QUESTIONS AND COMMENTS

1. Note the two major stages in the transformation of the institutional role of the Conseil Constitutionnel. The first occurred in the early 1970s, with the amendment to allow a group of minority deputies in the legislature to make challenges and the Conseil's willingness to invalidate legislation as interfering with a variety of individual rights. In 2008, the Conseil Constitutionnel focused its attention on the 1971 interpretation of the Preamble. (For further readings, see § 7 infra.)

More recently, with a constitutional amendment in 2008 and implementing legislation in 2009, the Conseil Constitutionnel has taken on a more important role in the judicial system and to individual litigants; and its status as the guarantor of rights and liberties would have been consolidated. Last, such a change might have provided the Constitutional Council with a more stable source of legitimacy.

4. GERMANY AND ITS FEDERAL CONSTITUTIONAL COURT

a. Historical Background

In the early 19th century modern Germany did not exist; its constituent parts were ultimately pulled together, following the breakup of the Holy Roman Empire. After the defeat of Napoleon Bonaparte in 1815, the German Confederation was established. This was a loose union of independent states, described as a "largely defensive alliance among autonomous aristocracies" dominated by Austria. David P. Currie, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 2 (1994). The German Confederation failed to consolidate the number of separate states from approximately 300 to about 40. In connection with the Confederation, the Bundestag—an assembly appointed by the rulers of the various states—was established. Federalism, and the roles of the constituent parts of Germany (called "Länder"), are dominant themes in German constitutional development and the development of the concept of a constitutional court.

In 1848 there were unsuccessful attempts at revolution in many parts of Europe, including Prussia. While a new national parliament was elected to take over powers from the Bundestag in 1848, and a new constitution was written, it was not effective. This ineffective constitution provided for a bill of rights, enforceable by judges, based on the American model.

By 1867 Prussia, the strongest of the different states that came to make up modern Germany, under the military leadership of Prime Minister Bismarck, organized the North German Confederation, leading to the defeat of France in the Franco-Prussian war and the establishment of the German Empire. Wilhelm I became "Kaiser," or emperor, and Bismarck continued to head the government as Chancellor. Under the Constitution of the Empire, there was a two-

* Currie, at 9, Prussia's own constitution, also adopted in response to the events of 1848, permitted some popular participation in lawmaking, and included a bill of rights.
house parliament, consisting of the Reichstag (an elected body) and the Bundestag (members appointed by the state governments). The legislative authority of the Reichstag was limited, however, and the Empire Constitution provided neither a bill of rights nor for judicial review of legislation.

Following Germany's defeat in World War I, the Weimar Republic and Constitution were created. A national assembly was elected to write the constitution, which was provided for a two-house parliament, a president and chancellor. The Weimar Constitution included a bill of rights, and was interpreted to permit judicial review. While the chancellor and cabinet were appointed by the president, they could be removed from their offices by the Reichstag without the designation of a successor; conversely, the President could dissolve the Reichstag, and frequently did. Apart from formal amendments, the legislature could, by passing another unconstitutional law by a two-thirds vote, alter the constitution without explicit amendment; Professor Currie asserts that in this way, the Constitution could be altered entirely by accident and no one could determine what the Constitution provided by reading it...

By the early 1930s the Nazis had obtained substantial representation in the parliament and in 1933, President Hindenburg appointed Hitler as Chancellor. Hitler immediately took advantage of emergency power provisions in the Weimar Constitution, declaring an emergency. His allies in the legislature extended those powers, authorizing essentially unlimited executive governance by decree and subordinating the Länder (state) governments to federal control. All other political parties were suppressed. After Hindenburg died in 1934, Hitler declared himself the "Führer" (leader) and the government the "Third Reich." (The first two were the Holy Roman Empire and the German Empire.) For a popular historical account, see William L. Shirer, THE RISE AND FALL OF THE THIRD REICH (1960).

Following Germany's defeat in World War II, West Germany (the portion of Germany under the control of the western allies) adopted a new constitution, the Basic Law of 1949. When East and West Germany reunited in 1990, they did so under that Basic Law.

Under the Basic Law, lawmaking authority is lodged primarily in the popularly elected Bundestag. The Bundestag is made up of members of the executive branches of the Länder, and it can exercise some suspensive veto over legislation proposed by the Bundestag; in some cases agreement of the Bundestag is required. While most laws are made at the federal level, administration of most law is carried out by the Länder. There is a President, but primary executive authority is vested in the Chancellor and the Cabinet. The Chanceller is chosen by the Bundestag but can only be removed if a replacement is designated.

The opening provisions of the Basic Law consist of a Bill of Rights, emphasizing their primacy. Constitutional amendments require a two-thirds vote by both houses, must be clearly stated, and cannot affect certain provisions of the Basic Law.

b. The German Constitutional Court: Creation, Jurisdiction, Status

A leading scholar of the German Constitutional Court is Professor Donald K. Krommes. His works provide useful accounts of the origins of judicial review in Germany, of the current operation of the Constitutional Court and of the history of appointments to that Court. The following summary is based largely on his text, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (2d ed. 1997), which is the source of the quoted material in what follows, and with respect to recent developments, on Donald P. Krommes & Russell A. Miller, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (3d ed. 2012). See also Donald P. Krommes, Germany: Balancing Rights and Duties, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 151 (Jeffrey Goldsworthy ed., 2000).

Germany's decision to create a single, specialized constitutional court was influenced by the notion, advanced by Professor Cappelletti, that Europe's career jurists are not well suited to constitutional adjudication, and by what Krommes calls the "conservative reputation and public distrust" of the regular courts. Krommes also emphasizes the role of earlier traditions, including "constitutional review" and "judicial review" in Germany.

Pre-World War II History: Krommes traces what he calls "constitutional review" to the Holy Roman Empire, with a revival in the 19th century German Empire. "Constitutional review" provided a forum to resolve disputes among and between the different states and also between the states and the central government. During the German Empire this function was performed by the legislative house in which the different states were represented. Under the Weimar Republic, the Staatsgerichtshof was a constitutional tribunal, or court, that assumed some of the jurisdiction previously exercised by that house. In addition to resolving conflicts between and among the different governments, the Staatsgerichtshof had jurisdiction over trial of impeachments against high executive officers for constitutional violations and over disputes involving the Länder administration of national law. Krommes concludes that the structure of the Staatsgerichtshof influenced subsequent constitutional development in several respects: A tribunal separate from ordinary courts exercised constitutional review, taking cases as a matter of original jurisdiction and in a procedure simpler than that of an ordinary lawsuit, and had jurisdiction to settle disputes of a constitutional nature among and between the different levels of government.

What Krommes calls "judicial review"—a broader concept including the power to review the constitutionality of enacted laws—also had
members of the convention favored having two different courts—one to deal with "political" disputes between governments and the other to deal with the constitutionality of laws. Others favored a single court with several different, specialized panels, exercising jurisdiction over many areas of public and constitutional law. Many German judges were concerned about such a mixing of "law" and "politics" in one forum.

The compromise that emerged was to have a single constitutional tribunal, with authority over all constitutional disputes including the validity of laws. The mandatory jurisdiction of the court could be invoked only by federal and state governments, political parties and in some cases other courts; but the initial Basic Law, while permitting the legislature to add to the Court's jurisdiction by statute, did not provide a constitutional right for private persons to petition the Constitutional Court, a decision influenced by practice in Weimar Germany. The political interests of the major parties were also served by the compromise: Kammers explains that the Social Democrats favored the limited access rules because political minorities would be protected and Christian Democrats thought they would be useful in preserving German federalism. This interest also was protected by the power of the Bundestag to choose half the judges, while the Social Democrats saw their interests supported by provisions that "federal judges and others" would be appointed to the court, which contemplated that persons in addition to federal judges would be appointed, thereby avoiding entrenched domination by professional judges in the largely conservative judiciary.

Once the Basic Law was adopted, it took almost another two years to enact the statute creating the Federal Constitutional Court. The competing perspectives of the central government, the Social Democrats and the Bundesrat on judicial selection and tenure, the provision of compensation to "other members," the size and structure of the court and the extent to which the Ministry of Justice controlled the courts were all subjects of debate. Months of negotiation resulted in a bill with substantial support from all major parties and all branches of government, and the Federal Constitutional Court Act (FCCA) was passed in March, 1951. According to Kammers, all participants felt that the court's political effectiveness and legitimacy would depend on the parties and the different governments reaching broad agreement on these matters. The FCCA provides for the qualifications and selection procedures for the Constitutional Court judges, establishes a two-chamber tribunal and prescribes the jurisdiction of each; defines when the two senates sit together as a "plenum"; and provides for removal and retirement of the judges.

**Major Categories of Jurisdiction**

**Constitutional complaints:** The Constitutional Court has jurisdiction over both "abstract review" of laws, and over "concrete" review that can arise out of ordinary litigation, both of which are limited by government entities or officials. But over 90% of the Constitutional Court's docketed caseload has been generated from constitutional complaints, which may be filed by any person who claims
that a government action has violated a right under the Basic Law if
the person has exhausted other legal remedies.\(^2\)

Initially authorized by statute, this provision became so important
that in 1969 the Basic Law was amended to constitutionalize the right
to file constitutional complaints. Even though the initial drafters
decided not to require the constitutional complaint procedure, by the late
1960s, Kammers reports, virtually no public official opposed amending
the constitution to guarantee it. He quotes Wolfgang Zeidler, a former
president of the Federal Constitutional Court, as saying some time
thereafter that “the administration of justice in the Federal Republic of
Germany would be unthinkable without the complaint of
unconstitutionality.” The overwhelming majority of constitutional
complaints are generated by judicial decisions; the constitutional
complaint procedure permits dissatisfied litigants to refer questions of
constitutional law to the Constitutional Court (even if the lower court
judges did not make a referral for concrete review, discussed below).
Kammers argues that the constitutional complaint is a “foundation” for
the Court’s high ratings in German public opinion polls and for the
“rising constitutional consciousness among Germans generally.”

Interestingly, the Court receives a large number of communications
from citizens each year that do not fall within the categories of the
Court’s jurisdiction; many are procedurally defective attempts at filing
the Court’s jurisdiction cases. These communications are referred to
a separate office, the General Register, from which civil servants respond
to a complaint is without merit. If the writer responds and nonetheless
requests review, these so-called “claims” are referred to one of the
chambers of the courts. In 1985, Kammers reported in the first edition
of his book, approximately 10,000 informal letters were received, of
which 728 (or 14%) ended up being referred on to chambers, where they
were all rejected; in 1993, 1,441 claims went to the chambers and again,
all were rejected; in 2010, according to Kammers and Miller, the Court,
received only a total of 9,340 communications, of which 4,847 received only a letter
of explanation from the General Register. Although the General
Register office performs a “nay-saying” function, it does provide some
response to each person who writes.

Abstract Review of Laws: The Court can be asked to decide whether
a law is constitutional by a federal, or state government, or by what was
at one time one-third and is now one-fourth of the members of the
Bundestag. See Kammers & Miller, at 14. Oral argument is rare in
constitutional complaint cases, but abstract review cases always have

\(^2\) Different time limits apply for different kinds of claims. Although exhaustion of
remedies is required, a person threatened by enforcement of a criminal statute need not
violate the law in order to challenge its validity, according to Kammers. A constitutional
complaint can only be filed by one who suffers a clear injury directly from the government
action complained of. For a more detailed description, see Kammers (id. at 14–15).

\(^3\) The great majority of complaints in the Constitutional Court are decided by three
judges “chambers” within each Senate. The chambers typically write short opinions, explaining
why the claim is without merit or inadmissible. If one judge believes a constitutional
complaint should be heard by the full Senate, the matter goes to the full Senate, and if three of the eight judges believe it should
be heard in full, it is; and only the full Senate can declare a statute unconstitutional. See
generally Kammers & Miller. The chambers process bears some similarity to the U.S. Supreme
Court’s “rule of four” for granting certiorari, but the chambers typically give reasons and their
decisions may be on the merits.

oral argument as well as written briefs. Although these cases are few in
number compared to the constitutional complaints, many highly
important decisions of the Constitutional Court, including the abortion
decisions cited in Chapter I and the Northwest decision excerpted in
Chapter VII, occur in abstract review proceedings. Typically these
cases are initiated by a minority political party that lost in the
legislative process for a bill that would have required the action of another government controlled by a different political
party. Kammers reports that some have called for elimination of the
abstract review procedure for permitting manipulation of the Court for
political purposes. But he suggests this is unlikely, as the power to
review the constitutionality of laws when they are enacted is central to
the Court’s functioning as guardian of the constitution, as understood
both by legislators and by members of the court.

Concrete Judicial Review: This may be referred to as “collateral
review, and occurs during the course of ordinary litigation. A
constitutional question of the validity of a federal or state law can be
raised before ordinary German courts. If the Court believes the law is
valid, it can go decide. But if it believes the law is unconstitutional, it
cannot as rule but must refer the question to the Federal Constitutional
Court. A court may raise a question to its own court, and on such a referral,
the constitutional court office performs a review of the law for the
ordinary litigation. Kammers reports that the number of concrete
review referrals is low (a total of 58 in 1994), relative to the number of
lower courts, and suggests that the low number may relect both
the reluctance of courts steeped in the traditions of legal positivism to
find a law unconstitutional and a degree of protectiveness of their own
jurisdiction served by finding or interpreting a law to be constitutional.
(On this phenomenon, see Ferrero Conella, supra.) Kammers and
Miller report that in recent years, there are more applications for
temporary injunctions than there are cases of concrete judicial review
referred to lower courts.

Separation of Powers Disputes: Disputes between the highest
branches of the federal government, called “Organstracht proceedings,”
require the Court to oversee the operations and even the internal
procedures of both executive and legislative branches to maintain the
required balance between them. In addition to the President, the
federal government, and the two houses of the legislature, political
parties may initiate proceedings under the Basic Law: “political
parties” are recognized to perform constitutional functions in organizing
the will of the voters (see Basic Law, Art. 21(1)). The complaint must
allege that the conduct complained of infringes a right or duty set forth in
the Basic Law.

Federalism Conflicts: The Federal Constitutional Court has
jurisdiction over disputes between the states and the central
government, disputes which generally arise out of conflicts concerning
state administration of federal law. The Court also has jurisdiction over

\(^4\) According to Kammers & Miller, at 13–14, although the raising number of temporary
injunction actions are related to the increase in constitutional complaints and perceived delays
in their disposition, such temporary injunctions are available in any of the Constitutional
Court’s categories of jurisdiction.
disputes between different states. These proceedings, like those in the Organonstraf jurisdiction, can be initiated only by certain governments or government parties, and must allege violation of rights or duties under the Basic Law.

Prohibiting Political Parties: As a substantive matter, the Basic Law provides that political parties that "seek to impair or do away with the free democratic basic order or threaten the existence of the Federal Republic of Germany shall be unconstitutional." Basic Law, Art. 21(2). The Basic Law also provides, however, that only the Federal Constitutional Court can declare parties unconstitutional, and only at the request of the Bundestag, the Bundesrat, or the federal government. (On the incidence of powers in constitutional courts to review elections, see Tom Ginsburg & Zachary Elkins, Ancillary Powers of Constitutional Courts, 87 Tex. L. Rev. 1451 (2009).) According to Kammes, as of 1986, the federal government had invoked this jurisdiction only three times—once to have the new Nazi Socialist Reich party banned in 1952, again in 1956, when the Communist Party was banned, and then, unsuccessfully, in 1994 when its petition (joined with the Bundesrat) to outlaw one party, and a petition from the land of Hamburg to outlaw another party, were both denied by the Court on the grounds that the organizations, while advocating beliefs hostile to democracy, were not political parties. As of 2010, Kammes and Miller indicate, only 5 such cases had been decided in the Court’s history.

The Federal Constitutional Court as An Institution: Status, Structure, Appointments

Although the Basic Law specifically authorized judicial review, at its inception the status of the Constitutional Court in the governing structure was somewhat unclear, particularly given the parliament’s authority to regulate the Court’s organization and structure. Over the first two decades of its existence, the Court’s status as a coordinate, independent constitutional arm of government, on a par with the Bundestag, the Bundesrat, the President, and the government (the Chancellor and Cabinet) was established. This was partly a result of the first justices on the Court advancing measures to secure the autonomy and independence of their court.

In June, 1952, the Constitutional Court released a memorandum prepared by Justice Gerhard Leibholz, a highly regarded member, calling for an end to the Court’s being under the supervisory authority and budget of the Ministry of Justice. The Court sought full control over internal administration, including the power to select and appoint its own officials and law clerks. The memo asserted that the Court was a supreme constitutional organ of coordinate rank with the Bundestag, Bundesrat, federal chancellor, and president, that its members were neither civil servants nor ordinary judges but were the supreme guardians of the Basic Law, who had a greater duty than the other organs to assure that they observed the requirements of the basic law. This memorandum created a furor, and a political battle that lasted some years. Social Democrats and the Bundesrat generally were hostile to the memo, while the Bundestag and the Ministry of Justice opposed them. But by 1960, as Kammes explains, the demands of Leibholz’s memo had all been met. By 1960 the Court had obtained independence from the Ministry of Justice and by 1960 the President of the Constitutional Court was the fifth-ranking official, following the president, chancellor, and the presidents of the two houses of parliament. In 1969, the Basic Law was amended to prohibit impairments of the Constitutional Court even during states of emergency, and to prohibit amendments of the FCKA in emergencies unless the Court itself agreed that the amendment was required to maintain the Court’s ability to function.

The two-senate structure of the Court did not work out as the drafters had anticipated. The senators are separate panels of eight (originally twelve) judges of the Court that have separate jurisdiction and administrative support. A "plenum" of the two senators meets to resolve jurisdictional disputes between them and to decide on rules of judicial administration. When justices are chosen, they are chosen for either the First or Second Senate; interchange between them is strictly limited. The original distribution of authority reflected the compromise from which the senators were born and the initial intention that they act as very different forms. The Second Senate was to perform functions similar to those of the Staatsgerichtshof of the Wartime Republic, deciding on abstract questions of law and resolving disputes between the different governments, ruling on the constitutionality of political parties and in impeachment proceedings. It thus was envisioned as a court of "constitutional review." The First Senate was given authority over concrete judicial review, involving constitutional questions that arose in ordinary litigation as well as over constitutional complaints. The original understanding was that it would function as a less political, more "objective" court engaged in constitutional interpretation and "judicial review."

Due to the popularity of the constitutional complaint, this initial allocation caused a substantial imbalance in workload. In 1956 the FCKA was amended to distribute the work more evenly, with the Second Senate being given a substantial portion of the jurisdiction initially allocated to the First; the Plenum was authorized to reallocate authority to maintain roughly equality in caseloads. The Second Senate was given jurisdiction over constitutional complaints and concrete review cases involving issues of civil and criminal procedure (in addition to its original docket of abstract review and more "political" cases).—

Justices of the Federal Constitutional Court must meet certain minimum eligibility requirements. They must be at least 40 years old, eligible for election to the Bundestag, and must have passed the first and second state examinations in law (which are also qualifications for
the nominee’s life would be regarded as an unwarranted invasion of privacy.\footnote{The law also requires the Minister of Justice to compile a list of all federal judges meeting the qualifications as well as the names of candidates submitted by political parties, or the federal or state governments. These lists are delivered to the JSC or Bundesrat, as appropriate. If after two months from the expiration of an existing justice’s term no replacement has been named, then the President of the Constitutional Court proposes a list of these candidates (or more, if there are multiple openings). The legislature is not obliged to choose from any of these lists, however.}

Despite the secrecy in which the selection proceeds, it is, not surprisingly, highly political. The JSC membership is typically high-party officials and legal experts; membership frequently overlaps with the Judiciary Committees, and members of the JSC themselves sometimes become candidates. The JSC members consult with party leaders, and informally with the Bundesrat. The two-thirds voting rule enables minority parties to exercise power and tends to promote compromise, both in the JSC and in the Bundesrat. In the Bundesrat, state (ländler governments and their justice ministers are the prime decisionmakers, and Bundesrat members may become candidates. This process of judicial selection, in the early years of the Court, is described in more detail in the following excerpt from Professor Kammers’ 1976 book.

c. The German Constitutional Court and the Appointments Process

Although written more than three decades ago, Professor Kammers’ book provides a still useful description of the challenges and characteristics of appointments to a newly established constitutional court.

Donald P. Kammers, JUDICIAL POLITICS IN WEST GERMANY (1976)

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...Partly because of the rule requiring a two-thirds vote for the election of a Justice, appointments to the Federal Constitutional Court are the subject of intense bargaining. The selection system ensures that political parties will play the decisive role in the recruitment of Justices and that the Court will be widely representative of parliamentary interests.

Bundestag: Who are the choosers? Let us start with the Wahlkreismannerschau, or Judicial Selection Committee (JSC), of the Bundestag, which elects half of the members of the Constitutional Court. This is no ordinary standing committee, but one staffed mainly by party leaders. If a committee member is not a party leader, he is invariably a person of prominence and influence in judicial matters or a person who enjoys high regard among his party associates and often among members of the opposition parties.

Ideally, the JSC functions as an independent decision-maker. But the parliamentary parties do seek to influence the selection of Justices through the lists they put forward when the committee is chosen by the whole House. The members of the committee in fact represent their