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Dear Professors Bauer and Rodriguez,

Thank you for the opportunity to appear before the Commission and offer my thoughts on the role of the Supreme Court in comparative perspective, and the potential lessons from other constitutional systems about how the finality of the Court's decisions might be tempered.

A The Role of the Supreme Court: A Comparative View

The US Supreme Court is widely admired globally for at least three things:

- (i) its long history of robust and effective judicial review in aid of the protection of democracy, the separation of powers, the rule of law, and individual rights;
- (ii) the quality of its opinions; and
- (iii) the degree to which the US public is aware of, and generally supports, the workings of the Court.

These are also all hallmarks of a well-functioning constitutional court, or ultimate appellate court with constitutional jurisdiction. Constitutional scholars often disagree about the appropriate scope of judicial review, but generally *agree* that court decisions should be

efficacious in altering legal and political practice.¹ And while scholars such as Gerald Rosenberg have questioned the extent of impact of important Supreme Court decisions, he and others have equally documented the efficacy of the Court in a range of cases.² The US is also broadly seen globally as a strong and effective constitutional court.

The Court also has a long track-record of delivering well-reasoned, well-written opinions cited by courts around the world.³ This is important to how lawyers both in the US and elsewhere perceive the Court: To be effective, court decisions must gain acceptance from legal as well as political audiences, and lawyers understandably tend to emphasize the importance of legal craft.

Finally, political support for a court depends on a mix of elite and popular support.⁴ The two often go together, but for the public to support a court, it will generally need to be aware of its broad function, or most significant decisions. While not high, public knowledge of the Court and its decisions is also greater in the US than in many other constitutional democracies.⁵

However, the Court is also viewed with greater skepticism by global constitutional scholars for the following reasons, among others:

- (i) the Court's decisions have an unusually high degree of finality or "strength", by global standards, in ways that raise questions about the democratic legitimacy of judicial review;⁶
- (ii) compared to other leading constitutional courts, the Supreme Court takes an unusually narrow view of:
 - a. guarantees of equality, and does not consider the disparate impact of legislation on protected minorities, nor treat the remedying of past harms as a compelling state interest in the context of affirmative action measures;⁷
 - b. guarantees of social and economic rights, though this is more common in other Anglo-American systems, than in Europe or Latin America;⁸ and
 - c. the permissible scope for imposing limitations on freedom of expression.⁹

¹ See Stephen Gardbaum, *What's So Weak About 'Weak-Form Review'? A Reply to Aileen Kavanagh*, 13 Int'l J. Const. L. 1040 (2015); Rosalind Dixon, *Strong Courts, Judicial Statecraft in Aid of Constitutional Change*, 59 Colum. J. Trans. L. 299 (2021).

² Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2d ed. 2008).

³ David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. Rev. 762 (2012).

⁴ See Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 Int'l J. Const. L. 106 (2009).

⁵ As seen in differences between the US and Australia. Compare Meredith Dost, *Dim public awareness of Supreme Court as major rulings loom*, Pew Research Center, <https://www.pewresearch.org/fact-tank/2015/05/14/dim-public-awareness-of-supreme-court-as-major-rulings-loom/>, and Ingrid Nielsen & Russell Smyth, *What the Australian Public Knows About the High Court*, 47 Fed. L. Rev. 31 (2019).

⁶ See Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009). Cf. Stephen Gardbaum, *The New Commonwealth Constitutionalism: Theory and Practice* (2013).

⁷ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Fisher v. University of Texas*, 570 U.S. 297 (2013); *Fisher v. University of Texas*, 579 U.S. ____ (2016).

⁸ Law & Versteeg, *supra* note 3. See also Adam Chilton and Mila Versteeg, *Rights without Resources: The Impact of Constitutional Social Rights on Social Spending* 60 J. L. & Econ. 713 (2017). A related critique might be the degree to which the US Constitution is not generally held to have horizontal effect.

- (iii) the Court is seen as both politicized and polarized along partisan lines, in ways that are more pronounced than in almost any other consolidated constitutional democracy; and
- (iv) the Justices continue to enjoy lifetime appointment, without being subject to any form of term limit or mandatory retirement age, in ways that are increasingly unusual in global terms.

There is a close connection between factors (i) and (iv) – i.e., unlimited judicial terms amplify the degree to which decisions of the Court enjoy formal as well as de facto finality over the medium term. In the long run, all Court decisions are potentially revisable, whether by a judicial change of heart or alongside changes in the composition of a court.¹⁰ The doctrine of *stare decisis* limits the degree to which either of these changes could affect the evolution of constitutional jurisprudence, but only to some extent. Changes in the composition of the Court are also one way in which democratic attitudes can legitimately influence the direction of constitutional decision-making.¹¹ Limits on predictable turnover on the Court, therefore, can also increase the strength or finality of decisions, and questions about the democratic legitimacy of judicial review.

As you are aware, there has been considerable scholarship in the US and elsewhere over the last 20 years raising questions about the legitimacy and desirability of strong forms of judicial review, given a recognition of the scope for reasonable disagreement among citizens about the scope and priority of various constitutional commitments. Scholars such as Jeremy Waldron have suggested that given reasonable disagreement of this kind, there is in fact no justification for judicial review – or at least strong-form judicial review of the kind exercised by the US Supreme Court – in a well-functioning political system that meets certain pre-conditions.¹² Others, such as Mark Tushnet and Stephen Gardbaum, have suggested that judicial review should almost always be weak, rather than strong, in form.¹³

B Judicial Term Limits

It is now global best practice to have some judicial term limits, and there is precedent in leading democracies for both: (a) a system of relatively long, fixed term and non-renewable judicial appointments, for periods ranging from 8 to 12 years;¹⁴ and (b) a system of mandatory retirement.¹⁵ For example, justices on the Constitutional Court of South Africa and Federal Constitutional Court of Germany serve for a period of 12 years (or less in the

⁹ See, e.g., Adrienne Stone, *The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication*, 23 Melb. U.L. Rev. 668 (1999); Evelyn Douek, *All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia*, 47 Fed. L. Rev. 551 (2019).

¹⁰ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009).

¹¹ Cf. Suzanna Sherry & Christopher Sundby, *The Risks of Supreme Court Term Limits*, SCOTUSblog (Apr. 05, 2019, 01:29 PM), <https://scholarship.law.vanderbilt.edu/faculty-publications/1091> (arguing that term limits would introduce too much instability into court decision-making).

¹² Jeremy Waldron, *Law and Disagreement* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346 (2005).

¹³ Tushnet, *supra* note 10; Gardbaum, *supra* note 1.

¹⁴ See European Commission for Democracy through Law (Venice Commission), *The Composition of Constitutional Courts* (1997).

¹⁵ As seen in Canada, UK and Australia. See, e.g., Brian Opeskin, *Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges* 35 Oxf. J. Leg. Stud. 627 (2015).

case of reaching the mandatory retirement age).¹⁶ Justices on the Constitutional Courts of France and Italy, and Colombia, serve for 9 and 8 years respectively.¹⁷

The current proposal to adopt term limits of 18 years are in fact considerably longer than in any comparable democracy: the next longest judicial term limit I am aware of is a 15-year term (albeit renewable), in Azerbaijan, a country rated by Freedom House as “not free”.¹⁸

This also suggests the value, from a comparative and democratic perspective, of the US adopting some form of limit on the tenure of federal judges – either in the form of judicial term limits, or a mandatory retirement age.¹⁹ There are obviously important questions about how and whether this could be done, consistent with the requirements of Art III, and the requirement that the justices shall not be removed except for proven misbehaviour while “in office”. And while I am inclined to think this is possible, there are members of the Commission who possess far more expertise than I on this question. But it is important to note that the United States is alone among leading constitutional democracies in having neither a fixed term nor a mandatory retirement age for its high court judges.

C Other Mechanisms for Lessening the Finality of Judicial Review

You have also asked me to address other potential ways in which the finality of judicial review may be limited. As I set out in the attached article, *The Forms and Functions of Weak(ened) Judicial Review*,²⁰ there are generally three ways in which constitutional designers can seek to limit the finality of court decisions under an entrenched constitution:

- (i) flexible procedures for formal constitutional amendment (“the Indian and Colombian models”²¹);
- (ii) formal powers of legislative override, as found in s 33 of the *Canadian Charter of Rights and Freedoms* 1982 (“the Canadian model”); and
- (iii) formal powers to limit or remove the jurisdiction of a court over certain matters (the US and arguably Indian models).

This is in addition to the constitutional flexibility, or scope for legislative override, created by adopting constitutional or quasi-constitutional norms by way of ordinary legislation. This, for

¹⁶ S. Afr. Const., 1996 s 176(1); Bundesverfassungsgericht, *The Federal Constitutional Court*, https://www.bundesverfassungsgericht.de/EN/Das-Gericht/Organisation/organisation_node.html.

¹⁷ Costituzione [Cost.] (It.); 1958 Const [FR]. Art 56; Constitución Política de Colombia [C.P.].

¹⁸ Venice Commission, *supra* note 14; Azerbaijan, Freedom House (2020), <https://freedomhouse.org/country/azerbaijan>.

¹⁹ There exists proposals to this effect. See, e.g., Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, Center for American Progress (Aug. 3, 2020, 4:00 AM), <https://www.americanprogress.org/issues/courts/reports/2020/08/03/488518/need-supreme-court-term-limits/>; Gabe Roth, *Supreme Court term limits do not require a constitutional amendment*, USA Today (Sep. 24, 2020, 5:00 AM), <https://www.usatoday.com/story/opinion/2020/09/24/supreme-court-justices-give-them-term-limits-instead-life-tenure-column/3503999001/>; Tyler Cooper, *Supreme Court Term Limits – Here’s the Best Option*, Bloomberg Law (Feb. 23, 2021, 8:00 PM), <https://news.bloomberglaw.com/banking-law/supreme-court-term-limits-heres-the-best-option>.

²⁰ Rosalind Dixon, *The forms, functions, and varieties of weak(ened) judicial review*, 17 Int. J. Const. L. 904 (2019).

²¹ Rosalind Dixon & Adrienne Stone, *Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection*, in *Philosophical Foundations of Constitutional Law* 103 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

example, is the basis for rights-based judicial review in the UK and New Zealand, and in certain Australian states.²²

Both US and comparative experience further points to a range of ways in which legislative or executive actors may seek to limit the finality of court decisions in ways not necessarily contemplated by constitutional drafters or designers. Mechanisms that have been used, or contemplated, for this purpose include attempts by the legislature or executive to²³:

- (i) Reduce a court's budget or administrative autonomy;
- (ii) Mandate a change to internal norms of judicial deliberation or decision making;
- (iii) Alter the majority rule for invalidation of legislation;
- (iv) Discipline, reassign or remove judges through administrative sanctions and processes;²⁴
- (v) Change the order of court hearings or rulings;²⁵
- (vi) Decline to publish the outputs or decisions a court in official reports;
- (vii) Decline to comply with the orders of a court order.

Some of these mechanisms (narrow or non-compliance) were employed by President Lincoln in response to the decision in *Ex parte Merryman*, for clearly pro-constitutional purposes, and have been defended on this basis by “departmentalists” in the US.²⁶ Leading departmentalist scholars have also defended a range of other mechanisms on this list, including cuts to a court's budget.²⁷ But as I will explain below, many of these mechanisms raise concerns from the perspective of a commitment to the rule of law and democratic constitutionalism, which should be weighed carefully before being adopted or deployed for pro-democratic or pro-constitutional reasons. The Biden Administration has committed to restoring the role of the United States as a global model and champion of democracy, and adopting many of these tactics risks making it easier for other countries to adopt similar strategies, but for distinctly anti-democratic or “abusive” constitutional ends.²⁸

Finally, as I note in *The Forms and Functions of Weak(ened) Judicial Review*, courts can choose to reason in ways that increase the revisability, or limit the finality, of their decisions. They can choose to:

²² See e.g., Bill of Rights Act 1990 (N.Z.); Human Rights Act 1998 (UK). For discussion, see also Stephen Gardbaum, *The New Commonwealth Constitutionalism: Theory and Practice* (2013).

²³ Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing* (forthcoming Jul. 2021).

²⁴ Burt Neuborne, *The Supreme Court of India* 1 Int. J. Const. L. 476, 481-82 (2003).

²⁵ See Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Monopoly*, *Revista Forumul Judecatorilor* 104 (2018); Hubert Tworzecki & Radoslaw Markowski, *Why Is Poland's Law and Justice Party Trying to Rein in the Judiciary?*, *The Washington Post* (Jul. 26, 2017, 12:32 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/26/why-is-polands-law-and-justice-party-trying-to-rein-in-the-judiciary/?utm_term=.bc645112bcfa.

²⁶ See, e.g., Sadurski, *supra* note 24.

²⁷ See, e.g., Walter Murphy, *Who Shall Interpret? The Question for the Ultimate Constitutional Interpreter*, 48 Rev. Pol. 401 (1986); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 Mich. L. Rev. 676 (2005); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267 (1995); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217 (1994); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

²⁸ See, e.g., Larry Kramer and others, as discussed in Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing* (forthcoming Jul. 2021).

²⁹ See Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing* (forthcoming Jul. 2021).

- (i) reason narrowly, rather than broadly;²⁹
- (ii) adopt weakened, democratically sensitive norms of stare decisis;³⁰ and
- (iii) adopt “weak” or delayed or non-coercive judicial remedies.³¹

D Amendment, Override and Limiting Jurisdiction

In many countries worldwide, processes of formal constitutional amendment are the leading way in which legislatures can engage in “dialogue” with a court, or to limit the finality of court decisions.³²

Many constitutions provide for relatively flexible, or non-demanding, requirements for formal constitutional amendment (at least in most cases, which do not involve the “basic structure” of the constitution, the potential “substitution” of a new constitution, or changes to a higher, more entrenched constitutional “tier”).³³ The distribution of political power – for example, in favour of a single dominant political party or coalition – often makes it relatively easy to satisfy legislative super-majority requirements. And a pattern of successful constitutional amendment often creates a public attitude of acceptance of, or support, for formal constitutional amendment – or what Tom Ginsburg and James Melton have called a constitutional “amendment culture”.³⁴

This has also meant that formal amendment has been used by legislatures in a range of leading democracies as a means of narrowing or modifying the effect of court decisions with which they disagree. Some of the leading examples, Adrienne Stone and I have argued, are Colombia and India – where there are clear limits to the power for amendment, but amendment is nonetheless widely used as a means of expressing disagreement with decisions of the Constitutional Court of Colombia and Supreme Court of India.³⁵

Formal processes of amendment also have a number of advantages as a tool for democratic dialogue in this context: they allow legislators to express disagreement with a court in ways

²⁹ See Cass R. Sunstein, *One Case At a Time: Judicial Minimalism On the Supreme Court* (2001). A related means of achieving the same result is to reason narrowly and in a more procedurally focused way: See e.g., Ittai Bar-Siman-Tov, *Semiprocedural Judicial Review*, 6 *Legisprudence* 271 (2012); Oren Tamir, *Administrativizing Constitutional Law* (Work in Progress 2021)

³⁰ This is arguably what the Court did, though suggested it would not do, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The same could be said of the German Constitutional Court in *Abortion II*, 88 BVerfGE 203 (1993). See also Rosalind Dixon, *The forms, functions, and varieties of weak(ened) judicial review*, 17 *Int. J. Const. L.* 904 (2019).

³¹ See Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009); Kent Roach, *Dialogic Remedies*, 17 *Int. J. Const. L.* 860 (2019); Po Jen Yap, *New Democracies and Novel Remedies*, *Pub. L.* 30 (2017).

³² On dialogue in Canada and the US, see, e.g., Peter W. Hogg & Allison A. Bushnell, *The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)*, 35 *Osgoode Hall L.J.* 75 (1997); Christopher P. Manfredi & James B. Kelly, *Six Degrees of Dialogue: A Response to Hogg and Bushnell*, 37 *Osgoode Hall L.J.* 513 (1999); Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 *Osgoode Hall L.J.* 235 (2009); Kent Roach, *Dialogic Remedies*, 17 *Int. J. Const. L.* 860 (2019); Barry Friedman, *Dialogue and Judicial Review*, 91 *Mich. L. Rev.* 577 (1993); Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 *Brook. L. Rev.* 1109 (2005); Barry Friedman, *Dialogue and Judicial Review*, 91 *Mich. L. Rev.* 577 (1993).

³³ Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 *Am. Pol. Sci. Rev.* 355 (1994); Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 *Geo. Wash. L. Rev.* 438 (2018).

³⁴ Tom Ginsburg & James Melton, *Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty*, 13 *Int. J. Const. L.* 686 (2015).

³⁵ Dixon & Stone, *supra* note 21.

that respect commitments to legal form, and thus have rule of law virtues. They also allow legislatures to express true constitutional *disagreements* as opposed to constitutional “misgivings” – by varying the scope, rather than applicability, of constitutional norms.³⁶

In the US, however, the Art V process is unlikely to offer any meaningful prospect for limiting the finality of Supreme Court decisions. That was not always the case: as the Commission is well aware, Art V was used to override the decisions of the Supreme Court in *Chisolm v. Georgia* 2 US 419 (1793), *Dred Scott v. Sandford* 60 US 393 (1857), *Pollock v. Farmers Loan & Trust* 157 US 429 (1895), *Minor v. Happersett*, 88 US 162 and *Oregon v. Mitchell* 400 US 112 (1970). But modern attempts to rely on Art V for this purpose have been unsuccessful.³⁷ And by most measures, the US Constitution is now the most rigid democratic constitution worldwide.³⁸

Constitutional amendment under Art V is more difficult, or demanding, under than in any other democracy.³⁹ (Previously, the US came second to the former Yugoslavia.⁴⁰ And the consistent non-use of Art V in the latter part of the 20th century has arguably contributed to a culture of non-amendment. Several leading US scholars have attempted and continue to attempt to change this,⁴¹ but this is obviously a very long-term and ambitious project.

Another leading mechanism for constitutional dialogue, in Canada, is the formal provision for a power of legislative override under s 33 of the Canadian *Charter*. The power applies only to rights, not structural constitutional norms, is subject to a 5-year sunset provision, and cannot be used in relation to the rights in ss 2 and 7-15 of the *Charter*.⁴² But otherwise, it is quite broad: it can be used retrospectively as well as prospectively, repeatedly for the same piece of legislation, and adopted by either a simple majority of the Canadian Parliament or a provincial legislature.⁴³

A similar mechanism has been adopted elsewhere, but in the context of a less consolidated constitutional democracy, and hence this model is widely seen as a “Canadian model” for weakening judicial finality.⁴⁴ Three things, however, should be noted in this context: Canada also experimented largely unsuccessfully with an earlier, much weaker model of rights-based review under the (statutory) Canadian *Bill of Rights* 1960; there is disagreement in Canada about how desirable it is for s 33 to play this function; and there has been limited actual use of s 33 in Canada. That has begun to change somewhat recently, but for the most part, the direct influence of s 33 has been limited. Some commentators attribute this to the very strong

³⁶ Waldron, *supra* note 12. See discussion in Dixon & Stone, *supra* note 21.

³⁷ Rosalind Dixon, *Partial Constitutional Amendment*, 13U. Penn. J. Const. L. 643 (2011).

³⁸ Lutz, *supra* note 34.

³⁹ Lutz, *supra* note 34. Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, in *Comparative Constitutional Design* (Tom Ginsburg ed., 2011); Rosalind Dixon, *Partial Constitutional Amendment*, 13 Int’l J. Const. L. 391 (2011).

⁴⁰ Lutz, *supra* note 34.

⁴¹ Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (2006).

⁴² Canadian Charter of Rights and Freedoms, s 33, Part I of the Constitution Act, *being* Schedule B to the Canada Act, 1982 c 11 (U.K.).

⁴³ *Ford v. Québec, (A.G.)* [1988] 2 S.C.R. 712. See discussion in, Tsivi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 Can. Pub. Admin. 255 (2008); Lorraine E. Weinrib, *The Canadian Charter’s Override Clause: Lessons for Israel*, 49 Isr. L. R. 67 (2016).

⁴⁴ See Stephen Gardbaum, *The New Commonwealth Constitutionalism: Theory and Practice* (2013) (noting it has been adopted in Poland and Mongolia).

commitment to human rights in Canada, others to a form of political path-dependence.⁴⁵ My own work on Canada, however, suggests that the indirect influence of s 33 has been significant. There has only been *one* occasion in which Canadian legislatures were unsuccessful in their attempts to modify or narrow the effect of a Supreme Court decision under the *Charter*, and this was a case involving prisoner voting rights, where s 33 was not available.⁴⁶ In every other case, and in the shadow of s 33, the Supreme Court of Canada has deferred to legislative modifications of their prior rulings.⁴⁷

A mechanism of this kind is thus clearly not perfect: it applies only to some constitutional norms (though this need not be the case elsewhere), it requires the expression of rights misgivings as opposed to disagreements and has had limited direct effect in the leading case in which it has been employed. But it has clear advantages: it provides a cabined mechanism for legislative override that respects rule of law constraints and offers a meaningful source of pressure for courts to accommodate expressions of reasonable democratic disagreement.

The difficulty in the US, however, is that it is extremely difficult to see how such an override mechanism could be adopted other than by way of the Art V process, or formal constitutional amendment. Attempts to introduce a statutory override might have some effect at a federal level if they were framed as a guide to the interpretation of federal statutes. But they would have little, if any, effect in the context of state statutes.

Hence, it is hard to see a practical path to adopting this as a model in the US, despite the arguments that have been made in favor of such an approach by Professor Robert Bork, among others.⁴⁸

A path that is potentially open to Congress in the US is to rely on its power under Art III to make “exceptions” to the jurisdiction of the Court. As you are well aware, this mechanism has been proposed as a means of overriding a range of Court decisions, though rarely used in practice.⁴⁹ There is also an open question as to whether the Court would uphold attempts to oust the jurisdiction of all federal and state courts, along with the jurisdiction of the Supreme Court, or even all of the Court’s jurisdiction – as opposed to some non-core parts of it.⁵⁰

But it is a model that has been used elsewhere with some success.⁵¹ In India, for example, the legislature (Lok Sabha) has frequently relied on a mix of formal constitutional amendment

⁴⁵ See, e.g., Roach, *supra* note 32; Kahana, *supra* note 44; Mark Tushnet, *Alternative Forms of Judicial Review*, 101 Mich. L. Rev. 2781-2802 (2003).

⁴⁶ See Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 Osgoode. Hall. L. J. 235 (2009); Rosalind Dixon, *Weak-Form Judicial Review and American Exceptionalism*, 32 Oxf. J. Leg. Stud. 487 (2012); Rosalind Dixon, *Constitutional ‘Dialogue’ and Deference*, in *Constitutional Dialogue: Rights, Democracy, Institutions* (Geoffrey Sigalet, Gregoire Webber & Rosalind Dixon ed., 2019); Rosalind Dixon, *The forms, functions, and varieties of weak(ened) judicial review*, 17 Int. J. Const. L. 904 (2019).

⁴⁷ Id.

⁴⁸ See Robert Bork, *Our Judicial Oligarchy*, First Things (Nov. 1996). See also Nicholas Stephanopoulos, *The Case for Legislative Override*, 10 UCLA J. Int’l L. & Foreign Aff. 250.

⁴⁹ The one case in which Congress did rely on its powers under Art III cl 2 was more prospective: see *Ex parte McCordle*, 74 US (7 Wall) 506 (1869).

⁵⁰ Cf. Richard H. Fallon Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 300-12 (6th ed. 2009). See Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What the Dialogue (Still) has to teach us*, 69 Duke L. J. 1 (2019).

⁵¹ For example, ouster clauses have both been used, and received substantial critical attention for their use, in the UK. See, e.g., Douglas E. Edlin, *A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States*, 57 Am. J. Comp. L. 67 (2009); Thio Li-Ann, *Ousting Ouster*

and the ouster of the jurisdiction of the Supreme Court of India (SCI) as a means of attempting to override or modify the effect of prior SCI decisions, especially those relating to the right to property.⁵² And while the SCI has struck down many of these measures, as undermining the basic structure of the Indian Constitution, they have upheld some others, in ways that have clearly had some impact on the finality of the SCI's decisions.⁵³

The real difficulty is that it has a very mixed political history in the US – having been proposed as a means of overriding *Brown v Board of Education*, 347 U.S. 483 (1954) and national efforts at racial desegregation.⁵⁴ It is also a means of weakening judicial review that is in tension with rule of law commitments, and the idea that all legislative and executive power should be subject to constitutional constraint construed and enforced – at least to some degree – by the courts.

E Changes to Judicial Deliberation, Decision Making and Publication

In addition to these three mechanisms, as I note above, there are a range of more informal mechanisms that have been used at times both in the US and elsewhere as a means of expressing disagreement with a court. You have also specifically asked me in this context to comment on the idea of judicial super-majority voting requirements.

A requirement of this kind has been applied at various times in certain US state constitutions;⁵⁵ applies today in South Korea,⁵⁶ and was adopted in Poland, along with a range of other changes aimed at curbing the power and authority of the Constitutional Tribunal.⁵⁷

They also have the clear potential to limit the finality of judicial decisions, by narrowing the *de facto* or functional scope of constitutional judicial review, *ex ante*.⁵⁸ Some constitutional scholars in the US and elsewhere defend this as an appropriate limitation on the judicial role.⁵⁹ It arguably approximates the kind of restrained model of review advocated by James Bradley Thayer: legislation will only be invalidated under this model if a super-majority of

Clauses: The Ins and Outs of the Principles Regulating the Scope of Judicial Review in Singapore, Sing. J. Leg. Stud. 392 (2020).

⁵² See, e.g., Neuborne, *supra* note 24; *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845; *State of Bihar v. Kameshwar Singh*, 1952 1 SCR 889; *Karimil Kunhikoman v. State of Kerala*, 1962 AIR 7231 1962 SCR Supl. (1) 829.

⁵³ Monaghan, *supra* note 51.

⁵⁴ See Bert Brandenburg, *Brown v. Board of Education and Attacks on the Courts: Fifty Years Ago, Fifty Years Later*, Justice at Stake (Aug. 13, 2019), at <https://www.brennancenter.org/our-work/research-reports/resources-justice-stake>.

⁵⁵ Jonathan L. Entin, *Judicial Supermajorities and the Validity of Statutes: How Mapp Became a Fourth Amendment Landmark Instead of a First Amendment Footnote*, 52 Case W. Res. L. Rev. 441 (2001).

⁵⁶ Joon Seok Hong, *Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea*, 67 Am. J. Comp. L. 177 (2019).

⁵⁷ Sadurski, *supra* note 24, at 70-75.

⁵⁸ Formal limitations, of course, are the product of both the relevant substantive constitutional norms and Art III-style standing, ripeness and mootness requirements.

⁵⁹ See, e.g., Jed Shugerman, *Balanced Checks: It should take two-thirds of the Supreme Court to stop Congress*, Slate (Jun. 20, 2012, 6:19 PM), <https://slate.com/news-and-politics/2012/06/supermajority-voting-on-the-supreme-court.html>. For theoretical discussion, see Jeremy Waldron, *Five to Four: Why do Bare Majorities Rule on Courts?* 123 Yale L. J. 1692 (2014).

judges view it as unconstitutional, in ways that approximate the idea of laws that are patently unreasonable or unconstitutional.⁶⁰

But judicial narrowness, or *ex ante* weakness of this kind, has clear dangers: in seeking to limit the danger of judicial over-reach, it creates an equal if not greater danger of judicial under-reach. For every campaign finance or voting rights statute that the Court upholds for lack of a super-majority willing to strike it down,⁶¹ it may uphold an equal or even greater number of laws restricting access to abortion or other fundamental rights.⁶²

Where a court *does* strike down a law by super-majority vote, this may also add to the perception that the Court's decision is final, and not legitimately subject to legislative or popular modification. This could also increase rather than decrease the difficulty of overriding decisions of the Court that observers regard as having anti- as opposed to pro-democratic effects.

Moreover, judicial super-majority requirements risk being under- as well as over-inclusive. A court that can only strike down legislation by super-majority vote may be far more willing to "read down" or re-interpret legislation by way of an ordinary majority decision. In many cases, statutory *re*-interpretation can also achieve much the same result as invalidation, especially in cases involving over- as opposed to under-inclusive legislation. This, for example, has been the experience in Japan: the Supreme Court of Japan is widely known as a court that has been extremely restrained in the exercise of its powers of judicial review.⁶³ It has almost never voted to invalidate legislation, but it has nonetheless engaged in quite wide-ranging sub-constitutional review in the guise of statutory (re)interpretation.⁶⁴ The same is true in the United Kingdom, where courts lack the power to invalidate legislation for incompatibility with the *Human Rights Act* 1998 (UK) (HRA), but have broad power to read down legislation under s 3 of the HRA. Against this background, the UK courts have placed consistent reliance on s 3, in addition to their weak declaratory remedies under s 4 of the HRA.⁶⁵

This is a less substantial risk in the US than in countries such as Japan or the UK (or many other Anglo-American jurisdictions), where the supreme court has jurisdiction to interpret all federal and state statutes, develop the common law and adjudicate on federal and constitutional issues. But it is still a risk: the Supreme Court could clearly adopt a version of this approach in relation to federal statutes.

There is also an additional danger to measures of this kind. The Biden Administration has made a clear public commitment to restoring the US's role as an exemplar and advocate for

⁶⁰ Cf. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

⁶¹ See, e.g., *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁶² Edgar Sandoval & Dave Montgomery, *Near-Complete Ban on Abortion is Signed Into Law in Texas*, The New York Times (May. 19, 2021), <https://www.nytimes.com/2021/05/19/us/texas-abortion-law.html>.

⁶³ See, e.g., David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 Wash. L. Rev. 1425 (2011).

⁶⁴ *Id.*

⁶⁵ Human Rights Joint Committee, *Declarations of Incompatibility by UK courts*, 2015, 7, at 4.1 (UK); Florence Powell & Stephanie Needleman, *How radical an instrument is Section 3 of the Human Rights Act 1998?*, UK Constitutional Law Association (Mar. 24, 2021), <https://ukconstitutionallaw.org/2021/03/24/florence-powell-and-stephanie-needleman-how-radical-an-instrument-is-section-3-of-the-human-rights-act-1998/>; Helen Fenwick et al., *Judicial Reasoning under the UK Human Rights Act* 15 (2011).

democracy on the global stage.⁶⁶ There is also a very real risk that, if the US were to adopt an approach of this kind, this would then be understood by a range of foreign actors as license to adopt the same tactic in their own country, but for distinctly less democratic purposes.

Democracy is under threat in a range of countries worldwide, including many countries previously viewed as stable or consolidated democracies.⁶⁷ Yet few of these countries have experienced an outright coup. Instead, they have seen an incremental or “stealth” drift toward authoritarian or competitive authoritarian forms of government, often using ostensibly legal or constitutional pathways.⁶⁸ One of the most important tactics used by would-be authoritarians in this context has also been a form of “abusive” constitutional borrowing or justification – i.e. reliance on liberal democratic norms and precedents as effectively justifying the erosion of democracy.⁶⁹

If the US is seen to legitimate a constitutional tool or technique, one can thus expect that would-be authoritarians elsewhere will point to the US precedent as justification for their own use of the same tool or technique, for distinctly anti-democratic or “abusive” ends. As David Landau and I show in our forthcoming book on the topic, all that is required for this tactic to succeed is for would-be authoritarians to deploy foreign (in this case US) models in ways that involve a high degree of superficiality, selectivity, acontextual or anti-purposive use.⁷⁰ There is also a quite clear history of would-be authoritarians relying on the US as a model in this context.⁷¹

Some measures, such as “court-packing”, raise fewer dangers of this kind – because they have already been subject to abusive borrowing by would-be authoritarian actors in a range of countries. In Hungary, in 2011 the Fidesz-controlled Parliament adopted a new Constitution that dramatically reduced the power and independence of a range of oversight institutions, including the Constitutional Court, and as part of this increased the size of the Constitutional Court, from 11 to 15.⁷² And in Venezuela, the Chavez regime increased the size of the Constitutional Court from 20 to 32, as part of broader changes introduced in 2004 designed to curb the independence of the Court.⁷³ And while this was a quite different context to the kind of court-packing contemplated by President Franklin Delano Roosevelt, as a response to the Supreme Court’s unwillingness to uphold key New Deal legislation, leaders such as Orbán and Chavez effectively used the US as a model in pursuing autocratic objectives.⁷⁴ Comparative scholars also highlight the potential for renewed use of court-packing in the US to be seen as legitimating new and expanded attempts at court-packing in a range of democracies under threat.⁷⁵

⁶⁶ *In His Own Words: How Biden Can Revive Global Democracy*, FreedomHouse (Jan. 20, 2021), <https://freedomhouse.org/article/his-own-words-how-biden-can-revive-global-democracy>.

⁶⁷ Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (2018); Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (2019). Huq and Ginsburg; Levitsky and Ziblatt books.

⁶⁸ Kim L. Scheppelle, *Autocratic Legalism*, 85 U. Chi. L. Rev. 548 (2018); Ozan O. Voral, *Stealth Authoritarianism*, 100 Iowa L. Rev. 1673 (2015); David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189 (2013).

⁶⁹ Dixon and Landau, *supra* note 23.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Scheppelle, *supra* note 69.

⁷³ See Raul A. Sanchez Urribarri, *Courts Between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court*, 36 L. & Soc. Inq. 854 (2011).

⁷⁴ Scheppelle, *supra* note 69.

⁷⁵ David Kosar & Katarina Sipulova, *How to Fight Court-Packing?*, 6 Const. Stud. 133 (2020); See generally Dixon and Landau, *supra* note 23.

It is also worth noting the capacity for mechanisms such as court packing to become a site of “lawfare” in the US⁷⁶: there is every likelihood that if a Democrat-controlled House and Senate were to approve an increase in the size of the Court, to pave the way for a Democratic President to make additional appointments to the Court, any Republican controlled Congress would then do the same in the future, thereby progressively expanding the size of the Court, and diminishing its internal coherence and efficiency, and potentially also broader perceived legitimacy.

Some courts worldwide are divided into specialised panels (for example, in Germany). And it would be one way of dealing with issues of increasing court size in the US, assuming this could be reconciled with the provision in Art III for “one Supreme Court”.⁷⁷ But if that were not the path taken, it would likely have a serious adverse effect on the Court’s internal coherence, working and efficiency. The Indian Supreme Court is currently the largest constitutional or appellate court worldwide, with 34 members. And while it sits in panels of two to 13, its judgments are widely seen to be of an uneven quality, and there is limited consistency between the doctrinal approach of different panels.⁷⁸

F The Courts’ Reasoning and Remedial Approach

As I note above, another way in which the finality of judicial review may be weakened is by courts choosing to reason in narrow (or shallow) ways, to weaken the force of prior precedents in the face of legislative disagreement or by courts adopting weakened remedies, in the form of delayed or non-coercive remedies. In each case, judicial-legislative dialogue still depends on the legislature being willing to adopt legislation expressing disagreement with a court, and the court then being willing to show some additional deference to relevant legislative constitutional judgments. But both this kind of legislative and judicial response will be encouraged by norms of reasoning, precedent and remedial approaches that *explicitly* leave scope for legislative dialogue.

The question this raises for the Commission is whether there is any way for the President or Congress to encourage courts to rely on reasoning or remedial approaches of this kind. One possibility is that Congress could pass a statute directing the Supreme Court to take this kind of approach. But this would likely raise significant difficulties under Art III in ways that would mean that such a statute would have little if any effect.⁷⁹

Another possibility, however, might be for the Commission to recommend to the President and Attorney-General that the Solicitor General adopt a new posture in constitutional cases, according to which the United States would encourage the Court to consider reliance on a “suspended declaration of invalidity” as one potential remedy, or even a preferred remedy in

⁷⁶ See e.g., Paul R. Williams, *Lawfare: A War Worth Fighting*, 43 Case W. Res., J. Int’l L. 43 (2010); Hugh Corder & Cora Hoexter, ‘Lawfare’ in *South Africa and Its Effects on the Judiciary*, 10 Afr. J. Leg. Stud. 105 (2017) (on the idea of lawfare).

⁷⁷ U.S. Const. art. III, § 1. See also Tara Leigh Grove, *Article III in the Political Branches*, 90 Notre Dame L. Rev. 1835 (2015).

⁷⁸ See, e.g., Tarunabh Khaitan, *Koushal v Naz: Judges Vote to Recriminalise Homosexuality*, 78 Mod L. Rev. 672 (2015); Rishad A. Chowdhury, *Missing the Wood for the Trees: A Critical Exploration of the Supreme Court of India’s Chronic Struggle with its Docket* (2016) (J.S.D. dissertation, University of Chicago).

⁷⁹ It would likely be struck down by the Court, or else read down as offering only guidance rather than any directive.

certain complex cases, in which it might be reasonable or appropriate to expect a response from Congress or state legislatures.⁸⁰

Suspended declarations of invalidity involve a mix of weak and strong remedial power: they are coercive in effect, and hence strong in form. But they involve a form of delay that weakens the immediacy of that coercion and provides an explicit invitation for legislative dialogue. And while, by itself, this invitation is not sufficient to ensure that dialogue occurs, it can encourage it in two ways: first, the timeframe a court gives for the legislature to respond can help provide a “focal point” for legislators, in ways that encourage an affirmative legislative response to a court decision.⁸¹ This can also have benefits both for legislative dialogue and deliberation, but also for promoting an appropriately pro-constitutional attitude and assumption of responsibility on the part of legislators.

Second, delaying the effect of judicial invalidation can give legislators the opportunity to consider an issue without needing to overcome the burdens of inertia often associated with changing the legal *status quo*.⁸² Given a suspended declaration, the legal *status quo* is clearly identified as in need of change, and there is not yet any new status quo to replace it.

The most important effect of a suspended declaration, however, may in fact be its capacity to send a signal to relevant legislative and judicial actors about the expectation of legislative-judicial dialogue, and of a kind that involves more than simple “compliance” with a Court order but a more dialogic interpretation of the requirements of “congruent and proportionate” legislative implementation of Constitutional requirements, and more dialogic approach to statutory construction and amendment.⁸³

Delayed remedies have a problematic history in the United States, given their use in *Brown I* and *II*⁸⁴, as a compromise meant to increase support for desegregation, but which most scholars now see as contributing to a pattern of long-term non-implementation of desegregation orders. But “all deliberate speed” is a formula that lacks the concrete time frame, and threat of coercive monitoring and oversight, associated with suspended declarations of invalidity in countries such as South Africa, Canada, Hong Kong and Colombia.⁸⁵ There is also clear precedent for this more concrete but delayed form of remedial approach in the US, in cases such as *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁸⁶

⁸⁰ See Robert Leckey, *Bill of Rights in the Common Law* (2015); Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 Duke L.J. 1, 48 (2016); Po Jen Yap, *New Democracies and Novel Remedies*, Pub. L. 30 (2017); Kent Roach, *Dialogic Remedies*, 17 Int. J. Const. L. 860 (2019).

⁸¹ Richard H. McAdams, *The Expressive Powers of Law: Theories and Limits* (2017).

⁸² Dixon, *supra* note 20.

⁸³ *City of Boerne v. Flores*, 521 U.S. 507 (1997). On statute, see, e.g., Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values and Second-Look Rules of Interbranch Dialogue*, 42 Wm. & Mary L. Rev. 1575 (2001).

⁸⁴ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).

⁸⁵ See Robert Leckey, *Bill of Rights in the Common Law* (2015); Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 Duke L.J. 1 (2016); Po Jen Yap, *New Democracies and Novel Remedies*, Pub. L. 30 (2017); Kent Roach, *Dialogic Remedies*, 17 Int. J. Const. L. 860 (2019).

⁸⁶ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1981) (holding unconstitutional a federal statute giving wide jurisdiction to federal bankruptcy courts, but delaying the order for four months to “giv[e] Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication,”). See discussion in Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 Duke L.J. 1, 48 (2016).

G Conclusion: The Value of the Commission and its Process

I would like to conclude by noting what I see as the important *procedural* value of the Commission's work. I have offered quite limited suggestions for reform in this context: I suggest that the Commission could usefully consider recommending to the Solicitor-General that the United States should encourage the Supreme Court to rely on suspended declarations of invalidity, as one additional possible, or even a preferred, remedy in certain cases. But I suggest that most of the options for reform are either very difficult to implement in a US context, given the strictures imposed by Arts III and V, or normatively problematic. And even the most promising reform, which involves encouraging the Court to place greater reliance on 'weak-strong' judicial remedies, or suspended declarations of invalidity, is also likely to have quite modest effect in this context.

However, the Commission's work – and the process of consultation and deliberation it is engaged in – itself has clear democratic value. It contributes to increasing the awareness among the American public of the Court's work, and its importance to American democracy. It helps ensure renewed democratic consent for the Court's constitutional role and functioning. And it has the potential to serve as a valuable democratic *check* on the Court's functioning.

Comparative experience teaches us that courts are often influenced not simply by what political actors *do* to reform or change the composition and structure of courts, but also what they publicly contemplate doing. This also suggests that the mere fact the Commission is engaged in a serious and good faith debate about judicial reform may itself serve as a valuable correction to any tendency the Court may have now, or in the future, to ignore concerns about democratic legitimacy and public confidence in the exercise of its constitutional functions.

Yours sincerely,

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