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What the World Can Teach Us About Supreme Court Reform

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INTRODUCTION

Judicial review remains more controversial in the United States than in other democracies, despite its far longer history.[1] This is sometimes explained by the unique lack of express textual authorization for the power,[2] even though it is not as if inclusion in the constitutional text immunizes a provision from widespread criticism and contestation.[3] To my mind, a more plausible and less appreciated reason is *how* judicial review is institutionalized and practiced in the United States. Whether or not the power of judicial review is ultimately justified in a reasonably well-functioning democracy,[4] where it is established, it should be structured in a way that minimizes inherent concerns about unaccountable discretion and partisanship. By comparative standards, judicial review in the United States largely does the opposite and, by means of a series of contingent and unnecessary design features and practices, maximizes them. In this rare moment of serious, self-conscious deliberation about institutional change on the U.S. Supreme Court following the Presidential Commission's report[5] and several hugely controversial judgments last term,[6] it is these features and practices that should be the focus of reform efforts.

1. *See, e.g.*, Wojciech Sadurski, *Constitutional Review in Europe and the United States: Influences, Paradoxes, and Convergence*, in AMERICAN EXCEPTIONALISM REVISITED 79–107 (Marcello Fantoni & Leonardo Morlino eds., 2016) (noting that, paradoxically, despite its much longer history, judicial review remains far more controversial in the U.S. than in Europe).
2. *See, e.g.*, *id.* at 103 (citing lack of express textual authorization for judicial review as one reason for the difference).
3. Think here, for example, of the provisions referencing slavery (U.S. CONST. art. I, § 2, cl. 3; *id.* art. 1, § 9, cl.1; *id.* art. IV, § 2, cl. 3), mandating equal state representation in the Senate (U.S. CONST. art. V), or creating the Electoral College (U.S. CONST. art. II, § 1, cl. 2–3).
4. There is a long-running debate about this. *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008).
5. Presidential Commission on the Supreme Court of the United States, Draft Final Report (Dec. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf [https://perma.cc/LV78-HC7D].
6. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) *overruling* Roe v. Wade, 410 U.S. 113 (1973), *and* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883 (1992); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (holding unconstitutional New York's proper-cause licensing requirement for carrying concealed weapons in public); West Virginia v. EPA, No. 20–1530, slip op. (U.S., June 30, 2022) https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf [https://perma.cc/G5M9-LQHJ] (striking down the EPA's Clear Power Plan).

That judicial review of statutes and other acts of democratically elected bodies often involves discretion and may be exercised in ways that align with recognizable political positions is inherent in the function. Considering these implications is a central part of the "take it or leave it" choice that any country faces when it decides whether to grant courts this power. It is also why many constitutional systems around the world conceive of judicial review as different from the ordinary judicial function, as a distinct quasi-political task requiring a separate, specialized court staffed by members with more varied experiences and training than regular judges and who are selected by a separate appointment process.[7]

What distinguishes judicial review in the United States from that in many other democracies is that certain specific features of how it is institutionalized and practiced *magnify*, rather than minimize, the inherently discretionary and politicized nature of the function. The result is a Supreme Court that very often has the final word on deeply contested social and political issues by choosing one of the two or more available plausible answers to the constitutional question posed on the basis of the same predictable and broadly partisan commitments that helped to get its members appointed in the first place, sometimes decades before. These public, open ideological divisions on the Court are in full view when, as often happens, such issues are decided by five votes to four, with only one or two "swing votes" truly uncertain and unaccounted for from the moment the justices elect to take up the case. By contrast, in many other systems of judicial review around the world, the extent of discretion, the depth and polarization of ideological division, its public display, the role that it plays in appointments, and its entrenched status are very often significantly smaller. This, I believe, is a large part of the reason why judicial review is less controversial elsewhere.[8] It is these contingent features of judicial review in the United States that create a distinctive problem.

This Essay proceeds as follows. Part I identifies the specific institutional features of judicial review in the United States that, individually or in combination, magnify inherent concerns about the power. It also explains how other systems have opted for alternative features that reduce or minimize these concerns. Part II explores which of these features can and should be changed in the United States, and how. Part III considers and evaluates certain other "independent" reform proposals; that is, ones that

7. *See* Sadurski, *supra* note 1.
8. *See id.*

do *not* relate to, or address, these distinctive features that raise concerns beyond those inherent in judicial review. These proposals are increasing the size of the Court, stripping it of jurisdiction, and establishing a legislative override power.

I. "INFLAMMATORY" FEATURES OF JUDICIAL REVIEW IN THE UNITED STATES

What are the contingent features of judicial review in the United States that create a distinctive problem and render the power more controversial than elsewhere? The first is the well-known comparative difficulty of formally amending the text of the U.S. Constitution.[9] Most obviously, this helps to create the "finality" of Supreme Court decisions, in that they are hard to effectively overrule by constitutional amendment where unpopular or deemed wrong, as compared to countries with more flexible constitutions.[10] Only four times in U.S. history has a Supreme Court decision been overruled by constitutional amendment, and only once in the last century.[11]

The second feature is that the instrument of judicial review, the U.S. Constitution, is a "thin," sparse constitutional text laced with "majestic generalities."[12] The result of its many key ambiguities, vaguenesses, and

9. Whereas Article V of the U.S. Constitution requires a two-thirds vote of both Houses of Congress and ratification by three-quarters of state legislatures, elsewhere, in both federal and unitary states, constitutions can very often be amended by a supermajority vote, usually two-thirds, of a unicameral or bicameral national legislature, alone.

10. For example, in Colombia, Germany, and India, all countries with otherwise powerful constitutional courts, the constitutions have been amended on 40 occasions since 1991, more than 60 occasions since 1949, and 101 times since 1950, respectively. *See, e.g.*, MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW 327 (2017); Gertrude Lübbe-Wolff, *The Basic Law–Germany's Constitution–at 70*, GERMAN TIMES (Apr. 2019), https://www.german-times.com/the-basic-law-germanys-constitution-at-70/ [https://perma.cc/RPY5-ZEKL]; *The Constitution Amendment Acts Including Statements of Objects & Reasons (SOR)*, MINISTRY L. & JUST., GOV'T OF INDIA: LEGIS. DEP'T https://legislative.gov.in/amendment-acts [https://perma.cc/TP5P-CYYF].

11. These four times occurred when the Eleventh Amendment overruled Chisholm v. Georgia, 2 U.S. 419 (1793); when the first sentence of the Fourteenth Amendment overruled Dred Scott v. Sandford, 60 U.S. 393 (1857) (U.S. citizenship of African Americans); when the Sixteenth Amendment overruled Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (federal taxation powers); and when the Twenty-fourth Amendment overruled Breedlove v. Suttles, 302 U.S. 277 (1937) (state poll taxes in federal elections).

12. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (Jackson, J.). (elucidating "the task of translating the majestic generalities of the Bill of Rights . . . .").

silences is that constitutional interpretation, or construction,[13] becomes a central task of constitutional adjudication and discourse. This task is inherently discretionary, as such provisions are usually open to more than one reasonable understanding.

In combination, these first two features have the consequence that constitutional interpretation is not only the central focus of constitutional law and adjudication, but also the near-exclusive mode of constitutional change. In other words, judicial finality is significantly manifested and exercised through contestable acts of judicial discretion that only the justices can reverse. Moreover, even without tough formal amendment rules, a majestic, sparsely worded, relatively enigmatic constitution not only requires interpretation more than a mundane, prolix one but is also more likely to be sacralized, as it reads like a religious text, oracular rather than profane in style.[14] Sacralization itself, as in the United States, makes formal amendment of the text practically more difficult and so adds to the centrality of interpretation.[15] For example, the texts of the Torah, New Testament, and Koran are "unamendable," though often reinterpreted. Japan's at least semi-sacralized constitution has never been amended despite a more flexible amendment rule than its U.S. counterpart.[16] Where constitutional interpretation is the central site of dispute and reasonable disagreement, as well as the main mode of constitutional change, the perception and reality of judicial discretion is increased.

The third and fourth distinguishing features of American judicial review are life tenure for federal judges and their mode of appointment. Every other democracy imposes either a fixed term (of typically nine to twelve years) or a mandatory retirement age for constitutional judges.[17] The combination of life tenure with judicial finality and discretion

13. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013), for an explanation of constitutional construction, as distinguished from constitutional interpretation.
14. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988) (exploring the religious language and imagery surrounding the Constitution).
15. *See generally* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 944 (2016).
16. SHIGENORI MATSUI, THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS 3 (2011) (noting that under art. 96, a two-thirds vote of both houses of the legislature and a popular referendum with a simple majority of votes cast is required for ratification).
17. *See, e.g.*, David S. Law, E. James Kelly, Jr., Class of 1965 Rsch. Professor of L., U. Va., Written Testimony to the Presidential Commission on the Supreme Court (Sept. 21, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/09/Professor-David-Law.pdf [https://perma.cc/8EVS-LB98].

massively raises the stakes of each rare vacancy, the timing of which is unpredictable, and of the interpretive philosophies of potential candidates. A president who may only have one chance to appoint a justice, who could be part of their legacy for decades to come, will want to maximize the opportunity and make the choice count. The appointments process in the United States facilitates this desire, especially when the president's party has a majority in the U.S. Senate. Not only are Supreme Court justices political nominees, vetted and selected by the president, but the Senate "advises and consents" by simple majority vote, which enables the confirmation of ideologically more extreme candidates than under a supermajority requirement.[18] Even before the Republican majority formally abolished the Senate's filibuster for Supreme Court nominees in 2017, when the Democrats attempted to use it against Neil Gorsuch,[19] there was a strong norm against its use for the Supreme Court. Only once during the twentieth century was the filibuster successfully employed to block a nomination,[20] and it was not used by the Democrats against such a controversial nominee as Clarence Thomas in 1991, who was confirmed by fifty-two votes to forty-eight.[21]

On more recent occasions where the president's party does not have a majority in the Senate, or is likely to soon lose it, we have seen the type of "constitutional hardball"[22] surrounding the nominations of Merrick Garland, Gorsuch, and Amy Coney Barrett that further enhances the perception—and reality—of political stakes and partisanship surrounding the Court's membership. The connection between life tenure, the role of judicial discretion, and the consequential nature of who is on the Court, was

18. *See* John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671 (2004).
19. *See* Russell Berman, *Republicans Abandon the Filibuster to Save Neil Gorsuch*, ATLANTIC (Apr. 16, 2017), https://www.theatlantic.com/politics/archive/2017/04/republicans-nuke-the-filibuster-to-save-neil-gorsuch/522156/ [https://perma.cc/JQ3D-F79E].
20. The one successful use during the twentieth century was Lyndon Johnson's nomination, made after he had announced that he was not running for re-election, of sitting justice Abe Fortas for Chief Justice, following Earl Warren's resignation in June 1968. *See* Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 333 (2005).
21. *See The Thomas Confirmation; How the Senators Voted on Thomas*, N.Y. TIMES (Oct. 16, 1991), https://www.nytimes.com/1991/10/16/us/the-thomas-confirmation-how-the-senators-voted-on-thomas.html [https://perma.cc/F6ZY-C4KZ].
22. *See* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523-553 (2004); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 917 (2018).

highlighted by Justice Ruth Bader Ginsburg's perceived failure to time her departure to ensure a Democratically nominated successor, her lighting fast replacement by Justice Barrett weeks before the 2020 presidential election, and the overruling of *Roe v. Wade* as a result.[23]

By contrast, the global norms of fixed term/rolling changeover of constitutional court judges, appointment by supermajority vote of the legislature or independent, nonpolitical commissions,[24] and operating under more easily amended constitutions changes the calculus and lowers the stakes significantly. Where judicial vacancies are plural and predictable, with timetables known in advance, and subject to supermajority vote, political nomination leads to political compromise. Independent, nonpolitical appointing commissions may not, and sometimes cannot, take the political affiliations of judicial candidates into account. Where the constitution is easier to amend, judicial decisions are less final.

The fifth and sixth features of U.S. judicial review that exacerbate its inherently discretionary and partisan nature are the practices of individualized, attributable judicial opinions—majority, concurring, and dissenting—and simple majority rule on the Court where the votes of individual justices are made public.[25] Of course, the two are necessarily connected. In systems where majority rule operates internally but how members of the court voted is not publicized, a single, anonymous judicial opinion for the court is needed to maintain secrecy. By contrast, the U.S practice of handing down opinions for the Court along with concurring and dissenting opinions lays bare the alternative plausible constitutional positions and hence the discretionary power of a majority to choose one rather than another. Often, and especially in closely divided decisions, the predictable alignment of justices suggests that this choice is driven by their respective ideological inclinations, for which they were likely nominated in the first place.

23. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) *overruling* Roe v. Wade, 410 U.S. 113 (1973), *and* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883 (1992). Chief Justice Roberts' concurring opinion and sixth vote to uphold the Mississippi statute narrowed, but did not overrule, *Roe. Id.* at 2317.

24. *See* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 538–540 (3d ed. 2014).

25. Unlike the previous features, these two are distinctive of the common law tradition as a whole, rather than the United States alone. This is one reason that several common law countries outside the United States have tended to resist judicial review more strongly or for longer than civil law ones. *See* STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE 7–12 (2013).

Individualized opinions and disclosed voting also disincentivize judicial compromise, as members of the Court will presumptively wish to appear consistent in their public positions, not want to attract claims of "betrayal," and have their own multidecade judicial legacies to cultivate. As Ferejohn and Pasquino have explained, for these reasons, as well as the greater ideological divide facilitated by simple majority political confirmation, U.S. Supreme Court justices spend relatively little time on the largely pointless exercise of face-to-face, internal deliberations which are aimed at persuading each other, and far more on external deliberations with their various interlocutors and constituencies outside the Court.[26] By contrast, in constitutional courts where a single, anonymous judgment is produced, the judges are effectively forced to deliberate among themselves to reach a majority decision in private and to agree on the contents of a common judgment they can all live with.

The final three features of U.S. judicial review that expand its discretionary nature and partisan appearance are the practice of certiorari at the Supreme Court, its rules on standing, and the Court's increasingly visible and important "shadow docket." [27] On the first, essentially the Court has no mandatory jurisdiction, and its entire docket is discretionary. It chooses which sixty to seventy appeals it will hear each term from the roughly five to six thousand petitions it receives.[28] More specifically, the "rule of four" means that it takes the votes of four justices to add a case to its official docket, and usually no reasons are given for either accepting or rejecting a petition.[29] Supreme Court observers often read a good deal of judicial strategy into these decisions. Adding a case on a controversial topic indicates that at least four members of the Court are inclined to overturn the lower court decision, or even one of the Court's own precedents to do so. Declining a case on such a topic may mean that opponents of an existing rule, or proponents of a position on an undecided issue, are not sufficiently confident of gaining the necessary five votes on the merits to make it worth risking a

26. *See* Ferejohn & Pasquino, *supra* note 18.
27. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).
28. *A Reporter's Guide to Applications Pending Before the Supreme Court of the United States*, SUP. CT. PUB. INFO. OFF., 14, https://www.supremecourt.gov/publicinfo/reportersguide.pdf [https://perma.cc/94MS-ZJX6].
29. *See Supreme Court Procedures*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1#:~:text=According%20to%20these%20rules%2C%20four,in%20a%20death%20penalty%20case. [https://perma.cc/AFB7-SJLU] (last visited Apr. 7, 2023).

potentially adverse decision and precedent. Sometimes, proponents of a position prefer to wait until either the Court's composition or public opinion has shifted in their favor. It is likely no coincidence that in Justice Barrett's first full term on the Supreme Court, with a newly consolidated six-three conservative majority, cases involving frontal attacks on the right to abortion and potentially expanding the scope of gun rights were on the docket for the first time in a decade.[30]

Again, by contrast, many other constitutional courts have far greater mandatory jurisdiction, thereby reducing this discretionary aspect of judicial review and the opportunities it provides for perceived partisanship and judicial strategizing. This is because in both "abstract" and "concrete review" decisions,[31] where the relevant authorized body— whether the requisite number of legislators, other public officials, lower or parallel ordinary courts, or sometimes even individual citizens—seeks a ruling from the court, it is usually required to provide one.[32]

On standing, the seemingly technical and differentially applied rules of what counts as a "case or controversy" for the purposes of federal court jurisdiction under Article III, serve as one of the well-known means of constitutional avoidance, or the "passive virtues."[33] As the rules have developed, they create significant judicial discretion as to whether a case gets before the Court, as evidenced by frequent dissents on the issue,[34] and at least give the impression of being employed in strategic ways by the justices. By comparison, many other systems of judicial review dispense with this threshold procedural issue and source of discretion by not conceptualizing judicial review as part of the ordinary judicial function of deciding who wins a litigated case. Thus, again, constitutional questions

30. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) *overruling* Roe v. Wade, 410 U.S. 113 (1973), *and* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883 (1992); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

31. Abstract review is the process by which specified public officials or political institutions refer a law to the constitutional court to decide on its constitutionality in the "abstract", i.e., outside the context of a particular case or controversy. Concrete review, by contrast, is where an ordinary court refers a constitutional question arising in a case or controversy before it to the constitutional court. *See, e.g.*, Sadurski, *supra* note 1.

32. *Id*.

33. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111-198 (1962).

34. *See* Hollingsworth v. Perry, 570 U.S. 693 (2013) (denying, by five-four vote, that that petitioners had standing to appeal district court order that California's proposition 8 banning same-sex marriage in the state was unconstitutional); California v. Texas, 141 S. Ct. 2104 (2021) (holding, by 7–2, that Texas lacked standing to challenge the Affordable Care Act's individual mandate).

arrive at the constitutional court either from certain specified political officials, in abstract review, or as an intercourt procedure from lower or parallel courts, in concrete review. A few common law countries that generally share the U.S. conceptualization have nonetheless effectively dispensed with the requirement of standing in certain constitutional cases.[35]

Finally, the increasingly visible and important so-called "shadow docket,"[36] by which the Court handles requests for emergency relief in ways that depart from its usual procedures, has become another key area for seemingly discretionary and polarized decision making. Through initial application to a single justice who decides whether to forward it to the Court, and without its normal briefing, oral arguments, and reasoned opinions, in the last three years many closely divided decisions on highly charged subjects have been speedily reached with unsigned orders of a few sentences that contain little by way of explanation.[37] These have included death penalty stays,[38] cases involving the 2020 election,[39] moratoriums on evictions,[40] religious exemption from public health regulations during the pandemic,[41] and whether to suspend operation of the Texas abortion law.[42] This is seemingly as close as judicial review gets to Max Weber's "kadi-justice."[43]

35. The major and best-known example is India, in what are known as public interest litigation (PIL) cases, where the Supreme Court permits any member of the public "to challenge a law on behalf of a person or class of persons who, because of their disadvantaged position, were unable to come to court directly." *See* MADHAV KHOSLA, THE INDIAN CONSTITUTION 120 (2012).
36. *See* Baude, *supra* note 27.
37. *See* The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary, 117th Cong. (Feb. 18, 2021) (statement of Stephen I. Vladeck, Law Professor, University of Texas School of Law).
38. *See* Dunn v. Smith, 141 S. Ct. 275 (2021); U.S. v. Higgs, 141 S. Ct. 645 (2021).
39. *See* Merrill v. People First of Alabama, 141 S. Ct. 25 (2020).
40. *See* Alabama Association of Realtors v. DHSS, 141 S. Ct. 2485 (2021).
41. *See* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).
42. *See* Whole Woman's Health v. Jackson142 S. Ct. 522 (2021).
43. MAX WEBER, ECONOMY AND SOCIETY 976–979 (Guenther Roth & Claus Wittich eds., 1968) (defining "kadi-justice" as judgments rendered in terms of concrete ethical or other practical valuation rather than through the rational interpretation of the law).

II. WHICH OF THESE FEATURES CAN AND SHOULD BE CHANGED—AND HOW?

Part I identified how the specific ways in which judicial review has been institutionalized and practiced in the United States magnify the concerns about discretionary power and politically inflected judicial choices that inhere in the function. One response to these inherent concerns is to deny courts the power of judicial review. A more common one in the post-1945 world has been to institutionalize the power in ways that seek to minimize the concerns. To what extent can and should the United States borrow from comparative experience to reform judicial review in this latter direction?

Although each of the features noted in Part I contributes to magnifying discretion and partisanship in the United States, so that reforming any would help to reduce these concerns, they do not all contribute equally. Moreover, some of these features would be more difficult to change than others. Accordingly, taking into account both the relative importance of the specific features and the practicability of changing them, where should reform efforts be focused?

Here, the very first feature towers over the issue. The difficulty of formal amendment, or replacement, of the Constitution renders the Article V amendment formula itself, the general character of the existing text, and any of the other listed features deemed required by it, more or less practically immune from reform. This difficulty is not a result of the text only. It is the formal requirements of Article V combined with both the current political context—in which party polarization and the politicization of the Court render required congressional supermajorities and a supermajority of all state legislatures all-but-impossible—and the cultural context of a sacralized text that constitutes not just the branches of the federal government but also, at least in part, the national identity.[44] Accordingly, the more promising route to reform is where action by Congress or another institution is, or may be, sufficient.

Two of the most consequential factors noted above are potentially more amenable to change: life tenure and the current political appointments process. Reform of either—or better, both—would help to break the high stakes game driving the choice of nominees further and further from the ideological center. With respect to life tenure, there is a respectable

44. *See* LEVINSON, *supra* note 14.

argument that Congress could set a fixed term for service on the Supreme Court or a mandatory retirement age from it. Again, this would match the universal comparative practice, from which the United States is currently an extreme outlier.[45] This argument is two-fold. First, Article III does not speak of "life tenure" for members of the Supreme Court or other federal judges, but of holding "their Offices during good Behaviour."[46] Accordingly, it can reasonably be read as not specifying what the term or length of the "office" is, but rather that, whatever the term, a federal judge exhibiting "good Behaviour" cannot be removed before it ends.[47] Second, under the Necessary and Proper Clause of Article I, Congress is empowered to "make all laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[48] Arguably, therefore, this provision would enable Congress to alter the conventional practice and specify a term for service on the Supreme Court—either a fixed number of years or a mandatory retirement age—on the basis that this is conducive and appropriate for effective execution of the Court's role in the overall system of government. The consequences of life tenure on the Court, both in terms of the strong incentives it creates for presidents to maximize the rare and unpredictable opportunity to influence the Court for decades and the unaccountability of those who defy the democratic preference for rotation in office, skew the working of the Court in the direction of ideological extremes and being out of touch with current needs.

Alternatively, the "office" that judges of "both the supreme and inferior Courts"[49] hold may be understood to be that of an Article III, or federal, judge. In this case, Congress could require that Supreme Court justices retain their office but transfer to a lower court at the end of the specified term. A third variation, as in a bill recently introduced in the U.S. House of Representatives,[50] would be to permit justices to retain their title and compensation but require them to take senior, nonactive status after their fixed term expires.

45. *See* Law, *supra* note 17.
46. U.S. CONST., art. III, § 1.
47. *Id.*
48. U.S. CONST., art. I, § 8, cl. 18.
49. U.S. CONST., art. III, § 1.
50. SUPREME COURT TENURE ESTABLISHMENT AND RETIREMENT MODERNIZATION (TERM) ACT, H.R. 8500, S. 2, 117th Cong. (2022) (introduced by Congressman Hank Johnson on July 26, 2022).

As between a fixed number of years and mandatory retirement, the preferred option is the global norm of nine to twelve year nonrenewable terms among specialist constitutional courts.[51] This better balances the relevant values of accountability, nonpartisanship, renewal, and independence than either a longer fixed term or the still possible multidecade service with a mandatory retirement age, given the recent U.S. practice of appointing younger judges.[52] In its statute, Congress should presumptively institute staggered twelve-year fixed terms for new appointees, with three seats becoming available every four years. Ideally, these vacancies would be timed to more likely fall during a president's second term, when the greater probability of divided government would further decrease the chance of confirming ideologically polarized justices.

Regarding the judicial appointments process, either Congress as a whole or the Senate by itself could establish a supermajority requirement for Supreme Court confirmations. This would similarly likely result in less ideologically extreme appointments and so more consensual, rather than partisan, decision making. Instead of reinstating the filibuster, which traditionally carried a strong norm against its use,[53] the Senate could simply change its internal rules to require a stated supermajority for confirming all Supreme Court nominees. Alternatively, Congress may be able to enact such a requirement by statute or resolution under its same Necessary and Proper Clause power.

On the combination of individualized opinions and simple majority voting on the Court that is made public, there is little that Congress can do about the former given the long cultural history of judicial opinion writing in the common law tradition.[54] To be sure, a chief justice might attempt to create a norm of unanimity, especially in important, highly-charged cases, or urge restraint in the writing of concurring and dissenting opinions. But

51. *See* Jackson & Tushnet, *supra* note 24.
52. Shira A. Scheindlin, *Trump's Judges Will Call the Shots for Years to Come. The Judicial System is Broken*, THE GUARDIAN: OPINION (Oct. 25, 2021), https://www.theguardian.com/ commentisfree/2021/oct/25/trump-judges-supreme-court-justices-judiciary [https://perma.cc/P5MC-FXAW].
53. *See* Fisk & Chemerinsky, *supra* note 20.
54. In civil law countries, the common practice of non-individualized, unanimous decisions functions to bolster judicial independence, given the potential concerns of fixed term constitutional court members about post-judicial employment opportunities. In the U.S., other mechanisms may be required in the absence of a single court opinion, although – depending on the precise reform—justices would still be entitled to continue in the "office" of federal judge on a lower court or receive their compensation after taking senior status.

both deeply ingrained tradition and the other magnifying factors previously identified count strongly against anything other than occasional, ad hoc success.

With respect to simple majority rule, however, again the Necessary and Proper Clause arguably authorizes Congress to require a supermajority for the Court to exercise its judicial review powers against either federal or state laws.[55] This would appear to be a reasonable and appropriate way for the Court to execute what is, after all, only its implied power over the constitutionality of statutes. Moreover, by requiring something closer to a "clear error rule,"[56] it would permit more reasonable legislative judgments to stand and reduce the perceived discretion of the Court to displace them. Alternatively, Congress's power under Article III, Section 2, Clause 2, which states that "[i]n all the other Cases before mentioned, the supreme court shall have appellate jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make,"[57] would seem to include the possibility of regulating for such a supermajority requirement.

These three reforms—ending life tenure and requiring supermajorities for both appointment of justices and exercises of judicial review—would be transformative, and so should be the primary focus of reform efforts. If the proposed measures were enacted but are held unconstitutional, then specific, focused, well-explained constitutional amendments would be the fallback position. Of the remaining, less systemically consequential features identified in Part I, Congress has always been understood to have significant powers over the mandatory or discretionary nature of the certiorari process. The clear source of this power is the same Article III, Section 2, Clause 2, just mentioned. Congress has exercised this power to progressively reduce the mandatory, and increase the discretionary, part of its jurisdiction, most notably with the

55. Such legislation has been introduced in Congress in the past. In 1868, a bill requiring a two-thirds majority of the Court to invalidate a federal statute was passed by the House and Senate, but President Johnson refused to sign it. *See* Jamelle Bouie, *This is How to Put the Supreme Court in Its Place*, N.Y. TIMES: OPINION (Oct. 14, 2022), https://www.nytimes.com /2022/10/14/opinion/supreme-court-reform.html [https://perma.cc/65FX-L59C]. In 1923, Senator William Borah introduced a bill requiring a minimum of seven justices to invalidate a federal statute. William E. Borah, *Five to Four Decisions as Menace to Respect for Supreme Court*, N.Y. TIMES, Feb. 18, 1923, at 20, https://www.nytimes.com/1923/02/18 /archives/five-to-four-decisions-as-menace-to-respect-for-supreme-court-how.html [https://perma.cc/4W97-2HNC].

56. This is the standard for judicial review proposed in James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

57. U.S. CONST., art. III, § 2, cl. 2.

Judges Act of 1925 and the Supreme Court Case Selection Act of 1988.[58] But what it reduces it can also increase. So, to create less discretion and the judicial strategizing it gives rise to, Congress could reinstate the mandatory nature of the Court's appellate jurisdiction in various types of cases. It could presumably also use this enumerated power to change the rule of four itself for still-discretionary cases. On standing, it would seem that, for similar reasons, in order to reduce its discretion Congress might be able to legislate more liberal rules as regulations under which the Court exercises its appellate jurisdiction. This power would also permit Congress to reform, reduce, and normalize the shadow docket.

III. "INDEPENDENT" REFORMS

The changes I have discussed and suggested in Part II all relate to the particular features of U.S. judicial review that magnify the inherent concerns with discretionary and partisan decision making relative to comparative constitutional norms. The possible reforms to be discussed in this Part are ones that have been widely canvassed in the current debates about fixing the Court but do *not* reflect how most other systems of judicial review manage to keep these concerns closer to the inherent minimum.

The first such reform is increasing the size of the Court. This is clearly within the powers of Congress, based on text and historical practice, as the U.S. Constitution, unlike many others, does not specify the number of justices.[59] During the nineteenth century, Congress altered the size of the Supreme Court, both upwards and downwards, on several occasions before settling on the current nine members in 1869.[60] The counterargument is that a constitutional norm or convention against "court packing" has developed since FDR's failed attempt in 1937.[61] But this, of course, goes to

58. *See* Stuart Taylor Jr., *Supreme Court is Expected to Gain Wide Freedom in Selecting Cases*, N.Y. TIMES, June 9, 1988, at A25, https://www.nytimes.com/1988/06/09/us/supreme-court-is-expected-to-gain-wide-freedom-in-selecting-cases.html [https://perma.cc/G6GZ-LYL6].

59. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST., art. III, § 1. By contrast, for example, the Italian, Brazilian, South African, and Indian constitutions specify the size of their constitutional or apex courts.

60. *See* JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10562, "COURT PACKING": LEGISLATIVE CONTROL OVER THE SIZE OF THE SUPREME COURT 2 (2020).

61. *See, e.g.*, Written Statement of Neil S. Siegel to the Presidential Comm'n on the Sup. Ct. of the United States, Pub. Meeting on "Composition of the Sup. Ct." 2 (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Siegel-Testimony.pdf [https://perma.cc/ACN3-4KPQ].

the constitutional politics of enactment rather than enumerated power; a court faced with such a statute could not plausibly invalidate it on the basis that it violates a nonlegal norm. At the same time, however, I view increasing the size of the Court as far less relevant to the structural problems of U.S. judicial review than the ones I have raised above. It would not only likely be viewed as a short-term partisan move that would trigger a tit-for-tat response when the political tables are turned, but also add to, rather than detract from, the problems of discretion and politicization. With more justices—and so likely more opinions—the splits on the Court, the alternative reasonings, and the space for strategic behavior would all increase.

Reducing the scope of judicial review by ousting it in certain areas, or engaging in jurisdiction-stripping, is another possibility. Again, there is a reasonably clear basis for this congressional power to make "Exceptions" to the Supreme Court's appellate jurisdiction in the same Article III, Section II, Clause 2 noted above. On the other hand, there are presumably implied limits to this power. Exceptions are, by definition, from the norm—otherwise Congress could eliminate the Supreme Court's power of judicial review altogether—although these limits have not been significantly defined or tested, given the relatively rare exercise of the power. It is possible that ousting Supreme Court review of a general class or category of cases, such as death penalty appeals, habeas petitions, or appeals from state supreme courts, would be deemed more within Congress's legitimate authority than ending review of substantive laws in specific, subject matter areas, such as abortion, same-sex marriage, or gun control. Similarly, ousting judicial review of certain statutes, as distinct from certain types of administrative decisions, might be thought to cross the line: for example, a comprehensive immigration statute versus individual deportation decisions made under it. Regardless of the precise scope and limits of the jurisdiction-stripping power, however, it does nothing to address the general structural concerns in the remaining cases over which the Court does have jurisdiction. For this reason, it is, at best, a limited instrument that may supplement but cannot replace more general reforms.

A third reform that has occasionally been canvassed in the past,[62] and has been mentioned in the current debate, is establishing a legislative power

62. Senator Robert LaFollette proposed a congressional override in the 1920s, following the Court's invalidation of the federal Child Labor Tax Law in *Bailey v. Drexel Furniture Co.* (*Child Labor Tax Case*), 259 U.S. 20 (1922). *See* REP. OF THE PROCS. OF THE FORTY-SECOND ANN. CONVENTION OF THE AM. FED'N OF LAB. 234–43 (The Law Rep. Printing Co.

to override Supreme Court decisions. Potential variations include granting the power to both Congress and state legislatures or just Congress, and a simple majority versus supermajority requirement.[63] This type of power has been established, in whole or part, in a handful of judicial review systems around the world, including Canada, New Zealand, the United Kingdom, Israel, and (briefly in the past) Romania and Poland.[64] Unlike the features distinguishing the United States from elsewhere discussed in Part I, this power is *not* part of the current comparative constitutional mainstream. As an easier to use alternative to constitutional amendment, the main point of such a legislative override mechanism, of course, is to address the first stated concern with U.S. judicial review above: namely, its finality. It is an interesting but uncertain question whether Congress has the power to create such an override, either by statute or resolution, under Article III, Section II, Clause 2, as an "exception" to the Court's appellate jurisdiction or as necessary and proper to the execution of its powers.[65]

In earlier work in comparative constitutional law,[66] I have been a proponent of such an override, as a means of bringing greater balance to judicial and legislative powers than is typical under either constitutional or legislative supremacy. My support for this power as a general normative matter of constitutional design in well-established democracies has been premised on certain specific conditions obtaining in practice. In sum, these are reasonably well-functioning legislatures that take rights seriously and a relatively abstract bill of rights that circumscribes but does not fully determine the answers to most rights issues, so that there is clear space for reasonable disagreement on what it requires or specifies in concrete situations. In this context, the override power enables, but obviously does not require, the reasonable view of a majority of the legislature to prevail

1922) [hereinafter 1922 AFL CONVENTION REPORT]. Robert Bork did so in the 1990s. *See* Robert H. Bork, *The End of Democracy?: Our Judicial Oligarchy*, 67 FIRST THINGS, 21, 23 (1996), https://www.firstthings.com/article/1996/11/the-end-of-democracy-our-judicial-oligarchy [https://perma.cc/UG4R-37QU].

63. For example, Bork proposed a two-thirds supermajority requirement for a congressional override. Bork, *supra* note 62.

64. *See* GARDBAUM, *supra* note 25, at 11.

65. Note that both Senator LaFollette and Robert Bork proposed a constitutional amendment for establishing the override. *See* 1922 AFL CONVENTION REPORT, *supra* note 62; Bork, *supra* note 62.

66. *See* GARDBAUM, *supra* note 25, at 47–76; *see also* Stephen Gardbaum, *The Case for the New Commonwealth Model of Constitutionalism*, 14 GERMAN L.J. 2229 (2013).

over the given reasonable view of a majority of the court.[67] Although the few countries that have established such a power are all parliamentary democracies, a case could be made that it might work more effectively in a presidential democracy, where the executive typically does not control the legislature or the legislative agenda to the same extent.[68]

It is, of course, true that such an override power is not the *only* way to limit or reduce judicial finality on constitutional issues. Indeed, given how the power is operating in Canada and the United Kingdom, it is arguable whether or not it is in fact having this effect in these two countries.[69] Other mechanisms include constitutional amendment and jurisdiction stripping, discussed above. Moreover, there are numerous ways in which courts can choose to exercise self-restraint in exercising judicial review, thereby reducing their finality de facto and granting more leeway for the elected institutions to resolve constitutional issues. These include issuing "minimalist" decisions, more "dialogical" remedies, and practicing deference.[70] But the situation we are now addressing is one in which such judicial self-restraint is mostly missing in action and overruling the Court by constitutional amendment is usually a nonstarter. As we have seen, jurisdiction stripping has some limited potential, but is not a general reform, unlike the one currently under consideration.

If I have a hesitation about the merits of establishing an override power in the United States, it is whether constitutional politics has perhaps become so dysfunctional and hyperpartisan that it does not meet the general preconditions for application. Do, or would, we expect state legislatures or Congress to take constitutional issues seriously in the specific required sense of deliberating to reach reasonable, good faith judgments on the merits, either initially or in response to a judicial decision? On the other hand, is this what we are currently getting from the Supreme Court? The concerns that are driving the call for reform suggest otherwise. Overall, the override would be an interesting experiment to try in the United States and could be repealed if it turned out

67. Where a supermajority requirement for judicial review exists, the case for such an override power is less compelling.
68. For a discussion of the relative ineffectiveness of "political review" in parliamentary systems, where executives typically govern through the legislature, see JANET L. HIEBERT & JAMES B. KELLY, PARLIAMENTARY BILLS OF RIGHTS: THE EXPERIENCES OF NEW ZEALAND AND THE UNITED KINGDOM (2015).
69. *See* GARDBAUM, *supra* note 25, at 223-37.
70. *See* Rosalind Dixon, *The Form, Function, and Varieties of Weak(ened) Judicial Review*, 17 INT'L J. CONST. L. 904 (2019).

to be a remedy worse than the disease. But my own recommendation, based on both this concern and the empirical unpredictability of how the override will actually operate in any given context, is that it would be preferable to first adopt reforms that bring U.S. judicial review into the comparative constitutional mainstream, rather than move from one outlying position to another.

CONCLUSION

We are living in a rare, once in a generation, moment of focused, collective deliberation on potential reforms of the Supreme Court, as exemplified by the creation and recent report of the Presidential Commission.[71] Given the many exercises of discretion and partisanship over the past few years, both towards and on the Court, it is no wonder that public support for the institution has dropped to multidecade lows and the justices are unusually busy in publicly defending its legitimacy.[72] Now is the time to focus on the distinctive, outlying features of American judicial review that magnify such discretion and partisanship and seek to reform them in line with global comparative wisdom.

71. *See* Presidential Commission on the Supreme Court of the U.S., *supra* note 5.
72. *See* Ruth Marcus, Opinion, *The Supreme Court's Crisis of Legitimacy*, WASH. POST, (Oct. 1, 2021, 1:50 PM), https://www.washingtonpost.com/opinions/2021/10/01/supreme-court-crisis-of-legitimacy [https://perma.cc/M39D-RJPW].