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I. INTRODUCTION

Judicial review, "probably the most characteristic feature of the American constitutional system,"[1] is a contribution to constitutions all over the globe.[2] Two hundred years ago the U.S. Supreme Court established judicial review by handing down *Marbury v. Madison.*[3] In Germany, the idea evolved later - in the 1920s under the Weimar Constitution (*Weimarer Reichsverfassung*, WRV). This article sets out to illuminate that incident in Germany's constitutional history. It shall also exemplify *en passant* the kind of legal reasoning common in a civil law system.

Part II of this article develops two models of judicial review. The idea of judicial review is built on certain axiomatic conditions and contains choices from a distinct set of dichotomies. Because some combinations of choices are more likely to occur than others, one can distinguish two models of judicial review. The first of these models I shall term the *Marbury Model,* and the second, as being more recent and for lack of a

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1. A. E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 277 (1968); ALLAN R. BREWER-CARÍAS, JUDICIAL REVIEW IN COMPARATIVE LAW 1 (D.F. Bur ed., 1989).

2. Winfried Brugger, *Kampf um die Verfassungsgerichtsbarkeit: 200 Jahre Marbury v. Madison,* 43 JURISTISCHE SCHULUNG [JuS] 320, 320 (2003); BREWER-CARÍAS, *supra* note 1, at 71-72, 77-79, 136.

3. Marbury v. Madison, 5 U.S. 137 (1 Cranch 137) (1803).

better word, the *Modern Model*. Weimar's Constitutionalism brought the two models closely together, as shown in part III of this paper. Although after an intense debate the *Marbury Model* was finally established under Weimar, the *Modern Model* was planted into the German constitutional thought at that time. Thus, not only was Weimar the point of arrival for judicial review in Germany – this study of Weimar constitutionalism provides, in ancillary effect, a close comparison of the two models as well. Finally, Part IV shall highlight very briefly some aspects of judicial review in contemporary Germany.

II. MODELS OF JUDICIAL REVIEW

The notion of judicial review can be understood broadly as judges keeping government action in check, although American jurisprudence usually defines it more narrowly.[4] Judges have the power to stay or rescind the actions of all three branches of government. They review the executive branch if, for instance, a citizen challenges an administrative order in court. They review the judicial branch itself when a party appeals the verdict. Likewise, they review the legislative branch if the issue of this litigation is the validity of the statute upon which the initial verdict rests. However, only judicial review of legislation will be addressed by this article. Constitutionally, this is most problematic, since the legislature is generally considered to be a body democratically superior to the judiciary.[5] This was certainly true under the Weimar constitution where members of parliament were elected by the people[6] while judges were appointed[7].

As a common analogy puts it, the notion of review implies that a yardstick exists with which the object under review can be measured. In other words, judicial review presupposes a hierarchy of norms. In reviewing legislation, the yardstick is usually a constitution. The constitution – the authority that creates the branches of government and confers certain powers upon them – also sets the framework wherein parliament is supposed to make its laws. [8] Insofar as a law does not comply with the "paramount law", it cannot prescribe or proscribe anything.[9] This is how

4. Brugger, *supra* note 2, at 320 n.2.

5. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 20-21 (1997); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW I § 3-6, at 302-306 (3d ed. 2000). *But see* MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 40-46 (1989). BREWER-CARÍAS, *supra* note 1, at 116-117.

6. WRV art. 22.

7. WRV art.104, § 1.

8. *See* CHEMERINSKY, *supra* note 5, at 6.

9. *See* Christopher Osakwe, *Introduction: The Problems of the Comparability of Notions in Constitutional Law,* 59 TUL. L. REV. 875, 875-77 (1985) (stating it as the general belief in "[a]ll le-

United States constitutionalism usually interprets the notion of judicial review.[10]

Judicial review can be further classified within this framework. For the purpose of this Article, three dichotomies shall suffice: centralized v. decentralized, abstract v. concrete, and *inter omnes* v. *inter partes*.[11] First, judicial review is decentralized if any court can overrule a statute which it has found to be unconstitutional. It is centralized if there is only one special court that may invalidate legislation[12]. This court can be either a constitutional court, created solely for this purpose, or any other (appellate) high court, which is to decide, among other issues, on the constitutionality of statutes.[13] Second, judicial review is concrete if the court incidentally rules upon the constitutionality of the statute, in deciding the case at hand.[14] Abstract judicial review, on the other hand, allows the court to solely review the constitutionality of a statute, independent from concrete cases.[15] Finally, one can examine the effects of a court's decision.[16] The verdict might be binding *inter partes* (only "between the parties" of this very case), or it may be a judgment *inter omnes* ("among all"). An example of *inter omnes* is negative legislation[17], where the invalidated statute is deleted from the books, and may never be applied again.[18]

Analytically, elements from one dichotomy can be combined with elements from another. Thus, for instance, both the decentralized abstract

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gal systems within the Western legal tradition" that "legislature . . . should conform to the state constitution."). I am not yet convinced, however, that the constitution – besides being a paramount law – also has to be a written one, as BREWER-CARÍAS, *supra* note 1, at 1-2, 82 (*but see* at 80, "usually", and at 106-109), and Danielle E. Finck, *Judicial Review: The United States Supreme Court Versus the German Constitutional Court*, 20 B.C. INT'L & COMP. L. REV. 123, 125 (1997) assert.

10. BREWER-CARÍAS, *supra* note 1, at 1.

11. *E.g., c.f.* BREWER-CARÍAS, *supra* note 1, at 91-93, for other criteria such as the moment at which control of the constitutionality of laws is determined (prior to the formal enactment of the particular law or after the law has come into effect), and the time when the decision will become effective: retroactively *(ex tunc, pro praeterito)* or prospectively *(ex nunc, pro futuro)*.

12. *E.g., see* Finck, *supra* note 9, at 125-126.

13. BREWER-CARÍAS, *supra* note 1, at 3, 91, 185.

14. *E.g., see* Finck, *supra* note 9, at 146; HANS D. JARASS & BODO PIEROTH, GRUNDGESETZ 1034 (6th ed. 2002).

15. MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 69, 71 (1971); Herbert Hausmaninger, *Judicial Referral of Constitutional Questions in Austria, Germany, and the United States*, 11 TUL. EUR. & CIV. L. F. 25, 26 (1997) (both citing the notion "principaliter", i.e. not "incidenter"); BREWER-CARÍAS, *supra* note 1, at 92.

16. *See* Mauro Cappelletti & John Clarke Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207, 1213 (1966).

17. Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, 5 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 31, 54, 56 (1929) [hereinafter: VVDStRL].

18. *See* TRIBE, *supra* note 5, § 3.3, at 214; CAPPELLETTI, JUDICIAL REVIEW, *supra* note 15, at 85; BREWER-CARÍAS, *supra* note 1, at 92-93 (both "erga omnes"); Kelsen, *supra* note 17, at 48.

review *inter partes* and the centralized concrete review *inter omnes* are possible. However, some combinations do not seem to be practical.[19] On the other hand, two combinations turn out to have been especially influential. One is the decentralized concrete review *inter partes*, as developed from *Marbury v. Madison*.[20] This variation I call the *Marbury Model*.[21] The other arrangement is the centralized abstract review *inter omnes*. In this paper, I refer to it as the *Modern Model*.[22]

The "landmark decision"[23] *Marbury v. Madison* is still considered the "single most important decision in American constitutional law"[24] in that it allowed an act of Congress to be declared unconstitutional for the first time in United States history.[25] However, in debating the U.S. Constitution the framers had left it undetermined whether a court could have the power to invalidate laws passed by Congress.[26] The idea, although discussed, was at the time too controversial to compromise upon.[27]

Against this backdrop, the U.S. Supreme Court handed down *Marbury v. Madison*, where Chief Justice John Marshall forcefully established the Constitution as the paramount law.[28] The 1803 decision marks the arrival of full-blown judicial review in America. In a conflict with the Constitution as the paramount law, the Constitution is the one to prevail.[29] Regarding law and politics as distinct, the Chief Justice directed the courts to avoid political decision making.[30] According to *Marbury*, every court had the power of judicial review, as long as the constitution-

19. Decentralized review *inter omnes* serves as an example. It seems self-contradictory to have more than one court deciding the same issue with unlimited validity, i.e. not just for the parties, but for everybody.

20. See *supra* note 3.

21. *Cf.* BREWER-CARÍAS, *supra* note 1, at 91, 136 ("American system").

22. *Cf.* Hausmaninger, *supra* note 15, at 25-26, BREWER-CARÍAS, *supra* note 1, at 92, 119, 190, 195 ("European model" or "Austrian system", because it was first established in the 1920 Austrian Constitution, the "personal masterpiece of Professor Hans Kelsen."), and PETER C. CALDWELL, POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY & PRACTICE OF WEIMAR CONSTITUTIONALISM 86 (1997) (noting Kelsen's influence on the Austrian constitution's drafting with regard to judicial review).

23. HOWARD, *supra* note 1, at 276.

24. CHEMERINSKY, *supra* note 5, at 36.

25. WILLIAM E. NELSON, MARBURY V. MADISON. THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 1 (2000).

26. BREWER-CARÍAS, *supra* note 1, at 136-137 (national judicial review).

27. HOWARD, *supra* note 1, at 278-279; NELSON, *supra* note 25, at 1-2; *cf.* Gerhard Robbers, *Die historische Entwicklung der Verfassungsgerichtsbarkeit,* 30 JUS 257, 259 (1990).

28. BREWER-CARÍAS, *supra* note 1, at 73, 101-103, *cf.* at 188; WERNER FROTSCHER & BODO PIEROTH, VERFASSUNGSGESCHICHTE 20 (3rd ed. 2002).

29. This reasoning, advanced by Alexander Hamilton's *Federalist No. 78, in* THE FEDERALIST PAPERS 394-396 (Garry Wills ed., 1982), was present in Weimar, *cf.* Heinrich Triepel, *Wesen und Entwicklung der Staatsgerichtsbarkeit,* 5 VVDSTRL 2-29, 15-16 (1929).

30. NELSON, *supra* note 25, at 3-4, 7-9, 115-118. *See* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 2, 22-25 (1976).

ality of the statute was decisive for the case at hand. Its verdict was binding only with respect to the parties before the court. U.S. courts, then, were empowered with decentralized concrete review *inter partes*.[31]

The analytic difference between *Marbury*'s review *inter partes* and a review *inter omnes* shrinks where, as in the United States, a hierarchy of courts is combined with the doctrine of *stare decisis*.[32] However, it does not disappear. The idea that lower courts have to follow higher court's precedent turns a decision *inter partes* practically into a decision *inter omnes* only after the "highest court in the land" has decided.[33] Thus, the difference remains not only until its decision is handed down, but also with regard to issues that, for whatever reasons, never make it to the highest court. Furthermore, the effect of the highest court's decision is less powerful where the statute remains on the books because lower courts remain able to distinguish precedent "away".

Until the twentieth century, *Marbury*'s judicial review remained largely an American phenomenon.[34] In Germany, the idea only truly arrived under the Weimar Constitution of 1919. The constitution of 1849 already contained a provision, that the Federal Supreme Court *(Reichsgericht)* was to review the constitutionality of federal legislation.[35] However, although quite influential, the constitution never went into effect.[36] Subsequently, the monarchic constitution of 1871 allowed for judicial review only with respect to rules and regulations *(Verordnungen)*.[37] With regard to a statute *(Gesetz)*, the judge could only deter-

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31. *Cf.* BREWER-CARÍAS, *supra* note 1, at 138, 144-145 ("cases or controversies"), 149.

32. CAPPELLETTI, JUDICIAL PROCESS, *supra* note 5, at 138-142; Jibong Lim, *A Comparative Study of the Constitutional Adjudication Systems of the U.S., Germany and Korea,* 6 TULSA J. COMP. & INT'L L. 147 (1999).

33. BREWER-CARÍAS, *supra* note 1, at 129-130, 134, 149-151. *But see* Cappelletti & Adams, *supra* note 16, at 1215, 1222.

34. NELSON, *supra* note 25, at 104 (noting that at the time, the United States were the only "major nation" in which a judicial body adjudicated the constitutionality of legislation).

35. GERM. CONST. OF 1849, art. 129a. *See* Bernd J. Hartmann, *How American Ideas Traveled: Comparative Constitutional Law at Germany's National Assembly in 1848-1849,* 17 TUL. EUR. & CIV. L.F. 23-70, 61-63 (2002).

36. *See* Hartmann, *supra* note 35, at 63.

37. RÜDIGER OSWALD, DAS RICHTERLICHE PRÜFUNGSRECHT GEGENÜBER GESETZEN UND VERORDNUNGEN IN DER KONSTITUTIONELLEN MONARCHIE UND UNTER DER WEIMARER REICHSVERFASSUNG 49, 108 (1974); Rudolf Hoke, *Verfassungsgerichtsbarkeit in den deutschen Ländern in der Tradition der deutschen Staatsgerichtsbarkeit, in* LANDESVERFASSUNGSGERICHTSBARKEIT 25-102, 79 (Christian Starck & Klaus Stern, eds., 1983). *Cf.* CALDWELL, *supra* note 22, at 33-34, 36-37; Christoph Gusy, *Die Grundrechte in der Weimarer Republik,* 15 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 163, 169 (1993); Ulrich Scheuner, *Die Überlieferung der deutschen Staatsgerichtsbarkeit im 19. und 20. Jahrhundert, in* 1 BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ 1-62, at 51 (Christian Starck ed., 1976). Art. 106 of the Prussian Constitution of 1850 even ruled out judicial review of the monarch's rules and regulations; *see* Hoke, *supra,* at 72; Robbers, *supra* note 27, at 261; HANS HATTENHAUER, DIE GEISTESGESCHICHTLICHEN GRUNDLAGEN DES DEUTSCHEN RECHTS 113 (4th ed. 1996).

mine whether it was constitutional in the formal sense. For example, whether it was signed properly, promulgated and published.[38] Thus, it was under the Weimar Constitution of 1919 when full-blown judicial review finally arrived in Germany.[39]

III. JUDICIAL REVIEW UNDER THE WEIMAR CONSTITUTION

A. The Weimar Constitution

Germany's Constitution of August 11, 1919, the *Weimarer Reichsverfassung,* was named after Weimar,[40] the town where the Constitutional Convention met. In 1919, the delegates preferred this city in Thuringia, not far from Frankfurt am Main, because it was 300 miles away from Berlin. The capital was not yet considered a safe place again.[41] After all, it was less than half a year since a revolution had been fought in Berlin. In October 1918, sailors were commanded to set sail and confront the British in a final do-or-die battle, even though Germany's defeat in the World War was already inevitable. As the sailors saw their lives wasted in a desperate and senseless fight, they refused to comply with the order. Their uproar was soon joined by workers, and on November 9, 1918, they jointly called a general strike in Berlin. While the population was taking to the streets, the Emperor William II resigned in fear of his life. On the very same day, the German Republic was proclaimed. Monarchy had become history and along with it went the governing force of the Bismarck Constitution of 1871.[42]

In order to replace the monarchic Bismarck Constitution, a new constitution had to be drafted. Thus, a Constitutional Convention was elected resulting in a resounding victory for the parties favoring a parliamentary

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38. CHRISTOPH GUSY, RICHTERLICHES PRÜFUNGSRECHT 27-28 (1985) [hereinafter PRÜFUNGSRECHT]; Hoke, *supra* note 37, at 78-79; OSWALD, *supra* note 37, at 108-109; *see* 24 ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [Decisions of the Federal Supreme Court in civil manners, hereinafter RGZ] 1, 3 (1890) and 9 RGZ 232, 235 (1883) respectively.

39. OSWALD, *supra* note 37, at 2; Hoke, *supra* note 37, at 94.

40. Reichs-Gesetzblatt [hereinafter RGBl.] 1919, pp. 1383-1418; cited according to THE CONSTITUTION OF THE GERMAN COMMONWEALTH (William Bennett Munro & Arthur Norman Holcombe, trans., 1932).

41. FROTSCHER & PIEROTH, *supra* note 28, at 256; CHRISTOPH GUSY, DIE WEIMARER REICHSVERFASSUNG 59 (1997) [hereinafter WEIMARER REICHSVERFASSUNG]; CALDWELL, *supra* note 22, at 64. *But see* HATTENHAUER, *supra* note 37, at 281.

42. FROTSCHER & PIEROTH, *supra* note 28, at 254-255; GUSY, WEIMARER REICHSVERFASSUNG, *supra* note 41, at 11; Elmar M. Hucko, *Introduction: The Weimar Constitution, in* THE DEMOCRATIC TRADITION. FOUR GERMAN CONSTITUTIONS 39, 39-42 (Elmar M. Hucko, ed., 1987); Munro & Holcombe, *supra* note 40, at 5-6; CALDWELL, *supra* note 22, at 64. In order to represent this, the German word "Reich" will not be translated as "empire," but as "Commonwealth," as Munro & Holcombe, *supra* at 12 *cf.* glossary at 14, have suggested.

democracy .[43] The delegates then started meeting in Weimar, the city of Goethe and Schiller. On July 31, they passed the Constitution, drafted primarily by Professor Hugo Preuss, which was published on August 11, 1919.[44] It cherished the separation of powers and considered itself the paramount law[45]. It also entailed fundamental rights[46], and proclaimed Germany's new achievement, democracy.

B. Debating Judicial Review

The Weimar Constitution established the *Staatsgerichtshof,* the National or State Court, next to the *Reichsgericht*, the Federal Supreme Court.[47] While the *Reichsgericht* had appellate jurisdiction in civil and criminal law cases,[48] the *Staatsgerichtshof* had to decide certain "political" issues, like constitutional disputes between the *Reich* (the federal government) and a *Land* (a state), or between individual *Länder* (states).[49] This procedure was termed *constitutional review.* The framers of the Weimar Constitution drew upon the preceding constitution of 1871 which employed constitutional review in the sense that the political institution of the *Bundesrat* (Federal Council) had to decide upon disputes between *Reich* and *Länder.*[50] It had already been established under this constitution as well that judicial review of administrative rules and regulations existed—a concept that remained unchallenged under the Weimar

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43. Hucko, *supra* note 42, at 44.

44. FROTSCHER & PIEROTH, *supra* note 28, at 258-59; Hucko, *supra* note 42, at 45; Munro & Holcombe, *supra* note 40, at 10; CALDWELL, *supra* note 22, at 64.

45. Anschütz and others challenged this view, drawing upon the amendment procedure in art. 76 WRV, *see* Carl Joachim Friedrich, *The Issue of Judicial Review in Germany,* 43 POL. SCI. QUAR. 188, 193 (1928). This view is convincingly rebutted by J. Friedrich, *id.* at 193-195; *see also* J. J. Lenoir, *Judicial Review in Germany under the Weimar Constitution,* 14 TUL. L. REV. 361, 362 (1940). *See generally* Aalt Willem Heringa, *The Separation of Powers Argument, in* JUDICIAL CONTROL: COMPARATIVE ESSAYS ON JUDICIAL REVIEW 27-43 (Rob Bakker et al. eds., 1995).

46. DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 5-6 (1994).

47. *See* CALDWELL, *supra* note 22, at xi, 147.

48. The tradition of the Reichsgericht traces back to the German Constitution of 1848/49, whose framers designed the Reichsgericht according to the model of the U.S. Supreme Court, *see* Bodo Pieroth, *Amerikanischer Verfassungsexport nach Deutschland,* 42 NEUE JURISTISCHE WOCHENSCHRIFT [hereinafter NJW] 1333, 1334 (1989), Helmut Steinberger, *Historic Influences of American Constitutionalism upon German Constitutional Development: Federalism and Judicial Review,* 36 COLUM. J. TRANSNAT'L L. 189, 200, (1997) and Hartmann, *supra* note 35, at 59-60.

49. CALDWELL, *supra* note 22, at xi, 147; BREWER-CARÍAS, *supra* note 1, at 203; *see generally* GUSY, WEIMARER REICHSVERFASSUNG, *supra* note 41, at 196-199 (discussing the system of courts), and at 209-216 (noting the *Staatsgerichtshof* and its jurisdiction).

50. *See* PHILIP M. BLAIR, FEDERALISM AND JUDICIAL REVIEW IN WEST GERMANY 9-10 (1981); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 5 (2d ed. 1997).

Constitution.[51] Thus if Weimar judges found rules or regulations to be unconstitutional, they were to disregard them and decide the case as if the rule had never been enacted.[52]

In contrast, the question of judicially reviewing federal statutes was heavily debated at the time.[53] Within the debate, two lines of reasoning are distinguishable. .[54] The first were textual arguments based on the written constitution. The second was on the question of political structure. . . .

1. Textual argumentation

The debate's textual arguments are somewhat typical of legal scholarship in codifying legal systems. As will be seen, the Weimar constitution neither explicitly allowed nor ruled out judicial review of federal laws' constitutionality, but instead was indeterminate on the matter. The Weimar constitution contained three provisions that were drawn upon in the debate: (a) WRV art. 13, § 2 provided a mechanism of judicial review, but only for certain cases; (b) WRV art. 102 subjected judges to the law; and (c) WRV art. 70 told the President to compile laws enacted constitutionally.

a. The "Noteworthy Innovation:" WRV art. 13, § 2. In the Weimar Republic, a federalist nation,[55] the Constitution regulated the relationship between federal laws and conflicting state laws. WRV art. 13, § 1, declared that the laws of the Commonwealth, i.e. the federal laws, were supreme over conflicting state laws, just like the U.S. Constitution, the "supreme law of the [l]and," binds "any [t]hing in the [c]onstitution or [l[aws of any State."[56] Since it is not always obvious whether laws conflict, the Weimar Constitution came up with what had been called, from

51. 1 BVerfGE 184, 194 (1952); J. Friedrich, *supra* note 45, at 189; Gustav Radbruch, *Richterliches Prüfungsrecht?,* 1 DIE JUSTIZ 12, 12 (1925); OSWALD, *supra* note 37, at 115; GUSY, WEIMARER REICHSVERFASSUNG, *supra* note 41, at 216; MANFRED FRIEDRICH, GESCHICHTE DER DEUTSCHEN STAATSRECHTSWISSENSCHAFT 380 (1997).

52. *See* 107 RGZ 315 (1924); GERHARD ANSCHÜTZ, DIE VERFASSUNG DES DEUTSCHEN REICHS VOM 11. AUGUST 1919 art. 70.3, at 217 (8th ed. 1928); Lenoir, *supra* note 45, at 367; Radbruch, *supra* note 51, at 12.

53. *See* BLAIR, *supra* note 50, at 10; and KOMMERS, *supra* note 50, at 525-6 note 17 (2d ed. 1997).

54. Hartmut Maurer, *Das richterliche Prüfungsrecht zur Zeit der Weimarer Verfassung,* 15 DIE ÖFFENTLICHE VERWALTUNG 684 (1963).

55. In the Weimar Constitution, the first section of the first chapter is entitled "Commonwealth and States." In this section, art. 5 proclaims that political authority is exercised by the National Government and by the State Governments. *See* Lenoir, *supra* note 45, at 361. *But see id.*, note 2 with differing opinions.

56. U.S. CONST. art. VI, § 2.

the German perspective, a "noteworthy innovation,"[57] and provided in WRV art. 13, § 2, the following mechanism for clarification:

> If doubt arises, or difference of opinion, whether State legislation is in harmony with the law of the Commonwealth, the proper authorities of the Commonwealth or the central authorities of the States, in accordance with more specific provisions of a national law, may have recourse to the decision of a supreme judicial court of the Commonwealth.

According to this provision, together with the more specific statute it called upon,[58] certain high-ranking state or federal authorities could call for a verdict about the compatibility between state legislation and a "law of the Commonwealth."[59] The yardstick in most cases was a federal statute, yet the notion of a "law of the Commonwealth" also encompassed the Weimar Constitution itself.[60] This allowed for the judicial review of *state* laws' federal constitutionality, and the review came as centralized, abstract review *inter omnes*.[61] In other words, the Modern Model.

In terms of *federal* laws' federal constitutionality, however, the landscape is different. WRV art. 13, § 2, determines the object of review to be "state legislation." First, was it yet possible to review federal laws by interpreting "state legislation" as encompassing also federal statutes? Second, while WRV art. 13, § 2, determines "laws of the Commonwealth" as the yardstick, could it not include in the notion of "law" only those federal statutes that were constitutional?

Within German jurisprudence, an interpretation of a provision cannot cross the boundaries of its text. Interpretation is the tool only for deciding between the several ways a vague or ambiguous provision is allowed to be read. It is not permissible to add – to put it roughly – a *new* way of reading the provision.[62] This is bad news for the first question, since the

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57. ANSCHÜTZ, *supra* note 52, art. 13.2, at 68.

58. The more specific provisions of national law were laid down in a statute enacted April 8, 1920 (1920 RGBl. 510-511). According to art. 1 of this act, the Reichsgericht was in charge. Nevertheless, for special cases the Reichsfinanzhof (State Tax Law § 6, 1920 RGBl. 402, 403) and the Reichsverwaltungsgericht or the Reichsschiedsgericht (Act of December 21, 1920, §§ 6,7, 1920 RGBl. 2117, 2118-2119) could decide.

59. Before that, the compliance of state law with federal law could only be examined by any court that was about to apply the state statute, implicitly, as a preceding question of the lawsuit. Judicial review was decentralized, concrete, and *inter partes*. WRV art. 13, § 2 did not change this, but added another proceeding of judicial review (ANSCHÜTZ, *supra* note 52, at 68).

60. 104 RGZ 58, 59 (1922); Fritz Morstein Marx, *Art. 13 Abs. 2 der Reichsverfassung und der Streit um die richterliche Prüfungszuständigkeit,* 45 (=6 NF) AÖR 218, 221 (1923/24).

61. The decision of the Reichsgericht had the effects of a law according to art. 3, § 3, of the Act of April 8, 1920, *supra* note 58.

62. This belief grows out of the civil law tradition, where parliament ought to make the law, while the judiciary is bound to apply it (to the case at hand). *See* KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 309-310 (3d ed., 1975). *See also* 8 BVerfGE 38, 41 (1958); 71

notions of "State" and "Commonwealth" certainly exclude each other – at least within the context of the Weimar Constitution. Not only was Section I entitled "Commonwealth and States," but WRV art. 5 was built on the distinction between the two. Accordingly, WRV art. 13, § 1, brought "laws of the Commonwealth" in opposition to "laws of the States," and § 2 itself presupposed a conflict between a "State" law and a law of "the Commonwealth." It follows that one cannot interpret state legislation, without more, to include federal legislation. In the realm of WRV art. 13, § 1 federal laws could not be reviewed directly.

But courts could try to review federal laws indirectly. When reviewing a state law, one could assert that the question of its compliance with a federal law becomes relevant only if the conflicting federal statute is itself constitutional.[63] An unconstitutional statute might "not [be] a law at all".[64] This position would require, before one could measure a state statute against the yardstick of a federal statute, that one measure this yardstick, the federal statute, against another yardstick, the federal constitution.

The argument stayed within the text of WRV art. 13, and it protected the states without taking anything away from the Commonwealth. Interpreting "law" this way, however, kept the prerequisite of "state legislation" untouched. Doubt or difference of opinion about a state law's compliance with a federal law was still necessary to start the review according to WRV art. 13, § 2. Only implicitly, within this review, could the judge ponder the preceding question of the federal law's constitutionality. This limited scope was a strong argument against the proposed interpretation, since it submitted federal laws to judicial review only under the contingent condition that a state law might conflict with it. Be that as it may, one thing is certain: there was no way to attack a federal law directly. Therefore, no matter how one interprets the provision, WRV art. 13, § 2 did not provide a general mechanism for judicial review of a federal law's constitutionality.

Following this conclusion, WRV art. 13, § 2 was even used as an argument *against* the judicial review of a federal law's constitutionality. The provision simply was claimed to be exhaustive.[65] Since the Constitu-

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BVerfGE 108, 115 (1985); 87 BVerfGE 209, 224 (1992); KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 29-30 (20th ed. 1999); REINHOLD ZIPPELIUS, JURISTISCHE METHODENLEHRE, at § 9 II a (8th ed. 2003). *But see* BRUN-OTTO BRYDE, VERFASSUNGSENTWICKLUNG 267 et seq. (1982).

63. Marx, *supra* note 60, at 221.

64. *Id. See also* Bruce Ackerman, *The Rise of World Constitutionalism,* 83 VA. L. REV. 771, 776 (1997), CAPPELLETTI, JUDICIAL REVIEW, *supra* note 15, at vii; Finck, *supra* note 9, at 125 (both noting that ordinary acts of legislation contravening higher law are not or cannot be a "law").

65. *Cf.* Marx, *supra* note 60, at 219.

tion had allowed judicial review only in the very narrow realm carefully defined in WRV art. 13, § 2, the argument went, it had ruled out judicial review outside of this realm.[66] This argument was not persuasive, however, since it was not consistent with the common wisdom and daily practice at the time. No one doubted, as stated above, that the Weimar Constitution asked for judicial review of executive acts.[67] Since, therefore, WRV art. 13 could not be understood as prohibiting this kind of judicial review, it was not possible to regard it as exhaustive.[68] Thus, WRV art. 13, § 2, neither ruled out nor generally allowed judicial review of federal laws' constitutionality.

b. Judges as subject to the law: WRV art. 102. The Weimar Constitution regulated "The Administration of Justice" in section VII of chapter I. The section started out with WRV art. 102, which read: "Judges are independent and subject only to the law." This provision was launched as an argument both for and against judicial review. Arguing in favor of judicial review, some scholars claimed again that unconstitutional statutes were not "law."[69] Thus, before applying a statute, the judge had to review its constitutionality. Others disagreed with this interpretation of "law," stressing the context of the notion: WRV art. 102 wanted the judge to be "subject" to the law. It seemed incompatible with this requirement to allowing the judge to review the law when by this very review, the judges would locate themselves "above" the law.[70]

Even assuming for the sake of argument that the judge is subject to constitutional statutes only, it does not follow that the judges themselves could decide upon the constitutionality of the law. It was also possible that they were bound by parliament's decision upon the constitutionality of the statute, which is implied in passing the bill. Thus because it was ambivalent on this matter, WRV art. 102 did not solve the problem either.

c. President compiling constitutionally enacted laws: WRV art. 70. The process of legislation regulated in chapter one, section V of the Weimar constitution, ends with the publication of the law. At this stage, WRV art. 70 provides: "The National President shall compile the laws which have been constitutionally enacted and within one month publish them in the

66. *Id.*

67. *Cf.* citations *supra* note 51.

68. Marx, *supra* note 60, at 219; Maurer, *supra* note 54, at 683, n.1.

69. This notion is already advanced in *Marbury v. Madison,* 5 U.S. (1 Cranch)137, 177 (1803) ("If the former part of the alternative be true, then a legislative act contrary to the constitution is not law . . .")

70. Friedrich Hase, *Richterliches Prüfungsrecht und Staatsgerichtsbarkeit, in* VERFASSUNGSGERICHTSBARKEIT UND POLITISCHES SYSTEM 109 (Friedrich Hase & Karl-Heinz Ladeur eds., 1980); Maurer, *supra* note 54, at 685.

National Bulletin of Laws." Thus, the provision asks the President to review whether the law has been "constitutionally enacted." This was presented as an argument against judicial review by claiming that the President's decision was binding for all other branches, since the "character"[71] of compilation purportedly established the "irrefutable assumption" of the provision's constitutionality.[72]

It remains to be shown, however, how the "character" of compilation should entail a dubious "irrefutable assumption" at all. Even granting the assumption *arguendo*, the question remained how far it would reach. It certainly would bind the branches only as far as the President had reviewed the law. The President, however, was to review - so it was agreed upon - only the formal constitutionality of the law,[73] i.e. the procedural requirements the constitution proscribes. This followed not only from the provision's legislative history,[74] but also from its context: only the law's constitutional "enactment" had to be reviewed, which was understood as referring to the procedure of enacting a law.[75] Thus, there was no way to regard the "irrefutable assumption" as preventing the judicial review of constitutionality in the material sense, i.e. the compliance with fundamental rights.[76]

WRV art. 70 resembled WRV art. 13 and art. 102. It neither forbade nor allowed the judicial review of a federal law's constitutionality. Thus, it can be concluded that the Weimar Constitution was silent on the matter.[77] This result is supported and explained by the genesis of the constitution. It is puzzling that the framers did not regulate this important matter, since they certainly had not forgotten to debate it. In Weimar, the delegate Dr. Ablass had proposed a two-fold provision. On the one hand, the Constitution should, aiming at regular courts, generally prohibit judi-

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71. Heinrich Triepel, *Der Weg der Gesetzgebung nach der neuen Reichsverfassung,* 39 ARCHIV DES ÖFFENTLICHEN RECHTS [AöR] 456, 535 (1920).

72. ANSCHÜTZ, *supra* note 52, art. 70.2, at 216.

73. Richard Thoma, *Das richterliche Prüfungsrecht,* 43 (=4 NF) AöR 267, 278 (1922); Triepel, *supra* note 71, at 536.

74. Thoma, *supra* note 73, at 278.

75. Triepel, *supra* note 71, at 536.

76. *Cf.* Kelsen, *supra* note 17, at 37 (regarding the distinction between constitutionality in the formal and in the material sense).

77. J. Friedrich, *supra* note 45, at 188; Radbruch, *supra* note 51, at 13; Triepel, *supra* note 71, at 535; CURRIE, *supra* note 46, at 5; KOMMERS, *supra* note 50, at 6; W. E. NELSON, *supra* note 25, at 105; Steinberger, *supra* note 48, at 205; M. FRIEDRICH, GESCHICHTE, *supra* note 51, at 321. The opposite was true for some state constitutions: The Bavaria Constitution from August 14, 1919 made the review of statutes' constitutionality mandatory under art. 72 . On the other hand both the Oldenburg Constitution from June 17, 1919, in § 36, sec. 3, and Schaumburg-Lippe's Constitution from February 24, 1922, in § 47, provided that review was done by the parliament only. *See* VERFASSUNGSGESETZE DES DEUTSCHEN REICHS UND DER DEUTSCHEN LÄNDER (Otto Ruthenberg ed., 1926) (reprinting the cited constitutions).

cial review of the constitutionality of federal statutes and regulations. On the other hand, the Constitution was to establish that, due to a motion filed by one hundred members of federal parliament, a specialized constitutional court was to review the constitutionality of the federal act.[78] This proposal would have led to the *Modern Model* of judicial review: centralized, abstract review *inter omnes*. The delegates discussed it at length.[79] Nevertheless, they could not reach a conclusion, either for or against judicial review. Beliefs on both sides were too strong to allow for a compromise. Thus, the proposed paragraph could not be passed, and the whole matter was deliberately left open.[80] This is why the Weimar Constitution contains a gap with respect to judicial review of federal statutes' constitutionality – a phenomenon which parallels the American situation at the Philadelphia convention.[81] As there were no commonly accepted legal arguments about how to fill this gap, scholars at the time concluded that the question should be resolved by political arguments instead of purely legal ones.[82]

2. Political argumentation

In the academy, the debate on judicial review was part of the legendary controversy on methods and tendencies (*Methoden und Richtungsstreit*)[83] which took place at the time[84] and still is considered a fundamen-

78. E. Theisen, *Verfassung und Richter,* 47 (=8 NF) AÖR 257, 261 (1925). *Cf.* Thoma, *supra* note 73, at 268.

79. *See* J. Friedrich, *supra* note 45, at 190, 191 n.1 (briefly outlining the discussion with reference to Hamilton's Federalist Paper No. 81, *supra* note 29, and a comparing remark to the situation in the American Constitutional Convention); Theisen, *supra* note 78, at 260-269 (summarizing the debate at length).

80. ANSCHÜTZ, *supra* note 52, art. 70.2, at 216; J. Friedrich, *supra* note 45, at 190; Theisen, *supra* note 78, at 267; Thoma, *supra* note 73, at 269; Triepel, *supra* note 71, at 534; Hase, *supra* note 70, at 108 f.; Maurer, *supra* note 54, at 683; OSWALD, *supra* note 37, at 113; GUSY, WEIMARER REICHSVERFASSUNG, *supra* note 41, at 216.

81. *Cf.* Finck, *supra* note 9, at 139.

82. Marx, *supra* note 60, at 223; Radbruch, *supra* note 51, at 13; Klaus Kröger, *Der Wandel des Grundrechtsverständnisses in der Weimarer Republik, in* GESCHICHTLICHE RECHTSWISSENSCHAFT. FREUNDESGABE FÜR A. SÖLLNER 299, 305 (Gerhard Köbler, Meinhard Heinze & Jan Schapp eds., 1990), at 305; CALDWELL, *supra* note 22, at 77-78.

83. This is the translation, provided by Dian Schefold, *Geisteswissenschaften und Staatsrechtslehre zwischen Weimar und Bonn, in* ERKENNTNISGEWINNE, ERKENNTNISVERLUSTE. KONTINUITÄTEN UND DISKONTINUITÄTEN IN DEN WIRTSCHAFTS-, RECHTS- UND SOZIALWISSENSCHAFTEN ZWISCHEN DEN 20ER UND 50ER JAHREN 576-599, 598 (Karl Acham, Knut Wolfgang Nörr & Bertram Schefold eds., 1998), in his English summary, for what became almost a technical term: *Methoden- und Richtungsstreit, cp.*, e.g., the titles chosen by Max-Emanuel Geis, *Der Methoden- und Richtungsstreit in der Weimarer Staatslehre,* 29 JURISTISCHE SCHULUNG [JuS] 91-99, 91 (1989), and by Manfred Friedrich, *Der Methoden- und Richtungsstreit: Zur Grundlagendiskussion der Weimarer Staatsrechtslehre,* 102 ARCHIV DES ÖFFENTLICHEN RECHTS 161-209, 208-209 (1977) (debating the relationship between the term's two components).

tal "crisis"[85] of the Weimar republic. With a constitution turned democratic, constitutional law had become a different discipline.[86] Constitutional law scholarship had to answer elemental questions about its subject, e.g., what the state and the law are,[87] and how they relate to one another.[88] Two schools fought irreconcilably: legal positivism and "anti-positivism". Legal positivism, following Kant, clearly distinguished between what is (*Sein*) and what ought to be (*Sollen*).[89] Believing in black letter law,[90] its protagonists wanted to liberate the law from any extra-legal influences.[91] Contrastingly, anti-positivism[92] leaned on Hegel.[93] Striving to re-unite *Sein* and *Sollen*,[94] this school dialectically wanted to include morals, politics, and history[95] into the law.[96]

The newly founded, yet already very prestigious Association of German Scholars of State Law (*Vereinigung der deutschen Staatsrechtslehrer*) staged the discussion.[97] The Association's famous meeting in Münster in 1926 exemplifies nicely the competing methodologies.[98] For

84. The debate began in the mid-1920s and experienced its climax around 1929; *see* CALDWELL, *supra* note 22, at ix; M. Friedrich, *Methodenstreit, supra* note 83, at 166; M. FRIEDRICH, GESCHICHTE, *supra* note 51, at 321, 323; Geis, *supra* note 83, at 91; MICHAEL STOLLEIS, 3 GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND 172 (1999); MICHAEL STOLLEIS, DER METHODENSTREIT DER WEIMARER STAATSRECHTSLEHRE – EIN ABGESCHLOSSENES KAPITEL DER WISSENSCHAFTSGESCHICHTE? 5 (2001). *Cf.* D. Schefold, *supra* note 83, at 567-568 (locating origins prior to WW I, in 1911/1912).

85. STOLLEIS, GESCHICHTE, *supra* note 84, at 157; STOLLEIS, METHODENSTREIT, *supra* note 84, at 7; M. FRIEDRICH, GESCHICHTE, *supra* note 51, at 324 (with contemporary quotations of a crisis).

86. M. Friedrich, *Methodenstreit, supra* note 83, at 168; STOLLEIS, GESCHICHTE, *supra* note 84, at 155.

87. STOLLEIS, GESCHICHTE, *supra* note 84, at 154.

88. Geis, *supra* note 83, at 91; STOLLEIS, METHODENSTREIT, *supra* note 84, at 5.

89. OLIVER LEPSIUS, DIE GEGENSATZAUFHEBENDE BEGRIFFSBILDUNG 304-318, 318-335 (1994); Geis, *supra* note 83, at 91-92; *cf.* D. Schefold, *supra* note 83, at 570; CALDWELL, *supra* note 22, at 89.

90. Geis, *supra* note 83, at 91.

91. STOLLEIS, GESCHICHTE, *supra* note 84, at 156; STOLLEIS, METHODENSTREIT, *supra* note 84, at 8.

92. Geis, *supra* note 83, at 93; STOLLEIS, GESCHICHTE, *supra* note 84, at 171; *cf.* Rudolf Smend, *Die Vereinigung der Deutschen Staatsrechtslehrer und der Richtungsstreit, in* FESTSCHRIFT FÜR ULRICH SCHEUNER 575-589, 585 (Horst Ehmke et al. eds., 1973) ("opposing . . . positivism").

93. Geis, *supra* note 83, at 93; STOLLEIS, GESCHICHTE, *supra* note 84, at 176. *Cf.* LEPSIUS, *supra* note 89, at 271-281.

94. Geis, *supra* note 83, at 93. *Cf.* LEPSIUS, *supra* note 89, at 239-253.

95. *Cf.* G. Edward White, *The Arrival of History in Constitutional Scholarship,* 88 VA. L. REV. 485 (2002).

96. Geis, *supra* note 83, at 94; STOLLEIS, GESCHICHTE, *supra* note 84, at 156.

97. The Association was founded by Triepel in 1922. *See* M. FRIEDRICH, GESCHICHTE, *supra* note 51, at 330.

98. *Cf.* STOLLEIS, GESCHICHTE, *supra* note 84, at 15, 189-190; M. Friedrich, *Methodenstreit, supra* note 83, at 184; M. FRIEDRICH, GESCHICHTE, *supra* note 51, at 324 (considering the meeting

the anti-positivistic school, Kaufmann argued in favor of judicial review.[99] For the legal positivists, Nawiasky took a stand against it.[100] However, a scholar's position on judicial review did not depend on his opinion regarding legal methodology.[101] Kelsen, for example, argued in Vienna in 1928 from a positivistic point of view in favor of judicial review.[102]

In the debate, the political argumentation was surprisingly ironic. The monarchist Right, although in opposition to the new republican constitution, was nevertheless in favor of judicial review – even though the idea protects the constitution (by invalidating statutes repugnant to it). On the other side, the Left opposed judicial review, thus denying a safeguard to the highly appreciated constitution.[103] Obviously, the parties' positions towards judicial review in particular were inconsistent with their views of the constitution in general.

However, this inconsistency can be explained on an intermediate level with the parties' views of the legislative branch. While the monarchic Right was suspicious of the democratic parliament, the Left felt the need to protect it against a judiciary that was largely still monarchic. Thus, the Left opposed judicial review not to weaken the Constitution but to protect the parliament from the courts, while the Right argued in favor of judicial review not to safeguard, but to deteriorate the Constitution.[104]

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in Münster as the controversy's origin); Smend, *supra* note 92, at 578; CALDWELL, *supra* note 22, at 149.

99. Erich Kaufmann, *Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung: Bericht von Professor Dr. Erich Kauffmann in Bonn, in* DIE GLEICHHEIT VOR DEM GESETZ IM SINNE DES ART. 109 DER REICHSVERFASSUNG. – DER EINFLUSS DES STEUERRECHTS AUF DIE BEGRIFFSBILDUNG DES ÖFFENTLICHEN RECHTS. 3 VVDStRL, 11 & 19-22 (1927); *see* STOLLEIS, GESCHICHTE, *supra* note 84, at 190-191; STOLLEIS, METHODENSTREIT, *supra* note 84, at 15.

100. Hans Nawiasky, *Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung: Mitbericht von Professor Dr. Hans Nawiasky in München, in* DIE GLEICHHEIT VOR DEM GESETZ IM SINNE DES ART. 109 DER REICHSVERFASSUNG. – DER EINFLUSS DES STEUERRECHTS AUF DIE BEGRIFFSBILDUNG DES ÖFFENTLICHEN RECHTS. 3 VVDStRL, 41-42 (1927); *see* Triepel, 3 VVDStRL 44, 53 (1927) (proposing to exclude the question on judicial review from the discussion, because the Reichsgericht had solved this problem in November) and STOLLEIS, GESCHICHTE, *supra* note 84, at 191.

101. *Cf.* STOLLEIS, GESCHICHTE, *supra* note 84, at 185 (discussing inconsistencies between political and methodological beliefs). *Cf.* also M. FRIEDRICH, GESCHICHTE, *supra* note 51, at 333-336; *and* Smend, *supra* note 92, at 578 (giving as a reason that the debate was about methodology, not about politics).

102. Kelsen, *supra* note 17, at 57-58, 68-70. *Cf.* CALDWELL, *supra* note 22, at 80-81.

103. *See* J. Friedrich, *supra* note 45, at 199 n.3; Hase, *supra* note 70, at 109, 111; Ralf Poscher, *Die Grundrechte der Weimarer Reichsverfassung, in* DIE GRUNDRECHTE IM SPIEGEL DES PLAKATS – 1919 BIS 1999, 25-29, at 28-29 (Kai Artinger ed., 2000).

104. J. Friedrich, *supra* note 45, at 199 note 3; Radbruch, *supra* note 51. This phenomenon had occurred already in 1848-49, when the National Assembly debated the new Constitution of the federation to be formed in Frankfurt's St. Paul's Church (*Paulskirche*). The Right had proposed that each state was allowed to sue not only the executive, but also the legislative branch of the federal

After Thoma had delivered a rather balanced speech on judicial review during the Association's inaugural meeting in 1922,[105] two Professors emerged as symbols of the opposing positions on judicial review: Gerhard Anschütz and Heinrich Triepel.[106] The liberal scholar Gerhard Anschütz has quite generally been regarded as the chief exponent of those who, in the tradition of the Bismarck Constitution of 1871, opposed judicial review.[107] The conservative monarchist Heinrich Triepel, on the other hand, was probably the most outstanding scholar in favor of it.[108]

Liberal scholars, although in opposition to judicial review, conceded that without it, verdicts might indeed turn out not to be quite "right," judicially. Nevertheless, this was seen as the lesser evil: The advantage of a predictable verdict was perceived as outweighing the interest in a right decision.[109] Liberal scholars thought that "their" constitution would be protected by safeguards other than judicial review, such as the President's review according to WRV art. 70.[110] After all, they were afraid that the stability a law is to provide would erode as soon as one court decided to enforce a statute that another court had found invalid.[111] This

government for violations of the new federal constitution (*see* 8 REDEN FÜR DIE DEUTSCHE NATION 1848/49, at 5669 (Munich 1979), reprint of the STENOGRAPHISCHER BERICHT ÜBER DIE VERHANDLUNGEN DER DEUTSCHEN CONSTITUIRENDEN NATIONAL VERSAMMLUNG ZU FRANKFURT AM MAIN (Franz Wigard ed.). The Left opposed the inclusion of the legislative branch (*see* the vote on art. 127, id., at 5672). However, the *Paulskirchenverfassung* was never enforced.

105. Thoma, *supra* note 73, at 275-281 (denying, in the end, the necessity of judicial review).

106. J. Friedrich, *supra* note 45, at 192, 194.

107. GERHARD ANSCHÜTZ, DIE VERFASSUNG DES DEUTSCHEN REICHS VOM 11. AUGUST 1919, at 370-375 (14th ed. 1933) (making an exception only for the *Staatsgerichtshof* at 369-370). *See* CALDWELL, *supra* note 22, at 152 and *generally* Walter Pauly, *Gerhard Anschütz: Introduction, in* WEIMAR: A JURISPRUDENCE OF CRISIS 128-130 (Arthur J. Jacobson & Bernhard Schlink eds., 2000) (discussing Anschütz and his role during Weimar); Hase, *supra* note 70, at 165-166; GUSY, PRÜFUNGSRECHT, *supra* note 38, at 91-93 (the latter two discussing his position on judicial review); Poscher, *supra* note 103, at 29; and CALDWELL, *supra* note 22, at 65 et seq., 73-74.

108. Heinrich Triepel, *Die Entwürfe zur neuen Reichsverfassung,* SCHMOLLERS JAHRBUCH FÜR GESETZGEBUNG, VERWALTUNG UND VOLKSWIRTSCHAFT 43 (1919), 459, 474 (asking the framers of the WRV to ensure that courts may judicially review the constitutionality of statutes; arguing comparatively with the United States where judicial review is considered a "palladium" of liberty); Triepel, *supra* note 71, at 535-538. *See* CALDWELL, *supra* note 22, at 148-153 and *generally* Ralf Poscher, *Heinrich Triepel: Introduction, in* WEIMAR. A JURISPRUDENCE OF CRISIS, *supra* note 107, at 171-174 (about Triepel); Hase, *supra* note 70, at 136-140; and GUSY, PRÜFUNGSRECHT, *supra* note 38, at 100-103 (the latter two outlining his position on judicial review).

109. Thoma, *supra* note 73, at 273. *Cf.* Radbruch, *supra* note 51, at 14. *See* Peter C. Caldwell, *Introduction: Richard Thoma, in* WEIMAR: A JURISPRUDENCE OF CRISIS, *supra* note 107, at 151-155 (discussing Thoma and his role in Weimar).

110. Thoma, *supra* note 73, at 279.

111. *Id.*, at 273. *See* Radbruch, *supra* note 51, at 14; Kelsen, *supra* note 17, at 48. *Cf.* TRIBE, *supra* note 5, at 215; Cappelletti & Adams, *supra* note 16, at 1215; CALDWELL, *supra* note 22, at 35 (about the U.S. being seen as a negative example of "where chaos ruled over law") vs. 145 (discussing the traditional adjudication in the interest of "security and predictability").

fear was fueled by the fact that in Germany, *stare decisis* was not, and is not, a valid doctrine.[112] German courts are bound by the law as it is found on the books, not by a higher court's interpretation as precedent.[113] Against this backdrop, one scholar even saw the said disadvantage of inconsistency "indisputably illustrated by the American experience with judicial review."[114]

On the other hand, conservative scholars heavily promoted judicial review. Heinrich Triepel was the man who uttered what became an often cited, quite famous quote: "In a parliamentary republic, judicial review is the most important, if not the only, safeguard of individual liberty against the parliament's otherwise unrestrained lust for power."[115] Besides this, the separation of powers, or, to be more precise, their checks and balances, were the key argument. In a parliamentary republic, the executive branch is completely dependent upon the legislative branch. WRV art. 54 stipulates that the administration is in need of parliament's trust. The Chancellor *(Reichskanzler)* and his secretaries *(Reichsminister)* have to resign if parliament decides so. In order to make up for this imbalance, the Right demanded a judicial check on legislation.[116]

3. Judicial decision

With the academy irreconcilably divided, the governing bodies themselves had to settle the dispute. Nevertheless, the courts were rather reluctant to decide the issue. Instead, the *Reichsgericht,* the Federal Supreme Court responsible for civil and criminal matters,[117] had left the

112. A higher court's interpretation is, if it is final, the decision of the concrete case at hand. If the higher court does not render a final decision, but only guidelines, and transfers the case back to the lower court for a decision, the interpretation is binding only for this very lower court (not for other lower courts the higher court is in charge of) and even for this lower court only in the pending case. In practice, all lower courts generally comply with their higher courts, because they want to avoid being reversed. However, if lower courts insist the higher court is wrong, they can stick to their interpretation in any future case. It is important to note that appeal is not possible in every case!

113. *See* Finck, *supra* note 9, at 132, 155; Lim, *supra* note 32, at 147. *Cf.* CAPPELLETTI, JUDICIAL PROCESS, *supra* note 5, at 139-142 (noting the absence of *stare decisis* and its effects for judicial review concepts).

114. Radbruch, *supra* note 51, at 14 (refers to the debate about the constitutionality of statutes for the protection of workers, enacted before 1905, but does not cite cases; he probably relates to *Lochner v. New York*, 198 U.S. 45 (1905), and the preceding verdicts). *Cf.* Carl Schmitt, *Das Reichsgericht als Hüter der Verfassung (1929), in* VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEN JAHREN 1924-1954, 63-109, 65 (Carl Schmitt, ed., 1958) (citing, in his Article from 1929, the American counter-example as "still suggestive").

115. Triepel, *supra* note 71, at 537; concurring are Marx, *supra* note 60, at 223 f.; Thoma, *supra* note 73, at 272, *cf.* Hase, *supra* note 70, at 103, 107; *see* J. Friedrich, *supra* note 45, at 194.

116. Triepel, *supra* note 71, at 537.

117. Lenoir, *supra* note 45, at 363-365 (providing a brief introduction into the court system under the Weimar Constitution).

question open[118] or restrained itself to some rather vague verdicts instead[119]. Meanwhile, other courts were less shy: The *Reichsfinanzhof*, the federal supreme court for tax matters, and the *Reichsversorgungsgericht*, the federal supreme court for matters of public officials' benefits, had argued clearly in favor of judicial review.[120] Finally, the *Reichsgericht* took a stand as well: On November 4, 1925, the court accepted the idea of judicial review of a federal law's constitutionality.[121] Taking into account the heated debate, the *Reichsgericht's* justification for claiming the competence of review was rather shallow. The court explained:

> Since the national Constitution itself contains no provisions according to which the decision on the constitutionality of national statutes has been taken away from the courts, and has been transferred to another determinate authority, the right and the obligation of the judge to examine the constitutionality of statutes must be recognized.[122]

Nevertheless, this way the court had proven, if anything, only the silence of the Constitution. The gap, however, is not a solution to, but the reason for the problem in the first place. Nevertheless, the verdict authoritatively established judicial review according to the *Marbury Model*: decentralized, concrete, and *inter partes*.[123] The "yardstick" of the review

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118. 56 ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN [Decisions of the Federal Supreme Court in criminal matters] 177, 182 (1921).

119. 102 RGZ 161, 164 (1921); 107 RGZ 377, 379 (1923) (obiter dictum); *see* Franz-Joseph Peine, *Normenkontrolle und Konstitutionelles System,* 22 DER STAAT 521, 545 (1983).

120. Decision of the so-called Great Senate from October 21, 1924, reported by Graßhof, *Pensionsansprüche von Offizieren,* 30 DEUTSCHE JURISTEN-ZEITUNG [DJZ] 99 (1925); Graßhof, *Wohlerworbene Rechte, Verfolgung derselben im Klageweg, Prüfungsrecht des Richters bez. der Gültigkeit der Gesetze,* 30 DJZ 332, 333-334 (1925), and referred to by ANSCHÜTZ, *supra* note 52, art. 70.3, at 217. 7 ENTSCHEIDUNGEN UND GUTACHTEN DES REICHSFINANZHOFS [Decisions and advisory opinions of the Federal Tax Supreme Court, hereinafter RFHGE] 97, 100-102 (1921). With Thoma, *supra* note 73, at 269, this decision is to be regarded as in favor of judicial review, although Albert Hensel, *Staatsrechtliche Fragen in den Entscheidungen und Gutachten des Reichsfinanzhofs*, 45 (=6 NF) AÖR 311, 331 n.11, disagrees. In 5 RFHGE 333, 334-335 (1921), the court had been less specific. *See* GUSY, PRÜFUNGSRECHT, *supra* note 38, at 80.

121. 111 RGZ 320, 322-323 (1925); confirmed in 114 RGZ 27, 33 (1926) (obiter dictum); 128 RGZ 165 (1929), 129 RGZ 146, 148-149 (1930). *See* J. Friedrich, *supra* note 45, at 196 n.1; Lenoir, *supra* note 45, at 368; and CALDWELL, *supra* note 22, at 153, for the facts. *Cf.* CURRIE, *supra* note 46, at 5 note 35; Hase, *supra* note 70, at 111; Lenoir, *supra* note 45, at 368; Maurer, *supra* note 54, at 684; Steinberger, *supra* note 77, at 206; Robbers, *supra* note 27, at 262-263; BREWER-CARÍAS, *supra* note 1, at 203-204; Poscher, *supra* note 103, at 27.

122. 111 RGZ 320, 323 (1925), translated according to J. Friedrich, *supra* note 45, at 197, also quoted in parts by Lenoir, *supra* note 45, at 369; another translation is provided by BREWER-CARÍAS, *supra* note 1, at 204. *Cf.* also CALDWELL, *supra* note 22, at 153-155 and Hase, *supra* note 70, at 111.

123. The verdict marks the arrival of judicial review in Germany (*see* GUSY, PRÜFUNGSRECHT, *supra* note 38, at 86-87, 120; OSWALD, *supra* note 37, at 130), even though in the very case at hand, the court refrained from striking down the federal law (111 RGZ 320, 331 (1925)). *Cf.* Schmitt, *supra* note 114, at 90 N.54 (1929) (presenting his own reading of the *Reichsgericht's* verdict after quoting *Marbury* comparatively); and CALDWELL, *supra* note 22, at 155

was the constitution including its individual rights. While some of them, merely social and economic rights, were interpreted as broad political statements (*Programmsätze*) not binding parliament, others were considered to be directly applicable to legislation as well. Examples of the latter were liberal, individual rights such as the freedom of property granted by WRV art. 153.[124]

C. Consequences

The *Reichsgericht's* verdict provoked reactions in all three branches of government. In the judicial branch, the courts followed the *Reichsgericht* and began engaging in judicial review.[125] Nevertheless, there are few supreme court verdicts known in which a federal law was invalidated.[126] Thus, it is fair to say that the judiciary accepted judicial review in principle, but seldom invoked its power to nullify legislation.[127]

In the executive, the National Cabinet reacted to the verdict of the *Reichsgericht*, and in contrast to the court, it did take into account the heated debate that had preceded the decision. Accepting that judicial review was established, the government wanted to prevent the inconsistencies between different courts that had been predicted.[128] It researched comparatively how foreign countries, including the United States, dealt

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(noting the parallel with *Marbury* as both decisions opened the way to judicial review while avoiding direct confrontation).

124. *See* 111 RGZ 320, 324 v. 328-329; Richard Thoma, *Die juristische Bedeutung der grundrechtlichen Sätze der Deutschen Reichsverfassung im allgemeinen, in* 1 DIE GRUNDRECHTE UND GRUNDPFLICHTEN DER REICHSVERFASSUNG 1-53, at 5, 11-12, 22 (Hans Carl Nipperdey, ed., 1929, reprint 1975); Walter Pauly, *Die Stellung der Weimarer Reichsverfassung in der deutschen Verfassungsgeschichte, in* 80 JAHRE WEIMARER REICHSVERFASSUNG – WAS IST GEBLIEBEN? 1, 19 (Eberhard Eichenhofer, ed., 1999); Eberhard Eichenhofer, *Soziale Grundrechte – verläßliche Grundrechte?, in* 80 JAHRE WEIMARER REICHSVERFASSUNG 207-230, at 214, 216-219; Poscher, *supra* note 103, at 26-27, 29 (Kai Artinger, ed., 2000); Christoph Gusy, *Die Grundrechte in der Weimarer Republik,* 15 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 163, 167-170, 171-173 (1993); GUSY, WEIMARER REICHSVERFASSUNG, *supra* note 41, at 275-284; Kröger, *supra* note 82, at 303-304, 306-311; CALDWELL, *supra* note 22, at 74-78.

125. J. Friedrich, *supra* note 45, at 197; Lenoir, *supra* note 45, at 368. *But see* W. E. NELSON, *supra* note 25, at 106 (claiming that the place of judicial review in German law remained "unclear".)

126. Decision of the Reichsversorgungsgericht (Great Senate) from October 21, 1924, reported by Graßhof, *supra* note 120, at 99, 333-334, and ANSCHÜTZ, *supra* note 52, art. 70.3, at 217; 124 RGZ 173, 178 (1929); 126 RGZ 161, 164 (1929). *See* Cappelletti & Adams, *supra* note 16, at 1215-1216 (speculating about reasons); GUSY, PRÜFUNGSRECHT, *supra* note 38, at 82, 84-85; and Poscher, *supra* note 103, at 27.

127. KOMMERS, *supra* note 50, at 7. Perhaps this is not too bad a record. After *Marbury,* the Supreme Court rested for 54 years, before it asserted its power to invalidate a law for the second time, *see* W. E. NELSON, *supra* note 25, at 1; and Steinberger, *supra* note 48, at 203. The case was *Dred Scott v. Sandford,* 60 U.S. (19 How) 393 (1856), *see* CHEMERINSKY, *supra* note 5, at 43-44, 548-549 (noting that the US Reporters misspelled Sanford); and WHITE, supra note 30, at 77-83.

128. Reichstags-Drucksachen, III. Wahlperiode, Nr. 2855, p. 3 (December 16, 1926). *See* Hoke, *supra* note 37, at 95.

with the problem and then proposed a bill to the *Reichstag,* the federal parliament, in 1926.[129] Under art. 1 of this bill, not only laws, but also rules and regulations whose constitutionality were "in doubt or controversial" could be reviewed by the *Staatsgerichtshof* upon motion by more than one-third of the members of the National Assembly. The judicial review was designed according to the *Modern Model*: centralized, abstract, and *inter omnes*.[130] Furthermore, if any court was of the opinion that a certain law or ordinance was unconstitutional, it had to refer the matter to the next higher court.[131] If this court shared the opinion of the lower court, the matter eventually would end up at the *Staatsgerichtshof* as well. In this case, judicial review was again centralized and binding *inter omnes*, but also concrete.

After parliament's term had run out before a decision was reached, the National Cabinet proposed the bill once more.[132] The result was the same, and the bill was never passed. Therefore, the *Reichsgericht's* decision of November 4, 1925 was unable to develop too heavy of an impact. The years left to the Weimar Republic were too short.[133] In the 1930s, judicial review of parliamentary laws was becoming more and more irrelevant. President Hindenburg governed under the authority of WRV art. 48, § 2, that allowed certain "measures" to regain "law and order" even if the measures were repugnant to fundamental rights.[134] Measures called Emergency Decree *(Notverordnung)* were issued even in lieu of parliamentary laws.[135] In the course of time, the huge number of executive measures suffocated parliament as the legislative branch.[136] In February 1933, after the *Reichstag* had been burning, it was a *Notverord-*

129. Reichstags-Drucksachen, III. Wahlperiode, Nr. 2855 (December 16, 1926); the references to the United States on page 3 and in the supplement on page 2 include a quotation of U.S. CONST. art. 6, s. 2. *See* 1 BVerfGE 184, 194 (1952); J. Friedrich, *supra* note 45, at 198-199, n.1; Lenoir, *supra* note 45, at 369; and Richard Grau, *Zum Gesetzentwurf über die Prüfung der Verfassungsmäßigkeit von Reichsgesetzen und Reichsverordnungen,* 50 (=11 NF) AÖR 287 et seq. (discussing the bill which is reprinted *id.* as well).

130. Art. 1 § 1, art. 5; *see* CAPPELLETTI, JUDICIAL PROCESS, *supra* note 5, at 133-134, 136.

131. Art. 6.

132. Reichstags-Drucksachen, IV. Wahlperiode, Nr. 382 (October 19, 1928). *See* 1 BVerfGE 184, 194 (1952); Hase, *supra* note 70, at 111; Maurer, *supra* note 54, at 687. *Cf.* J. Friedrich, *supra* note 45, at 199-200, for reasons.

133. Steinberger, *supra* note 77, at 206.

134. *Cf.* CURRIE, *supra* note 46, at 6.

135. FROTSCHER & PIEROTH, *supra* note 28, at 268. *See generally* Christoph Gusy, *Die Entstehung der Weimarer Reichsverfassung,* 49 JURISTENZEITUNG [JZ] 753, 761-762 (1994) (illustrating how WRV art. 48 was framed), and HATTENHAUER, *supra* note 37, at 287 (illustrating how WRV art. 48 was used). If parliament demanded the revocation of the measure (according to WRV art. 48, § 3, cl. 2), the President would simply resolve parliament (according to WRV art. 25, § 1) – as it happened in 1930. *See* FROTSCHER & PIEROTH, *supra* note 28, at 268, 279-280.

136. ADOLF LAUFS, RECHTSENTWICKLUNGEN IN DEUTSCHLAND 327-328 (4th ed. 1991); FROTSCHER & PIEROTH, *supra* note 28, at 307-309.

nung that helped Hitler to win the upcoming election.[137] At that time judicial review, clearly not compatible with what the new authoritaries believed,[138] had ceased to be an issue[139] as parliament had lost its role of being a leading source of law to the *Führer*.[140] It took a new constitution, the Basic Law, to revitalize the concept.

IV. JUDICIAL REVIEW UNDER THE BASIC LAW

Germany's constitution from 1949, the Basic Law *(Grundgesetz, GG)*, reacted to Germany's immediate past, especially to the Weimar Constitution and to the collapse of law under the Nazi regime.[141] The Weimar constitution had been – as shown – indeterminate with regard to judicial review, and from 1933 to 1945, the German legal order had not fostered justice but had permitted brutal inhumanity and unimaginable immorality.[142] Against this backdrop, the Basic Law did not leave judicial review to implication, but explicitly formed a thorough and deliberate framework of norm control.[143] Drafting the new constitution, the framers borrowed from *Marbury v. Madison* the idea of an constitution as the "paramount law"[144] binding all branches of government.[145] At the same time, the Basic Law opted for a specialized constitutional court. While every judge has the power and the duty to review the constitutionality of statutes (*Prüfungskompetenz*), the power to invalidate them (*Verwerfungskompetenz*) is centralized at the Federal Constitutional Court.[146] This follows from GG art. 100, § 1. The provision, similar to

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137. *See* LAUFS, *supra* note 136, at 326-327 (4th ed. 1991); FROTSCHER & PIEROTH, *supra* note 28, at 307-309.

138. *See* 1 BVerfGE 184, 194 (1952).

139. Hase, *supra* note 70, at 113. *See* Lim, *supra* note 32, at 159-160. *Cf.* Lenoir, *supra* note 45, at 381.

140. FROTSCHER & PIEROTH, *supra* note 28, at 323-24.

141. Erhard Denninger, *Judicial Review Revisited: The German Experience*, 59 TUL. L. REV. 1013, 1013 (1985); Finck, *supra* note 9, at 136; BODO PIEROTH & BERNHARD SCHLINK, GRUNDRECHTE 12 (17th ed. 2001).

142. *See* Denninger, *supra* note 141, at 1013.

143. CAPPELLETTI, JUDICIAL PROCESS, *supra* note 5, at 161-162; *see* CURRIE, *supra* note 46, at 162. With respect to judicial review in the European Community see Iris Canor, *Harmonizing the European Community's Standard of Judicial Review?*, 8 EUROPEAN PUBLIC LAW 135 (2002).

144. Rainer Wahl, *Der Vorrang der Verfassung*, 20 DER STAAT 485, 490 (1981); Steinberger, *supra* note 77, at 207-208.

145. GG art. 20, § 3. The Basic Law is cited according to the official translation, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Press and Information Office of the Federal Government, ed., Christian Tomuschat & David P. Curry, trans., 1998), also available online at http://www.iuscomp.org/gla/statutes/GG.htm. *Cf.* CURRIE, *supra* note 46, at 343-412 (with a complete translation); and KOMMERS, *supra* note 50, at 507-518 (translating selected provisions).

146. Arg. e. GG art. 100, § 1. *See* 2 BVerfGE 124 (128-135) *aff'd* 4 BVerfGE 331 (339); Georg Nolte & Peter Rädler, *Judicial Review in Germany*, 1 EUROPEAN PUBLIC LAW 26, 27 (1995); Hausmaninger, *supra* note 15, at 30. CAPPELLETTI, JUDICIAL REVIEW, *supra* note 15, at 74-75,

art. 6, § 1 of the law proposed under the Weimar constitution,[147] provides that if a court concludes a law on whose validity its decision depends to be unconstitutional the proceedings shall be stayed, and a decision shall be obtained from the Federal Constitutional Court. As this Court invalidates a law, it is erased from the books. Thus, the Court's centralized review is valid *inter omnes*.[148]

Within this framework, judicial review can be both abstract and concrete. Judicial review is abstract, if the court decides upon request of the Federal Government or of one third of the members of the *Bundestag*, the federal parliament.[149] Historically, the proceeding draws upon the proposals by the Weimar government from 1926 and upon the system of judicial review Dr. Ablass introduced during Weimar's constitutional convention in 1919.[150] On the other hand, judicial review is concrete if the decision from the Federal Constitutional Court is obtained after a lower court concluded a statute to be unconstitutional.[151] Since this proceeding is possible only if the verdict the lower court is going to render depends on the constitutionality of the statute, judicial review in this case arises from the ordinary lawsuit the lower court is about to decide. Thus, Germany today allows for centralized review *inter omnes*, both concrete and abstract. The Basic Law has subscribed to a modified *Modern Model* of judicial review.

V. SUMMARY AND COMMENTS

Conditions that make judicial review possible are the idea of a paramount law and the separation of powers, while adherence to democracy and fundamental rights boosts the importance of judicial review. Within

misses the distinction when he claims that in Germany, ordinary judges are forbidden to review the constitutionality of legislation.

147. *See* sub III.C.

148. The Court's monopoly of invalidation, furthermore, allows a distinction between declaring laws either constitutional or unconstitutional. While only the Constitutional Court may declare the unconstitutionality of laws, other courts share the authority of deciding upon their constitutionality. A decision on a law's constitutionality is made, explicitly or implicitly, any time a court applies it. The effects of these decisions, however, are limited in that they do not bind other branches or courts.

149. GG art. 93, § 1, nr. 2. The standard is different from the concrete norm control ("doubt or difference of opinion," not "conclusion") had been used already in art. 1 s. 1 (cp. art. 6 §1) of the bill proposed in 1926 and again in 1928, *see* supra note 129 and 132, and originates from WRV art. 13. *Cf.* Nolte & Rädler, *supra* note 146, at 27-28; Erhard Denninger, *Judicial Review Revisited: The German Experience*, 59 TUL. L. REV. 1013, 1026 (1985).

150. *See* sub III.C and sub III.B.1.c. Note that according to both Weimar proposals, rules and regulations were explicitly included, but only one third of the delegates could file the motion. Today, the Federal Constitutional Court interprets rules and regulations (Rechtsverordnungen) as excluded, *see* 1 BVerfGE 184, 201 (1952); *aff'd* 48 BVerfGE 40, 44-45 (1978).

151. GG art. 100, § 1, cl. 1.

this framework, two models of judicial review are visible: the classical *Marbury Model* of decentralized, concrete review *inter partes* and the more recent *Modern Model* of centralized, abstract review *inter omnes*. Judicial review of the kind the *Marbury Model* describes has been adopted under the U.S. Constitution and as well as under the Weimar Constitution. Neither constitution provides explicitly for judicial review. Under the Basic Law in 1949, Germany changed to centralized review, a concept already developed, but not realized during the Weimar Republic.

The two models developed in theory are not realized purely in practice, either in the United States or in Germany. In the United States, the *Marbury Model* is in force, and although the decisions are technically binding only *inter partes*, the hierarchy of courts and the concept of precedent lead to a factual validity of Supreme Court decisions *inter omnes*. At the same time in Germany, where the *Modern Model* is prevailing, both abstract and concrete procedures of judicial review are realized. As the United States and Germany's systems of judicial review both work, the choice between the models grounds mainly in tradition, but not in the perception of one system as being superior to the other. Comparing the German and the American way of judicial review, it seems as neither is better, neither is worse, but both are just different.[152]

152. *See,* in another context, Bernd J. Hartmann, *Besser? Schlechter? – Anders* [Better? Worse? - Different], 19 JURISTISCHE AUSBILDUNG 670 (1997).

Appendix A

	JUDICIAL REVIEW ACCORDING TO ART. 1	JUDICIAL REVIEW ACCORDING TO ART. 6
OBJECT OF REVIEW	Federal statutes, rules and regulations (art. 1, sec. 2)	Federal law (art. 6, sec. 1)
BODY APPEALING FOR REVIEW	More than one third of the members of the National Assembly (*Reichstag*) or of the "Senate" (*Reichsrat)*; also federal government *(Reichsregierung)*, (art. 1, sec. 2)	Any court
CONDITION OF REVIEW	Constitutionality "in doubt or controversial", (art. 1, sec. 2) It is not necessary that there be a concrete case that has given rise to the doubt or controversy → *abstract review*	- Court must think the federal law is unconstitutional - Federal law must be applicable to the case the court is about to decide → *concrete review*
BODY REVIEWING	Specialized court called *Staatsgerichtshof* (art. 1, sec. 2) → *centralized review*	High-ranking courts have to appeal to the *Staatsgerichtshof* as well (art. 6, sec. 2, s. 1); Lower courts appeal to a high-ranking court; if this court agrees, it continues the appeal to *Staatsgerichtshof* (art. 6, sec. 3). → *centralized review*
YARDSTICK	Federal constitution, both procedure and fundamental rights (art. 1, sec. 2)	Same (art. 6, sec. 1, s. 2, art. 1, sec. 2)
SCOPE OF VERDICT	Declaration as unconstitutional has the same "power as a law" (art. 5) → object of review is deleted from the books; thus decision binding *inter omnes*	Same, if the *Staatsgerichtshof* handed down the verdict (art. 6, sec. 2, s. 5, art. 5), else cf. art. 6, sec. 4, s. 2.