."[10] The German legal order has always distinguished sharply between administrative and constitutional law. The juridical basis of the distinction, according to Franz Jerusalem, is that the former concerns the execution of the state's will once it is made, whereas the latter concerns those organs of government constitutionally obligated to form the state's will.[11] These organs—the constitutionally prescribed units of the political system—and these alone are the subjects of constitutional review.

JUDICIAL REVIEW. The doctrine of judicial review, unlike constitutional review, was alien to the theory of judicial decision in Germany.[12] A judge's only duty under the traditional German doctrine of separation of powers was to enforce the law as written. About the mid-nineteenth century, however, some German legal scholars and judges sought to cultivate ground in which judicial review might blossom. In 1860, Robert von Mohl, who was acquainted with the *Federalist Papers* and the work of the United States Supreme Court, published a major legal treatise in defense of judicial review.[13] Two years later, an association of German jurists, with Rudolf von Ihering emerging as its chief spokesman, went on record in favor of judicial review.[14] Jurists attending the meeting recalled provisions of the Frankfurt Constitution (1849) authorizing the Federal Supreme Court (Reichsgericht) to hear complaints by a state against national laws allegedly in violation of the Constitution and even by ordinary citizens claiming a governmental invasion of their fundamental rights, foreshadowing by a century similar authority conferred on the Federal Constitutional Court. Their views, however, like the provisions of the 1849 Constitution, failed to take root in the legal soil of monarchical Germany (1871–1918).[15]

The Weimar Republic provided a climate more sympathetic to judicial review. Inspired by the work of the Frankfurt Assembly, the 1919 Constitution established a constitutional democracy undergirded by a bill of rights. The Weimar period also witnessed the continuing influence of the "free law" school (*Freirechtsschule*) of judicial interpretation,[16] marking a significant challenge to the dominant tradition of legal positivism. And although the Constitution remained silent with respect to the power of the courts to review the constitutionality of law,[17] judicial review as a principle of limited government enjoyed strong support in the Weimar National Assembly.

But, as Hugo Preuss predicted—and warned—the Weimar Constitution's failure expressly to ban judicial review prompted courts to arrogate this power to themselves.[18] In the early 1920s, several federal high courts, including the Reichsgericht, suggested in dicta that they possessed the power to examine the constitutionality of laws.[19] On January 15, 1924, deeply disturbed by the swelling controversy over the revaluation of debts, the Association of German Judges confidently announced that courts of law were indeed empowered to protect the right of contract and, if necessary, to strike down national laws and other state actions—or inactions that failed to safeguard property rights—on substantive constitutional grounds.[20] Several months later, the Reichsgericht announced that "in principle courts of law are authorized to examine the formal and material validity of laws and ordinances."[21]

State courts during the Weimar period held firm to the German tradition that judges are subject to law and have the duty to apply it even in the face of conflicting constitutional norms. Yet even here, differing postures toward judicial review were beginning to emerge. Although most state constitutions said nothing about judicial review, some courts followed the lead of the Reichsgericht by accepting judicial review in principle; however, they seldom invoked it to nullify legislation. Only the Bavarian Constitution expressly authorized courts to review laws in light of both state and national constitutions. The Schaumburg-Lippe Constitution, echoing the still-dominant German view, expressly denied this power to the courts.[22]

When the German states (now known as *Länder*) reemerged as viable political units after World War II, judicial review appeared once more, this time as an articulate principle of several state (*Land*) constitutions. Perhaps because of the Weimar experience, however, these documents did not authorize the regular courts to review the constitutionality of laws. Once again, consistent with an older tradition of constitutional review, this authority was vested in specialized courts staffed with judges chosen by parliament from a variety of courts or constituencies. In any event, as this survey of German constitutional review demonstrates, the framers of the Basic Law had plenty of precedents on which to draw in constructing their own version of constitutional democracy.

The Herrenchiemsee Conference

It should now be clear that judicial review in Germany did not spring full-blown out of the Basic Law of 1949. It was not adopted, as is often supposed, in response to American pressure during the occupation. The Allied powers did, of course, concern themselves with the reorganization of the judicial system.[23] For one thing, they insisted that any future government of Germany must be federal, democratic, and constitutional. Later, when the military governors commissioned the Germans to draft a constitution for the Western zones of occupation, they made it clear that judicial review was implicit in their understanding of an independent judiciary.[24] Yet the military governors did not impose judicial review on a reluctant nation. The Germans decided on their own to establish a constitutional court, to vest it with authority to nullify laws contrary to the Constitution, and to elevate this authority into an express principle of constitutional governance.[25] While they were familiar with the American system of judicial review and were guided by the American experience in shaping their constitutional democracy, Germans relied mainly on their own tradition of constitutional review.

The groundwork for the Basic Law was prepared in a resplendent nineteenth-century castle on an island in Lake Chiemsee during August 1948. On the initiative of Bavaria's state governor, Minister-President Hans Ehard, the *Länder* in the Allied zones of occupation called on a group of constitutional law experts to produce a first draft of a constitution to expedite the work of the ensuing constitutional convention known as the Parliamentary Council.[26] The Herrenchiemsee proposals, which included provisions for a national constitutional tribunal,[27] followed the recommendations of Professor Hans Nawiasky, commonly regarded as the father of the postwar Bavarian Constitution, which, like many other state constitutions drafted in 1946 and 1947, provided for a state constitutional court. In cooperation with Hans

Kelsen, Nawiasky had prepared a working paper proposing the establishment of a constitutional tribunal modeled after the Weimar Republic's Staatsgerichtshof. Nawiasky was a strong advocate of judicial review during the Weimar period, and Kelsen had been one of the creators of the Austrian Constitutional Court.[28] Claus Leusser, an Ehard associate and later a justice of the Federal Constitutional Court, also helped to draft the Herrenchiemsee judicial proposals.[29]

The Herrenchiemsee drafters looked mainly to the experience of Weimar's Staatsgerichtshof for guidance in defining the powers of the proposed constitutional court.[30] The draft plan envisioned a tribunal vested with both the competence of the Staatsgerichtshof (i.e., its constitutional review jurisdiction) and the authority to hear the complaint of any person alleging that any public agency had violated his or her constitutional rights. Aware of the potential power of the proposed court, the conferees recommended a plan of judicial recruitment that would broaden the court's political support. The plan included proposals for (1) the election of justices in equal numbers by the Bundestag (the federal parliament) and the Bundesrat (the council of state governments), (2) the participation of both houses in selecting the court's presiding officer (the president), and (3) the selection of one-half of the justices from the high federal courts of appeal and the highest state courts.[31] But the drafters were at odds over how the new court should be structured; the discord centered on whether it should be organized as a tribunal separate from and independent of all other courts or carved out of one of the federal high courts of appeal.[32]

The Parliamentary Council

The debate over the new court's structure continued in the constitutional convention (i.e., the Parliamentary Council).[33] It all boiled down to a dispute over the nature of the new tribunal. Should it be like Weimar's Staatsgerichtshof and serve mainly as an organ for resolving conflicts between branches and levels of government (i.e., a court of constitutional review)? Or should it combine such jurisdiction with the general power to review the constitutionality of legislation (i.e., judicial review)? In line with the Herrenchiemsee plan, the framers finally agreed to create a constitutional tribunal independent of other public-law courts, but they disagreed over how much of the constitutional jurisdiction listed in the proposed constitution should be conferred on it as opposed to other high federal courts.

The controversy centered on the distinction between what some delegates regarded as the "political" role of a constitutional court and the more "objective" law-interpreting role of the regular judiciary. Some delegates preferred two separate courts—one to review the constitutionality of laws (i.e., judicial review), the other to decide essentially political disputes among branches and levels of government (i.e., constitutional review). Others favored one grand multipurpose tribunal divided into several panels, each specializing in a particular area of public or constitutional law. This proposal was strenuously opposed by many German judges, who were alarmed by any such mixing of law and politics in a single institution.[34] The

upshot was a compromise resulting in a separate constitutional tribunal with exclusive jurisdiction over all constitutional disputes, including the authority to review the constitutionality of laws.

The final version of the Basic Law extended the court's jurisdiction to twelve categories of disputes and "such other cases as are assigned to it by federal legislation" (Article 93 [2]). This jurisdiction, however, could be invoked only by federal and state governments (i.e., the chancellor or minister-president and his cabinet), parliamentary political parties, and, in certain circumstances, courts of law. The framers rejected the Herrenchiemsee proposal to confer on private parties the constitutional right to petition the court, a decision in line with the general practice of constitutional review in Weimar Germany and Austria. (As noted below, however, the individual right to petition the constitutional court was restored by legislation in 1951 and incorporated into the Basic Law in 1969.) In any event, the two main parties in the Parliamentary Council favored these limited rules of access, the Social Democrats because they would protect political minorities in and out of parliament, and the Christian Democrats because they saw the rules as equally useful in preserving German federalism.[35]

The interests of both political parties were also reflected in judicial selection clauses specifying that the Federal Constitutional Court shall consist of "federal judges and other members," half "to be elected by the Bundestag and half by the Bundesrat" (Article 94). Christian Democrats were thus assured of a strong "federal" presence on the court, just as Social Democrats could take comfort in knowing that the court would not be dominated by professional judges drawn wholly from a conservative judiciary. Impatient to get on with their work of producing a constitution, the framers stopped there, leaving other details of the Constitutional Court's organization and procedure to later legislation.

The Legislative Phase

Almost two additional years of debate were necessary to produce the enabling statute creating the Federal Constitutional Court. The shape of the new tribunal represented a compromise between the conflicting perspectives of the federal government, the Social Democrats, and the Bundesrat on such matters as judicial selection and tenure, the ratio of career judges to "other members," the qualifications of judicial nominees, the court's size and structure, and the degree of control over the court to be exercised by the Federal Ministry of Justice.[36] All participants in the debate recognized that the court's political acceptance would depend on broad agreement on these matters across party and institutional lines. Finally, after months of intensive negotiation within and between the Bundestag and the Bundesrat, a bill emerged with the overwhelming support of the major parliamentary parties and all branches of government. The result was the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz, hereafter cited as FCCA) of March 12, 1951.[37]

In its current version the FCCA includes 105 sections that codify and flesh out

the Basic Law's provisions relating to the court's organization, powers, and procedures, important features of which are discussed below. Representing numerous political compromises, the FCCA (1) lays down the qualifications and tenure of the court's members, (2) specifies the procedures of judicial selection, (3) provides for a two-senate tribunal, (4) enumerates the jurisdiction of each senate, (5) prescribes the rules of access under each jurisdictional category, (6) defines the authority of the Plenum (both senates sitting together), and (7) establishes the conditions for the removal or retirement of the court's members.

JURISDICTION

The United States Constitution contains no express reference to any judicial power to pass upon the validity of legislative or executive decisions. Chief Justice John Marshall laid down the doctrine of judicial review by inference from the constitutional text in the seminal case *Marbury* v. *Madison*.[38] The Basic Law, by contrast, leaves nothing to inference, as it enumerates all of the Constitutional Court's jurisdiction. The court is authorized to hear cases involving the following actions:

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

The court thus has the authority not only to settle conventional constitutional controversies but also to try impeachments of the federal president, to review decisions of the Bundestag relating to the validity of an election, and to decide questions critical to the definition and administration of federal law. International law is particularly important here, for Article 25 of the Basic Law makes "the general rules of public international law . . . an integral part of federal law." Whether such rules are an integral part of federal law and whether they create rights and duties for persons living in Germany are questions only the Constitutional Court can decide.

Table 1.1. Federal Constitutional Cases, 1951–1994

Proceeding	Docketed	Decided
Unconstitutional parties	5	5
Disputes between federal organs	107	51
Federal-state conflicts	26	14
Abstract judicial review	124	68
Concrete judicial review	2,901	959
Constitutional complaints	97,007	80,767*
Other proceedings	1,097	652
Total	101,268	82,516

Source: Statistical summary prepared by the administrative offices of the two senates (1951 to December 31, 1994; typescript).

*Of these, 3,750 were decided by the full senates, most prior to the establishment of the chambers within each senate.

Each of the jurisdictional categories listed above is assigned to either the First Senate or the Second Senate.[39] For our purposes, the most important of these categories involve the constitutionality of political parties, federal-state conflicts, disputes between high organs of the national government, constitutional complaints brought by ordinary citizens, abstract judicial review, and concrete judicial review—importance here being measured by the number of cases filed in each category or by their political significance. As table 1.1 shows, constitutional complaints make up about 95 percent of the court's caseload. As we shall see, however, some of the court's most politically important work arises in other jurisdictional areas.

Prohibiting Political Parties

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

Up to now, as table 1.1 indicates, the court has ruled on five such petitions. In

two of the cases, decided early on, the court sustained the petitions: in 1952 when it banned the neo-Nazi Socialist Reich party, and in 1956 when it ruled the Communist party unconstitutional.[40] In 1994, however, the court rejected the petitions of the Bundesrat and the federal government to have the Free German Workers party (FGWP) declared unconstitutional as well as Hamburg's petition to ban the National List (NL) operating on its territory. The court ruled that although the FGWP and the NL advanced views hostile to political democracy, neither group qualified as a political party within the meaning of the law or the Constitution.[41]

Disputes between High Federal Organs

Conflicts known as *Organstreit* proceedings involve constitutional disputes between the highest "organs," or branches, of the German Federal Republic. The court's function here is to supervise the operation and internal procedures of these executive and legislative organs and to maintain the proper institutional balance between them.[42] The governmental organs qualified to bring cases under this jurisdiction are the federal president, Bundesrat, federal government, Bundestag, and units of these organs vested with independent rights by their rules of procedure or the Basic Law.[43] Included among these units are individual members of parliament, any one of whom may initiate an *Organstreit* proceeding to vindicate his or her status as a parliamentary representative.[44] These units also include the parliamentary political parties.[45] Early on, the Plenum ruled that even nonparliamentary political parties may invoke this jurisdiction.[46] They may do so in their capacity as vote-getting agencies or organizers of the electoral process because, in fulfilling this task, political parties function as "constitutional" or federal organs within the meaning of the Basic Law (Article 93 (1) [1]).[47] If a political party is denied a place on the ballot, or if its right to mount electoral activity is infringed by one of the high organs of the Federal Republic, it can initiate an *Organstreit* proceeding against the federal organ in question. An *Organstreit* proceeding is not available, however, to administrative agencies, governmental corporations, churches, or other corporate bodies with quasi-public status.[48]

Federal-State Conflicts

Constitutional disputes between a state and the national government ordinarily arise out of conflicts involving a state's administration of federal law or the federal government's supervision of state administration. Proceedings may be brought only by a state government or by the federal government acting in the name of its cabinet. In addition, the court may hear "other public law disputes" between the federation and the states, between different states, or within a state if no other legal recourse is provided. Here again, only the respective governments in question are authorized to bring such suits. As in *Organstreit* proceedings, the complaining party must assert that the act or omission complained of has resulted in a direct infringement of a right or duty assigned by the Basic Law. For its part, the Constitutional Court

is obligated by law to declare whether the act or omission infringes the Basic Law and to specify the provision violated. In the process of deciding such a case, the court "may also decide a point of law relevant to the interpretation of the [applicable] provision of the Basic Law."[49]

Concrete Judicial Review

Concrete, or collateral, judicial review arises from an ordinary lawsuit. If a German court is convinced that a relevant federal or state law under which a case has arisen violates the Basic Law, it must refer the constitutional question to the Federal Constitutional Court before the case can be decided. Judicial referrals do not depend on the issue of constitutionality having been raised by one of the parties. A lower court is obliged to make such a referral when it is convinced that a law under which a case has arisen is in conflict with the Constitution. If a collegial court is involved, a majority of its members must vote to refer the question. The petition must be signed by the judges who vote in favor of referral and accompanied by a statement of the legal provision at issue, the provision of the Basic Law allegedly violated, and the extent to which a constitutional ruling is necessary to decide the dispute.[50] The Federal Constitutional Court will dismiss the case if the judges below it manifest less than a genuine conviction that a law or provision of law is unconstitutional or if the case can be decided without settling the constitutional question.[51] As a procedural matter, the court must permit the highest federal organs or a state government to enter the case and must also afford the parties involved in the earlier proceeding an opportunity to be heard. The parties make their representations through written briefs.

Abstract Judicial Review

Whereas the United States Supreme Court requires a real controversy and adverse parties before it can decide a constitutional question, the Federal Constitutional Court may decide differences of opinion or doubts about the compatibility of a federal or state law with the Basic Law on the mere request of the federal or a state government or of one-third of the members of the Bundestag.[52] The relevant parties in these cases are required to submit written briefs. Oral argument before the court, a rarity in most cases, is always permitted in abstract review proceedings. The question of the law's validity is squarely before the court in these proceedings, and a decision against validity renders the law null and void.[53]

When deciding cases on abstract review, the court is said to be engaged in the "objective" determination of the validity or invalidity of a legal norm or statute.[54] The proceeding is described as objective because it is intended to vindicate neither an individual's subjective right nor the claim of the official entity petitioning for review; its sole purpose is to declare what the Constitution means. In so doing, the court is free to consider any and every argument and any and every fact bearing on any and every aspect of a statute or legal norm under examination. Indeed, once the

federal government, a *Land* government, or one-third of the Bundestag's members lays a statute or legal norm before the court on abstract review, the case cannot be withdrawn without the court's permission, a condition that reinforces the principle of judicial independence that allows the court to speak in the public interest when necessity demands it.

Constitutional Complaints

In the proceedings discussed so far, access to the Federal Constitutional Court is limited to governmental units, certain parliamentary groups, and judicial tribunals. A constitutional complaint, by contrast, may be brought by individuals and entities vested with particular rights under the Constitution. After exhausting all other available means to find relief in the ordinary courts,[55] any person who claims that the state has violated one or more of his or her rights under the Basic Law may file a constitutional complaint in the Federal Constitutional Court. Constitutional complaints must be lodged within a certain time, identify the offending action or omission and the agency responsible, and specify the constitutional right that has been violated.[56] The FCCA requires the court to accept any complaint if it is constitutionally significant or if the failure to accept it would work a grave hardship on the complainant.[57]

The right of an individual to file a constitutional complaint was originally a gift bestowed by legislation, and German citizens took advantage of their statutory right in increasing numbers over the years. By the mid-1960s the court was awash in such complaints, and Germans had come to regard the constitutional complaint as an important prerogative—almost a vested right—of citizenship. From the beginning, these complaints constituted the court's major source of business. In response, and with the court's backing, federal legislators anchored the right to file constitutional complaints in the Basic Law itself (Article 93 (1) [4a]). A companion amendment ratified in the same year (1969) vested municipalities with the right to file a constitutional complaint if a law violates their right to self-government under Article 28.[58] The popularity of the constitutional complaint was such that no responsible public official opposed these amendments.[59] Years later, the president of the Federal Constitutional Court was moved to say that the "administration of justice in the Federal Republic of Germany would be unthinkable without the complaint of unconstitutionality."[60]

According to Article 93 (1) [4a] of the Basic Law, any person may enter a complaint of unconstitutionality if one of his or her fundamental substantive or procedural rights under the Constitution has been violated by "public authority." "Any person" within the meaning of this provision includes natural persons with the legal capacity to sue as well as corporate bodies and other "legal persons" possessing rights under the Basic Law.[61] As a general rule, only domestic legal persons are permitted to file constitutional complaints, although the Second Senate has ruled that foreign corporations are entitled to file procedural complaints involving the

right to a fair trial.[62] The public authority clause of Article 93 (1) [4a] permits constitutional complaints to be brought against any governmental action, including judicial decisions, administrative decrees, and legislative acts. No ordinary judicial remedy is available against legislative acts. If, however, such an act is likely to cause a person serious and irreversible harm, he or she may file the complaint against the act without exhausting other remedies. Finally, over and above these basic threshold requirements, a complaint must be "clearly founded" (*offensichlich begründet*) if it is to be accepted and decided on its merits.[63]

The procedure for filing complaints in the Constitutional Court is relatively easy and inexpensive. No filing fees or formal papers are required. Most complaints are handwritten and prepared without the aid of a lawyer (about a third are prepared by counsel). No legal assistance is required at any stage of the complaint proceeding. As a consequence of these rather permissive "standing" rules, the court has been flooded with complaints, which have swelled in number from well under 1,000 per year in the 1950s, to around 3,500 per year in the mid-1980s, to more than 5,000 per year in the mid-1990s, when constitutional complaints began to rival the numbers on the appellate docket of the United States Supreme Court.[64] The court grants full dress review to barely more than 1 percent of all constitutional complaints, but such complaints result in some of its most significant decisions and make up about 55 percent of its published opinions.

INSTITUTION

Status

When the Constitutional Court opened its doors for business in Karlsruhe on September 28, 1951, its status within the governmental framework of separated powers, and even its relationship to the other high federal courts, remained an unsettled issue. The Basic Law itself was ambivalent on the matter of the court's status. On the one hand, the wide-ranging powers of the court laid down in the constitutional charter pointed to a tribunal commensurate in status with the other independent constitutional organs (i.e., the Bundesrat, Bundestag, president, and federal government [chancellor and cabinet]) created by the Constitution. On the other hand, the Basic Law authorized parliament to regulate the court's organization and procedure. Initially, the new tribunal was placed under the authority of the Federal Ministry of Justice, a situation that irritated several justices, including the court's first president, Hermann Höpker-Aschoff. As a consequence, the justices boldly set out, in their first year of operation, to defend the court's autonomy, foreshadowing the fierce independence they would later exercise in adjudicating constitutional disputes.[65]

On June 27, 1951, after months of planning, the court released a memorandum originally drafted by Justice Gerhard Leibholz, one of its most prestigious members,

that called for an end to any supervisory authority by the Justice Ministry, complete budgetary autonomy, and the court's full control over its internal administration, including the power to appoint its own officials and law clerks. The memorandum added that the Federal Constitutional Court is a supreme constitutional organ coordinate in rank with the Bundestag, Bundesrat, federal chancellor, and federal president. Its members, then, are in no sense civil servants or ordinary federal judges but rather supreme guardians of the Basic Law entrusted with the execution of its grand purposes, no less than other high constitutional organs of the Federal Republic of Germany. Indeed, the memorandum continued, the court has an even greater duty: to ensure that other constitutional organs observe the limits of the Basic Law.[66]

The memorandum from Karlsruhe generated a strong tremor in Bonn; it startled the government, angered the Ministry of Justice, and set off several years of skirmishing that yielded alignments almost identical to those that had formed in the early stages of the parliamentary debate on the structure of the proposed tribunal. Social Democrats and the Bundesrat generally supported the justices' demands, while the coalition parties in the Bundestag generally opposed them. The real tangle, however, was between the Ministry of Justice and the Constitutional Court, and it featured an occasional unseemly public exchange between two Free Democrats who as members of the Parliamentary Council had played major roles in drafting the Basic Law, namely, Thomas Dehler, minister of justice, and President Hermann Höpker-Aschoff, the stately and highly respected "chief justice."[67]

In 1953, the Bundestag severed the court's ties to the Ministry of Justice, and by 1960, with the gradual growth of the court's prestige and influence, all of the "demands" articulated in the Leibholz memorandum had been met.[68] In Bonn's official ranking order, the court's president now enjoyed the fifth highest position in the Federal Republic, following the federal president, the federal chancellor, and the presidents of the two "houses" of parliament. As "supreme guardians of the constitution," the remaining justices followed behind. Eventually they were even exempted from the disciplinary code regulating all other German judges.[69] The court's hard-won constitutional status was best symbolized by a 1968 amendment to the Basic Law providing that the "function of the Federal Constitutional Court and its justices must not be impaired" even in a state of emergency. During such a time, the special body responsible for acting on behalf of the Bundestag and the Bundesrat is even barred from amending the FCCA unless such an amendment is required, "in the opinion of the Federal Constitutional Court, to maintain the capability of the court to function."[70]

The Two-Senate Structure

The most important structural feature of the Constitutional Court is its division into two senates with mutually exclusive jurisdiction and personnel.[71] The Plenum—the two senates sitting together—meets periodically to resolve jurisdictional conflicts between the senates and to issue rules on judicial administration. Justices are elected to either the First Senate or the Second Senate. The president ordinarily presides over the First Senate and the vice president over the Second Senate. Both "chief justices" are wholly independent with respect to judicial matters before their respective senates. Finally, each senate is equipped with its own administrative office for the organization and distribution of its workload (see figure 1.1).[72]

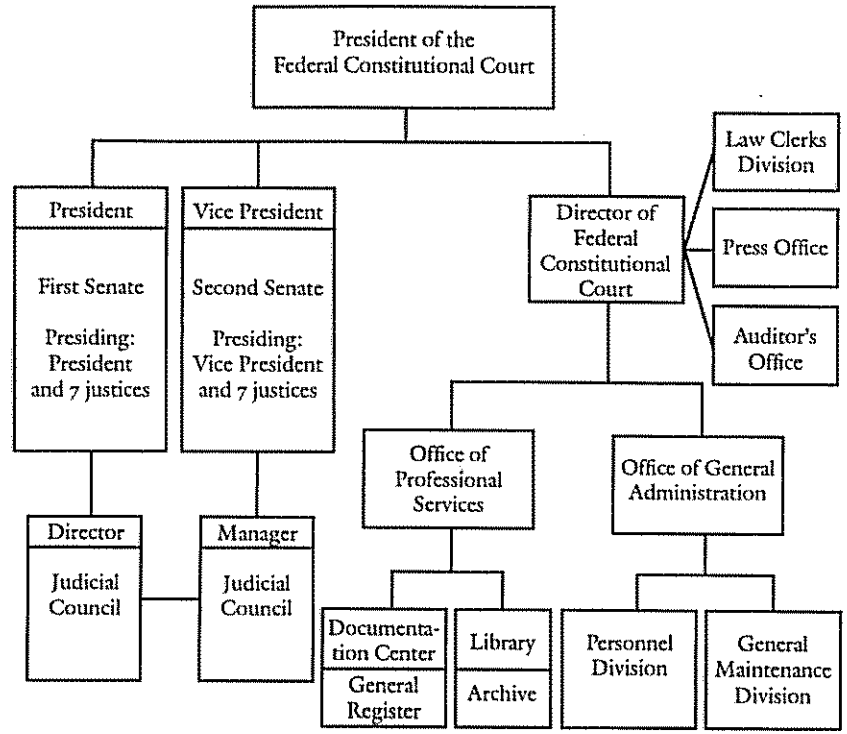

Figure 1.1. Federal Constitutional Court Organization

The twin-senate idea was a compromise between legislators who preferred a fluid system of twenty-four justices rotating on smaller panels and those who preferred a fixed body like that of the United States Supreme Court. More important, the bifurcation was the institutional expression of the old debate between those who viewed the court in conventional legal terms and those who saw it in political terms. The original division of jurisdiction showed that the senates were intended to fulfill very different functions. The Second Senate was designed to function much like Weimar's Staatsgerichtshof; it would decide political disputes between branches and levels of government, settle contested elections, rule on the constitutionality of political parties,[73] preside over impeachment proceedings, and decide abstract ques-

tions of constitutional law. The First Senate was vested with the authority to review the constitutionality of laws and to resolve constitutional doubts arising out of ordinary litigation. More concerned with the "nonpolitical" side of the court's docket and the "objective" process of constitutional interpretation, the First Senate would hear the constitutional complaints of ordinary citizens as well as referrals from other courts. As already noted, a lower tribunal that seriously doubts the constitutionality of a statute under which an actual case arises is obliged, before deciding the case, to certify the constitutional issue to the Constitutional Court for its decision.[74]

This division of labor resulted initially in a huge imbalance between the workloads of the two panels. The Second Senate decided only a handful of political cases, while the First Senate found itself flooded with constitutional complaints and concrete review cases. As a consequence, the federal parliament amended the FCCA in 1956 to distribute the caseload more evenly between the senates. Much of the First Senate's work was transferred to the Second Senate, thus eroding the original rationale of the two-senate system. The Second Senate, while retaining its "political" docket, would henceforth decide all constitutional complaints and concrete judicial review cases dealing with issues of civil and criminal procedure. The First Senate would continue to decide all such cases involving issues of substantive law. In addition, the Plenum was authorized by law to reallocate jurisdiction in a manner that would maintain relatively equal caseloads between the senates.[75]

The number of justices serving on the two senates has also changed over the years. The FCCA originally provided for twelve members per senate. In 1956 the number was reduced to ten; in 1962 it was further reduced to eight, fixing the court's total membership at sixteen (see Appendix B).[76] Considerations of efficiency, coupled with the politics of judicial recruitment,[77] prompted these reductions. For all practical purposes, then, the Constitutional Court comprises two independent tribunals, although each functions in the name of the court as a whole. In 1983, however, parliament modified the ironclad rule against any interchange among justices. The FCCA now provides that if one senate is unable to convene because of the incapacity or unavailability of one or more of its justices—a quorum consists of six justices—one justice from the other senate may be chosen by lot to serve temporarily in the understaffed senate. The presiding officers of the two senates are excluded from serving as substitute justices.[78]

Intrasenate Chamber System

To speed up the court's decision-making process, the FCCA changed the internal structure of the two senates in 1956 by authorizing each senate to set up three or more preliminary examining committees, each consisting of three justices, to filter out frivolous constitutional complaints.[79] At the beginning of each business year, each senate appoints its respective committees, subject to the rule that no three justices may serve together on the same committee for more than three years.[80] The president and vice president serve as chairs of their respective committees, as does

the senior justice on each of the remaining committees. A committee may dismiss a complaint if all three of its members consider it to be "inadmissible or to offer no prospect of success for other reasons."[81] Under current procedure, if one of the three justices votes to accept a complaint—that is, if he or she thinks it has some chance of success—it is forwarded to the full senate.[82] At this stage, the "rule of three" controls; if at least three justices in the full senate are convinced that the complaint raises a question of constitutional law likely to be clarified by a judicial decision, or that the complainant will suffer serious harm in the absence of a decision, the complaint will be held acceptable.[83] Thereafter, and on the basis of more detailed examination, a senate majority could still reject the complaint as inadmissible or trivial.[84]

In 1986, on the Constitutional Court's own recommendation, the federal parliament enhanced the power of the three-judge committees, henceforth called chambers (*Kammer*). In addition to their normal screening function, the chambers are now empowered to rule on the merits of a constitutional complaint if all three justices agree with the result and the decision clearly lies within standards already laid down in a case decided by the full senate.[85] The authority to declare a statute unconstitutional or in conflict with federal law is reserved to the full senate.[86] Under current procedures, a chamber is not required to file a formal opinion justifying its refusal to accept a complaint for a decision on the merits.[87] As a matter of practice, however, whether deciding a complaint on the merits or on the question of admissibility (*Zulässigkeit*), a chamber often accompanies its decision with an opinion one to several pages long.[88] Most of these decisions remain unpublished, and they are cataloged in the court's own files for internal use and reference.[89] Occasionally, however, and in consultation with the full senate, chamber decisions are published in the court's official reports.[90] Other chamber opinions that serve to clarify points of law already laid down in previous cases or likely to command public attention may be released for publication in major legal periodicals such as *Neue Juristische Wochenschrift* and *Deutsche Juristenzeitung*.[91]

By separating the wheat from the chaff, the chambers dispose of 95 percent of all complaints, relieving the full senates of what would otherwise be an impossible task. Chambers are no longer required to offer reasons for the dismissal of a complaint if the complainant is notified at the outset that there is little hope for the success of his or her petition, a practice that helps the court to clear its docket.[92] To discourage the filing of trivial complaints, the FCCA authorizes the court to fine petitioners who "abuse" the constitutional complaint procedure. Currently, the court may level a fine of up to DM 5,000 ($3,600) on abusers.[93] As of 1986, the chambers were given the additional authority to impose a fee of up to DM 1,000 ($720) on any petitioner whose complaint it refuses to accept because it is either clearly inadmissible or wholly unlikely to succeed.[94] This practice, however, failed to decrease the number of complaints arriving at the court, and it was recently abandoned.

The chamber system has been the subject of several constitutional challenges, the complainant having argued in each case that a chamber's dismissal of his com-

plaint denied him the right to "the jurisdiction of his lawful judge" under Article 101 of the Basic Law. Since the Basic Law provides for *one* constitutional court, argued the complainants, the full senate is constitutionally required to decide every case. In the three *Three-Justice Committee* cases,[95] involving decisions by both senates, the court ruled against the complainant on the basis of its original statutory authority to establish internal committees. In one instance, seemingly piqued by the audacity of the complainant who challenged its decision-making procedures, the Second Senate slapped a nominal fine on the complainant for "abusing the constitutional complaint procedure."[96] These decisions, all rendered before the right to file a constitutional complaint was entrenched in the Basic Law, underscored the finality of committee decisions unanimously rejecting complaints. In short, if a complaint is unanimously rejected, no "appeal" lay to the full senate, its sister senate, or the Plenum.

The constitutionalization of the complaint procedure in 1969 appeared to erode the foundation of the *Three-Justice Committee* cases. In recent years, however, no challenge has been hurled against the chamber system on constitutional grounds, "and in any event it is rather hard to imagine the court undermining its own protective ramparts."[97] Clearly, some form of gatekeeping procedure involving less than full senate membership is necessary as a practical matter if the court is to cope with a system that "entitles [anyone] to complain to it about virtually anything."[98] On the other hand, the system could permit hidden criteria to influence the summary disposition process and thus perhaps to "resolve" matters rightfully within the full senate's competence.[99] There is also the chance that different standards may exist from chamber to chamber, possibly invading the Plenum's right to ensure uniform judgments across senates, although the three-year rolling membership requirement would seem to mitigate this problem.

Qualifications and Tenure

To qualify for a seat on the Constitutional Court, persons must be forty years of age, eligible for election to the Bundestag, and possess the qualifications for judicial office specified in the German Judges Act (Deutsches Richtergesetz).[100] This means that prospective justices must have successfully passed the first and second major state bar examinations. Additionally, justices may not simultaneously hold office in the legislative or executive branch of the federal or a state government. Finally, the FCCA provides that the "functions of a justice shall preclude any other professional occupation save that of a professor of law at a German institution of higher education," and that the justice's judicial functions must take precedence over any and all professorial duties.[101]

The FCCA originally provided lifetime terms for the federal judges on each senate (i.e., those chosen from the high federal courts). The other members—justices not required to be chosen from the federal courts—were limited to renewable eight-year terms of office. The recruitment of a certain number of judges from

the federal courts for the duration of their terms on those courts was expected to bring judicial experience and continuity to the Constitutional Court's work. Parliament amended the FCCA in 1970, however, to provide for single twelve-year terms for all justices, with no possibility of reelection.[102] Three of the current eight justices per senate must, as before, be elected from the federal judiciary. All justices—federal judges and other members—must retire at age sixty-eight, even though they may not have served for twelve years.

The debate on judicial tenure prior to the 1970 change in the law was entangled with the question of whether justices should be authorized to publish dissenting opinions.[103] As early as 1968, lawmakers, supported by a majority of the justices, seemed prepared to sanction signed dissenting opinions. But the feeling was widespread that the justices could not be expected to speak their minds if their tenure depended on the continuing pleasure of parliament. The justices themselves favored lifetime appointments. The government in turn responded with a bill that provided for both dissenting opinions and a twelve-year term with the possibility of reelection for a single second term of twelve years. Social Democrats, however, insisted on a single fixed term of twelve years, conditioning their support of the dissenting opinion largely on the acceptance of this proposal. But the question was not hotly contested among the political parties. A single twelve-year term, combined with the dissenting opinion, was generally thought to be an adequate solution to both the problem of judicial independence and the need for a greater measure of judicial openness on the Constitutional Court.[104]

Machinery for Judicial Selection

The Basic Law provides that half the court's members be elected by the Bundestag and half by the Bundesrat. Under the FCCA, however, the Bundestag elects its eight justices indirectly through a twelve-person Judicial Selection Committee (JSC) known as the Wahlmännerausschuss. Party representation on the JSC is proportionate to each party's strength in the Bundestag; eight votes are required to elect.[105] The Bundesrat, on the other hand, votes as a whole for its eight justices, a two-thirds vote also being required to elect.[106] Although each house elects four members of each senate, the FCCA stipulates that of the three justices in each senate "selected from among the judges of the highest federal courts, one shall be elected by one [house] and two by the other, and of the remaining five judges, three shall be elected by one [house] and two by the other."[107] Which house elects each combination is a matter of informal agreement between the two chambers, although the Bundestag and Bundesrat alternate in selecting the court's president and vice president (the Bundestag was authorized to elect the first president and the Bundesrat the first vice president).[108]

Prior to the selection process the minister of justice is required to compile a list of all the federal judges who meet the qualifications for appointment, as well as a list of the candidates submitted by the parliamentary parties, the federal government, or

a state government. The minister delivers these lists to the electoral organs at least one week before they convene. If either house fails to elect a new justice within two months of the expiration of a sitting justice's term, the chairman of the JSC—the oldest member of the committee—or the president of the Bundesrat (depending on the house doing the electing) must request the Constitutional Court itself to propose a list of three candidates; if several justices are to be elected simultaneously, the court is required to "propose twice as many candidates as the number of justices to be elected."[109] The Plenum selects the list by a simple majority vote. But parliament is not obligated to choose the appointee from this or any other list.

In reality, the actual process of judicial selection is highly politicized. The JSC, which consists of senior party officials and the top legal experts of each parliamentary party, conducts its proceedings behind closed doors and after extended consultation with the Bundesrat.[110] Although the parliamentary parties may not legally instruct their representatives on the JSC how to vote, committee members do in fact speak for the leaders of their respective parties. The two-thirds majority required to elect a justice endows opposition parties in the JSC with considerable leverage over appointments to the Constitutional Court. Social and Christian Democrats are in a position to veto each other's judicial nominees, and the Free Democratic party, when in coalition with one of the larger parties, occasionally wins a seat for itself through intracoalition bargaining. Compromise is thus a practical necessity.

Compromise among contending interests and candidacies is equally necessary in the Bundesrat, where the interests of the various states, often independent of party affiliation, play a paramount role in the selection of the justices. An advisory commission consisting of the state justice ministers prepares a short list of potentially electable nominees. The justice ministers on the commission, like certain state governors (i.e., ministers-president) and members of the Bundestag's JSC, are often themselves leading candidates for seats on the Constitutional Court. Informal agreements emerge from the commission's proceedings, specifying which states shall choose prospective justices and in what order. Throughout this process the commission coordinates its work with that of the JSC. It is important to avoid duplicate judicial selections, and the two chambers need to agree on the particular senate seats each is going to fill and which of these seats are to be filled with justices recruited from the federal high courts (three justices of each senate must be recruited from these courts).[111]

PROCESS

Internal Administration

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

In 1975, after years of discord between the president and individual justices over their respective duties and powers, parliament enacted a set of standing rules of procedure governing the court's internal operations.[112] The new rules charge the Plenum, over which the president presides, with preparing the budget, deciding all questions pertaining to the justices' duties, and formulating general principles of judicial administration. They authorize the Plenum to establish several standing committees for the purpose of recommending policies dealing with matters such as record keeping, budgetary policy, personnel administration, and library administration. The rules require the president to carry out these policies and to represent the court in its official relations with other government agencies and on ceremonial occasions. In addition, the rules entitle each senate to an administrative director, who is responsible to its presiding justice. Overall judicial administration is the responsibility of the Constitutional Court's director, the highest administrative official in the court, who answers only to the president.[113] The director, like the justices themselves, must be a lawyer qualified for judicial office. (Indeed, one previous director, Walter Rudi Wand, was elected to the Second Senate in 1970.) Finally, each justice is entitled to three research assistants or clerks of his or her own choosing. Law clerks are not recent law school graduates as in the United States. They are usually in their thirties or early forties and already embarked on legal careers as judges, civil servants, or professors of law. Most serve for two or three years, although some clerks have stayed on for longer periods.

Decision-Making Procedures

The FCCA, along with the Constitutional Court's General Rules of Procedure, sets forth each senate's internal practices and procedures. For its part, the FCCA includes general and special provisions governing each category of jurisdiction (e.g., party prohibition cases, federal-state conflicts, collateral judicial-review references, etc.). The General Rules of Procedure deal with (1) conditions under which a justice may be excluded from a case; (2) procedures to be followed in various types of cases; (3) rights of the parties involved in litigation before the court, including the qualifications of those legally entitled to represent them; (4) obligations of public officials and judges to cooperate with the court in disposing of certain cases; (5) special rules accompanying the issuance of temporary orders; and (6) the manner in which decisions are made and announced.[114]

The procedures on judicial removal require a justice to recuse himself from a

case if he is related to one of the parties or has a personal interest in its outcome.[115] Recusation, however, is beyond a justice's own discretion. Whether he or she initiates the recusal or resists a formal challenge of bias by one of the parties, the full senate decides the matter in his or her absence. A decision denying or upholding a voluntary recusal or a challenge to a justice refusing to withdraw from a case must be supported in writing and included among the court's published opinions.[116]

A justice who refuses to recuse himself in the face of motions against his participation must provide his colleagues with a formal statement in defense of his involvement. The statement is included in the senate's formal opinion on the recusal. The critical issue in such cases is not whether the justice in question is in fact biased, but whether a party to the case has a sufficient reason for believing that he or she may be incapable of making an impartial judgment. So far, two justices have been excluded under these procedures: Justice Gerhard Leibholz in the third *Party Finance III* case (1966),[117] and Justice Joachim Rottmann in the *East-West Basic Treaty* case (1973).[118] Both produced moments of high tension on the court. In each instance petitioners complained that the justice compromised his impartiality by making off-the-bench—and admittedly indiscreet—public comments on the merits of pending litigation.[119]

The Constitutional Court's deliberations are secret, and the justices render their decisions on the basis of the official record. The rules require that each senate decision be justified by official opinions signed by all participating justices (six justices constitute a quorum).[120] Oral arguments are the exception; they are limited to cases of major political importance. Of fifty reported cases handed down in 1991, only eight were decided subsequent to oral argument. A decision handed down on the basis of an oral proceeding is known as a judgment (*Urteil*); a decision handed down in the absence of oral argument is labeled an order, or ruling (*Beschluss*). The distinction is formal, however; whether an *Urteil* or a *Beschluss*, the judgment binds all state authorities, and decisions having the force of general law—for example, most abstract and concrete judicial review cases—must be published in the *Federal Law Gazette,*[121] along with all parliamentary resolutions and laws.

ASSIGNMENT. Specialization is a major feature of the judicial process within the Federal Constitutional Court. As noted earlier, each senate has a specified jurisdiction. Once incoming cases have been processed in the Office of the Director, they are channeled to the appropriate senate and then passed on to the various justices according to their areas of expertise.[122] Before the start of the business year, each senate establishes the ground rules for the assignment of cases. By mutual agreement, and in consultation with his or her senate's presiding officer, each justice agrees to serve as the rapporteur (*Berichterstatter*) in cases related to his or her particular interest or specialty. At least one justice of the Second Senate, for example, typically has a background in international law and serves as the rapporteur in cases involving international legal issues such as asylum, extradition, and deportation.

Another justice might take charge of cases involving tax and social security law, while still another might be assigned cases dealing with issues arising from laws relating to marriage and the family.

The rapporteur's job is to prepare a written document, or brief (votum) whose preparation is a crucial stage in the decisional process. Assisted by his or her law clerks, the rapporteur prepares what amounts to a major research report. He describes the background and facts of the dispute, surveys the court's own precedents and the legal literature, presents fully documented arguments advanced on both sides of the question, and concludes with the personal view of how the case should be decided. A votum, which may be well over a hundred pages long, may take weeks, even months, to prepare, and often it forms the basis of the first draft of the court's final opinion.[123] In any one calendar year each justice prepares several major votums, studies thirty to forty additional ones authored by his or her colleagues, drafts shorter reports (minivotums)—about two hundred per year—for his two colleagues on the three-judge chambers, writes the opinion in cases assigned to him as rapporteur, and readies himself for the weekly conference.

ORAL ARGUMENT. As already noted, formal hearings before the court are rare. Each senate hears oral argument in three or four cases annually, usually in *Organstreit* and abstract judicial-review cases, in which oral argument is mandatory unless waived by the major organs or units of government bringing these cases. The rapporteur, who by this time has neared the completion of his or her votum, usually dominates the questioning. The main function of the oral argument is less to refine legal issues than to uncover, if possible, additional facts bearing on them. The public hearing also adds legitimacy to the decision-making process in cases of major political importance, particularly when minority political parties allege that the established parties have treated them unconstitutionally.[124] The generous time allotted to oral presentations—a full day or more—and the court's readiness to hear the full gamut of argumentation on both sides of a disputed question are intended to generate goodwill and convey a sense of fairness and openness to winners and losers alike.

CONFERENCE. The presiding officer of each senate schedules weekly—occasionally semiweekly—meetings to decide cases and dispose of other judicial business. Except for August and September, when the court is not in session, meetings are normally held every Tuesday, frequently spilling over into Wednesday and Thursday. Votums and draft opinions of cases already decided dominate the agenda. In considering a votum, the presiding justice calls on the rapporteur to summarize the case and state the reasons for his recommendation. The rapporteur's role is crucial here, for a carefully drafted and well-organized votum usually carries the day in conference. In addition, the pressure of time often prompts justices to defer to the rapporteur's expertise and judgment.[125]

Still, the rapporteur has to win the consent of his colleagues. It is his respon-

sibility, along with that of the "chief justice," to marshal a majority or find a broad basis of agreement. In this process, skill and personality are important. The rapporteur who does his homework, solicits the views of colleagues, and negotiates artfully is likely to prevail in conference. Justices who lack these gifts or the full confidence of their colleagues are unlikely to prevail. If, on the other hand, the rapporteur is in the minority—and even the most influential justices occasionally find themselves in this position—he does not necessarily lose his influence over the case, for he still has the task of writing the court's opinion. If he combines political sagacity with a deft literary hand, he may leave his imprint on the finished product. A rapporteur with strong dissenting views may request that the writing of the opinion be assigned to another justice, but this rarely happens. If he knows the requisites of judicial statesmanship, he will draft an opinion broadly reflective of a wide common denominator of agreement, often representing a compromise among conflicting constitutional arguments.[126]

The production of such opinions—that is, opinions which reduce discord on the bench and preserve the court's moral authority in the public mind—is likely to be a function of the presiding officer's capacity for leadership. His task is to guide discussion, frame the questions to be voted on, and marshal the largest majority possible behind judicial decisions. His leadership is particularly important in the sessions in which opinions undergo final and often meticulous editing. Despite the introduction of signed dissenting opinions in 1971, the court continues unanimously to decide more than 90 percent of its reported cases. Although these reports disclose the identities of the justices participating in a case, majority opinions remain unsigned. It is common knowledge among informed observers, however, that the rapporteur in a unanimous decision is the principal author of the final opinion. The institutional bias against personalized judicial opinions has tended to minimize published dissents. Dissenting justices—even if they have circulated written dissents inside the court—more often than not choose not to publish their dissents or even to be identified as dissenters partly out of a sense of institutional loyalty. The prevailing norm seems to be that personalized dissenting opinions are proper only when prompted by deep personal convictions.

Caseload and Impact

Table 1.1 presents an overview of the court's workload during its first forty-three years of operation. These statistics, however, do not tell the full story of the business before the court or its function in the German polity. In a given calendar year the court receives eight to ten thousand letters, notes, or communications from citizens throughout the Federal Republic. Inadmissible under the court's regular procedures, these "cases" are consigned to the custody of the General Register's Office (see figure 1.1).[127] The General Register responds to these petitioner's, in most instances advising them that their inquiries are misdirected. If, however, the petitioner

Table 1.2. The Federal Constitutional Court's Caseload in 1991, 1992, and 1993

Jurisdictional category	1991	1992	1993
Election disputes	19	—	—
Disputes between federal organs	5	4	8
Abstract judicial review	2	8	2
Concrete judicial review	99	137	90
Other public law disputes	9	7	2
Requests for temporary injunctions	36	57	88
Constitutional complaints	3,904	4,214	5,246

Source: Statistical summary prepared by senate administrative offices (1993; typescript).

writes back demanding to be heard, his or her file is forwarded to one of the senates.[128] In 1993, 1,441 such claims were screened by the respective chambers of the two senates; all were rejected.[129] The General Register thus serves as an important checkpoint. Through it pass only the most insistent of complainants. At the same time the court bestows the courtesy of a response on every person who appeals to it.

As table 1.2 shows, constitutional complaints and concrete judicial review references make up the bulk of the Constitutional Court's load. Still, the number of concrete review references is extremely low in light of a judiciary consisting of twenty thousand judges. In 1994, German judges referred only fifty-five cases to the Constitutional Court. The apparent reluctance of judges to refer constitutional questions may be attributed to the strong tradition of legal positivism that continues to hold sway in the regular judiciary. Jealous of their own limited power of judicial review, judges usually resolve doubts about the constitutional validity of laws at issue in pending cases by upholding them or interpreting them so as to avoid questions of constitutionality, thus obviating the necessity of appeal to Karlsruhe.

The constitutional complaint procedure, on the other hand, has served as an escape hatch for litigants upset with the performance of the judiciary. Seventy-five percent of all constitutional complaints are brought against judicial decisions (table 1.3). Nearly all complaints against court decisions alleged to have violated the procedural guarantees of the Basic Law are disposed of by the Second Senate. The First Senate has jurisdiction over most complaints involving claims to substantive constitutional rights such as equal protection (Article 3); life, liberty, or personality (Article 2); human dignity (Article 1); property (Article 14); and the freedom to choose a trade or profession (Article 12).[130] Even though the full senates decide a mere handful of such cases—22 of 5,194 complaints filed in 1994—the constitutional complaint procedure is now deeply rooted in Germany's legal culture. The right of any citizen to take his or her complaint to Karlsruhe is an important factor in

Table 1.3. Sources of Constitutional Complaints, 1993

Filed against	Heard by		Total
	First Senate	Second Senate	
Ordinary courts			
Civil	1,394	443	1,837
Criminal	14	1,026	1,040
Administrative courts	319	1,264*	1,583
Social courts	166	—	166
Finance courts	6	132	138
Labor courts	117	1	118

Source: Statistical summary prepared by senate administrative offices (1993; typescript).
*Of these, 1,021 cases involved asylum proceedings.

the court's high rating in public opinion pools and perhaps the chief reason for the development of a rising constitutional consciousness among Germans generally.[131]

Most of the court's manifest political jurisprudence falls into other jurisdictional categories, particularly conflicts between branches of government, disputed elections, federal-state controversies, and abstract judicial-review proceedings. Although few in number (see table 1.1), the political impact of these cases is substantial.[132] The most politically sensitive cases in recent years have involved constitutional challenges to policies growing out of German reunification, particularly issues relating to property rights, abortion, and the dismissal of public employees. The ongoing unification process continues to preoccupy German courts, and many pending cases, such as the criminal prosecutions brought against former GDR citizens accused of elementary human rights abuses, will make their way to the Federal Constitutional Court.[133] The more important of these cases are taken up briefly, where appropriate, in the following chapters.

In general, however, the Constitutional Court is most politically exposed when deciding cases on abstract judicial review. These cases are almost always initiated by a political party on the short end of a legislative vote in the federal parliament or by the national or a state government challenging an action of another level of government controlled by an opposing political party or coalition of parties. The apparent manipulation of the judicial process for political purposes in these cases has led some observers to favor the abolition of abstract judicial review.[134] But those who decry the judicialization of politics—or, alternatively, the politicization of justice—have not gained much parliamentary support for the constitutional amendment that would be necessary to abolish abstract review. Equally disconcerting for those who would eliminate the thin line between law and politics trod by the court in these cases is the failure of the justices themselves to mount any opposition to abstract judicial review. Indeed, the elimination of abstract review would run counter to the

view of constitutionalism currently prevalent in the Federal Republic: the view that the court, as guardian of the constitutional order, is to construe and enforce the Constitution whenever statutes or other governmental actions raise major disputes over its interpretation. This observation clears the way for a more extensive treatment of the Basic Law, its interpretation, and the Constitutional Court's role in the German polity.

2

THE BASIC LAW AND ITS INTERPRETATION

STRUCTURE AND PRINCIPLES

The Basic Law of the Federal Republic of Germany (FRG) entered into force on May 23, 1949. It was called a "basic law" (*Grundgesetz*) because the Parliamentary Council did not want to bestow the dignified term "constitution" (*Verfassung*) on a document drafted to govern a part of Germany for a transitional period that would only last until national reunification. On that faraway day—or so it seemed at the time—the Basic Law would cease to exist with the adoption of a German constitution "by a free decision of [all] the German people."[1] When that day finally did arrive, on October 3, 1990, following a remarkable series of events, German unity was achieved within the framework of the Basic Law. The decision to retain the Basic Law as an all-German constitution, and to continue its designation as the *Grundgesetz,* was not unanticipated. Over the course of the preceding forty years, particularly in the light of the huge body of decisional law created by the Federal Constitutional Court, the Basic Law had come to assume the character of a document framed to last in perpetuity.

The treaty under which the German Democratic Republic (GDR) became a part of the FRG, however, instructed the soon-to-be-chosen all-German parliament to consider amendments to the Basic Law in light of questions raised by unification. Whether the Basic Law should be ratified in a popular referendum was one of these questions. The Basic Law had never been submitted to a popular vote. State legislatures had chosen the original delegates to the Parliamentary Council, and those same bodies ratified it. But now that Germany was unified, thus changing the composition of the German people, a referendum on the Basic Law would ostensibly infuse it with the popular legitimacy it arguably lacked. A parliamentary commission on constitutional revision established in 1991 nevertheless rejected the idea of holding a popular referendum. The commission appeared to accept the prevailing view among Germany's constitutional lawyers that twelve national elections in forty years expressed overwhelming popular support for the existing constitutional order and established the Basic Law's fundamental legitimacy. The GDR's voluntary accession to the Federal Republic under the Basic Law—a decision unmistakably affirmed in East Germany' first free election on March 18, 1990—was also regarded as evidence of the document's broad acceptance among East Germans.[2]

The parliamentary commission also considered a long list of proposed amendments to the Basic Law calculated to reflect Germany's new social and political identity. Many of these proposals responded to the socialist aspirations of reform-minded democrats in the old GDR. These reform democrats also supported initiatives on the part of certain West German groups for the adoption of plebiscitary institutions at the national level, a constitutional change that would radically alter Germany's governmental system. The commission rejected nearly all of these proposals, including the suggested referenda and recommendations for the incorporation of social welfare goals in the Basic Law. A short list of proposals, however, did win the commission's approval, and a few of them received the necessary two-thirds vote—in both Bundestag and Bundesrat—required to amend the Constitution. Where appropriate, these amendments and those incorporated into the Unity Treaty are discussed in the following pages and chapters.[3] It suffices to note here that none of these amendments modified the Basic Law's essential features or affected the fundamental structure of the political system as originally constituted.

The New Constitutionalism

In content and style the Basic Law follows a pattern typical of constitutions adopted by other liberal democracies (see Appendix A). It guarantees individual rights independent of the state, creates a political system of separated and divided powers, provides for an independent judiciary crowned by a high court of constitutional review, and establishes the Constitution as the supreme law of the land. Moreover, in a major reformulation of German constitutionalism, the Basic Law freezes certain structures and principles in perpetuity. Article 79 (3)—the so-called eternity clause—prohibits any amendment to the Basic Law that would change the *federal* character of the political system or impinge on the basic principles laid down in Articles 1 and 20.

Article 1 proclaims that the "dignity of man is inviolable," and Article 20 sets up a "democratic, social, and federal state" based on the rules of "law and justice." As the Constitutional Court has said on numerous occasions, these core principles manifest themselves in the list of human rights enumerated in the Basic Law. These principles and rights may also be said to be rooted in three major legal traditions that have shaped contemporary German constitutionalism, namely, classical-liberal, socialist, and Christian–natural law thought. Each of these traditions played a formative role in German legal history; each was powerfully represented at the Constitutional Convention of 1949; each finds many of its central values represented in the text of the Basic Law; and each continues its representation in German political life today. The Free Democratic party (FDP) represents the classical-liberal tradition; the Social Democratic party (SPD) the socialist tradition; and the Christian Demo-

cratic Union (CDU), together with its Bavarian affiliate, the Christian Social Union (CSU), the Christian–natural law tradition. In drafting the Basic Law, the representatives of these parties shed their historical antagonisms and, in a remarkable display of concord, drew willingly from the humanistic content of each tradition to create a constitution that combines the main values of each in a workable, if not always easy, alliance.[4]

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

The substantive values represented by these traditions are enormously important in the jurisprudence of the Federal Constitutional Court, although in the aftermath of reunification the political and social tradition of the old GDR may affect the interpretation of these values. There is no debate in Germany, however, as there is in the United States, over whether the Constitution is primarily procedural or value oriented. Germans no longer understand their constitution as the simple expression of an existential order of power. They commonly agree that the Basic Law is fundamentally a normative constitution embracing values, rights, and duties. That the Basic Law is a value-oriented document—indeed, one that establishes a hierarchical value order—is a familiar refrain, as we shall see, in German constitutional case law.

HUMAN RIGHTS AND DIGNITY. Article 1, appropriately, is the cornerstone of the Basic Law. Paragraph 1 declares: "The dignity of man is inviolable. To respect and protect it is the duty of all state authority." The principle of human dignity, as the Constitutional Court has repeatedly emphasized, is the highest value of the Basic Law, the ultimate basis of the constitutional order, and the foundation of all guaranteed rights.[5] The second paragraph continues: "The German people therefore acknowledge inviolable and inalienable rights as the basis of every community, of peace and of justice in the world." Paragraph 3, finally, declares that the basic rights enumerated in the Constitution (Articles 1–19) "shall bind the legislature, the executive, and the judiciary as directly enforceable law." Article 19 (2) underscores the preeminence of these rights by prohibiting, in the fashion of the perpetuity clause of Article 79, any encroachment on "the essential content of a basic right" under the Constitution. Finally, Article 19 (4) secures these rights by making courts of law accessible to any person whose rights are violated by state authority.

Many of the fundamental guarantees of the Bonn Constitution are word-for-word reproductions of corresponding articles in the Weimar Constitution. The difference is that the Weimar Constitution recognized basic rights as goals, but they were not judicially enforceable. The notion of "inviolable and inalienable" rights is also sharply at variance with the spirit of earlier German constitutions, for the Basic Law is Germany's first national constitution to recognize the preconstitutional existence of guaranteed rights. Contrary to the legal positivism underlying the Weimar Constitution,[6] fundamental rights are not the creations of law, nor are they distinctive to the German people. By some interpretations they are vested in persons by nature; by others the Basic Law simply acknowledges preexisting rights rooted in the universal concept of human dignity. General law (i.e., positive law) may limit rights, but for the first time those laws are themselves to be measured by the higher-law norms of the Constitution.

STATE AND MORALITY. The constitutional system of the Federal Republic also differs from past regimes in its refusal to treat individual freedom as a reflection of the state itself. The traditional theory of rights in Germany drew no clear distinction between state and society. The citizen was an organic part of the state, and the state itself was an agent of human liberation.[7] The German "*Staat*" and the English "state" are not equivalent terms. *Der Staat* is more than the body politic. It represents, in Kant,[8] the perfect synthesis between individual freedom and the objective authority of law, and, in Hegel, a moral organism in which individual liberty finds perfect realization in the unified will of the people: not arbitrary will, but rather "the power of reason actualizing itself in will."[9] In brief, the *Staat* is considered to be a superior form of human association, a uniting of individuals and society in a higher synthesis, a reality "in which the individual has and enjoys his freedom, [albeit] on condition of his recognizing, believing in, and willing that which is common to the whole."[10] Some features of the Basic Law, particularly its communitarian values, lend themselves to greater understanding in the light of these traditional German notions of liberty and state, notions suggestive of aspects of the Aristotelian *polis* and the early American tradition of civic republicanism.[11] Nevertheless, as Leonard Krieger has pointed out, the founders of the Basic Law, in the light of the Nazi experience, discovered the "bankruptcy of the state as a liberalizing institution." "Dominant now," he concluded in a monumental study of the German idea of freedom, "is an attitude which views the state as a morally neutral, purely utilitarian organization of public power."[12]

Krieger's assessment, while generally correct, needs to be qualified. The Basic Law as a modern twentieth-century constitution is interesting precisely because it

subjects positive law to a higher moral order. To be sure, the Basic Law's list of fundamental rights protects the ideological pluralism and moral diversity of the German people. But some rights, such as that to the free development of personality, are limited by the "moral code," as that term is used within the meaning of Article 2 (2), as well as by certain conceptions of man and society found by the Federal Constitutional Court to be implicit in the constitutional concept of human dignity. The Constitutional Court itself rejects the notion of a value-neutral state. Instead, as noted later in this chapter, it speaks of a constitutional polity deeply committed to an "objective order of values."[13]

The Nature of the Polity

Article 20, as already noted, sets forth the fundamental principles of the new republic. In addition to describing the new polity as a "democratic and social federal state," paragraph 1 decrees that "all state authority emanates from the people." Under paragraph 2 the people are to exercise their authority "by means of elections and voting and by specific legislative, executive, and judicial organs." The Basic Law thus creates a representative democracy undergirded by the doctrine of separation of powers. Paragraph 3 subjects legislation "to the constitutional order," just as "the executive and judiciary are bound by law *and justice*" (emphasis added). Finally, to ensure the realization of these values at all levels of government, Article 28—the so-called homogeneity clause—decrees that state and local governments "must conform to the principles of republican, democratic, and social government based on the rule of law."[14]

The Basic Law builds on and strengthens older doctrines and practices in the German constitutional tradition: Popular sovereignty, affirmed once again, now manifests itself in representative institutions rather than plebiscites; political parties, fortified by a new electoral system combining single-member districts with proportional representation, organize these institutions in the public interest; a strong chancellor, unremovable save by a constructive vote of no-confidence,[15] stabilizes the government; the basic structure of federalism, now beyond the power of the people to amend, is established in perpetuity; separation of powers includes judicial control of constitutionality; and, finally, majority rule is overlaid with a complex system of checks and balances, not to mention the indirect election of the federal president.

Four conceptions of the state that have achieved authoritative status in German constitutional law capture most of these institutional features and principles of government. These are the concepts of *Parteienstaat* (political party state), *Sozialstaat* (social welfare state), *Rechtsstaat* (state based on the rule of law), and *streitbare Demokratie* (militant democracy). The new polity is, of course, also a *Bundesstaat* (federal state), but this aspect of the polity is discussed in chapter 3. Several provisions of the Basic Law identify the new polity as a "free liberal democratic order," a phrase that fairly well encapsulates the nature of the modern German state.

PARTEIENSTAAT. Under the Basic Law, popular sovereignty is to be achieved through political parties competing in free and equal elections. In a departure from tradition as radical as judicial review itself, Article 21 of the Basic Law permits the free establishment of political parties, virtually certifying them as the chief agencies of political representation in the new polity. Yet, in an effort to secure genuine majority rule, the Constitution requires parties to organize themselves democratically and to account publicly for the sources of their funds. Additionally, and in language recalling an older German theory of the state, Article 21 declares that "political parties shall participate in forming the political will of the people."[16]

Article 38, which provides for the "general, direct, free, equal, and secret" election of parliamentary delegates, pulls in the opposite direction, toward an older, representative theory of democracy. Members of parliament, Article 38 declares, "shall be representatives of the whole people, not bound by orders and instructions, and shall be subject only to their conscience." Here a natural-law principle—conscience—intrudes to limit the party loyalty implied, perhaps even mandated, by Article 21. The federal structure, like the theory of party responsibility, also tempers majority rule, for the states enjoy a corporate right to participate in the national legislative process and often exercise that right to delay or refuse their consent to bills passed by the Bundestag. In the end, the Constitution seems ordained not only to achieve, under the rubric of majority rule, some semblance of correspondence between public policy and popular will, but also, as a consequence of its federal structure, to serve as an instrument of political conciliation, consensus, and cohesion.[17]

SOZIALSTAAT. The Basic Law, however, is more than a framework for the process of government. It incorporates a number of substantive values. As chapter 6 (on economic rights) shows, the *Sozialstaat* stands for social justice and obligates the government to provide for the basic needs of all Germans. This commitment, however, does not mean that every social benefit conferred by law is mandated by the principle of social justice. Whether particular policies such as family allowances or educational benefits are constitutionally required by the principle of the social welfare state is a matter of dispute among constitutional scholars,[18] a dispute that has reached a new level of intensity in reunified Germany. In any event, the concept of the social state, like that of the *Rechtsstaat,* has a good pedigree in German constitutional thought.[19] Its roots lie deep in the old Lutheran notion that while the people owe allegiance to the prince, the prince in turn is bound to see to the welfare of his subjects, an idea that finds its most prominent modern expression in the social security and protective labor legislation of the Bismarckian era. Backed by strong socialist influences, the social state as a concept of political order gradually worked its way into the Weimar Constitution, and today even neoliberal, market-oriented spokesmen, not to mention Christian Democrats schooled in Catholic social thought, regard the *Sozialstaat* as an important ingredient of Germany's constitutional tradition.[20]

Nevertheless, a lively academic debate over the relationship between the *Sozial-*

staat and the *Rechtsstaat* continues to engage German constitutional theorists. The *Rechtsstaat,* formally conceived, emphasizes the crucial importance of individual liberty, the right to choose one's trade, and the right to acquire and dispose of one's property. At what point do the demands and arrangements of the *Sozialstaat* begin to undermine the *Rechtsstaat*'s liberty-securing values and structures? German views range from the conservative perspective of Ernst Forsthoff, who has argued that the Basic Law constitutionalizes an individualistically based, market-oriented, free enterprise economy, all the way over to the extreme left-wing perspective—one shared today by many East Germans—that the *Sozialstaat* constitutionally requires major redistributive socioeconomic and tax policies.[21] As we shall see in chapter 6, the Federal Constitutional Court, like the majority of constitutional scholars, has taken a far less dogmatic view of the *Sozialstaat.*

RECHTSSTAAT. There is no equivalent term in English for the German *Rechtsstaat.* It is often loosely translated as "law state," "rule of law," or "a state governed by law," but the concept, in both its older and newer incarnations, embodies more than the idea of a government of laws.[22] As developed originally in the nineteenth century, the *Rechtsstaat* was a "state governed by the law of reason," one that insisted on the freedom, equality, and autonomy of each individual within the framework of a unified legal order defined by legislation and administered by independent courts of law. The traditional liberal *Rechtsstaat,* while emphasizing the importance of formal liberty, was indifferent to whether the government of the day, as opposed to the timeless *Staat,* was monarchical, aristocratic, or democratic in form. It was not until later, toward the end of the nineteenth century, under the influence of constitutional theorists such as Otto von Gierke and Rudolf von Gneist, that the *Rechtsstaat* began to integrate state and society and to proclaim the unity of law and the state. Although bound by laws administered by independent courts, the state took on a life of its own, undermining the individualistic rationale of the earlier *Rechtsstaat.* Finally, in the early twentieth century and during the Weimar Republic, the concept of the *Rechtsstaat* was increasingly associated with legal positivism. Statute law was supreme law, supreme because it reflected the popular will, the ultimate basis of the *Rechtsstaat*'s traditional legitimacy. In this system, the courts had the duty to uphold the law as defined by statute and to ensure that all state activity was conducted according to the supreme legislative will. There was no place for judicial review.

The Bonn Constitution did not completely abandon the principles of the old *Rechtsstaat;* it remains a crowning principle of German constitutionalism. But the Basic Law now uses the term "law" (*lex*) in the sense of both *Gesetz* (statutory law) and *Recht* (right or justice).[23] As put forth in Article 20 (3), "the executive and the judiciary are bound by law and justice" just as "legislation is subject to the constitutional order."[24] According to the Federal Constitutional Court, this "constitutional order" is a value-oriented legal order. In short, the Basic Law not only subjects law to the concept of justice; it also creates a fundamental system of values in terms of

which all legislation or other official acts must be assessed. Ernst-Wolfgang Böckenförde, a justice of the Federal Constitutional Court, put it this way:

> The logic of thinking about values and justice demands that the constitution conceived along the lines of the material *Rechtsstaat* should lay claim to an absolute validity extending to all spheres of social life. It thus sanctions certain basic politico-ethnic convictions, giving them general legal validity, and discriminates against others that run counter to them. It no longer guarantees liberty unconditionally by way of formal legal demarcation; it does so only *within* the fundamental system of values [*Wertgrundlage*] embodied in the constitution.[25]

These values and the concept of justice, as Böckenförde suggests, may trump liberty when they come into conflict. Under the United States Constitution, on the other hand, liberty would win over what the Germans have come to understand as values as well as over the unwritten constitutional principles that the term "justice" implies. In short, the social *Rechtsstaat* is not only governed by law; it is also perceived as a substantive charter of justice. All positive law must conform to the Basic Law's order of values—as distinguished from guaranteed individual rights—informing the Constitution as a whole.

In contemporary German constitutional theory, the Basic Law is supreme and the Federal Constitutional Court has the authority to enforce it. Judicial review is therefore a key element of the *Rechtsstaat* under the Basic Law. Of course, all branches of government are responsible for the implementation of the Constitution, but as the highest institutional expression of the rule of law, the court has a special role in this regard, a role explicitly sanctioned by the constitutional text. Thus any branch or level of government that violates the Constitution or refuses to carry out a constitutional duty can be called to account in a proper proceeding before the court. In addition, the Basic Law authorizes the court to review the constitutionality of laws and to hear complaints from ordinary citizens claiming a violation of their fundamental freedoms by any agency or branch of government. These powers, together with the ability of all other judges to refer constitutional questions to the court for resolution, impart additional normative force to the Constitution.

STREITBARE DEMOKRATIE (*MILITANT DEMOCRACY*). The term "militant democracy" appeared originally in the *Communist Party* case (1956), the decision which declared the Communist Party of Germany unconstitutional because of its ideological opposition to the "free democratic basic order."[26] The concept finds its grounding in the text of the Basic Law itself. The Nazi experience and the emergence of a communist dictatorship in East Germany "fostered a strongly antitotalitarian mindset in the framers of the *Grundgesetz.*"[27] Article 21 (2) declares that political parties which "by reason of their aims or the behavior of their adherents seek to impair or

abolish the free democratic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional." Indeed, the principle of democracy in the Basic Law offers no refuge to the enemies of democracy. Article 18 is yet another expression of the constitutional principle that democracy is entitled to defend itself against internal enemies. According to this provision, any person who abuses the basic freedoms of speech, press, teaching, assembly, association, or property "in order to combat the free democratic basic order" forfeits these rights.[28] Indeed, under Article 20 (4), even ordinary "Germans have the right to resist any person attempting to do away with this constitutional order, should no other remedy be possible."

These constitutional perspectives differ from the Weimar Constitution in their requirement of absolute adherence to the value order of the existing political system. To minimize any abuse of power conferred by Articles 18 and 21, the Basic Law authorizes only the Federal Constitutional Court to order the forfeiture of rights or to declare parties unconstitutional. During the Weimar period the president of the Republic could ban parties and curtail rights on his own authority under the emergency provisions of Article 48. Under the Basic Law, by contrast, the Constitutional Court retains its authority during a state of emergency, including the authority to determine the forfeiture of basic rights under Article 18. In short, the Basic Law joins the protection of the *Rechtsstaat* to the principle that the democracy is not helpless in defending itself against parties or political movements bent on using the Constitution to undermine or destroy it.

Enforceable Charter

In view of the previous discussion, Germany might be said to have three constitutions. The first is the unamendable constitution, the one that Article 79 (3) of the Basic Law establishes in perpetuity. Indeed, as declared by the Federal Constitutional Court, any amendment to the Basic Law that would undermine or corrode any one of its core values would be an unconstitutional constitutional amendment. The second is the amendable constitution, namely, those parts of the written text that can be altered without affecting the Basic Law's core values. Finally, there are the unwritten, or suprapositive, principles implicit in such terms as "justice," "dignity," and "moral code." These governing principles, like the hierarchical value order that the Constitutional Court has extracted from the text of the Basic Law, are an important part of Germany's constitutional order. Germany's real constitution, then, includes more than the written text of the Basic Law itself.

Each of the three constitutions is judicially enforceable, a practice that departs radically from the traditional judicial role in Germany. Germany's variant of judicial review, however, differs from the American. The difference is at once subtle and profound, and it may be summarized as follows: Whereas American constitutionalism has historically entailed a creative interaction between the constitutional text and evolving political practice, German constitutionalism tends to place greater

emphasis on the capacity of the formal text to influence political practice. One manifestation of this tendency is abstract judicial review. This procedure underscores the sovereignty and universality of constitutional norms and affirms the essential unity of the Constitution, a concept of constitutionalism seemingly related to the old notion of the *Rechtsstaat,* which envisioned the state or polity as a purely juristic construction.[29] In short, while judicial review under the Basic Law represents a major break with the German legal tradition of the *Rechtsstaat,* it nevertheless continues to manifest elements of that tradition.

Perhaps the following remarks will clarify this point. The American Constitution has historically served as a framework for the process of government. While the constitutional text and the polity have influenced one another, the bond between them is far from perfect.[30] American pragmatism leaves a lot to chance and circumstance, is comfortable with constitutional ambiguity, and does not insist on the application of constitutional morality in all of its particulars. The Supreme Court has developed a battery of techniques to avoid constitutional decisions in certain cases and even to permit—for example, under the aegis of the "political question" doctrine, the "case or controversy" requirement, and other devices for avoiding decision—contraconstitutional developments within the polity. The American public mind is comfortable with the uncertainty that often prevails when for prudential reasons the Supreme Court declines to consider constitutional issues. Thus, the written Constitution is far from coextensive with the American polity.

In Germany, on the other hand, the Basic Law was designed not only to create a system of governance but also to foster a secure and preferred way of life.[31] German constitutional scholars often speak of the steering, integrating, and legitimizing functions of the Constitution, as if to suggest a perfect bonding between text and polity.[32] They insist on the strict enforcement of the Basic Law in all of its particulars, for to do otherwise would be to sanction a lawless society. In brief, there is less tolerance of uncertainty or ambiguity in constitutional matters. Conflicts between text and polity cause crises in the German public mind and commotion among legal scholars and others concerned with the proper relationship between the "normativity" of the Constitution and the "existentiality" of political reality.[33]

This complex of attitudes has implications for judicial review. Abstract questions of constitutional law matter in Germany, in contrast to the Holmesian view—a predominantly American perspective—that general propositions do not decide concrete cases. Questions of constitutionality that arise in the course of enacting legislation must be confronted, not avoided; there is thus a tendency to have the constitutional correctness of every important and controversial statute scrutinized by the Constitutional Court in Karlsruhe. The feeling exists that if legislation, however trivial or noncontroversial, is unconstitutional, it is contrary to the *Rechtsstaat* and therefore bad for the body politic. In this spirit, as Karl Heinrich Friauf has written, constitutional interpretation in Germany "forms a part of what we might call the eternal struggle for the self-realization of constitutional law in the life of the community."[34]

CONSTITUTIONAL INTERPRETATION

Background

The German approach to constitutional interpretation needs to be understood within the wider context of Germany's legal culture. The nature of German constitutionalism is perhaps best explained by describing the general legal context in which the Constitutional Court functions and showing how this context differs from the American system. But a cautionary word is necessary. I deliberately focus on contrasts between German and American law rather than on their similarities so as to impart a sharp sense of the mind-set engaged in the process of constitutional interpretation in Germany. The similarities should be clear enough in this discussion of the methods and principles of constitutional interpretation. The vocabulary of constitutional debate, however, differs in the two countries, and these differences match the countries' respective conceptions of law and the judicial process.

The German public mind, schooled in the tradition of *Begriffsjurisprudenz* (conceptual jurisprudence), or legal positivism, has tended to envision law as a self-contained, rational, deductive system of rules and norms. Positing a sharp separation between law and morals—between the "is" and the "ought"—*Begriffsjurisprudenz* has sought to create a science of law marked by its own internal standards of validity. Its object is to keep law entirely separate from the domains of politics, psychology, and sociology.[35] Law, in short, rests on an independent foundation of reason and logic. The concept of judicial decision generated by this mode of legal thought is the idea of a court—an autonomous legal institution—entrusted with the systematic if not the mechanical application of fixed rules of law. Its major theme is fidelity to law. Similarly, the process of judging exemplifies the unity, clarity, and simplicity typical of the structure of the German civil code.[36]

The American conception of law, by contrast, derives its spirit from the common law, the essence of which is captured in Oliver Wendell Holmes's endlessly quoted aphorism, "The life of the law has not been logic, it has been experience."[37] Like Holmes, Americans generally have understood law as a pragmatic enterprise. Correspondingly, they understand the concept of judicial decision as a context-sensitive, inductive process open to extralegal influences, responsive to social reality, and sharply aware of the limits of formal law in the management of human affairs. Judging, therefore, while guided by established rules and principles, is largely a creative process to be exercised in the light of social need and enlightened public policy.[38] Finally, and fundamentally, common law, and therefore the bulk of constitutional law, is not something created by the state as supreme legislator. It is made primarily by judges and is calculated at once to limit the state and to promote the release of individual and group energy.[39]

Even if it be noted that these observations relate chiefly to private law, code-law reasoning in Germany, like common-law reasoning in the United States, has exerted a powerful influence on the development of public law, including constitutional law.

If the spirit of American public law is symbolized by figures like Holmes, Pound, Llewellyn, Cardozo, Frank, and Hand,[40] the spirit of German public law is symbolized by legal theorists such as Jellinek, Anschütz, Laband, Puchta, Radbruch, and Bergbohm.[41] Similarly, if American constitutional jurisprudence locates its indigenous spiritual roots in the commonsense realism of Madison, Hamilton, and Wilson,[42] German constitutional jurisprudence finds its guiding light in the idealistic rationalism of Hegel, Kant, and Fichte.[43] This may blur important distinctions among German schools of legal thought, yet the one notion that emerges relatively intact, in contrast to the American theory, is the reality and ubiquity of the state. German legal theorists have commonly assumed that law and justice would thrive solely within the bosom of that perfect society known as the state.

The Basic Law represents a major break from this tradition. It does not regard the state as the source of fundamental rights. The core of individual freedom, like human dignity itself, is anterior to the state. Thus, law and justice, as we have seen, now measure the validity of governmental actions, including judicial decisions. Inalienable rights, justice, values, and other such notions arguably present in the Basic Law militate against the methodology of legal positivism. And yet, for all that, and of immediate interest to us, the approach to judicial reasoning in *Begriffsjurisprudenz* has outlasted positivism and has had a lasting influence throughout Europe, including Germany.[44] As we shall see, German constitutional scholars no less than the justices of the Federal Constitutional Court have made significant attempts to build a theory of judicial decision based on reason and logic.

In discussing these contrasts between legal cultures, we should observe that in both Germany and the United States, countervailing theories of law have always challenged the dominant mode of legal thought. In Germany, for example, the extent to which judges were free to depart from the will of the legislator was a central issue in legal argument during much of the nineteenth century. *Begriffsjurisprudenz,* while it predominated during this period, had to defend itself against the historical school of jurisprudence.[45] By the same token, in the early years of the twentieth century the "free law" school of judicial interpretation and the *Interessenjurisprudenz* of Philipp Heck and Rudolf von Ihering assailed the prevailing school of legal positivism.[46] Then too, during the Weimar Republic—against the backdrop of the continuing revolt against legal positivism—neo-Hegelian, neo-Kantian, and phenomenological schools of legal thought were developing new theories of law and judicial interpretation in an effort to overcome the dualism of "is" and "ought" at the basis of positivist dogma.[47] Finally, after World War II, natural-law theory, breaking out afresh from both Catholic and Protestant sources, tried to depose legal positivism.[48] In the United States, pragmatic jurisprudence had to face similar challenges, ranging from those of David Dudley Field, Christopher Langdell, and Owen Roberts, all of whom tried to build a true science of law or judging, to those of the value-oriented natural-law "moralists" and fundamental rights "objectivists" of our own time.[49]

Approaches to Interpretation

Constitutional interpretation as practiced today by the Federal Constitutional Court draws on several of West Germany's competing traditions of law and judicial decision. Thus we observe styles of argument ranging from reliance on linguistic analysis to the invocation of "suprapositivist" norms reputedly underlying the Basic Law.[50] Like the United States Supreme Court, the Constitutional Court employs a variety of interpretive modes, including arguments based on history, structure, teleology, text, interest balancing, and natural law. The one technique that is not formally followed in German constitutional analysis is that of *stare decisis*—which is unknown in the judiciaries of code-law countries—although as a matter of practice the court's opinions brim with citations to previous cases. The techniques and modes of analysis that are used have generated a critical literature in Germany as abundant as it is controversial. Like its equivalent in the United States, this literature is concerned largely with the legitimacy and justification of judicial decision making.[51]

THE DOMINANT TRADITION. Any discussion of constitutional interpretation in Germany, on or off the Constitutional Court, begins with the usual reference to the grammatical, systematic, teleological, and historical methods of analysis.[52] In resorting to one or more of these forms of argument, the Constitutional Court is drawing on the conventional approach to judicial decision in German statutory law that originated in the extreme conceptualism of the nineteenth-century school of jurisprudence known as pandectology.[53] Grammatical, or textual, analysis, often the starting point of judicial interpretation, focuses on the ordinary or technical meaning of the words and phrases in a given constitutional provision. Systematic, or structural, analysis seeks to interpret particular provisions of the Basic Law as part of a constitutional totality. Teleological, or purposive, analysis—a favored form of judicial reasoning in Germany—represents a search for the goals or aspirations behind the language of the Constitution. Finally, historical analysis involves the elucidation of the text by reference to the original intent of the framers or to the values they constitutionalized. The grammatical, historical, and systematic methods focus on textual interpretation. The teleological method, on the other hand, is a more open-ended approach to judicial decision making.

It is difficult, however, to rank these methods in any fixed order of priority. Like the American Supreme Court, the Constitutional Court uses whatever method or combination of methods seems suitable in a given situation. An exception is that in Germany, original history—that is, the intentions of the framers—is seldom dispositive in resolving the meaning of the Basic Law.[54] The court has declared that "the original history of a particular provision of the Basic Law has no decisive importance" in constitutional interpretation.[55] Original history performs, at best, the auxiliary function of lending support to a result already arrived at by other interpretive methods. When there is conflict, however, arguments based on text, structure, or teleology will prevail over those based on history.[56]

These canons of interpretation, German commentators note, are ways of discovering the "objective will" of the Constitution's framers. Even the teleological method assumes that there is, here and now, a "right" meaning of the constitutional text, although the standards used in discovering the *telos* of the Basic Law are unclear. One standard, of course, is original history, but as just noted, the "subjective will" of the framers is merely an auxiliary aid to interpretation. In truth, the teleological approach is itself susceptible to the subjectivism that the dominant tradition wishes to avoid. Karl Heinrich Friauf has observed that the teleological approach is a "gateway through which consideration of social policy and even the political philosophy of the judges flow into the interpretation of the Constitution."[57] Judges and scholars do not always so readily acknowledge the creative character of constitutional interpretation.

However, most commentators are aware of the limits of these customary methods of interpretation. As Konrad Hesse, a former justice of the Constitutional Court, has pointed out, the "objective will" thesis, so assiduously applied in statutory construction, is unsuited to constitutional interpretation.[58] For one thing, no order of priority among these methods exists when their application leads to different results. For another, as Friauf has suggested, there is no mechanical way of applying these methods to the open-ended words and phrases of the Basic Law. When these methods fail and the court is faced with a dispute involving competing constitutional values, it often resorts to ad hoc balancing. Indeed, the rhetoric of conceptual jurisprudence belies the "pragmatic, flexible and undogmatic" approach to constitutional interpretation that often characterizes the court's work.[59]

JUDICIAL FUNCTION: COMPETING VISIONS. The tension between objectivity and creativity that commentators have noticed in the court's work reflects a larger conflict between competing visions of the judicial function. Two general approaches to judicial decision making emerge from the materials in this book. The first approach, which distinguishes sharply between the functions of judge and legislator, is as familiar to Americans as it is to Germans. In this view, making law is not a part of judicial interpretation. The judge is bound to the prescribed norms of the Constitution; his task is to discover the content of these norms and then to apply them uncompromisingly, a process known as *Normgebundenheitstheorie* (theory of binding norms).[60] German no less than American justices have sought to perpetuate this traditional view of the judicial function. "The Court can only unfold what already is contained . . . in the Constitution," wrote Professor Ernst Friesenhahn, a former Constitutional Court justice.[61] "As an independent, neutral body, which renders decisions solely in terms of law, it determines the law with binding effect when it is disputed, doubted or under attack. In doing so, it bears no political responsibility, though its decisions may have great political significance."[62]

Justice Gerhard Leibholz, an influential member of the Second Senate for twenty years, also drew a bright line between "politics" and the "political law" of the Constitution.[63] He distinguished between "disputes of [a] legal-political character which can be placed under legal constitutional control" and disputes of a "purely political nature . . . which cannot be decided according to the rules of Law."[64] Consistent with the conventional German approach to constitutional review, the Constitutional Court, in Leibholz's view, is under a duty to explore every relevant fact and aspect of law in a case so as "to find the truth objectively."[65] In a similar vein, Justice Helmut Simon, a former member of the First Senate, has said that the Federal Constitutional Court "neither creates norms nor belongs to those political institutions responsible for the active structure of our common life or the future of the community. As an organ of the judiciary, its function, like that of other courts, is limited within the framework of a judicial proceeding, to the application and interpretation of laws originating in some other forum. . . . [It has no other power] except that of declaring acts of public authority constitutional or unconstitutional."[66]

Nevertheless, a number of justices and constitutional scholars have acknowledged the inherent limits of *Normgebundenheitstheorie.* Professor Konrad Hesse, appointed to the First Senate in 1975 (see Appendix B) and the author of a leading treatise in constitutional law, is openly critical of the judicial function conceived as a simple act of cognition or an objective process of discovery upon the application of a given methodology.[67] For him, constitutional interpretation is an art flowing from the interplay between text and interpreter: The judge perceives the meaning of a constitutional text as he reflects on the present in the light of constitutional language drafted within a given historical context. In the view of Justice Ernst-Wolfgang Böckenförde, a member of the Second Senate since 1983, constitutional interpretation requires a delicate balancing of competing values as well as competing theories of the polity expressed in such concepts as the liberal state, the social state, and the democratic state.[68] Justice Dieter Grimm, appointed to the First Senate in 1987, is even more candid: "There is no preestablished difference between courts and legislatures which a particular constitution has to adopt and which an interpreter has to enforce regardless of what the constitution says. In addition, constitutional courts inevitably cross the line between law and politics," because "the constitution does not offer an unambiguous and complete standard for [reviewing the validity of legislation]."[69] In Grimm's view, this reality argues for less rather than more judicial intervention by the Constitutional Court in the political and legislative arenas.

After eleven years on the court, even Justice Leibholz wrote that it would be "an illusion and . . . inadmissible formalistic positivism, to suppose that it would be possible or permissible to apply . . . general constitutional principles . . . without at the same time attempting to put them into a reasonable relationship with the given political order." "The constitutional judge cannot do anything except relate the rules [of the Basic Law] to political reality."[70] In 1971, as he was about to leave the court, Leibholz remarked that "the existing conflict between constitution and constitutional reality does not admit either of a purely legalistic solution in favor of the Constitution, or of an exclusively sociological solution in favor of constitutional reality. Rather, this conflict must be viewed as [a dialectical one] between normativity and existentiality."[71]

An even deeper political understanding of constitutional decision making emerged in a series of interviews with the justices, most of whom readily acknowledge the importance of statesmanship—a keen sense of the political—on the bench. Most consider the political consequences of their decisions and at the same time remark that such consequences can never be dispositive of a constitutional issue.[72] Justice Leibholz concedes that the constitutional judge, "more than the 'ordinary judge,' [must] understand something of the essence of politics and of those social forces which determine political life."[73] Some of the justices equate judicial statesmanship with the court's capacity to achieve consensus. President Wolfgang Zeidler, the "chief justice" of the Second Senate from 1983 to November 1987, even ventured to observe that "objectivity" in constitutional interpretation manifests itself most clearly when the justices of a given senate, who collectively represent diverse career backgrounds, ideologies, and political attachments, manage to surmount their differences and reach unanimous agreement.[74] Other justices see a dialectical process at work: The "right" answer in a given case is the product of collective decision making; a "right" or "good" decision is one that has banished disagreement in the solvent of group discussion and dialogue.[75]

The Structural Unity of the Basic Law

In its first major decision—the *Southwest State* case (1951; no. 3.1)—the Federal Constitutional Court underscored the internal coherence and structural unity of the Basic Law as a whole.[76] "No single constitutional provision may be taken out of its context and interpreted by itself," declared the court. "Every constitutional provision must always be interpreted in such a way as to render it compatible with the fundamental principles of the Constitution and the intentions of its authors."[77] Justice Gerhard Leibholz, commenting on *Southwest,* elaborated: "The Court holds that each constitutional clause is in a definite relationship with all other clauses, and that together they form an entity. It considers certain constitutional principles and basic concepts to have emerged from the whole of the Basic Law to which other constitutional regulations are subordinate."[78] In one important case the court alluded to the "unity of the Constitution as a logical-teleological entity," a concept traceable to Rudolf Smend's "integration" theory of the Constitution.[79] Smend regarded the Constitution as a living reality founded on and unified by the communal values embodied in the German nation. In Smend's theory, the Constitution not only represents a unity of values, it also functions to further integrate and unify the nation around these values.[80]

Closely related to the concept of the Constitution as a structural unity is the principle of practical concordance (*praktische Konkordanz*), according to which con-

stitutionally protected legal values must be harmonized with one another when such values conflict. One constitutional value may not be realized at the expense of a competing constitutional value. In short, constitutional interpretation is not a zero-sum game. The value of free speech, for example, rarely attains total victory over a competing constitutional value such as the right to the development of one's personality. Both values must be preserved in creative unity. Professor Konrad Hesse wrote: "The principle of the Constitution's unity requires the optimization of [values in conflict]: Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values."[81]

PROPORTIONALITY. The principle of proportionality, like the concept of an objective value order discussed in the next section, is crucial to any understanding of German constitutional law. Proportionality plays a role similar to the American doctrine of due process of law. The Basic Law contains no explicit reference to proportionality, but the Constitutional Court regards it as an indispensable element of a state based on the rule of law. The court consistently invokes the principle of proportionality in determining whether legislation and other governmental acts conform to the values and principles of the Basic Law. In much of its work, the court seems less concerned with *interpreting* the Constitution—that is, defining the meaning of the documentary text—than in applying an ends-means test for determining whether a particular right has been overburdened in the light of a given set of facts. In fact, the German approach is not so different from the methodology often employed by the United States Supreme Court in fundamental rights cases.

In its German version, proportionality reasoning is a three-step process. First, whenever parliament enacts a law impinging on a basic right, the means used must be appropriate (*Eignung*) to the achievement of a legitimate end. Because rights in the Basic Law are circumscribed by duties and are often limited by objectives and values specified in the constitutional text, the Constitutional Court receives considerable guidance in determining the legitimacy of a state purpose. The sparse language of the United States Constitution, by contrast, often encourages the Supreme Court to rely on nontextual philosophical arguments to determine the validity of a state purpose that impinges on a constitutional right. Second, the means used to achieve a valid purpose must have the least restrictive effect (*Erforderlichkeit*) on a constitutional value. This test is applied flexibly and must meet the standard of rationality. As applied by the Constitutional Court, it is less than the "strict scrutiny" and more than the "minimum rationality" test of American constitutional law. Finally, the means used must be proportionate to the end. The burden on the right must not be excessive relative to the benefits secured by the state's objective (*Zumutbarkeit*).[82] This three-pronged test of proportionality seems fully compatible with, if not required by, the principle of practical concordance.

AN OBJECTIVE ORDER OF VALUES. In its search for constitutional first principles, the Constitutional Court has seen fit to interpret the Basic Law in terms of its overall structural unity. Perhaps "ideological unity" would be the more accurate term, for the Constitutional Court envisions the Basic Law as a unified structure of *substantive* values.[83] The centerpiece of this interpretive strategy is the concept of an objective order of values, a concept that derives from the gloss the Federal Constitutional Court has put on the text of the Basic Law. According to this concept, the Constitution incorporates the basic value decisions of the founders, the most basic of which is their choice of a free democratic basic order—a liberal, representative, federal, parliamentary democracy—buttressed and reinforced by basic rights and liberties. These basic values are objective because they are said to have an independent reality under the Constitution, imposing on all organs of government an affirmative duty to see that they are realized in practice.

The notion of an objective value order may be stated in another way. Every basic right in the Constitution—for example, freedom of speech, press, religion, association, and the right to property or the right to choose one's profession or occupation—has a corresponding value. A basic right is a negative right against the state, but this right also represents a value, and as a value it imposes a positive obligation on the state to ensure that it becomes an integral part of the general legal order.[84] One example may suffice: The *right* to freedom of the press protects a newspaper against any action of the state that would encroach on its independence, but as an objective *value* applicable to society as a whole, the state is duty bound to create the conditions that make freedom of the press both possible and effective. In practice, this means that the state may have to regulate the press to promote the value of democracy; for example, by enacting legislation to prevent the press from becoming the captive of any dominant group or interest.

This view of the Constitution as a hierarchical value system commands the general support of German constitutional theorists, notwithstanding intense controversy on and off the bench over the application of the theory to specific situations.[85] From some jurisprudential perspectives this theory allows the court to engage in open-ended decision making while appearing to be text-bound. It is an ingenious—some critics would say disingenuous—judicial methodology. As Clarence Mann has written, "It harbors the illusions of determinate norms in the fact [*sic*] of inarticulated value premises and of judicial neutrality aloof from the creative search for normative content," yet, in contrast to *Begriffsjurisprudenz*, it does "not necessarily exclude considerations of political reality in the construction and application of the constitution."[86] In short, it satisfies the traditional German yearning for objectivity in the sense of separating law from politics yet tolerates the search for purpose in constitutional law.

Indeed, the Constitutional Court has occasionally spoken of certain suprapositivist norms that presumably govern the entire constitutional order. In an early case decided in 1953, the court, recalling the Nazi experience, rejected "value-free

legal positivism."[87] The First Senate, at that time presided over by President Josef Wintrich, an influential Catholic jurist with roots in the Thomistic tradition, appeared to accept natural law as an independent standard of review.[88] Since then, particularly when interpreting the Basic Law's equality clauses, the court has tended to speak more of "justice" or the "fundamental principles of justice."[89] Some constitutional cases, however, appear to defend such principles on a theory of legal positivism where the reference is to positive constitutional norms of lower and higher rank. In this reckoning the value order of the Basic Law is an essential part of the positive legal order. Still, it is not altogether clear from the court's jurisprudence whether the suprapositivist norms underlying the Constitution exist outside the text, reflect the express values of the text, or account for the hierarchical order that the court has discerned among the values constitutionalized by the framers. Whatever the answer, the hierarchical system of values found to inhere in the Basic Law is itself largely a product of constitutional interpretation.

UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT. One doctrine that has emerged from viewing the Constitution as a structural unity and a hierarchical system of values is the concept of the unconstitutional constitutional amendment.[90] The doctrine holds that even a constitutional amendment would be unconstitutional were it to conflict with the core values or spirit of the Basic Law as a whole. Some see this as a contradiction in terms; others find a textual basis for such a construction in those unamendable provisions of the Basic Law harboring the highest values of the constitutional polity. The Constitutional Court accepted the concept of the unconstitutional constitutional amendment as valid doctrine in the *Article 117* case (1953).[91] It has figured more recently in the *Klass* case (1970), in which dissenting justices were prepared to invalidate an amendment to Article 10 of the Basic Law limiting the "inviolable" right of "privacy of posts and telecommunications."[92]

The doctrine of the unconstitutional constitutional amendment is one of several unwritten constitutional principles the court has deduced from the overall structure of the Basic Law. Other examples are the principles of federal comity, the party state, and militant democracy. Comity has been inferred from the Basic Law's general structure of federal-state relationships (see chapter 3), the party state from the language of Article 21 (see chapter 5), and militant democracy from the oft-repeated words "free liberal democratic order" (see chapter 5). These are also among the highest values of the German polity, and they have taken their place along with other fundamental norms found within the objective value order of the Basic Law.

THEORY OF BASIC RIGHTS. In the seminal *Lüth* case (1958; no. 8.1), the Constitutional Court remarked that the Basic Law's objective system of values "expresses and reinforces the validity of the [enumerated] basic rights."[93] Given the importance of this system, declared the court, these objective values "must apply as a constitutional

axiom throughout the whole legal system," influencing private as well as public law. The court ruled that while basic rights apply *directly* to state action, they apply *indirectly* to substantive private law. Accordingly, in deciding conflicts between private parties, judges are obligated to consider the "radiating effect" of basic rights on third parties (*Drittwirkung*). In private-law disputes, then, the interpretation of private law must be consistent with the objective values underlying guaranteed basic rights.

A collateral search for a coherent theory of basic rights (*Grundsrechtstheorie*) has also evolved out of the concept of an objective system of values. The attempt to construct a coherent theory of rights, however, confronts an interpretive difficulty. For one thing, open-ended words and phrases like "democracy," "constitutional order" and, above all, "free democratic basic order," are indeterminate concepts. Additionally, under the Basic Law, persons have duties as well as rights, but rights and duties are not easily reconciled. Developing a philosophically coherent jurisprudence of rights under any circumstance is a difficult task. To do so in the light of the text of the Basic Law is even more difficult.

In truth, German constitutional theorists have advanced five normative theories of basic rights: liberal, institutional, value oriented, democratic, and social.[94] Each finds some support in the literature of constitutional theory; each draws some support from particular decisions of the Federal Constitutional Court.[95] Liberal theory, based on postulates of economic liberty and enlightened self-determination, emphasizes the negative rights of the individual against the state. Institutional theory focuses on guaranteed rights associated with organizations or communities such as religious groups, the media, universities (research and teaching), and marriage and the family. Value-oriented theory places its emphasis on human dignity as it relates to rights flowing from the nature of the human personality. Democratic theory is concerned with certain political functions incident to the rights of speech and association and the role of elections and political parties. Social theory, finally, highlights the importance of social justice, cultural rights, and economic security. Not surprisingly, scholars and judges have linked each of these theories to one or another of the conceptions of state discussed earlier.

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

JUDICIAL REVIEW IN OPERATION

A major function of constitutional theory in Germany, as in the United States, is to resolve "the tension between representative democracy and constitutional review in a way that both justifie[s] and regulate[s] their coexistence."[96] Numerous commentators have sought to mark the boundary between legislation and constitutional adjudication and to comprehend the fine line that the Federal Constitutional Court has drawn between law and politics.[97] The following discussion summarizes the strategies devised to temper judicial activism with restraint and thus to preserve the creative coexistence between democracy and constitutionalism.

The Scope of Review

The Constitutional Court renders its decisions largely in declaratory form. In cases of major importance it may issue a temporary injunction against a political department of the government, pending the clarification of a constitutional question. The court normally confines itself, however, to declaring laws null and void or simply incompatible with some particular provision of the Basic Law. As noted earlier, the court is unbound by any case or controversy requirement. By remaining on the high road of broad-ranging, principled declarations, the court in a sense elevates the status of the parties, assuming their moral autonomy in the face of decision. As Justice Hans G. Rupp explained: "The only marshal there is to enforce the court's ruling is its moral authority, the conscience of the parties concerned, and in the last resort, the people's respect for law and good government. It is mainly this limitation which renders it less objectionable to let a court settle legal issues which are closely connected with domestic or international politics."[98]

Apart from this limitation, the Constitutional Court follows a number of guidelines analogous to certain maxims of judicial self-restraint advanced by Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*.[99] For example, the rule that the United States Supreme Court will not pass upon the constitutionality of legislation in a nonadversary proceeding has its equivalent in the Constitutional Court's refusal to decide moot questions. We have seen that concrete judicial-review references must arise within the framework of actual litigation. The justiciability of a constitutional complaint likewise depends on certain attributes of concreteness and particularity. Even cases coming before the court on abstract judicial review require real conflicts of opinion within or among governing institutions.

By the same token, the court will not anticipate a question of constitutional law in advance of the necessity for deciding it. In short, while every case properly before the court involves a constitutional question, the court usually refrains from deciding ancillary constitutional issues not yet ripe for decision. For example, the court may strike down a particular federal regulation interfering with a state's administration of federal law but decline to set forth the general conditions under which federal administrative control would prevail.[100] The court also is reluctant to issue temporary injunctions against government agencies about to engage in allegedly unconstitutional behavior, preferring as a matter of strategy to allow the challenged activity to proceed until the court has had time to consider the matter on its merits.[101] Yet here, as with much of its authority, the court's sense of self-restraint is the only check on the exercise of its power.

American legal scholars will recognize other *Ashwander* maxims in the court's general approach to constitutional disputes. A leading principle of judicial review in Germany obliges the court to interpret statutes, when possible, in conformity with the Basic Law (*Pflicht zur verfassungskonformen Auslegung*).[102] If a statute lends itself to alternative constructions for and against its constitutionality, the court follows the reading that saves the statute, unless the saving construction distorts the meaning of its provisions. The court also has stated on numerous occasions that it will not substitute its judgment of sound or wise public policy for that of the legislature,[103] a rule particularly relevant in equal protection analysis. Nor will statutes be overturned simply because the legislature may have inaccurately predicted the consequences of social or economic policy. As the *Codetermination* (1978; no. 6.6) and *Kalkar I* (1978; no. 4.6) cases make plain,[104] the court grants a generous margin of error to the legislature. It will uphold an ordinary statute unless the statute clearly violates the principle of proportionality (*Verhältnismässigkeit*), the rule of law (*Rechtsstaatlichkeit*), or some related principle of justice such as legal security, clarity, or predictability.[105]

The court applies these same principles with respect to laws examined in the course of ordinary civil and criminal proceedings. In addition, the justices have developed several rules for limiting the number of referrals (*Vorlageverfahren*) from courts of law.[106] One such rule requires lower courts to certify statutes for review when they are convinced that the law under which a dispute arises is unconstitutional,[107] but only when a ruling of unconstitutionality would change the outcome of the case. Another is that only statutes passed since the ratification of the Basic Law qualify as subjects of concrete judicial review to be decided by the Constitutional Court. Any court may review and nullify on constitutional grounds pre-1949 legislation as well as administrative regulations and local ordinances. These so-called preconstitutional laws rank lower than laws passed since May 23, 1949.[108] The Constitutional Court has ruled, however, that such laws are within the scope of its concrete review procedure when they have been reenacted or substantially amended under the Basic Law. The appropriate parties may nevertheless challenge an untouched preconstitutional law in an *abstract* judicial-review proceeding.[109]

Finally, while the court does not enjoy discretion akin to the *certiorari* power of the Supreme Court, it does have limited control over its docket through the three-judge chambers. Since 1993, the chambers have been empowered to decide concrete review cases, provided the decision conforms to rules already laid down in previous decisions by the senates. (In 1994, the chambers heard twenty of the twenty-eight judicial references decided by the senates.) In addition, as we saw in chapter 1, these

chambers may reject trivial constitutional complaints as well as those unlikely to result in any clarification of an important constitutional question. Most constitutional complaints stem from judicial decisions. In reviewing such decisions, the court has steadfastly maintained that it will not act as a general court of review (*Revisionsgericht*).[110] Ordinary errors of fact and law are not reviewable by the Federal Constitutional Court. On the other hand, an arbitrary finding of facts or a wholly unreasonable application of the law in a given case would not survive constitutional analysis. But where a complainant raises a constitutional issue under another court's reasonable interpretation of an ordinary law, the Constitutional Court usually confines itself to a determination of whether the lower court adequately considered the values of the Basic Law. The court will usually sustain the lower court's judgment if that court assessed the statute in the full light of the relevant constitutional values.[111]

Form and Effect of Decisions

The court applies most principles of constitutional interpretation with considerable flexibility and prudence. On first impression, however, and contrary to the canons of judicial restraint mentioned in the previous section, the court's decision-making record might suggest a tribunal embarked on a path of relentless activism. By January 1, 1992, the court had invalidated 423 laws and administrative regulations (or particular provisions thereof) under the Basic Law (see table 2.1). Of these negative rulings, the First Senate decided 243 and the Second Senate 180, nearly 70 percent of which involved provisions of federal law, a figure explained by the predominant lawmaking role of the federal government in nearly every major area of public policy. The large majority of these rulings admittedly involved minor legal provisions, but a fair number featured important public policies in fields such as education, taxation, employment, social insurance, and labor law.[112]

As table 2.1 indicates, the Constitutional Court may hold laws or regulations

Table 2.1. Invalidated Legal Provisions, 1951–1989

	Federal law		State law		
	Void	Incompatible	Void	Incompatible	Total
Senate					
First	108	81	37	17	243
Second	65	39	54	22	180
Total	173	119	91	39	423

Source: Compiled from statistical summaries provided by administrative offices of the Federal Constitutional Court (1992; typescript).

Note: The figures include laws (*Gesetz*) and administrative regulations (*Verordnungen*).

that it considers unconstitutional either null and void (*nichtig*) or incompatible (*unvereinbar*) with the Basic Law. When held to be *nichtig,* the statute immediately ceases to operate; when declared *unvereinbar,* the statute or legal norm is held to be unconstitutional but not void, and it remains in force during a transition period pending its correction by the legislature, a decisional mode that now has the sanction of law and, as the table shows, is an option the court frequently exercises.[113]

These overrulings, however, are dwarfed by the number of laws or statutory norms that the court has sustained over the years. With respect to laws that are upheld, the court distinguishes between so-called unobjectionable (*unbeanstandeten*) norms and those held to be in conformity with the Basic Law. Unobjectional norms are those the court sustains in the normal course of deciding constitutional complaints. The other category includes statutory provisions questioned in concrete review cases but sustained in accordance with the principle that requires the court to interpret a norm consistent with the Basic Law. Between 1951 and 1993 these unobjectionable and *verfassungskonforme* statutory provisions numbered 1,367.[114]

The practice of declaring a legal provision unconstitutional but not void is one of two strategies used by the court to soften the political impact of its decisions. This first strategy uses admonitory decisions (*Appellentscheidung*) to tender advice to parliament with respect to statutes or legislative omissions that run afoul of the Basic Law or are likely to do so.[115] This strategy of declaring a law or practice unconstitutional but not void is designed to prevent the greater hardship or inconvenience that would flow from the complete voidance of a statute. How long and under what conditions an unconstitutional but unvoided law can remain in force is a matter the court reserves to itself to decide. The court usually sets a deadline for corrective legislative action and occasionally directs parliament to adopt a specific solution. More often the court lays down the general guidelines within which parliament is required to legislate.[116]

Under the second strategy, the court actually sustains a challenged statute but warns the legislature that it will void it in the future unless the legislature acts to amend or repeal the law. Cases employing this decisional mode often involve equal protection claims arising out of statutes that deny benefits or privileges to some persons while conferring them on others.[117] Such decisions are prudential judgments designed to give the legislature time to adjust to changing conditions or to avoid the political or economic chaos that might result from a declaration of unconstitutionality. By resorting to this procedure, the court keeps the constitutional dialogue going and furnishes parliament with the flexibility it needs to work out creative solutions to the problem under scrutiny.

In some situations, however, when the court declares a statute unconstitutional and void, rather than keeping parliament in a quandary as to what alternative policy or program would survive constitutional analysis, it tenders "advice" that leaves little discretion to lawmakers.[118] In the important *Party Finance* case (1966) it went so far as to tell parliament that federal funding would have to be provided to minor politi-

cal parties securing 0.5 percent of all votes cast in a federal election instead of the 1.5 percent limit previously established by law.[119] In the well-known first *Abortion* case (1975; no. 7.10), which invalidated a permissive abortion statute, the court effectively rewrote the law, which parliament subsequently felt obliged to pass. This practice, as noted in the next section, has come under increasing criticism in Germany.

These rulings, like all of the court's decisions, including those that declare a statute or other legal provision compatible with the Basic Law, have the force of law, and as a consequence bind all branches and levels of government.[120] In the *Southwest State* case (1951; no. 3.1) the court made it clear that the binding effect of its decisions also bars the legislature from reenacting a law after it has been declared unconstitutional. The binding effect principle applies to the actual ruling of a case and to the "essential" reasoning or rationale on which it is based. What constitutes "essential reasoning," however, is not always clear. It does not embrace all arguments marshaled in support of a given result, although it seems to include those basic standards of review in terms of which a law is sustained or nullified, for these standards bind courts of law in their own interpretation of ordinary law.[121] The one exception to the binding effect rule is the Federal Constitutional Court itself. (The rule of *stare decisis* does not bind the German judiciary.) While reluctant to depart from principles laid down in its case law, the court will readily do so if convinced that it erred in an earlier ruling. Indeed, as the *Census Act* case (1983; no. 7.6) underscores, constitutional provisions may themselves take on new significance in the light of changing social conditions.

Whenever the Constitutional Court strikes down a law in whole or in part, the effect is prospective (*ex tunc*). This rule is qualified, however, by a provision of the FCCA that permits new trials in criminal cases in which a court convicts a defendant under a subsequently voided statute.[122] Statutes declared incompatible with the Basic Law but not void may continue to be enforced, but only under conditions laid down by the Constitutional Court. The effect of such decisions on other courts is substantial; they may not proceed with pending cases arising under such statutes until the legislature has amended or corrected the statute in conformity with the guidelines set by the Constitutional Court.[123]

It is important to remember that the Constitutional Court's rulings are exclusively declaratory. The FCCA includes a provision that actually bars any direct enforcement of the court's rulings.[124] Its decisions are "enforceable" through ordinary legislation and judicial proceedings. It is well to remember also that the court's jurisdiction is compulsory. It lacks a storehouse of "passive virtues" by which it might for prudential reasons avoid a ruling on a constitutional issue.[125] Moreover, the court's declaratory authority is sweeping, for it is at liberty to range beyond the immediate issue before it and review the constitutionality of any part of a statute challenged in an abstract or concrete judicial-review proceeding. To link judicial power of this character with direct executive implementation would pose an enormous threat to representative democracy in Germany. The court's ultimate legitimacy in the German system, as noted earlier, rests on its moral authority and the willingness of the political arms of the government to follow its mandates.

The court's own sense of self-restraint is another key to its acceptance and durability. But the court is faced with a dilemma. If it is to perform its steering and integrative role in the German system, objectify the values of the Basic Law, and bring constitutional normativity into conformity with constitutional reality, it must rule, according to the modern German version of the *Rechtsstaat,* on a properly presented constitutional issue, even though such a ruling may thrust it headlong into a politically exposed position. The court has learned to cope with this politically exposed position. For example, in cases involving disputes between high constitutional organs (i.e., separation of powers, or *Organstreit,* proceedings) or those brought by political minorities on abstract judicial review, the court occasionally makes an ally of time, delaying decision until the controversy loses its urgency or is settled by political means, prompting the initiating party ultimately to withdraw the case. Largely because of this tactic, the court has decided, up to 1995, only 51 of the 107 *Organstreit* proceedings and 68 of the 124 abstract review proceedings submitted to it.

JUDICIAL REVIEW AND THE POLITY

As this summary of constitutional review suggests, and as subsequent chapters show, the Constitutional Court is at the epicenter of Germany's constitutional democracy. "The Basic Law is now virtually identical with its interpretation by the Federal Constitutional Court," remarked Professor Rudolf Smend on the court's tenth anniversary.[126] Already by the 1990s Smend's view was conventional wisdom among German public lawyers and constitutional scholars. Most scholars and legal professionals accept the court as a legitimate participant in the larger community decision-making process, a remarkable achievement of postwar institution building in the Federal Republic. Professor Christian Starck, one of the Basic Law's leading commentators, described this consensus when he referred to the court as the "crowning completion of the constitutional state" and applauded its "decisive influence upon the development of our constitutional law."[127]

We may hazard some guesses as to why West Germany's legal community accepts the court as the final, authoritative interpreter of the Basic Law. First, and most obvious, the court functions as a specialized constitutional tribunal, with clear authority derived from the constitutional charter itself. Second, a democratic legislature chooses the members of the court just as it controls the court's organization and procedures. Constitutionally prescribed recruitment procedures all but guarantee that the court will consist of members acceptable to the established political parties and be broadly representative of established political interests, including the interests of the states as corporate entities within the German system. Third, after years

of experimentation with various terms of office, including life tenure for justices elected from the federal courts, Germans settled for a simple, nonrenewable term of twelve years for each justice, the effect of which is to secure both the court's independence and a continuing membership profile not too unlike that of parliament itself. Finally, parliament permitted the introduction of dissenting opinions in 1971—a practice barred in all other German courts—one sign of the growing maturity of German constitutional jurisprudence.

At the same time, the Constitutional Court, like the United States Supreme Court, often finds itself in the eye of a political storm. Despite its democratic legitimacy, or perhaps because of it, the Constitutional Court has developed into a fiercely independent institution and has struck down large numbers of statutory provisions and administrative regulations. A veritable *Blitzkrieg* of public lectures, newspaper and television commentaries, articles in legal periodicals—some authored by former justices—and legal monographs have criticized the court, although for the most part respectfully, for "judicializing politics" or "politicizing justice."[128] Some of these publications take the court to task for many of its admonitory decisions, which in the view of some critics have turned the court into a quasi-legislative institution. The *Abortion I, Party Finance IV, Census Act, East-West Basic Treaty,* and *Higher Education Admission* cases are examples of decisions faulted for improperly exceeding the limits of judicial power.[129] Even more devastating, other critics have charged, is the court's dampening effect on legislative confidence and mobility. Some argue that parliament legislates too much in the shadow of the court, fearful that its laws may run afoul of some judicial order, standard, or admonition.[130] These critics point to the tendency of legislators to tailor their work to anticipated court decisions and to scrutinize constitutional cases for hints on how to shape public policy. If this tendency does prevail, the court's role in the polity is not exhausted by an analysis simply of its formal powers or its case law. The mere presence of the court would seem to inhibit certain kinds of legislative activity.

This criticism, harsh as it is, is nevertheless predicated on a shared commitment to the court as an institution. There is another stream of commentary, however, identified mainly but not exclusively with neo-Marxist critics, that manifests far less sympathy for the court's institutional roles in German politics. In the eyes of these critics, the court serves as a brake on social change and is the main force responsible for the imposition of a constitutional ideology that sanctifies consolidation and stability, defends the status quo, and promotes consensus politics. There may be some grounds for this criticism, for the court has often used its power—with prominent exceptions duly noted in the following chapters—to invalidate reforms regarded as progressive and liberalizing by large segments of German society.[131]

Still, the court's prestige appears to be very high. A series of public opinion polls taken in recent years shows that it enjoys substantially more public trust than any other major political or social institution, including parliament, the military establishment, the regular judiciary, the television industry, and even churches and universities.[132] This public trust is also evident in the former East German regime. East Germans are making appeals to the Constitutional Court in increasing numbers, just as the court, on a number of occasions mentioned in later chapters, has vindicated constitutional claims originating in the new eastern states. The absence of any major political effort to curtail the court's powers despite its location at the center of many political storms is perhaps another manifestation of its general support throughout Germany. Even proposals by respected academic figures to abolish the court's controversial abstract judicial-review jurisdiction,[133] which the court could well do without in light of the political manipulation that often accompanies the invocation of this procedure, has fallen on deaf ears.

The Constitutional Court's durability is traceable to more than general public support. The court owes much to West Germany's community of scholars, despite the acerbic pens of some writers. The literature on the court, ranging from doctrinal controversy in professional journals to informed media accounts of particular cases, is comparable to the volume and sophistication of commentary on the United States Supreme Court. German commentators form an ever-widening interpretive community organized around a deepening interest in the court's work. According to Professor Peter Häberle, among the most learned of Germany's judicial scholars, the commentators see themselves engaged in a common enterprise with the Federal Constitutional Court.[134] Their constructive criticism and increasing assertiveness have been stimulated in part by the use and popularity of the court's own dissenting opinions.[135]

The high-spirited give-and-take between the justices and the commentators has become an important element in the growing maturity of German constitutional law and consciousness. That both court and commentators see themselves engaged in actualizing the Constitution in the public life of the nation undoubtedly reflects the authoritative role of constitutional commentary in argumentation before the court and in the general influence of the professorate on and off the bench. The court's twenty-fifth anniversary celebration was an important symbol of this cooperation between bench and academy: Professor Christian Starck, a former law clerk to Justice Herbert Scholtissek and himself a leading commentator on the Basic Law, delivered a brief address before the assembled justices in the name of all German constitutional scholars,[136] while Chief Justice Ernst Benda in response acknowledged the "critical importance" of their "partnership" with the justices in contributing to the court's total work product.[137]