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Bob Bauer  
Professor of Practice and Distinguished Scholar in Residence  
NYU School of Law

Cristina Rodríguez  
Leighton Homer Surbeck Professor of Law  
Yale Law School

Co-Chairs, Presidential Commission on the Supreme Court of the United States

Dear Professor Bauer, Professor Rodríguez, and fellow Members of the Commission,

Thank you for the kind invitation to submit written testimony to the Commission. It is an honor to do so. By way of introduction, I am a law professor at the University of Virginia trained as a comparative legal scholar and political scientist. My research focuses on the comparative and empirical study of judicial and constitutional systems, including the institutional design of courts and the politics of constitutional adjudication. I have taught and conducted fieldwork in a variety of countries throughout Asia, and I am co-editor of the forthcoming Oxford University Press book series, *Judicial Systems of the World*.

I would like to take this opportunity to offer brief comments from a comparative and empirical perspective on three institutional design issues that I understand may be of interest to the Commission:

- (1) supermajority voting requirements for judicial review;
- (2) legislative overrides of judicial decisions; and
- (3) judicial term limits.

(1) *Supermajority requirements*

Attached please find an LL.M. thesis by my former student Eric Chan entitled “Judicial Review and Supermajority Voting Rules” that I supervised at the University of Hong Kong. It provides an overview of supermajority voting requirements on apex and constitutional courts around the world. Eric collected data on the voting rules of all national apex and constitutional courts around the world and identified the countries that impose some kind of supermajority voting requirement on acts of judicial review by their apex/constitutional courts. He has kindly consented to public circulation of his thesis. I am not aware of other

scholarship that provides a global and empirical overview of this topic.<sup>1</sup> The following summary relies heavily on his empirical findings.

— The countries that impose supermajority voting requirements on judicial review are concentrated in Latin America, Asia, and the Islamic world. Within the United States, Nebraska and North Dakota have such requirements.

— The following countries have supermajority voting requirements for acts of judicial review: Chile, El Salvador, Lebanon, Mexico, Morocco, Nicaragua, Peru, Russia, South Korea, and Taiwan.<sup>2</sup> Among these countries, the necessary vote threshold varies from 60% (the Czech Republic) to unanimity (El Salvador), with a two-thirds requirement being most common.

— In addition, a sizeable number of countries take the milder position of requiring an absolute majority of the entire court, as opposed to a majority or plurality of voting justices, namely: Argentina, Bolivia, Brazil, Burundi, Colombia, Costa Rica, Niger, North Macedonia, Panama, Slovakia, Switzerland, Turkey, Ukraine, and Yemen.

— A few countries have adopted supermajority requirements for specific types of decisions. Examples include Germany (for decisions prohibiting political parties), Iraq (for decisions concerning relations between the federal and regional governments), and Mongolia (for reconsideration of previous decisions).

— Supermajority requirements have been adopted for a variety of reasons that depend greatly on context.

(a) In some cases, such as Taiwan or Russia, they were adopted as a way of restraining judicial review in response to, or in retaliation against, decisions that antagonized the government (although in Taiwan, the requirement has recently been repealed.) This was also the situation in Nebraska, North Dakota, and Ohio, where supermajority requirements were adopted in the aftermath of the Supreme Court's controversial *Lochner* decision.

(b) They can also be the product of some combination of distrust of judicial review and political calculations on the part of influential politicians, as was the case in South Korea.

(c) In other cases, especially in Latin America, they were adopted as part of overall reforms that actually empowered the courts on the whole but stopped short of going as far as the United States. In the case of Costa Rica, for example, the supermajority requirement was adopted partly out of concern that the Court might too readily invalidate laws for policy reasons, which many felt was the case in the United States.

(d) In still other cases, such as Lebanon and the Czech Republic, the use of supermajority requirements was part of a larger constitutional design strategy for managing conflict in deeply divided societies, the idea being that a supermajority requirement would make it

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<sup>1</sup> A number of examples are discussed in Yaniv Roznai, 'Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review' (2020) 14(4) ICL Journal 355, at 368–71.

<sup>2</sup> Taiwan has enacted legislation that will eliminate the supermajority requirement as of 2022.

harder for any one faction on its own to dominate other factions (e.g., Czechs and Slovaks, or Muslims and Christians).

## (2) *Legislative overrides of judicial decisions*<sup>3</sup>

In recent years, scholars have expressed interest in the possibility of a happy medium between legislative supremacy (which is criticized as insufficiently protective of rights and/or minorities) and judicial supremacy (which is criticized as insufficiently democratic and/or too vulnerable to unchecked judicial policymaking). In particular, some have pointed to the idea of giving the legislature power to override or set aside acts of judicial review as a way of combining the best of both worlds and fostering democracy-enhancing “dialogue” between the judiciary and the legislature. In practice, however, such arguments appear to be unduly optimistic.

In systems of legislative supremacy, courts do not review legislation. Instead, elected lawmakers have the ultimate responsibility for acting in good faith upon their best understanding of constitutional requirements, and they are answerable to the people at the ballot box if they fail to do so. In such systems, electoral accountability is deemed both necessary and sufficient to ensure constitutional compliance. This has historically been the case, for example, in Westminster systems that operate on the principle of parliamentary sovereignty and place supreme and inalienable power in the legislature.

In systems of judicial supremacy, by contrast, courts have the power to enforce a constitution with the status of higher law against other branches of government, and neither elected lawmakers nor the people themselves have any formal way of overruling or overcoming a constitutional ruling short of amending the constitution itself. This type of system, first introduced in the United States over two hundred years ago, exploded in popularity over the latter half of the twentieth century. Its spread has been fueled by a widespread belief, shaped in part by the horrors of World War II, that the protection of rights—particularly minority rights—cannot be entrusted to popular majorities. Whether judicial review actually enhances the protection of rights in democratic societies, however, remains a matter of empirical debate.<sup>4</sup> Counterexamples such as the Netherlands, Denmark, and Sweden demonstrate that constitutional democracy and fundamental rights can thrive in the absence of judicial review.<sup>5</sup>

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<sup>3</sup> This section borrows from David S. Law and Hsiang-Yang Hsieh, ‘Judicial Review of Constitutional Amendments: Taiwan’, in David S. Law (ed.), *Constitutionalism in Context* (Cambridge University Press, forthcoming 2022).

<sup>4</sup> See, e.g., Anna Harvey, *A Mere Machine: The Supreme Court, Congress, and American Democracy* (Yale University Press, 2013) at 285 (finding that democracies without judicial review protect rights better on average than democracies with judicial review by independent courts); David S. Law and Mila Versteeg, ‘Sham Constitutions’ (2013) 101 *California Law Review* 863 at 925–31 (finding that judicial review is not statistically correlated with respect for constitutional rights).

<sup>5</sup> See, e.g., Maartje de Visser, ‘Non-Judicial Constitutional Interpretation: The Netherlands’, in Law (ed.), *Constitutionalism in Context* (n 3); Ran Hirschl, ‘The Nordic Counter-Narrative: Democracy, Human Development, and Judicial Review’ (2011) 9(2) *International Journal of Constitutional Law* 449 at 450–51.

The intermediate option is some form of “soft review,” as opposed to no review or “hard review” (i.e., the US model). In such systems, courts have the power to declare legislation unconstitutional, but the legislature in turn has the opportunity to preserve the legislation, whether by acting affirmatively (in the form of a legislative override) or simply doing nothing.<sup>6</sup> Proponents of such arrangements argue that soft review can potentially resolve the tension between judicial supremacy and legislative supremacy in a manner that simultaneously respects democratic values and preserves checks and balances. On the one hand, courts keep democratic self-governance within constitutional limits by forcing democratic institutions to engage in careful and thorough deliberation. On the other hand, democratic self-governance is respected because the final say remains with the elected representatives of the people.<sup>7</sup> Ideally, soft review achieves all of this on the basis of reasoned exchange or “dialogue,” rather than unprincipled horse-trading or brute-force majority rule. The courts play the role of bringing constitutional values into focus in the legislative forum, while the legislature acts only after reasoned deliberation and with the benefit of judicial input. In this way, differences between institutions are supposedly resolved in ways that enrich public discourse and evidence mutual learning and respect.

Soft review is associated with certain Commonwealth jurisdictions – specifically, Canada, New Zealand, and the United Kingdom<sup>8</sup> – although it is not necessarily exclusive to the Commonwealth.<sup>9</sup> In Canada, section 33 of the Canadian Charter of Rights and Freedoms, also known as the “notwithstanding clause,” enables the legislature to issue a time-limited but renewable declaration that a statute shall continue to apply “notwithstanding” a judicial decision that the statute is unconstitutional.<sup>10</sup> In the United Kingdom, the Human Rights Act 1998 requires British courts to issue a “declaration of incompatibility” if they conclude that a law is incompatible with the European Convention on Human Rights. Although such a declaration triggers legislative reconsideration of the law, it does not invalidate the law or obligate Parliament to act.<sup>11</sup> In New Zealand, the Bill of Rights Act 1990 instructs the courts to interpret other legislation in conformity with the rights found in the Bill of Rights to the greatest extent possible, but the courts have no power to

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<sup>6</sup> Mark V. Tushnet, ‘Alternative Forms of Judicial Review’ (2003) 101 *Michigan Law Review* 2781 at 2782–86. On judicial review in Hong Kong and New Zealand, see Cora Chan, ‘Subnational Constitutionalism: Hong Kong’, and Matthew S.R. Palmer, ‘Indigenous Rights: New Zealand’, in Law (ed.), *Constitutionalism in Context* (n 3).

<sup>7</sup> Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2009) at 18–20, 22–23.

<sup>8</sup> Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013).

<sup>9</sup> Arguably, Hong Kong possesses a form of soft review: its Court of Final Appeal has intimated that it may have limited power to review national legislation for compatibility with Hong Kong’s Basic Law. If it were to exercise that power, China’s national legislature would be able to override the decision by issuing its own binding interpretation of the Basic Law to the contrary. See Chan (n 6) (discussing the *Ng Ka Ling* case).

<sup>10</sup> Canadian Charter of Rights and Freedom, s. 33; see e.g. Tsvi Kahana, ‘The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter’ (2001) 44 *Canadian Public Administration* 255.

<sup>11</sup> UK Human Rights Act 1998, s. 4.

invalidate laws that cannot be reconciled with the Bill of Rights through interpretation alone.<sup>12</sup>

As an empirical matter, however, there is little evidence that the legislative override power actually yields a happy medium between legislative supremacy and judicial supremacy, or that it promotes meaningful constitutional dialogue between the legislature and the judiciary. Instead, “soft review” systems have shown a tendency to devolve into one extreme or the other (legislative supremacy or judicial supremacy). Canada is a case in point. At one extreme, the province of Quebec has overused the override power to the point of preemptively immunizing all laws against constitutional challenge, and dragging the override power itself into disrepute in the process.<sup>13</sup> At the other extreme, the federal government has effectively abandoned the override power.<sup>14</sup> New Zealand has also veered in practice toward the extreme of legislative supremacy: only once in over thirty years have the New Zealand courts declared a statute inconsistent with the Bill of Rights.<sup>15</sup>

### (3) *Term limits*

I am not aware of any other country that has neither a mandatory retirement age nor term limits for apex court justices. (I thus agree with the facts given in the testimony of Professors Ginsburg and Jackson on this issue.) From a comparative perspective, the US federal judiciary is clearly an outlier in this regard. Furthermore, the experience of countries with strong traditions of judicial independence and judicial review, such as Canada, Germany, India, South Africa, South Korea, and Taiwan, demonstrates that time limits on judicial service can be compatible with both judicial independence and vigorous judicial review.

The most obvious risks of term limits are that judges may be incentivized to seek renewal or reappointment by currying favor with those in power, and that their behavior on the bench may be influenced by the need to secure post-judicial employment. Common techniques for addressing these risks include limiting justices to a single non-renewable term, and allowing them to remain on the bench long enough that post-judicial employment ceases to be an important practical consideration. These techniques can be, and often are, combined in the form of a single, relatively lengthy, nonrenewable term of office, of the type that others have already brought to the attention of the Commission.

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<sup>12</sup> New Zealand Bill of Rights Act 1990, s. 6; see Palmer, ‘Indigenous Rights: New Zealand’ (n 6).

<sup>13</sup> See *Ford v. Quebec (AG)* [1988] 2 SCR 712; Constitutional Law Group, *Canadian Constitutional Law*, 3d edn (Emond Montgomery, 2003) at 775.

<sup>14</sup> See Kahana, ‘The Notwithstanding Mechanism’ (n 10).

<sup>15</sup> *Attorney-General v. Taylor* [2018] NZSC 104, [2019] 1 NZLR 213; see Palmer, ‘Indigenous Rights: New Zealand’ (n 6).

Please do not hesitate to let me know if there are any questions I can answer in connection with this written testimony or any of the preceding subject matter. It would be my pleasure to assist.

Sincerely,

A handwritten signature in black ink that reads "David Law". The signature is written in a cursive style with a prominent flourish at the end.

David S. Law

E. James Kelly, Jr., Class of 1965  
Research Professor of Law  
Affiliated Faculty, East Asia Center  
University of Virginia