Princeton University ~~Woodrow Wilson~~ The Princeton School
Of Public and International Affairs

Kim Lane Scheppele
Laurance S. Rockefeller Professor of Sociology and International Affairs
in the School of Public and International Affairs
and in the University Center for Human Values
118 Wallace Hall, Princeton, New Jersey 08544
TEL (609) 258-6949; FAX (609) 258-2180
[redacted]

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Dear Professor Tribe and Commissioners –

You've asked excellent questions that go right to the heart of the issues that would have to be addressed in making a transition from the present way of organizing the American federal judiciary to a system with elements borrowed from other jurisdictions, along the lines I suggested in my written and oral testimony. What you'll find below addresses your questions, which are included in italics so everyone has your questions and my answers together. In addition, I have included at the end an elaboration of my answer to the important question Professor Boddie directed to me during our panel when she asked about the judicial protection of minority rights in comparative perspective.

I apologize in advance for the long answers, but the questions you've posed require seeing the surrounding context in which establishing a separate constitutional jurisdiction, providing for a legislative override of court decisions and defending minority rights through judicial review make sense.

Can It Happen Here? Creating a Separate Constitutional Jurisdiction in the U.S. Legal System

Your questions:

My first question relates to what might be called path dependence: Have you given thought to how changing from (a) an integrated system like ours, in which cases very often (perhaps even usually) present (i) mixed questions of individual rights and separation of powers and federal-state division or of constitutional and statutory interpretation and (ii) both facial and as-applied questions, to (b) a separate-track system like that of many other countries, might produce patterns very different from those in a system that used separate tracks from the outset?

My second question relates to just how one would superimpose a separate-track system on one like ours, with cases like INS v. Chadha (the congressional veto case involving the deportation of an individual) or, for that matter, Marbury v. Madison (the mother of all judicial review cases, of course, but one ultimately involving the delivery of a commission to a particular jobseeker), or Bond v. United States (the case of a woman prosecuted under the federal chemical weapons statute for trying to poison a romantic rival), or NFIB v. Sebelius (the first of the three

ACA cases), in all of which statutory and constitutional issues, separation of powers and federalism issues, and/or structural and individual rights issues, are inextricably intertwined?

Some answers:

In the sixty-five countries that use "concentrated review" featuring specialized constitutional courts, a specialized constitutional jurisdiction was typically created when a new constitution came into effect. This eliminated some, but not all, of the problem of path dependence. On one hand, new constitutions tend to change many rules about the organization of public authority so continuity must be reaffirmed rather than assumed. But on the other hand, new constitutions never raze to the ground everything that went before. In particular, when countries enact new constitutions, they rarely replace their old judiciaries, so newly created constitutional courts have been typically superimposed over old general jurisdiction courts that must then get used to a new division of labor. In short, new constitutions don't eliminate the problem of path dependence.

In the places I know in detail, that process of mutual accommodation between the traditional courts and the constitutional court was rarely immediate but instead took between a few years and a decade before it ran smoothly. Sometimes turf wars broke out between the previous apex court used to having the final word on everything and the new constitutional court that now had the final word on constitutional questions. But I know of no place where that transition to a separate constitutional jurisdiction ultimately failed. Judges do become accustomed to new rules and learn to live with them. It would not be impossible to graft onto the U.S. system as we know it a separate constitutional jurisdiction.

If the U.S. were to consider separating constitutional jurisdiction from "ordinary" (e.g. statutory interpretation) cases, we would have to "rebuild the boat in the open sea" without benefit of a constitutional overhaul. That might make path dependence even more of a drag on the process, one might suppose. But, based on the experience of other countries, I would suggest that some features of a concentrated review system could be relatively easily transposed into the American system because they already exist in some form in our legal order while other features would require rethinking the role of the courts in more fundamental ways and might be a heavier lift. The same was true almost everywhere that a specialized constitutional jurisdiction was created and superimposed over a preexisting judicial system. We'd have a great deal of international experience to draw on in making such a transition.

Concentrated review in a separate constitutional jurisdiction actually comprises many different kinds of cases, some of which will be quite familiar to us and others of which will be novel. You've pointed out many different ways that constitutional questions arise in the American federal judiciary, intermingled with other legal questions and resting on different legal grounds, so that it seems very difficult here to distinguish the constitutional questions for separate treatment. To solve the different sorts of problems you mentioned, judiciaries in other countries wrestled with those issues and created different paths through which constitutional questions can get to the tribunal with constitutional jurisdiction without dragging all of the other legal questions along.

Let me first take up how constitutional courts handle constitutional and "non-constitutional" legal questions when they enter the judicial system mixed together in concrete cases. In a system of diffuse review like ours, where any court with jurisdiction to hear the underlying subject matter can also address the constitutional issues, constitutional and non-constitutional questions are decided together,

if the constitutional questions are addressed head-on at all. In fact, the American doctrine of constitutional avoidance counsels judges to decide cases on statutory interpretation or other legal grounds wherever possible and simply say nothing at all about the constitutional issues unless there is no other way around the legal problem at stake. In systems of concentrated review, however, the constitutional questions are flagged and highlighted, rather than buried, because these questions must be handed off to a separate court. In such a system, judges must take note of the constitutional questions rather than to find some way to ignore them. That may seem strange to American constitutional lawyers, but as I will argue below, it makes constitutional jurisprudence more coherent and properly elevates the constitution to the dominant place it should have in any constitutional democratic order.

In systems with a separate constitutional jurisdiction, the judge with subject-matter competence (e.g. civil, criminal, administrative, family, tax etc.) who is presented with a concrete case in which constitutional and non-constitutional legal questions are simultaneously at issue must examine the case for constitutional questions early in the process of litigation. If the constitutional questions raised by the case have clear answers already in existing law, the deciding judge applies both the constitutional standard and the ordinary law jointly to resolve the case. That's what already happens in the United States. No change needed.

If the deciding judge believes that the statute that she may have to apply is unconstitutional, if the case involves a constitutional issue of first impression or if the constitutional answer is simply unclear, the deciding judge in a system of concentrated review must suspend the proceedings and refer the constitutional question(s) to the specialized constitutional court to decide. The constitutional court will then answer only the constitutional questions without reference to the concrete case in which the questions have arisen. The answer that comes back from the constitutional court in these cases is virtually always more abstract and general – even theoretical – than one finds in a diffuse system. But there is a clear division of labor. Just as the ordinary judge is barred in a system of concentrated review from resolving novel constitutional questions or declaring statutes unconstitutional, the constitutional judge is similarly barred from resolving questions of ordinary law. The constitutional court therefore develops general constitutional standards through these "reference cases," standards that can be applied to specific facts by other judges. The constitutional court may strike laws and other "normative acts" (legal regulations with general application like regulations and decrees) for unconstitutionality or the constitutional court may issue a binding interpretation of a potentially unconstitutional law so that the law cannot be unconstitutionally applied. Ultimately, however, the judge with the subject-matter jurisdiction in ordinary law decides the concrete case using the constitutional ruling as guidance.

The referral of constitutional questions to a specialized constitutional tribunal (or a constitutional chamber of a supreme court) could be grafted onto our common law system. After all, interlocutory appeals already exist in our federal judiciary, so it is clear that judges already know how to suspend the proceedings before them in order to refer a specialized question to a different court and then use the resulting answer to resolve the case before them. Perhaps the most similar procedure in the U.S. federal system is the certification of state law issues to state courts for a ruling on the issues involved. In short, we already model this sort of division of labor between courts on other legal questions. Adding a federal constitutional "certification" to our practices would not therefore be wholly foreign.

The harder question is how judges would know when constitutional issues are resolved enough so that they can decide a case with constitutional implications themselves and when the constitutional

issues are novel enough to require them to refer the case to a constitutional court. Formal rules can spell out criteria for making this judgment, but ultimately drawing the boundary between the cases that ordinary judges can decide on their own and the cases that must be referred requires experience that sediments into conventions. It is precisely on this contested terrain in systems with new constitutional courts that disagreements arise for a few years between apex courts in the ordinary judiciary and the constitutional court until the different courts eventually settle on workable standards. The German Federal Constitutional Court, for example, decided that ordinary judges could handle questions involving the constitutionality of regulations and lower-level legal norms, requiring only that the ordinary courts refer questions about the constitutionality of statutes to the constitutional court for review. Precisely how the division of labor between ordinary courts and a newly created constitutional court is specified depends on the jurisdiction. The United States could surely craft a specialized constitutional jurisdiction to fit its existing practices.

Reference cases (also called specific review or direct review cases in different jurisdictions) are not the only kinds of cases that constitutional courts decide, however. Constitutional questions can arrive at the constitutional tribunal in many different ways in addition to the referral from a judge in a concrete case. Different constitutional courts vary in the kinds of cases they hear, but given that the German Federal Constitutional Court was the most commonly used template for most of the constitutional courts in the world, I'll use that court as a model in order to explore how such a system would handle the variety of cases you describe.

You've mentioned the potentially difficult issue of "as applied" review. The German Federal Constitutional Court (GFCC) deals with "as applied" review in two ways. One is the way I just mentioned, in which the constitutional court in a reference case can require a particular interpretation of a statute to save it from a declaration of unconstitutionality. Another way to reach "as applied" issues is through a type of case called a "constitutional complaint."

In a constitutional complaint, a litigant litigates her case through the system, and if – after the apex court makes its final ruling – she is still convinced that her constitutional rights have been violated by the unconstitutional application of an otherwise constitutional law or through the application of an unconstitutional law or through the *ultra vires* exercise of public power, she can take her case to the constitutional court for its opinion. These cases look just like the cases that the U.S. Supreme Court already decides, with one difference: the constitutional court defers to the rulings of the ordinary courts on any non-constitutional legal question that the question may have posed along the way. In constitutional complaints, however, unlike in reference cases, the GFCC can make the final decision in a concrete case because the only open questions are constitutional ones by the time they are litigated through the system of appeals in the ordinary courts.

Constitutional complaints not only allow the GFCC to reach "as applied" violations but they also permit the GFCC to take a look at the challenged law to double-check its constitutionality, which acts as additional oversight on whether the ordinary courts are spotting constitutional problems adequately through their references. Constitutional review here also sweeps more broadly. Constitutional complaints – at least in the German system – do not just challenge laws and their interpretation, but they can also allege the failure of constitutionally constituted entities – particularly the executive branch and agencies – to operate within the boundaries of the law. This, too, is very similar to what the U.S. Supreme Court already does – which is to consider constitutional questions embedded in concrete cases where the question is whether a law is unconstitutional, whether the law has been unconstitutionally applied or whether a public power has exceeded its legal authority. This sort of jurisdiction, also,

would be easy to handle in the American federal judiciary because constitutional complaints are so similar to the cases that are already the bread and butter of U.S. constitutional law.

Facial challenges are handled at the GFCC primarily through another type of procedure: "abstract review" cases. While facial challenges are difficult to generate in the American legal order because they must emerge from a case or controversy, the system of concentrated review makes it easy to bring such cases. In most systems of concentrated review, a set of designated political actors – for example the president before he signs a law, the losing minority in the legislature after the law has been passed, an ombudsman, the government of an affected state/province, the public prosecutor or others – have the power to bring a law before the constitutional court without any concrete dispute at issue. They can ask for the law to be reviewed "in the abstract." In fact, when I worked at the Hungarian Constitutional Court for four years in the 1990s, *actio popularis* petitions making facial challenges could be brought by *anyone* (yes, anyone!). And they were the only kind of cases my court heard. As someone trained in the American system in which there are always facts to think with in answering a legal question, I initially found this quite disorienting, and I assume that most American lawyers and judges would feel the same way. Moreover, given conventional *ratio decidendi* analysis in the common law, how would one even know what the rule of a case was without the facts to circumscribe the holding? But here, too, one learns. There's a fair amount of judicial craft involved in working out what a constitutional case stands for in a system of abstract review; suffice it to say that constitutional courts are not shy about explaining what they take to be the primary toplines of their decisions. I've put together a small casebook of materials on how jurisdictions that have no formal doctrine of precedent learn to "treat like cases alike" and to find the holding of a case without facts to apply in future cases. If you would like to see it, please let me know!

The U.S. federal courts have firmly rejected the opportunity to issue advisory opinions and the incorporation of abstract review cases would pose the biggest challenge for American lawyers because it requires thinking about law in a manner most similar to advisory opinions. Nonetheless, particularly when the power to bring an abstract review case is limited to particular political actors who have sworn oaths to uphold the constitution and who may want an opinion on the constitutional status of a law before they act to enforce it, it might be worth trying to learn to think without facts or concrete disputes. In most systems with abstract review, the legislature may not seek an advisory opinion while a law is being debated. Abstract review occurs after the legislature has passed the law, so the courts are not acting as if they are part of the legislative process, which is one of the separation of powers issues posed by advisory opinions. But facial challenges are not shapeless; the actors who are permitted to challenge the constitutionality of a law or regulation in the abstract do in fact have to specify what in fact they are challenging about the law. As result, the questions asked of a constitutional court are always more specific than "is this law unconstitutional?".

Some abstract review procedures have been grafted onto common-law systems with the same traditions as ours. In Canada, "reference questions" (which have a different meaning than the reference cases above) are abstract review petitions that can be sent to the Supreme Court of Canada, asking for a ruling on the constitutionality of laws. This is not a new power of the Canadian Supreme Court; they were given this jurisdiction under the *Supreme and Exchequer Courts Act of 1875*. While reference questions have in practice overwhelmingly dealt with constitutional issues, the 1875 law allows the "Governor in Council" (that is, the cabinet) to "refer to the Supreme Court for hearing or consideration, any matters whatsoever as he may think fit." The bill also allowed for either house of Parliament to ask reference questions of the Supreme Court as well. Perhaps the most common sort of question on which the Supreme Court has opined concerns whether a particular subject matter is

within the power of the federal government to regulate or whether the subject can only be regulated by the provinces. The most famous reference asked what would be required under the Canadian Constitution for the province of Quebec to secede from Canada. *The Secession Reference Case* is widely credited with defusing the tension over secession threats by laying out procedural requirements that provided a way forward, detailed enough to allow time to calm the controversy and postpone the issue for another day. You can see the history of reference cases decided by the Supreme Court of Canada here. The fact that a Supreme Court as close in its history and practices to the U.S. Supreme Court as the Canadian one could add reference cases to its docket without incident is powerful evidence that the U.S. could do the same.

Foreign judges who have become accustomed to abstract review think that the American system is strange. I am often asked by foreign judges why Americans have to wait until a law goes into effect and then wait again for someone to be injured by this law – actually or imminently – before anyone can ask the constitutional question of a court. If there are constitutional problems with a law, they ask me, then isn't it better to get those settled before millions of people rely on the law or before people actually get hurt? And isn't it a good idea to encourage political actors like presidents, prime ministers, parliamentary minorities and ombuds to think about constitutionality as something they, too, should double-check by bringing abstract review cases to the peak court? Facial challenges through abstract review petitions allow all of these things. In addition, abstract review petitions can address issues that ordinary litigation cannot always reach because the issues are structural, as when separation of powers conflicts arise or when other features of the basic organization of the constitutional system are at issue without necessarily creating identifiable victims. In my view, developing abstract review jurisdiction would require a more fundamental rethink of the way that the American federal judiciary operates, but having worked in systems where such review is possible and in fact quite normal, I can attest that abstract review cases are crucial for getting constitutional issues sorted out before laws are enforced and in elaborating what the less-litigated features of constitutions mean. And they generate participation of the other branches of government in creating constitutional law.

Beyond reference cases, constitutional complaints and abstract review cases, constitutional courts often have original jurisdiction over the same issues that give rise to original jurisdiction in the U.S. Supreme Court, requiring no change at all in standard American practices. They also tend to have original jurisdiction in cases that involve any dispute between and within branches of government. The GFCC, for example, has ruled in "*Organstreit*" (institutional conflict) cases concerning the allocation of seats between parties in the Parliament, the circumstances under which the Parliament can be dissolved by the President, the funding of political parties, and the legal status of members of Parliament, among many other things. Some constitutional courts, like the German one, are additionally given the task of ruling in election disputes and determining the eligibility of political parties to participate in politics. In Hungary, the constitutional court had to sign off on referendum questions before they could go forward. Not all constitutional courts exercise the same jurisdiction, but the general idea is to channel all questions of constitutional importance to this court.

Legal disputes in the real world are complicated, and you have listed a series of U.S. cases in which the constitutional questions pertained to very different aspects of constitutional law and were mixed in with a variety of ordinary legal questions under very specific circumstances. You've asked how a court with constitutional jurisdiction would handle such questions given the evident entanglement of the legal issues. Let me address your specific examples with an example from Germany that I believe covers all your bases.

After 9/11, the German parliament passed a law that gave the federal defense minister the power to shoot down hijacked aircraft to prevent an attack like the one on the U.S. World Trade Center. A plane captain and some frequent fliers challenged the law because it would violate their rights (to life, liberty and dignity) if they were on a plane that was shot down under this law. Several Länder (states) challenged the law because the downed planes might fall into their territory and they claimed constitution required that they be given the ability to participate in the shootdown decision. Members of the upper chamber of the Parliament (representing the states) challenged the parliamentary procedure used to pass the law because it did not seek consent of the upper house. (Not all laws in Germany require consent of both chambers.) No planes had been shot down, so there was no concrete case presented. How did the court deal with these very different questions of constitutional law – including rights claims, claims about the constitutional limits of the use of military power, federalism claims and claims about the proper procedure used by the Parliament in the same law? And how did it deal with them in the abstract, before any action under the law took place?

First, the Constitutional Court combined all of the challenges into a single case even though they arose in different disputes. After all, the point was to assess the constitutionality of the law and not just to answer each disputant separately. The Court granted standing to the pilot and potential passengers even though they had not yet been directly affected by the law because the Court reasoned that by the time they had the ability to show imminent harm, it would be too late for the Court to vindicate their rights. (The GFCC has a much more open standing doctrine than one now finds the U.S. federal courts.) Then the Court took the challenges one by one. No, the military could not use its weapons domestically in an emergency, given specific constitutional restrictions. No, the federal government could not act alone to shoot down aircraft without consulting the states whose territories would be affected, given the constitutional structure of federalism. But yes, since the law fell within the subject matter rules that permitted it to be enacted without the concurrent consent of the upper house, the parliamentary procedure enacting the law was constitutional. But no, definitely no, on the constitutional compliance of the law with the right claims. The rights of those who could reasonably expect to be in the plane would be infringed because (in very Kantian terms) the state cannot constitutionally choose to deliberately sacrifice some innocent lives to save others. Only if the plane were occupied only by hijackers who had committed a criminal offense already (and were not holding innocent hostages) could the plane be shot down. You can see a summary of the reasoning here and the whole decision in translation here. I've obviously abbreviated a great deal.

The *Aircraft Security Case* raises many of the same questions you flagged in citing *Chadha, Marbury, Bond and NFIB.* Like *Chadha*, the *Aircraft Security Case* dealt precisely with whether one or both houses of the legislature needed to authorize the legal regulation at issue. Like *Marbury*, the Court used this case as a vehicle for expanding its own power because the Court decided the rights claims by citing Article 1 of the Basic Law on human dignity, an article that is unamendable. That citation prevented the Parliament from amending the constitution and reenacting the law because amendment of the provision relied on in the decision was itself unconstitutional. (A note: Two articles of the German Basic Law are unamendable – Article 1 identifying human dignity as the core of the German legal order and Article 20 requiring that the state be democratic, federal and social. The GFCC has long held – though never acted upon – the view that it could declare constitutional amendments unconstitutional if they violate the unamendable provisions.) Like *Bond*, the case raised questions of the domestic application of international law, because the German government had argued that the statute was enacted pursuant to a series of European Union regulations about civil aviation security after 9/11. The Court held that shooting down aircraft was not required by European Union law, so international (transnational) law was not applicable. Like *NFIB*, the Court addressed whether granting

the action in question (in this case, the military the power to shoot down aircraft) exceeded the constitutional power of the federal government, and the answer was yes. All of those questions were decided in a single opinion. And the opinion had no "facts" of the sort that we are typically accustomed to in the U.S. because the law was challenged immediately after it took effect, in part through abstract review petitions from authorized parties and in part through constitutional complaints from ordinary citizens.

This is only one example of a constitutional court at work; I could multiply others. Suffice it to say that there is nothing U.S. courts can do that can't be done at least as well in a system with a special constitutional jurisdiction. In fact, I would argue that these other systems have created a more coherent, more principled, more – well – "constitutional" jurisprudence than the U.S. courts have managed to produce. They don't have a canon of avoidance. Rather the reverse. Constitutional questions are highlighted, given separate treatment and are answered in decisions that read more like treatises than like narrow answers to specific disputes. In short, I think that creating a separate jurisdiction for constitutional questions produces better, clearer and more coherent constitutional law. Of course, as I mentioned in my written and oral testimony, powerful courts with the ability to create constitutional law in this coherent way also tend to sit in constitutional systems in which the constitution is much more easily amendable than is the U.S. Constitution, so that there is a political route to override court decisions that overreach the political moment.

Given the complexity I've just described, and the costs of switching a rickety but generally well-understood American system to an unfamiliar new model in which constitutional questions are flagged, highlighted and decided separately from other legal questions, why bother to create special constitutional jurisdiction? Isn't the U.S. system good enough?

Having worked in these other sorts of constitutional systems and then returned to the U.S., I can't help but feel that U.S. constitutional law is impoverished relative to these other systems. Constitutional avoidance is generally a portrayed as a virtue in U.S. law, but when that admonition is taken seriously, the Constitution fails in fact to permeate the legal system because the vast majority of legal questions are deemed answerable without any reference to the Constitution. Where the constitutional questions are separated out for consideration in a specialized court, however, one finds more general and systemic answers to the question of what a constitution means. Such a system enlarges the presence of the constitution in daily law. In the legal systems with constitutional courts that I know best like Germany, South Africa, Hungary (between 1990-2010) and Colombia, the constitution feels more like the foundation of the legal system as a whole, with principles that ripple through the whole legal order, rather than like a mixed packet of unrelated clauses that are only invoked and elaborated when there is no other choice.

For those of us raised in a system of diffuse review, having the judge decide everything at once (the facts, the ordinary law and the constitutional question) is what we know. But this creates the problem that we know so well that it is hard to see. American constitutional law is often completely incoherent. Some incoherency comes from "diffuse review" in which all courts in the system can answer federal constitutional questions in parallel without having to necessarily follow each other as long as there is no higher (to them) court ruling on point. Other incoherency come from a divided Supreme Court that fails to agree on a single course of action and zig-zags with personnel and personal changes. But there is a different sort of incoherence that comes from intertwining constitutional questions with questions of ordinary law. Courts – including but not only the Supreme Court – see their job as finding adequate answers for individual cases more than providing a coherent account of the

basic principles of the constitutional order. If they can set aside the constitutional questions to solve the particular problem before them adequately, judges in diffuse systems feel no particular responsibility to explain what the constitution requires as a general standard. That's not their job; they solve cases and controversies. Constitutional law is a by-product.

The end result of a system of diffuse review is a constitutional jurisprudence that is clause-bound and technical as well as missing in action on crucial points. Vast swaths of the U.S. Constitution are not even covered in constitutional law courses because those particular clauses have never been (and often cannot be) litigated. Given the limitations inherent in the U.S. system of judicial review, constitutional law simply cannot develop in coherent manner. My constitutional law colleagues abroad are always scandalized when they learn that most of the law governing the federal executive branch in general and the presidency in particular is written in secret memos in the Office of Legal Counsel and the White House Counsel's Office. Wouldn't it be better to organize constitutional review so that the Constitution could be elaborated as if it were a coherent whole and so that secret law doesn't govern some of its most crucial elements? Depending on how constitutional jurisdiction is organized, this could be the outcome. For a country that venerates its Constitution, it seems very strange that the common wisdom among American lawyers and judges is that the Constitution should be avoided and made smaller whenever the opportunity arises. And if there are giant parts of the Constitution that cannot be litigated or brought before a tribunal for elaboration, that's just the system we have.

We could do better.

How would the U.S. create a separate constitutional jurisdiction? The "one Supreme Court" language of Article III might counsel against a separate constitutional court, though one might argue that the "one Supreme Court" of Article III only anticipates a uniform highest court of appeal (even if on a discretionary writ). But if the creation of a separate constitutional court seems like a stretch too far, then the U.S. could adopt the practice mentioned in my written testimony of creating a constitutional chamber *within* the Supreme Court. That, to my mind, could be done by statute, since all detail of the organization of the judiciary, including the internal organization of this "one Supreme Court," is left to Congress to define.

There's another benefit of creating a constitutional chamber within the Supreme Court and giving it special constitutional jurisdiction. If constitutional questions could be singled out and sent to this chamber for review, through reference cases, constitutional complaints and abstract review cases (or some subset of those), then we could expect the number of constitutional cases heard by the Supreme Court to greatly increase. That might argue for expanding the number of judges on the Supreme Court to handle the increased workload that comes from dividing the Court into at least two separate benches, one to hear cases involving statutory interpretation and the other to hear constitutional questions. While I have not been generally supportive of the idea of expanding the number of judges on the bench just because recent appointments have generated controversy and the Congress clearly has the power to do so, I think it would be justifiable to expand the number of judges on the Supreme Court if it were accompanied by a jurisdictional change like this that would give the Court more cases to decide. In fact, the German Federal Constitutional Court itself is divided into two "senates": one hears constitutional complaints involving rights questions and the other hears the structural cases (separation of powers and federalism cases, interpretation of international law, abstract review cases addressing powers of various state authorities and so on). By now, it is not strange in comparative perspective for a single court to contain multiple chambers with different jurisdictions.

It could happen here.

The Last Word? Creating a Legislative Override of Judicial Decisions

You've also asked me to elaborate on what a legislative override of judicial decisions might entail, given that this proposal – if adopted – would also create a strikingly new feature of the U.S. constitutional system:

> *My third question addresses your observation, near the end of the panel 1 session, that you were coming to see the prospect of subsequent legislative override focused on individual Supreme Court rulings that strike a particularly negative chord with the Congress in power at the time, as an especially attractive option. I'm curious about three related dimensions of that option:*
>
> *(1) In the jurisdictions using such an option, does the override reverse the result of the underlying judicial ruling as to the individual parties involved or is it given purely prospective effect and, if the former, is there not some concern about the "trial by legislature" problem which, in our constitutional system, is reflected in the prohibition on state and federal bills of attainder?*
>
> *(2) Doesn't the linking of legislative overrides with particular judicial rulings create a troublesome distorting effect when a specific adjudication has special notoriety because of the identity of the party or parties involved?*
>
> *(3) To the degree that these concerns are mitigated by decoupling the effect of the legislative override from the fate of the parties whose controversy gave rise to the underlying adjudication, do not the considerable benefits of having an actual "case or controversy" before the tribunal deciding the constitutional issue in question get lost as the level of abstraction is increased?*
>
> Some answers:

The countries that have used some version of legislative override are all common-law jurisdictions descended from the English model of parliamentary supremacy. The override in its purest form was first instituted in Canada with the passage of the Charter of Rights and Freedoms in 1982, entrenching rights for the first time in the Canadian Constitution and giving the Supreme Court the power to enforce them by declaring laws that trench on rights unconstitutional. The Charter thus limited parliamentary supremacy for the first time in the areas of rights protection. The override had the effect of restoring parliamentary supremacy *à la carte* in cases where the Supreme Court of Canada interpreted rights provisions against the grain of Canadian parliaments, either national or provincial. Instead of making the Charter more radical, as it may sound to our ears now, it softened the introduction of the first entrenched bill of rights.

The U.S., of course, has never endorsed parliamentary sovereignty in its own constitutional system. But the canons of deference and constitutional avoidance as well as the concern about the counter-majoritarian difficulty are echoes of that tradition in the U.S.. It may not be too much of a stretch to look to our fellow common-law constitutionalists for ideas about how about to reconcile the power of

the courts to declare statutes unconstitutional with the power of the democratically elected branches to make the law based on the will of the people.

To see how the U.S. might use a legislative override to balance these two sources of legitimacy in a constitutional and democratic order, it may help to explain more about how the legislative override works in Canada. The "legislative override" is elaborated in Section 33 of the Charter of Rights and Freedoms:

Section 33

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter [containing such fundamental rights as freedom of expression, freedom of conscience, freedom of association and freedom of assembly, the right to life, liberty and security of the person, freedom from unreasonable search and seizure, freedom from arbitrary arrest or detention, a number of other legal rights, and the right to equality].

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. . . .

Under Section 33, Parliament is not given the power to annul any court decision it doesn't like. Many of the questions you rightly raise could well result from an unfettered practice to override specific decisions in specific cases if the Parliament is miffed. Instead, the legislative override in Canada is limited to cases in which the Supreme Court has nullified a statute or limited a statute's interpretation in ways that Parliament finds unjustifiable because Parliament and the Supreme Court have different views of the way that the balance should be struck between rights protection and the powers of the government to regulate. In short, the legislative override may only be used when the legislature and the court disagree on what the constitution means.

The Canadian override must appear in the form of a law of general application that acknowledges it is being enacted "notwithstanding" the court's decision on constitutionality. This law may only be valid for five years before it automatically sunsets unless it is explicitly renewed with the acknowledgment that it is being passed again "notwithstanding" the decision of the Court. Five years was chosen for the sunset provision because, under the Canadian system, an election would surely be held between the time that the override was enacted and the time that the law came up again for potential renewal. The intervening election would give the over-riders' constituents a chance to weigh in, assuming that the overrides would be highlighted in election campaigns. Only if majorities in favor of renewing the override were elected would these unconstitutional laws remain on the books for more than the first provisional period. And even then, the laws that are enacted "notwithstanding" contrary court decisions must still be renewed every five years.

Whether override legislation has retroactive effect back to when its predecessor law was struck or interpreted in a concrete case – and therefore whether the overriding law would affect the outcome of the specific case at issue when the Court made its decision – depends on wording of the legislation itself. Under Section 33, the overriding legislation could have the effect of overturning the result in the concrete case because the effect of reenactment would be the same as if the law were enforced continuously without a break caused by the Supreme Court decision. But the legislature could decide

that the newly enacted law has only prospective application. Unless the law were originally targeted at a specific person and then targeted again in the override procedure, however, it is unlikely to have the effects that you envision. If it did, however, it would raise "bill of attainder" issues as you suggest, and that would be an appropriate matter for the Supreme Court to consider (about which, more below).

If such an override possibility were to be included in American law parallel to the way it is exercised in Canada, Congress would only be given the power to override judicial decisions declaring statutes unconstitutional or insisting that the Constitution requires a particular interpretation of a law which the Congress disagrees. Of course, Congress already has the power to override judicial decisions which, in Congress's view, misinterpret or misapply a statute; Congress can write another law to clarify what it meant. The point of adding a legislative override option to the American Congress' existing powers would be to provide an outlet for outrage about a Court decision about constitutionality of a law to be challenged politically rather than having that outrage directed at making the Court more politically accountable. An override option would permit the Congress to be a coequal interpreter of the Constitution, something that would provide an important safety valve against efforts to destroy the Court when it makes unpopular decisions under a functionally unamendable Constitution. I suggested this option as one way to take pressure off the Court by channeling political energy mobilized against unpopular decisions into the political process rather than into the judicial nominations process with the risk of further politicizing or destroying the Court.

Because of the tradition of parliamentary supremacy in Canada, a simple majority in both houses of Parliament is sufficient to override a court decision at either the national or the provincial level. In the U.S., with a different tradition of separation of powers, perhaps the better rule would be to use the same congressional procedure as for the legislative override of a presidential veto, requiring two-thirds of both houses. A supermajority override would honor the constitutional power of the branch being overridden while lodging the last word on what the Constitution means in the Congress.

If a legislative override is seriously considered for the United States, careful attention should be paid to whether there should be limits on the particular parts of the Constitution whose interpretation could be subject to such an override. The legislative override in Canada explicitly excludes a number of constitutional provisions from this procedure. For example, the Court has the last word on the regulation of the democratic process and voting rights given the evident interest that the political branches have in interpreting those rights in ways that entrench themselves in office. The Court also has the last word on separation of powers issues, given that the point of having the Court decide inter-branch conflicts is to end the conflict and not just to delay it if the legislature doesn't accept its answer. As the Canadian Library of Parliament research service notes:

> A number of rights entrenched in the Charter are not subject to recourse to section 33 by Parliament or a legislature. These are democratic rights (sections 3–5 of the Charter), mobility rights (section 6), language rights (sections 16–22), minority language education rights (section 23), and the guaranteed equality of men and women (section 28). Also excluded from the section 33 override are section 24 (enforcement of the Charter), section 27 (multicultural heritage), and section 29 (denominational schools) – these provisions do not, strictly speaking, guarantee rights.

In the American context, it would be important to think carefully about which constitutional provisions might be put beyond the reach of an override procedure. The examples you give are prime instances for concern. If the law originally permitted a rather famous person to be targeted and the

Supreme Court indicated that the law violated his rights, then the reenactment of the law would allow the targeted violation of rights to continue. Removing from the override a judicial determination that legislation is unconstitutional because it violates bill of attainder provisions might be crucial, for precisely the reasons you suggest. Legislation that alters the balance between branches of government might be another because the unilateral ability of Congress to override without the President having a corresponding ability to do so would tilt the constitutional balance too far in Congress' direction. Federalism provisions might be a third, because again the Congress through an override procedure would have an overbearing power not available to states. Legislation that advantages one political party over another or one party's voters over another might also be exempted from the override. And so on. For one particularly thoughtful treatment, I might recommend your colleague Nicholas Stephanopoulos' article "The Case for the Legislative Override," 10 UCLA Journal of International Law and Foreign Affairs 250 (2005).

My guess is that the Supreme Court decisions in which overrides would be likely in the United States are going to be the same issues that have generated overrides in Canada: same-sex marriage, choice of religious schools, church-state issues, limitations on compensation for past rights violations and the preservation of local cultures in the face of the nationalization of rights. (Abortion, which would surely be on the American list is not on the Canadian list because the Supreme Court of Canada struck down all abortion regulations in one of its first major decisions under the Charter in 1983. There has never been a national parliamentary majority to override that decision, so it has faded from the scene as a hot-button political issue.) As Canadian political culture adapted to the override option and in particular as Canadian public opinion firmly backed the Supreme Court instead of the overriding parliaments, override threats are still made but they are rarely acted upon, and they have gradually faded out after an initial flurry. There is some concern, however, that the entry onto the political scene of a provincial premier accustomed to ignoring constitutional conventions may be changing this practice. It is therefore worth thinking about how to prevent the abuse of the override as part of its design.

I detect in your questions a certain attachment to the practice of deciding constitutional questions in the context of specific fact patterns. After all, that is how the U.S. has always done things, and most of us have become accustomed to thinking in that way. The Canadian system still operates primarily through cases and controversies, like the U.S. whose decisions it almost inevitably followed until the enactment of the Charter. Since the Charter and its associated override provision were enacted in 1982, however, the Supreme Court of Canada has changed the way it makes its decisions and it has regularly departed from the constitutional vision of its sister Court south of its border. This was not a result of the Charter alone; a new judicial culture was born out of the entrenchment of rights in the Canadian Constitution. Instead of thinking of itself as primarily resolving the case before the Court with constitutional law as a byproduct, the Supreme Court of Canada now embraces the opportunity to elaborate in a more theoretical way what the Charter (and the rest of the Canadian Constitution) means as its first responsibility. That affects both case selection and opinion writing. While it is still the court of highest appeal (with a largely discretionary jurisdiction like the U.S. Supreme Court), the Supreme Court of Canada writes decisions as if its first responsibility is to clarify the constitutional landscape and to teach political officials how to perform constitutional analyses so that they can jointly share the burden of ensuring that the Constitution really does exist in practice. The legislative override, while rarely used, acts to ensure that if the Court were to go too far past the bounds of politics, Parliament could at least temporarily weigh in on many of the same questions also.

As I mentioned in my written and oral testimony, my reason for suggesting an override procedure in U.S. law has to do with the position of the Supreme Court in the constitutional system of the U.S.. We have an old Constitution. It is the oldest functioning Constitution in the world, we often say with pride. But it is a Constitution without many modern conveniences that other constitutions have since included as standard. Moreover, the difficulty of amendment of this Constitution has meant that modernization of the Constitution as well as decisions on hot-button matters of public interest all run through the Supreme Court. As issues before the Court continue to generate a firestorm of controversy, the only practical avenue for overturning decisions of the Court has been through changing the judges who sit on that Court. The result has been toxic for the Court and harmful for the political process which is left with virtually no way to participate in the conversation about what the Constitution requires in our time. A legislative override of constitutional decisions of the Court might provide a way to channel anger over Court decisions into the political process rather than solely into the nomination and confirmation process for judges. It might be the best way to save the independence of the Supreme Court.

I hope I've addressed some of your concerns about a potential legislative override.

Protecting Minority Rights through Judicial Review

During our panel, Commissioner Boddie asked me what comparative constitutional law has to say about the protection of minority rights through judicial review. Realizing now that she may well have asked that question in light of my testimony proposing that the Constitution be made easier to amend and that Congress be permitted to override constitutional decisions of the Supreme Court, I want to revisit my answer to address how we can still ensure that minority rights are protected even if the U.S. were to make the decisions of the Supreme Court easier to circumvent.

At this point in our history, we cannot reliably say that the U.S. Supreme Court is the strongest institutional defender of the rights of disadvantaged minorities in the U.S. constitutional order. The Supreme Court's decision a few days ago in Brnovich v. Democratic National Committee, eviscerating Section 2 of the Voting Rights Act after it had already nullified Sections 4 and 5 of the same law in Shelby County v. Holder, shows that the Supreme Court may not think that the protection of disadvantaged minorities is one of its special responsibilities. The Supreme Court in both of these cases seems to have left a path for the Voting Rights Act to be reenacted with updated data and benchmarks for measuring the effect of new election laws on minority populations. But what if the Supreme Court were to declare in a subsequent round of voting rights cases or in the next round of affirmative action cases that the Constitution, despite its history and its language which have been understood to give special protections to minorities since the civil rights revolution, now prohibits any step that public institutions can take to remedy past discrimination? Under those circumstances, and in light of the overwhelming bipartisan majorities by which the Voting Rights Act was last reauthorized in 2006, one might imagine that a legislative override of a decision that blocked any statutory remedy for discrimination would be more likely to defend minority rights than the Supreme Court we currently have. Many of us have so long associated the protection of disadvantaged minorities with a counter-majoritarian institution that the switch to thinking that political remedies may be more effective will require a major reorientation.

I argued in my oral testimony that other peak courts have been much stronger in the protection of disadvantaged minorities than has the U.S. Supreme Court. One obvious reason why is that these peak courts have newer constitutions with more modern articulations of rights. In fact, newer national

constitutions now routinely require states to take affirmative steps to correct for prior discrimination as part of the equality clauses of constitutions. Let me quote a few of them with the affirmative obligations of states in bold. Just from this constitutional language, you will see why it is easier for the courts charged with enforcing their constitutions to be stronger in defending the rights of disadvantaged groups:

The German Basic Law 1949: Article 3 [Equality before the law]

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. **The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist**.

(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability.

Canada, Charter of Rights and Freedoms, 1982, Section 15:

1. Equality before and under law and equal protection and benefit of law
   Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

2**. Affirmative action programs**
   Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Colombian Constitution 1991: Article 13 [Equality]

All individuals are born free and equal before the law, shall receive equal protection and treatment from the authorities, and shall enjoy the same rights, freedoms, and opportunities without any discrimination on account of gender, race, national or family origin, language, religion, political opinion, or philosophy.

The State shall promote the conditions so that equality may be real and effective and shall adopt measures in favor of groups that are discriminated against or marginalized.

The State shall especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and shall sanction the abuses or ill-treatment perpetrated against them.

South African Constitution 1996: Article 9 Equality

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

2. Equality includes the full and equal enjoyment of all rights and freedoms. **To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken**.

3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Under these provisions, the questions that American courts are preoccupied with – which is whether the *different* treatment of unequal groups is itself unlawful discrimination – simply disappear. Courts don't have to stretch far to arrive at the conclusion that affirmative action to remedy past discrimination is not only lawful, but even required. It is right there in the text. If you are considering recommending other constitutional amendments, copying peer democracies by inserting the affirmative obligation of the state in matters of minority protection would be high on my list of proposed amendments.

That said, that answer doesn't fully address Professor Boddie's concerns, which I gather grow from the understandable worry drawn from long experience in America that majoritarian institutions cannot be counted on to protect disfavored minorities. She is absolutely right to be concerned, and that is precisely why the constitutional clauses above were written the way they were in systems in which courts are given extraordinary powers of judicial review. Even in Canada which, as we have just seen, permits override of court decisions that apply the equality principle (Section 15), the Supreme Court has developed a very strong constitutional jurisprudence of equality without being overridden. But even if there were pushback at national level, a different provision about affirmative action exists in Article 6 of the Charter pertaining to "mobility rights" which covers the right of all to live and work anywhere in Canada. That provision is excluded from the legislative override. In these other constitutional systems, as I mentioned in my written testimony, constitutional amendment is easier than in the U.S., but constitutional peers are developing different amendment procedures for different parts of the constitution, requiring the part containing rights to be subject to the most onerous amendment procedure. So the protection against unfair discrimination is entrenched in each of these constitutions precisely so as not to leave minority rights protection solely to majoritarian institutions.

In fact, the places in Europe where minority rights are most visibly imperiled – France with regard to North Africans and Roma and the UK with regard to Black, Asian and Minority Ethnic (BAME) populations – are precisely the countries that have the weakest judicial review on the continent. Until 2008 in France, the Constitutional Tribunal was barred from reviewing any law once it had come into effect; constitutional review was limited to the brief period between parliamentary passage and the signature of the president. Not surprisingly, minority protection in France is not strong because many old laws passed at a time when minority rights protection was not robust were still in force. In the UK, the Human Rights Act still does not fully entrench rights; all courts can do is to call the legislature's

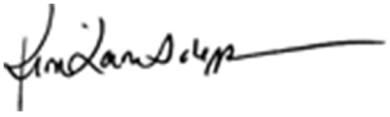
attention to the fact that statutes may conflict with rights. As I mentioned in my written testimony, the British Parliament usually does correct "incompatibilities" that are pointed out to it, but that is different from an ongoing effective judicial review of minority rights protection. Sometimes judges are given more power precisely to look after minority rights; some systems without judicial review in their domestic constitutions – for example, Belgium, the Netherlands and the Nordic states – have used their domestic constitutional clauses that elevate international law above national statutes to give themselves the power to directly apply the case law of the European Court of Human Rights in interpreting national law. That said, strong constitutional democracies with strong judicial review may make better decisions, but much depends on the political will to enforce those decisions.

I agree with Professor Boddie that it is hard to enforce minority rights effectively without strong judicial protection. That is why the recent decisions of the U.S. Supreme Court that abandon the commitment to racial equality are so distressing. The Supreme Court's new direction on equality rights provides another urgent reason to ensure that the Court doesn't block the political branches from acting to protect the rights of disadvantaged minorities in the name of the Constitution.

* * *

I would certainly welcome more conversation on these points. Please feel free to follow up on this and any other issues that my testimony in particular or comparative constitutional law in general may raise for your inquiries. I'm always delighted to have the chance to discuss how other jurisdictions deal with constitutional matters and to think about whether we could – or should – try any of these ideas here at home.

With all best wishes,



Kim Lane Scheppele
Laurance S. Rockefeller Professor of Sociology and International Affairs
in the Woodrow Wilson Princeton School for Public and International Affairs
and the University Center for Human Values
Princeton University

Contact information:
Department of Sociology, 118 Wallace Hall, Princeton University, Princeton NJ 08544 USA
(but snailmail is not being checked in the pandemic)
Office Phone: +1.609.258.6949
(messages forward to home number while we're all away from offices)
Email: [redacted]
Webpage: https://sociology.princeton.edu/people/kim-lane-scheppele