review and constitutional complaint side? Note that some argue that the U.S. Constitution should be interpreted to preclude the Court's sitting in panels (or, a fortiori, being constituted as separate divisions).

2. Does the number of judges to be selected at the same time, or the regularity of periodic selection, affect the selection process?

3. Consider whether the German experience with the organization of its Constitutional Court bears on questions of (a) what should be in a constitution, and (b) how easy or hard it should be to amend the constitution.

4. Does the nonrenewability of a judge's term of office address issues of judicial independence that the U.S. provisions for life tenure seek to secure? Does the answer depend on other factors, such as minimum age for appointment, retirement age for judges, or pension availability? Should former judges be barred from certain pursuits after retiring from a constitutional court?

5. The JSC (the Committee of the Bundestag that makes the Bundestag's judicial nominations for it) works under a two-thirds rule. This, together with the requirement for representation of parties in the JSC proportional to their representation in the Bundestag, tends to promote the need for compromise between majority and minority parties. After reading about the JSC, what do you think of proposals that the U.S. Senate be required to approve by a two-thirds vote nominee to the U.S. Supreme Court?

6. Consider changes in the make-up of the Constitutional Court judges since the founding years, including the possible pressures on the system of judicial selection that may have been created by German Unification. In 1987, one scholar called attention to a "judicialisation" in the professional background of judges. Christine Landfried, Constitutional Review and Legislation in the Federal Republic of Germany, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON (Christine Landfried ed. 1987) noting a "significant tendency towards [fewer] judges with professional experience in politics and economics and [more] Justices with careers in administration, the judiciary and as university professors" between 1951 and 1983. In 1997, Professor Kromers commented on the removal of East German judges from their positions following reunification: "The harsh standards applied in Berlin might also be attributed to the 'hard-nosed' leadership of Jutta Limbach, Berlin's seemingly unforgiving minister of justice, a Social Democrat who in 1994 was elected president of the Federal Constitutional Court, in part because of her aggressive campaign of judicial reform in Berlin's eastern sector." Donald Kromers, Review Essay, Transitional Justice in Germany (reviewing Inga Markovits, IMPERFECT JUSTICE: AN EAST-WEST GERMAN DIARY (1996)), 22 Law & Soc. Inquiry 829, 838 n. 11 (1997), For helpful discussion of the changes in East German justice institutions following German unification, see Peter Quaint, THE IMPERFECT UNION 166-92 (1997).

5. NEW CONSTITUTIONAL COURTS OF THE 1990S: EASTERN EUROPE, SOUTH AFRICA, ASIA

As the former Soviet Union dissolved, many countries in Eastern Europe and the former Soviet Union engaged in constitutional change, as well as economic transformation. Almost all of these countries have looked to variants of the European, rather than American, model of judicial review. In the early 1990s, as described in Chapter IV above, South Africa saw a substantial constitutional innovation, in which a new Constitutional Court was created, and put into operation, before a new constitution, and with a mandate to review the constitution, when necessary, for its conformity to a set of principles on which the parties to the constitutional negotiations had agreed. Moreover, several Asian countries also experienced democratic transformations around this time, associated with new constitutions and organs of judicial review. See generally Tom Ginsburg, JUDICIAL REVIEW IN NEWDEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003) (exploring the theory, that judicial review accompanies democratization as a form of "insurance" for parties who can no longer be sure of controlling governments through case studies of Taiwan, South Korea, and Mongolia). In contrast to Japan's relatively non-activist Supreme Court (not a specialised constitutional court), some newer Asian democracies have seen specialized constitutional courts actively subjecting government acts to judicial review. For discussion, see Ginsburg, JUDICIAL REVIEW IN NEWDEMOCRACIES, supra; Jiunnrong Yeh, Presidential Politics and the Judicial Facilitation of Dialogue between Political Actors in New Asian Democracies, 8 Int'l J. Const. L. 1 (CON) 911 (2010).

The struggles over the authority of these courts often reveal broader contests within their respective nations. For example, the Czechoslovak Constitutional Court Act (1991) did not authorize the proposed court to subordinate Czech, or Slovak, law to Czechoslovak federal legislation, but only to the proposed new federal constitution; and it did not specify whether the subordinate unia's law was void if found to conflict with the proposed federal constitution. See Herman Schwartz, The New East European Constitutional Courts, 13 Mich. J. Int'l 1, 741, 748-762 (1992); Lloyd Cutler & Herman Schwartz, Constitutional Reform in Czechoslovakia: E Duobus Unum? 58 U. Chi. L. Rev. 511, 540-44 (1991). This silence on basic questions of the hierarchy of legal norms and the relationship between the whole nation to its constituent parts reflected the deepening division between Czechs and Slovaks that, by the end of 1992, led to the break-up of Czechoslovakia into two separate countries.

In his 1992 study of six East European nations (Czechoslovakia, Rumania, Bulgaria, Russia, Hungary and Poland), Professor Schwartz found that in all the constitutional courts, judges were selected "in whole or in part by the parliaments, sometimes by simple majority rule." None of those six did the constitutional court judges have life tenure, and most, though not all, had limited renewable terms. Hungary enacted nine year terms for its new Constitutional Court.
capable and independent court with some liberal and pluralist tendencies. In Taiwan, which has undergone a process of democratization and constitutional change since the late 1960s, "[the Constitutional Court] . . . , despite being an old institution established in 1948, began exhibiting greater vibrancy since the 1990s and produced a record in which about thirty to forty percent of challenged legislative or administrative acts were ruled unconstitutional." The constitutional court of South Korea they describe as "[most] impressive," ruling "against the government about one third of the time" in cases involving constitutional challenges. See id. at 807–08. But all three of these courts are described as "reactive" in the sense that none of these courts promoted any social and political agendas as its own initiative, unlike their counterparts, the South African Constitutional Court or the Indian Supreme Court, and "cautious" insofar as they "did not rule directly against the majoritarian preferences of the public, unlike the U.S. Supreme Court."

On Asian courts, in addition to the works cited above, consider Jiunn-rong Yeh & Wen-Chen Chang, The Emergence of East Asian Constitutionalism: Features in Comparison, 39 Am. J Comp. L. 805 (2011), comparing three Asian constitutional courts. The authors argue that the emerging pattern differs from "western constitutionalism," or the "transitional constitutionalism" of Eastern European states, but also is not properly described by so-called "Asian values" discourses. Rather, they argue, East Asian constitutionalism is characterized by 1) institutional constitutional state building, 2) textual and institutional continuity, 3) judicial review, and 4) a wide range of rights responsive to social and political progress." Id. at 816. On the first point, they emphasize that "[t]he three constitutional-making experiences in East Asia involved neither democratization nor "outside" credentials as the first judges of the German Federal Constitutional Court. On the possible relationship of age to "outside" credentials," see Robert HAUSMANNER, TOWARDS A "NEW" RUSSIAN CONSTITUTIONAL COURT, 28 Cornell Int’l L.J. 349, 370 n. 150 (1995).

Even in such high profile cases as the South Korean Court’s refusal to agree to the impeachment and removal from office of the president, because the constitutional violations he had committed were not grave enough to warrant removal, the authors argue that the legislative impeachment proceedings were largely motivated by internal political party struggles, and that by the time the issue was in the Court, the public’s support for the President had increased, and the Court was "wise" in choosing not to impeach while at the same time "condemning some of his constitutional violations, which provided a certain consolation to President Roh’s opponents." Id. at 828–29.


** See Schwartz (2000), at 144–45.
project of convincing citizens that law is distinct from politics and that courts should say what the law is?  

c. Incrementalism, judicial review and social and social welfare rights. Some years before the events of 1989, Poland established a constitutional court. The process began with an amendment to the Constitution in 1983 which provided that the court could act as a “for foreign consumption” by the Communist leadership of the country that the leadership did not intend to follow through on. Mark F. Brzezinski & Leszek [Lecch] Garlicki, Judicial Review in Post-Communist Poland: The Emergence of a Rule of Law, 31 Stan. J. Int’l L. 13, 23 n.50, 28 (1999) (citing Professor Inkubski). 54 By 1980, however, a constitutional court act had been passed, and in 1989 and 1992, the jurisdiction of the court (the Constitutional Tribunal) was significantly expanded. Yet that Tribunal could not review laws passed before 1982 and a decision by the Tribunal holding national legislation unconstitutional could still be overturned by Parliament on a two-thirds vote, within six months of the Court’s decision. See “Little Constitution” of 1982 art. 35a. While the Polish Constitutional Tribunal was fairly activist in finding laws unconstitutional between 1989 and 1997, the Parliament also exercised its veto power over the Court’s decisions on some occasions. On these developments, see generally Brzezinski & Garlicki; see also Schwartz (2000) at 58 (noting the importance of the embodiment, a position created in 1987, in bringing cases to the Court). In the 1997 Final Constitution adopted by the legislature and approved in a public referendum, the authority of the parliament to overturn the Tribunal’s decisions was eliminated. See Art. 150 (1) (“Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final.”). 55 Recall Professor Ackerman’s argument, in Chapter IV above, about the importance of revolutionary moments in developing constitutionalism. Does the Polish experience suggest that the moment can extend over years? Or does it instead suggest the possibilities of incrementalism in constitutional development? 

In describing constitutional drafting in Poland in 1991, Professor Rapacki concluded on the relationships between, and difficulties of determining, (a) what form of constitutional review to have, (b) whether the constitution should include positive welfare rights, and (c) how easy or difficult it should be to amend the constitution. See Andrej

54 Professor Schwartz reports that the Hungarian Court’s decision on the death penalty was not overturned by the parliament (as it could have been by a two-thirds vote to amend the constitution); that President Solyom was not reappointed to the Court at the end of his first 9-year term (judges were eligible for reappointment once); and the new Court president in 1998 “declared that the Court was free of political interests.” Schwartz, supra note 109, at 79, 80–81. More recently, significant changes in the Hungarian constitution, promulgated in 2011 and effective January 1, 2012, after the Fidesz party won control of the legislature, have raised concerns that the Court’s independence, and other aspects of Hungary’s constitutional identity, are under threat. See Rózsa László Scheppe, The Constitutional Constitution, in New York Times (Jan. 5, 2013) (printed under Paul Reissman’s column); Kim Lane Scheppe, The Hungarian Constitutional Revolution, New York Times (Dec. 19, 2011) (printed under Paul Reissman’s column); Chapter IV (C) above, note on Amendments, Electoral Design and Abuse of Constitutionalism: Hungary’s New Constitution, 2010–12.

6. LATIN AMERICAN COURTS

As noted above, judicial review has long antecedents in some Latin American countries, such as Argentina. In recent years, following effort to escape from cycles of violence and military rule, some courts in Latin America have become more independent of their governments, and have developed important constitutional jurisprudence. Constitutional regime change occurred in Colombia in the early 1960s, and included establishment of a new and powerful Constitutional Court, which took over most constitutional review functions from a longstanding Supreme Court. In the years since, the jurisprudence of the Colombian Court on issues of human rights and including social welfare rights has attracted widespread attention. See Colombian Constitutional Court website, http://english.corteconstitucional.gov.co (Letter of February 6, 2011) (announcing the beginning of publication of some decisions in English in "response to the requests made by readers from all around the world"); see also Chapter I, above (noting the Colombian Constitutional Court's decision on abortion).

For an interesting collection focused on political factors and judicial independence, see COURTS IN LATIN AMERICA (Gretchen Helmke & Julio Rios-Figueroa eds., 2011). In their introductory chapter, Courts in Latin America, Helmke and Rios-Figueroa argue that some constitutional courts in the region exercise more review authority over interbranch conflicts (as in Mexico after 1984, and Brazil since 1988), while others do so over individual rights claims, as in Colombia since 1992. Costa Rica, since 1985, they view (along with a few other courts for limited time periods) as exercising powerful review authority over both kinds of disputes. See id. at 9 (Table 1.1). Some essays explore the thesis that political fragmentation enhances judicial power, see, e.g., Rebecca Bill Chávez, John A. Forejohn & Barry R. Weingast, A Theory of The Politically Independent Judiciary: A Comparative Study Of The United

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13 See Interim Constitution Approved in Poland, East European Constitutional Review 19 (summer 1993), "Little Constitution" at 1992, art. 13.4 (after Presidential vote and reconfirmation by two-thirds, legislation may be referred by president for pre-entemnt review by Constitutional Tribunal, if Tribunal finds law constitutional President must sign it).