Presidential Commission on the Supreme Court of the United States

America's Constitutional Court: A Comparative Look at Judicial Review and the Resolution of Major Social and Political Issues

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My name is Julie Suk. I am a Professor of Law at Fordham University School of Law, and a Florence Rogatz Visiting Professor at Yale Law School. I teach and write in the areas of Comparative Constitutional Law, Civil Procedure, and Antidiscrimination Law, with my most recent scholarship focusing on constitutional change in the direction of greater equality and inclusion in the United States and Europe.

My written testimony brings a comparative perspective to the U.S. Supreme Court's role in the resolution of major social and political issues. The design of constitutional courts in our peer democracies can illuminate the arguments for and against proposals to reform American judicial review of legislative enactments. The U.S. Supreme Court has long functioned as a constitutional court, a counterpart to the constitutional courts, sometimes called constitutional councils, in many peer democracies around the world. These courts exercise the power of judicial review; like the U.S. Supreme Court, they can invalidate legislation that they deem contrary to the constitution. Yet, significant differences in institutional design have enabled constitutional courts in some other nations to engage more transparently with legislatures to generate consensus and incremental change towards resolving major social and political issues on which the people are divided. Such processes reveal the democracy-promoting potential of judicial review. The power to review statutes in the abstract, without the anchor of a litigated case or controversy, contributes to constitutional courts' ability to resolve divisive social and political issues legitimately.

I shall suggest reform proposals that could respond to the primary concerns animating the calls to reform the U.S. Supreme Court. Reform proponents suggest a need to temper the Supreme Court's power to shape public policy through judicial review of legislation for unconstitutionality, a power which appears excessive and illegitimate when exercised by unelected life-tenured judges who were appointed under conditions of increasingly partisan political polarization. Proposals to expand the number of Justices and/or to eliminate the Justices' lifetime tenure have dominated the debate. These "court-packing" and "term limits" proposals have in turn been criticized for their risks of exacerbating divisiveness and politicization; it is further suggested that ending Supreme Court Justices' life tenure would require a constitutional amendment. I shall propose that a less direct reform of the Supreme Court may do more to temper its power to control public policy by deciding cases that involve major social and political issues. Without amending the Constitution or changing the composition or tenure of the Supreme Court, Congress can create a new non-Article III court to

resolve the politically charged constitutional questions that the Article III judiciary is constitutionally barred from reaching. The design for a new court can be informed by the experience of modern constitutional courts throughout the world. An Article I institution with the power of abstract constitutional review over legislative enactments could shift the ecology in which the U.S. Supreme Court decides cases over time.

I. The U.S. Supreme Court: A Constitutional Court?

If there was any doubt in the text of the Constitution of 1787, *Marbury v. Madison* established that the U.S. Supreme Court was a constitutional court, with the power to invalidate legislative acts it deemed contrary to the Constitution. The constitutional text did not explicitly say that the judicial power extended to invalidating acts of Congress or state legislatures. But Alexander Hamilton envisioned independent federal judges with a "duty as faithful guardians of the Constitution" in Federalist No. 78, which meant that "whenever a particular statute contravenes the Constitution, it will be the duty of judicial tribunals to adhere to the latter and disregard the former."[1] In 1803, Chief Justice Marshall reasoned in *Marbury v. Madison* that "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it,"[2] and "It is emphatically the province and duty of the judicial department to say what the law is."[3] The nature of the judicial function in a common-law system of precedent was such that, "If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."[4] In a system of precedent, a judicial decision to refrain from applying a law to a case on grounds of the statute's unconstitutionality effectively establishes a rule which constrains future application of that law. This understanding of the judge's duty in deciding the cases and controversies brought before the court effectively turned every court into a constitutional court.

Thus construed, the American power of judicial review is exceptionally diffuse in the world of modern constitutionalism. As newly drafted twentieth-century constitutions emerged in Europe after the two world wars, their framers learned from the American experience, which confirmed both the importance of judicial review to constitutional democracy, and the need to update and refine the institution of constitutional review. Understandings of law, politics, and the role of judges in a democracy have evolved since *Marbury*. Today, most constitutional democracies have departed from the U.S. approach of empowering ordinary courts of first instance to invalidate or enjoin legislative enactments with ultimate power of constitutional interpretation belonging to a Supreme Court that also adjudicates cases arising under statutory and private law. More typically, the constitutional court is a specialized court with original jurisdiction over constitutional questions. The U.S. Supreme Court, by contrast, assesses the constitutionality of legislation almost always in the course of affirming or reversing the decision

[1] THE FEDERALIST No. 78.
[2] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).
[3] Id.
[4] Id. at 178.

of another court on the question, consistent with Article III's grant of appellate jurisdiction to the Supreme Court in cases arising under the Constitution. Constitutional courts (or constitutional councils, as they are called in France and a few other countries), generally have the power to resolve difficult constitutional questions in the abstract, without the anchor of a litigation initiated by a person alleging a judicially redressable concrete injury. They overlap with the U.S. Supreme Court in their additional power over concrete cases that raise constitutional questions.

II. Modern Guardians of the Constitution

The modern constitutional court was the brainchild of Austrian law professor Hans Kelsen, who later emigrated to the United States and taught at the law schools at Harvard and UC-Berkeley. Kelsen served as a drafter of the 1920 Austrian constitution and an inaugural member of the Austrian constitutional court in its first decade. Like Hamilton over a century before him, Kelsen saw the need for an institutional "guardian of the constitution."[5] A constitution could endure as law only with protection by judges with constitutional expertise who were independent from the legislature.[6] But the constitutional court that was created for this purpose by the Austrian constitution of 1920 had features and functions that the U.S judiciary lacks, then and now. These differences indicate not only a legal-cultural gap between the United States and Europe; they mainly reflect the global evolution of legal thinking and legal practice between the eighteenth and twentieth centuries. The design of most constitutional courts was informed by the insights of legal realism, whereas our Founding Fathers' Supreme Court was a pre-realist creature of the Enlightenment. The Austrian constitutional court became a template which influenced the design of the German Constitutional Court in the Basic Law adopted in 1949, the French Constitutional Council established by the 1946 Constitution of France, and many other constitutional courts throughout Europe, Latin America, Africa, and Asia.[7] Today, constitutional courts resolve many of the major social and political issues that cause division in modern societies, which also often land on the U.S. Supreme Court's docket. Constitutional adjudication shapes the law of abortion and the rights of the unborn, voting rights, affirmative action, free speech, and freedom of religion, to name a few.

The jurisdiction of constitutional courts throughout the world, unlike that of the U.S. Supreme Court, is not limited to "Cases" and "Controversies." Constitutional courts also issue decisions answering constitutional questions in the course of "abstract" review, rather than in the course of resolving a concrete litigated case. These opinions often trigger deliberation and dialogue by legislatures to overcome the constitutional problems identified by the court. The

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[5] Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsarbeit* [Nature and Development of Constitutional Adjudication], *in* THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW 22-78 (Ed. & trans. Lars Vinx, 2015)

[6] Id. at 27-28, 48.

[7] See generally Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 25 WEST EUROPEAN POLITICS 77, 79 (2002).

invalidation of legislative enactments by constitutional courts can nudge legislatures to improve the legislation or propose constitutional amendments, which then unleashes additional processes by which the people can form and express their democratic will.

At first glance, abstract review may appear to be the analogue of the facial challenge in U.S. constitutional law, with concrete review being the comparative counterpart to the as-applied challenge. Like the facial challenge, abstract review can lead the court to declare the law unconstitutional in every conceivable application,[8] and therefore enjoining its application to any future factual situation. But unlike facial challenges, abstract review occurs in the absence of a litigant alleging a concrete and redressable injury. By contrast, no federal court—including the Supreme Court—could entertain an injunction against any legislation without a litigant who meets the constitutional requirements of Article III standing in an active dispute. The dispute resolution function of the court is not part of the equation when a Kelsenian constitutional court issue a decision in abstract review. In abstract review, the court's answer to the constitutional question is triggered by a petition brought by petitioners authorized by the constitution or statute to bring generalized constitutional challenges to legislative enactments.

This limited group of authorized petitioners to trigger abstract review typically includes a critical mass of the legislators opposed to the statute, and/or the executive. Thus, the recipient and primary audience of the court's decision is a lawmaker, not an injured person seeking a specific remedy justified by proposed constitutional arguments. A more focused, principled, and comprehensive dialogue about policy approaches consistent with constitutional commitments can occur, unobstructed by the primary duty to fairly adjudicate the claims of an individual with unique, complicated and potentially unrepresentative injuries at the center of the proceeding. Making the constitutional rules governing complex social and political issues exclusively through Article III "Cases" and "Controversies," without abstract review, can pull judicial focus away from the core constitutional principles that most need to be guarded.

III. Comparing Concrete and Abstract Review: The Case of Abortion

Consider, for example, the U.S. Supreme Court's abortion cases. Almost all of them, from the landmark *Roe v. Wade*[9] to the currently pending *Dobbs v. Jackson Women's Health*,[10] involve significant contestation over the litigants' standing. As *Roe* highlights, pregnant women seeking abortions have difficulty establishing standing to challenge abortion restrictions because pregnancy lasts only nine months, leaving the woman without a redressable injury if she gives birth during the pendency of the litigation. Organizations that litigate abortion rights, and impact litigation groups generally, strategize to identify the proper plaintiff to bring a constitutional challenge, having defined the constitutional problem they want courts to resolve

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[8] See *United States v. Salerno*, 481 U.S. 739 (1987). See also Michael Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994).

[9] 410 U.S. 113 (1973)

[10] 945 F. 3d 265 (5th Cir. 2019).

abstractly, often in advance of finding a plaintiff. The widely acknowledged goal of this litigation is to establish a generally applicable constitutional norm, such as the invalidation of laws restricting abortion before they go into effect, rather than simply to obtain a remedy for a specific injured litigant. But such litigation cannot proceed in federal court without a litigant alleging a specific redressable injury, which sets the parameters for the judicial decision that will have precedential effect moving forward. Recent constitutional challenges to abortion restrictions have been brought by abortion providers rather than women seeking abortions,[11] since their injuries outlive the duration of any particular pregnancy and thus remain redressable. This puts abortion providers at the center of a constitutional conflict in which pregnant women have the most serious stake. The lack of abstract constitutional review perpetuates an official story that the Supreme Court is merely deciding a case and not establishing rules that shape policy. Because everyone knows this to be purely fictional, the Court's legitimacy is compromised.

The abstract review of abortion statutes by the German Constitutional Court illustrates how abstract review can establish a more open dialogue between the judiciary and the legislature, leading to incremental change towards more democratic and legitimate resolutions of major social and political issues. When the West German legislature passed a statute in 1974 decriminalizing abortion and permitting it on demand through the twelfth week of pregnancy, 193 members of Parliament from the political opposition petitioned the Constitutional Court for abstract review of the statute's constitutionality, before the law could go into effect. Invoking the state's duty to protect life, the Constitutional Court invalidated the statute.[12] The German Basic Law recognizes "everyone"'s right to life, and thus the Court concluded that the state had a positive duty to protect life, born and unborn. Abstract review led the court to consider the statute broadly, including its effects on pregnant women, even though pregnant women did not participate in the proceeding. Invoking situations where the "[r]ight to life of the unborn can lead to a burdening of the woman which essentially goes beyond that normally associated with pregnancy,"[13] the court acknowledged the constitutional permissibility of abortion in such circumstances. The court noted that "the general social situation of the pregnant woman and her family can produce conflicts of such difficulty that, beyond a definite measure, a sacrifice by the pregnant woman in favor of the unborn life cannot be compelled with the means of the penal law."[14]

Then the court threw the ball to the legislature: "It is a matter for the legislature to distinguish in greater detail the cases of indicated interruption of pregnancy from those not indicated. . . until a valid statutory regulation goes into effect, it appeared necessary . . . to issue a directive, the contents of which are obvious from the tenor of this judgment." To avoid reverting back to the pre-reform criminal abortion statute for too long, the West German

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[11] See *Whole Woman's Health v. Hellerstedt*, 579 U.S. __, 136 S. Ct. 2292 (2016); *June Medical v. Russo*, 591 U.S. __ (2020).
[12] BVerfGE 39,1 (1975). The citations are to the English translation published as Robert E. Jonas; John D. Gorby, West German Abortion Decision: A Contrast to *Roe v. Wade*, 9 JOHN MARSHALL J. PRAC. & PROC. 605 (1976).
[13] Id. at 647.
[14] Id. at 648.

legislature immediately drew up a new statute in 1976 responsive to the constitutional court's concerns.[15] It recriminalized abortion, but also liberalized it by allowing more abortions than the pre-reform statute had. The statute directed doctors to consider the "present and future living conditions" of the pregnant woman in permitting abortions that threaten the pregnant woman's physical or mental health.

After German reunification, the German legislature decriminalized abortion again in 1992, permitting first-trimester abortions on demand consistent with the East German law. The Constitutional Court for the unified Germany invalidated the new statute,[16] reiterating the constitutional duty to protect unborn life. But this time, the German Constitutional Court expanded the constitutional frame, bringing Article 6.4 of the Basic Law – guaranteeing mothers the special protection and care of the community – and Article 3.2 of the Basic Law – guaranteeing "equal rights between men and women" into the legislative duty to protect life: "The state does not satisfy its obligation to protect unborn human life simply by hindering life-threatening attacks by third parties. It must also confront the dangers attached to the existing and foreseeable living conditions of the woman and family which could destroy the woman's willingness to carry the child to term."[17] The state had a duty to "attend to the problems and difficulties, which the mother could encounter during the pregnancy,"[18] such that the duty to protect life meant that "the state is bound to promote a child-friendly society"[19] and "must ensure that a parent, who gives up work to devote herself or himself to raising a child, be adequately compensated for any resulting financial disadvantages."[20]

In the following years, the legislature took action, again restricting abortion but immunizing first-trimester abortions from criminal liability. But the most remarkable legislative response pertained to the other constitutional duties expounded by the court. The legislature adopted a constitutional amendment building on Article 3.2. on the equal rights of men and women, adding a sentence in 1994 that provided, "The state shall promote the actual implementation of equal rights between women and men and eradicate disadvantages that now exist."[21] Subsequent legislation expanded paid parental leave for both mothers and fathers, with an eye to policy features designed to encourage fathers to take more leave than they had taken in the past.[22] Democratically elected representatives in legislatures took guidance from the constitutional court's broad-ranging elaboration of constitutional values to synthesize livable public policy compromises after societal disagreements about abortion and

[15] Fifteenth Criminal Law Amendment Act of May 18, 1976.
[16] BvF 2/90, 2 BvF 4/92, and 2 BvF 5/92, May 28, 1993 (quoted text from official translation on Constitutional Court website).
[17] 2 BvF 2/90, May 28, 1993, ¶ 166.
[18] Id., ¶ 167.
[19] Id.
[20] Id., ¶ 172
[21] For a more detailed discussion of the adoption of this amendment, the issues it intended to address, and jurisprudence construing it, see Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J. L. & FEMINISM 381, 412-18 (2017).
[22] Gesetz zum Elterngeld und zur Elternzeit (Bundeselterngeld- und Elternzeitgesetz - BEEG), Dec. 5, 2006, BGBL I, at 2748.

motherhood. Abstract review enabled the constitutional court to provide independent analysis of constitutional norms in the collaborative spirit of improving the legislature's discharge of its constitutional duties.

IV. A Modern Design: Twentieth-Century Constitutional Courts

Like Hamilton, Kelsen believed that a court enforcing the constitution needed judges with deep legal expertise and independence of judgment from the political branches. At the same time, French and German legal theorists of the late nineteenth century had laid to rest the image of judges as apolitical logicians—they acknowledged and even celebrated the creative norm-generative dimension of judging.[23] For Kelsen, there was no denying that striking down legislative acts based on constructions of a constitution was a normative political act that went beyond legal reasoning. A judge's invalidation of a statute on grounds of unconstitutionality was no different in effect from a legislature's repeal of legislation. Thus, Kelsen referred to a court exercising judicial review as a "negative legislator."[24] Constitutional courts necessarily performed a function that was as similar to the making positive law by legislatures as it was to the application of law by tribunals adjudicating disputes.

The institutional design of twentieth-century constitutional courts openly acknowledged this hybrid character of constitutional adjudication. Gone were the days of aspiring, as Hamilton did in 1788, to the "complete separation of the judicial from the legislative power,"[25] which our Founding Fathers naïvely tried to achieve through the constitutional guarantees of life tenure and non-reduction of judicial salaries. Although there is some variety, most constitutional court judges serve limited terms or are subject to mandatory retirement ages, and, in recognition of the political dimension of constitutional justice, constitutional judges are typically appointed by some combination of the legislature, judges or legal professionals, the executive. The French Constitutional Council, for instance, has a total of nine members, of whom three are appointed by the President of the Republic, three are nominated by the President of the Senate, and three are nominated by the President of the National Assembly, on a staggered schedule. The German Constitutional Court has sixteen justices, half elected by the Bundesrat and the other half by the Bundestag, with the additional requirement that at least three members of each Senate of the Constitutional Court must have previously served on one of the other apex federal courts.

Today, constitutional courts exercise both quasi-legislative functions, such as abstract judicial review, and quasi-judicial functions, when the constitutional court resolves a constitutional issue that has arisen in the context of litigation initiated by an injured party. In Austria, as in France, Germany, Italy, Spain, Belgium, and many other European and Latin American countries, a criminal, civil, and administrative court adjudicating a concrete case can

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[23] See, e.g., RUDOLF VON JHERING, LAW AS A MEANS TO AN END (Isaac Husik trans. 1913), FRANÇOIS GÉNY, METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW (trans. Louisiana State Law Institute, 1963).

[24] See Kelsen, *supra* note 5, at 47.

[25] THE FEDERALIST No. 79.

submit an application for judicial review to the constitutional court if it doubts the constitutionality of any legal provision that it must apply to resolve a specific controversy. In many countries, the constitutional court is not necessarily the highest court of the land. Constitutional courts cohabit the judicial apex with the highest appellate courts, such as a supreme court with jurisdiction over a broad range of civil, criminal, and social legal matters, and, in many cases, an apex administrative court, such as the Council of State in France and Italy. In some countries, such as Germany, individuals may also lodge a constitutional complaint directly with the constitutional court alleging that a government entity has violated their constitutional rights. Many constitutional courts around the world which exercise the power to invalidate laws they deem unconstitutional emulated the institutional features of these twentieth century constitutional courts, while taking more generalized inspiration from the United States' centuries-old Supreme Court.

Constitutional courts also have discretion to delay the date of an unconstitutional statute's invalidity. In the original design of the Austrian Constitutional Court, that delay could last up to a year. Kelsen explained that this "enabled the legislature to replace the impeached statute by a new a constitutional one before the annulment became effective."[26] The judicial opinion explaining the unconstitutionality of the statute would guide the legislature's revision of the law to achieve its purposes by constitutional means, and the deadline would put time pressure on the legislature to act. If the legislature persists in believing that the law it adopted is or should be constitutional, contrary to the constitutional court's view, it could propose a constitutional amendment before the law sunsets. An amendment proposal continues the dialogue with the constitutional court and with the citizenry, to elucidate and transform the constitution's norms moving forward. This dynamic process of constitutional norm development, involving multiple institutional actors, helps legitimize the resolution of social and political issues that divide the citizens of a modern democracy.

V. From Article III to Article I: Resolving Constitutional Social and Political Issues

Notwithstanding the democracy-enhancing contributions of modern constitutional courts, the U.S. Supreme Court cannot be transformed into such a court because the judicial power of Article III courts is limited to deciding "Cases" and "Controversies." The U.S. Supreme Court cannot constitutionally engage in abstract judicial review of the constitutionality of legislative enactments. Last Term, the Supreme Court affirmed that "[u]nder Article III, federal courts do not adjudicate hypothetical or abstract disputes,"[27] and embraced a tight definition of the injury-in-fact necessary to support the Article III standing without which the federal judiciary cannot legitimately adjudicate. The Court concluded that Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is."[28]

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[26] Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution*, 4 J. POLITICS 183, 187 (1942).
[27] *Transunion LLC v. Ramirez*, No. 20-297 (S. Ct. June 25, 2021), Slip Op. at 8.
[28] Id. at 10.

Once it is conceded that resolving the abstract question of whether a legislative enactment contravenes the Constitution is outside of Article III, any institution that can invalidate legislation on such grounds belongs in Article I rather than Article III. Congress has created a number of specialized Article I courts, with judges who do not hold life tenure as Article III judges do. These courts include the United States Tax Court, Court of Military Commission Review, the U.S. Court of Appeals for Veterans Claims, the U.S. Court of Federal Claims, and the U.S. Bankruptcy Courts. As early as 1828, the Supreme Court, in an opinion by Chief Justice Marshall, recognized the possibility of "legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States."[29] *American Insurance v. Canter* legitimized territorial courts, and it reasoned that "[t]he jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in execution of those general powers which that body possesses over the territories of the United States."[30] By this logic, Congress can create non-Article III courts pursuant to its enumerated constitutional powers, as part of its power to enact all laws "necessary and proper" for executing its constitutionally enumerated powers. Congress could create an article I tax court, for instance, because of its power to lay and collect income taxes under the Sixteenth Amendment.[31] Judges on Article I courts serve for limited terms of 14 or 15 years.

Many legal scholars who have testified before this Commission thus far have embraced Professor John Hart Ely's justification of American judicial review. Grounded in the logic of footnote 4 from *United States v. Carolene Products*,[32] Ely defended judicial review to protect minorities who may struggle to be heard the political process.[33] Even though the power of unelected judges to strike down legislative enactments appears to undermine majoritarian democracy,[34] it can be exercised to promote democracy when it removes legislatively imposed barriers to participation by the powerless. Protecting the rights that most shape the ability of all of "We the People" to participate in the democratic political process – voting, speech, equal protection, assembly – should thus be at the *raison d'être* of judicial review.

But is the Supreme Court, or the Article III judiciary, a properly designed institution for this job in the twenty-first century? A constitutional court composed of experts on constitutional law who are independent, appointed by a range of political actors, and evolving

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[29] 26 U.S. 511, 546 (1828).
[30] Id.
[31] For a history of the United States Tax Court, *see* HAROLD DUBROFF & BRANT HELLWIG, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS (2d ed. 2014), available at https://www.ustaxcourt.gov/resources/book/Dubroff_Hellwig.pdf
[32] 304 U.S. 144, 152 n.4 (1938). In upholding an act of Congress regulating additives to milk, the Court acknowledged the possibility that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."
[33] See JOHN HART ELY, DEMOCRACY AND DISTRUST 151 (1980).
[34] This is what Alexander Bickel termed "the countermajoritarian difficulty." See ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1986).

more rapidly in composition than the Supreme Court may be better equipped to guard the Constitution and the full political participation of all, by comparison to a life-tenured judiciary that only the Senate approves. Throughout the U.S. Constitution's reign of 232 years, several amendments empowered Congress to protect the political rights of vulnerable groups: Section 2 of the Thirteenth Amendment, Section 5 of the Fourteenth Amendment, Section 2 of the Fifteenth Amendment, Section 2 of the Nineteenth Amendment, Section 2 of the Twenty-Fourth Amendment. Pursuant to these enumerated powers, Congress could legitimately create a constitutional court that vindicates Ely's justification for judicial review by engaging in abstract review, particularly when vulnerable groups face barriers to establishing standing and challenging statutes in Article III courts.

Over time, the work of such a court could change the United States' constitutional landscape towards inclusion and democracy. It remains an open question as to whether, in adjudicating "Cases" and "Controversies," the Supreme Court would embrace or defy the interpretations of the Constitution arrived at by a new constitutional court in the course of abstract review. Either way, there would be a new constitutional voice to be reckoned with, involving political costs to defiance regardless of whether deference is legally required. Given the proposed design and comparative analogues, neither court would be clearly hierarchically superior or inferior to the other. Harmonization would depend on the quality and collegiality of the judges across the board. But the multiplication of constitutional perspectives engendered by the creation of a newly designed institution of constitutional review could temper any outmoded undemocratic tendencies of the existing federal judiciary. And, while the proposal may appear to be a radical departure from a long tradition of the Supreme Court's constitutional supremacy, it is consistent with twenty-first century constitutionalism around the world.