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Foreword

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Foreword

*Donald P. Kommers**

In *Democracy in America*, published four years before the fiftieth anniversary of the United States Constitution, Alexis de Tocqueville remarked: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."¹ By the turn of the century other foreign scholars would point to the Supreme Court's authority to review the constitutionality of legislative and executive actions as the most distinctive feature of the American governmental system. Today, as the bicentennial of our Constitution approaches, we Americans are inclined to assert, beneath a veil of concealed pride, that the Supreme Court of the United States is indeed the most powerful constitutional tribunal in the world.

But these assertions, however valid they may have been prior to 1950, no longer hold true. The Supreme Court of the United States finds itself now confronted with a worthy rival, in both authority and prestige, in West Germany's Federal Constitutional Court. The latter's formal powers of constitutional review actually exceed those of the American tribunal while its case law, now approaching eighty volumes of reported decisions, touches every major aspect of German public law, even affecting the nerve center of the political system. As the major fount of constitutional doctrine in the Federal Republic, the Court's decisions have also generated a steady stream of scholarly commentary fully equal to the sophistication and fertility of constitutional scholarship in the United States. And, as German public opinion polls have shown, the Court ranks as the most revered and respected of the Federal Republic's governing institutions. Today, thirty-eight years after its founding, its influence extends even beyond Germany's borders, serving as a model for the establishment of constitutional courts elsewhere in Europe.

In the following Article, Professor Wolfgang Zeidler, President ("Chief Justice") of the Federal Constitutional Court, tells us more about the nature of the tribunal over which he presides. The most striking feature of this remarkable institution, from an American perspective, is its exclusive authority to invalidate laws and other governmental actions under the Constitution (the Basic Law). In Germany, as in Italy and Austria, the power of judicial review is concentrated in a specialized tribunal. Courts doubting the constitutionality of a law under which a concrete

* Professor of Law, Notre Dame Law School. Professor Kommers has worked extensively in the field of German Constitutional Law and has written a book and numerous articles on the Federal Constitutional Court. His latest work in this area will be published in his forthcoming book *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY*. President Zeidler's visit to the University of Notre Dame last year to a conference on German and American constitutional law was, in part, a tribute to Professor Kommers' work in this field. The conference was cosponsored by the Notre Dame Law School and the Konrad Adenauer Foundation.

1 A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (1945).

case arises or individuals challenging the constitutionality of a judicial decision or other official action must, if they wish to pursue the matter, refer the question to or file a complaint with the Federal Constitutional Court. By the same token, except for a limited category of cases involving international law and federal-state conflicts over the interpretation of federal law, the Constitutional Court's authority is limited to settling constitutional disputes.

An important feature of this authority is its declaratory nature. Except for temporary injunctions issued in cases of compelling necessity, the Constitutional Court does not involve itself in the enforcement of specific legal obligations. Its power of judgment is normally confined to declaring laws or parts thereof compatible or incompatible with the Constitution. This authority, which is explicitly conferred by the Basic Law, is sweeping. For example, in an abstract judicial review proceeding the Court is at liberty to examine the entire statute before it and to invalidate provisions because they are unconstitutional. No "case or controversy" requirement bars or limits review in such proceedings. Even in constitutional complaints by individual citizens the Court's focus is less on the plight of the complaining party than on the general validity of the challenged action. This open-ended approach to constitutional review reflects the strong German "tendency to have the constitutional correctness of every important and controversial statute scrutinized by the . . . Court" and "forms a part of what [might be called] the eternal struggle for the self-realization of constitutional law in the life of the community."²

I hope these remarks help to place President Zeidler's Article in perspective. His Article describes the various strategies and techniques of judicial decision developed and used by the German Court over the years. Particular constitutional cases are detailed to show how they have been applied. At times, the Court modified or refused to apply its usual strategies and techniques in part to soften the political impact of its decisions. It is not difficult to see why. After all, the Court's jurisdiction is compulsory and its authority, as we have seen, far-reaching. Lacking the "passive virtues" of inaction so familiar to the United States Supreme Court, the German tribunal invites confrontation with other departments of government whenever it decides a constitutional dispute. As a politically exposed institution the Court is under some obligation to employ decisional procedures that will avoid such confrontation as much as possible and express its respect for the democratic political process.

Professor Zeidler's Article appears here, in English, for the first time. It is the most comprehensive and up-to-date treatment of the Federal Constitutional Court's decisional procedures to appear so far in an American law review. It should interest students of comparative constitutional law as well as American scholars alarmed by the United States Supreme Court's claims to finality or exclusivity in constitutional interpretation. By the use of certain decisional modes described by President

2 Friauf, *Techniques for the Interpretation of Constitutions in German Law*, in PROCEEDINGS OF THE FIFTH INTERNATIONAL SYMPOSIUM ON COMPARATIVE LAW 2, 9 (1968).

Zeidler, the German Court provides the legislature with considerable leeway in meeting its constitutional obligations. In doing so the Court does not close off the search for a better ordering of constitutional values by democratic means. It does not foreclose further debate or action with respect to a matter of doubtful constitutionality. It fosters instead a creative constitutional dialogue between itself and parliament.