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The Federal Constitutional Court in the German Political System

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The Federal Constitutional Court is an important policy-making institution in the German political system. As the guardian of the Basic Law, the Constitutional Court has played a critical role in umpiring the federal system, resolving conflicts among branches of the national government, overseeing the process of parliamentary democracy, monitoring the financing of political parties, and reviewing restrictions on basic rights and liberties. In each of these areas, the Court's decisions have shaped the contours of German life and politics. Its influence is fully the equal of that of the Supreme Court in American politics. Despite its "activist" record of nullifying laws favored by legislative majorities, the German Court has managed to retain its institutional independence as well as the trust of the general public.

THE FEDERAL CONSTITUTIONAL COURT IN THE GERMAN POLITICAL SYSTEM

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INTRODUCTION

The Federal Constitutional Court is a major policy-making institution in Germany's system of government. Within the space of four decades (1951-1991), this tribunal has evolved into the most active and powerful constitutional court in Europe. Its pivotal character in the German political system stems from its role as a judicial lawmaking body created for the specific purpose of deciding constitutional disputes under the Basic Law.[1] In deciding such disputes—that is, in interpreting the language and spirit of the Basic Law—the Constitutional Court has influenced the shape of Germany's

1. The German Constitution is known as the Basic Law or the *Grundgesetz* (hereafter cited as GG), the term originally used to underscore its provisional character in the absence of national unity.

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political landscape, reaching deep into the heart of the existing state, guarding its institutions, circumscribing its powers, clarifying its goals and, in some instances, instructing politicians to adopt given courses of action. Indeed, the Court has managed to colonize spheres of law and politics that only the most ardent supporter of judicial review would have thought possible in 1951. The purpose of this essay is to explain this development, to examine the exercise of judicial review in selected areas of German politics, and to describe the techniques the Court has used to build and maintain its authority.

The blossoming of the Federal Constitutional Court into an important political institution should not have come as a surprise. After all, the Basic Law of 1949, unlike previous German constitutions, created a juridical democracy, one that clearly limits the power of popular majorities. Drafted in response to the abuses and weaknesses of the Weimar Constitution—and its demolition by the enemies of democracy—the Basic Law incorporates the power of judicial review and concentrates its exercise in the Federal Constitutional Court. Popular sovereignty remains a cardinal principle of German constitutionalism, but it now takes the form of representative institutions enframed by a complex scheme of divided and separated powers undergirded by a tangled web of checks and balances. This machinery is complicated, and the Basic Law's framers saw the need to enlist the skill of a political engineer to keep the mechanism going. Were its constituent parts to break down from too much friction or spin out of control from excessive motion, a constitutional court would be there to do the fixing. In short, the Basic Law itself places the Constitutional Court at the epicenter of the Federal Republic's political system.

A simple recitation of the Constitutional Court's formal authority highlights its political significance. The Basic Law itself lays down all of the Court's important authority, specifying no fewer than 17 subjects or proceedings over which the Court shall have compulsory jurisdiction. These proceedings include petitions to declare political parties unconstitutional, disputes between the highest organs or branches of the federal government, conflicts between the states or between the latter and the federal government, doubts about the compatibility of state or federal law with the Basic Law when such doubts are placed before the Court by specified organs of government, and constitutional complaints filed by individual citizens.[2]

Organizationally, the Court is divided into two senates equal in power but exercising mutually exclusive jurisdiction. The First Senate decides issues arising mainly out of ordinary litigation, whereas the Second Senate functions much like the Weimar Republic's *Staatsgerichtshof*, whose task it was

2. *Bundesverfassungsgerichtsgesetz* §§ 13 (2), (3), (4), (5), and (6).

to resolve disputes, as its name suggests, among branches and levels of government. The three major actors responsible for working out the details of the Court's structure (i.e., Christian Democrats, Social Democrats, and delegates from various states represented in the Bundesrat) had different reasons for voting in favor of creating a specialized constitutional tribunal outside the regular judiciary. Christian Democrats would have at their disposal a powerful weapon for protecting basic rights, particularly those of property and personality. Social Democrats, traditionally distrustful of judicial review and the regular judiciary, saw the Court as an equally powerful tool in the protection of minority rights, especially the rights of minority parliamentary parties.[3] Finally, the states represented in the Bundesrat envisioned the Court and particularly the Second Senate as a bulwark of German federalism. These lines of division were not as neat as suggested, but they fairly well describe the predominant orientation of the three groups.

THE CONSTITUTIONAL COURT AND JUDICIAL POLITICS

A. GENERAL OVERVIEW

The enormous power conferred on the Federal Constitutional Court virtually assured that it would find itself in rough waters, navigating between the reefs of law and politics. It needs to be reemphasized that the Constitutional Court is not self-propelling. To engage its sails, a helmsman—usually high state officials, a court of law, or an individual complainant—must steer it into the wind. As Table 1 indicates, these helmsmen have kept the ship under full sail for 40 years. Occasionally, to continue the nautical metaphor, they have taken the vessel into stormy political seas, but the ballast in its hold, accumulated in vast amounts over the years, keeps it steadily and confidently on course. The directions it takes often meet with the disapproval of those who set it on its way, but few in Germany today would, on that account, take the wind out of its sails or return it to harbor.

Table 1 shows the frequency with which governmental institutions and quasi-official agencies such as political parties have set the Court in motion. Individuals have generated the bulk of the Court's workload but, even apart from their constitutional complaints, the Court would have its hands full with a yearly average of some 95 cases. As the following analysis will show,

3. In lending their firm support to the new tribunal, Social Democrats were motivated by their weak position in the Bundestag and what they perceived as Adenauer's tendency to aggrandize the power of the chancellery at the expense of both parliament and minority parties outside the dominant coalition (Laufer, 1968, p. 98).

Table 1
Proceedings Before the Constitutional Court 1951-1992

Proceeding	Docketed	Decided
Unconstitutionality of parties	4	2
Disputes between federal organs	91	48
Federal-state conflicts	25	13
Abstract norm control	112	65
Concrete norm control	2756	913
Constitutional complaints	86,567	71,166
Other	941	437
Total	90,496	72,744

Source. Statistical Summaries Prepared by the Administrative Offices of the Two Senates (From September 9, 1951 to December 31, 1992; typescript).

agencies of government and official political groups have often used the Constitutional Court as an alternative forum in which to press their political goals.

B. UNCONSTITUTIONAL PARTIES AND ABSTRACT JUDICIAL REVIEW

Proceedings where the Court is likely to be most exposed to political criticism are those involving the prohibition of political parties and abstract judicial review. Needless to say, the two party prohibition cases listed in Table 1 are landmarks in the political history of the Federal Republic. The banning of the neo-Nazi Socialist Reich Party (SRP) in 1952 and the Communist Party (KPD) in 1956 showed how the government could use the Court for political purposes. For one thing, these proceedings made it possible legally to suppress party organizations opposed to constitutional democracy, even though the parties under fire in these cases posed little or no threat to Germany's nascent polity. For another, both cases served the foreign policy objectives of the ruling government (Kirchheimer, 1961, p. 155). The SRP Case (1952) helped West Germany purchase the goodwill and trust of the Allied powers, whereas the KPD Case (1956) served as a cogent weapon in the cold war between East and West.

The Court's decision in the SRP Case was swift and popular. Far more controversial was the KPD Case, with much of the controversy centering on the wisdom of the federal government's petition to ban the Communist party. Four years elapsed before the First Senate, after considerable prodding from the Adenauer-led government, could bring itself to decide the case. In so

doing, the Senate confined its analysis to the program of the KPD and the Marxist-Leninist theory behind it. From this perspective, the KPD like the SRP decision was easy—easier than the American case of *Dennis v. United States* (1951)—because the Basic Law explicitly withholds its protection from political parties which "by reason of their aims . . . seek to impair or abolish [the Federal Republic's] free democratic basic order" (Article 21 [2] GG). In any event, the KPD and SRP decisions were enormously important ideologically. Not only did they canonize the German idea of a "militant democracy" and its accompanying vision of a value-oriented society tied to a particular conception of political morality; they also launched a massive effort to bar "extremists," particularly members of the Communist party, from German public life (Braunthal, 1990, pp. 15-21; Kommers, 1976, pp. 279-280).

The Federal Constitutional Court's political exposure is equally direct in abstract judicial review proceedings, even though in such cases the Court is engaged in the "objective" determination of the validity or invalidity of a legal norm or statute (Schlaich, 1991, p. 77). The proceeding is described as objective because it is intended neither to vindicate 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 doing so, 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 is out of the petitioner's hands because it cannot be withdrawn without the Court's permission, a condition that reinforces the Court's independence and allows it to speak in the public interest when it discerns that interest to be truly at issue.

What makes abstract review so politically sensitive, however, is the capacity of any of the three parties to transpose a political conflict directly into a constitutional one. For example, a defeated minority in the Bundestag, if equal to one third of its members, may challenge a law on abstract review immediately after its passage. Such cases, as Table 2 demonstrates, are often contests between parties in the ruling coalition and the main parliamentary opposition. When federal and state governments are involved, a petitioner under the control of one party or coalition of parties frequently challenges the validity of a law passed by a government controlled by its opposition. The Abortion Case (1975) illustrates both situations perfectly. Christian Democrats in the Bundestag and five *Länder* under Christian Democratic control challenged the validity of a liberal abortion statute that the ruling SPD-FDP coalition had passed in 1974. In this highly controversial case,

Table 2
Partisan Uses of Abstract Judicial Review

	Selected Norms Declared Unconstitutional[a]		
Subject of Norm	Enacting Body	Petitioner	Date of Decision
Party finance	FG/CDU	LG/SPD	24 July 1958
Nuclear arms referendum	LG/SPD	FG/CDU	30 July 1958
Federal TV station	FG/CDU	LG/SPD	28 February 1961
Party finance	FG/CDU	LG/SPD	19 July 1966
Abortion	FG/SPD	1/3 BT/CDU	25 February 1975
Conscientious objection	FG/SPD	1/3 BT/CDU	13 April 1978
University admissions	FG/SPD	LG/CSU	10 December 1980
Public broadcasting	LG/CDU	1/3 BT/SPD	4 November 1986
Foreign resident voting	LG/SPD	1/3 BT/CDU	31 October 1990
Public broadcasting	LG/SPD	1/3 BT/CDU	5 February 1991

a. FG = Federal Government; LG = State Government; BT = Bundestag; CDU = Christian Democratic Union; SPD = Social Democratic Party; CSU = Christian Social Union.

decided on 25 February 1975, the Court not only invalidated the statute, but ordered the legislature to define abortion as an "act of killing" and to reimpose criminal penalties for its commission.

Abstract judicial review is a common weapon in Germany's political arsenal. As Table 1 indicates, 112 petitions—an average of 3 per year—have been taken to the Court, resulting so far in 44 published opinions. The law, or a section thereof, was struck down in 23 and sustained in 21 of these opinions. Of the 44 cases, 21 were partisan disputes of the kind listed in Table 2, with the Christian Democratic Union (CDU) winning 11 and the Social Democratic Party (SPD) winning 9. (The remaining case, brought by SPD members of the Bundestag against the European Defense Community Treaty of 1952, was dismissed.) Other abstract review cases were mainly federal-state disputes largely transcending party lines, but no less political for that reason. Bavaria, a bastion of German federalism ruled by the CDU's conservative sister party, the Christian Social Union (CSU), leads the pack with 11 petitions against federal laws, 6 of which challenged the constitutionality of statutes enacted under the governance of the CDU.

Governments and politicians continually threaten to drag their political opponents "to Karlsruhe"—the location of the Court—when their interests are at stake. The Court's presence is deeply felt in the corridors of power, often leading politicians to negotiate their differences rather than to risk total defeat in one of the Court's senates. The threat of being taken to Karlsruhe on abstract review might induce a government to repeal a statute before the

Court has rendered its decision. At that point, the Court might declare that it is no longer in the public interest to decide the case.[4] Of the 112 cases decided on abstract review, 33 were resolved in a manner other than by full-senate decision. A good many of these cases were withdrawn with the Court's permission, occasionally after the Court itself had used the one weapon at its disposal for stripping a case of its urgency, namely, procrastination. Occasionally, too, a petitioner entertaining second thoughts about an abstract review referral may request the Court to delay its decision, a request that it usually honors.[5]

C. NORM CONTROL: INSTRUMENT OF JUDICIAL INTERVENTION

Abstract review, however, is only one small part of the Court's norm control jurisdiction. Other routes by which petitioners may challenge laws on constitutional grounds are judicial referrals and constitutional complaints. Judicial referrals—known as concrete judicial review—arise out of litigation. If a court is convinced in the course of a lawsuit that a statute or legal norm under which the case has arisen is unconstitutional, a ruling concerning which is crucial to the outcome of the case, the court—or a majority of the judges thereof—is obligated to refer the matter to the Constitutional Court. Once again, the proceeding involves an objective determination of constitutional meaning, for the interests and arguments of the parties involved in the suit are of no concern to the Court (Benda & Klein, 1991, p. 301). The constitutional complaint, on the other hand, is a tool that ordinary persons, after exhausting their legal remedies, may use to challenge the validity of a law or any governmental action alleged to infringe a fundamental right secured by the Basic Law.

Over the years, as Table 3 indicates, the Court has invalidated 423 statutory provisions, pursuant mainly to constitutional complaints and concrete judicial proceedings. As the tabular data also indicate, the Court may nullify a statute or legal ordinance in either of two ways: by holding a legal provision null and void (*nichtig*), or by declaring it incompatible (*unvereinbar*) with the Basic Law. When held *nichtig*, the statute ceases immediately to operate; when declared *unvereinbar*, the statute or legal norm is held unconstitutional but not void, and it remains in force during a transitional period pending its correction by the legislature (Kommers, 1989, pp. 60-61).

4. An example is the Hesse Judiciary Case (1989). The federal government brought an action against Hesse to challenge the validity of its Judiciary Act of 1984. Hesse repealed the act and asked to have the case withdrawn, whereupon the Court declared that there was no longer any public interest in handing down a decision in the case.

5. Interview with Justice Dieter Grimm, May 6, 1992.

Table 3
Number of Invalidated Provisions,[a] *1951-1991*

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

a. Figures include laws (*Gesetze*) and administrative regulations (*Verordnungen*).
Source. Compiled from statistical summaries provided by administrative offices of the Federal Constitutional Court (typescript, 1992).

These nullifications, incidentally, occurred in 361 separate decisions, 212 and 149 decided, respectively, by the First and Second Senates. Equally important are the policy areas in which these nullifications occurred. According to one authoritative analysis, 61 of the laws struck down dealt with general social policy, 35 were tax and fiscal measures, 29 embraced issues on law and order, and 34 related to economic, transport, educational, or employment policy (von Beyme, 1991, p. 382).

Standing alone, these figures project an image of a judicial body in perpetual conflict with the legislature. Table 4, however, offers a more nuanced account of the Court's "activism." It distinguishes, as does the Court in its own compilation, between "unobjectionable" (*unbeanstandeten*) norms and those held in conformity with the Basic Law. Unobjectionable norms are those that the Court sustains in the normal course of deciding constitutional complaints. The other category involves legal norms whose constitutionality lower courts have questioned on concrete review. These norms have been sustained in accordance with the interpretive principle that holds that if two interpretations of a statutory norm are possible, one contrary and the other compatible with the Basic Law, the Court is obligated to choose the interpretation that conforms to the Constitution (*Pflicht zur verfassungskonformen Auslegung*). The self-imposed duty to so interpret the Basic Law helps to minimize conflicts between legislature and judiciary.

Another angle of vision on the Court's activism occurs when the data in Table 4 is presented by legislative periods. About 20% of all laws—or parts thereof—enacted in each period wind up on the Court's docket, underscoring the extent to which Germans have been willing to constitutionalize their politics. CDU- and SPD-led governments appear to have fared about equally under the Court's "tutelage," although in the 7th Legislative Period (1972-1976) the SPD, heading a ruling coalition, saw the Court nullify several of

Table 4
Number of Legal Norms Sustained, 1951-1992

Level of Government	Unobjectionable Norms	Norms Interpreted in Conformity with Basic Law	Total
Federal	902	190	1092
Land	250	25	275
Total	1152	215	1367

Source. Official statistics of Federal Constitutional Court, 1992.

its major socioeconomic reforms. Since 1969, the Court appears to have oscillated between the poles of activism and restraint, notwithstanding the identity of the coalition government. The terms activism and restraint, incidentally, are descriptively inadequate for conveying any real sense of the Constitutional Court's influence over the political order or on the German public mind. Even when the Court defers to the judgment of legislators or gives them wide latitude for exercising discretion, it still decides the dispute in the course of which broad declarations of constitutional right and duty are often proclaimed.

A particularly dramatic example of this mode of decision making is the well-known East-West Basic Treaty Case—an abstract judicial review proceeding initiated by Bavaria against Bonn's governing coalition of Social and Free Democrats. Here the Court sustained the constitutionality of a landmark treaty normalizing relations between the two German states. Bavaria argued that the treaty rejected the Basic Law's commitment to the principle of national unity. In response, the Court declared that in meeting constitutional goals, particularly in the area of foreign policy, flexibility and discretion were essential tools of the trade. Yet to the chagrin of the ruling coalition, the Court used this case to make wide-ranging pronouncements on the scope of judicial review, on the nature of the West German state, and on the principle of reunification.

In fact, the Court rebuked the federal government for trying to "out maneuver" the First Senate, in which the case was pending, by attempting to ratify the treaty before the Senate had made its decision. With respect to national unity, the Court declared that the goal of reunification, stated in the Preamble of the Basic Law, is legally binding on "all constitutional organs" each of which is "required to keep the claim of reunification alive domestically, to vigorously push it in foreign relations, and to refrain from any activity that would undermine the goal of reunification." The East-West

Treaty Case (1973) had something of the flavor of *Marbury v. Madison* (1803). It handed the government a victory, but qualified that victory with a lecture on the rule of law and warnings about exceeding the limits of executive discretion.

D. SEPARATION OF POWERS AND FEDERALISM

What is remarkable about the data in Table 1 is the large number of federal-state disputes and conflicts involving separation of powers that they include, both high-risk areas of judicial intervention. An American commentator (Choper, 1980) has suggested that the "final resolution [of such conflicts of power should] be remitted to the interplay of the national political process" (p. 263). He argued that when the U.S. Supreme Court interferes in such power struggles, it risks "the expenditure of precious judicial capital" (p. 275). Except for a handful of "great cases" over two centuries, the Supreme Court appears to have accepted this advice, particularly in the area of foreign policy (Henkin, 1990). In Germany, by contrast, the Court must resolve such conflicts, even in the area of foreign policy,[6] when duly called on to do so within the framework of its constitutional jurisdiction. Because, as already noted, this jurisdiction is clearly set forth in the Basic Law, the hatch of nonjusticiability provides no avenue of escape.

The specificity of the Basic Law leaves less room for judicial maneuverability than does the U.S. Constitution. The Basic Law's complex system of federal-state relations, including its detailed provisions on *Land* (state) administration of federal law and the apportionment of tax revenue between levels of government, measures the extent to which the process of government is subject to constitutional legalism. A similar framework of legality engirds the principle of separated powers. In Germany, these powers are both complex and overlapping. For one thing, executive power is divided between the federal president and the federal government. For another, legislative power is shared by the chancellor—under Article 65 he is "responsible for [setting] general policy guidelines"—and Parliament. In addition, federalism and separation of powers blend into a unity at the point of public administration. The Basic Law entrusts the states with the administration of federal law, but then federal officials often challenge state rules made in pursuance of federal law as usurpations of Parliament's legislative authority. "Legality of administration" (*Gesetzmäßigkeit der Verwaltung*) is an important principle of German administrative law, and it is reinforced by the constitutional requirement that all statutes delegating authority to administrative agencies

6. For the best illustration, see the East-West German Basic Treaty Case (1973).

set forth the "content, purpose and scope" of the delegation (Article 80 [1] GG). In short, these features of the Basic Law—the point requires reemphasis—encourage adjudication, thrusting the Constitutional Court headlong into the process of government.

Important cases have also arisen out of constitutional complaints and concrete judicial review referrals contesting legislative delegations of authority to executive officials. Although Parliament and the executive are structurally unified in Germany, the Constitutional Court has distinguished sharply between the functions of legislation and administration, making sure that these processes are kept separate and distinct, as a line of decisions striking down broad delegations of authority to executive officials illustrates. (In the United States, by contrast, long-standing political practices rather than judicial intervention have defined the powers of the various branches.) Although insisting that "the legislature make all crucial decisions in fundamental normative areas" (Kalkar Case, 1978),[7] thereby expressing its own ability clearly to draw a rather sharp line between policy-making and rule making, the Court has also recognized that "some uncertainty in the law must be tolerated [in those situations] where the legislature would otherwise be forced to adopt impractical limitations or refrain from any regulation at all" (Kalkar Case, 1978). In the decision from which the quoted passage is drawn—a case involving a constitutional challenge to the construction of a nuclear power plant—the Court sustained broad statutory standards for licensing fast-breeder reactors. But it also instructed the legislature to keep itself abreast of scientific developments in the nuclear power field so "that all essential and fundamental questions of the licensing procedure" could be stated with precision.

As important as the nondelegation cases are for illustrating the judicial role in supervising the relationships between policymakers and policy-administrators, certain disputes between the highest constitutional organs of the Federal Republic—the so-called *Organstreitigkeiten*—command far greater public attention. In a few of these cases, the Court has done no less than to define the art of government itself. In the Official Propaganda Case (1977), for example, the Court barred governmental agencies from using public money to advertise the policies and accomplishments of the incumbent (SPD-FDP) government, up to then a common practice of agencies seeking to inform the public of their activities. Over the strong dissents of two justices, the Court invalidated these activities as violating the principle of party democracy and the neutrality required by it on the part of all state organs in the course of an election campaign.

7. For a discussion of Kalkar and related cases, see Currie (in press, chap. 3 on separation of powers) and Kommers (1989, pp. 149-157).

The decisions of the Constitutional Court in the area of separation of powers are interesting not only for their immediate political results, but also for the political theory in which they appear to be rooted. The jurisprudence of the nondelegation cases, for example, has been influenced by the Court's romantic vision of representative democracy. This vision is essentially Diceyan in character, viewing parliament as a sovereign voice of the people and the sole repository of public power.[8] By the same token, the Court's image of electoral politics, as the Official Propaganda Case (1977) underscores, is that of a "bottom up" process of people choosing governors who then translate the will of the people into public policy. These jurisprudential images are worthy of study in their own right because once the normative foundations of a decision have been exposed, they can be assessed for their congruence with political reality.

Federal-state relations have provided the Constitutional Court with still other opportunities to perpetuate its vision of the political order created by the Basic Law. Although firmly upholding the principle of federal supremacy in those areas of public policy expressly committed to the federal government, this vision also includes a critically important and autonomous role for the individual *Länder*. For one thing, the Court has tended strictly to construe the long list of concurrent powers granted to the federal government under Article 74, probably because a broad construction of these powers would virtually obliterate the *Länder* as effective units of the federal system. For another, the Court has invoked the unwritten principle of "comity" to impose a variety of obligations on both federal and *Land* governments in their relations with each other.

Two of the Court's most celebrated decisions, both defining moments in German constitutional law, handed the *Länder* their most significant victories. In the Concordat Case (1957), the first of the two decisions, the Court sustained the constitutionality of Lower Saxony's Public School Act over the objection that its failure to reestablish denominational schools violated the German-Vatican Concordat of 20 July 1933. The federal government's challenge to Lower-Saxony's law recalls the American case of *Missouri v. Holland* (1920), except that here the Constitutional Court ruled that the state's reserved power in the field of education takes precedence over a valid international treaty.

In the other decision, the Television Case (1961), which nullified a decree establishing a national television station, the federal government under Konrad Adenauer sustained its most bitter defeat at the hands of the Second

8. For an excellent critical treatment of Dicey's views see Craig, 1990, (pp. 12-55).

Senate. In some of the sharpest language the Court has ever used, it reproached the federal government not only for unceremoniously invading the state's preserve—here over cultural matters—but also for the deceptive manner in which it did so. The government issued the decree after consulting with *Länder* controlled by Christian Democrats; it did not consult the states ruled by Social Democrats. Invoking the concept of comity, the Court declared that the federation is obligated to confer with all the states when embarking on a policy that affects them all. "[T]he obligation to act in a profederal manner," declared the Court, "prohibits the federation from trying to 'divide and conquer' . . . [and from] treat[ing] some governments differently because of their party orientation" (Kommers, 1989, p. 82). In short, the Court instructed the federal government to take federalism seriously.

The Constitutional Court has been particularly active in the area of federal-state financial relations, territory the U.S. Supreme Court has largely consigned to the politics of cooperative federalism. Moreover, when an American state challenges the exercise of federal fiscal power, as in *South Dakota v. Dole* (1987), the Court's broad construction of the federal spending power usually means that the state loses. The Constitutional Court, by contrast, is much more protective of state authority in this field, an involvement invited by the Basic Law's detailed and complex provisions on the distribution of tax revenue between levels of government. Another reason for judicial intervention is the principle of state autonomy in the field of public administration. A federal grant-in-aid, for example, interfering with a state's administrative jurisdiction, not to mention one of its reserved powers, would surely invite a judicial challenge that a Land government would be likely to win.[9] South Dakota, it is safe to say, would have prevailed in the Federal Constitutional Court.

The Basic Law, like the U.S. Constitution, empowers the nation's highest tribunal to decide constitutional conflicts between the states and the national government. Germany's Constitutional Court, however, takes this responsibility seriously. A decision such as *Garcia v. San Antonio Metropolitan Transit Authority* (1985), in which the U.S. Supreme Court declared that the federal structure itself was sufficient to protect the states against any federal invasion of their authority, would be unthinkable in Germany. Again, to echo an oft-repeated refrain, the Constitutional Court's function is to declare what the Basic Law means, particularly in the sensitive area of federal state relations, and not to allow any other set of institutional structures to make such decisions (Dolzer, 1989, pp. 61-73).

9. See, for example, the Financial Subsidies Case (1975).

E. POLITICAL DEMOCRACY

An essay focusing on constitutional politics in Germany would be incomplete without a discussion of the Constitutional Court's crucial role in determining the character of German democracy. In contrast to the view that prevailed during the Weimar Republic and earlier, the Constitutional Court has always believed that a strong representative democracy requires strong political parties. Indeed, the Court has been largely responsible for advancing and perpetuating the theory of the "party-state" (*Parteienstaat*), a theory inferred from Article 21, paragraph 1, of the Basic Law: "political parties shall participate in forming the political will of the people." From this sparse language, the Court has deduced that, when engaged in the process of "will-formation," political parties are "integral units of the constitutional state" (Schleswig-Holstein Election Case, 1952). As such, they qualify as "constitutional organs" capable of defending their corporate rights, as already seen, within the framework of the Constitutional Court's *Organstreit* jurisdiction.

The theory of the party-state embraces an idealized vision of parliamentary democracy. As the chief agents of political representation, parties organize the electorate, identify its will, and transform that will into the will of the state. In this vision, parties are both responsive and responsible: responsive in reflecting the views of those who voted for them, responsible in merging those views into a higher concern for the common good when proposing and passing laws. Accordingly, political parties form an indispensable link between the people and their governing institutions. Of necessity, these parties include both majority and opposition parties. The *Parteienstaat* is thus a multiparty state in which majority and minority parties reflect the full spectrum of public opinion. Minority parties are particularly important because in the multiparty state they hold the feet of the governing parties to the fire of public criticism. By doing so, they themselves mold public opinion, call attention to neglected interests, and participate in the formation of public policy.

This jurisprudential vision of parties as transmission belts connecting the ruled to the rulers hardly conforms to political reality, for decision making in Germany is largely a politics of consensus marked by neocorporatist forms of bargaining within a complex intergovernmental bureaucracy largely immune from any real legislative oversight (Katzenstein, 1987, pp. 5-10). The justices, of course, are aware of this complex process of government. Their duty, however, is to the Constitution and to the ideal of democracy expressed therein. But these ideals are not always compatible, as the tension between

Articles 21 and 38 of the Basic Law attests. Whereas Article 21 enthrones political parties as the principal agencies of parliamentary representation, Article 38 commands that members of the Bundestag "shall be representatives of the whole people, not bound by orders and instruction, and subject only to their conscience." Much of the Constitutional Court's jurisprudence on elections and political representation can be understood as an effort to reconcile these conflicting views of parliamentary democracy.

Almost every phase of the electoral system and parliamentary politics has been subject to judicial review in furtherance of the democratic values that the justices find to be implied or specified in Articles 21 or 38. Decisions dealing with parliamentary politics, many of which sparked enormous controversy in political circles as well as commentary in legal publications, span a gamut ranging from the Legislative Pay Case (1975), where the Court virtually dictated higher salaries for representatives, through the Parliamentary Dissolution Case (1983), where the Court laid down principles that shall govern any attempt to dissolve the Bundestag and hold new elections, down to the recent Wüppersahl Case (1989) invalidating a ruling depriving a nonparty deputy of his speaking rights on the floor of the Bundestag.[10] Election cases include judicial rulings (a) invalidating laws permitting foreign residents to vote in state and local elections (Foreign Resident Voting Cases, 1990); (b) sustaining, in the interest of political stability, the erstwhile rule requiring a party to win 5% of the vote before entering Parliament (Five-Percent Clause Case I, 1957; Five-Percent Clause Case II, 1972);[11] but (c) suspending the application of the 5% clause to the whole of Germany in the first all-German election following reunification (All-German Election Case, 1990), thus insuring that certain minority parties in eastern Germany would secure representation in the first all-German Bundestag.

Party finance is still another area of the political process that bears witness to the power of judicial doctrine. In fact, the Political Parties Act—the federal law regulating the organization, procedures, and financing of political parties—is largely a codification of rules laid down by the Constitutional

10. Thomas Wüppersahl was elected to the Bundestag in 1987 as a member of the Greens. Shortly thereafter, following a dispute with the party outside Parliament, he resigned from the Greens but kept his parliamentary seat, whereupon the Greens successfully moved to strip him of his parliamentary privileges, including his committee memberships and speaking rights on the floor of the Bundestag. Although the Court's judgment permits the Bundestag to withhold from a nonparty delegate all parliamentary privileges associated with affiliation with a party, it declares that every deputy has the right to speak, vote, interrogate, introduce bills, serve on a committee (though not necessarily of one's choice), and participate in elections held by the entire house.

11. In 1979, the Court also sustained the 5% clause as applied to elections to the European Parliament (European Parliament Election Case, 1979).

Court.[12] Judicial decisions in this area have, inter alia, (a) curtailed individual and corporate contributions to political parties (Tax Deduction Case, 1958), (b) limited the public finding of political parties to the reimbursement of legitimate campaign costs (Party Finance Case I, 1966), (c) required Parliament to reimburse these costs when a political party obtains at least 0.5% of the vote (Party Finance Case II, 1968), (d) struck down a law requiring the disclosure of party contributions in excess of DM 40.000, the Court having lowered the figure to DM 20.000 (Corporate Tax Case, 1979), and (e) restricted public funding of political parties to one half of a party's total income from other sources (Party Finance Case III, 1992). Several of these cases were decided against the backdrop of party finance scandals, declining party membership, and increasing rates of nonvoting. In deciding them, the Court's message to the parties was clear: to intensify their membership drives, to appeal to small contributors, to magnify their general appeal, and to revitalize their organizations.

JURIDICAL DEMOCRACY: COMPLIANCE AND RESPECT

The preceding analysis shows how central is the work product of the Federal Constitutional Court to an understanding of the German political system. Yet, this article has featured but a slender band of the Court's decisions. Any one of numerous topics might have been chosen to illustrate the interplay of legislative and judicial politics. Indeed, as suggested earlier, there are few areas of German public life that the Constitutional Court has left untouched. The Court has been at the center of six of the most controversial issues to rock German public life in recent years—the decree barring radicals from public employment (Civil Servant Loyalty Case, 1975), university admissions (Numerus Clausus Case, 1972), labor-management relations (Codetermination Case, 1979), nuclear power plant construction (Kalkar Case, 1978), the collection and storage of census data (Census Case, 1983), and the presence of chemical weapons on German territory (Chemical Weapons Case, 1987). In each of these areas, even where the challenged policy was sustained, the Court laid down rules and guidelines governing the legislature's behavior, present and future. At the cost of millions of dollars, the Court even ordered the postponement of a federal census pending parliamentary action to amend a census statute that would respect a newly created right of "informational self-determination" (Census Case, 1983).

Decisions such as these, which require the legislature either to amend statutes or to undertake inquiries that would avoid future mistakes, have

12. Parteiengesetz in der Fassung der Bekanntmachung vom 3. März 1989, BGB1. I, S. 327.

drawn the fire of politicians, legal scholars, and other commentators. With a mixture of both pride and sarcasm, German newspapers relish headlines branding the justices as "kings," their pronouncements as "divine ordinances," and the Court itself as a "super-legislature." And yet, despite the verbal artillery aimed at the Court, the general official and unofficial reaction to its work product has been one of compliance and respect. One could, of course, point to instances where public officials at certain levels have not heeded the letter or spirit of a constitutional ruling—when, for example, the First Senate struck down a liberalized abortion statute as violative of the right to life (Abortion Case, 1975)—but instances of open defiance are virtually nonexistant. One could also identify institutional and jurisdictional changes that could be construed as legislative retaliations for the Court's sins of omission and commission. But these rebuffs occurred early on when the Court was establishing its authority and affirming its independence. Today, politicians would risk their reputations by tampering with its authority or independence.

The Court's prestige among the general public appears to have grown over the years. As Table 5 indicates, it is the most trusted of German institutions, outranking by far the Bundestag, the federal government, and political parties. Perhaps one reason for this showing is the Court's identity in the public mind with the protection of basic rights. Up to now, this article has said little about constitutional complaints. The Basic Law authorizes ordinary citizens to file a complaint with the Court if the state interferes with any of their constitutionally guaranteed rights. As Table 1 shows, tens of thousands of individuals have done so. Moreover, constitutional complaints account for about 60% of the Court's 2,403 published decisions.

This jurisprudence, together with the immense popularity of the constitutional complaint procedure, has contributed to the development of a strong sense of constitutional awareness among Germans generally. Even in those cases where the petitioner loses his appeal, the Court's measured voice, sympathetic understanding, and solemn tones remind Germans that this institution is special, for it is truly an oracle of law and indeed, as the Court itself so often emphasizes, the "supreme guardian of the Constitution." These performances are impressive and they invite the applause of an attentive public ranging from the far right to the far left of the political spectrum.

The Court seems particularly adept at building confidence in itself. It runs its own public relations division and sponsors special ceremonial events when justices leave or join the Court. It also draws attention to itself when, in cases of special importance, the Court holds public hearings. The Chemical Weapons Case (1987) was such an instance. In that case, involving 44 constitutional complaints against the storage of U.S. chemical weapons at

Table 5
Popular Trust in Public Institutions (percentages)

Institution	1982	1990
Federal Constitutional Court	82	84
Police	69	83
Judiciary	74	69
Schools	70	78
Universities	69	77
Bundestag	61	65
Churches	67	62
Public employees	68	62
Federal government	59	61
Trade unions	53	44
Political parties	39	37
Newspapers	57	36

Source. Emnid-Informationen, 11/12 1988: 15, 9/10 1990: A 31ff.

secret locations in Germany, the Second Senate listened for 2 days to three prominent attorneys known for their advocacy on behalf of environmentalist causes. They lost the case, but were obviously heartened by the Senate's willingness to hear long arguments challenging the constitutionality of a major aspect of German military strategy, arguments that the Court restated at length in the opinion itself. It is likely, too, that they were emboldened by the strong dissenting opinion of Justice Ernst Gottfried Mahrenholz, the vice president of the Constitutional Court.

The Court has also been successful in building support for itself in the academic legal community. Professors of public law constitute a small and relatively cohesive group in Germany. The justices know them, and the latter, for their part, especially the Court's professorial contingent, regularly take part in academic conferences and symposia. Scores of the justices' former law clerks are now distinguished professors in their own right, and most of them have presented oral arguments—repeatedly—before the Court. By the same token, many of the justices have received honorary professorships on law faculties, just as a number of their students and former law clerks have managed to secure appointments as justices.

The cohesion and loyalty manifested in this interpretive community is also reflected in the literature of constitutional law, both on and off the bench. There is, of course, great conflict, as in the United States, over constitutional interpretation, as well as disagreement over the Court's roles in particular areas of public policy. The field of disagreement, however, is much narrower

than in the United States. For example, one fails to find the legal academy or the Court tearing itself apart over such issues as originalism versus textualism or interpretivism versus noninterpretivism. There is a large measure of consensus over the methodology of judicial decision making as well as the style of opinion writing in Germany, a methodology and style of reasoning that lends extraordinary legitimacy to judicial pronouncements.

Furthermore, even though the justices publish dissenting opinions, and have done so since 1971, the Court still manages to speak mainly with one tongue. There is a pervasive belief on and off the bench that if the justices abandon themselves to the generally agreed on methodology of constitutional interpretation, and struggle to reach a consensus flowing from that methodology, they will have arrived at the right answer in the interpretation of the Basic Law. Yet, the justices freely acknowledge that constitutional law is "political" law and that their decisions affect political outcomes, but they insist that their decisions are no less law for that reason. The justices like to compare themselves to referees in a football match. The game of democracy is played out on a field whose measurements have been specified by the Basic Law. As referees, they throw up yellow and red cards, affecting the outcome of the game, but only in the process of forcing state and society to play by the rules.[13]

In the absence of the firm national identity that the Germans lost in the wake of World War II, the Court has been the principal architect of what some have called "constitutional patriotism"—that is, shifting the basis of loyalty from the nation to the Constitution. Building trust in itself and the political system created by the Basic Law appears to be one of the Court's main tasks. The Court was doing just that when, in the All-German Election Case (1990), it suspended the applicaton of the 5% clause to Germany as a whole, thus insuring a better deal for the eastern states, particularly for minority parties there. Later, in a small gathering of German law professors, Roman Herzog, president of the Federal Constitutional Court, remarked that, in this and related decisions arising out of reunification, the Court was mindful of its responsibility to work for the integration of the east into the political system of the west. The Court was contributing to the east's integration by fostering confidence in the political institutions of the Federal Republic, a frank admission of the Court's important political role in the aftermath of German unity.[14] Perhaps one measure of the east's confidence in the Court is the institution of judicial review and the increasing number of petitions coming from that source.

13. Conversation with Justice Paul Kirchhof, May 7, 1992.

14. The author was present at this meeting, held on February 8, 1992, in celebration of Professor Klaus Stern's 60th birthday.

The Court's relationship to the Bundestag has been more controversial. In response to the oft-heard view that the Court too often encroaches on the Bundestag's domain, Ernst Benda—former president of the Federal Constitutional Court—noted that the Court's role is defined not by any classical understanding of separation of powers, but by the Basic Law.[15] Benda came close to suggesting that the relationship between the two institutions is one of partnership, not of rank or priority. The Constitutional Court's frequent tactic of declaring laws incompatible with the Basic Law, but not void, sustains this thesis, for it provides the legislature with another opportunity to consider the constitutional implications of its laws and behavior. As a consequence, legislative policy-making often takes on the character of a dialogue between the justices and members of the Bundestag.

Still another reason for the Court's high regard among the people is its identification with the *Rechtsstaat*. If any institution personifies the preeminence and morality of the "law-state," it is the Federal Constitutional Court. That the state—and thus the Court—is above politics and wholly independent of particular governments and ruling coalitions is an idea that runs deep in Germany's public consciousness. People believe it, the justices know they believe it, and part of their function is to perpetuate the belief. Institutionally, the Court benefits from and feeds off the strong tradition of the German *Rechtsstaat*. The decline in party membership and the increasing disillusionment with political parties and existing governments serve only to reinforce the Court's identity with a transcendent state. These considerations, along with the weakness historically of the German democratic tradition, help to explain the Court's profound influence over German life and politics.

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