

**MEMORIAL:
DAVID CURRIE AND GERMAN CONSTITUTIONAL LAW**

Republication - Separation of Powers in the Federal Republic of Germany

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A. Introduction

The Federal Republic of Germany celebrated its fortieth birthday in 1989, and the sudden and unexpected accession of the former German Democratic Republic the following year has drawn the world's attention to the newly united nation. This article is the third installment in an effort to explain the basic features of the German constitution.¹

Adopted by the Germans themselves with the blessing of the three Western occupying powers in 1949, the Basic Law (Grundgesetz) sets up a democratic, federal, and social state under the rule of law, with an extensive bill of rights and

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¹ See also David Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333 (1989); DAVID CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* (forthcoming).

comprehensive judicial review of both executive and legislative action.² I have written elsewhere about German federalism and about some aspects of the bill of rights;³ my present topic is the separation of powers.

The Basic Law is built upon the premise of popular sovereignty. "All governmental authority," says the second paragraph of Article 20, "emanates from the people." But the Federal Republic is after all a republic, not a direct democracy; the same paragraph goes on to say that the people shall exercise their power "by means of elections and voting" and through the organs of government.⁴ Most important for present purposes, it requires a separation of governmental powers; for it specifies that the people shall act through the agency of special, or particular, or separate ("besondere") legislative, executive, and judicial bodies.⁵

Separation of powers can serve to promote rational government by optimizing the conditions for making various decisions.⁶ Basic policy may be set by a deliberative assembly, administration may be entrusted to a unified executive, individual disputes may be resolved by independent judges.⁷ No less significant, however, is Montesquieu's famous argument for separation of powers as a fundamental safeguard of liberty.⁸ For when legislative, executive, and judicial powers are

² See GRUNDGESETZ [GG] [Constitution] art. 1-20, 28(1), 93, 100(1) (F.R.G.) [hereafter cited as GG].

³ See *supra* note 1.

⁴ For the view that history and the paucity of particular constitutional authorizations strictly limit the permissibility of such direct democratic devices as the initiative or referendum despite the language of Art. 20, see Roman Herzog, *Art. 20, in 2 GRUNDGESETZ KOMMENTAR* Para. Nr. 38-45 (Theodor Maunz, Günter Dürig, *et al.* eds.) [hereafter cited as Maunz/Dürig]. For the contrary argument, see Ekkehart Stein, *Art. 20(1-3), in 1 KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (REIHE ALTERNATIVKOMMENTARE)* Para. Nr. 39-40 (Erhard Denninger *et al.* eds.) [hereafter cited as AK-GG]. In reaching his conclusion Herzog places no reliance on the use of the term "Republik" in Art. 20(1); the Basic Law is understood to employ that term in opposition to monarchy, not to direct democracy. See Herzog, *Art. 20, in 2 Maunz/Dürig*, Para. Nr. 5-8.

⁵ "Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt." See Herzog, *Art. 20, in 2 Maunz/ Dürig*, Para. Nr. 37-43.

⁶ See KONRAD HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* Para. Nr. (15th ed. 1985) ("eine Frage sachgemäßer Bestimmung und Zuordnung der staatlichen Funktionen").

⁷ See *id.*, Para. Nr. 488; *cf.* Currie, *The Distribution of Powers after Bowsher*, 1986 SUP. CT. REV. 19 (1986).

⁸ *L'esprit des Lois*, bk. 11, ch. 6 (1748).

divided, three distinct bodies must abuse their authority before the citizen's rights can be infringed.⁹

The allocation of governmental powers in Germany differs from that in the United States in a number of interesting ways. The most striking difference is that the Federal Republic has a parliamentary rather than a presidential system; federal ministers serve at the pleasure of the legislature.¹⁰ Thus at the outset there is less structural separation between legislative and executive organs in Germany than in the United States. The judges, on the other hand, are quite independent. Indeed in some respects they are better protected from executive or legislative influence than their counterparts in the United States.

Moreover, the lack of separation between the federal parliament and federal ministers is counterbalanced by a second interesting departure from the American model: a significant reduction in the powers of the ministers themselves. Most federal laws are carried out not by federal officials but by the constituent states (Länder), and even the federal administration is given a degree of independence from political pressure. Thus principles both of federalism and of civil service compensate to a significant extent for the structural symbiosis of the parliamentary model; even at the structural level there is more separation of powers in Germany than a first look at the parliamentary system might suggest.

Furthermore, the undeniable American advantage with respect to structural separation is matched by a marked German advantage in separation of functions. Only the legislature may make laws; only the executive may enforce them; only judges may adjudicate. Not only is the executive bound by the laws and in many respects permitted to act only on the basis of statutory authority; in Germany there are meaningful and judicially enforced limits to the delegation of legislative power. With rare exceptions there are no independent agencies with executive powers; most enforcement authority is ultimately subject to ministerial control. Finally, there are essentially no quasi-judicial agencies in the American sense of the term; if administrators decide concrete individual disputes, their decisions must be subject to de novo judicial review on questions of fact as well as law.

⁹ For a German version of this argument, see Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 2-12. For the analogous argument in support of federalism, see CURRIE, *FEDERAL REPUBLIC OF GERMANY*, *supra* note 1. As we shall see, in Germany federalism significantly complements the horizontal separation of powers.

¹⁰ The *Länder* constitutions likewise follow the parliamentary model, though the Basic Law does not require them to. See Matthias Herdegen, *Strukturen und Institute des Verfassungsrechts der Länder*, in 4 HANDBUCH DES STAATSRECHTS 479, Para. Nr. 16-37 (Josef Isensee & Paul Kirchhof eds., 1990) [hereafter cited as HANDBUCH DES STAATSRECHTS].

In sum, despite the parliamentary system there are significant structural as well as functional limits to the concentration of authority in Germany. These limits provide significant additional safeguards against arbitrary governmental action, and Article 79(3) protects their essential features from constitutional amendment.¹¹

B. Legislative Power

Federal statutes, Article 77(1) provides, are adopted by the Bundestag – the federal parliament. Through a separate body called the Bundesrat, the constituent states exercise a significant check on federal legislation – a veto power that in a surprising number of important instances cannot be overridden by the parliament itself.¹²

In conformity with the democratic principle of Article 20, members of the Bundestag are chosen in “general, direct, free, equal, and secret elections.¹³ Within the Bundestag, minority interests are protected. Each member is entitled to introduce bills,¹⁴ and the investigative machinery can be set in motion by as few as

¹¹ See GRUNDGESETZ [GG] [Constitution] art. 79(3) (F.R.G.); “Amendments of this Basic Law affecting . . . the basic principles laid down in Article[] . . . 20 shall be inadmissible.”

¹² See CURRIE, FEDERAL REPUBLIC OF GERMANY, *supra* note 1. Unlike the President of the United States (U.S. Const., Art. I, § 7), the executive in Germany has no general veto power. Laws increasing expenditures or reducing revenues, however, can be adopted only with Cabinet approval. See GRUNDGESETZ [GG] [Constitution] art. 113 (F.R.G.). The theory is that neither the legislature nor the executive can be trusted where the public’s money is concerned; each branch therefore acts as a check on the other. See Theodor Maunz, *Art. 113*, in 4 Maunz/Dürig, Para. Nr.1; Gunter Kisker, *Staatshaushalt*, in 4 HANDBUCH DES STAATSRECHTS, Para. Nr. 35, 48-51. In addition, legislative appropriations are interpreted only to authorize expenditures, not to require them. *Id.*, Para. Nr. 28, 52. *Contrast Train v. City of New York*, 420 U.S. 35 (1975). For an acerbic statement of the view that Art. 113 was doomed by political realities to be the dead letter it has apparently become, see Heiko Faber, *Art. 113*, in 2 AK- GG, Para. Nr. 1-4.

¹³ GRUNDGESETZ [GG] [Constitution] art. 38(1) (F.R.G.). In a series of significant decisions the Constitutional Court has done a good deal to ensure the directness as well as the equality of elections in support of the democratic principle. On the question of directness see BVerfGE 3, 45 (1953) (striking down a provision authorizing political parties to name substitutes for candidates who had withdrawn after election); BVerfGE 7, 77 (1957) (striking down a provision permitting parties to change the order in which candidates appeared on the electoral list in a similar situation). On equality, see the decisions cited in Currie, *Lochner Abroad*, *supra* note 1, at 367 n. 272.

¹⁴ See GRUNDGESETZ [GG] [Constitution] art. 76(1) (F.R.G.): “Bills shall be introduced in the Bundestag by the Federal Government [Bundesregierung] or by members of the Bundestag or by the Bundesrat.” This right may be subjected to reasonable procedural regulations but not substantively limited, even by the Bundestag itself. BVerfGE 1, 144 (1952). The length of speeches by individual members, however, may be limited in the interest of avoiding paralysis. BVerfGE 10, 4 (1959).

one fourth of the members.¹⁵ Article 28(1) requires the Lander to have similar legislative bodies.¹⁶

I. Autonomy and Stability

Various provisions of the Basic Law protect the Bundestag from interference by other organs of government.¹⁷ Members are elected for four-year terms¹⁸ and entitled to “remuneration adequate to assure their independence.”¹⁹ In proper Burkean fashion, they are bound “only by their conscience.”²⁰ For votes or debates

¹⁵ GRUNDGESETZ [GG] [Constitution] art. 44(1) (F.R.G.). The Constitutional Court has confirmed that this provision implicitly gives the same minority the right to control the agenda of the investigating committee. BVerfGE 49, 70 (79-88) (1978). The principle of full and equal membership implicit in the election provisions has been said to require in general that parties be represented on committees in proportion to their strength, but in one significant recent decision the Court held over two dissents that the overriding need for confidentiality justified creation of a five-member commission to consider the budget of secret service agencies even though none of its members represented the unorthodox Green Party. BVerfGE 70, 324 (362-66) (1986). This understandable limitation must be narrowly confined if it is not to impair the principle of representative government. See BVerfGE 80, 188 (1989), holding that Art. 38(1) of the Basic Law forbade the exclusion of a representative from all committees simply because he was not a member of any political party. BVerfGE 84, 304 (1991). Cf. *Powell v. McCormack*, 395 U.S. 486 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966). These and other U.S. decisions cited in this article are discussed in DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* (1985) and DAVID CURRIE, *THE SECOND CENTURY* (1990) [hereafter cited as *THE FIRST HUNDRED YEARS* and *THE SECOND CENTURY* respectively].

¹⁶ This requirement also applies to local governments (Kreise und Gemeinden), except that in Gemeinden the citizens themselves may act as a legislative assembly. *Id.*

¹⁷ See generally Maunz, *Art. 40, in 2 Maunz/Dürig*, Para. Nr. 1-2; Hans-Peter Schneider, *Art. 40, in 2 AK-GG*, Para. Nr. 2.

¹⁸ GRUNDGESETZ [GG] [Constitution] art. 39(1) (F.R.G.).

¹⁹ GRUNDGESETZ [GG] [Constitution] art. 48(3) (F.R.G.). The adequacy of their compensation is subject to review by the Constitutional Court. See BVerfGE 40, 296 (1975); BVerfGE 4, 144 (1955) (holding that individuals who are members of both federal and state legislatures need not be paid twice); BVerfGE 32, 157 (1971) (finding the retirement pension prescribed by law sufficient to satisfy Art. 48(3)); Maunz, *Art. 48, in 3 Maunz/ Dürig*, Para. Nr. 14-16. For criticism of the decisions, see Schneider, *Art. 38, in 2 AK-GG*, Para. Nr. 28; and Schneider, *Art. 48, in 2 AK-GG* Para. Nr. 11-12 (arguing that the transformation of legislators into salaried officials, while freeing them from reliance on external sources of income, has made them dependent upon the political parties that determine their chances for reelection). Cf. U.S. Const. art. 1, § 6 (“a Compensation. . . to be ascertained by Law”).

²⁰ GRUNDGESETZ [GG] [Constitution] art. 38(1) (F.R.G.). See generally Maunz, *Art. 38, in 3 Maunz/ Dürig*, Para. Nr. 9-16. For a glimpse into the ticklish relationship between this provision and Art. 21, which guarantees political parties a significant role in the political process, see HESSE, *supra* note 6, Para. Nr. 598-603. As in the United States, the party system significantly limits the practical significance of the separation of powers in Germany.

in the Bundestag they may not be questioned elsewhere;²¹ they may be prosecuted or arrested only with the consent of the Bundestag;²² they may not be required to divulge information received in the course of their duties.²³ To avoid undue bureaucratic influence, civil servants and salaried public employees may be required to resign their offices before assuming a seat in parliament.²⁴ The Bundestag decides for itself when to adjourn and reconvene,²⁵ chooses its own officers,²⁶ makes its own rules,²⁷ keeps its own order,²⁸ and resolves disputes

²¹ GRUNDGESETZ [GG] [Constitution] art. 46(1) (F.R.G.); see Maunz, *Art. 46, in 3 Maunz/ Dürig*, Para. Nr. 6. There is an exception for defamation. See also BVerfGE 60, 374 (1982) (holding that a representative might be subjected to censure ("Rüge") outside the Bundestag because the sanction had no legal effect). Cf. U.S. Const. art. I, § 6: "[F]or any Speech or Debate in either House, they shall not be questioned in any other Place."

²² GRUNDGESETZ [GG] [Constitution] art. 46(2)-(4) (F.R.G.); see Maunz, *Art. 46, in 3 Maunz/ Dürig*, Para. Nr. 26. Prior consent is not required if the representative is apprehended "in the commission of the offense or in the course of the following day," but even then the proceeding must be suspended at Bundestag request. Cf. the narrower protection afforded to members of the U.S. Congress from arrest "in all Cases, except Treason, Felony and Breach of the Peace," U.S. Const. art. I, § 6.

²³ GRUNDGESETZ [GG] [Constitution] art. 47 (F.R.G.); see Maunz, *Art. 47, in 3 Maunz/ Dürig*, Para. Nr. 2.

²⁴ GRUNDGESETZ [GG] [Constitution] art. 137(1) (F.R.G.). The implementing statute effectively so provides. See Herzog, *Art. 20, in 2 Maunz/Dürig*, Para. Nr. 45, arguing that repeal of this provision would be inconsistent with the general separation of powers requirement of Art. 20(2). Although the text of the Basic Law speaks broadly of restrictions on "[t]he right to stand for election" (see Maunz, *Art. 137, in 4 Maunz/ Dürig*, Para. Nr. 15), the Constitutional Court has held that Art. 137 authorizes only incompatibility and not ineligibility provisions; since legislative autonomy is endangered only when an individual holds executive and legislative offices at the same time, the civil servant is permitted to serve once he has resigned his administrative position. BVerfGE 57, 43 (62, 66-69) (1981). See also BVerfGE 58, 177 (1981) (finding no incompatibility in simultaneous service in county and city government). Moreover, the German system being a parliamentary one, there is no comparable limitation with regard to cabinet ministers. See GRUNDGESETZ [GG] [Constitution] arts. 63, 64 (F.R.G.); Herzog, *Art. 20, in Maunz/Dürig*, Para. Nr. 46. The analogous U.S. provision is broader and leaves nothing to legislative discretion: "[No] person holding any office under the United States shall be a member of either House during his continuance in office." U.S. Const. art. I, § 6. The Basic Law contains no equivalent of the further provision of this section that serves the distinct purpose of preventing legislators from lining their own pockets by appointment to offices created or made more lucrative during their tenure.

²⁵ GRUNDGESETZ [GG] [Constitution] art. 39(3) (F.R.G.). The preceding paragraph requires the Bundestag to meet initially within 30 days after its election. Cf. U.S. Const. amdt. 20, § 2 (requiring Congress to meet at least once a year and prescribing a presumptive date); art. I, § 6 (limiting the power of one House to adjourn without consent of the other); art. 2, § 3 (empowering the President to convene Congress "on extraordinary occasions" and to determine the date of adjournment if the two Houses cannot agree).

²⁶ GRUNDGESETZ [GG] [Constitution] art. 40(1) (F.R.G.). Cf. U.S. Const. art. I, § 2, 3.

²⁷ GRUNDGESETZ [GG] [Constitution] art. 40(1) (F.R.G.). See BVerfGE 44, 308 (1977) (upholding a rule permitting action without the normal quorum in the absence of objection). Cf. U.S. Const. art. I, § 5. The current Bundestag rules ("Geschäftsordnung") can be found in *Art. 38, in 2 Maunz/Dürig*, Para. Nr. 5.

respecting the election of its own members—subject in the last instance to review by the Constitutional Court.²⁹ In order to reduce its dependence on the executive for information necessary to the performance of its functions, the Bundestag has broad investigative powers.³⁰ Finally, in contrast to some other parliamentary systems, the Basic Law sharply limits the power of the executive to dissolve the assembly.

Under the Weimar Constitution the Reichspräsident could dissolve the assembly at will, so long as he did not do so more than once for the same cause.³¹ The results were instability, external control of parliament, and impairment of representative democracy. ³²In reaction to this unsatisfactory state of affairs, Article 68(1) permits the Chancellor to bring about dissolution only if the Bundestag refuses his request for a vote of confidence, and then only if the President of the Federation (Bundespräsident) agrees.³³

²⁸ See GRUNDGESETZ [GG] [Constitution] art. 40(2) (F.R.G.), which vests “proprietary and police powers” in the presiding officer of the Bundestag and forbids searches and seizures on its premises without her consent.

²⁹ GRUNDGESETZ [GG] [Constitution] art. 41(1)-(2) (F.R.G.). This authority extends also to the question whether a member has lost his seat. See BVerfGE 5, 2 (1956) (upholding the Bundestag’s decision to exclude a representative who had moved to East Berlin before it was a part of the Federal Republic). There is an obvious tension here between the principles of legislative independence and of democratic legitimacy. Contrast U.S. Const. art. I, § 5 (“Each House shall be the judge of the elections, returns and qualifications of its own members”); *Roudebush v. Hartke*, 405 U.S. 15 (1972) (Senate decision respecting election not subject to judicial review); *Powell v. McCormack*, 395 U.S. 486 (1969) (qualifications subject to House determination limited to those listed in the Constitution).

³⁰ GRUNDGESETZ [GG] [Constitution] art. 44(1) (F.R.G.). See BVerfGE 67, 100 (1967); BVerfGE 76, 363 (1987); BVerfGE 77, 1 (1987); Schneider, *Art. 44, in 2 AK- GG*, Para. Nr. 2-3. Cf. *Kilbourn v. Thompson*, 103 U.S. 168 (1881); *McGrain v. Daugherty*, 273 U.S. 135 (1927). The investigative power serves also as an important check on executive abuse, see n.166 *infra* and accompanying text. In light of the experience in this country (cf. *Watkins v. United States*, 354 U.S. 178 (1957)) there might be cause to fear that in prescribing that “the decisions of investigative committees are not subject to judicial scrutiny.” Art. 44(4) excessively subordinated individual rights to parliamentary autonomy; but fortunately the Constitutional Court has not taken this language at face value. See cases cited *supra*; Maunz, *Art. 44, in 3 Maunz/Dürig*, Para. Nr. 63-65 (explaining that this provision insulates only investigative findings, not sanctions against witnesses, from judicial review).

³¹ *Verfassung des Deutschen Reichs vom 11. Aug. 1919*, RGB1 S.1383 [hereafter cited as WRV], Art. 25.

³² See BVerfGE 62, 1 (41) (1983) (noting that not one Reichstag during the entire Weimar period was permitted to serve out its full constitutional term).

³³ The Chancellor is the head of the Cabinet (Bundesregierung); the President’s duties, except in this instance, are largely ceremonial. See text at nn.138-59 *infra*. His discretion with regard to dissolution under Art. 68 was confirmed by the Constitutional Court as an important check on improvident action: “This provision permits dissolution only when three supreme constitutional organs of government—the Chancellor, the Parliament, and the President—have each made their own independent political

The spirit of this provision was severely tested in 1982, when the Free Democratic Party (FDP), which held the balance of power in the Bundestag, decided to change horses in midstream—as in light of the express constitutional independence of the members it had a perfect right to do.³⁴ Abandoning the coalition with the Social Democrats (SPD) which both parties had promised the voters during the 1980 campaign, the FDP joined the so-called Union parties (CDU and CSU) in voting to replace Chancellor Helmut Schmidt with the Christian Democrat Helmut Kohl. All of this was in complete accord with the plain terms of Article 67(1).³⁵ The trouble began when the new coalition decided that it was desirable to hold new elections in order to obtain popular confirmation of the change.³⁶

The difficulty was that under Article 39(1) the next election date was two years away; the only practicable way to advance the schedule was to lose a vote of confidence under Article 68(1).³⁷ So the coalition decided to do just that—to ask its own adherents to deny it their support. Picking his way carefully through the constitutional thicket, the President approved the Chancellor's ensuing request to dissolve the assembly, and the case went to the Constitutional Court.³⁸

Literally the requirement of Article 68(1) was satisfied: The Chancellor had lost a vote of confidence.³⁹ But that, the Court responded, was not enough. The unmistakable purpose of the provision was to make dissolution more difficult, in the interest of parliamentary stability. Although the immediate aim of Article 68(1) was to prevent the executive from dissolving the legislature without its consent, the

decision." BVerfGE 62, 1 (35) (1983). *See also id.* at 50 (adding that the President was also obliged to determine—with appropriate deference to the Chancellor's decision—whether the conditions of Art. 68 itself were met).

³⁴ *See supra* note 20; BVerfGE 62, 1 (37-38) (1983).

³⁵ *See infra* notes 161-64.

³⁶ *See BVerfGE* 62, 1 (4-9) (1983).

³⁷ A constitutional amendment would have required a two-thirds vote of both Bundestag and Bundesrat under Art. 79(2) and was subject to the objection that the Constitution should not be lightly amended. The Social Democrats, who also wanted accelerated elections, argued that Kohl should resign in order to trigger Article 63(4)'s provision permitting dissolution if parliament is unable to agree on a new Chancellor; the coalition responded that this route would require delay as the members went through repeated ballots in an effort not to endorse his successor. *See BVerfGE* 62, 1 (11, 14-18) (1983).

³⁸ *See id.* at 9-19.

³⁹ *See id.* at 38 (arguing in effect that on its face "lack of confidence" meant only the unwillingness of a majority of the members to vote for the Chancellor or his program).

four-year term prescribed by Article 39(1) was meant to be the rule rather than the exception. Thus even if the Chancellor, the Bundestag, and the President all agreed, Article 68(1) permitted dissolution only if the political situation in the Bundestag was such that the Chancellor's "ability to govern" was "no longer adequately assured."⁴⁰

It might seem to follow, as two dissenting Justices argued, that the dissolution order was unconstitutional.⁴¹ As a general matter there was obvious force in the President's protestation that there was no way to determine whether a legislator's vote was sincere,⁴² but there was no doubt as to the members' motives in the actual case. No one arguing for dissolution had suggested any difference of opinion among the governing parties; both the Free Democrats and the Union had expressly proclaimed their intention to reinstitute after the election the Government they professed not to support.⁴³

Nevertheless the Court managed to uphold the dissolution. Breach of the campaign promise of a liberal-social coalition, the majority conceded, did not (as one Justice argued)⁴⁴ justify the action; there could be no lack of democratic legitimacy in a

⁴⁰ *Id.* at 40-44. There is much in the legislative history, as reported in Justice Rinck's dissenting opinion, *id.* at 86-102, to support his conclusion that Art. 68(1) was designed for the case in which a majority of the Bundestag was opposed to the Chancellor but unable to agree on his successor. *See, e.g.*, the official committee explanation to the Parliamentary Council (*id.* at 101): "The President's right of dissolution under Article 68 of the Basic Law is – apart from the right of emergency legislation [discussed *infra* note 160] – the principal weapon of the Government against an obstructive and destructive parliamentary majority." The Court, which took a somewhat less exacting position, found the record less plain and added that in any event legislative history was not entitled to much weight. *Id.* at 44-47.

⁴¹ *See id.* at 112-16 (Rottmann, J., dissenting) (adding that the coalition had agreed upon new elections before putting together its Government and that two days after the Chancellor had put the question of confidence the Bundestag had approved his budget by the largest majority on any controversial issue in thirteen years): "The parliamentary stability of the Government was completely beyond question." *See also id.*, at 108 (Rinck, J., dissenting).

⁴² *Id.* at 18. Justice Rottmann suggested in dissent that the best evidence of a Government's lack of actual support would be its inability to obtain passage of substantive legislation. *See id.* at 110.

⁴³ *See id.* at 13 (Chancellor Kohl) ("The coalition parties. . . are basically prepared to work together again after the election"), 15 (FDP leader Genscher) ("The [Government's] mandate shall be renewed, but only after the voters have spoken"). The Chancellor proudly insisted that he had never made a secret of his motives; to have resigned in order to precipitate elections under Art. 63(4), as the opposition urged, would have been in his view "manipulative." *See id.* at 13-14.

⁴⁴ *See id.* at 67-69 (Zeidler, J., concurring) (arguing that there was no popular mandate for the present Government because the people had voted for Schmidt, not for Kohl). Justice Zeidler's opinion contains an interesting argument for changing constitutional interpretation in the light of changed circumstances. *See also Herzog, Art. 68, in 3 Maunz/Dürig, Para. Nr. 76-77.*

government chosen by representatives exercising the discretion the Constitution gave them.⁴⁵ Yet the “extraordinary situation” in the Bundestag in 1982 had given the Government a plausible basis for concluding that it could not be confident of a lasting majority. The decision to abandon the old coalition had created serious discord among the Free Democrats. Prominent members had resigned from the party, and it had suffered dramatic reverses in subsequent state elections. The coalition had been established for limited purposes and a limited time; by insisting on early elections, the Free Democrats had made clear that they were not prepared to support the government until the end of the normal term.⁴⁶ Laying great stress on the deference due to the political branches in evaluating the realities of political power,⁴⁷ the Court concluded that their assessment was not clearly erroneous; there was no basis for finding that they had acted without substantive justification in order simply to advance the election.⁴⁸

The American observer may be reminded of occasions when our Supreme Court has spoken bravely while bowing to superior political force.⁴⁹ Strategic behavior of this nature may be more effective in the long run than charging the windmill; when Chancellor Kohl sought unsuccessfully to advance the date of elections following the East German accession in 1990, he rejected the dissolution option out of hand.

II. Supremacy

Article 20(3) of the Basic Law states the fundamental principle of statutory supremacy (Gesetzesvorrang): While the legislature itself is bound only by the

⁴⁵ BVerfGE 62, 1 (43) (1983).

⁴⁶ *Id.* at 51-62. For documentation of the view that none of the events recited by the majority had significantly affected the FDP's willingness or ability to continue the coalition, see *id.* at 115-16 (Rottmann, J., dissenting).

⁴⁷ *Id.* at 50. See Schneider, *Art. 68, in 2 AK - GG*, Para. Nr. 6 (applauding this exercise of judicial restraint and finding in it the seeds of a political-question doctrine).

⁴⁸ BVerfGE 62, 1 (62-63) (1983). See Herzog, *Art. 68, in 3 Maunz/Dürig*, Para. Nr. 78-84 (endorsing both the decision and the earlier suggestion of the Enquête-Kommission that the Basic Law be amended to permit the Bundestag to dissolve itself for any reason by a 2/3 vote). The Kommission was a panel of politicians and experts established by the Bundestag to consider possible constitutional amendments. For its recommendation, see BERATUNGEN UND EMPFEHLUNGEN ZUR VERFASSUNGSREFORM (SCHLUßBERICHT DER ENQUÊTE-KOMMISSION VERFASSUNGSREFORM DES DEUTSCHEN BUNDESTAGES) [hereafter cited as SCHLUßBERICHT DER ENQUÊTE-KOMMISSION], *Zur Sache 3/76*, pt. 1, 92, 102-07 (1976); for a dissenting view, see Schneider, *Art. 68, in 2 AK-GG*, Para. Nr. 17.

⁴⁹ See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Brown v. Board of Education (II)*, 349 U.S. 294 (1955); compare *Watkins v. United States*, 354 U.S. 178 (1957) and *Barenblatt v. United States*, 360 U.S. 109 (1959).

constitutional order (“die verfassungsmäßige Ordnung”), the executive and the courts are bound by law (“Gesetz und Recht”). Just what is meant by “Recht” in this provision is unclear, as we shall see. What is generally understood is that the reference to “Gesetz” requires other branches, of government to respect statutes constitutionally enacted.⁵⁰

There is nothing surprising about this requirement. Indeed it would seem implicit in the grant of legislative power that statutes have the force of law. Despite the broader language of Justice Black’s majestic opinion for the Court in our *Steel Seizure* case, for four of the six majority Justices all that had to be said was that the President was bound by law.⁵¹ Statutory supremacy serves all the goals that led to the creation of a popularly elected legislative body in the first place: democratic self-government, representative deliberation, and the separation of powers.⁵²

The principle of statutory supremacy was most severely tested in the notorious *Soraya* decision of 1973.⁵³ Princess Soraya, former wife of the Shah of Iran, had brought an action for invasion of privacy, alleging that the defendants had written and published a fictitious interview in which she had purportedly revealed intimate details of her private life. The Civil Code expressly provided that damages for nonpecuniary injury could be awarded only in cases specified by statute.⁵⁴ No statute authorized such damages for invasion of privacy, but the Federal Court of Justice (Bundesgerichtshof) held they could be awarded anyway. The defendants argued that the court had disobeyed its constitutional obligation to respect the limitations imposed by the Civil Code; the Constitutional Court held the court had acted within its powers.

To an outside observer the Court of Justice seems indeed to have contradicted the statute. The Civil Code did not merely fail to authorize damages for emotional harm; it flatly forbade them in the absence of statutory authority, which admittedly

⁵⁰ See, e.g., Hans-Peter Schneider, *Die Gesetzmäßigkeit der Rechtsprechung*, 1975 DIE ÖFFENTLICHE VERWALTUNG [DöV] 443, 448.

⁵¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (opinions of Frankfurter, Jackson, Burton, and Clark). In the United States this conclusion is strengthened by Art. II, § 3, which requires the President to “take care that the laws be faithfully executed,” and by Art. VI, which makes statutes the “supreme law of the land.” See Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 24.

⁵² See *id.* at 21-23; Fritz Ossenbühl, *Vorrang und Vorbehalt des Gesetzes*, 3 HANDBUCH DES STAATSRICHTS 315, Para. Nr. 1-3, tracing the German principle to democracy and the rule of law.

⁵³ BVerfGE 34, 269 (1973).

⁵⁴ Bundesgesetzbuch (BGB), § 253: “Wegen eines Schadens, der nicht Vermögensschaden ist, kann Entschädigung in Geld nur in den durch das Gesetz bestimmten Fällen gefordert werden.”

did not exist.⁵⁵ Indeed the Constitutional Court began its discussion with a startling passage that seemed to suggest that the courts were not always bound by statute after all. By altering the traditional formulation so that judges were no longer bound simply by “Gesetz” but by “Recht” as well, the Basic Law had deliberately abandoned “a narrow statutory positivism.” “Recht” within the meaning of Article 20(3) was not coextensive with statutory law; under some circumstances it could include additional norms derived by judges from “the constitutional legal order as a whole” and functioning “as a corrective to the written law.” It followed, said the Constitutional Court, that the judges could fill gaps in the statutes “according to common sense and ‘general community concepts of justice.’”⁵⁶

So far, so good; no Anglo-American observer would expect a court to hold that the supremacy of statutes deprived judges of the power to make interstitial common law. The problem was that there seemed to be no gap to fill. To get around this difficulty the Court proceeded to proclaim a most dynamic doctrine of statutory interpretation: As a codification grows older, the judge’s “freedom to develop the law creatively” increases. “The interpretation of a statutory norm cannot always remain tied to the meaning it had at the time of its enactment”; as social conditions and attitudes change, so under certain circumstances does the content of the law. In such a situation the judge may not simply take refuge in the written text; he must deal freely with the statute if he is to meet his obligation to declare the law.⁵⁷

This passage seems to come perilously close to saying that when a statute is perceived as outmoded a judge is under no obligation to follow it. Understandably, it has been severely criticized.⁵⁸ As the Court’s rather cryptic opinion suggests, the root of the problem is Article 20(3)’s delphic reference to “Gesetz und Recht.” Both terms can be translated as “law.” “Gesetz” tends to be the narrower and more technical term; it is commonly, though not exclusively, used in connection with

⁵⁵ For similar assessments by German commentators, see Volker Krey, *Rechtsfindung contra legem als Verfassungsproblem (I)*, 1978 JURISTENZEITUNG [JZ] 361, 362 n. 14, and authorities cited.

⁵⁶ BVerfGE 34, 269 (287) (1973).

⁵⁷ “Einem hiernach möglichen Konflikt der Norm mit den materiellen Gerechtigkeitsvorstellungen einer gewandelten Gesellschaft kann sich der Richter nicht mit dem Hinweis auf den unveränderten Gesetzeswortlaut entziehen; er ist zu freier Handhabung der Rechtsnormen gezwungen, wenn er nicht sein Aufgabe, ‘Recht’ zu sprechen, verfehlen will.” *Id.* at 289.

⁵⁸ See, e.g., Krey, *supra* note 55 (III), at 465; Schneider, *supra* note 50, at 445 (“most questionable extension of judicial decisionmaking authority,” “devaluation of the obligation to follow the law,” “first step toward ‘unrestrained interpretation’”). But see Friedrich Kübler, 28 JZ 667, 667 (1973) (warning that a contrary decision would have turned every alleged misinterpretation of the BGB into a question for the Constitutional Court).

statutes.⁵⁹ “Recht” not only comprehends unwritten as well as written law; it often has the less positivist meaning of “justice.”⁶⁰

As the *Soraya* opinion suggests, one school of thought in Germany has been that the reference to “Recht” did more than broaden the categories of law that bound executive and judicial officers;⁶¹ in reaction to the calamitous positivism of the Nazi era, it bound judges in cases of conflict to follow justice rather than law. At a minimum, on this theory Article 20(3) constitutionalizes natural law by requiring the judge to reject fundamentally unjust laws.⁶² Some commentators have carried the argument further, as some language in *Soraya* seems to suggest: No law that is outmoded or misguided should stand in the way of a court’s reaching the just result.⁶³

The debates in the Parliamentary Council afford no evidence that the innocuous term “Recht” was intended to have any such sweeping consequences. As initially drafted, the provision would simply have bound executive and judicial officers to follow the law (“Gesetz”).⁶⁴ The reference to “Recht” and the further provision binding the legislature to the constitutional order were added by what we would call the Committee on Style (Rédaktionsausschul3) in order better to express “the

⁵⁹ See Fritz Ossenbühl, *Gesetz und Recht – Die Rechtsquellen im demokratischen Rechtsstaat*, in 3 HANDBUCH DES STAATSRICHTS 281, Para. Nr. 4-13. “Gesetzgebung” (lawmaking) is the term the Basic Law employs to describe the legislative process. See, e.g., GRUNDGESETZ [GG] [Constitution] arts. 70-77 (F.R.G.). See also GRUNDGESETZ [GG] [Constitution] art. Art. 78 (F.R.G.) (describing the processes by which a statute (“Gesetz”) passed by the Bundestag becomes law). On the other hand, the reference to “Gesetz” in Art. 97’s provision that judges are subject only to law (“nur dem Gesetz unterworfen”) is widely understood to refer to the entire corpus of positive law. See Ossenbühl, *id.* at Para. Nr. 15; Krey, *supra* note 55, at 465.

⁶⁰ The English version of the Basic Law published by the Press and Information Office of the German Federal Government confidently translates “Gesetz und Recht” as “law and justice,” thus glossing over the troublesome ambiguity of the original, as any translation would.

⁶¹ Indeed it has been doubted whether the inclusion of “Recht” was meant to make judicial precedents binding at all. See Krey, *supra* note 55, at 464.

⁶² See Krey, *supra* note 55, at 363-64, 465-66. Cf. *Loan Ass’n v. Topeka*, 87 U.S. 655 (1875). For the argument that fundamentally unjust laws that violate none of the other provisions of the Basic Law must be rare indeed, see Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 49-54. Ossenbühl, *supra* note 59, at Para. Nr. 18, views the reference to “Recht” as a reminder of past injustice (“Unrecht”) directed essentially to the law-makers.

⁶³ See the authorities cited Krey, *supra* note 55, at 364.

⁶⁴ See 1 JAHRBUCH DES ÖFFENTLICHEN RICHTS [JöR] (N.F.) 1959-99 (1951). After omission for stylistic reasons of references to the rule of law (“Herrschaft des . . . Gesetzes”) and to the requirement (redundant in light of Art. 3) that the laws themselves be equal, the provision read: “Rechtsprechung und Verwaltung stehen unter dem Gesetz.” *Id.* at 197.

rule of law as the foundation of the Basic Law.”⁶⁵ The defense of the original formulation was purely stylistic: Nothing had been said about “the constitutional order” because it went without saying that all organs of government were bound by the Constitution. That the courts were also bound by law, the same speaker added, was equally obvious from the very nature of judicial activity: The judiciary’s sole task was “to apply and interpret the law.”⁶⁶ To conclude that the ambiguous reference to “Recht” authorized judges (and presumably also administrators) to ignore constitutional statutes, it might be added, would contradict the plain command of the same sentence that they are bound by law (“Gesetz”)—and all the fundamental policies of democracy, predictability, and separation of powers that underlie that provision as well.⁶⁷

However difficult it may be to reconcile the result in the *Soraya* case with the principle of parliamentary supremacy, the fact remains that the Court was careful to couch its reasoning in terms of statutory interpretation, not of any right to defy the legislature. Its ultimate conclusion, however strained, was that there was indeed a gap in the legislation that the judges could properly fill by devising a new common law rule.⁶⁸ The new right to damages for intangible injuries attributable to the invasion of privacy, which served to promote the constitutionally protected interests in human dignity and the free development of personality, thus qualified as “Recht” within the meaning of Art. 20(3)—“not in opposition to but in elaboration and extension of the written law.”⁶⁹

⁶⁵ *Id.* at 200 (Delegate Dehler) (“zur besseren Kennzeichnung der Rechtsstaatlichkeit als der Grundlage des Grundgesetzes”).

⁶⁶ *Id.* (Delegate von Mangoldt) (“die Gesetze anzuwenden und auszulegen”).

⁶⁷ For arguments on the latter basis, see Krey, *supra* note 55, at 466-67. Such a conclusion would also create an irreconcilable conflict between Art. 20(3) and Art. 97(1), which says nothing about “Recht” and flatly declares the judges “subject to law.” See *supra* note 59; Krey, *supra* note 55, at 465-66.

⁶⁸ See BVerfGE 34, 269 (290) (1973): “Damit wurde eme Lücke im Blick auf die Sanktionen, die bei einer Verletzung dieses Persönlichkeitsrechts zu verhängen waren, sichtbar... .” See also BVerfGE 82, 6 (11-15) (1990) (applying the principles laid down in *Soraya* to uphold the extension by analogy to unmarried couples of a surviving partner’s right to assume the other’s lease after death, although the governing statute spoke only of spouses).

⁶⁹ BVerfGE 34, 269 (281, 291) (1973). The Federal Court of Justice, whose decisions are summarized in *id.* at 273-75, had taken the arguably more candid approach of holding that Arts. 1(1) and 2(1), which declare human dignity (“die Würde des Menschen”) inviolable (“unantastbar”) and guarantee the right to free development of the personality (“die freie Entfaltung [d]er Persönlichkeit”), required the state to provide redress for victims of invasions of privacy. For general discussion of these provisions, see Currie, *Lochner Abroad*, *supra* note 1, at 356-63; for discussion of the interesting problem of affirmative state obligations to protect one citizen from another, see Currie, *Positive and Negative Constitutional Rights*, 53 U CHI. L. REV. 864 (1986).

Later decisions have given no support to any suggestion in *Soraya* that courts might have power to disregard misguided but constitutional statutes. In 1978, for example, the Constitutional Court made clear that a court could not constitutionally “correct” a statute providing for damages for wrongful deprivation of personal liberty by restricting recovery to cases of intentional wrong: “It is not the business of a judge who is bound by the statute and laws to cut back claims for liability that the statutes afford. . .”⁷⁰ Whatever the authors of the earlier opinion had in mind, it seems clear today that both executive and judicial officers in Germany are bound by constitutional statutes, as Article 20(3) provides.

III. Exclusivity

Less obvious perhaps than the principle that legislation binds other organs of government is a second and almost equally fundamental corollary of the grant of lawmaking power to the legislature: its exclusivity. It should come as no surprise that in Germany, as in the United States, no one but the legislature may enact statutes. What may not be so obvious is that in many cases it follows that the executive may not act without statutory authority.

In Germany, as in the United States, this is not generally true of the courts. The one noncontroversial conclusion of the *Soraya* opinion was that Article 20(3) did not preclude the courts from creating common law when the statutes were silent.⁷¹ The authority to do so, the Court has persuasively argued, is implicit in the grant of jurisdiction to resolve disputes.⁷²

⁷⁰ BVerfGE 49, 304 (320) (1978). See also BVerfGE 41, 231 (1976) (holding that a member of a local governing body could not constitutionally be barred from representing an individual charged with crime since the relevant disqualification statute applied only to claims against the government); BVerfGE 65, 182 (1983) (holding that by giving priority to wage claims in an insolvency proceeding the Federal Labor Court had exceeded the limits on judicial lawmaking imposed by Article 20(3) since the bankruptcy state left no room for additional priorities). The opinion just cited distinguished *Soraya* by noting that the judicially created rule in the earlier case had “merely” afforded a remedy for a preexisting constitutional right and that it enjoyed widespread support among academic commentators. *Id.* at 194-95. Except to the extent that these passages may be taken to imply acceptance of the Court of Justice’s argument that damages for invasion of privacy were compelled by the Basic Law itself, they seem typical of what courts tend to say when they deal with precedents for which they have no sympathy.

⁷¹ German labor law, as the Court noted in *Soraya* (BVerfGE 34, 269 (288) (1973)), is mostly judge-made law. See BVerfGE 84, 212, (226-27) (1991) (upholding judicial authority to fashion rules respecting the legality of lockouts within the limits of Art. 9(3)).

⁷² See *id.* at 227; Ossenbühl, *supra* note 59, Para. Nr. 35-41; Krey, *supra* note 55, at 466. The Supreme Court’s decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), constitutes a narrow and convincing

Various provisions of the Basic Law, however, preclude the courts as well as the executive from acting without statutory authority. Recognizing that even such fundamental values as freedom of expression and of movement must yield on occasion to overriding countervailing concerns, the framers of the Basic Law expressly provided that a number of the basic rights that document guaranteed could be limited – but in most cases only by or on the basis of statute.⁷³

At first glance these provisions may appear to the American observer a shocking compromise of fundamental rights. A constitutional right to freedom of speech, it may be said, is of little value if it can be overridden by legislation. Any constitutional right worthy of the name would provide protection against the legislature itself.

Indeed the Basic Law *does* provide significant protection against legislative infringement of basic rights, even those which are explicitly subject to statutory limitation. A law limiting basic rights must expressly specify any right that is limited; it must be a general law that does not single out individuals for unfavorable treatment; and it may not impinge upon the essential content (“Wesensgehalt”) of the right.⁷⁴ Perhaps most significantly, it must satisfy the stringent test of proportionality (“Verhältnismäßigkeit”) that the Constitutional Court has found implicit in the rule of law and in the basic rights themselves: No limitation of a basic right is valid unless it is calculated to promote a legitimate governmental purpose, is the least restrictive means of attaining that goal, and imposes a reasonable burden.⁷⁵ It should be recalled that, although our rhetoric is different, our basic rights are not absolute either. The Supreme Court commonly engages in a similar balancing process to determine the extent of the constitutional

exception to this general rule based on the limited purposes of federal jurisdiction over controversies between citizens of different states.

⁷³ *E.g.*, GRUNDGESETZ [GG] [Constitution] art. 8(2) (F.R.G.), which permits restriction of the right of outdoor assembly “durch Gesetz oder auf Grund eines Gesetzes.” Similar provisions appear in connection with the right to life, personal liberty, and bodily integrity (Art. 2(2), reinforced by Art. 103(2), 104(1)), postal and telecommunications privacy (Art. 10(2)), freedom of movement (Art. 11(2)), occupational freedom (Art. 12(1)), and property (Art. 14(3)). The somewhat different provisions respecting expression (Art. 5(2)) and the right to free development of personality (Art. 2(1)) will be discussed in more detail below.

⁷⁴ GRUNDGESETZ [GG] [Constitution] art. 19(1), (2) (F.R.G.).

⁷⁵ See Currie, *Lochner Abroad*, *supra* note 1, at 353-54.

guarantee itself—and often without requiring a showing that no less restrictive means are available.⁷⁶

What then is the function of the German provisions permitting legislative limitation of basic rights? It is not merely to make explicit the unavoidable conclusion that even fundamental rights are not absolute, but also to protect the citizen by making clear that even when competing interests predominate basic rights can be limited only with the consent of the people themselves as represented in Parliament; not by some appointed bureaucrat subject only to indirect political control.⁷⁷ The provisions requiring a legislative basis for limitation of basic rights (Gesetzesvorbehalte) are therefore important elements both of democracy and of the separation of powers.⁷⁸ They have been vigorously enforced by the Constitutional Court.⁷⁹

But the principle that the executive may act only on the basis of statute is by no means limited to actions impinging on those basic rights which the Constitution expressly provides may be limited only on the basis of legislation. The general

⁷⁶ E.g., *Board of Trustees of SUNY v. Fox*, 109 S. Ct. 3028, 3032-35 (commercial speech); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984) (time, place, and manner restrictions). See generally Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943 (1987).

⁷⁷ See HESSE, *supra* note 6, Para. Nr. 314: “All reservation clauses empower only the legislature to limit basic rights.... A limitation of basic rights by executive or judicial authorities acting on their own is impermissible.”

⁷⁸ Of all our Bill of Rights provisions, only the neglected third amendment explicitly contains this important safeguard: “No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.” Cf. U.S. Const., Art. I, § 9: “No money shall be drawn from the Treasury, but in consequence of appropriations made by law...Subject to limited exceptions, the same principle is laid down in Art. 110-112 of the Basic Law. See Kisker, *supra* note 12, Para. Nr. 40-47; BVerfGE 45, 1 (1977) (holding that the Finance Minister had exceeded his authority under Art. 112 to authorize non-budgeted expenditures in cases of unforeseen and unavoidable necessity (“eines unvorhergesehenen und unabweisbaren Bedürfnisses”). For a summary of other explicit provisions of Basic Law reserving particular powers to the legislature, see Ossenbühl, *supra* note 52, Para. Nr. 26-30.

⁷⁹ Some of the decisions are collected in Currie, *Lochner Abroad*, *supra* note 1, at 340, 347-48 n.112. Most difficult to reconcile with the explicit requirement of a legislative basis for restriction of basic rights is once again the troublesome *Soraya* decision, where the Constitutional Court not only permitted the civil courts to invent a right to damages for invasion of privacy in the teeth of what appeared to be a plain legislative prohibition (see *supra* notes 53-69 *supra*) but went on to conclude without explanation (BVerfGE 34, 269 (292) (1973)) that this judicially made law qualified as a general law (“allgemeines Gesetz”) within the meaning of Art. 5(2), whose purpose, like that of the other provisions discussed in this section, seems to be to reserve the power to limit basic rights to the democratic and representative parliament. See Ossenbühl, *supra* note 52, Para. Nr. 13-14. The result might have been more convincingly explained by invoking Art. 5(2)'s further provision acknowledging that freedom of expression was also limited by the right to inviolability of personal honor (“Recht der persönlichen Ehre”).

freedom of action (“allgemeine Handlungsfreiheit”) that the Constitutional Court has found in Article 2(1),⁸⁰ for example, finds its limits according to the text of the Basic Law in “the rights of others, . . . the constitutional order, [and] the moral code”—a formulation that hardly seems restricted to acts of parliament. Nevertheless the Constitutional Court has made clear that the requirement of legislative authorization applies to limitations of this freedom as well.

In a 1981 decision, for example, an administrative court had disqualified the law partner of a member of the local governing council from acting as counsel in a lawsuit against the local government, on grounds of possible conflict of interest. The relevant statute, however, disqualified only the members themselves. Because there was no legal basis for the court’s action, said the Constitutional Court, it offended the basic principle of the rule of law embodied in Article 20(3). Thus it was not part of the “constitutional order,” and thus not a legitimate limitation of the general freedom of action guaranteed by Article 2(1).⁸¹

Article 20(3) is the provision that binds both executive and judicial officers to follow the law. On its face it does not appear to embody the additional requirement that they act only on the basis of law, though as the Court remarked both can be characterized as aspects of the rule of law (Rechtsstaatsprinzip). The rule of law itself, while imposed on the constituent states by Article 28(1),⁸² is not expressly made applicable to the central government; it is often said to be implicit in the basic structural provisions of Article 20, or in the Basic Law as a whole.⁸³ The subsidiary principle that liberty and property can be restricted only on the basis of legislation, which was created essentially out of whole cloth during the 19th century as a means of protection against the still autocratic executive, can perhaps best be explained as implicit in Art. 20(2), which enunciates the general principle of separation of powers.⁸⁴

⁸⁰ GRUNDGESETZ [GG] [Constitution] art. 2(1) on its face guarantees a right to the free development of personality (“die freie Entfaltung [d]er Persönlichkeit”). For its interpretation see BVerfGE 6, 32 (1957) (Elfes); Currie, *Lochner Abroad*, *supra* note 1, at 358-59.

⁸¹ BVerfGE 56, 99 (107-09) (1981) (adding that the further requirement of fair warning that had also been attributed to the rule of law had been offended as well).

⁸² “Die verfassungsmäßige Ordnung in den Ländern muß den Grundsätzen des republikanischen, demokratischen und sozialen Rechtsstaates im Sinne dieses Grundgesetzes entsprechen.”

⁸³ See, e.g., Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 30-35. For shrill criticism of the conventional learning, see Richard Bäumlein & Helmut Ridder, *Art. 20*, in 1 AK-GG, Para. Nr. 33-77.

⁸⁴ See Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 59, 76-80.

Finding the legal basis for the general Gesetzesvorbehalt not in the basic rights alone but in the structural provisions of Article 20 made it only a matter of time until it was extended beyond its historical roots to require statutory authority not only for the invasion of individual rights but also for actions taken in dispensing government benefits. In upholding a statutory provision reducing payments to war victims living outside the Federal Republic, for example, the Constitutional Court was careful to insist that the legislature itself was required "to determine in essence" under what circumstances and to what extent the normal payments should be reduced.⁸⁵

This is the basic principle of separation of powers on which Justice Hugo Black relied in concluding that President Truman could not seize the steel mills without statutory authorization.⁸⁶ It is the principle that Justice Jackson in the same case, contrasting Article II's requirement that the President take care that the laws be faithfully executed, convincingly traced to the due process clause: "One [clause] gives a governmental authority that reaches so far as there is law, the other gives a private right that authority, shall go no further. These signify about all there is of the principle that ours is a government of laws and not of men."⁸⁷ It is also a fundamental and undisputed principle of German constitutional law.⁸⁸

IV. Nondelegability

In March 1933 the Nazi-dominated Reichstag enacted a statute (Ermächtigungsgesetz) authorizing Adolf Hitler and his Cabinet to govern by decree.⁸⁹ Actions taken under this provision could be said literally to comply with any constitutional requirement that there be a statutory basis for executive action; the legislature had authorized the Reichsregierung to pass whatever laws it liked. Yet such an unlimited transfer of legislative power to the executive could scarcely be found consistent with the purposes of any such requirement, or with provisions vesting lawmaking powers in the popularly elected Parliament. As our own Justice

⁸⁵ BVerfGE 56, 1 (13) (1981). *See also id.* at 21, concluding that the legislature had fulfilled its duty.

⁸⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁸⁷ *Id.* at 643 (Jackson, J., concurring).

⁸⁸ *See Herzog, Art. 20, in 2 Maunz/Dürig, Para. Nr. 55.* As the Constitutional Court emphasized in a leading decision, there are many areas (not least involving foreign affairs) in which the Basic Law itself vests important policymaking authority in the executive. What is reserved to the legislature is basically the formulation of law. *See BVerfGE 49, 89 (124-27) (1978) (Kalkar).*

⁸⁹ "Reichsgesetze können außer in dem in der Reichsverfassung vorgesehenen Verfahren auch durch die Reichsregierung beschlossen werden." RGB1. 1933, Teil I, S. 141.

Black observed not so many years ago, “Congress [like any other parliamentary body] was created on the assumption that enactment of this free country’s laws could be safely entrusted to the representatives of the people in Congress, and to no other official or government agency.”⁹⁰

Consequently, when the Germans turned to the task of drafting a new democratic constitution after the Second World War, they took care to prohibit the legislature from making any such sweeping transfer of authority in the future. In recognition of the obvious fact that legislators cannot be expected to regulate the details of every governmental program, Article 80(1) permits federal legislation to empower any federal minister, or the federal or state government as a whole, to promulgate regulations (“Rechtsverordnungen”) having the force of law.⁹¹ It goes on to require, however, that the content, purpose, and extent (“Inhalt, Zweck und Ausmaß”) of the authorization be specified by the statute itself.

From a transatlantic perspective the Constitutional Court seems to have taken this provision very seriously. In its very first substantive decision, the Court struck down on the basis of Article 80(1) a provision authorizing the Minister of the Interior to adopt any regulations “necessary for the execution” of a statute respecting the rearrangement (“Neugliederung”) of Lander in what is now BadenWürttemberg. In contrast to the practice of the Weimar period, said the Court,

[t]he Basic Law in this as in other respects reflects a decision in favor of a stricter separation of powers. The Parliament may not escape its lawmaking responsibilities by transferring part of its legislative authority to the executive [Regierung] without considering and precisely determining the limits of the delegated authority. The executive, on the other hand, may not step into the shoes of Parliament on the basis of indefinite provisions authorizing the promulgation of regulations.⁹²

The authorization before them, the Justices concluded, was so indefinite that it was impossible to predict when and how it would be employed or what the resulting

⁹⁰ *Zemel v. Rusk*, 381 U.S. 1, 22 (1965) (dissenting opinion).

⁹¹ See HESSE, *supra* note 6, Para. Nr. 526, arguing that this delegation provision “frees the Parliament for its true task of carefully considering and deciding fundamental issues.”

⁹² BVerfGE 1, 14 (60) (1951).

regulations might say. It therefore failed to specify the content, purpose, and extent of the authority conferred, as the Basic Law required.⁹³

This decision by no means stands alone. In 1958, for example, the Court invalidated a delegation of power to adopt regulations “to compensate for the differential burdens imposed by the transfer tax” upon firms that were or were not vertically integrated (einstufige and mehrstufige Unternehmen).⁹⁴ There were no generally accepted standards, said the Court, for determining whether a firm was vertically integrated; the statute left it to the executive to decide whether to achieve equalization by imposing a surtax on those firms the law favored or by reducing the tax on those it disadvantaged; indeed the statute did not even require the executive to exercise its authority at all.⁹⁵ The rule of law, the Court concluded, forbade the legislature to leave essential elements of the law (“das Wesentliche”) to be determined by regulation. The authorization had to be specific enough that one could determine from the law itself what might be demanded of the citizen; the legislature itself “must have made some conscious decision.”⁹⁶

If this seems a rather strict application of the nondelegation principle,⁹⁷ other early decisions went even further. In 1962 the Constitutional Court struck down a grant of authority to prescribe average values (“Durchschnittswerte”) for “specific articles or groups of articles” for purposes of a compensatory use tax on imported goods, in lieu of determining the value of each individual item.⁹⁸ In 1964 it struck

⁹³ *Id.*

⁹⁴ BVerfGE 7, 282 (1958). Since the tax was assessed every time a product changed hands, firms that processed and marketed their own products from start to finish enjoyed a significant cost advantage. *See id.* at 291-92.

⁹⁵ *Id.* at 292-301.

⁹⁶ “Der Gesetzgeber . . . muß . . . selbst schon etwas gedacht und gewollt haben.” *Id.* at 302, 304. Compare the requirement of a “primary standard” or “intelligible principle” formulated by our Supreme Court during the time when it too took seriously the provision vesting lawmaking powers in the legislature rather than in anyone else. *See* *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409-11 (1928). For alternative formulations of the governing standard in Germany, *see* Maunz, *Art. 80*, in 3 Maunz/Dürig, Para. Nr. 27-28.

⁹⁷ *Contrast* *Field v. Clark*, 143 U.S. 649 (1892) and *J.W. Hampton Co. v. United States*, 276 U.S. 394, 409-11 (1928) (upholding delegations of authority to adjust tariffs to compensate for unreasonable foreign duties and for low foreign production costs respectively); *Federal Energy Comm. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (upholding a delegation to the President of authority to “adjust . . . imports” in any way he deemed necessary to prevent them from endangering national security).

⁹⁸ BVerfGE 15, 153 (1962). The statute, said the Court, “neither determined how far back in time one might go .in determining the average value nor specified how long an average value remained in force once it had been established.” Both the purposes and the articles for which average values were to be

down an authorization to define the statutory term “ton-kilometer” for purposes of determining the amount of a tax on the transportation of freight.⁹⁹ In each of these cases one might have expected the Court to conclude that the lawmakers had left to the executive only the details of applying a policy that the legislature itself had determined.¹⁰⁰

The Court has not always been so hostile to delegation. In a leading 1958 decision the Justices went out of their way to salvage a delegation of authority to promulgate regulations by which “prices, rents, fees, and other charges for goods and services of all kinds, with the exception of wages, are established or approved, or price levels are maintained.”¹⁰¹ Article 80(1) did not require, said the Court, that the content, purpose, and extent of the delegation appear expressly in the statutory text; resort could be had to such ordinary interpretive tools as purpose, context, and legislative history to illuminate the legislative will.¹⁰² The purpose of the statute, as suggested by the last clause of the passage just quoted, was to preserve the general level of prices prevailing at the time of enactment. Intended as a temporary measure looking toward reestablishment of a free market economy, the statutory authority could be employed only to fend off “serious distortions with consequences for the price structure as a whole.”¹⁰³ Nor was the statute too indeterminate in specifying the content of the delegated authority, for in light of long practice the general authorization to adopt measures other than those fixing prices was construed to embrace only associated accounting and reporting provisions and equalization charges assessed on one category of providers for the

prescribed were left to executive discretion. Finally, the statute did not even say whether various articles grouped together had to be of approximately equal value, and thus the delegation enabled the executive “to introduce a different assessment principle . . . and thereby significantly to alter the basis” of the tax itself. *Id.* at 160-65.

⁹⁹ BVerfGE 18, 52 (1964). There were various ways of determining both weight and distance, the Court said, and the statute did not clearly choose among them. *Id.* at 63-64.

¹⁰⁰ “The legislature,” said the Court in the case last mentioned, “must provide its delegate with a ‘program.’” *Id.* at 62. In light of decisions such as those just noted, the Enquête-Kommission (*see supra* note 48) recommended in 1976 that Art. 80(1) be amended to require only the purpose (not the content or extent) of a delegation to appear in the statute, in order to spare lawmakers the burden of prescribing details. *See SCHLUßBERICHT DER ENQUÊTE-KOMMISSION, supra* note 48, at pt. 1, 190-93.

¹⁰¹ BVerfGE 8, 274 (278) (1958) (*Preisgesetz*).

¹⁰² *Id.* at 307.

¹⁰³ *Id.* at 310, 312-13.

benefit of another.¹⁰⁴ Finally, the extent of the delegated authority was restricted by the limited purposes of the statute.¹⁰⁵

This decision bears an uncanny resemblance to our own price-control case, *Yakus v. United States*,¹⁰⁶ which contrary to popular rumor was not inconsistent with meaningful limits on delegation of legislative power in the United States.¹⁰⁷ In each case the Court plausibly construed the statute in such a way that in administering it the executive was carrying out a legislative policy rather than imposing one of its own. In so doing the German Court expressly invoked the principle, familiar in both countries but not always taken seriously in delegation cases, that whenever possible a statute should be interpreted so as to make it consistent with the Constitution.¹⁰⁸

Later German decisions have tended to follow the price-control case rather than the less sympathetic decisions noted above.¹⁰⁹ The Constitutional Court has continued, however, to find delegations unconstitutionally broad.¹¹⁰ Most strikingly, it has

¹⁰⁴ *Id.* at 314-18.

¹⁰⁵ *Id.* at 318. It was not necessary, the Court added, that the delegation be "as specifically drafted as possible"; it must merely be "sufficiently specific." *Id.* at 312.

¹⁰⁶ 321 U.S. 414 (1944).

¹⁰⁷ See THE SECOND CENTURY, *supra* note 15, at 300-01.

¹⁰⁸ See BVerfGE 8, 274 (324) (1958) (noting that the price-control law could be sustained *only* on the basis of this "verfassungskonforme[n] Auslegung"). For instances in which the respective tribunals seem to have tried less hard to find an acceptable narrowing construction, see the German decisions cited *supra* notes 98 and 99, as well as *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and Justice Cardozo's more sympathetic dissent, *id.* at 437-38.

¹⁰⁹ See, e.g., BVerfGE 55, 207 (225-44) (1980) (exhaustively explicating history and tradition to find implicit limitations on a facially broad authorization to adopt regulations respecting moonlighting by public servants); BVerfGE 68, 319 (332-34) (1984) (upholding an authorization to set minimum and maximum fees for medical services because the statutory requirement that the regulations respect the legitimate interests of both doctors and patients required that fees be "neither too high . . . nor too low"); BVerfGE 76, 130 (142-43) (1987) (finding standards in the legislative history sufficient to save an otherwise unconfined grant of authority to determine the level of court costs payable by public institutions). See also HESSE, *supra* note 6, Para. Nr. 528; Maunz, *Art. 80*, in 3 Maunz/Dürig, Para. Nr. 29-31 (arguing that the Court's tendency to merge the three constitutional requirements of content, purpose, and extent into a single quest for a legislative "program" has led to a certain loosening of the standard); Ulrich Ramsauer, *Art. 80*, in 2 AK-GG, Para. Nr. 46-56 (concluding (as suggested in BVerfGE 76, 130 (142-43) (1987)) that the degree of specificity required has come to depend largely upon the degree of intrusiveness of the regulations authorized and on the complexity of the subject matter).

¹¹⁰ More recent examples include BVerfGE 38, 373 (381-83) (1975) (striking down an authorization to specify the professional duties ("Berufspflichten") of pharmacists); BVerfGE 58, 257 (279) (1981)

generally done so on the basis not of Article 80(1) itself but of other provisions that the Court has found to embody a similar nondelegation principle.

As recently as 1988, for example, the Court struck down a statute making it a crime to violate any condition of a permit for the erection, modification, or operation of broadcasting facilities.¹¹¹ Because of the lack of meaningful statutory limitations on the authority to impose the permit conditions themselves, the Court concluded, the statute “leaves it to the postal authorities to determine the elements of an offense by administrative action.”¹¹² Since the statute contemplated the issuance of permits rather than regulations, Article 80(1) did not apply. However, under Articles 103(2) and 104(1) one may be punished only for an offense previously defined by law (“gesetzlich bestimmt”) and imprisoned only on the basis of law in the formal sense (“auf Grund eines förmlichen Gesetzes”). Like Article 80(1) itself, said the Court, these provisions required the legislature itself basically (“grundsätzlich”) to determine for what offenses one might be punished or imprisoned.¹¹³

If the requirement that offenses be “defined by law” seems to say just what the Court said it meant, the requirement that imprisonment be “on the basis” of statute seems less clear. Article 12(1), for example, allows occupational freedom to be limited “by or on the basis of statute”; as the Court has acknowledged, this disjunctive formulation demonstrates that some delegation of authority is permissible.¹¹⁴ Moreover, the ubiquitous right to “free development of personality” guaranteed by Article 2(1) is limited not by statutes but by “the constitutional order,” which on its face does not seem to require that the legislature act at all. Nevertheless the Constitutional Court has found that the nondelegation principle applies to measures limiting *any* of the fundamental rights protected by the Basic Law, even in cases outside the scope of Article 80(1).

To begin with, Article 80(1) applies only to federal legislation. The Court had little difficulty with this limitation; as a crucial ingredient of democracy and the rule of law, both of which Article 28(1) requires the constituent states to respect, the

(invalidating an unconfined delegation of authority to determine which pupils should be expelled from school).

¹¹¹ BVerfGE 78, 374 (1988).

¹¹² *Id.* at 383-89.

¹¹³ *Id.* at 381-83.

¹¹⁴ *See* BVerfGE 33, 125 (155-56) (1972).

essence of Article 80(1) was applicable to the Lander as well.¹¹⁵ More interestingly, although Article 80(1) applies only to the delegation of authority to adopt regulations, the principle that it embodies has been held to apply to other delegations as well. For the doctrine that the legislature may not transfer its functions is understood as a corollary of the principle that the executive often may act only on the basis of legislation; both are aspects of a general reservation of legislative authority (“Gesetzesvorbehalt”) said to be implicit in the separation of powers and in the rule of law.¹¹⁶

The seminal case was the familiar *Price Control* decision. The governing statute authorized the executive to accomplish its purposes by issuing individual administrative orders (“Verfügungen”) as well as regulations. That the provisions respecting individual orders did not fall within Art. 80(1), the Court declared, did not insulate them from constitutional limitations on delegation; here too the content, purpose, and extent of the delegated authority must be determined by statute. This conclusion was traced to three basic aspects of the rule of law: the principle (Art. 20(3)) that the administration is bound by law (Gesetzmäßigkeit der Verwaltung), the separation of powers (Art. 20(2)), and the requirement (Art. 19(4)) that administrative action be subject to judicial review.¹¹⁷

The first and third of these arguments appear unconvincing. To say that the executive is bound by law seems to mean it must obey legal limitations on its discretion, not that its discretion must be limited. Similarly, judicial review is not an end in itself but a means of enforcing limitations on executive authority; if there are no limitations there is nothing to review.¹¹⁸ The separation of powers argument,

¹¹⁵ BVerfGE 41, 251 (266) (1976). See GRUNDGESETZ [GG] [Constitution] art. 28(1) (F.R.G.): *Die verfassungsmäßige Ordnung in den Ländern muß den Grundsätzen des republikanischen, demokratischen und sozialen Rechtsstaates im Sinne dieses Grundgesetzes entsprechen*. Obviously this provision gives the Court a good deal of latitude in determining which provisions applicable on their face only to the Bund are essential elements of republican democracy, the rule of law, and the social state. See Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 122-25.

¹¹⁶ See, e.g., BVerfGE 49, 89 (126-27) (1978) (Kalkar); Maunz, *Art. 80*, in 3 Maunz/Dürig, Para. Nr. 11; Ossenbühl, *supra* note 52, Para. Nr. 10, 41. Indeed most of the decisions respecting the general Gesetzesvorbehalt deal with the delegation question. The requirement that there be some statutory basis for executive action follows a fortiori from the principle that even when it delegates authority the legislature must make the basic policy decisions.

¹¹⁷ BVerfGE 8, 274 (325-26) (1958).

¹¹⁸ The argument that there must be limits to delegation in order that the judges may have something to review was no more persuasive when made by Chief Justice Stone in the *Yakus* case. *Yakus v. United States*, 321 U.S. 414, 426. In an introductory paragraph the German Court had hinted that the principle of fair warning might provide yet another basis for the specificity requirement, noting that the rule of law required that a delegation be definite enough to make administrative action predictable (“voraussehbar

however, is strong. "If the authority of the executive is not sufficiently restricted," said the Court, "then the executive is no longer executing the law . . . but making decisions in the legislature's place."¹¹⁹

In an important later decision the Court effectively traced the nondelegation doctrine to the constitutional guarantee of democracy as well.¹²⁰ By permitting restrictions of occupational freedom only by or on the basis of statute, the Court added, Article 12(1) made it basically the responsibility of the legislature "to determine which public interests are so weighty that the individual's right to liberty must take second place":

The democratic legislature may not abdicate this responsibility at its pleasure. In a governmental system in which the people exercise their sovereign power most directly through their elected Parliament, it is rather the responsibility of this Parliament above all to resolve the open issues of community life in the process of determining the public will by weighing the various and sometimes conflicting interests.¹²¹

Thus the implicit constitutional restrictions apply when authority is delegated not only to federal or state executive officers but also to legislative committees,¹²² to public corporations,¹²³ to local governments,¹²⁴ and to occupational associations.¹²⁵

und berechenbar") by the affected citizen. BVerfGE 8, 274 (325) (1958). Fair warning is indeed an important element of the rule of law in Germany, *see* BVerfGE 56, 99 (109) (1981), and the Constitutional Court recently confirmed that it was one of the purposes behind the specificity requirement for criminal statutes in Art. 103(2). BVerfGE 78, 374 (382) (1988). Fair warning could be provided by the adoption of administrative standards, *see* KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 207-08 (2d ed. 1978), but that would not remove the basic objection to unbridled delegation of legislative authority.

¹¹⁹ BVerfGE 8, 274 (325) (1958). Since the terms of the delegation were the same as those of the authority to adopt regulations, which the Court had found sufficiently confining, they were upheld on the same reasoning. *Id.* at 326-227.

¹²⁰ BVerfGE 33, 125 (158) (1972) (Fachärzte).

¹²¹ *Id.* at 159.

¹²² BVerfGE 77, 1 (1987).

¹²³ BVerfGE 12, 319 (1961); BVerfGE 19, 253 (1965).

¹²⁴ BVerfGE 32, 346 (1972).

In some of these instances the standards applied are less stringent, in light of the fact that the delegation may be said to promote self-government by those most directly affected.¹²⁶ Moreover, the requisite specificity varies with the degree to which the delegated authority impinges upon fundamental rights. Thus while the crucial right to choose one's occupation can basically be limited only by the legislature itself, the power to regulate the conduct of those engaged in an occupation may be delegated to a professional association.¹²⁷ Even in the latter case, however, the legislation must set forth those provisions which "essentially [wesentlich] characterize the image of the professional activity as a whole."¹²⁸

The constitutional principle that emerged was neatly summed up in a major 1978 opinion upholding a grant of authority to license the construction and operation of a nuclear breeder reactor:

Today it is firmly established by the decisions that—without regard to any requirement of an incursion [into individual freedom]—in basic normative areas, and especially when the exercise of basic rights is at stake, the legislature is required. . . to make all essential decisions itself [alle wesentlichen Entscheidungen selbst zu treffen]... Articles 80(1) and 59(2) of the Basic Law, as well as the specific reservations of legislative power [in the catalog of fundamental rights] are particular instances of this general reservation [dieses allgemeinen Gesetzesvorbehalts].¹²⁹

¹²⁵ BVerfGE 33, 125 (1972). See also Reinhold Hender, *Das Prinzip Selbstverwaltung*, in 4 HANDBUCH DES STAATSRECHTS 1133, Para. Nr. 58.

¹²⁶ See, e.g., BVerfGE 33, 125 (159) (1972); Ramsauer, *Art. 80, in 2 AK-GG*, Para. Nr. 31-32. Cf. *United States v. Mazurie*, 419 U.S. 544 (1975) (applying especially lenient standards to a delegation of authority to an Indian tribe with governmental powers of its own); *City of Eastlake v. Forest City Enters.*, 426 U.S. 668 (1976) (holding ordinary delegation standards inapplicable to a provision for referendum).

¹²⁷ BVerfGE 33, 125 (158, 160) (1972). For the same differentiation in the context of Art. 80(1) itself see *supra* note 109. Cf. *Schneider v. State*, 308 U.S. 147, 164 (1939) (invalidating a grant of discretionary authority to issue permits for the door-to-door distribution of handbills).

¹²⁸ BVerfGE 33, 125 (160) (1972). At stake in this case was an authorization of the medical profession itself to set standards for practice by medical specialists (Fachärzte). Concluding that the challenged rules impermissibly contracted occupational freedom on the merits, the Court did not have to decide whether the delegation itself was too broad. See *id.* at 165; *Lochner Abroad*, *supra* note 1, at 349.

¹²⁹ BVerfGE 49, 89 (126-27) (1978) (Kalkar). For a later statement of the same principle in the context of public education see BVerfGE 58, 257 (268-69) (1981); for a brief description of the radical changes

The decisions are numerous and not all easy to reconcile. They document the difficulty and uncertainty of administering a requirement that is necessarily a matter of degree.¹³⁰ Yet in reading them it is difficult to escape the conclusion that we have lost something significant that the Germans have worked hard to maintain. For over the years the Constitutional Court has devoted itself diligently to the task of assuring that major policy decisions respecting the content of the law are made by the representative and popularly elected legislature, as they should be in a republican democracy – a task with which our Supreme Court has not seriously concerned itself since 1936.¹³¹

wrought by the Constitutional Court in this field since 1970 see Ossenbühl, *supra* note 52, Para. Nr. 43. Art. 59(2), to which the Court referred in the breeder case, requires legislative consent to any treaty affecting political relations or matters that are otherwise within legislative control. Such a treaty, however, need not specifically regulate everything that would be considered essential in the case of ordinary legislation; any such requirement, according to the Constitutional Court, would hamper the ability of the Federal Republic to deal with other nations. BVerfGE 77, 170 (231-32) (1987).

¹³⁰ Critical characterizations employing such terms as “bankruptcy” and “blind alley” are collected and gently dismissed in Ossenbühl, *supra* note 52, Para. Nr. 44.

¹³¹ The Basic Law contains, however, a variety of provisions—most of them added by constitutional amendment in 1968—designed to preserve order in extraordinary situations in which normal governmental processes are disrupted, and some of them envision the possibility of lawmaking outside the Bundestag. In case of a military emergency (“Verteidigungsfall”) brought about by actual or threatened external attack, federal legislative powers are not only expanded to include matters normally reserved to the Länder (GRUNDGESETZ [GG] [Constitution] art. 115c(1) (F.R.G.)); they may also be exercised by a joint committee made up of members of the Bundestag and Bundesrat (“Gemeinsamer Ausschuß,” GRUNDGESETZ [GG] [Constitution] art. 53a (F.R.G.)), if by a two-thirds vote the committee finds that the Bundestag is unable to fulfill its duties (Art. 115e). In the less critical case of a so-called legislative emergency (“Gesetzgebungsnotstand”), GRUNDGESETZ [GG] [Constitution] art. 81 (F.R.G.) authorizes the effective transfer of lawmaking powers from the Bundestag to the Bundesrat, *see* Herzog *Art. 81, in* 3 Maunz/Dürig, Para. Nr. 64-65, if after rejecting the Chancellor’s request for a vote of confidence under GRUNDGESETZ [GG] [Constitution] art. 68 (F.R.G.) the Bundestag is not dissolved. Defending emergency provisions in principle as preferable to extraconstitutional action, the respected former Justice Konrad Hesse has argued that the various clauses concerning physical interruption of government are too complicated and unconfined and that the whole idea of the legislative emergency is misguided: “The only thing that can be achieved on the basis of Art. 81 GG is thus to prolong the political crisis whose consequences it was designed to avoid.” Hesse, *supra* note 6, Para. Nr. 719-71. Those inclined to be smug about the absence of comparable provisions in the U.S. Constitution would be well advised to take another look at the extent of implicit military authority acknowledged in cases of true emergency by dicta in such brave and justly celebrated decisions as *Ex parte Milligan*, 71 U.S. 2 (1866), and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

C. Executive Power

The principal focus of 19th-century constitutionalism in Germany was on democratization of the legislative process. Even the visionary Frankfurt Constitution of 1849 (Paulskirchenverfassung), which would have divided legislative authority between a council of states (Staatenhaus) and a popularly elected assembly, envisioned as head of state a hereditary Kaiser who would exercise executive powers through ministers of his own choosing.¹³² Thus this first step toward democracy, which was carried forward in Bismarck's 1871 Constitution, brought with it a significant separation of powers: The people had an increasing say in the making of laws, but it was still the monarch who enforced them.¹³³

The Weimar Constitution, adopted after the First World War, democratized the executive too but in so doing significantly diminished the separation of powers by making executive ministers dependent upon the popularly elected parliament.¹³⁴ At the same time, however, that Constitution vested in an independently elected President (Reichspräsident) extensive powers, not least the authority to take extraordinary measures whenever there was a serious threat to security or public order.¹³⁵ In fact this authorization enabled the President to rule much of the time without the interferences of Parliament, which he freely dissolved under another express constitutional provision.¹³⁶

¹³² Verfassung des deutschen Reichs vom 28. März 1849, RGBI S. 101, Abschnitte III-IV. § 101 gave the executive a suspensive veto that could be overridden by passing the same bill in three consecutive sessions. § 73 delphically described the ministers appointed by the Kaiser as responsible ("verantwortlich"); the extent to which this term implied parliamentary control of the executive was never clarified, since the constitution never took effect.

¹³³ See Verfassung des Deutschen Reichs vom 16. April 1871, RGBI. S. 63, Art. 5, 6, 11-20. At this point the German situation resembled that which Montesquieu had so admired in England, although at the time he wrote it had largely ceased to reflect reality. See 11 MONTESQUIEU, *L'ESPRIT DES LOIS* ch. 6 (1748); WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 69-72, 253-54, 303 (New York, Dolphin Books n.d.) (1872).

¹³⁴ Although ministers were chosen by the independent Reichspräsident, they also required the confidence of the Reichstag, which was given the express power to vote them out of office. WRV, *supra* note 31, Arts. 53, 54.

¹³⁵ WRV, *supra* note 31, Arts. 41, 48.

¹³⁶ *Id.* at Art. 25. "Of the fourteen years of the Weimar Republic, more than nine were definitively shaped [bestimmt] by extraordinary measures under Art. 48." 6 ERNST RUDOLF HUBER, *DEUTSCHE VERFASSUNGSGESCHICHTE SEIT 1789* 689 (W. Kohlhammer 1981) (1957). See also GOLO MANN, *DEUTSCHE GESCHICHTE DES 19. UND 20. JAHRHUNDERTS* 756-58, 766-67 (1958); Jürgen Jekewitz, *Art. 54, in 2 AK-GG*, Para. Nr. 5-10; BVerfGE 62, 1 (1983).

In conscious response to the imperial tendencies of popularly elected Presidents during the Weimar period,¹³⁷ the present Basic Law opts for a parliamentary system without a strong independent executive,¹³⁸ thus further reducing the separation of powers.

I. The President, the Chancellor, and the Cabinet

The Federal Republic does have an independent President (Bundespräsident), but he is not elected by the people,¹³⁹ and he performs a largely ceremonial role. Formally it is the President who represents the Federal Republic in its relations with other nations and concludes treaties,¹⁴⁰ who appoints cabinet ministers, judges, and other federal officials,¹⁴¹ and who exercises the power to pardon offenses.¹⁴² Most of his acts, however, require ministerial approval, which means that he cannot act on his own.¹⁴³ Moreover, in most cases the President has no

¹³⁷ "The debate in the Parliamentary Council [over the powers of the President] was shaped by the desire to depart from the principles of the Weimar Constitution." Klaus Schlaich, *Die Funktionen des Bundespräsidenten im Verfassungsgefüge*, in 2 HANDBUCH DES STAATSRECHTS 541, Para. Nr. 88.

¹³⁸ For comparison of the present provisions with those of the Weimar Constitution, see Herzog, *Art. 54*, in 3 Maunz/Dürig, Para. Nr. 8-12.

¹³⁹ The President is elected by a special convention ("Bundesversammlung"). All members of the Bundestag are members of this convention; the state legislatures choose an equal number of additional delegates "on the principle of proportional representation." GRUNDGESETZ [GG] [Constitution] art. 54(1), (3) (F.R.G.). For explanation of the reasons for this procedure, see Herzog, *Art. 54*, in 3 Maunz/Dürig, Para. Nr. 10-12, 28. The President's term is five years, and he may be reelected only once (GRUNDGESETZ [GG] [Constitution] art. 54(2) (F.R.G.)). On impeachment by a two-thirds vote of either the Bundestag or the Bundesrat, he may be removed from office if the Constitutional Court finds him guilty of deliberate violations of the Constitution or other federal law (GRUNDGESETZ [GG] [Constitution] art. 61 (F.R.G.)). Broad incompatibility provisions (GRUNDGESETZ [GG] [Constitution] art. 55 (F.R.G.)) promote the President's neutrality; immunities from arrest and prosecution (GRUNDGESETZ [GG] [Constitution] art. 60(4) (F.R.G.)) protect him from harassment. See Herzog, *Art. 55*, in 3 Maunz/Dürig, Para. Nr. 3; Herzog, *Art. 60*, in Maunz/Dürig, Para. Nr. 56.

¹⁴⁰ GRUNDGESETZ [GG] [Constitution] art. 59(1) (F.R.G.).

¹⁴¹ GRUNDGESETZ [GG] [Constitution] arts. 60(1), 63(2), 64(1) (F.R.G.). With respect to judges and nonministerial officials Art. 60(1) permits the appointment power to be vested elsewhere by law.

¹⁴² GRUNDGESETZ [GG] [Constitution] art. 60(2) (F.R.G.). It is also said that certain unexpressed ceremonial prerogatives, such as the establishment of national symbols and the award of medals, are inherent in the office. See Herzog, *Art. 54*, in 3 Maunz/Dürig, Para. Nr. 69.

¹⁴³ With certain exceptions including the appointment and dismissal of the Chancellor, Article 58 requires the countersignature ("Gegenzeichnung") of a responsible minister for presidential orders and decrees ("Anordnungen und Verfügungen"). This formulation, it is said, was meant to embrace all legally binding acts of the Bundespräsident, including pardons. See Schlaich, *supra* note 137, Para. Nr. 68,

discretion to *decline* to act either, but rather a duty to endorse whatever lawful course of action the political branches of government propose. In some instances this duty is made clear by the constitutional text;¹⁴⁴ in others it is said to be implicit in the decision to reject the Weimar model.¹⁴⁵

On the other hand, like other officials, the President is bound by the Constitution and, except when participating in the legislative process, by other laws as well.¹⁴⁶ Accordingly it has been argued that he has both the power and the duty to refuse to endorse any governmental action contrary to law, and thus that he must review the legality of every executive or legislative act he is requested to approve.¹⁴⁷

This issue has been extensively debated in the context of Article 82(1)'s requirement that "laws enacted in accordance with the provisions of this Basic Law" be certified or authenticated ("ausgefertigt") by the President.¹⁴⁸ Central to the President's action is the largely technical certification that the published text corresponds to an actual legislative decision; it is clear that he has no right to veto a measure on

79; Herzog, *Art. 58, in 3 Maunz/Dürig*, Para. Nr. 21-44 (listing exceptions). The principal function of the approval requirement is to prevent the President from "pursuing an independent policy contrary to the wishes of the Government" or "interfering with the unified conduct of public affairs." Schlaich, *supra* note 137, Para. Nr. 64.

¹⁴⁴ E.g. GRUNDGESETZ [GG] [Constitution] art. 63(2) (F.R.G.), which provides that the person chosen as Chancellor by the Bundestag shall be appointed by the Bundespräsident ("ist vom Bundespräsidenten zu ernennen"). Under Art. 63(1) it is the President who proposes the initial candidate, and in so doing he may exercise his own discretion, but the Bundestag is free to select someone else. See GRUNDGESETZ [GG] [Constitution] art. 63(3) (F.R.G.); Schlaich, *supra* note 137, Para. Nr. 14. Somewhat less plain is Art. 64(1), which provides that the President shall appoint and dismiss other ministers upon proposal by the Chancellor ("auf Vorschlag des Bundeskanzlers"). Nevertheless it is understood that while the President has the right to argue over the merits of a ministerial nomination he must ultimately bow to the Chancellor's demands. See Schlaich, *supra* note 137, Para. Nr. 28 (acknowledging "an indefinable power to correct abuses"); Herzog, *Art. 54, in 3 Maunz/Dürig*, Para. Nr. 85 (finding the text clear).

¹⁴⁵ In the foreign-affairs field, for example, it is said that the President has no policymaking authority whatever; even speeches are cleared with the Foreign Ministry. See Schlaich, *supra* note 137, Para. Nr. 50, 71. See also Herzog, *Art. 54, in 3 Maunz/Dürig*, Para. Nr. 86 (treaties), 87 (nonministerial appointments and general presumption against presidential discretion); Schlaich, *supra* note 137, Para. Nr. 29-30.

¹⁴⁶ See GRUNDGESETZ [GG] [Constitution] arts. 1(3), 20(3), 56, 61 (F.R.G.).

¹⁴⁷ See Herzog, *Art. 54, in 3 Maunz/Dürig*, Para. Nr. 74-77. The President's refusal to sign is not an "order" or "decree" and thus according to most observers does not require ministerial approval under See GRUNDGESETZ [GG] [Constitution] art. 58 (F.R.G.). See Herzog, *Art. 54, in 3 Maunz/Dürig*, Para. Nr. 84; Herzog, *Art. 58, in 3 Maunz/Dürig*, Para. Nr. 44 (adding that a countersignature requirement would defeat the purpose of providing a check on executive action).

¹⁴⁸ "Die nach den Vorschriften dieses Grundgesetzes zustande gekommenen Gesetze werden vom Bundespräsidenten nach Gegenzeichnung ausgefertigt und im Bundesgesetzblatte verkündigt."

purely policy grounds.¹⁴⁹ On the other hand, the language of the provision is generally understood to permit the President to refuse to certify a statute that has not been adopted in accordance with the procedural requirements of the Basic Law.¹⁵⁰ Whether he may also reject a statute on the ground that it offends substantive constitutional requirements is disputed, but Presidents have done so on rare occasions.¹⁵¹

The arguments are familiar from our own debates over judicial review of legislation: Neither the President's obligation to obey the Constitution nor his oath to uphold it¹⁵² necessarily tells us what the Constitution requires him to do; "in accordance with this Basic Law" might mean in conformity with its prescribed procedures.¹⁵³ In favor of the President's right to reject statutes on substantive constitutional grounds it has been argued with some force that such authority provides an additional check against infringement of the Constitution; that it would undermine the legitimating function of the authentication provision to require the President to sign an unconstitutional law; and that it would be intolerable to insist that the President knowingly countenance an unconstitutional act.¹⁵⁴

¹⁴⁹ See Schlaich, *supra* note 137, Para. Nr. 24-25.

¹⁵⁰ See *id.* at Para. Nr. 33.

¹⁵¹ *Id.* at Para. Nr. 31, found only five instances (as of 1987) in which a President had refused to certify laws on constitutional grounds, two of them for failure to comply with the procedural requirement of Bundesrat consent. For a more recent example see President von Weizsäcker's refusal to sign a law that would have transferred authority over air traffic controllers to a private corporation, on the substantive ground that Article 33(4) permitted governmental functions to be carried out in most cases only by government officials. *Der Staatsnotar bockt*, DIE ZEIT, Feb. 8, 1991, p. 5. "Der Staatsnotar bockt," says the headline – the notary refuses to sign.

¹⁵² GRUNDGESETZ [GG] [Constitution] art. 56 (F.R.G.) ("das Grundgesetz und die Gesetze des Bundes wahren und verteidigen"). See Herzog, *Art. 56*, in 3 Maunz/Dürig, Para. Nr. 21 (arguing that the oath adds a moral obligation to the legal one imposed by GRUNDGESETZ [GG] [Constitution] art. 20(3) (F.R.G.)).

¹⁵³ See Schlaich, *supra* note 137, Para. Nr. 35-36; Ramsauer, *Art. 82*, in 2 AK-GG, Para. Nr. 11-16. Cf. *Marbury v. Madison*, 5 U.S. 137 (1803); THE FIRST HUNDRED YEARS, *supra* note 15, at 72-73. For consideration of the analogous question whether executive officers in the United States are bound by unconstitutional laws see Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-90).

¹⁵⁴ See Schlaich, *supra* note 137, Para. Nr. 36, 37, 41. For arguments as to why Article 100(1)'s requirement that other judges who believe a statute unconstitutional certify the question to the Constitutional Court, see *infra* notes 287-89, does not implicitly require the President to sign unconstitutional laws, see Schlaich, *supra* note 137, Para. Nr. 38.

In a few instances, moreover, the President does exercise discretion of his own. It is said, for example, that he does so in pardoning offenders, in establishing national symbols, and in calling the Bundestag into special session.¹⁵⁵ Most important in this connection, however, are the powers of the President in times in which the normal political process has broken down. If the Bundestag cannot muster a majority for the election of a Chancellor, the President decides whether to accept a minority candidate or to dissolve the Bundestag and precipitate new elections.¹⁵⁶ If the Chancellor upon losing a vote of confidence seeks to dissolve the Bundestag, it is the President who decides whether to do so.¹⁵⁷ If he decides not to order new elections in this situation, it is he (on application of the Cabinet with Bundesrat consent) who decides whether to declare a legislative emergency ("Gesetzgebungsnotstand") permitting the Cabinet and the Bundesrat to put a law into force without Bundestag action.¹⁵⁸ In all these instances the Basic Law employs the permissive word "may" ("kann") or its equivalent, and it is understood that the President exercises his own discretion in determining what action to take.¹⁵⁹

Thus the Bundespräsident can exercise significant political power only in times of crisis in which the normal machinery of government does not function.¹⁶⁰ Ultimate

¹⁵⁵ See Schlaich, *supra* note 137, Para. Nr. 6-11; Herzog, *Art. 54*, in 3 Maunz/Dürig, Para. Nr. 86 (stressing that Art. 39(3) requires the Bundestag to convene at the request of either "the President or the Chancellor").

¹⁵⁶ GRUNDGESETZ [GG] [Constitution] art. 63(4) (F.R.G.). In this case the normal countersignature requirement does not apply. See GRUNDGESETZ [GG] [Constitution] art. 58 (F.R.G.).

¹⁵⁷ GRUNDGESETZ [GG] [Constitution] art. 68(1) (F.R.G.).

¹⁵⁸ GRUNDGESETZ [GG] [Constitution] art. 81(1), (2), (3) (F.R.G.). See *supra* note 131.

¹⁵⁹ See Herzog, *Art. 54*, in 3 Maunz/Dürig, Para. Nr. 86. With respect to the vote of no confidence under Art. 68 the Constitutional Court confirmed the President's discretion, as well as his authority to determine whether the legal requirements for dissolution had been met, in its famous opinion respecting the dissolution of Parliament in 1983. See BVerfGE 62, 1, (35, 50) (1983); Schlaich, *supra* note 137, Para. Nr. 15-21 (adding that as a practical matter the President's discretion in the case of a vote of no confidence has been severely limited by the Court's loose interpretation of the conditions justifying dissolution (see *supra* notes 33-48) and by its insistence, BVerfGE 62, 1 (50-51) (1983) that in assessing the political prospects for a viable Government the President is not to substitute his judgment for that of the Chancellor). See also Meinhard Schröder, *Bildung, Bestand und parlamentarische Verantwortung der Bundesregierung*, 2 HANDBUCH DES STAATSRICHTS 603, Para. Nr. 23 (arguing that the Bundespräsident is free to reject a minority Chancellor under Art. 63(4) only if he doubts that candidate's ability to form an effective government).

¹⁶⁰ See Schlaich, *supra* note 137, Para. Nr. 58.

federal executive authority rests with the Cabinet (Bundesregierung) and the ministers of which it is composed.¹⁶¹

Though formally appointed by the President, the Chancellor is elected by the Bundestag, and as a practical matter it is he who selects the other ministers.¹⁶² Under Article 67 the Bundestag can remove the Chancellor—and with him his ministers¹⁶³—at any time and for any reason, but only if it simultaneously names his successor.¹⁶⁴ The purpose of this provision is to guard against the risk of an executive vacuum while ensuring ultimate parliamentary control.¹⁶⁵

Thus in theory the Bundestag can determine the direction of executive policy through its power to select and replace the Chancellor, and it has broad

¹⁶¹ See GRUNDGESETZ [GG] [Constitution] art. 82 (F.R.G.): “Die Bundesregierung besteht aus dem Bundeskanzler und aus den Bundesministern.”

¹⁶² GRUNDGESETZ [GG] [Constitution] arts. 63, 64 (F.R.G.); see Herzog, *Art. 63*, in 3 Maunz/Dürig, Para. Nr. 1-6. In fact the choice of both Chancellor and Ministers is worked out by negotiation among the coalition parties in advance of the formal steps prescribed by the Constitution. See Schröder, *supra* note 159, Para. Nr. 1-2. Except for those ministries expressly named in the Basic Law (Defense, Finance, and Justice), the Chancellor determines which positions shall exist as an incident to his authority to fill them. See Herzog, *Art. 64*, in 3 Maunz/Dürig, Art. 64, Rdnr. 3-5; Schröder, *supra*, Rdnr. 27-28 (arguing that the legislature is powerless to interfere). For early debates over the issue in the United States see Currie, *The Constitution in Congress: The First Congress, 1789-91* (forthcoming). That the Chancellor must nominate ministers and allot them significant areas of responsibility, however, is said to be established by Art. 62’s basic decision in favor of a cabinet system. See Herzog in 3 Maunz/Dürig, Art. 62, Rdnr. 3.

¹⁶³ GRUNDGESETZ [GG] [Constitution] art. 69(2) (F.R.G.). Parliamentary removal of individual ministers, or of the Chancellor alone, is not permitted; the Cabinet stands or falls as a whole. See Herzog, *Art. 67*, in 3 Maunz/Dürig, Par. Nr. 10-11; Herzog, *Art. 69*, in 3 Maunz/Dürig, Para. Nr. 44. Some of the Länder constitutions, in contrast, permit the Parliament to remove individual ministers. See Herdegen, *supra* note 10, Para. Nr. 30.

¹⁶⁴ Thus when the Cabinet has lost the support of Parliament there are three possibilities: The election of a new Chancellor under Art. 67 or (if the Chancellor resigns) Art. 63, the dissolution of Parliament under Art. 68 (see *supra* notes 33-48), and the continuation in office of a minority government. In the event of a race between Parliament to replace the chancellor and the Chancellor to seek the dissolution of Parliament, Art. 68(1) gives the legislature a trump card by providing that the right to dissolution is extinguished as soon as a new Chancellor is chosen. See Herzog, *Art. 68*, in 3 Maunz/Dürig, Para. Nr. 63 (explaining that it would make no sense to dissolve an assembly that was in a position to choose a viable cabinet).

¹⁶⁵ Schröder, *supra* note 159, Para. Nr. 33-35. But see HESSE, *supra* note 6, Para. Nr. 635 (doubting whether a minority government kept in power by virtue of Art. 67’s requirement of a constructive vote of no confidence (“konstruktives Mißtrauen- svtum”) is likely to be more effective than a caretaker government remaining in office in default of a successor, as under the Weimar Constitution); Herzog, *Art. 62*, in 3 Maunz/Dürig, Para. Nr. 80 and Herzog, *Art. 67*, in 3 Maunz/Dürig, Para. Nr. 16. For the argument that an attempt to force the Chancellor to resign by terminating his salary would amount to an unconstitutional circumvention of Art. 67, see *id.* at Para. Nr. 44.

investigative powers to enable it better to perform its oversight function.¹⁶⁶ In practice, it is often said, the situation tends to be reversed: By virtue of its superior access to information and its influence on the dominant political parties, the Cabinet effectively determines *legislative* policy.¹⁶⁷ In any event, there is far less structural separation between the legislature and top executive officers in the Federal Republic than there is in the United States.¹⁶⁸

Within the Cabinet, the Chancellor determines the general principles (“Richtlinien”) of executive policy.¹⁶⁹ Within these principles, however, each minister conducts the affairs of his department autonomously and on his own responsibility (“selbständig und unter eigener Verantwortung”).¹⁷⁰ Many

¹⁶⁶ GRUNDGESETZ [GG] [Constitution] art. 44 (F.R.G.). In accordance with this purpose, the implicit executive privilege of withholding confidential or sensitive information is narrowly interpreted. See BVerfGE 67, 100 (127-46) (1984); Maunz, *Art. 44*, in 3 Maunz/Dürig, Para. Nr. 57. In fact, since the Cabinet normally enjoys the support of a parliamentary majority, it is more commonly the opposition that acts as a watchdog. To this end Art. 44(1) requires the Bundestag to conduct an investigation whenever requested by one fourth of its members, and the Constitutional Court has held that the same quorum may basically determine the agenda of the investigation—an important check in a system without strict structural separation of executive and legislative bodies. See BVerfGE 49, 70 (79-88) (1978); Herzog, *Art. 62*, in 3 Maunz/Dürig, Para. Nr. 105-06.

¹⁶⁷ See, e.g., Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 64, 54-55 (noting the clear predominance (“deutliches Übergewicht”) of the Cabinet).

¹⁶⁸ Indeed, although the Chancellor and other ministers are forbidden to engage in most other remunerative activities in order to minimize conflicts of interest, they may serve simultaneously as members of Parliament, as is common in a parliamentary system. See Herzog, *Art. 66*, in 3 Maunz/Dürig, Para. Nr. 2-4, 33-36 (explaining that historically a legislative seat does not qualify as a “salaried” office within the meaning of the incompatibility provision of GRUNDGESETZ [GG] [Constitution] art. 66 (F.R.G.)), and that therefore (strange as it may seem) a federal minister is free to serve as a state legislator as well).

¹⁶⁹ GRUNDGESETZ [GG] [Constitution] art. 65 (F.R.G.). These principles or guidelines, which have been defined as “binding, abstract, normative instructions,” have been compared to framework legislation (see CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY*, *supra* note 1) in that they must leave sufficient discretion to the individual ministers to work out the details. See Norbert Achterberg, *Innere Ordnung der Bundesregierung*, 2 HANDBUCH DES STAATSRICHTS 629, Para. Nr. 18-19; Herzog, *Art. 65*, in 3 Maunz/Dürig, Para. Nr. 5-10 (invoking the same analogy but concluding that the Chancellor is free to resolve particular controversies of significant political import so long as individual ministers retain a significant degree of overall discretion).

¹⁷⁰ GRUNDGESETZ [GG] [Constitution] art. 65 (F.R.G.). This means, for example, that it is the individual Minister who makes hiring and firing decisions and issues instructions to administrators within his department. See Herzog, *Art. 65*, in 3 Maunz/Dürig, Para. Nr. 59-61. Differences of opinion over matters concerning more than one Ministry are resolved by the Cabinet as a whole. GRUNDGESETZ [GG] [Constitution] art. 65 (F.R.G.); see Achterberg, *supra* note 169, Para. Nr. 59. In normal times the Defense Minister is Commander in Chief of the armed forces (GRUNDGESETZ [GG] [Constitution] art. 65a (F.R.G.)); in a military emergency (see *supra* note 131), command passes to the Chancellor in the interest

significant powers, moreover, are given not to any individual minister but to the Cabinet as a whole.¹⁷¹ Thus the executive power is not only less independent but also less centralized in Germany than it is in the United States, although the Chancellor can exercise ultimate control through his power to set guidelines and effectively to hire and fire other Cabinet members.¹⁷² In so doing, of course, the Chancellor himself is subject to the threat of replacement and thus to a measure of parliamentary control.

II. The Limits of Parliamentary Control

Despite the structural symbiosis inherent in the parliamentary system, Article 20(2)'s insistence that legislative and executive powers be exercised by distinct governmental bodies is not without significance. In the first place, at the fundamental level, there are limits to the methods by which the legislature may exercise control over executive actions.

As a minimum, Article 20(2) must mean that the Bundestag cannot itself execute the laws.¹⁷³ Nor, as a general rule, can it tell the executive how to exercise its authority in a particular case;¹⁷⁴ the parliament controls policy at the wholesale rather than the retail level by passing laws and by replacing the Cabinet.

of unified policy (GRUNDGESETZ [GG] [Constitution] art. 115b (F.R.G.)). Under GRUNDGESETZ [GG] [Constitution] art. 112 (F.R.G.) expenditures not provided for in the budget may be made only with the Finance Minister's approval.

¹⁷¹ See, e.g., GRUNDGESETZ [GG] [Constitution] arts. 76, 81 (F.R.G.) (proposal for legislation in normal times and alter declaration of legislative emergency); GRUNDGESETZ [GG] [Constitution] arts. 84, 85, 86 (F.R.G.) (various devices for controlling officials engaged in actual administration of the laws); GRUNDGESETZ [GG] [Constitution] art. 115a, 115f (F.R.G.) (application for declaration of a military emergency and extraordinary powers once such a declaration is made). The Basic Law's allocation of authority between the Cabinet and its various Ministers was consciously patterned after that of the Weimer Constitution. See Achterberg, *supra* note 169, Para. Nr. 9-12. For a detailed breakdown of this allocation, see Meinhard Schröder, *Aufgaben der Bundesregierung*, 2 HANDBUCH DES STAATSRICHTS 585, Para. Nr. 17-24.

¹⁷² GRUNDGESETZ [GG] [Constitution] arts. 64, 65 (F.R.G.). See Achterberg, *supra* note 169, Para. Nr. 54; Herzog, *Art. 64*, in 3 Maunz/ Dürig, Para. Nr. 20 (finding that true basis of the Chancellor's preponderance in his power over the composition of the Cabinet). Contrast U.S. Const. art. II, § 1: "The executive power shall be vested in a President of the United States."

¹⁷³ See also Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 83, 111 (basing this conclusion on the requirement (partly codified in Art. 19(1)) that laws be of general applicability and on the general equality provision of Art. 3(1)).

¹⁷⁴ See Wolfgang Loschelder, *Weisungshierarchie und persönliche Verantwortung in der Exekutive*, 3 HANDBUCH DES STAATSRICHTS 521, Para. Nr. 26, 41.

There is one important qualification of this principle that should strike a familiar chord for the observer from the United States. In the ubiquitous *Price Control* case the Constitutional Court expressly upheld a statutory provision empowering the Bundestag alone, without meeting the constitutional requirements for legislation, to veto regulations adopted by the executive setting prices for various goods and services.¹⁷⁵ Relying heavily on a long history of similar statutory provisions, the Court also justified its conclusion on the ground (asserted unsuccessfully by Justice White in his dissent from *INS v. Chadha*)¹⁷⁶ that the legislative veto compensated for the increase in executive power brought about by the delegation itself.¹⁷⁷ The context of the decision, however, was one of general rulemaking, not of individual executive action. Moreover, in any case the legislative veto is purely negative; it permits the Bundestag to prevent but not to compel executive action. The crudeness of the tools of legislative control thus affords the Cabinet considerable practical autonomy within the confines of the parliamentary system.

A variety of structural principles, moreover, further limit the degree of parliamentary control over the actual administration of the laws. As already indicated, the Bundestag can remove individual ministers only by removing the Chancellor, and it can do that only if it chooses his successor at the same time. In addition, there are significant limits to the authority of the Cabinet itself, and correspondingly to the indirect authority of Parliament, over the administration (*Verwaltung*).

Even in those areas in which federal laws are administered by federal agencies directly responsible to one or another ministry,¹⁷⁸ some structural autonomy is

¹⁷⁵ BVerfGE 8, 274 (319-22) (1958).

¹⁷⁶ 462 U.S. 919 (1983).

¹⁷⁷ For an approving view see, Maunz, *Art. 80*, in 2 Maunz/Dürig, Para. Nr. 35, 60. As far as the U.S. Constitution is concerned, I have argued elsewhere that the Supreme Court was right: Once it is decided that the delegation is not too broad, the executive in acting under it is executing the law, and the legislature can interfere only by changing the law itself. *THE SECOND CENTURY*, *supra* note 15, at 591-93. Indeed the German Court acknowledged that a regulation approved by the Bundestag remained a regulation: The requirement of legislative approval did not make inapplicable the requirement of Art. 80(1) that the statute specify the content, purpose, and extent of the delegated authority. BVerfGE 8, 274, (322-23) (1958). See also BVerfGE 9, 268, 279-80 (1958), holding in contrast to *Buckley v. Valeo*, 424 U.S. 1, 109-43 (1976), that the fact that one member of a board with power to arbitrate disputes over public employment was a legislator did not disqualify him. The arrangement was invalidated, however, on the distinct ground that the executive was entitled to control of fundamental matters affecting its own composition. See text at nn.192-95 *infra*.

¹⁷⁸ Such areas include defense, foreign affairs, some federal taxes, postal and telecommunications services, and some aspects of transportation. See GRUNDGESETZ [GG] [Constitution] arts. 32, 87(1), 8Th,

provided by Article 33, which requires that most public servants be selected without regard for their political inclinations and that the public service be conducted with due regard for the traditional principles of the professional civil service (“unter Berücksichtigung der hergebrachten Grundsätze des Berufsbeamtentums”). These principles embrace appropriate remuneration (including pensions and allowances for child support) and even titles, the right to a hearing before discharge, and above all (in most cases) protection against dismissal without cause.¹⁷⁹

Because these provisions preserved the special privileges of public officers that Allied authorities had worked hard to eliminate, they were viewed as a victory for the civil servants’ lobby.¹⁸⁰ As the Constitutional Court has emphasized, however, they also serve the broader and more important purpose of promoting the rule of law by limiting political influence on the execution of the laws.¹⁸¹ Of course the politically responsible ministers exercise extensive control over the administration through their authority to appoint and instruct inferior officers.¹⁸² In most cases, indeed, civil servants are expected to accept their superiors’ decisions as to the legality of their orders. The official’s ultimate responsibility, however, is to the

87d, 108(1) (F.R.G.)Art. GG; CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 1.

¹⁷⁹ See BVerfGE 7, 155 (1957); BVerfGE 8, 1 (22-28) (1958); BVerfGE 11, 203 (210-17) (1960); BVerfGE 43, 154 (165-77) (1976); BVerfGE 44, 249 (262-68) (1977); BVerfGE 62, 374 (382-91) (1982); BVerfGE 64, 323 (351-66) (1983). See also Helmut Lecheler, *Der öffentliche Dienst*, 3 HANDBUCH DES STAATSRICHTS 717, Para. Nr. 49-70; Currie, *Lochner Abroad*, *supra* note 1, at 351-52. Officers whose responsibilities involve the exercise of a discretion distinctively political, such as appointed mayors, may be discharged on political grounds. See BVerfGE 7, 155 (164-70) (1957); cf. *Elrod v. Burns*, 427 U.S. 347 (1976), drawing a similar distinction for purposes of determining when patronage dismissals offend the guarantee of free expression in the United States. For complaints about the increasing incidence of patronage hiring in Germany in the teeth of the nondiscrimination provision of Art. 33(3), see Lecheler, *supra*, Para. Nr. 20, 104, 107-09 (1988).

¹⁸⁰ See WOLFGANG BENZ, *VON DER BESATZUNGSHERRSCHAFT ZUR BUNDESREPUBLIK* 133-16, 208-09 (1984).

¹⁸¹ See BVerfGE 7, 155 (162-63) (19857), invoking the debates in the Parliamentary Council and emphasizing the virtues of stability, neutrality, and “a counterweight to the political forces” that determine public affairs; Meinhard Schröder, *Die Bereiche der Regierung und der Verwaltung*, 3 HANDBUCH DES STAATSRICHTS 499, Para. Nr. 31.

¹⁸² Technically all officers are appointed by the Bundespräsident under GRUNDGESETZ [GG] [Constitution] art. Art. 61(1) (F.R.G.). Like most of his actions, however, appointments require the countersignature of the responsible minister, who makes the actual decision. See GRUNDGESETZ [GG] [Constitution] art. 58 (F.R.G.); Lecheler, *supra* note 179, Para. Nr. 75. See also Walter Krebs, *Verwaltungsorganisation*, 3 HANDBUCH DES STAATSRICHTS 567, Para. Nr. 55, arguing that constitutional provisions for direct federal administration imply a high degree of centralized control.

nation, not to a particular government;¹⁸³ and in the extreme case he may even have a duty to resist illegitimate instructions.¹⁸⁴

The question of autonomy in the civil service exposes a tension between basic constitutional values, for freedom from political influence means freedom from democratic control. This tension is exacerbated by the existence of certain executive or administrative bodies, at both federal and state levels, that are situated outside the normal hierarchy of direct ministerial control.

A few such organizations can trace their pedigree to the Basic Law itself. Most significant perhaps is the Bundesbank, a close cousin of our Federal Reserve Board, which is entrusted with the issuance of paper money and stabilization of the currency.¹⁸⁵ Article 88 says nothing about the structure of this bank, but the history of central banks in Germany leaves no doubt that an institution independent of the Cabinet was contemplated.¹⁸⁶ Accordingly, the statute expressly insulates the Bundesbank from Cabinet direction, requiring the Bank to support the overall economic policy of the Government only to the extent consistent with its own particular obligations (“unter Wahrung ihrer Aufgabe”).¹⁸⁷ Similarly, Article 114 expressly envisions an even more independent auditing office (Bundesrechnungshof) to supervise public accounts.¹⁸⁸ The former provision reflects the teaching of experience that politically responsible governments cannot be trusted to give monetary stability the priority it deserves,¹⁸⁹ the latter the

¹⁸³ See Lecheler, *supra* note 179, Para. Nr. 91, 103. See also *id.* at Para. Nr. 51-53 (adding that objectivity on the part of the public servant is a constitutional command).

¹⁸⁴ See Loschelder, *supra* note 174, Para. Nr. 92-102. The entire executive authority, of course, is bound by law (“Gesetz und Recht”) under Article 20(3). Like the Bundespräsident’s oath to uphold the Constitution (see text at n.152 *supra*), however, this provision does not tell us what the law requires the individual officer to do.

¹⁸⁵ These powers are suggested by Art. 88 of the Basic Law itself, which speaks of a note-issuing and currency bank (“eine Währungs- und Notenbank”). To the end of controlling the money supply the Bundesbank has statutory authority among other things to fix interest and discount rates, to establish minimum reserve requirements for banks, and to make purchases and sales in the open market. See Maunz, *Art. 88*, in 3 MAUNZ/DÜRIG, Para. Nr. 29-40. Cf. 12 U.S.C. ch. 3 (Federal Reserve).

¹⁸⁶ See Maunz, *Art. 88*, in 3 MAUNZ/DÜRIG, Para. Nr. 16, 18-19.

¹⁸⁷ See *id.* at Para. Nr. 17, 20.

¹⁸⁸ Art. 114 expressly requires that members of the Bundesrechnungshof enjoy “the independence of judges,” which is discussed in the text at *infra* notes 219-73. See also Maunz, *Art. 114*, in 4 Maunz/Dürig, Para. Nr. 17-24; Krisker, *supra* note 12, Para. Nr. 125 (complaining of excessive executive influence in the selection of members).

¹⁸⁹ See Maunz, *Art. 88*, in 3 Maunz/Dürig, Para. Nr. 16.

conviction that public confidence in government requires auditing by a truly impartial outsider.¹⁹⁰

Article 87 contemplates additional federal administrative bodies outside the normal hierarchy of direct ministerial supervision. Paragraph (2) of that Article requires that social-insurance agencies with responsibilities transcending state lines be conducted as public corporations; paragraph (3) permits the erection of additional public corporations and institutions (“bundesunmittelbare Körperschaften und Anstalten des öffentlichen Rechtes”) in fields in which the Bund has legislative authority. The traditional concept of a public corporation or institution implies some degree of independence from ordinary ministerial control.¹⁹¹

As we move from modest civil service provisions to the more radical notion of autonomous administrative bodies, however, the tension between the desire for neutrality and the basic principles of parliamentary democracy becomes more acute. The difficulty was neatly illustrated by an important 1959 decision of the Constitutional Court.¹⁹² A statute of the state of Bremen gave public officials and employees a say in decisions affecting staffing and conditions of employment. If the agency and the representatives of its personnel (Personalrat) disagreed, the dispute was to be resolved by an arbitration panel on which the presiding officer of the state legislature held the balance of power.¹⁹³ Insofar as this measure applied to personnel decisions involving public officials (Beamte), the Court held it unconstitutional.

The fact that a member of the legislature was a member of the panel, the Court said, did not condemn the provisions. The heart of the separation of powers requirement, made applicable to the states by Article 28(1) of the Basic Law, was to enable the various branches of government to act as checks on one another; a

¹⁹⁰ In the field of higher education, Article 5(3)'s guarantee of academic freedom (“Wissenschaft, Forschung und Lehre”) has been held to require a significant degree of self-government by faculties of public universities. *E.g.*, BVerfGE 35, 79 (1973); *see* Krebs, *supra* note 182, Para. Nr. 71. *Cf.* BVerfGE 12, 205 (1961) (holding that the guarantee of broadcasting freedom in Art. 5(1) forbade state interference with the management and programming of public television stations).

¹⁹¹ *See* Krebs, *supra* note 182, Para. Nr. 55; Maunz, *Art. 87*, in 3 Maunz/Dürig, Para. Nr. 66. The same provision also expressly authorizes the establishment of autonomous higher federal agencies (“selbständige Bundesoberbehörden”) under the same conditions, but the term “autonomous” in this connection is understood to imply organizational distinctness rather than freedom from ministerial direction. *See id.* at Para. Nr. 83; Hans Peter Bull, *Art. 87*, in 2 AK-GG, Para. Nr. 28.

¹⁹² BVerfGE 9, 268 (1958);

¹⁹³ The agency and the Personalrat each chose three other members of the panel. *See id.* at 269, 271-72.

certain shifting of power in favor of the legislature was no cause for concern in a parliamentary democracy.¹⁹⁴

What was wrong with the provision, in the Court's view, was that depriving the state Cabinet of power to make its own personnel decisions was inconsistent with the principle of responsible government implicit in Article 28's prescription for democracy and the rule of law. "The autonomous authority of the Cabinet to make political decisions, its ability to carry out its constitutional duties, and its substantive responsibility to the people and to Parliament are obligatory requirements of the constitution of a democratic state characterized by the rule of law." Not every administrative function had necessarily to be subject to ministerial control.

Yet there are some duties which, because of their political significance [wegen ihrer politischen Tragweite], may not be generally taken out of the area of Cabinet responsibility and transferred to agencies independent of both Cabinet and Parliament. If this were not so, it would be impossible for the Cabinet to bear the responsibility imposed upon it [by the Basic Law], since unsupervised agencies responsible to no one would be in a position to influence the administration.

Control over personnel decisions respecting public officers, the Court concluded, was an essential attribute of Cabinet authority, since the reliability and disinterestedness of the public service depended largely upon them: "The appointment of a poorly qualified official can impair or paralyze the work of an entire branch of the administration for years to come...."¹⁹⁵

¹⁹⁴ *Id.* at 279-80. See *supra* note 177.

¹⁹⁵ BVerfGE 9, 268 (281-84) (1958). For similar reasons the statute was held to offend the traditional civil service principles that Art. 33(5) requires both state and federal authorities to respect: The public official's responsibility to obey the laws and the lawful orders of his superiors was incompatible with his dependency on anyone else. *Id.* at 285-88. The Court added, however, that decisions as to "social" matters not directly affecting the duties of public officers, as well as even employment decisions affecting employees with lesser responsibilities ("Angestellte" and "Arbeiter"), might constitutionally be entrusted to the arbitration panels in question. *Id.* at 284-85.

Knowledgeable commentators disagree as to 'the scope of the doctrine enunciated in this decision.¹⁹⁶ As already noted, the Basic Law itself modifies the principle of responsible government by requiring an independent auditor and permitting an autonomous central bank. It is sometimes said that these explicit provisions are narrow exceptions to a general constitutional prohibition of "ministerialfreie Räume" – areas of administration immunized from ministerial control. The constitutional guarantee of parliamentary democracy, it is argued, normally requires a chain of authority reaching from the people by way of parliament and cabinet to those engaged in administering the laws.¹⁹⁷ The Court itself, however, has subsequently endorsed the establishment of independent committees or examiners to resolve disputes over individual tax assessments or to determine which publications are harmful to minors, on the ground that such decisions fall outside the policymaking realm ("dem Bereich der politischen Gestaltung") that the Basic Law reserves to the Cabinet.¹⁹⁸ Other observers point to the proliferation of more or less independent agencies and suggest that parliamentary control need not imply cabinet control. Even those unwilling to limit autonomous agencies to those specifically contemplated by the Constitution, however, tend to conclude that there are narrow limits to the ability to remove important executive functions from political supervision entirely.¹⁹⁹ For as every student of government in the United States knows, the creation of independent agencies not only impairs democratic control of executive action; it also undermines the principle of unified executive

¹⁹⁶ On the one hand it can be argued that the decision is a narrow one: Of course the Cabinet must be in a position to carry out its responsibilities, but the Basic Law does not say what those responsibilities are. See GRUNDGESETZ [GG] [Constitution] art. 65 (F.R.G.), empowering each minister to conduct "the affairs of his department" on his own responsibility; Müller, *Ministerialfreie Räume*, 1985 JuS 497; Herzog, *Art. 65, in 3 Maunz/Dürig*, Para. Nr. 106 (stressing that the decision dealt only with administrative organization). On the other hand, one might respond that the framers of the Basic Law would hardly have bothered to ensure ministerial control of personnel decisions while permitting the entire subject being administered to be withdrawn from ministerial responsibility.

¹⁹⁷ See, e.g., Loschelder, *supra* note 174, Para. Nr. 20-22, 37-40, 59. The historical and functional test employed by the Constitutional Court in determining that a subsidiary role in the supervision of banks was implicit in the conception of a "currency and note-issuing bank" under Art. 88 (BVerfGE 14, 197 (215-19) (1962)), while serving in that case to delimit the boundary between federal and state powers, seems no less appropriate for determining the 'range of administrative activity that the same Article permits to be removed from ministerial control.

¹⁹⁸ BVerfGE 22, 106 (113) (1967); BVerfGE 83, 130 (150) (1990). Committee decisions in the first case were subject to review by the courts at the instance of the administration, but not by the administration itself.

¹⁹⁹ See, e.g., Krebs, *supra* note 182, Para. Nr. 80-83; Müller, *supra* note 196, at 508; Herzog, *Art. 65, in 3 Maunz/Dürig*, Para. Nr. 103 (analogizing the relinquishment of parliamentary control over executive action to the delegation of rulemaking authority and suggesting a similar test of "essential" executive functions).

policy implicit in constitutional provisions for parliamentary as well as presidential government.²⁰⁰

To the extent that federal agencies are free from ministerial direction, however, they are also relatively free from parliamentary interference. More significantly, additional structural separation between legislative and executive authority is provided by Article 83's requirement that most federal laws be carried out by the Länder.

As I have explained elsewhere,²⁰¹ the Cabinet is given a variety of tools for ensuring that the Länder actually fulfill their enforcement duties. Outside those few areas in which the Länder enforce federal laws as agents of the Federation ("im Auftrag des Bundes"),²⁰² however, direct federal supervision is basically limited to ensuring the legality of administrative action rather than controlling the exercise of discretion in particular cases.²⁰³ Moreover, the most effective of these tools can be employed only with the consent of the Bundesrat—that is, by a weighted vote of the states themselves.²⁰⁴ Thus in Germany the vertical principle of federalism

²⁰⁰ Cf. *Myers v. United States*, 272 U.S. 52 (1926), a decision sadly eroded by later developments. See *Humphrey's Executor v. United States*, 29 U.S. 602 (1935); *Morrison v. Olson*, 487 U.S. 654 (1988). When executive authority is delegated to public bodies composed of those most immediately affected (e.g., disciplinary proceedings before professional associations), the democratic concern for parliamentary control is counterbalanced by the equally democratic argument of self-determination. See Hendlér, *supra* note 125, Para. Nr. 48-49, 56. The transfer of executive responsibilities to *private* organizations, on the other hand, is particularly problematic in light of Art. 20(2)'s provision that public authority be exercised by specified organs of government and Art. 33(4)'s command that governmental responsibilities be entrusted "as a rule" to civil servants. It was on this ground that the Bundespräsident recently refused to sign a law that would have privatized the business of air traffic control, which entails giving orders to pilots that have the force of law. See *supra* note 151. See also Krebs, *supra* note 182, Para. Nr. 10. For the impact of the organizational freedom guaranteed to workers by Art. 9(3) on the ability of workers and managers to set wages binding on nonparties, see BVerfGE 34, 307 (315-20) (1973).

²⁰¹ See CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 1.

²⁰² GRUNDGESETZ [GG] [Constitution] art. 85 (F.R.G.). In these cases state agencies are subject to federal instructions respecting not only the legality ("Gesetzmäßigkeit") but also the appropriateness ("Zweckmäßigkeit") of their actions. See GRUNDGESETZ [GG] [Constitution] art. 85(4), (5).

²⁰³ See GRUNDGESETZ [GG] [Constitution] arts. 84(3) (F.R.G.): "The Federal Government [Bundesregierung] shall exercise supervision to ensure that the Länder execute federal laws in accordance with applicable law [dem geltenden Rechte gemäß]." See also Peter Lerche, *Art. 84, in 3 Maunz/Dürig*, Para. Nr. 152; Krebs, *supra* note 182, Para. Nr. 41. Länder discretion may be limited by the issuance of general administrative rules ("Verwaltungsvorschriften") (GRUNDGESETZ [GG] [Constitution] art. 84(2) (F.R.G.) or (if the statute so provides) by regulations that also bind third parties ("Rechtsverordnungen") (GRUNDGESETZ [GG] [Constitution] art. 80(1) (F.R.G.)). In either case the rule becomes part of the "law" that the state agency is required to apply in taking individual actions. See Lerche, *id.* at Para. Nr. 157.

²⁰⁴ GRUNDGESETZ [GG] [Constitution] arts. 37, 80(2), 84(2), (4), (5) (F.R.G.).

compensates to a significant extent for the lack of horizontal separation of powers that inheres in a parliamentary system.²⁰⁵ Since Länder agencies are generally subject to direction by ministers responsible to the state Parliament, it does to—in contrast to the creation of independent federal agencies—without impairing the important principle of democratic control.

In short, while there is less structural separation between the legislature and high executive officers in the Federal Republic than in the United States, those officers have less power over the administration than their counterparts in this country. Executive authority is divided among the Cabinet, the civil service, federal agencies and institutions outside the normal administrative hierarchy, and the Länder in such a way that the Bundestag has much less influence on those who actually enforce the law than one might expect in a parliamentary system.

D. Judicial Power

Unlike the executive, the German courts are independent. Indeed in several respects their power to act as a check on abuses of authority by other organs of government is better protected than that of courts in the United States.

In contrast to most of their counterparts in this country, German courts are organized by subject matter. The Basic Law provides for a Federal Constitutional Court (Bundesverfassungsgericht) and for a series of specialized federal supreme courts (“oberste Gerichtshöfe”) in the fields of administrative law (Bundesverwaltungsgericht), taxation (Bundesfinanzhof), labor (Bundesarbeitsgericht), and social security (Bundessozialgericht), as well as a more general supreme court for other civil and criminal matters (Bundesgerichtshof).²⁰⁶ With few exceptions, moreover, there are no lower federal courts. Just as most federal laws are administered in the first instance by state executive officers, most lawsuits based on federal law are brought initially in state courts, which are likewise organized on subject-matter lines.²⁰⁷ In the United States such an arrangement would raise fears both of distracting litigation over jurisdictional

²⁰⁵ See Otto Kimminich, *Der Bundesstaat*, 1 HANDBUCH DES STAATSRICHTS 1113, Para. Nr. 45; Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 28, 35.

²⁰⁶ See GRUNDGESETZ [GG] [Constitution] arts. 93-95 (F.R.G.).

²⁰⁷ See GRUNDGESETZ [GG] [Constitution] art. 92 (F.R.G.): “Judicial power. . . shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder.” Apart from the Constitutional Court and the supreme courts listed in Art. 95, the only federal courts provided for are for industrial property (“Angelegenheiten des gewerblichen Rechtsschutzes”) and for disciplinary matters in the military and civil service. GRUNDGESETZ [GG] [Constitution] art. 96(1), (2), (4) (F.R.G.).

boundaries and of inadequate enforcement of federal rights.²⁰⁸ In Germany neither seems to have been a problem.²⁰⁹

In comparison with our Bill of Rights, the otherwise rather detailed Basic Law has surprisingly little to say about judicial procedure. Article 103 contains a ban on double jeopardy, a prohibition of ex post facto punishments, and a requirement that offenses be specifically defined by statute;²¹⁰ Article 104 requires that persons taken into custody be brought before a judge by the end of the following day and prescribes in some detail the components of the preliminary hearing.²¹¹ There is no explicit mention of the privilege against self-incrimination, the right to a speedy or public trial, the right to subpoena and confront witnesses, the right to counsel, or even the right to be informed of the nature and cause of the accusation.²¹²

This is not to say that there are no such rights, or that they exist at legislative pleasure.²¹³ Article 103(1) guarantees every litigant (in civil as well as criminal matters) a hearing in accordance with law (“rechtliches Gehör”). In determining the contours of this hearing the Constitutional Court has begun to constitutionalize some of the elements of what we would consider a fair trial.

²⁰⁸ For a humble example justifying the former concern, consider the horrors that have arisen in attempting to distinguish the jurisdiction of our Court of Appeals for the Federal Circuit under 28 U.S.C. § 1295 from that of the ordinary Courts of Appeals under §§ 1291-92, as hinted at in DAVID CURRIE, *FEDERAL COURTS* 601 (4th ed. 1990). For typical expressions of concern about the adequacy of appellate review to protect federal rights in the United States, see *Osborn v. Bank of the United States*, 22 U.S. 738, 822-23 (1824); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964). The well known benefits and costs of specialized courts in this country are discussed in hideous detail in David Currie & Frank Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975).

²⁰⁹ Art. 95 originally provided for creation of a separate tribunal to resolve differences of opinion among the various specialized judicial branches. So few conflicts arose, however, that no such court was ever established. The present Art. 95(3) substitutes a more practicable joint panel (“Gemeinsamer Senat”) composed of members of the various Supreme Courts. See Herzog, *Art. 95, in 4 Maunz/Dürig*, Para. Nr. 52-60. For discussion of the federalism aspect of this question, CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY*, *supra* note 1.

²¹⁰ GRUNDGESETZ [GG] [Constitution] art. 103(2), (3) (F.R.G.).

²¹¹ GRUNDGESETZ [GG] [Constitution] art. 104(2)-(5) (F.R.G.).

²¹² Cf. U.S. Const. Amdt. 5-6.

²¹³ Under the first clause of Art. 74 the Federation has concurrent legislative authority over the procedures of state as well as federal courts—subject, of course, to limitations found elsewhere in the Basic Law. See CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY*, *supra* note 1.

Central to Article 103's concept of a judicial hearing is the right to present one's case ("Äußerung") and have it considered ("Berücksichtigung").²¹⁴ To make this right meaningful, the Court has convincingly held that decisions may be based only on information that has been made available to the parties for possible rebuttal.²¹⁵ In addition, the Court has been quite aggressive in insisting that the right to be heard may not be forfeited by failure to file papers within the prescribed time period without some fault on the part of the party or of his attorney.²¹⁶

Interestingly, the Court has not gone much beyond these elementary principles in interpreting Article 103(1). For unexplained reasons it has tended in declaring other procedural rights to find them implicit either in the rule of law or in particular substantive provisions of the Bill of Rights. Thus, for example, both the right to an attorney and the right to a translator have been said to derive not from the explicit guarantee of a hearing but from the general principles of the rule of law,²¹⁷ while

²¹⁴ For a general statements of these two requirements *see, e.g.*, BVerfGE 64, 135 (143-44) (1983); Eberhard Schmidt-Aßmann, *Art. 103(1)*, in 4 Maunz/Dürig, Para. Nr. 66-67. Cf. the provisions of our Administrative Procedure Act, 5 U.S.C. § 553(b), (c), for so-called notice-and-comment rulemaking by administrative agencies. For particulars respecting the right to be heard, *see, e.g.*, BVerfGE 4, 190 (191-92) (1955) (adequate time to contest appeal of favorable decision); BVerfGE 5, 9 (11) (1956) (no constitutional right to oral argument); BVerfGE 60, 250 (252) (1982) (duty to hear all witnesses offered by the parties). Whether a judge has actually considered the submissions of the parties is obviously not always subject to proof, yet in a surprising number of cases the Constitutional Court has found that they were not considered. *E.g.*, BVerfGE 11, 218 (219-20) (1960) (where it was admitted that the judges were unaware of the submission); BVerfGE 18, 380 (383-84) (1965) (where the submission had been erroneously rejected as untimely).

²¹⁵ *E.g.*, BVerfGE 10, 177 (182-84) (1959); BVerfGE 12, 110 (112-113) (1961). Cf. *Ohio Bell Tel. Co v. Public Utilities Comm.*, 301 U.S. 292 (1937); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 393 (D.C. Cir. 1973).

²¹⁶ Thus late filings have regularly been excused on the ground that the defaulting party was on vacation when notice reached his home (BVerfGE 25, 158 (166) (1969)), that mail delivery was unusually delayed (BVerfGE 40, 42 (44-46) (1975)), that the party had relied on misleading official advice (BVerfGE 40, 46 (50-51) (1975)), or that he was unable to understand the German language (BVerfGE 40, 95 (99-100) (1975)). For the suggestion that the Court may have been overly generous in this regard, *see* Schmidt-Aßmann, *Art. 103(1)*, in 4 Maunz/Dürig, Para. Nr. 126. *Contrast* *Wainwright v. Sykes*, 433 U.S. 72 (1977) (permitting even constitutional rights in the context of a criminal proceeding to be lost for failure to raise them in time absent an affirmative showing of cause).

²¹⁷ The theory is that any interference with one's general freedom of action can be justified only by the constitutional order, the rights of others, or the moral code (Art. 2(1)); that any action inconsistent with the rule of law fails to satisfy these conditions; and that a fair trial is an element of the rule of law guaranteed by Art. 20(3). *See* BVerfGE 38, 105 (111-18) (1974) (attorney); BVerfGE 64, 135 (145-57) (1983) (translator). For criticism of these decisions, *see* Schmidt-Aßmann, *Art. 103(1)*, in 4 Maunz/Dürig, Para. Nr. 9, 103, 117-18 (arguing that the more specific provision of Art. 103(1) should take precedence and cogently rioting that in many cases the right to a hearing is meaningless without the aid of an attorney or translator). Cf. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

unreasonable procedural restrictions on a landlord's right to justify a rent increase have been held to offend Article 14's guarantee of property rights.²¹⁸

Taken all together, this case law has established an impressive battery of procedural rights of constitutional rank. The fact remains that the Constitutional Court has been much less preoccupied with procedural questions than has the Supreme Court of the United States.²¹⁹

I. Judicial Independence

With respect to the courts, the general separation of powers principle of Article 20(2) is reinforced by Article 92's flat statement that judicial authority is vested in judges of the various courts and by Article 97(1)'s unequivocal command that the judges be independent and subject only to law ("unabhängig und nur dem Gesetz unterworfen").²²⁰ The requirement that judges follow the law forbids them to play favorites or to impose their own personal preferences. The requirement of independence protects them against outside influence, especially by other branches of government.²²¹

²¹⁸ BVerfGE 53, 352 (358-61) (1980). See also BVerfGE 56, 37 (41-52) (1981) (tracing the privilege against self-incrimination to the provisions protecting human dignity (Art. 1(1)) and the right to development of personality (Art. 2(1))). For other examples, see Currie, *Lochner Abroad*, supra note 1, at 345 n.97, 351 n.147; Schmidt-Aßmann, *Art. 103(1)*, in 4 Maunz/Dürig, Para. Nr. 8. This approach has the advantage of permitting the Court to find constitutional requirements for administrative as well as judicial procedure—unlike that based on Art. 103(1), which is expressly directed to the courts. Art. 19(4), which guarantees judicial review of administrative action (see *infra* notes 273-82), is likewise understood to require procedures adequate to make such review effective. Its central focus, however, is on access to the courts; the quality of the judicial proceeding is principally governed by Art. 103(1). See Schmidt-Aßmann, *Art. 103(1)*, in 2 Maunz/Dürig, Para. Nr. 19-26, 7.

²¹⁹ Although it has been estimated that as many as 45% of all constitutional complaints before the Court have concerned the right to a hearing under Art. 103(1), the vast bulk of these complaints present no new question of law, and the Court functions essentially to correct plain violations of the established rules. See Schmidt-Aßmann, *Art. 103(1)*, in 4 Maunz/Dürig, Para. Nr. 157, 159.

²²⁰ In this context the term "Gesetz," despite its narrower alternative connotations, is understood to include all authoritative sources of positive law. See, e.g., Herzog, *Art. 97*, in 4 Maunz/Dürig, Para. Nr. 4-5; Gunther Barbey, *Der Status des Richters*, 3 HANDBUCH DES STAATSRICHTS 815, Para. Nr. 32. For the disputed significance of Art. 20(3)'s additional provision binding the judiciary to "Recht" as well as "Gesetz," see supra notes 53-69, discussing the *Soraya* case. For the argument that Art. 97(1) requires as a general rule that judges be trained in the law in order to be in a position to obey it, see Herzog, *Art. 92*, in 4 Maunz/Dürig, Para. Nr. 77-84.

²²¹ See Wilhelm Karl Geck, *Wahl and Status der Bundesverfassungsrichter*, 2 HANDBUCH DES STAATSRICHTS 697, Para. Nr. 29-30, 49-51.

Perhaps the most fundamental dimension of judicial independence is the organizational command of Article 20(2) that legislative, executive, and judicial functions be vested in distinct bodies (“besondere Organe”).²²² This not only means that no legislative or executive agency may exercise judicial functions as such;²²³ it also limits the ability of the same individual to serve simultaneously as both legislator or administrator and judge. Article 94(1) makes this incompatibility principle explicit as to members of the Constitutional Court;²²⁴ as to other judges the Court has found its core implicit in Article 20’s general requirement of separate judicial institutions. Emphasizing the obvious inherent conflicts of interest, for example, the Court held in 1959 that mayors, municipal administrators, and members of municipal councils could not constitutionally act as judges in criminal matters that might also affect their other official duties.²²⁵ Three years later, however, the Court gave notice that the incompatibility principle was not so absolute as one might have expected by permitting municipal officials to serve as judges in small-claims controversies between private parties in which the local government itself had no interest.²²⁶ Apart from the specific provision regarding

²²² See Herzog, *Art. 97*, in 4 Maunz/Dürig, Para. Nr. 10.

²²³ See BVerfGE 14, 56 (67) (1962) (deriving from Art. 20(2) the requirement that the courts be “sufficiently separate from administrative agencies in the organizational sense”); Karl August Bettermann, *Die rechtsprechende Gewalt*, 3 HANDBUCH DES STAATSRECHTS 775, Para. Nr. 5, adding that the Basic Law itself makes two exceptions to this rule: Art. 84(4) makes it the responsibility of the Bundesrat in the first instance to determine whether one of the Länder has failed in its duty to enforce federal law, and Art. 10(2) authorizes the legislature to substitute agencies of its own for courts in passing upon the legality of electronic and postal surveillance in national security cases. Added in 1968, the latter provision was upheld with some difficulty over the objection that it contradicted fundamental principles of Art. 20, which Art. 79(3) protects even against constitutional amendment. See *infra* notes 316-17. See also GRUNDGESETZ [GG] [Constitution] art. 41(1) (F.R.G.), noted in text *supra* notes 28-29, which in order to safeguard the independence of the Bundestag makes it basically the judge of the credentials of its own members.

²²⁴ “They may not be members of the Bundestag, the Bundesrat, the Federal Government, nor of any of the corresponding organs of a Land.” The universal understanding that this is only an incompatibility and not an ineligibility provision is reflected in the statute establishing the Constitutional Court, which after repeating the language of Art. 94(1) adds that the Justices cease to be members of the named governmental bodies upon their appointment to the Court. BVerfGG § 3(3). See also § 3(4) of the same statute, which extends the incompatibility principle further by barring the Justices from any professional activity except that of law professor at a German university.

²²⁵ BVerfGE 10, 200 (216-18) (1959). See also BVerfGE 18, 241 (255-56) (1964) (holding for similar reasons that members of the executive or policymaking branches of a professional association could not serve as judges in cases involving complaints of unprofessional conduct).

²²⁶ BVerfGE 14, 56 (68-69) (1962). Thus in the result the incompatibility doctrine the Constitutional Court has derived from the separation of powers is somewhat reminiscent of the limitations our Supreme Court has found in the due process clause in such cases as *Tumey v. Ohio*, 273 U.S. 510 (1927).

the Constitutional Court, the constitutional incompatibility doctrine thus appears to be one largely of neutrality rather than of separation.²²⁷

No less obvious is the conclusion that Article 97(1) affords the judges what the Germans call substantive (“sachliche”) independence: They are subject to no one else’s orders.²²⁸ Article 101(1) contains two further provisions designed to preclude either the legislature or the executive from affecting judicial decisions by determining which judges will hear a particular case. Ad hoc courts (“Ausnahmegerichte”) are flatly prohibited,²²⁹ and no one may be removed from the jurisdiction, of his lawful judge (“seinem gesetzlichen Richter entzogen werden”). The latter provision, though hardly self-explanatory, requires among other things that both jurisdiction and the assignment of judges within a multimember tribunal be fixed in advance as nearly as practicable—all in the interest of reducing the risk of outside influence on judicial decisions.²³⁰

²²⁷ *But see* Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 47, 49 (arguing that Art. 20(2) also forbids members of the Bundestag or of the Cabinet to serve simultaneously as judges). *See also* Deutsches Richterergesetz vom 8. Sept. 1961, BGBI I, S. 1665 [DRiG], § 4, which subjects judges to a broad statutory incompatibility rule.

On the related question of the extent to which judges may be entrusted with nonjudicial functions the Constitutional Court has been somewhat equivocal. In 1971 it held that an authorization to examine witnesses in conjunction with an administrative investigation did not compromise judicial independence precisely because in so doing the judge was not engaged in adjudication. BVerfGE 31, 43 (45-46) (1971). *See also* Wassermann, *Art. 92*, in 2 AK-GG, Para. Nr. 39 (concluding that the Basic Law does not forbid giving judges nonjudicial duties). Subsequent decisions, however, have upheld the grant of such arguably extracurricular functions as the correction of land registers only after concluding that they were closely related to some traditional judicial function. BVerfGE 76, 100 (106) (1987); *see also* BVerfGE 64, 175 (179-80) (1983) (computations incident to financial arrangements on divorce). For American analogies, *contrast* Hayburn’s Case, 2 U.S. 409, 410-14 n. (1) (1792), where five Justices on circuit convincingly concluded that federal judges as such could not exercise nonjudicial functions, with the troublesome decision in *Mistretta v. United States*, 488 U.S. 361 (1989) (permitting judges to serve as members of a sentencing commission with substantive rulemaking powers).

²²⁸ *See* BVerfGE 3, 213 (224) (1953); Herzog, *Art. 97*, in 4 Maunz/Dürig, Para. Nr. 9, 22-24; Geck, *supra* note 221, Para. Nr. 49.

²²⁹ As Art. 101(2) acknowledges, this provision does not preclude the creation of specialized courts for such subjects as labor law; Art. 95 expressly contemplates them. What Art. 101 requires is that their jurisdiction be specified by statute, in general terms, and in advance. *See* BVerfGE 3, 213 (223) (1953); Christoph Degenhart, *Gerichtsorganisation*, 3 HANDBUCH DES STAATSRICHTS 859, Para. Nr. 27.

²³⁰ *See* BVerfGE 4, 412 (416) (1956) (adding that the prohibition of extraordinary courts was designed to prevent evasion of this provision); BVerfGE 17, 294 (298-302) (1964); Degenhart, *supra* note 229, Para. Nr. 17-24. Art. 101(1) serves also as the procedural tool enabling individual litigants to challenge the status of those who pass upon their cases; for a judge who does not satisfy all the constitutional requirements for the exercise of judicial authority cannot be the “lawful judge” to whom every litigant is entitled. *See* BVerfGE 10, 200 (213) (1959); Barbey, *supra* note 220, Para. Nr. 62.

To make the guarantee of substantive independence a reality, however, the judges must be personally independent as well.²³¹ Other provisions of the Basic Law help to specify just what this means.

Not surprisingly, the judges are not free from political influence with respect to their appointment. In a country in which all power emanates from the people, the judges like other public servants require democratic legitimation.²³² In recognition of the political significance of the Constitutional Court's decisions, half of its members are chosen by the Bundestag and half by the Bundesrat, which represents the state governments.²³³ Judges of the five supreme courts are selected by the federal minister with responsibility over the subject matter in conjunction with a committee ("Richterwahlausschuß") on which the respective state ministers and the Bundestag have an equal voice.²³⁴ The appointment of state-court judges is regulated by the Lander, subject to more or less general principles that may be laid down in federal framework legislation (Rahmengesetze)²³⁵ and to Article 28's

²³¹ See Herzog, *Art. 97*, in 4 Maunz/Dürig, Para. Nr. 11, 47; Geck, *supra* note 221, Para. Nr. 50; Rudolf Wassermann, *Art. 97*, in 2 AK-GG, Para. Nr. 15: "The guarantee of freedom from instructions would be ineffective if the judge had to fear dismissal or transfer in the event of an displeasing decision."

²³² See GRUNDGESETZ [GG] [Constitution] art. 20(1) (F.R.G.); Geck, *supra* note 221, Para. Nr. 6; Wassermann, *Art. 92*, in 2 AK-GG, Para. Nr. 13a-14. Thus the Constitutional Court has held that Art. 92, which vests judicial power in courts of the Bund and of the Lander, permits municipalities or public corporations to exercise such power only if the state itself has a decisive say in selecting the judges. See BVerfGE 10, 200 (214-15) (1959) (holding that municipal courts were Lander courts within the meaning of Art. 92); BVerfGE 18, 241 (253-54) (1964) (rejecting objections in principle to the exercise of judicial powers by a medical association organized as a corporation under public law but invalidating a provision for judicial selection by members of that body).

²³³ GRUNDGESETZ [GG] [Constitution] art. 94(1) (F.R.G.). The implementing statute provides for indirect election of those members chosen by the Bundestag, evidently in the interest of efficiency. The constitutionality of this departure has been questioned on the ground that election by the Bundestag itself would provide a greater measure of democratic legitimacy. The statute also requires a two-thirds vote for approval of each appointment, in the interest of assuring broad popular support for the institution. Any implication that Justices were appointed to further the policies of a particular political majority, it is argued, could impair the public confidence, on which the Court's effectiveness depends. In practice the two major parties (SPD and CDU/CSU) have agreed to divide the seats equally, reserving one of those assigned to whichever party happens to be in the Cabinet for its inevitable coalition partner, the FDP. One of the consequences has been that most of the Justices have been either members of the major parties or very close to them—a situation which has also been called detrimental to the image of a disinterested Court. See Geck, *supra* note 221, Para. Nr. 7-20.

²³⁴ GRUNDGESETZ [GG] [Constitution] art. 95(2) (F.R.G.). Both the federal minister and the committee must agree on the choice. See Maunz, *Art. 95*, in 4 Maunz/Dürig, Para. Nr. 63.

²³⁵ GRUNDGESETZ [GG] [Constitution] art. 98(3) (F.R.G.). Herzog, *Art. 98*, in 4 Maunz/Dürig, Para. Nr. 1-2, 13-14, 34-40 (also noting that tradition of ministerial appointment of Lander judges and Art. 98(4)'s

requirement that they respect the principles of “republican, democratic, and social government based on the rule of law.”

Once appointed, however, the judges enjoy a significant measure of job security. In contrast to federal judges in the United States, who can be removed under extraordinary but unreviewable circumstances by the Senate,²³⁶ most German judges can be removed, suspended, transferred, or retired during their term of office only pursuant to the decision of other judges.²³⁷ By confining this protection to judges with full-time regular appointments (“die hauptamtlich und planmäßig endgültig angestellten Richter”), however, Article 97(2) implies that not all judges enjoy this protection. Indeed the perceived need for training positions, for nonlegal expertise, and for community participation has generated a longstanding assortment of probationary, part-time, and lay judges who fall outside the express limitations on premature removal.²³⁸ Acutely aware that abuse of this practice might undermine Article 97(1)’s more comprehensive requirement of substantive independence, the Constitutional Court has insisted that the use of nontenured

explicit permission for participation by a committee such as those which help to select most federal judges).

²³⁶ U.S. Const. Art. I, §§ 2, 3; Art. II, § 4.

²³⁷ GRUNDGESETZ [GG] [Constitution] art. 97(2) (F.R.G.) (“nur kraft richterlicher Entscheidung”). Thus even as it held that municipal officials could constitutionally sit as judges in cases involving small claims between private parties (*see supra* notes 225-26), the Constitutional Court found it contrary to Art. 97(2) to provide that they lost their position as judges when they left the local government, because this arrangement effectively enabled the municipality to fire the judge. BVerfGE 14, 56 (71-72) (1962). Further provisions for removal on the basis of criminal conviction or after a formal disciplinary proceeding were upheld since in both cases removal depended upon judicial decision. *Id.* at 71. *See also* BVerfGE 17, 252 (259-62) (1964) (holding Art. 97(2) offended by a selective assignment of cases that left a judge with essentially nothing to do even though he had not been formally transferred, retired, suspended, or removed). Art. 97(2)’s further provision permitting transfer or discharge of judges upon restructuring of the court system itself (“Veränderung der Gerichte oder ihrer Bezirke”) has an obvious practical explanation but has been criticized as a potentially significant gap in the guarantee of an independent judiciary. *See Herzog, Art. 97, in 4 Maunz/Dürig, Para. Nr. 53-54* (insisting that courts may not be abolished or otherwise altered in order to get rid of individual judges or influence a particular case). *Cf.* the Jeffersonian Judiciary Act of 1802, 2 Stat. 132, which is widely understood to have abolished the Circuit Courts created just a year before in order to put their Federalist judges out of a job; *Stuart v. Laird*, 5 U.S. 299 (1803), where the Supreme Court ducked the troublesome constitutional question; CURRIE, THE FIRST HUNDRED YEARS, *supra* note 15, at 74-75.

²³⁸ *See Barbey, supra* note 220, Para. Nr. 41-48; *Herzog, Art. 97, in 4 Maunz/Dürig, Para. Nr. 49-52* (termining the lack of any requirement that judges be given regular appointments one of the “open flanks” of the independent judiciary). Lay judges in administrative and criminal cases (called “Schöffen” in the latter case) serve a purpose somewhat analogous to that of the Anglo-American jury. *Cf.* GERHARD CASPER, THE JUDICIARY ACT OF 1789 AND JUDICIAL INDEPENDENCE (forthcoming).

judges be kept to a minimum and that absent extraordinary circumstances not more than one probationary judge at a time pass judgment on any particular case.²³⁹

In respect to the grounds on which judges may be removed or retired, the German Constitution is plainly less protective. The permissible grounds are not specified in the Basic Law itself. Article 97(2) requires that they be determined by statute, but they may also be altered by statute—subject once again, one assumes, to the fundamental requirement that they not be such as to impair the independence of the judge.²⁴⁰

Somewhat less satisfactory in terms of judicial independence are the provisions respecting the term of office itself. Unlike Article III of our Constitution,²⁴¹ the Basic Law does not prescribe life tenure expressly, and Article 97(2)'s explicit provision authorizing the legislature to fix a retirement age for those judges who are appointed for life forbids the conclusion that it does so by implication.²⁴² The current statute provides that members of the Constitutional Court—unlike most federal judges, who serve until they reach the age of 65²⁴³—be appointed for a term

²³⁹ See BVerfGE 14, 56 (70) (1962); BVerfGE 14, 156 (161-73) (1962) (invoking both GRUNDGESETZ [GG] [Constitution] art. 97(2) (F.R.G.) and GRUNDGESETZ [GG] [Constitution] art. 92 (F.R.G.)). See Barbey, *supra* note 220, Para. Nr. 53-55; Herzog, *Art. 97, in 4 Maunz/ Dürig*, Para. Nr. 62, 67-69. In conformity with the Constitutional Court's conclusion that most part-time and lay judges must partake of the protections that Art. 97(2) expressly affords their regular colleagues, the statute defining the status of judges (DRiG, § 44(2)) provides that. (unlike probationary judges under § 22) they can be removed only pursuant to judicial decision. See also § 29 of the same statute, which makes the Court's presumption against multiple probationary judges an absolute rule; Wassermann, *Art. 97, in 2 AK-GG*, Para. Nr. 68 (branding the whole idea of judges who are less than fully independent questionable ("fragwürdig")).

²⁴⁰ GRUNDGESETZ [GG] [Constitution] art. 97(2) (F.R.G.) ("nur aus Gründen und unter den Formen, welche die Gesetze bestimmen"). The statutes provide for retirement or removal on the basis of incapacity as well as misconduct. DRiG, §§ 21, 24, 34; BVerfGG, § 105. See Geck, *supra* note 221, Para. Nr. 24 (adding that the statutory procedure is so structured as to pose no threat to judicial independence and that (as of 1987) no member of the Constitutional Court had ever been subjected to these provisions); Herzog, *Art. 97, in 4 Maunz/Dürig*, Para. Nr. 58, 61 (concluding that the Constitutional Court has established a general principle of personal independence going beyond the specific terms of Art. 97(2)). Art. 98(2) additionally authorizes the Constitutional Court, on application of the Bundestag and by a two thirds vote, to remove any federal judge for infringement of the Basic Law or "the constitutional order of a Land." See Gerd Roellecke, *Aufgabe und Stellung des Bundesverfassungsgerichts in der Gerichtsbarkeit*, 2 HANDBUCH DES STAATSRICHTS 683, Para. Nr. (assimilating this provision to others designed to protect against subversion of the basic constitutional system and adding that it had never yet been invoked).

²⁴¹ "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior." U.S. Const., Art. III, § 1.

²⁴² See BVerfGE 3, 213 (224) (1953); Herzog, *Art. 97, in 4 Maunz/Dürig*, Para. Nr. 55. 56.

²⁴³ See DRiG, § 48 (as amended Dec. 12, 1985, BGBI. I, S. 2226). Länder judges are subject to similar provisions. See Herzog, *Art. 97, in 4 Maunz/Dürig*, Para. Nr. 59. The mandatory retirement provision seems well designed to avoid the embarrassment of members who have passed their peak without posing any serious threat to judicial independence. For examples of difficulties experienced by our

of twelve years, with no possibility of reappointment.²⁴⁴ The abbreviated term is designed (at some cost in terms of lost experience) to avoid too great a gap between the Court and the country,²⁴⁵ the ban on a second appointment to eliminate the incentive to curry popular favor.²⁴⁶ If these prescriptions were written into the Constitution, they might be entirely adequate; there is more than one way to achieve judicial autonomy. Yet the legislature may revise the criteria at any time, and it has done so more than once. To shorten the terms much further, or to permit reappointment, as was done at one time,²⁴⁷ might significantly impair the independence of the judges.²⁴⁸

Nor does the Basic Law expressly regulate either the number of judges or the amount of their compensation. Hamilton's basic insight that "a power over a man's subsistence amounts to a power over his will" persuaded our Framers to forbid diminution of judicial salaries;²⁴⁹ Franklin Roosevelt's attempt to pack the Supreme Court with Justices of his own persuasion graphically exposed the dangers of their failure to fix their number.²⁵⁰ The Basic Law gives the legislatures authority over both the composition of the courts and the legal status of their judges.²⁵¹

Supreme Court for want of a similar requirement, *see* CURRIE, THE FIRST HUNDRED YEARS, *supra* note 15, at 320 n. 250; CURRIE, THE SECOND CENTURY, *supra* note 15, at 3.

²⁴⁴ BVerfGG § 4(1), (2), ¶ (3) of the same section adds that Justices must retire at age 68 even if their 12 years have not expired.

²⁴⁵ *Cf.* the New Deal crisis of the 1930's in the United States, CURRIE, THE SECOND CENTURY, *supra* note 15, at ch. 7.

²⁴⁶ For explication and criticism of this reasoning, *see* Geck, *supra* note 221, Para. Nr. 21-22 (noting that the age limit of 68 years provides significant protection against obsolescence and arguing that decisions may be influenced by the desire to obtain alternative employment at the end of the 12-year term).

²⁴⁷ Originally those Justices appointed from the various Supreme Courts served for life, other Justices for eight years subject to reappointment. *See* Franz Klein, § 4, in BUNDESVERFASSUNGSGERICHTSGESETZ KOMMENTAR Para. Nr. 1 [hereafter cited as Maunz/-Schmidt-Bleibtreu].

²⁴⁸ *See id.*, Para. Nr. 3; BVerfGE 14, 56 (70-71) (1962) and BVerfGE 18, 241 (255) (1964), finding terms of six and four years respectively "not so short as seriously to impair the personal independence" of judges not covered by the specific provisions of Art. 97(2); Herzog, *Art. 97*, in 4 Maunz/Dürig, Para. Nr. 66 (arguing that for professional judges eight years should be the constitutional minimum).

²⁴⁹ U.S. Const. Art. III, § 1; *see* THE FEDERALIST, No. 79.

²⁵⁰ *See* CURRIE, THE SECOND CENTURY, *supra* note 15, at 235-36.

²⁵¹ For the composition of ordinary federal and state courts, *see* GRUNDGESETZ [GG] [Constitution] art. 74 nr. 1 (F.R.G.); for that of the Constitutional Court, *see* GRUNDGESETZ [GG] [Constitution] art. 94(2) (F.R.G.). Article 98(1) authorizes federal regulation of the status of federal judges, Art. 98(3) state regulation of that of state judges subject to federal framework legislation and to the concurrent federal legislative authority over salaries granted by Art. 74a.

Like our own Congress, the German legislature has from time to time altered the number of Justices, presumably on neutral grounds.²⁵² Decisions of the Constitutional Court, however, have made clear that the general guarantee of judicial independence places strict limits on legislative power to tamper with judicial salaries. Compensation may not be left to executive discretion, lest it be manipulated to influence judicial decisions.²⁵³ Most significantly, the judge's salary must be adequate to assure an appropriate standard of living,²⁵⁴ though reductions are not per se prohibited.²⁵⁵ These decisions seem to afford a sound basis for predicting that the Court would be equally vigilant to invoke the general guarantee of Article 97 against any effort to undermine judicial independence by such devices as altering the term or number of Justices or the grounds for their removal.

Finally, judicial autonomy cannot be sidestepped in Germany by the creation of "legislative courts" or quasi-judicial administrative agencies, which our Supreme Court has so startlingly allowed in the teeth of Article III.²⁵⁶ The basic German provision (Art. 92) is similar on its face: "The judicial power shall be vested in the judges."²⁵⁷ It is common ground that, in light of its unmistakable purpose of assuring an independent arbiter, this provision means that judicial power may be exercised *only* by judges.²⁵⁸ Just what the judicial power in this context means, however, is disputed.

²⁵² See Geck, *supra* note 221, Para. Nr. 4.

²⁵³ See BVerfGE 12, 81 (88) (1961) (basing this conclusion on Art. 33(5)'s general requirement of respect for traditional principles of public service); BVerfGE 26, 79 (93-94) (1969) (explaining and following the earlier decision as an interpretation of the guarantee of judicial independence in Art. 97(1)).

²⁵⁴ See BVerfGE 12, 81 (88) (1961) (attributing to Art. 33(5)'s traditional public-service principles the requirement of a firm and appropriate salary (eine "angemessene—feste—Besoldung")); BVerfGE 26, 141 (157-58) (1969) (finding challenged judicial salaries consistent with Art. 97 because they were not so plainly insufficient as to threaten judicial independence). Indeed the Court has gone so far as to hold that traditional principles under Art. 33(5) require that judges be given a suitably dignified title as well. BVerfGE 38, 1 (12-14) (1974).

²⁵⁵ See BVerfGE 5, 372 (393) (1981).

²⁵⁶ See generally Currie, *Bankruptcy Courts and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1983). Recent decisions upholding such tribunals include *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), and *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833 (1986).

²⁵⁷ Cf. U.S. Const. Art. III, § 1: "The judicial power of the 'United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

²⁵⁸ See, e.g., BVerfGE 22, 49 (73-75) (1967); Bettermann, *supra* note 223, Para. Nr. 4; Herzog, *Art. 92*, in 4 *Maunz/Dürig*, Para. Nr. 42.

At a minimum, Article 92 has been described as reaffirming that specific provisions such as Article 104(2), which requires that a “judge” pass upon the legality and length of incarceration, mean exactly what they say.²⁵⁹ The Constitutional Court, however, has held that Article 92 has an independent scope of its own. In an important 1967 decision the Court concluded that this provision reserved to the courts alone the decision of “at least the core of those duties traditionally entrusted” to their jurisdiction—specifically including the imposition of criminal fines (“Geldstrafen”), which fell outside the specific command of Article 104(2).²⁶⁰

At the same time, however, the Court made clear that not everything the courts did was an exercise of “judicial power” reserved by Article 92 to the judges alone.²⁶¹ What, made criminal fines such a serious matter as to require that they be entrusted from the start to independent judges was above all the stigma of moral blameworthiness (“ethischer Schuldvorwurf”) attached to them; once the criminal label was removed, administrative agencies could be empowered to impose money penalties (“Geldbußen”) for traffic violations and other civil offenses (“Ordnungswidrigkeiten”) not generally perceived to involve moral turpitude,²⁶² and similarly to suspend driving privileges temporarily in order to bring home to particular offenders the importance of conforming to the law in the future.²⁶³

Thus, like our Supreme Court, the Constitutional Court has divided the business of the courts into that which is inherently judicial and that which may be entrusted either to judges or to administrators at legislative discretion.²⁶⁴ Whatever may be the case in this country,²⁶⁵ however, the inalienable core of judicial power in the Federal Republic is not limited to serious criminal cases. Not only does it embrace a wide panoply of matters specifically assigned to the courts by other provisions of

²⁵⁹ *E.g.*, *id.*, Herzog, *Art. 92*, in 4 Maunz/Dürig, Para. Nr. 43-46. *See also* BVerfGE 22, 49 (76-77) (1967).

²⁶⁰ BVerfGE 22, 49 (77-81) (1967).

²⁶¹ *See id.* at 78.

²⁶² BVerfGE 27, 18 (28-32) (1969).

²⁶³ BVerfGE 27, 36 (40-44) (1969). For criticism of these criteria as too lenient, *see* Bettermann, *supra* note 223, Para. Nr. 20-22, as too strict, *see* Herzog, *Art. 92*, in 4 Maunz/Dürig, Para. Nr. 42-50 (finding it perverse to hold that only a judge could impose a trifling fine on a professional driver while permitting a bureaucrat to suspend his license and thus to “annihilate his civil existence”).

²⁶⁴ *Cf.* Murray’s Lessee v. Hoboken Land & Improv. Co., 59 U.S. 272 (1856); *Ex parte* Bakelite Corp., 279 U.S. 438 (1929).

²⁶⁵ *See supra* note 256.

the Basic Law;²⁶⁶ the Court has twice flatly stated in dictum that it also includes the entire field of civil law (“die bürgerliche Rechtspflege”).²⁶⁷

Moreover, even in those cases that may be decided by an administrative agency in the first instance, the litigant has a constitutional right to unrestricted judicial review. “Should any person’s rights be violated by public authority,” says Article 19(4), “recourse to the courts shall be open to him.”²⁶⁸ The Constitutional Court has made clear both that this provision guarantees access to judges who satisfy all the criteria of judicial independence prescribed by the Basic Law²⁶⁹ and that the reviewing court is free to take new evidence and to reexamine de novo any administrative conclusions of fact or of law.²⁷⁰ Under these circumstances the requirement of initial resort to the administration is not likely seriously to impair the right to an ultimate decision by an independent judge.²⁷¹ Thus in this respect too the Basic Law is more protective of the right to an independent adjudication than is the U.S. Constitution as interpreted by the Supreme Court.²⁷²

In short, although the Basic Law is not as explicit as one might wish with respect to the number and terms of the Justices or the grounds for their premature removal, the unequivocal guarantee that judicial power be wielded by independent judges

²⁶⁶ See BVerfGE 22, 49, (76-77) (1967).

²⁶⁷ BVerfGE 27, 18 (28) (1969). In support of this conclusion, see Bettermann, *supra* note 223, Para. Nr. 30-46 (arguing that applying the law to particular facts is an executive function only in matters to which the government is itself a party, and that therefore only a neutral judge can resolve disputes between private parties). Cf. the “public right” distinction embraced by the Supreme Court in *Ex parte Bakelite Corp.*, *supra* note 264, and watered down by *Crowell v. Benson*, 285 U.S. 22 (1932), and later decisions cited in *supra* note 256. This is not to deny that in Germany, as elsewhere, private parties may agree to resolve disputes by arbitration or that private associations may discipline their own members. The best explanation for such instances of private adjudication seems to be consent, cf. *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833 (1986), and even in such cases the Basic Law is said to require judicial review at least to prevent gross abuses (Mißbrauchskontrolle) if not also to ensure the legality (Rechtmäßigkeit) of the decision. See Herzog, *Art. 92, in 4 Maunz/Dürig*, Para. Nr. 145-69; Bettermann, *supra* note 223, Para. Nr. 77-79.

²⁶⁸ “Wird jemand durch die öffentliche Gewalt in seinen Rechten verletzt, so steht ihm der Rechtsweg offen.”

²⁶⁹ E.g., BVerfGE 22, 49 (77) (1967); see Bettermann, *supra* note 223, Para. Nr. 61.

²⁷⁰ See, e.g., BVerfGE 27, 18 (33-34) (1969); BVerfGE 27, 36 (43) (1967); Bettermann, *supra* note 223, Para. Nr. 50; Herzog, *Art. 92, in 4 Maunz/Dürig*, Para. Nr. 67, 70.

²⁷¹ Cf. *United States v. Raddatz*, 447 U.S. 667 (1980).

²⁷² See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932) (permitting limited judicial review of most factual matters decided by an administrative agency in workers’ compensation cases).

and the express provision that they can be displaced only by other judges may be construed to afford more comprehensive protection against attacks by other branches of government than the Constitution of the United States.

II. Judicial Review

The Basic Law does not leave judicial review to implication. As already noted, Article 19(4) guarantees judicial review of administrative action to anyone whose rights are infringed by public authority.²⁷³ In contrast, despite Chief Justice Marshall's famous dictum about the importance of the right to redress,²⁷⁴ the Supreme Court has never held that our Constitution requires judicial review of administrative action as a general matter.²⁷⁵ Moreover, it follows from the language and purpose of Article 19(4) that the reviewing court must determine both the law and the facts *de novo*; for otherwise it could not determine whether the complainant's rights had been denied.²⁷⁶

Indeed, in suggesting on several early occasions that the courts must also exercise independent judgment in applying the law to the facts²⁷⁷ the Constitutional Court

²⁷³ As the constitutional term "rights" suggests, it is necessary but not sufficient that the complainant be adversely affected by the action of which he complains; he must also be within a class of persons the law he invokes was designed to protect. See Schmidt-Aßmann, *Art. 19(4)*, in 2 Maunz/Dürig, Para. Nr. 118-20, 136-42. Cf. *Association of Data Processing Organizations v. Camp*, 397 U.S. 150 (1970). The text of Art. 19(4) also requires a present rather than a future invasion of right, but in some cases a threat of future action constitutes a present injury. See Schmidt-Aßmann, *Art. 19(4)*, in 2 Maunz/Dürig, Para. Nr. 164, 278-79. Cf. the treatment of this question in the context of the constitutional complaint, *infra* note 285.

²⁷⁴ "The very essence of civil liberty," said Marshall, "certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

²⁷⁵ On occasion the Court has held that in particular contexts due process requires judicial process, e.g., *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936), and it once held that Article III required *de novo* review of jurisdictional facts decided by an administrative agency in a workers' compensation case. *Crowell v. Benson*, 285 U.S. 22 (1932). Beyond this, *Crowell* implied that Article III required review of questions of law decided by quasi-judicial agencies and of the reasonableness—not the correctness—of their factual findings. See generally LOUIS JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 381-89 (1965).

²⁷⁶ E.g., BVerfGE 15, 275 (283) (1963); BVerfGE 61, 82 (111) (1982) (quoted in *infra* note 281). Contrast the limited judicial review of fact findings typically afforded in the United States by the formula "supported by substantial evidence on the record as a whole." E.g., Administrative Procedure Act, § 10(e), 5 U.S.C. § 706(2)(E). In support of the constitutionality of this limited review in most cases, see *Crowell v. Benson*, *supra* note 275.

²⁷⁷ E.g., BVerfGE 8, 274 (326) (1958) (*Preisgesetz*): "Der durch [Art. 19 Abs. 4 GG] erteilte Rechtsschutzauftrag kann nur dann verwirklicht werden, wenn die Anwendung der Norm durch die...

may have gone further in this direction than the Basic Law warranted. For the use of imprecise statutory language (“unbestimmte Rechtsbegriffe”) may indicate a legislative desire to leave the details of regulatory policy to administrative discretion,²⁷⁸ and Article 19(4) seems to say nothing about the breadth of discretion that may be conferred on an executive agency.²⁷⁹ In providing a remedy for infringement of legal rights it helps to effectuate Article 20(3)’s command that the administration follow the law, and the law ends where discretion begins.²⁸⁰ More recent statements by the Court appear to acknowledge this limitation.²⁸¹

Despite its apparently all-encompassing reference to persons whose rights are infringed by public authority (“die öffentliche Gewalt”), Article 19(4) has been held to provide redress essentially only to victims of *executive* action.²⁸² Ever since the beginning, however, the statutes have authorized anyone whose constitutional rights are invaded by *any* branch of public authority to file a constitutional complaint (“Verfassungsbeschwerde”) with the Constitutional Court,²⁸³ and since

Exekutive von den Gerichten nachprüfbar ist.” See also BVerfGE 11, 168 (192) (1960) (suggesting that a statutory provision attempting to limit judicial review of such questions by placing them within agency discretion would raise a serious constitutional issue).

²⁷⁸ See *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

²⁷⁹ For limits on the delegation of lawmaking authority, see *supra* notes 88-131, discussing GRUNDGESETZ [GG] [Constitution] art. 80(1) (F.R.G.) and related doctrines.

²⁸⁰ See Bettermann, *Die Rechtsweggarantie des Art. 19 Abs. 4 GG in der Rechtsprechung des BVerfGE*, 96 ARCHIV DES ÖFFENTLICHEN RECHTS [AöR] 528, 543 (1971). GRUNDGESETZ [GG] [Constitution] Art. 19(4) “says nothing about the existence, content, or extent of the rights against whose infringement it promises judicial protection. It does not afford them; it assumes them.” See also Schmidt-Aßmann, *Art. 19(4)*, in 2 MAUNZ/DÜRIG, Para. Nr. 78; FRITZ SCHARPF, DIE POLITISCHEN KOSTEN DES RECHTSSTAATS 38-52 (1970) (criticizing the intrusiveness of German review in this regard in light of practice in the United States).

²⁸¹ See, e.g., BVerfGE 61, 82 (111) (1982), reaffirming that Art. 19(4) “basically precludes binding the judiciary to accept findings of fact or conclusions of law made by others branches of government” but “[w]ithout prejudice to areas of [administrative] latitude for the exercise of creativity, judgment, or discretion conferred by law [unbeschadet normativ eröffneter Gestaltungs-, Ermessens- und Beurteilungsspielräume.” The highest administrative court (Bundesverwaltungsgericht) has been even more explicit: “If two or more lawful decisions are possible, Art. 19(4) does not require that the choice among them be made on the ultimate responsibility of the court.” BVerfGE 39, 197 (205) (1971). See also Schmidt-Aßmann, *Art. 19(4)*, in 2 MAUNZ/DÜRIG, Para. Nr. 184-85.

²⁸² See BVerfGE 15, 275 (280) (1963) (“Art. 19(4) provides protection by the judges, not against the judges”); BVerfGE 24, 33 (49-51) (1968) (arguing among other things that the authors of the Basic Law would have used more explicit language if they had meant to overturn the traditional rule against direct challenges to legislation). *Administration* of the legislature or the courts, however, is subject to Art. 19(4); and the exclusion of statutes from that provision remains disputed. See Schmidt-Aßmann, *Art. 19(4)*, in 2 MAUNZ/DÜRIG, Para. Nr. 91, 93, 102; Wassermann, *Art. 19(4)*, in 1 AK-GG, Para. Nr. 37.

²⁸³ BVerfGE of Dec. 3, 1951, § 90 ff, BGBI. I, S. 243.

1969 this remedy has been anchored in the Basic Law itself (Article 93 I Nr. 4a).²⁸⁴ Though the language of this provision is no broader than that of Article 19(4), it was plainly intended to provide a remedy for unconstitutional legislative and judicial as well as administrative action, and it has consistently been so applied.²⁸⁵

There is no comparable provision in the U.S. Constitution. Even the incidental power of judicial review announced in *Marbury v. Madison*²⁸⁶ ensures only that the courts may not be used to help carry out unconstitutional laws; it provides no

²⁸⁴ As the Basic Law contemplates, the implementing statute requires in most cases that ordinary legal remedies be exhausted before a constitutional complaint is filed, and it permits the Court to decline jurisdiction over complaints that reveal neither a novel constitutional issue nor serious harm to the complainant. BVerfGE §§ 90(2), 93c. Although the constitutional complaint extends only to the vindication of certain specified rights (most particularly those contained in the catalog of fundamental rights in Part I of the Basic Law), those rights include the right to free development of personality, which as the Constitutional Court interprets it includes anything the individual might wish to do and which may be restricted only by a law satisfying all substantive and procedural requirements of the Basic Law. BVerfGE 6, 32, 41 (1957) (Elfes). Thus “every burden imposed on the citizen by the state has become the invasion of a fundamental right,” and thus the affected citizen may invoke the interests of third parties (Judgment of Jan. 28, 1992, Case No. 1 BvR 1025/82, 1992 NJW 964, 965 (not yet officially reported)) and may raise questions of federalism and separation of powers as well. See KLAUS SCHLAICH, DAS BUNDESVERFASSUNGSGERICHT 10-11, 107-08 (1985); Wolfgang Löwer, *Zuständigkeiten und Verfahren des Bundesverfassungsgerichts*, 2 HANDBUCH DES STAATSRICHTS 737, Para. Nr. 153. Nor is standing invariably restricted to those directly regulated by the challenged action, as it may infringe the rights of others as well. Thus customers have been permitted to argue that a law limiting the hours when stores could be open denied them their constitutional right to make purchases (BVerfGE 13, 230 (233) (1961)), and businesses to raise equal-protection objections to tax preferences granted their competitors (BVerfGE 18, 1 (11-14) (1964)).

²⁸⁵ See, e.g., BVerfGE 1, 97 (100-04) (1951) (complaint attacking statute); BVerfGE 7, 198 (203-12) (1958) (complaint attacking judicial decision); Maunz/Schmidt-Bleibtreu, § 90, Para. Nr. 68. Because a complaint is permissible only if the complainant is presently affected by the official action of which he complains, however, ordinarily no complaint may be filed directly against a statute whose impact on the complainant depends upon some further administrative act; in such a case no right is infringed until that act is taken. BVerfGE 1, 97 (102-03) (1951). Appropriately, however, the Court has recognized that it would be intolerable to require that one violate a criminal statute in order to test its validity; in such a case the enactment of the law itself is held to violate the complainant’s rights. See BVerfGE 13, 225 (227) (1961) (entertaining a pharmacist’s complaint against a statute that limited his hours of operation); BVerfGE 46, 246 (255-56) (1977) (entertaining a complaint by producers and sellers of margarine against a law regulating the composition of their product: “Under these circumstances the complainants cannot be expected to take the risk of violating the law”). Cf. *Steffel v. Thompson*, 415 U.S. 452 n.18 (1974): “The court, in effect, by refusing an injunction, informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it.” At the other end of the time scale, the Constitutional Court, like the Supreme Court, is willing to relax ordinary mootness principles in order to assure judicial review of measures whose effect on any individual is normally so fleeting that most cases would otherwise be mooted before a decision could be reached. See, e.g., BVerfGE 49, 24 (52) (1978) (entertaining a complaint against the temporary isolation of imprisoned terrorists after the challenged order had expired); BVerfGE 81, 138 (140-41) (1989). Cf. *Roe v. Wade*, 410 U.S. 113 (1973).

²⁸⁶ 5 U.S. 137 (1803).

guarantee of judicial intervention to protect the citizen from unconstitutional actions taken outside of the courts. Incidental review of the constitutionality of statutes sought to be applied in ordinary litigation in Germany (“konkrete Normenkontrolle”) is assured by Article 100(1), which requires that other tribunals refer such questions to the Constitutional Court if they believe a statute invalid.²⁸⁷ The Constitutional Court’s monopoly of the power to declare statutes unconstitutional expresses respect for the dignity of the legislature and adds legitimacy to the judicial determination; it also serves to promote uniformity and to reduce the risk of an erroneous or uninformed decision.²⁸⁸

The constitutional provisions for constitutional and administrative complaints, as noted, go further. Moreover, they are subject to no implicit limitations based on sovereign immunity, which would contradict their assurance of a remedy in whole or in part.²⁸⁹ On the contrary, Article 34 goes so far as to guarantee that the courts will be open even to claims for money damages against the state itself for injuries caused by violations of official duties²⁹⁰—a type of claim that lies at the core of

²⁸⁷ Incidental judicial review had been found implicit in the Weimar Constitution on grounds reminiscent of *Marbury v. Madison*. 111 RGZ 320 (1925).

²⁸⁸ See BVerfGE 1, 184 (197-201) (1952) (stressing the duty of every court to examine the constitutionality of each norm it is asked to apply); Löwer, *supra* note 284, Para. Nr. 66; SCHLAICH, *supra* note 284, at 73-74. Cf. the once general requirement in 28 U.S.C. §§ 1253, 2281, 2282 (1948 ed.) (present truncated version in *id.*, §§ 1253 and 2284 (198x)) of a three-judge district court, subject to direct and mandatory Supreme Court review, to pass upon the validity of state or federal statutes; Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964). From the first of these justifications for the Constitutional Court’s exclusive jurisdiction it follows that other courts may strike down statutes adopted before promulgation of the Basic Law or state laws that conflict with later federal statutes, for in neither case does the decision imply that the legislature has violated its constitutional duties. See BVerfGE 2, 124 (128-35) (1953); BVerfGE 10, 124 (127-28) (1959); Maunz, *Art. 100*, in 4 Maunz/Dürig, Para. Nr. 12-13.

²⁸⁹ Contrast U.S. Const., Amdt. 11; *Hans v. Louisiana*, 134 U.S. 1 (1890); *Edelman v. Jordan*, 315 U.S. 651 (1974). The Administrative Procedure Act’s recent waiver of immunity in nondamage actions challenging federal administrative action (5 U.S.C. § 702) rests on legislative grace alone (see *United States v. Lee*, 106 U.S. 196 (1882)), and it does not apply to suits against individual states. For some of the complex distinctions our Supreme Court has drawn in this unfortunate area, see David Currie, *Sovereign Immunity in Suits Against Officers*, 1984 Sup. Ct. Rev. 149; CURRIE, *THE SECOND CENTURY*, *supra* note 15, at 568-80.

²⁹⁰ See Hans-Jürgen Papier, *Art. 34*, in 2 Maunz/Dürig, Para. Nr. 12-13 (noting that Art. 34 not only requires the state to pay whenever the offending official is liable under private law but also contains “an institutional guarantee of government liability” as an important element of the rule of law); Helmuth Rittstieg, *Art. 34*, in 2 AK-GG, Para. Nr. 7-8.

sovereign immunity in this country and that the Supreme Court has never allowed in the absence of statute.²⁹¹

An even sharper contrast between the German and American systems of judicial review, however, is provided by a series of provisions in Article 93(1) of the Basic Law authorizing a variety of proceedings between governmental bodies that would not meet prevailing standards for a justifiable “case” or “controversy” in the United States. These proceedings include contests between various branches of the federal government (“Organstreite”), between the Federation and the individual states (“Bund-Länder Streitigkeiten”), and between two or more states (“föderalistische Streitigkeiten”) over the limits of their respective powers.²⁹² These provisions reflect the entirely plausible conviction that a governmental body itself is the most appropriate party to argue against any encroachment on its authority;²⁹³ they squarely repudiate the peculiar limitations on government standing erected by the Supreme Court in such cases as *Massachusetts v. Mellon*.²⁹⁴

Most foreign to the United States experience is the provision in the second clause of Article 93(1) for what is familiarly known as abstract judicial review (“abstrakte Normenkontrolle”), by which the Constitutional Court is authorized to resolve “differences of opinion or doubts” respecting the constitutionality of federal or state legislation. As the term itself suggests, abstract judicial review is not based upon the concrete facts of a particular case;²⁹⁵ the Constitutional Court determines the validity of a challenged statute on its face. Nor, strictly speaking, is there any requirement of adverse parties.²⁹⁶ The implementing statute does provide that jurisdiction lies only if one governmental body (or one third of the members of the

²⁹¹ See, e.g., *Edelman v. Jordan*, *supra* note 289; Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 39 (1963).

²⁹² GRUNDGESETZ [GG] [Constitution] art. 93(1) Nr. 1, 3, 4 (F.R.G.). In a creative decision involving an analogous state constitutional provision the Constitutional Court concluded that political parties, because of their central role in the electoral process as recognized by Art. 21 of the Basic Law, were entitled to initiate Organstreit proceedings in certain cases. BVerfGE 1, 208 (223-8) (1952). See also BVerfGE 60, 53 (61-62) (1982); GRUNDGESETZ [GG] [Constitution] art. 93(1), cl. 1 (F.R.G.) (extending the Organstreit proceeding to controversies over the rights and duties not only of supreme federal organs but also of “other parties who have been vested with rights of their own by this Basic Law”).

²⁹³ See Löwer, *supra* note 284, Para. Nr. 11, 27-28 (arguing that as a substitute for the use of force the judicial remedy must be comprehensive).

²⁹⁴ 262 U.S. 447 (1923) (holding the state without standing to argue that a federal statute invaded powers reserved to the states).

²⁹⁵ See Maunz/Schmidt-Bleibtreu, § 76 Para. Nr. 1; Löwer, *supra* note 284, Para. Nr. 63.

²⁹⁶ See BVerfGE 1, 208, 220 (1952): “Thus there is no defendant in this proceeding.”

Bundestag) believes a statute enacted by another invalid, and other bodies likely to disagree with the complainant's position have a right to be heard;²⁹⁷ the likelihood that both sides of the question will be presented is therefore great.²⁹⁸ Moreover, the text of the Basic Law makes clear that only laws actually adopted can be subjected to abstract review; the Court cannot determine whether a mere proposal for legislation would be constitutional if enacted.²⁹⁹ Once an abstract review proceeding is begun, however, it is not necessarily mooted either by withdrawal of the complaint³⁰⁰ or by expiration of the challenged law—at least when, to use the terminology of our Supreme Court, the issue is one capable of repetition but otherwise evading review.³⁰¹ Moreover, in contrast to the various intergovernmental controversies noted above, the entity attacking a law need not be asserting an infringement of its own constitutional rights or powers,³⁰² often its contention is that the law invades individual rights.³⁰³

Indeed a large percentage of the abstract judicial review proceedings have been filed by members of the opposition in the Bundestag, as Article 93 expressly permits; the party that loses in the legislative process commonly pursues the controversy before the Constitutional Court.³⁰⁴ The same thing often occurs in Organstreite proceedings between branches of the central government, since a parliamentary caucus (Fraktion) is entitled to assert the rights of the Parliament

²⁹⁷ BVerfGG § 76, 77. For widespread reservations as to the constitutionality of the former provision in light of the fact that Art. 93 empowers the Court to resolve “doubts” as well as “differences of opinion,” see Maunz/Schmidt-Bleibtreu, § 76, Para. Nr. 50-52.

²⁹⁸ See Löwer, *supra* note 284, Para. Nr. 63.

²⁹⁹ BVerfGE 1, 396 (400-10) (1952). See Löwer, *supra* note 284, Para. Nr. 59. Some of the Länder, however, provide also for abstract review of merely proposed legislation, sometimes at the instance of any citizen. See Herdegen, *supra* note 10, Para. Nr. 49.

³⁰⁰ See BVerfGE 1, 396 (414) (1952) (insisting that the subject of the Court's inquiry was not the complaint but the constitutionality of the law).

³⁰¹ BVerfGE 79, 311 (327-28) (1989); cf. *Roe v. Wade*, *supra* n.285.

³⁰² See BVerfGE 1, 396 (407) (1952); BVerfGE 52, 63 (80) (1979) (upholding the right of a Land government to challenge the constitutionality of a federal law limiting the deductibility of political contributions). Contrast BVerfGG § 64(1), 69; BVerfGE 2, 143 (149-59) (1953).

³⁰³ The famous 1975 abortion case, for example, in which the Constitutional Court held the state had a duty to protect the unborn by making abortion generally a crime, was an abstract review proceeding brought by state governments and by the minority of the Bundestag. BVerfGE 39, 1 (1975).

³⁰⁴ See Löwer, *supra* note 284, Para. Nr. 54; SCHLAICH, *supra* note 284, at 68.

itself.³⁰⁵ Accordingly the provisions for intergovernmental controversies, and especially the provision for abstract judicial review, have been criticized as casting the Court into the heart of the political process.³⁰⁶ Yet the questions the Court must decide are inherently of political significance, and it can be argued that it is only appropriate that it be given full authority to decide them. Abstract judicial review can thus be defended as assuring the airtight (“lückenlose”) system of judicial review that the rule of law is said to demand;³⁰⁷ perhaps more than any other avenue of relief it epitomizes the role of the Constitutional Court as guardian of the Constitution (“Hüter der Verfassung”).³⁰⁸

In accordance with this point of view, it is commonly said that German law knows no equivalent of our political question doctrine: All constitutional questions presented must be decided by the Constitutional Court.³⁰⁹ Whether the law is otherwise in this country may be a matter more of semantics than of substance. It is entirely consistent with a judicial duty to say what the law is to conclude that the law commits a particular issue to the discretion or determination of another branch of government.³¹⁰ The German Court has done so a number of times,³¹¹ and it is not

³⁰⁵ See BVerfGG § 64(1); 1 BVerfGE 351, 359 (1952); SCHLAICH, *supra* note 284, at 49: “By virtue of the standing of party caucuses, the Organstreit has also become an instrument of control by the parliamentary opposition.”

³⁰⁶ E.g., Alfred Rinke, *Art. 93/94, in 2 AK-GG*, Para. Nr. 105.

³⁰⁷ See BVerfGE 8, 274, 326 (1958) (*Preisgesetz*) (discussing GRUNDGESETZ [GG] [Constitution] art. 19(4) (F.R.G.)).

³⁰⁸ See BVerfGE 1, 184 (1952). Decisions in abstract and concrete norm control proceedings, as well as those invalidating or upholding statutes on the basis of constitutional complaints, are declared by statute to have the force of law (“Gesetzeskraft”). BVerfGG § 31. This means that they not only bind the parties but constitute, as our Supreme Court said in *Cooper v. Aaron*, 358 U.S. 1 (1958), “the law of the land.” See Herzog, *Art. 94, in 4 Maunz/Dürig*, Para. Nr. 19-32. In the United States this conclusion was highly controversial in light of the fact that the judicial power extends only to the resolution of particular cases and controversies (U.S. Const. Art. III, § 2). In Germany it is expressly contemplated by the Constitution (Art. 94(2) GG: “Federal law. . . shall specify in which cases [the Court’s] decisions shall have the force of law”).

³⁰⁹ See, e.g., Rinke, *Art. 93/94, in 2 AK-GG*, Para. Nr. 85: “Within its jurisdiction the Constitutional Court has a duty to decide.” See also Wasserman, *Art. 19(4), in 1 AK-GG*, Para. Nr. 29; Schneider, *supra* note 50, at 451.

³¹⁰ See Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30, 34 (1974). This seems to be all that Chief Justice Marshall had in mind when he disclaimed judicial authority to interfere with “questions, in their nature political, or which are, by the constitution and laws, submitted to the executive.” *Marbury v. Madison*, 5 U.S. 137, 170 (1803); see CURRIE, *THE FIRST HUNDRED YEARS*, at 67 n.19.

³¹¹ E.g., BVerfGE 2, 231 (224-25) (1953) (holding that the question whether there was a need for the exercise of concurrent federal legislative power under Art. 72(2) was “a question for the faithful exercise

clear that our political question doctrine means anything more.³¹² In one important respect, however, the German approach is quite convincing: A refusal to decide “political” questions that the Constitution does *not* commit to other branches would indeed be difficult to reconcile with the basic principle of judicial review.

Finally, whatever other indirect weapons other branches may have at their disposal for counteracting decisions of the Constitutional Court,³¹³ it is clear that they cannot undermine judicial review by enacting statutes that limit the Court’s jurisdiction. In the United States scholars determined to assure a meaningful check on unconstitutional legislation have struggled for decades to prove that Article III’s provisions giving Congress authority to define federal jurisdiction mean less than they plainly say;³¹⁴ in Germany every avenue of judicial review mentioned above is expressly guaranteed by the Constitution itself.³¹⁵

of legislative discretion that is by its nature nonjusticiable and therefore basically not subject to review by the Constitutional Court’); BVerfGE 4, 157 (174) (1955) (holding that whether a treaty with France respecting the Saarland impeded the integration of that territory into the Federal Republic and thus offended Art. 23 was “a question of political judgment not susceptible of determination as a matter of constitutional law.’); BVerfGE 25, 353 (361-63) (1969) (concluding 4-4, for want of the majority vote necessary to find the challenged action unconstitutional, that provisions vesting the pardon power in the executive implicitly excepted its exercise from judicial review and adding that there were no judicially manageable standards (“greifbare Maßstäbe”) to apply); BVerfGE 66, 39 (60-62) (1983) (refusing to decide whether the decision to station additional nuclear weapons on German soil increased the danger of war because there were no justicially manageable standards for resolving the question (“es fehlt hierfür an rechtlich maßgebenden Kriterien”) and because the evaluation was committed to other branches of government (“Einschätzungen dieser Art obliegen den für die Außen- und Verteidigungspolitik der Bundesrepublik Deutschland zuständigen Bundesorganen”). See also Schneider, *Art. 68, in 2 AK-GG*, Para. Nr. 6 (finding the seeds of a political-question doctrine in the Court’s deference to the political branches in determining the constitutionality of a dissolution of the Bundestag under Art. 68 (note 47 *supra* and accompanying text)); Friedrich Klein, *Bundesverfassungsgericht und richterliche Beurteilung politischer Fragen* 10 (1966): “Political questions are those for whose decision there are no legal norms.”

³¹² See Henkin, *Is There a Political Question’ Doctrine?*, 85 YALE L.J. 597 (1976).

³¹³ See *supra* notes 219-73.

³¹⁴ For citations to the extensive literature, see CURRIE, *THE FIRST HUNDRED YEARS*, *supra* note 15, at 27.

³¹⁵ Art. 93(2) expressly empowers the legislature to add to the jurisdiction conferred by the Basic Law itself, but not to take it away. See BVerfGE 24, 33 (48) (1968), construing a statute to preclude only constitutional complaints (which at that time were authorized only by statute) and not the abstract or concrete norm control authorized by the Basic Law, in order to preserve its constitutionality: “The legislature cannot by ordinary statute preclude access to a Constitutional Court procedure authorized by the Basic Law itself.” See also Roellecke, *supra* note 240, Para. Nr. 2. For implicit limits on the power to add to the Court’s jurisdiction, see Maunz, *Art. 93, in 4 Maunz/ Dürig*, Para. Nr. 3.

It is true that the Basic Law can be amended by a process significantly less demanding than that prescribed in the Constitution of the United States.³¹⁶ Indeed in the aftermath of the radical activities of the late 1960's Article 10 of the Basic Law was amended to permit the preclusion of judicial review of the legality of postal and electronic surveillance measures in certain national security cases. The Constitutional Court in a controversial split decision managed to uphold this amendment against, the argument that Article 79(3) protected human dignity, the separation of powers, and the rule of law even from constitutional amendment, but only after insisting that the case was exceptional and that the alternative tribunal to which the review function was entrusted be as independent as the courts themselves.³¹⁷

In short, the Federal Republic is fully committed to independent judicial review of both executive and legislative action as an indispensable means of assuring that other branches of government not exceed the limits of their authority. Judicial review in both aspects is more extensive and in important respects more securely guaranteed by the Basic Law than by the Constitution of the United States.

E. Conclusion

Separation of powers has dramatically different contours in the Federal Republic and in the United States. A parliamentary system, which Germany shares with most other successful democracies, necessarily entails a sacrifice of separation to better coordination of official policy and more effective safeguards against the abuse of executive authority. Fundamental choices of this nature tend to reflect the varying crises that preceded adoption of a particular constitution. The United States opted for a strong and independent executive after a period of dissatisfaction with the excesses and inadequacies of populist legislatures; the Federal Republic strengthened legislative prerogatives after an era of executive tyranny.

³¹⁶ Compare U.S. Const., Art. V (proposal by 2/3 vote of each House of Congress and ratification by 3/4 of the individual states) with GRUNDGESETZ [GG] [Constitution] art. 79(2) (F.R.G.) (2/3 vote of the Bundestag and of the states as represented in the Bundesrat). A single extraordinary majority in the Bundesrat is likely to be easier to obtain than simple majorities in 38 separate assemblies.

³¹⁷ BVerfGE 30, 1 (23-29) (1970), criticized by Wassermann, *Art. 19(4), in 1 AK-GG*, Para. Nr. 62. See also Schmidt-Aßmann, *Art. 19(4), in 2 Maunz/Dürig*, Para. Nr. 30: "Judicial protection of individual rights against acts of public authority basically cannot be excluded even by constitutional amendment." For German views as to the importance of judicial review in assuring obedience to law, see HESSE, *supra* note 6, Para. Nr. 202; Maunz, *Art. 100(1), in Maunz/Dürig*, Para. Nr. 3. A judicially enforceable Bill of Rights had been a condition of Allied approval of the Basic Law. See ERNST RUDOLF HUBER, 2 QUELLEN ZUM STAATSRICHT DER NEUZEIT 209 (1951). But see Roellecke, *supra* note 240, Para. Nr. 30 (arguing that an amendment significantly contracting the Constitutional Court's jurisdiction might be consistent with Art. 79(3)).

Consistently with this historical development, the Germans have been more vigilant than we to enforce the principle that basic decisions as to the content of the law must be made by the democratic and representative parliament. Not only must the executive obey statutes once they have been enacted; there are great fields in which it may not act without statutory authorization, and there are meaningful limitations on the delegation of legislative power. Thus the three categories of executive action that Justice Jackson so carefully distinguished in our *Steel Seizure* case³¹⁸ have been conflated in Germany to a significant degree in accordance with a single guiding principle: The legislature, not the executive, shall make the law.³¹⁹

Safeguards against the abuse of executive authority in Germany include not only parliamentary control and strict limits on executive lawmaking but division of executive power itself—among the Cabinet, the administration, autonomous entities like the Bundesbank, and most significantly the constituent states. Federalism thus compensates in substantial measure for the lack of structural separation between the central legislative and executive powers, since freedom from the Cabinet means freedom from the Bundestag as well. At the same time, however, significant agencies as independent of centralized democratic control as our Federal Trade Commission are essentially limited to two special cases mentioned in the Basic Law itself; the Constitutional Court has been far more alert to prevent incoherence and unresponsiveness in executive policy than has our Supreme Court.

Finally, in establishing an independent judiciary crowned by a Constitutional Court with broad powers of judicial review and in anchoring in the Constitution itself a guarantee of judicial relief for every victim of illegal administrative action, the Federal Republic has gone even beyond the United States to ensure actual observance of the Constitution and to promote the rule of law.

³¹⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

³¹⁹ See, e.g., HESSE, *supra* note 6, Para. Nr. 508, 524.