CONSTITUTIONAL REVIEW OF STATUTES IN GERMANY AND THE UNITED STATES COMPARED

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I. INTRODUCTION

In countries that task courts with constitutional review of statutes, judges are major political players and "most extraordinarily powerful"[1] since they can strike down laws passed by the elected legislature. In Germany, such constitutional

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1. Peter E. Quint, *"The Most Extraordinarily Powerful Court of Law the World Has Ever Known"?—Judicial Review in the United States and Germany*, 65 MD. L. REV. 152, 152 (2006).

review is conducted by a specialized Federal Constitutional Court (*Bundesverfassungsgericht*), whose power to conduct constitutional review is laid out in the German Constitution (*Grundgesetz*),[2] as well as a in a separate federal statute, the German Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*).[3] According to the German Constitutional Court Act, the Constitutional Court ought to declare a law to be null and void if it violates the German Constitution.[4] However, bearing in mind the political consequences of such a declaration with regard to a democratically passed law, the Court has in some cases developed other techniques to address the unconstitutionality of a law without fully invalidating it.

In the United States, courts also conduct constitutional review of statutes. Yet, U.S. judges find less guidance in the U.S. Constitution or U.S. statutes on how to conduct constitutional review or how to address unconstitutional statutes. This is not surprising as U.S. courts developed their approach based on a constitution that was written more than 225 years ago in a common law system, the oldest written constitution still in use today.[5] Despite the absence of explicit constitutional or statutory rules on how unconstitutionality should be dealt with, courts in the United States generally default to declaring a statute void if it conflicts with the Constitution of the United States. But, the Supreme Court deviates from the default remedy of nullity. It has developed other techniques to adequately address unconstitutionality. The Supreme Court's approaches are similar to approaches followed by the much younger German Constitutional Court, based on the much younger German constitution, despite the very different tradition, means, and structure of judicial review in both jurisdictions.

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2. GRUNDGESETZ [GG] [BASIC LAW], *translated at* https://www.gesetze-im-internet.de/englisch_gg/.

3. Bundesverfassungsgerichtsgesetz [BVerfGG] [Federal Constitutional Court Act], Aug. 11, 1993, BUNDESGESETZBLATT, Teil I [BGBL I] at 1473, last amended by Gesetz [G], Oct. 8, 2017, BGBL I at 3546, art. 2, https://www.gesetze-im-internet.de/englisch_bverfgg/index.html.

4. *See id.* art. 2, § 78.

5. *Constitution of the United States of America*, ENCYCLOPEDIA BRITANNICA, www.britannica.com/topic/Constitution-of-the-United-States-of-America (last updated Jan. 29, 2019).

II. THE ORIGINS OF CONSTITUTIONAL REVIEW

A. Germany

German law stems from a civil law background and is based on codified statutes. In cases of dispute over these statutes, different types of courts are responsible to judge the disputes at hand. The highest of these courts are the Federal Court of Justice (*Bundesgerichtshof*), the court for appeals in criminal and civil law matters; the Federal Administrative Court (*Bundesverwaltungsgericht*), the court for appeals on administrative matters; and several other specialized federal courts of appeals.[6] Below these courts there are different types of higher regional courts (appeals courts) within every state and different types of regional courts. Although all of these courts have the power to interpret the German Constitution, none of them actually has the power to declare a statute to be unconstitutional. With the introduction of the German Constitution in 1949, this power was explicitly granted to the specialized Federal Constitutional Court.[7] The Constitutional Court deals with cases involving federal constitutional law issues; it only reviews the correctness of interpretation and application of laws by other courts for infringements of "specific constitutional law" (*spezifisches Verfassungsrecht*).[8] It is not supposed to act as "super appeals court" (*Superrevisionsinstanz*)[9] and does not stand on a higher hierarchical level than the aforementioned highest federal courts of the country. "Specific constitutional law" is an unclear criterion that has been developed by the Constitutional Court itself. It is not mentioned in the German Constitution or in the German Constitutional Court Act, which gives the Constitutional Court some leeway. "Specific constitutional law" is affected if a specialized court has applied a law that is

6. The other specialized federal courts are the Federal Finance Court (*Bundesfinanzhof*), Federal Labour Court (*Bundesarbeitsgericht*), the Federal Social Court (*Bundessozialgericht*) and the Federal Patent Court (*Bundespatentgericht*). The aforementioned specialized federal courts, as well as the Federal Court of Justice and the Federal Administrative Court, were established under Articles 95 and 96 of the German Constitution. GRUNDGESETZ [GG] [BASIC LAW] arts. 95, 96.

7. *See id.* art. 100, ¶ 1.

8. *See* KLAUS SCHLAICH & STEFAN KORIOTH, DAS BUNDESVERFASSUNGSGERICHT: STELLUNG, VERFAHREN, ENTSCHEIDUNGEN ¶ 281, (10th ed. 2015). For the criteria of "specific constitutional law," see generally Andreas Voßkuhle, *Artikel 93*, *in* 3 KOMMENTAR ZUM GRUNDGESETZ 665, ¶¶ 54–66 (Peter M. Huber & Andreas Voßkuhle eds., 7th ed. 2018).

9. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 198 (198).

unconstitutional. "Specific constitutional law" may further be affected if a decision of a specialized court breaches the Constitution itself, which is the more common case in practice.

B. United States of America

The law of the United States was originally derived from the common law system of English law, i.e., judge-made law, in which judicial review of statutes had not played any role in the past because of the principle of "Sovereignty of Parliament."[10] Since then, U.S. law has departed from this origin through the extensive introduction of written laws, the most significant of them being the Constitution. Naturally, its adoption raised the question whether courts were entitled to strike down statutes that violated the Constitution. With regard to laws passed by Congress, this question was answered positively in 1803 by Chief Justice John Marshall in the Supreme Court's landmark decision of *Marbury v. Madison*,[11] despite the fact that the U.S. Constitution does not expressly provide for a system of judicial review.[12] In *Fletcher v. Peck*,[13] the Supreme Court further established its authority to strike down state laws that it found to be incompatible with the U.S. Constitution.

Although the Supreme Court by these decisions primarily established its own power of constitutional review, it did not limit this power to itself. The Supreme Court binds with its decisions also lower courts regarding a finding of unconstitutionality of a given statute.[14] Other courts are also empowered to review statutes with regard to unconstitutionality. All other courts on the federal level essentially means thirteen Courts of Appeals, ninety-four District Court, and some specialized courts including the United States Bankruptcy Courts, the United States Court of

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10. Arguably, the situation has changed in the United Kingdom with the introduction of the Human Rights Act in 1998, which enables a certain degree of judicial review and gives the courts the right to give a declaration of incompatibility according to Section 4 of the Act if an Act of Parliament is incompatible with the European Convention on Human Rights. Human Rights Act 1998, ch. 42, § 4 (Eng.).

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

12. The fact that the U.S. Constitution does not expressly provide for a system of judicial review of statutes has led to an extensive discussion whether such form of judicial review is itself unconstitutional. *See, e.g.*, William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 13, 16–29 (1969); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 898 (2003).

13. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 87 (1810).

14. The doctrine of stare decisis refers to "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Claims, and the United States Court of International Trade, all of which are subordinate to the Supreme Court and are entitled to conduct judicial review of federal laws.[15]

U.S. states are generally free to organize their state court systems and constitutional review of their state statutes provided that such state constitutional review does not violate the U.S. Constitution.[16] A state can have either a two-tiered or three-tiered court system. A court of last resort, often called a Supreme Court, is the highest court. Some states also have an intermediate court of appeal. Below these state appellate courts are the state trial courts. States usually have specialized trial courts, e.g., probate courts, juvenile courts, and family courts. All of these state courts are entitled to conduct judicial review of the respective state laws.[17]

III. MEANS OF CONSTITUTIONAL REVIEW OF STATUTES

A. Germany

The German Constitution expressly sets forth three procedures according to which constitutional review by the Constitutional Court may be conducted and which can lead to a declaration of unconstitutionality by the German Constitutional Court: "Abstract Judicial Review" (*Abstrakte Normenkontrolle*),[18] "Concrete Judicial Review" (*Konkrete Normenkontrolle*),[19] and "Individual Constitutional Complaint" (*Verfassungsbeschwerde*).[20]

In the case of Abstract Judicial Review, the constitutionality of a federal law or a law of a state (*Land*) is reviewed upon request of either the federal government (*Bundesregierung*), the government of a German state (*Landesregierung*), or a quarter of the members of the German house of representatives (*Bundestag*). Abstract Judicial Review is not permitted until after a bill has been passed

15. Article III, Section 1 of the Constitution of the United States created the Supreme Court as the highest court in the United States and authorized Congress to pass laws establishing the lower federal courts. U.S. CONST. art. III, § 1.

16. 20 AM. JUR. 2D *Courts* § 5 (2015).

17. Some states have previously attempted to nullify federal laws. However, the U.S. Supreme Court has rejected state nullification attempts in a series of decisions. *See, e.g.*, Ableman v. Booth, 62 U.S. (21 How.) 506, 526 (1858) (rejecting Wisconsin's attempt to nullify the Fugitive Slave Act); Perez v. Campbell, 402 U.S. 637, 651–52 (1971) (holding that state law may not frustrate the operation of federal law even though the state legislature in passing its law had some purpose in mind other than the one of impinging federal law).

18. GRUNDGESETZ [GG] [Basic Law] art. 93, ¶ 1.

19. *Id.* art. 100, ¶ 1.

20. *Id.* art. 93, ¶ 1.

by the responsible legislative bodies and entered into effect.[21] However, there are exceptions with regard to constitutional review of statutes granting consent for ratification of an international treaty, e.g., the Maastricht Treaty and the European Union Treaty of Lisbon. These statutes can be challenged earlier because the subsequent determination of their unconstitutionality by the Constitutional Court would not affect Germany's obligations under public international law with regard to the respective treaties.

Concrete Judicial Review takes place when an ordinary court (may it be a civil, criminal, or an administrative court), which has to apply a law in a concrete case, deems the applicable statute[22] to be unconstitutional. In such a case, the court must suspend the proceedings and refer the question of constitutionality to the Constitutional Court for a final decision. After the Constitutional Court has decided on the constitutional issue at hand, the ordinary court may continue judging the case.

Individual constitutional complaints can be lodged by any natural person or legal entity[23] claiming a violation of his or her basic rights or a violation of similar rights expressly stated in the German Constitution,[24] caused by a judicial decision being based on an unconstitutional law or, in rare cases, immediately caused by the law itself.

In each of the aforementioned procedures, the question of whether a law is unconstitutional presents itself in the same

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21. BVerfG July 30, 1952, 1 BVERFGE 396 (408); BverfG Mar. 7, 1953, 2 BVERFGE 143 (144). Preventive legal protection is in rare cases granted by preliminary injunctions in accordance with Section 32 of the Federal Constitutional Court Act; however, the Constitutional Court is not entitled to give abstract legal opinions upon request. BVerfGG [Federal Constitutional Court Act], Aug. 11, 1993, BGBL I at 1473, § 32.

22. It should be noted that the Constitutional Court can only conduct Concrete Judicial Review on German laws that came into force after 1949, i.e. after the foundation of the Federal Republic and after the German Constitution came into force. Although this is nowhere explicitly codified, it is generally accepted by the courts and academics alike. Only the so-called post-constitutional legislator should be protected from having to accept the reproach of unconstitutional action by a simple court. *See, e.g.*, BVerfG July 21, 1956, 6 BVERFGE 55 (65); BVerfG May 17, 1960, 11 BVERFGE 126 (129–31); BVerfG Jan. 14, 1969, 25 BVERFGE 25 (26–27); BVerfG Jan. 14, 1969, 29 BVERFGE 40 (42–43). However, if the post-constitutional legislator has incorporated a pre-constitutional law (either civil or criminal) into its will—for instance, by amending the law—then this law as a whole is subject to the jurisdiction of the Constitutional Court.

23. According to the German Constitution, "basic rights" apply to domestic legal persons to the extent that the nature of such rights permits. GRUNDGESETZ [GG] [BASIC LAW] art. 19, ¶ 3.

24. The expression "basic rights" in the German Constitution refers to fundamental rights—such as personal freedom, equality before the law, freedom of speech, or freedom of assembly—granted to individuals or legal persons in the German Constitution. *Id.* arts. 1–19. "Similar rights" refers to rights that are akin to the basic rights, e.g., the right to equal citizenship or the fair trial principle.

way.[25] Should the Constitutional Court, as part of these procedures, declare a law to be unconstitutional, this declaration has the force of law[26] and is binding *erga omnes*, i.e., on the Federal Republic, the States, the courts, and all public authorities. The relevant operative part of the decision is to be published in the Federal Law Gazette.[27]

The overwhelming majority of cases come to the Constitutional Court by means of constitutional complaints. According to the most recent official statistics of the Constitutional Court, there have been 29 filed requests for judicial review of statutes by specialized courts in 2017 and 3,656 since 1951.[28] There have been no filed requests for Abstract Judicial Review in 2017 and only 180 since 1951.[29] On the other hand, there have been 5,784 Individual Constitutional Complaints in 2017 and 224,221 since 1951[30] (most of them being inadmissible or evidently unsubstantiated). In comparison, the U.S. Supreme Court usually receives 7,000 to 8,000 certiorari petitions filed in total during each yearly term, although not all of the petitions raise constitutional issues.[31]

B. United States of America

Unlike the German Constitution, the Constitution of the United States does not set forth the procedures according to which constitutional review has to be conducted. Article III, Section 2 of the U.S. Constitution solely indicates that courts have to decide on "cases" and "controversies." This provision was interpreted to mean that courts of the United States may not give advisory opinions or judge by means of abstract judicial review; instead, the U.S. Constitution only permits courts to issue a judgment in legal disputes in which at least two parties present a legal dispute to a court for resolution.[32] As a consequence, constitutional questions

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25. For a comprehensive overview, see Helmut Philipp Aust & Florian Meinel, *Entscheidungsmöglichkeiten des BVerfG* [*Choices of the Federal Constitutional Court*], 54 JURISTISCHE SCHULUNG [JuS] 25–30, 113–17 (2014).

26. *See* BverfGG [Federal Constitutional Court Act] Aug. 11, 1993, BGBL I at 1473, § 31.

27. *Id.*

28. *Eingänge nach Verfahrensarten* [*Inputs According to Process Types*], *in* JAHRESSTATISTIK 2017 [ANNUAL STATISTICS 2017] 6 (BVerfG 2017), http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2017/gb2017/A-I-4.pdf?__blob=publicationFile&v=2.

29. *Id.*

30. *Id.*

31. *Supreme Court Procedure*, SCOTUSBLOG, http://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/ (last visited Nov. 2, 2019).

32. *See, e.g.*, Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1546–47 (2016); *see also* Smith v. Adams, 130 U.S.

arise for courts in ordinary cases in which it happens that they have to apply a constitutional provision with regard to the dispute presented by the parties. The Supreme Court may decide on a constitutional matter as part of its appellate jurisdiction after a party has petitioned to the Court to grant a writ of certiorari.[33] If the Supreme Court grants certiorari, it gives a final judgment on the concrete case at hand and can choose whether to rule on any underlying constitutional issues. Unlike the German Constitutional Court, the Supreme Court does not have to decide on every constitutional issue brought to its attention but may select its cases on its own merits.[34] Moreover, in contrast to the German system, the Supreme Court's decision on the question of a statute's constitutionality technically affects the parties only and there is no judgment against the law itself, but the decision binds future courts through the doctrine of stare decisis.[35]

IV. UNCONSTITUTIONALITY

A law is unconstitutional in Germany and in the United States if it is incompatible with constitutional law of the respective jurisdiction, because of the constitution's superiority to statutes. Unconstitutionality has to be understood in light of the legal framework of a jurisdiction. Within the German legal framework, a law of a state has to be compatible with the constitutional law of this specific state as well as the German Constitution; a federal law takes precedence over the constitutions of the states and is to be reviewed constitutionally only in the light of the German Constitution. This hierarchy is very similar to that in the United States. In the United States, a state law has to be compatible with the constitution of the state, the U.S. Constitution, and federal statutes; a federal law only has to be compatible with the U.S. Constitution.[36] In light of this hierarchy, under both Germany's and the United States' legal systems, unconstitutionality means

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167, 173–74 (1889); U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 21 (1994); Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 99 (1993); Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663–64 (1993).

33. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 66–67, (13th ed. 1997), for the origins of this form of discretionary review.

34. See SUP. CT. R. 10, for an exemplary list of reasons for the Court to grant a writ of certiorari. Despite the fundamental obligation of the German Constitutional Court to grant a legal right to be heard in front of the Court, the Constitutional Court does not decide on every constitutional complaint brought to it. Out of the unmanageable amount of constitutional complaints received, the Constitutional Court selects those cases that it regards important to be decided on by one of the two chambers.

35. *See* BLACK'S LAW DICTIONARY, *supra* note 14.

36. *See* 16 AM. JUR. 2D *Constitutional Law* §§ 53, 55 (1962).

that a law, either a state law or a federal law, is not compatible with the federal constitution, or that a state law is not compatible with the state's constitution.

Furthermore, with regard to Germany, the primary and secondary law of the European Union also take precedence over federal laws and state laws. Law adopted by the institutions of the European Union (secondary EU law)—unlike primary EU law, the international basis of the Union—is not open to proceedings in front of the Constitutional Court. The task of interpreting and applying secondary EU Law rests with the Court of Justice of the European Union (CJEU).[37] The courts of the member states—specialized courts and constitutional courts—are in a dialogue with the CJEU, in particular through the preliminary ruling procedure according to Article 267 of the Treaty on the Functioning of the European Union. The CJEU does not decide itself on the incompatibility of national laws with EU law but answers interpretative questions of EU law. It is then for the national courts to draw the necessary conclusions with respect to the interpretation or invalidation of national laws. The power to declare a national law to be incompatible with laws of the European Union lies with the national courts. However, unlike with constitutional law, the German Constitutional Court does not have a monopoly on giving such declarations of incompatibility. Any German court can find incompatibility with EU law. Moreover, it has to be noted that EU law only takes priority in its application over national law; i.e., a national court that considers national law to be incompatible with EU law only refrains from applying the national law in a specific dispute at hand but does not invalidate the law in entirety with *erga omnes* effect.[38]

V. REASONING OVER QUESTIONS OF UNCONSTITUTIONALITY

Despite the different origins of judicial review within the United States and Germany, as well as the different means of conducting such review, the reasoning of the courts over questions of constitutionality is very similar within both jurisdictions.

Based on the so-called *canones*, developed by Friedrich Carl von Savigny, statutes in Germany are interpreted on the basis of

37. *See* Treaty on European Union art. 19, Feb. 7, 1992, 1992 O.J. (C 191) 1.

38. *See generally* PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 464–508, 533–36 (6th ed. 2015); ULRICH HALTERN, EUROPARECHT, DOGMATIK IM KONTEXT (3rd ed. 2017).

grammatical, historical, systematic, and teleological arguments.[39] This technique is also used with regard to questions of constitutionality by the German Constitutional Court. In contrast, the U.S. Supreme Court bases its decisions regarding questions of constitutionality on a literal reading of the text of the U.S. Constitution, contextual considerations, the framers' intent, precedent, and policy considerations.[40]

Grammatical and literal interpretation are essentially the same. Courts look at the exact wording of the constitutional text in order to solve the respective constitutional question. Courts use grammatical and literal interpretation usually as the first line of arguments, however, these methods often fail to give a definite answer to a constitutional law question and dispute at hand and are often viewed in combinations with other methods and considerations.[41]

Historical arguments under German law and American arguments based on the framers' intent are also comparable. Both look at the genesis of the specific provisions in the respective constitution. But U.S. courts seem to give greater weight to the actual intent of the framers than German courts,[42] which tend to resort to teleological arguments more quickly. Perhaps this can be explained by the relatively higher esteem in which the framers of the U.S. Constitution—celebrated heroes of the American Revolution—are held as compared to the drafters of the German Constitution, who are less known and worked based on previous versions of German constitutions that were subject to a complex history of their own.

Arguments from constitutional theory and systematic arguments in Germany and in the United States are also comparable. Such arguments place the relevant section of the respective constitution within its wider framework when interpreting it.[43]

Value arguments under U.S. law and teleological arguments under German law are also similar in their application.

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39. *See* Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT'L J. CONST. L. 633, 660 (2004); Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View*, 42 AM. J. COMP. L. 395, 396–401 (1994).

40. Rosenfeld, *supra* note 39; Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

41. Rosenfeld, *supra* note 39.

42. *Id.* The importance of intent when deciding on constitutional questions can also be seen by the weight given to intent when deciding on the question of whether a partial unconstitutional law can be severed. *See also infra* Section VI.C.

43. Rosenfeld, *supra* note 39, at 661.

Teleological arguments look at the purpose of the relevant section of the German Constitution and of the German Constitution as a whole.[44] When applying value arguments, the courts in the United States look at arguments that "appeal directly to moral, political, or social values or policies."[45] Although the teleological arguments are more internal to the German Constitution and the value arguments under U.S. law are in fact external to the U.S. Constitution,[46] the German Constitutional Court has interpreted teleological arguments quite widely and has taken the change of moral, political, and social values within the German population into consideration. An example that illustrates this well can be seen with regard to the Constitutional Court's approach to homosexuality. In a judgment issued on May 10, 1957,[47] the Court declared the criminal liability of male homosexuality to be compatible with the fundamental rights of the German Constitution. Starting with a judgment issued on July 17, 2002,[48] the Court declared the introduction of the legal institution of registered civil partnership for homosexual couples constitutionally admissible and its equality with the legal institution of marriage for heterosexual couples to be constitutionally required.

Arguments from precedent under U.S. law stem from the common law origin of the U.S. legal system,[49] which establishes that U.S. courts are bound by stare decisis when deciding constitutional matters. However, the Supreme Court does not follow this doctrine "slavishly"[50] and sometimes overrules its own previous decisions.

Unlike U.S. courts, the German Constitutional Court is not bound by its own decisions and is permitted to dismiss legal opinions within earlier decisions. Yet, in practice, the German Constitutional Court tends to stick to its past decisions, which it regularly cites as authority, when judging constitutional matters.[51]

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44. *Id.*
45. Fallon, *supra* note 40, at 1204.
46. Rosenfeld, *supra* note 39, at 661.
47. BVerfG May 10, 1957, 6 BVERFGE 389.
48. BVerfG July 17, 2002, 105 BVERFGE 313.
49. *See supra* Section I.
50. Rosenfeld, *supra* note 39, at 662.
51. *See id.*; Wolfgang Zeidler, *Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*, 62 NOTRE DAME L. REV., 504, 521–22 (1986).

VI. LEGAL EFFECT OF A DECLARATION OF UNCONSTITUTIONALITY

A. Nullity

Under German law, if the Constitutional Court declares a law to be unconstitutional, it is generally regarded to be null and void, despite the fact that nullity and voidness are not expressly stated in the German Constitution. Unlike Article 140 of the Austrian Constitution, the German Constitution does not expressly state that the Constitutional Court can repeal unconstitutional laws.

The effects of a judgment by the Constitutional Court declaring a law to be unconstitutional and void are addressed in Sections 78 and 79 of the German Constitutional Court Act. A declaration of nullity has the effect that the unconstitutional law may not be applied henceforth.[52] However, in considering the constitutionality of the law as applied in the past, the situation is different. In criminal cases, a new trial is permissible if a conviction was based on an unconstitutional and void law.[53] In all other cases, official decisions resting on such a law—for instance, administrative acts or judicial rulings—remain valid if the statute of limitations for challenges has run out; however, these voided laws can no longer be prospectively enforced.[54] For example, if a citizen has paid taxes on the basis of an unconstitutional tax law and has let the tax assessment become incontestable, the citizen is not entitled to claim any tax refunds. But, if the assessment can still be challenged or the citizen has not yet paid, then tax authorities could no longer compel the citizen to pay taxes based on an unconstitutional law.

To avoid problems arising from incontestable decisions, administrative bodies issue decisions subject to a reservation of subsequent review. An administrative body might issue such a reservation to a decision if the body expects that the particular law on which the decision is based might be invalidated by the Constitutional Court.[55]

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52. Wiltraut Rupp-v.Brünneck, *Admonitory Functions of Constitutional Courts*, 20 AM. J. COMP. L. 387, 390 (1972).

53. BVerfGG [Federal Constitutional Court Act] Aug. 11, 1993, BGBL I at 1473, § 79, ¶ 1.

54. *Id.* § 79, ¶ 2.

55. As an example, taxes are only provisionally set by the tax authorities if the compatibility of the applicable superior tax law is the subject of proceedings before the CJEU, the Constitutional Court, or a federal court. ABGABENORDNUNG [AO] [FISCAL CODE OF GERMANY], § 165, ¶ 1(3), *translation at* https://www.gesetze-im-internet.de/englisch_ao/.

In the United States, neither the Constitution nor any other law states the legal effects of an unconstitutional law, but since *Marbury v. Madison*,[56] it is generally accepted that "an act of the legislature [that is] repugnant to the constitution[] is void."[57] As courts in the United States only make decisions in "cases" and "controversies," a declaration of a law to be void theoretically only means that the respective law is not enforced in the case at hand. However, judicial adherence to stare decisis assures that rulings declaring laws void will be applied in future cases involving the respective law.[58] Therefore, from a practical point of view, a court declaration that a law is void applies to all cases that are subsequently litigated. Moreover, just like in German law, in criminal cases the voidness of a law has retroactive effects. However, retroactive constitutional review of a US criminal case is only permissible if the conviction was based on a law that is unconstitutional due to a "substantive constitutional rule,"[59] rather than a procedural rule.

B. Voidness vs. Voidability

German constitutional scholars debate whether the Constitutional Court's judgment to nullify a law is best grasped by the *doctrine of voidness* or rather by the *doctrine of voidability*. Under the doctrine of voidness, an unconstitutional law is null and void ab initio and ipso jure and the Constitutional Court only determines that.[60] However, under the doctrine of voidability, an unconstitutional law is initially valid but the Constitutional Court voids the law with effect ex nunc, i.e., henceforth. Hence, the decision by the Constitutional Court is not a declaratory judgment, but rather a reformatory one.[61]

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

57. *Id.* at 177.

58. GUNTHER & SULLIVAN, *supra* note 33, at 26.

59. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

60. Herbert Bethge, *in* BUNDESVERFASSUNGSGERICHTSGESETZ 159, § 31, ¶¶ 142–44 (Theodor Maunz et. al. eds., 54th ed. 2018); Andreas Heusch, *in* BUNDESVERFASSUNGSGERICHTSGESETZ § 31, ¶ 74 (Dieter C. Umbach et al. eds., 2nd ed. 2005); CHRISTIAN HILLGRUBER & CHRISTOPH GOOS, VERFASSUNGSPROZESSRECHT ¶ 548 (4th ed. 2015); Wolfgang Löwer, *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 1285 (Josef Isensee & Paul Kirchhof eds., 3rd ed 2005); HARTMUT MAURER, STAATSRECHT I § 20, ¶ 84 (7th ed. 2015).

61. Malte Graßhoff, *in* BUNDESVERFASSUNGSGERICHTSGESETZ § 78, ¶ 31 (Dieter C. Umbach et al. eds., 2nd ed. 2005); Eckart Klein, *in* VERFASSUNGSPROZESSRECHT ¶ 1369 (Ernst Benda & Eckart Klein eds., 3rd ed. 2011); CHRISTIAN PESTALOZZA, VERFASSUNGSPROZEßRECHT § 20, ¶¶ 14–18, (3rd ed. 1991).

Both doctrines have advantages and disadvantages in evaluating the decisions of the Constitutional Court. The doctrine of voidness fits better with the traditional concept of how conflicting norms resolve in the legal hierarchy that exists under the German Constitution: federal laws void conflicting laws of the states, executive orders are voided by conflicting parliamentary statutes, and national laws are voided by conflicting EU law. The doctrine of voidability gives more weight and power to parliamentary legislation, even if it must not be confused with a presumption towards the constitutionality of laws passed by parliament. Moreover, the voidability doctrine aligns with the fact that for practical purposes many Constitutional Court judgments declaring a law unconstitutional and void only have prospective effect.

In the United States, courts and scholars also extensively debate the retroactivity and prospectivity of judgments declaring a law unconstitutionally null and void.[62] However, there does not seem to be quite as robust of a doctrinal dispute in the United States regarding the concepts of voidness and voidability as there is in Germany.

In *Norton v. Shelby County*,[63] the Supreme Court held that "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[64] The Court thereby seems to have indicated that the doctrine of voidness must be applied with regard to United States' constitutional law. However, since courts within the United States are solely deciding on "cases" and "controversies," the aforementioned statement by the Supreme Court can better be regarded as an overstatement[65] than an actual statement of the law. In fact, since United States' courts only invalidate laws in particular cases, the doctrine of voidability better depicts the legal effects of such judgments within the United States' jurisdiction.

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62. *See, e.g.*, Richard Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMP. L. SUPP. 37 (2014); Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515 (1998); Lee-ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of* Obergefell, 2016 WIS. L. REV. 873, 887–910 (2016).

63. Norton v. Shelby Co., 118 U.S. 425, 438 (1886).

64. *Id.* at 442.

65. GUNTHER & SULLIVAN, *supra* note 33, at 27.

C. Partial Nullity

Regularly, only a single norm, one sentence, or even a single word of a law proves to be incompatible with the constitution. This raises the question of whether the offending part of the law is severable and whether only a declaration of partial (quantitative or quantitative) nullity may be given by the courts.

In Germany, according to the established precedent of the German Constitutional Court, a complete nullification of a law is only proper if the other constitutional provisions of the law are so closely connected with the unconstitutional part of the law that they form a comprehensive, inseparable unit that loses its meaning and its justification in the event of the removal of individual parts.[66] Therefore the Constitutional Court only rarely nullifies a law in its entirety.

Within the United States, the criteria for the question of whether a partially unconstitutional law may be severed by the courts has changed several times over the years.[67] The Supreme Court developed the modern test regarding severability in *Alaska Airlines, Inc. v. Brock*,[68] in which it held that a partial nullification can be applied when the remaining part will be "fully operative as a law"[69] and "the statute created [by severing the unconstitutional part of the law] . . . is [not] legislation that Congress would not have enacted."[70]

In both jurisdictions, upon taking the decision of whether to sever a statute, the courts ask themselves whether the remaining part of the law could stand on its own. However, within the United States, more emphasis is put on the legislature's intent regarding the law. Arguably, the approach by the U.S. Supreme Court gives less liberty to the courts to answer the question of whether a law may be severed since the courts are bound by the legislature's (hypothetical) intention regarding the question of severability.

Besides the concept of partial quantitative nullity, outlined above, the German Constitutional Court at times also applies the concept of qualitative partial nullity. Under this concept, certain use-cases of a law are nullified by the Constitutional Court, but

66. Zeidler, *supra* note 51, at 508; *e.g.*, BVerfG Dec. 6, 1983, 65 BVERFGE 325 (358).

67. See Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. LEGIS. 227, 232–43 (2004), for a comprehensive summary of the case law regarding severability within the United States.

68. Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987). See Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738 (2010), for a criticism of American law's approach to partial unconstitutionality.

69. *Alaska Airlines, Inc.*, 480 U.S. at 684 (citations omitted).

70. *Id.* at 685.

the wording of the law remains unchanged. This concept may best be explained by outlining the facts of a case the German Constitutional Court has decided. At issue in this case was a German corporate income tax law that stipulated a general exemption from taxes on political parties. While if this law were applied generally it would be compatible with the German Constitution, under the law, communal voters associations were not granted this privilege and thus were subject to the general rules of corporate income tax liability. The Constitutional Court viewed this as a breach of the principle of equality and declared the general rules of corporate income tax unconstitutional insofar as communal voters associations were, in contrast to political parties, liable to pay corporate income taxes.[71]

The application of the concept of qualitative nullity by the Constitutional Court is widely criticized for a lack of transparency and publicity[72] since such judgments leave the law facially unchanged. For instance, in the above example, it is not visible in the statute that communal voters associations are exempted from the corporate income tax. Moreover, some authors criticize the concept since they believe that the Constitutional Court exceeds its role as a supervisory body over the legislature and, rather, actively designs the law.[73]

The U.S. Supreme Court also applies qualitative partial nullity in some of its decisions. One example of such a case is *FEC v. Wisconsin Right to Life, Inc.*[74] This case concerned the constitutionality of Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibits corporate funds from being spent for issue advocacy advertisements during the sixty-day period prior to a general election. The plaintiffs in the case argued that the BCRA was unconstitutional as applied to an advertisement that asked voters to contact their Senators and urge them to oppose filibustering of judicial nominees. The Supreme Court agreed with the plaintiffs, holding that the BCRA was unconstitutional as applied to such advertisements that do not explicitly endorse or oppose a candidate and upholding the BCRA with regard to its other applications.[75] Another case in which the Supreme Court arguably used partial qualitative nullity concerned

71. BVerfG Sept. 29, 1998, 99 BVERFGE 69 (83).

72. See SCHLAICH & KORIOTH, *supra* note 8, ¶ 386, for criticism of the Constitutional Court's application of qualitative partial nullity.

73. *See, e.g.*, BVerfG Oct. 16, 1984, 67 BVerfGE 348 (349).

74. FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

75. *Id.* The Supreme Court later ruled in Citizens United v. FEC, 558 U.S. 310 (2010), that the BCRA was unconstitutional with regard to all other applications too.

a New Hampshire abortion law.[76] In 2003, New Hampshire enacted the Parental Notification Prior to Abortion Act, which prohibited physicians from performing an abortion on a pregnant minor until forty-eight hours after written notice of such abortion was delivered to her parent or guardian. The Act did not explicitly permit a physician to perform an abortion in a medical emergency without parental notification, which the Court held to be unconstitutional. Nevertheless, the Court decided not to invalidate the statute but, rather, focused on potential remedies, arguing that lower courts were able to render narrower declaratory and injunctive relief in the given situation. However, by indicating that this law was unconstitutional with regard to the respective use-case, the Court arguably effected a declaration of partial qualitative nullity, similar to that used by the German Constitutional Court.

D. Exceptions from the Principle of Nullity

In certain cases, the nullification of an unconstitutional law is even less desirable than keeping the law in the statute books—at least for a limited amount of time. Therefore, the U.S. Supreme Court and the German Constitutional Court have developed instruments to allow avoidance of the effects of nullifying of a law.

1. Declaration of Incompatibility

In Germany, courts can make what German lawyers refer to as a "declaration of incompatibility"; here, a court declares a law to be unconstitutional but, nevertheless, allow for its future application. In some of these cases, the court only permits future application of the unconstitutional law for a limited timeframe, allowing the legislature time to modify the law.[77]

An often-used example to explain the application of a declaration of incompatibility relates to the legal rules regulating the salaries of civil servants. According to Article 33, paragraph 5 of the German Constitution, civil servants must be paid an appropriate salary for their services towards the state. In a case judged by the Constitutional Court, it held that the then-

76. *See* Ayotte v. Planned Parenthood, 546 U.S. 320 (2006).

77. Under German law, declarations of incapacity were originally developed through case law, but the power of the Constitutional Court to issue these declarations is now explicitly acknowledged by the Law on the Federal Constitutional Court. BVerfGG [Federal Constitutional Court Act] Aug. 11, 1993, BGBL I at 1473, § 31, ¶ 2.

applicable salaries paid to civil servants were too low and, therefore, unconstitutional.[78] However, if the Constitutional Court declared the law to be null and void, civil servants would—at least temporarily—not only receive too low a salary, but none at all. Such a judgment would go against the objectives of Article 33, Paragraph 5 of the German Constitution and create a worse result than if the unconstitutional statute were fully upheld. Therefore, the Constitutional Court decided to declare the law to be incompatible with the German Constitution and set the legislature a deadline to amend the law.

Another illustrative example relates to the Constitutional Court's treatment of the laws of two German states on the preventive detention of highly dangerous criminals.[79] In its judgment, the Constitutional Court came to the conclusion that the aforementioned laws were unconstitutional because the German states did not have the legislative competence to pass them. If the Constitutional Court had declared these laws null and void, highly dangerous criminals would have had to be released, which would have interfered with the state's institutional obligations to protect the fundamental rights of individuals. The Constitutional Court avoided this consequence by allowing the laws to remain valid for six months, giving legislative bodies enough time to pass new, constitutional statutes on the preventive detention of these criminals.

In cases where a law violates the principle of equality by excluding privileges from certain groups, the Constitutional Court will rarely completely void a law. Instead, the Constitutional Court will typically only give a declaration of incompatibility, leaving it up to the legislature to decide whether it wants to grant the advantage to another comparable group too, whether it wants to abolish the privilege altogether, or whether it wants to find other criteria to circumscribe the privileged groups in accordance with the Constitution.[80] Since in such a scenario none of these options is constitutionally preferable, a declaration of nullity would be one-sided. Therefore, as phrased by the Constitutional Court, "[t]he violation of the principle of equality leads to a mere declaration of incompatibility, because the contrariety to the principle of equality

78. BVerfG Mar. 22, 1990, 81 BVERFGE 363 (384).
79. BVerfG Feb. 10, 2004, 109 BVERFGE 190 (235).
80. *E.g.*, Zeidler, *supra* note 51, at 517.

does not force the legislature to certain conclusions, the legislature rather has multiple options to overcome the unconstitutional situation."[81]

As one can see from the examples outlined above, under German law, there are essentially two groups of cases in which the Constitutional Court avoids a declaration of nullity although a law is unconstitutional. First, a declaration of nullity is not made when the situation caused by that declaration would be in greater conflict with the constitutional order than the situation caused by the continued existence of the law. Second, a declaration of nullity is not made when the legislature has multiple options about how to overcome a breach of the Constitution.

The U.S. Supreme Court sometimes employs a similar approach in dealing with laws that are declared unconstitutional. In its landmark decision *Brown v. Board of Education*,[82] the Supreme Court ruled that racial segregation in public schools based on state laws is a violation of the Fourteenth Amendment's Equal Protection Clause but refrained from explicitly declaring the state laws to be void. In the second case of *Brown v. Board of Education*,[83] the Supreme Court determined that segregation should be ended as early as possible, but the Court also recognized that it would be extremely difficult to implement the related changes and that the decision concerned a hugely controversial and political issue. The Court therefore decided that segregation in schools must end "with all deliberate speed."

In addition, the U.S. Supreme Court sometimes leaves the remedy question to states after it declares a state law to be unconstitutional. For example, in *Levin v. Commerce Energy, Inc.*, a state tax scheme was declared to be unconstitutional because it discriminated against non-local companies.[84] Instead of invalidating the scheme, the Supreme Court left the remedial choice in the hands of state authorities, noting that the Constitution requires only equal treatment, which can be accomplished in more than one way. Moreover, the Supreme Court acknowledged that state courts are better positioned than their federal counterparts to correct unconstitutional state laws because the remedy should be tailored with "the State's legislative prerogative firmly in mind," and state courts are more familiar with state legislative preferences.[85]

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81. BVerfG June 22, 1995, 93 BVERFGE 121 (148).
82. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).
83. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).
84. Levin v. Commerce Energy, Inc., 560 U.S. 413 (2010).
85. *Id*. at 427.

From the decisions of the Supreme Court in the cases just discussed, it appears that the Supreme Court also uses declarations of incompatibility in some circumstances to delay nullifying an unconstitutional law. However, unlike the German Constitutional Court, the Supreme Court has so far refrained from setting the legislature a concrete deadline for the revision of a specific law at hand.

2. Admonitory Decisions

Another means developed by the German Constitutional Court to avoid a declaration of nullity are the so-called "admonitory decisions" (*Appellentscheidungen*). When it issues an admonitory decision, the Court both declares the law in question to be presently constitutional while also indicating that the law might become unconstitutional in the near future if the legislature does not repeal or amend it.[86] The Court therewith appeals to Parliament for legislative action.[87] Hence, admonitory decisions enable the Constitutional Court to decide on constitutional principles and indicate the direction in which policies should be pursued, thus fulfilling the Court's constitutional duty without directly challenging the validity of the disputed legislation.

As an example of admonitory decisions in action, on April 10, 2018, the Constitutional Court decided on a challenge against the German Real Property Tax Act, which had been subject to previous admonitory decisions.[88] The Court found a violation of the constitutional guaranty of equality in Article 3 of the German Constitution, because valuation criteria had not been updated since 1964 which distorted valuations and unreasonably benefited some taxpayers while harming others. The Court determined that the Legislature is obligated to consider market values and enjoys some discretion in determining valuation methods for tax purposes.[89] However, the Court determined that the distortions created by this failure to update the valuation criteria created a constitutionally unacceptable level of inequality in taxation and required a correction.[90] To remedy the situation, the Court did not declare the Real Property Tax Act invalid, but instead set a

86. Rupp-v.Brünneck, *supra* note 52, at 387.

87. *Id.*

88. BVerfG Apr. 10, 2018, 148 BVERFGE 147; *see also* BVerfG June 22, 1995, 93 BVERFGE 121; BVerfG June 22, 1995, 93 BVERFGE 165; BVerfG Nov. 7, 2006, 117 BVERFGE 11.

89. BVerfG Apr. 10, 2018, 148 BVERFGE 147 (147, 183).

90. 148 BVERFGE 147 (187, 206).

deadline for the legislature to rewrite the law by December 31, 2019, and for the tax authorities to implement the changes by December 31, 2024. The court noted that if it declared the statute invalid, it would create an excessive amount of administrative burden to unwind prior tax assessments and payments[91] and harm the State's needs for the funds generated by the real property tax, which recently amounted to approximately fourteen billion Euros.[92]

Other examples of admonitory decisions in the Constitutional Court include the following. First is the indication by the Constitutional Court that a tax burden will become unconstitutional in the face of increasing inflation.[93] Another example relates to statutory default interests, the amount of which is inappropriate given the current low interest rate environment.[94] A third example is an indication of possible changes to previously settled case law by the Constitutional Court.[95]

The Supreme Court has taken similar approaches and indicated that a law may become unconstitutional in the future, urging Congress to make changes. An example of this can be seen in *Northwest Austin Municipal Utility District Number One v. Holder*,[96] in which the Supreme Court had to decide on the constitutionality of Section 5 of the Voting Rights Act. Section 5 requires certain jurisdictions to obtain federal authorization before implementing changes to their election laws, which is especially controversial due to its potential intrusion on state sovereignty. Despite this issue, the Court, by using a "superficial textual analysis," upheld the constitutionality of Section 5 while simultaneously signaling "that next time around [S]ection 5 would not survive constitutional scrutiny in its current form."[97] Although the Court thereby did not rule on the constitutionality of Section 5, the Court signaled to Congress that it should take legislative action in order to avoid a declaration of nullity in future cases.[98]

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91. 148 BVERFGE 147 (213–14).

92. 148 BVERFGE 147 (213).

93. BVerfG June 22, 1995, 93 BVERFGE 121 (income and property tax).

94. BVerfG Nov. 28, 1984, 68 BVERFGE 287 (308).

95. BVerfG July 26, 1972, 34 BVERFGE 9 (26); *see also* MAURER, *supra* note 60, at 472.

96. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 205 (2009).

97. Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 784 (2012).

98. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 197, 203–05 (2009). It should be noted that the Supreme Court again had to decide on the validity of Section 5 of the Voting Rights Act in the case of *Shelby County v. Holder*, 570 U.S. 529

E. Interpretation in Conformity with the Constitution

The U.S. Supreme Court, as well as the German Constitutional Court, can also avoid declaring a law to be unconstitutional by engaging in a technique that German lawyers refer to as an "interpretation in conformity with the constitution." As its name suggests, by engaging in this technique, the courts use regular methods of interpretation of laws to interpret a law in a way that is compatible with the country's constitution. If this technique is available to a court in a specific case, it shall be used to uphold the validity of a law.[99] As the Supreme Court phrased it in *Ashwander v. Tennessee Valley Authority*[100]: even if "serious doubt[s]" concerning the validity of an act of Congress are raised, the Court will first ascertain "whether a construction of the statute is fairly possible by which the question may be avoided."[101]

A recent prominent example in which the Supreme Court has used the aforementioned technique can be seen in the case of *National Federation of Independent Business v. Sebelius*, in which the Supreme Court had to decide on the constitutionality of two aspects of the Patient Protection and Affordable Care Act, commonly known as "Obamacare."[102] One of the issues to be decided was the so-called individual mandate clause that requires most Americans to maintain health insurance coverage. The clause generally provides for a penalty to be paid for non-compliance with the mandate. Although the clause would not have been constitutional as a penalty, the Supreme Court regarded it as a "tax" and hence an exercise of Congress's taxing power, even though Congress had described it as a "penalty" and had specifically avoided calling it a "tax." By interpreting the individual mandate clause as such, the Supreme Court therewith avoided declaring this aspect of the law unconstitutional.

(2013), since no legislative action has been taken since its decision in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009). Although it did not strike down Section 5 of the Act, within that case it held Section 4(b) of the Voting Rights Act to be unconstitutional. *Holder*, 570 U.S. at 530, 557. Section 4(b) contains the coverage formula that determines which districts are subject to authorization under Section 5. *Id.* at 529. This essentially made Section 5 inapplicable until a new coverage formula would be enacted.

99. Zeidler, *supra* note 51, at 509; Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936).

100. Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936).

101. *Id.* at 348 (citations omitted).

102. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

As one can see from the above, the technique of an interpretation in conformity with the constitution is closely akin to a declaration of qualitative partial nullity by the courts. Differences consist in the margins of interpretation. In essence, an interpretation in conformity with the constitution is a positive version of a declaration of qualitative partial nullity aiming to ensure the validity of the respective statute. Therefore, in German jurisprudential literature, interpretation in conformity with the constitution is often described as a hybrid declaration of compatibility and incompatibility.[103]

The method of interpreting a law in conformity with the constitution can surely be praised for the courts' efforts to uphold a law and upholding the legislature's intent. However, if this method is used too widely, the courts might overstep their institutional competence by rewriting the law to conform it to constitutional requirements.[104] To avoid this, the courts should focus greatly on the legislative intent when using the method of interpreting a law in conformity with the Constitution.

VII. CONCLUSION

Even though the origins, scope, and means of judicial constitutional review of statutes are different in the United States and in Germany, courts in both countries have a similar understanding of the meaning of unconstitutionality and apply similar techniques when deciding on the constitutionality of a law. In general, the courts in both countries declare a law void if it conflicts with their constitution, unless a declaration of invalidity worsens or fails to remedy the violation of the constitution. Bearing in mind the political consequences of invalidating a law, the courts have developed alternative approaches to deal with constitutionally problematic laws. For example, both courts can partially invalidate laws, declare laws to be incompatible with the respective constitution without invalidating the law, give admonitory decisions, and interpret laws in conformity with the respective constitution. However, in both countries such judge-

103. Klein, *supra* note 61, ¶ 1411; HILLGRUBER & GOOS, *supra* note 60, ¶ 536; SCHLAICH & KORIOTH, *supra* note 8, ¶ 441.

104. Arguably in a non-constitutional context the Supreme Court has done so when adopting the so-called *first sale doctrine* in the case of *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908). *See* Lothar Determann & David Nimmer, *Software Copyright's* Oracle *from the Cloud*, 30 BERKELEY TECH. L.J. 161, 172–73 (2015).

made approaches remain controversial due to concern regarding the proper role of the judiciary vis-a-vis the other branches.[105]

105. See DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 38–41 (3rd ed. 2012), for criticism of the Federal Constitutional Court's power within the framework of the German balance of power.