IMPORTANT NOTE ON THESE DISCUSSION MATERIALS

The following are discussion materials assembled solely for deliberation by the President's Commission on the Supreme Court of the United States. Each set of discussion materials was prepared by a working group for the Commission's use in studying and deliberating on the issues identified in Executive Order 14023 and is informed by the Commission's public deliberations on October 15, 2021.

These materials attempt to set forth the broad range of arguments that have been made in the course of the public debate over reform of the Supreme Court. They were designed to be inclusive in their discussion of these arguments to assist the Commission in robust, wide-ranging deliberations.

The inclusion of particular arguments in these draft materials does not constitute a Commission endorsement or rejection of any of them, and specific points of analysis or particular perspectives appearing in the drafts should not be understood to reflect the Commission's views or those of any particular Commissioner. Consistent with Executive Order 14023, the Commission includes members with diverse perspectives on these issues. Commissioners therefore can be expected to hold various and even strongly opposing views, which will be the subject of deliberation at the public meeting scheduled for November 19, 2021.

Prior to its next public meeting, the Commission will post a draft final Report for deliberation and a vote on its submission to the President.

CHAPTER 4: THE COURT'S ROLE IN THE CONSTITUTIONAL SYSTEM

Many observers view the judiciary and especially the Supreme Court as vital to the preservation of individual rights, democracy, federalism, and other constitutional values.[1] On this account, the Court serves as an important counterweight to majoritarian impulses, safeguards the Constitution, and helps ensure the rule of law. But others argue that the Supreme Court has exerted too much power in our system of constitutional governance by interfering with or taking control of matters that should be resolved by the elected branches and the political process. Under this view, the Court has emerged as an obstacle to the realization of important social goals and undermined the ability of Congress and other political actors to protect rights.[2]

Proposals to disempower the Court generally rest on two interrelated assumptions. First, Court rulings that statutes violate the Constitution typically require exercising judgment about the meaning of the Constitution, over which reasonable people might disagree, as is often illustrated by divisions among the Justices themselves in constitutional cases. Second, in cases of reasonable disagreement over whether a law comports with the Constitution, principles of democracy necessitate that Congress and the executive branch have opportunities to check the judgments of an unelected judiciary and to advance their own views about what the Constitution requires. In the view of some proponents of judicial disempowerment, the modern Supreme Court has injected itself into spheres appropriately left to democratic argument and resolution—for example, by invalidating laws that prohibit or restrict abortion or legislation designed to protect voting rights. For these critics, the Court's fundamentally "countermajoritarian" character is in tension with the basic commitments of a democracy; an unelected judiciary, in this view, acts undemocratically when it invalidates the acts of democratically elected representative bodies.[3] For some, the problem is also that Supreme Court Justices are nearly always drawn from the elite and are therefore insufficiently representative of the population as a whole.[4]

Those who critique the Supreme Court's power emphasize that when the Court acts to invalidate statutes, its decisions "have an unusually high degree of finality or 'strength'[] by global standards."[5] This high degree of finality derives in part from the Court's approach to judicial review, known as "judicial supremacy."[6] That is, the Court has held that it has the last word on constitutional interpretation and that its decisions bind not only the parties in a particular case but also future action by the President, Congress, and the states.[7] The Court has embraced judicial supremacy since at least the 1950s, when it asserted that "the federal judiciary is supreme in the exposition of the law of the Constitution."[8] Yet, as discussed below in Part III of this Chapter, this approach to judicial review is not explicitly required by the text of the Constitution or by the Court's early precedents establishing the power of judicial review. Indeed, judicial supremacy has long been contested, sometimes by Congress and the President and sometimes even within the Court. Critics argue that the Court was not intended to be the *exclusive* interpreter of the Constitution; rather, as long as legislative and executive branch actors obey specific Court orders in specific cases, they can act in their spheres on a contrary interpretation of the Constitution.[9]

Two other features of our constitutional system combine with judicial supremacy to insulate the Court's constitutional judgments from the will of the people as it evolves over time. First, the U.S. Constitution is very difficult to amend—much more so than most state and foreign constitutions.[10] Second, as discussed in Chapter 3 of this Report, because Justices serve for life, the timing of nominations is unpredictable. Some Justices serve for many decades and some Presidents have few or no opportunities to make appointments. According to some observers, the result is that the Court may not be reflective of, or responsive to, the people, as expressed through electoral preferences over time.

Proposals to curb judicial power are diverse. Without purporting to be comprehensive, this Chapter examines proposals (1) to strip the Supreme Court and other federal courts of jurisdiction to hear certain kinds of cases, (2) to impose supermajority voting requirements or require courts to give deference to legislative judgments about constitutionality, and (3) to authorize congressional overrides of judicial decisions striking down legislation. As we emphasize, some disempowering proposals specifically target the Supreme Court, while others would apply to lower courts as well. Some would insulate broad categories of legislation from judicial review; others would limit judicial power only with respect to specifically identified issues.

We consider the extent to which such proposals would affect the Supreme Court's role, or that of the judiciary as a whole, in relation to the other branches of government in the resolution of major social, political, and cultural issues. We also highlight the counterarguments advanced by those who defend the existing role of the Court in our constitutional system. Among other concerns, critics of proposals to disempower the courts worry that such reforms might undermine protections for individual rights, particularly minority rights, or that as more constitutional interpretation is performed by the political branches, the law could become less settled or well-reasoned. Critics also emphasize that disempowerment reforms could undermine the rule of law by eliminating the courts' role in ensuring officials' accountability. Some also question whether courts necessarily operate in ways that are antidemocratic.[11]

Our discussion is predominantly analytical. We do not purport to resolve the fundamental questions of democratic and political theory that any substantial disempowering of the courts would raise. Instead, we analyze the extent to which the various proposals to disempower the courts would in fact realize their stated goals. We also identify some of the potential costs of various proposals, including from the perspective of those who emphasize the importance of the courts in protecting individual rights, federalism, or other constitutional values and structures. Finally, we discuss the constitutional issues to which leading proposals would give rise and evaluate whether the proposals could be achieved without constitutional amendment. Given the importance of concerns about the Court's power in relation to the elected branches—and given the relative lack of attention disempowering proposals have received compared to some of the other reforms discussed in this Report—a key aim of this Chapter is to inform future debate on these topics.[12]

I. Proposals to Restrict the Supreme Court's Jurisdiction

One set of proposals to reduce the power of the Supreme Court involves limiting the Court's jurisdiction to hear and decide certain types of cases. Over the last fifty years, various members of Congress have proposed bills that would strip the jurisdiction or authority of the Supreme Court—sometimes in conjunction with the jurisdiction of other courts—to rule on the constitutionality of anti-abortion legislation,[13] school prayer,[14] the Affordable Care Act,[15] prohibitions against pornography,[16] local mandates to recite the Pledge of Allegiance,[17] and the now-invalidated Defense of Marriage Act.[18] Proponents of such jurisdiction-stripping measures may hope that limiting the Court's power in this way would shift control over affected public policies to the political and democratic processes. However, we note that jurisdiction stripping has no inherent partisan valence and could be utilized to serve the ideological goals of nearly any constituency with the political capacity to enact it.

Jurisdiction stripping has long been a topic of debate among legal academics as well, and it has drawn new attention in the last few years. For example, one commentator recently suggested that Congress might use jurisdiction stripping to protect specific legislation, such as a hypothetical federal wealth tax, from judicial invalidation.[19] Others have proposed jurisdiction stripping as a general means of disempowering the Court and shifting authority to more democratically accountable institutions.[20] Jurisdiction stripping is also a mechanism that has been used in other countries to make apex courts more politically accountable.[21]

Though the academic debate has been robust, no recent commentator has offered a programmatic blueprint for jurisdiction stripping. In the analysis that follows, we provide a brief historical background concerning congressional efforts to strip courts of their jurisdiction, an evaluation of various types of jurisdiction-stripping proposals, and an assessment of the constitutionality of jurisdiction stripping in its various forms.

At bottom, one cannot assess the constitutionality of jurisdiction stripping in the abstract. Congress certainly has some power to impose limits on the appellate jurisdiction of the Supreme Court. However, the extent of that power is unclear, and the constitutionality of specific proposals would depend upon the particular details of those proposals. The Commission does not have a firm view on the overall merits of jurisdiction stripping, but we are skeptical that the aim of promoting more democratically accountable control of public policy can be achieved solely by limiting the jurisdiction of the Supreme Court.

A. Constitutional and Historical Background

The Constitution undisputedly gives Congress power to grant and withhold the jurisdiction of the federal courts, though the precise scope of that power is much debated. Article III of the Constitution vests the Supreme Court with "original" jurisdiction in a small category of cases. Article III then specifies that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*."[22] Although the scope of Congress's power under the Exceptions Clause has never been settled definitively, Congress always has made some exceptions to the Court's appellate jurisdiction. The 1789 Judiciary Act, for example, made no provision for Supreme Court review of criminal cases tried in the lower federal courts.[23]

The Constitution also contemplates broad congressional power to determine and adjust the jurisdiction of the lower federal courts. As the result of a deliberate compromise at the Constitutional Convention, Article III authorizes Congress to create lower federal courts but does not require it to do so. It provides instead that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[24] This language has always been understood to authorize Congress to create or not create lower courts, and to vest the lower courts with less jurisdiction than the maximum amount that Article III would permit.

In the 1789 Judiciary Act, Congress accepted the Constitution's invitation to create lower federal courts and gave them broad jurisdiction, but Congress also imposed significant limitations. For example, the Act included jurisdictional dollar-amount requirements not only for cases brought by parties from different states (what is known as diversity jurisdiction), but also for civil actions brought by the United States.[25] The 1789 Judiciary Act also omitted any general grant of jurisdiction to the lower federal courts to address suits arising under the Constitution, laws, and treaties of the United States. Such cases could be filed only if they happened to fall within other more specific grants of jurisdiction, which many did not.

From the beginning, moreover, the federal courts' exercise of their jurisdiction conferred by Congress provoked occasional controversy and calls for statutory revision. In the early decades of constitutional history, contention surrounded the Supreme Court's appellate jurisdiction under Section 25 of the 1789 Judiciary Act to review the decisions of state supreme courts. Throughout the antebellum era, a number of states and state courts objected that Supreme Court review of state court decisions was incompatible with the partial sovereignty of states and their institutions as guaranteed by the Constitution. In 1831, the House Judiciary Committee reported out a bill that would have stripped the Supreme Court's jurisdiction to review state court judgments, but that measure failed on the floor amid concerns about asserted state authority to nullify acts of Congress.[26]

Following the Civil War, fearing that the Supreme Court might invalidate the Military Reconstruction Act,[27] Congress enacted a statute depriving the Court of appellate jurisdiction over a pending habeas corpus case that presented important constitutional questions concerning Reconstruction. The Court upheld this deprivation of its appellate jurisdiction in *Ex parte McCardle*.[28] However, in upholding this jurisdiction-stripping statute, the Court's view of Congress's power remained ambiguous. The Court noted that although Congress had eliminated one avenue for parties to bring their challenges to the Military Reconstruction Act to the Court, it had potentially left open another avenue that could be used in future cases.

In another case from the Reconstruction Era, *United States v. Klein*, the Supreme Court invalidated a statute that made it harder for pardoned rebels to receive compensation from the United States.[29] Formally, the statute directed both the Court of Claims and the Supreme Court to dismiss "for want of jurisdiction" certain claims against the United States in which a party relied on a presidential pardon to establish proof of loyalty during the Civil War. The Court issued an opinion whose rationale, to this day, has inspired uncertainty and debate. It held that a statute that confers Supreme Court jurisdiction up to "a given point" in a case, but then requires the Court to dismiss that case "when it ascertains that a certain state of things exists," is "not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to

the appellate power."[30] In other words, limits exist on Congress's power to make exceptions, though there is debate about what these limits are.

Congress enacted a small spate of legislation restricting the jurisdiction of the federal courts during the 1930s, primarily to limit the remedies lower federal courts could issue for violations of the law. The Norris-LaGuardia Act of 1932 sharply limited the capacity of "the courts of the United States" to issue injunctions "in a case involving or growing out of a labor dispute."[31] The Supreme Court upheld that restriction against a constitutional challenge in *Lauf v. E.G. Shinner & Co*.[32] The Johnson Act of 1934 stripped the federal courts of jurisdiction to enjoin state orders fixing rates for public utilities whenever certain conditions were satisfied, including where "[a] plain, speedy and efficient remedy" for illegality was available in state court.[33] The Tax Injunction Act of 1937 similarly provided that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[34]

Since at least the 1950s, members of Congress regularly have introduced legislation that would strip the Supreme Court, the lower federal courts, or both of jurisdiction to resolve particular hotly contested and politically salient constitutional issues.[35] Only one of these proposals, the Military Commissions Act of 2006, has ever been enacted into law (and that statute was subsequently invalidated, as noted below). In the 1950s, Congress gave serious consideration to bills that would have restricted the Supreme Court's jurisdiction to review challenges to national-security legislation.[36] In the 1970s, a number of proposals sought to limit federal jurisdiction to order busing as a remedy for school segregation.[37] The 1980s witnessed repeated failed proposals to limit federal jurisdiction over challenges to abortion restrictions and school prayer.[38] In 2004, the House of Representatives enacted bills that would have deprived both the lower federal courts and the Supreme Court of jurisdiction over suits challenging Congress's 1996 Defense of Marriage Act,[39] as well as over suits against laws requiring students to recite the Pledge of Allegiance in school.[40] But those measures died in the Senate. In more recent years, members of Congress have introduced jurisdiction-stripping legislation involving abortion, religious liberty, and other matters.

In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) withdrew the Supreme Court's certiorari jurisdiction to review decisions by the federal courts of appeals denying prisoners convicted by state courts the permission to file second or "successive" petitions for federal writs of habeas corpus.[41] The Court upheld that limitation in *Felker v. Turpin*.[42] In doing so, however, it emphasized that the AEDPA provision curbing the Court's certiorari jurisdiction did not deprive it of jurisdiction to consider original petitions for habeas. AEDPA would "inform" its consideration of such petitions, the Court said, but not exert a preclusive effect.

The Detainee Treatment Act of 2005, as amended by the Military Commissions Act of 2006, purported to strip all courts of the United States, including the Supreme Court, of habeas corpus jurisdiction in all cases brought by noncitizens being detained as enemy combatants. (Congress instead tried to provide a substitute for habeas corpus: providing the D.C. Circuit with limited review of detention decisions made by non-Article III military tribunals.) But the Supreme Court held in *Boumediene v. Bush*[43] that the withdrawal of habeas jurisdiction violated the Suspension Clause of Article I, Section 9 of the Constitution, which provides that "[t]he

Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[44] The Court did not opine on jurisdiction stripping outside of the habeas context.

Overall, the Constitution gives Congress power to limit the Supreme Court's appellate jurisdiction. This was the conclusion of the various experts who testified before this Commission on the issue.[45] However, Congress's jurisdiction-stripping power is not unlimited, and neither the Court's jurisprudence nor past practice fully defines its reach or scope. Thus, the constitutionality and policy merits or demerits of jurisdiction-stripping proposals are contingent on the proposals' details. We evaluate those details below.

B. Evaluation of Current Jurisdiction-Stripping Proposals

In this Section, we consider proposals to strip courts of their jurisdiction to review the constitutionality of federal and state legislation. Jurisdiction-stripping legislation might also seek to shield executive action from judicial review, though we are aware of fewer proposals to do so. Our analysis necessarily takes a selective approach, given the many possible kinds of jurisdiction-stripping measures. We focus mostly on issue-specific jurisdiction-stripping legislation that would seek to disempower courts from ruling on a specific law or type of law. Examples include proposals that would bar jurisdiction over challenges to a wealth tax or to a law regulating abortion. We omit discussion of most general jurisdiction-stripping bills, such as those that exclude relatively unimportant cases (as measured by dollar amount, for example) from the federal courts. We do consider general jurisdiction-stripping efforts insofar as they would seek to temper or eliminate the federal courts' authority to declare legislation unconstitutional, and thereby to decrease the courts' power relative to other institutions of government.

In evaluating jurisdiction stripping, we also differentiate among proposals based on the courts they would affect: Some proposals would restrict the appellate jurisdiction of the Supreme Court alone, while leaving lower court jurisdiction intact. Others would withdraw jurisdiction from all federal courts, including the district courts and courts of appeals, while leaving state court jurisdiction intact. Still others would withdraw jurisdiction not only from the Supreme Court, but also from all other federal and state courts. The merits and consequences of each type of proposal would differ, as we explain.

To organize our analysis, we begin by considering the goals of jurisdiction-stripping proposals and the proposals' likely efficacy in achieving those goals. We then consider the consequences that successfully implementing the proposals might have for the functioning of the constitutional system.[46] We defer consideration of the constitutional issues that their enactment would present until Section I.C. We do not evaluate the specific policy goals that any jurisdiction-stripping proposal might serve.

1. *Goals and Efficacy*

Most prominent jurisdiction-stripping proposals today would shield specific, substantively defined issues, legislation, or policies from judicial review by the Supreme Court, by all federal courts, or by all federal and state courts. The goals of such proposals are

overwhelmingly substantive in nature—to protect the particular laws in question from judicial invalidation. Nevertheless, proposals to curb judicial jurisdiction can also have more abstract goals, involving the redistribution of decisionmaking authority within our scheme of government. More specifically, some proponents of jurisdiction stripping regard it as a means of promoting greater democratic accountability by transferring power from the Supreme Court to more democratically responsive institutions.[47]

The Commission does not take a position on the desirability of any particular substantive proposal. These issues are ones over which Commissioners disagree. However, in analyzing the issue of jurisdiction stripping, we are skeptical that jurisdiction stripping could promote meaningful democratic accountability if Congress were to restrict the appellate jurisdiction of the Supreme Court alone.

The reallocation of authority would be most dramatic if Congress were to strip jurisdiction from all courts, including state as well as federal courts, to entertain constitutional challenges to particular substantive legislation. In foreclosing all judicial review of legislation, Congress might be viewed as effectively claiming authority to determine that any covered statutes—such as one imposing a wealth tax or those banning abortions—were constitutionally valid. Proponents of such legislation, moreover, would likely defend it as enhancing political democracy and accountability by enabling Congress, as a democratically accountable institution, to authoritatively resolve a constitutional issue about which reasonable minds could be expected to differ.[48]

However, the ability of issue-specific jurisdiction-stripping legislation to promote political democracy seems by definition limited, since legislation of this kind would still leave responsibility for the overwhelming bulk of constitutional interpretation in the courts, despite stripping it from discrete contexts. Similarly, general jurisdiction-stripping bills that affect a smaller subset of courts rather than the full set of federal and state courts would have limited effect in enhancing democratic accountability in the domain of constitutional interpretation.

Measures that would restrict the appellate jurisdiction of the Supreme Court alone, for example, would not straightforwardly transfer interpretive authority from the judiciary to Congress or to any other democratically accountable institution. They would instead reallocate power from the Supreme Court to the lower courts. There seems to be little reason to preclude Supreme Court jurisdiction over specific constitutional questions that remain subject to decision by the lower courts. Precluding Supreme Court review alone would do little or nothing to enhance political democracy. Nor would it advance interests in justice or accuracy to permit different courts to issue incompatible rulings on the same substantive constitutional issue with no possibility of Supreme Court review.

Proposals that would withdraw jurisdiction from all federal courts but allow continued adjudication of a constitutional issue in the state courts might more plausibly aspire to promote a democracy-enhancing goal. They would leave responsibility for constitutional decisions in the hands of state judges who are, in many instances, democratically elected or otherwise amenable to the influence of public opinion. By contrast, Article III of the federal Constitution seeks to insulate federal judges from political influence through guarantees of life tenure and protection against salary reduction.

We are uncertain, however, about the precise extent to which a transfer of adjudicative power from federal to state courts would enhance the influence of political majorities over the resolution of constitutional issues. To reach such a conclusion would require resolution of myriad empirical and normative issues. State court judges would remain bound by the Supremacy Clause, which provides that the Constitution is the "supreme Law of the Land" and that "the Judges in every State shall be bound thereby,"[49] but it is not clear whether state court judges would be bound by preexisting Supreme Court precedents speaking to the constitutional question over which Congress had precluded formal Supreme Court review. If state courts found that prior Supreme Court precedents tied their hands, then this sort of jurisdiction stripping would be limited as a means of promoting democratization of authority over constitutional interpretation. An unintended effect might even be to freeze in place the Supreme Court doctrine on the books at the time of the jurisdiction stripping.

Proposals that would strip the jurisdiction of all courts to rule on the constitutionality of federal (and possibly also state) legislation would undoubtedly have a major effect in allowing Congress and state legislatures to insulate their preferences and judgments of constitutional validity from judicial review. Whether congressional preclusion of all judicial review of specific legislation or policies could fairly be described as injecting political accountability into the process of constitutional interpretation would depend on (a) whether Congress actually purported to conclude that the legislation or policies that it shielded from judicial review were constitutionally valid and (b), if so, whether it took its responsibilities to apply and interpret the Constitution seriously. Some commentators believe that legislatures in countries that do not have judicial review discharge their responsibilities to protect individual rights with impressive conscientiousness.[50] It is also imaginable, however, that legislation precluding all judicial challenges to particular statutes or programs could have the purpose and effect of undermining constitutional rights, because Congress and state legislatures might not feel bound to protect them.

2. *Consequences for the Functioning of the Federal System*

The systemic consequences of jurisdiction-stripping legislation would similarly depend on the details of any particular measure that Congress might adopt. Legislation that withdrew appellate jurisdiction from the Supreme Court but retained jurisdiction in the lower federal courts and in state courts would obviously diminish the capacity of the Supreme Court to ensure uniformity in constitutional interpretation (and consistency in constitutional outcomes) across federal courts of appeals and state supreme courts. The courts of appeals and state supreme courts could become the courts of last resort with respect to the constitutional status of federal legislation. Thus, a federal statute could be held constitutional by one circuit and unconstitutional by another, with no apex court to resolve the circuit split. We would regard this resulting lack of uniformity on matters of great political or constitutional salience as a significant cost.

In some cases, moreover, the absence of opportunity for appeal to the Supreme Court could result in a single lower court having the capacity to utter the last, controlling word on an important constitutional issue. This result would occur if, for example, a court of appeals upheld a nationwide injunction against the enforcement of a federal statute or policy based on a constitutional ruling. Partial jurisdiction stripping would thus empower the lower courts.

A statute that simultaneously withdrew jurisdiction from both the Supreme Court and the lower federal courts could have similar effects in producing unreconciled disagreements among state courts about important constitutional issues, leading to variation in the U.S. Constitution's reach and effects. Furthermore, many courts have concluded that state courts lack the power to issue injunctions against federal officials, which would contribute to further disagreement and tension.[51]

A jurisdiction-stripping statute that bars state as well as federal courts from exercising jurisdiction over constitutional challenges to legislation would have even further-reaching systemic consequences. Whether by accident or design, it would impliedly reject longstanding assumptions about what it means to possess a constitutional right in the United States. More specifically, it would make rights more dependent on legislative exposition, a task that legislatures may not currently be well-positioned to undertake. Legislatures are not currently adept at anticipating all possible future applications of a statute and crafting exceptions for cases that would present constitutional difficulties. It is possible that legislatures might enhance their relevant skills and resources if courts no longer played such a dominant role, for example by expanding legal staff dedicated to constitutional analysis. To the extent that jurisdiction stripping reflects majoritarian impulses while depriving individuals of any right to seek redress in court, it might also make it harder for minorities to vindicate individual rights that, in some instances, are essential to constitutional democracy itself.

A final systemic consequence that merits consideration is the extent to which a particular jurisdiction-stripping measure would tend to contribute to partisan polarization and institutional instability.[52] There is little empirical data on this point.[53] One might worry that the turn by transient majorities in Congress to jurisdiction stripping to insulate their preferred policy objectives from judicial scrutiny could give rise to escalating jurisdiction stripping as control of Congress changes hands, ultimately resulting in serious abuses of power. Against this worry, it might be argued that the fact that Congress has long had this tool at its disposal and has used it infrequently suggests this concern is more hypothetical than real. However, we cannot rule out the possibility that in the current era, lawmakers might resort to jurisdiction stripping with increasing frequency in partisan political struggles.

C. The Constitutional Permissibility of Jurisdiction Stripping

Debates about the constitutional limits on Congress's power to restrict the jurisdiction of the Supreme Court, the lower federal courts, and the state courts have generated an enormous literature that was described decades ago as already "choking on redundancy."[54] Here we can do no more than highlight some areas of virtual consensus among scholars and identify some of the issues that different types of jurisdiction-stripping legislation would pose.

1. *Sources of Congress's Regulatory Power*

In order to enact jurisdiction-stripping legislation, Congress must be able to point to a specific source of authority within the Constitution. Insofar as legislation restricting the appellate jurisdiction of the Supreme Court is concerned, power would come from the Exceptions Clause, as discussed in Section I.A, possibly in conjunction with the Necessary and Proper Clause.[55]

Where jurisdiction-stripping legislation also extends to the lower federal courts, a prima facie source of authority lies in Article III's Judicial Vesting Clause, which provides that Congress "may from time to time ordain and establish" tribunals "inferior" to the Supreme Court.[56] Traditional understandings hold that the power to create lower courts includes a power to prescribe and limit their jurisdiction. If a further source of authority were needed, the Necessary and Proper Clause may provide it.

Insofar as Congress might seek to restrict state court jurisdiction in conjunction with a restriction on the appellate jurisdiction of the Supreme Court, its authority would rest solely on the Necessary and Proper Clause. Congress could deprive the state courts of jurisdiction to entertain a constitutional challenge to state or federal legislation only if doing so was "necessary and proper for carrying into Execution" one of the powers of the federal government,[57] which presumably would include making effective or viable Congress's restraints on the Court's appellate jurisdiction.

Finally, we note that jurisdiction-stripping legislation might have a spillover impact on the Supreme Court's original jurisdiction. Because the Supreme Court's Article III original jurisdiction extends to cases "in which a State shall be [a] Party," any case brought by a state could potentially be filed under the Court's original jurisdiction.[58] For instance, the landmark voting rights case of *South Carolina v. Katzenbach*,[59] which upheld the Voting Rights Act against a broad constitutional challenge, was brought within the Court's original jurisdiction. We note that states have filed several high-profile challenges to federal policies in recent years.[60] While few of these challenges have been brought as original jurisdiction suits, the practice could take on more importance if politically salient jurisdiction-stripping legislation were enacted. The prospect of states filing original actions is significant partly because it is questionable whether Congress can restrict the *original* jurisdiction of the Supreme Court; the Article III exceptions power does not extend to Supreme Court original jurisdiction. Although the current original jurisdiction statute does not authorize the full extent of jurisdiction that the Article III appears to contemplate, some Justices and commenters have expressed doubts about Congress's capacity to confine the Court's original jurisdiction short of its constitutionally specified bounds.[61] In other words, original jurisdiction could potentially be an important loophole in many jurisdiction-stripping proposals.

2. *Sources of Limitations on Congress's Jurisdiction-Stripping Power*

For analytical purposes, it is helpful to distinguish two kinds of limitations on Congress's powers to restrict the jurisdiction of the Supreme Court, the lower federal courts, and state courts. One category includes limitations that are inherent in, or "internal" to, Article III's grant of jurisdiction-limiting powers to Congress. Another category of limitations arises from constitutional provisions that circumscribe congressional power by creating individual rights. In scholarly literature, such limits are often referred to as "external" limits on congressional power.

a. Limits from Within Article III

It is difficult to identify specific examples of clear and noncontroversial internal limits, because each possible limit is much debated among scholars. That said, it is easy to give general examples that illustrate the idea. In perhaps the best-known example, Professor Henry M. Hart,

Jr., argued in a much-celebrated contribution to the federal courts literature that the Constitution's provision that "the judicial Power of the United States shall be vested in one supreme Court" establishes an implicit limit, internal to Article III, on Congress's power to make exceptions to the Court's appellate jurisdiction.[62] Constitutionally authorized restrictions, Hart maintained, cannot go so far as to "destroy the essential role of the Supreme Court in the constitutional plan." To offer an illustration of this concern, a statute that limited the Court's appellate jurisdiction to cases presenting issues of statutory interpretation only—and thus excluded all constitutional issues—might be thought to destroy the Court's essential role and thus overreach Congress's power under the Exceptions Clause. We note, however, that some scholars and commentators appear unpersuaded by Hart's argument on this point.[63]

In another controversial example, some have argued that a jurisdiction-limiting statute would exceed Congress's powers if it were enacted for constitutionally forbidden purposes, whatever those might be.[64] Whether such an inquiry into purpose is appropriate is a subject of debate. *Ex parte McCardle* contains a dictum clearly precluding the inquiry. In response to the argument that Congress had withdrawn the Court's appellate jurisdiction for the forbidden purpose of preventing the enforcement of a constitutional right, the Court answered that "[w]e are not at liberty to inquire into the motives of the legislature."[65] But there is arguably language in *United States v. Klein* that supports the inquiry into forbidden purposes; there, the Court stated that jurisdiction-stripping legislation that is enacted "as a means to an end" that is not constitutionally valid "is not an exercise of the acknowledged power of Congress to make exceptions . . . to the appellate power."[66] In addition, Supreme Court decisions in the twentieth and twenty-first centuries have made legislative motives relevant to the assessment of statutes' constitutional validity under a broad range of other constitutional provisions, such as the First Amendment.[67] In light of those decisions, it is arguable that motive-based analysis could now be invoked.

b. Limits from Elsewhere in the Constitution

No one doubts that rights under some provisions of the Constitution define limits on Congress's power to restrict the jurisdiction of the Supreme Court and other courts. In *Boumediene v. Bush*, the Supreme Court affirmed that the Suspension Clause constitutes a rights-based limit on congressional power to curb jurisdiction over petitions for the writ of habeas corpus.[68] Although *Boumediene* was decided by a narrowly divided Court, it should be uncontroversial to say that a statute stripping jurisdiction over suits brought by racial minorities or adherents of a particular religion or political party would violate constitutional guarantees against discrimination.

Henry Hart famously argued that jurisdiction-limiting legislation would violate the Due Process Clause if it removed all grants of jurisdiction and all judicial remedies through which those rights might be vindicated, because a law of that kind would effectively destroy constitutional rights. According to Hart, it would be "monstrous illogic" to construe Congress's power to limit jurisdiction and withhold judicial remedies as a de facto power to destroy constitutional rights.[69] But there is little case law or other authority identifying where exactly the lines between the permissible and the impermissible are drawn.

Hart did not believe—and the Supreme Court has denied—that the Constitution guarantees an effective remedy in court to every person whose constitutional rights have been violated. Hart's concern about the nullification of rights appears to have involved systemic effects, such as those of imagined legislation that would make it impossible for anyone ever to judicially vindicate a particular constitutional right at all. But Hart again did not attempt line drawing of his own and ultimately equivocated even with regard to the question of whether and when a total deprivation of jurisdiction and remedies to enforce a right might violate the Constitution. "The multiplicity of remedies, and the fact that Congress has seldom if ever tried to take them all away, has prevented the issue from ever being squarely presented," he wrote.[70]

3. *The Constitutionality of Particular Jurisdiction-Curbing Proposals*

It would be infeasible to attempt to apply the principles delineated above—many of which, as we acknowledged, are disputed anyway—to all of the specific types of jurisdiction-curbing legislation that Congress might enact. Instead, we analyze some of the general issues that would arise from jurisdiction-curbing legislation within each of the three categories that we distinguished at the outset of Section I.B: First, we consider proposals that would restrict the appellate jurisdiction of the Supreme Court alone, while leaving lower court jurisdiction intact. Second, we consider proposals that would withdraw jurisdiction from all federal courts, while leaving state court jurisdiction intact. Finally, we consider proposals that would withdraw jurisdiction from all federal and state courts, including the Supreme Court, to rule on the constitutionality of federal (and possibly also state) legislation.

a. Restricting the Jurisdiction of Only the Supreme Court

If Congress were to withdraw the appellate jurisdiction of the Supreme Court over a class of cases—such as those challenging the constitutionality of a wealth tax or of prohibitions against abortion—while allowing such challenges to be litigated in other courts, including federal district courts and courts of appeals, challengers would likely argue that the restriction overstepped congressional power under the Exceptions Clause by precluding the Court from performing a function essential to its status as the nation's "one supreme Court." The argument would be that the Court is deprived of an aspect of its "supreme" status when it is denied the opportunity to pronounce authoritatively on a justiciable issue with respect to which the decisions of lower courts may diverge and might even (from the Court's perspective) err egregiously.[71] Proponents of this argument could acknowledge Congress's authority to withdraw rights to de novo appellate review by the Supreme Court, but insist that the Court must retain some minimal capacity to correct clear lower court errors—capacity that traditionally existed through "discretionary writs, such as mandamus, habeas corpus, and prohibition."[72]

When the Supreme Court confronted a statute that deprived it of appellate jurisdiction over a narrow class of court of appeals decisions in the habeas corpus case of *Felker v. Turpin*, the Court upheld the statute, but it emphasized—as it had more than a century earlier in *Ex parte McCardle*[73]—that it retained jurisdiction to oversee the courts of appeals by entertaining original applications for the writ.[74] As a result, there appears to be no squarely on-point precedent deciding whether Congress could more categorically strip the Supreme Court of all jurisdiction over a particular issue or set of issues that the lower courts could continue to decide. Perhaps the only clear conclusion is this: A total preclusion of all opportunity for Supreme Court oversight of

lower court decisions involving specific issues, statutes, or policies would run a greater risk of judicial invalidation than a less-than-total preclusion.

b. Restricting the Jurisdiction of All Federal Courts, but Not State Courts

There also appears to be no authoritative ruling and no consensus among scholars on the permissibility of Congress's stripping all federal courts of jurisdiction over a class of cases—which again might be cases challenging the constitutionality of a wealth tax or prohibitions against abortion—while permitting those specified issues to be litigated in the state courts. Reviving an argument that Justice Joseph Story advanced in the iconic case of *Martin v. Hunter's Lessee*,[75] one prominent modern commentator has argued energetically that legislation of this kind would violate the provision of Article III, Section 2, Clause 1 that "[t]he judicial Power [of the United States] shall extend *to all Cases, in Law and Equity, arising under this Constitution*, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[76] Under this principally text-based argument, the Exceptions Clause permits elimination of the Supreme Court's appellate jurisdiction in cases "arising under" federal law if and only if they are subject to the jurisdiction of the lower federal courts. Similarly, Congress can divest the lower federal courts of jurisdiction over cases presenting federal questions that remain within the Supreme Court's appellate jurisdiction to review state court judgments. But, the argument maintains, Congress cannot simultaneously preclude the exercise of jurisdiction by both the Supreme Court and the lower federal courts in cases arising under the Constitution, laws, and treaties of the United States.

Other distinguished modern scholars have disagreed with this argument on both originalist and precedent-based grounds.[77] Among other arguments, they maintain that Article III's provision that the judicial power shall extend to "all cases" under the Constitution serves mainly to clarify that Congress can provide for federal jurisdiction over both civil and criminal actions if it chooses to do so.[78]

c. Restricting the Jurisdiction of All Courts, Including State Courts

Simultaneous preclusion of jurisdiction by all courts to consider challenges to the constitutional validity of legislation would present a plethora of serious constitutional issues. Among other things, because a statute precluding all judicial jurisdiction would necessarily be invalid if a preclusion of all federal jurisdiction would be invalid, the grounds for constitutional objection cumulate as the scope of an attempted issue-specific preclusion of judicial review expands. Here we identify a few of the distinctive issues that a preclusion of all judicial jurisdiction would present, though without pretense of exhaustive treatment.

If Congress sought to deprive state courts of jurisdiction to rule on challenges to the constitutional validity of state legislation under the U.S. Constitution, there would be a serious question about the source of Congress's authority to do so. It is not obvious that a federal statute divesting state courts of jurisdiction to rule on the constitutionality of state legislation, for purposes other than granting exclusive jurisdiction to the federal courts, would be "necessary and proper" for carrying any federal power into execution.

If Congress sought to deprive all courts of jurisdiction to rule on the constitutional validity of federal legislation, a similar question would arise about the source of Congress's power. It might be argued that legislation of this kind would be "necessary and proper" to implement whatever substantive power supported the enactment of the federal legislation that Congress sought to shield from judicial scrutiny—for example, a statute imposing a wealth tax or barring abortions. But that conclusion would be disputable. The Necessary and Proper Clause, and the doctrine interpreting it, leave room for an argument that a categorical bar on judicial challenges to arguably unconstitutional legislation is not necessary and proper because of its adverse impact on constitutional rights.

Depending on the details of any particular measure that Congress might enact, rights-based restrictions on congressional authority would likely come into play, as well. The restrictions would perhaps be plainest if Congress sought to provide for coercive enforcement of a statute by the courts while purporting to withdraw judicial jurisdiction to entertain constitutional objections to the statute that courts were charged with enforcing. Consider, for example, if a doctor were prosecuted for violating a statute that forbade performing abortions, or a taxpayer were prosecuted for refusing to pay a wealth tax. If Congress purported to bar a court from entertaining defenses that the abortion prohibition or the wealth tax were unconstitutional, the doctor or the taxpayer would have a more than colorable argument that the "jurisdictional" statute violated the Due Process Clause or otherwise intruded on the courts' exercise of an irreducibly judicial function.

d. Conclusion on Constitutionality

Given the Exceptions Clause, Congress undoubtedly has some capacity to disempower the Supreme Court by restricting its jurisdiction if Congress should choose to do so. But the precise scope of congressional power is uncertain. Moreover, even if we were prepared to make conclusions about the proper resolution of disputed issues, the requisite judgments would depend on the fine-grained details of particular proposals.

That said, we offer three general conclusions: First, congressional legislation aimed at disempowering the Supreme Court by limiting its jurisdiction to resolve particular constitutional issues would likely trigger constitutional challenges. Second, depending on the precise form that jurisdiction-limiting legislation might take, the Supreme Court could plausibly find some of the possible challenges to be meritorious. Third, the more that jurisdiction-limiting legislation leaves open alternative avenues for judicial enforcement—such as through state courts and lower federal courts—the more likely it is to survive constitutional challenges. However, leaving open alternative avenues for judicial enforcement might also hinder jurisdiction-stripping legislation from achieving the ends that its proponents would wish to realize.

II. Proposals for Supermajority Rules or Deference Rules at the Supreme Court

A second way to reduce the Supreme Court's power would be to impose a supermajority voting requirement for decisions finding actions of the political branches unconstitutional, or alternatively, to require the Court to apply a deferential standard of review in constitutional cases. These proposals would make it more difficult than it is today for the Supreme Court to

invalidate legislation and other acts of the elected branches on constitutional grounds. Like other proposals discussed in this Chapter, they therefore would shift some power away from the Court, although they would still leave the Court as the ultimate authority over constitutional matters.

This Part provides an overview of supermajority voting requirements and deferential standards of review as potential reforms. It begins with a historical and comparative look at proposals for supermajority voting requirements advanced at earlier times in U.S. history and approaches adopted in foreign and state courts. It next considers the advantages and potential drawbacks of a supermajority voting rule and assesses the feasibility of particular approaches to implementation, particularly by considering the implications for the lower courts of a supermajority rule at the Supreme Court. It then considers the advantages and drawbacks of reducing the Court's power by requiring a deferential standard of review. Finally, this Part concludes by examining Congress's power under the Constitution to impose either type of reform.

A. Supermajority Voting Requirements—Historical and Comparative Context

Proposals for supermajority voting requirements generally focus on the U.S. Supreme Court. Federal district judges preside alone, or on three-judge panels, such that decisions by the district courts are either unanimous or by 2-1 panel vote. Similarly, federal courts of appeals typically preside in three-judge panels, deciding cases either unanimously or by 2-1 panel vote, though when they sit en banc, a supermajority requirement could be applied to change their current simple majority voting practice. Congress might prescribe supermajority voting rules for state courts, but this is an uncommon suggestion and, as discussed below, it may be subject to substantial constitutional objections.

By longstanding practice, the U.S. Supreme Court decides cases by simple majority vote. Neither Article III of the Constitution nor Congress in the 1789 Judiciary Act directly specified how the Supreme Court's cases should be decided. From the beginning, however, the Court appears to have assumed that a simple majority vote was sufficient to determine its rulings—a conclusion generally consistent with the practices of Anglo-American multimember courts of the time.

The first proposal in Congress for a supermajority voting requirement at the Supreme Court seems to have been made in 1823, and over sixty such proposals have been offered at various times since then.[79] During the Reconstruction Era, the Republican-controlled House of Representatives passed a bill imposing a supermajority vote requirement for invalidating federal legislation, but the Senate did not act on it.[80] In the 1920s, Idaho Senator William Borah made an influential proposal to require that:

> in all suits now pending, or which may hereafter be pending, in the Supreme Court of the United States, except cases affecting ambassadors, other public ministers, and consuls and those in which a State shall be a party, where is drawn in question an Act of Congress on the ground of repugnancy to the Constitution of the United States, at least seven members of the court concur before pronouncing said law unconstitutional.[81]

A more recent proposal, from 1967, encompassed rulings against both state and federal law:

> The Supreme Court may not in any case hold that any provision of an Act of Congress, an Act of the legislature of any State, or a constitution of a State is invalid because it violates a provision of the Constitution of the United States unless at least six Justices of the Supreme Court concur in that holding.[82]

Many (perhaps all) of these proposals appear to have been reactions to particular rulings or lines of rulings of the Court, or concerns about particular rulings the Court might issue. For example, in the 1820s, members of Congress were principally concerned about Supreme Court decisions invalidating state laws.[83] After the Civil War, Congress worried that the Court might invalidate Reconstruction legislation or even question the validity of the Fourteenth Amendment itself; in the early twentieth century, Senator Borah and his supporters were reacting to pro-business decisions issued by narrow majorities of the Court.[84]

Although Congress never enacted a supermajority rule for Supreme Court voting, North Dakota, Nebraska, and Ohio each adopted supermajority voting for their supreme courts in the early twentieth century. The North Dakota Constitution provides that the state supreme court "shall not declare a legislative enactment unconstitutional unless at least four of the [five] members of the court so decide."[85] Similarly, the Nebraska Constitution provides: "No legislative act shall be held unconstitutional except by the concurrence of five [of seven] judges."[86] A scholarly examination of experience under these provisions suggests that they have not posed significant operational difficulties.[87] Ohio adopted a similar constitutional amendment in 1912, which it repealed in 1968 after experiencing difficulties in practice.[88]

Although majority voting is the most common practice among multimember courts worldwide, a number of high courts outside the United States (including in Mexico and South Korea) operate under a supermajority voting requirement for constitutional adjudication. According to a recent study, at least ten countries have such a requirement, typically imposed in their constitutions.[89] Some of these countries have substantial experience with constitutional litigation under supermajority voting rules. For example, South Korea adopted the current version of its supermajority rule for its constitutional court in 1987, requiring the votes of six out of nine justices to find a statute unconstitutional. A study of the South Korean constitutional court counted sixty-two cases from 1987 to 2016 decided by a 4-5 vote (that is, in which five, but not more than five, justices thought the statute was unconstitutional), along with a substantial docket of constitutional cases in which the votes were not so closely divided.[90] The study does not suggest significant tensions arising in Korean law or in the conduct of the court as a result of the supermajority voting rule, although it identifies a few issues of implementation.[91] Comparative experience also indicates that a supermajority voting rule does not necessarily prevent a constitutional court from issuing important rulings finding statutes to be unconstitutional. For example, Mexico's Supreme Court—despite operating under a rule generally requiring the vote of 8 of 11 justices to invalidate legislation—has issued a number of important constitutional rulings against the government.[92]

B. Evaluating Supermajority Voting Requirements

In this section, we begin by articulating the arguments made by proponents of supermajority voting requirements as well as those made by skeptics. We then evaluate the extent to which supermajority voting rules would achieve the goals of their proponents and

identify some implementation concerns that must be taken into account when considering these proposals.

1. *Goals and Risks*

The principal goal of proposals for supermajority voting requirements is to make it more difficult for the Court to invalidate laws or other government actions on constitutional grounds. A supermajority voting requirement would require broader agreement among the Justices with the judgment of unconstitutionality than under a simple majority voting rule. In the view of advocates of these proposals, the Court today is not sufficiently deferential to lawmakers by historical standards; it is too prone to overturning laws and thwarting the outcomes of the democratic process.[93] Relatedly, proponents emphasize that the Court has resolved too many disputed constitutional issues by narrow 5-4 majorities, particularly in the modern era.[94] This observation sometimes centers specifically on the Court's perceived willingness to overturn acts of Congress, while other times it is raised more generally about the Court's resolution of disputed matters of social policy. Some proponents of these proposals view supermajority voting requirements as a bright-line, readily enforceable means of approximating the kind of deference to legislative judgment that James Bradley Thayer sought to achieve through a "rule of [judicial] administration" under which courts would invalidate congressional legislation only in cases of "clear" unconstitutionality.[95]

Some scholars also ground their support for supermajority voting on the greater likelihood that the Court will reach correct constitutional decisions if a supermajority must agree that a law is unconstitutional.[96] Supermajority requirements would, in their view, also enhance deliberation and consensus-building among the Justices, leading on balance to superior outcomes.[97]

For skeptics of supermajority voting rules, a central concern is that such measures would undercut judicial capacity to protect constitutional rights against majoritarian overreach. One longstanding, conventional view of the courts and constitutional review is that they serve as a valuable countermajoritarian check on the political branches by vindicating individual and structural rights in constitutional cases, limiting the abuse of power by overweening legislatures and executive officers.[98] A supermajority voting requirement would make it more difficult for courts to protect constitutional rights as they interpret them. A related concern is that a supermajority voting rule would weaken courts' ability to protect the constitutional structures of federalism and separation of powers against encroachment by Congress. Supermajority voting rules thus might not only enhance congressional power as compared to the courts; they might also enhance congressional power as compared to the states and the executive branch.

Supporters of disempowering proposals counter that supermajority voting requirements actually may bolster constitutional rights precisely by restricting the Supreme Court, on the ground that "rights protection may well be available in superior form through political branches."[99] Instead of looking exclusively to courts as protectors of individual rights and legislatures as threats to those rights, such commentators admire legislative efforts like the Voting Rights Act as protective of constitutional rights and criticize the Court's decision to invalidate Section 4 of the Voting Rights Act in *Shelby County v. Holder*.[100] They see an important role for the political branches in promoting constitutional freedom that courts recently,

in their view, have undercut.[101] Moreover, if one thinks the courts are too protective of the states and the executive branch, or that structural disputes are better worked out politically rather than through the judiciary, enhancing congressional power in the area would be an advantage.

2. *Efficacy and Implementation*

Any ultimate assessment of the systemic consequences of supermajority voting requirements will depend on one's perspective on the role the Supreme Court and the federal judiciary ought to play within our system of government and on how well the democratic lawmaking process and its various institutions currently operate. Evaluating these proposals will hinge in large part on one's view of the relative abilities of courts and legislatures to protect constitutional rights. Whatever one's perspective on this question, which we do not purport to answer, we think it useful to offer observations concerning the likely effects of a supermajority voting requirement for the Supreme Court.

We believe that supermajority voting requirements are likely to achieve at least some of the effects intended by proponents. Supermajority voting may shift authority over constitutional questions marginally away from the Supreme Court and toward other government actors by reducing the likelihood that the Court would find actions of the political branches unconstitutional. But supermajority requirements also would bring with them their own potential costs, and it is uncertain that greater "correctness" would result from supermajority voting in the absence of agreed upon criteria for differentiating correct from incorrect decisions.[102] The extent of success would depend on how the supermajority voting requirements were imposed, and the general idea of supermajority voting gives rise to some specific implementation challenges, particularly given the wide range of cases that come before the Court in varied procedural posture. Below, we highlight a few of the many complications that might arise.

First, a supermajority requirement would complicate the Supreme Court's supervision of the courts of appeals. Though a full accounting of these technical issues would be too extensive to analyze in detail here, it is important to consider what the weight of a 5-4 decision of the Supreme Court would be in a world where a 6-3 decision is required to find a statute unconstitutional. Imagine that the Supreme Court votes 5-4 to affirm a lower court decision that invalidated a federal law on constitutional grounds. What happens to the constitutional challenge? The 5-4 vote falls short of the requisite supermajority needed to find unconstitutionality, so does the Court's decision amount to a decision to reverse the lower court judgment invalidating the statute? We would assume so, given that the principal motivation for the supermajority rule is greater judicial deference to the political branches. The alternative, in which the lower court decision is undisturbed, would not actually promote judicial deference; it would only shift power from the Supreme Court to the lower courts.

But this disjunction between the majority of judges who have heard a case and concluded that a law is unconstitutional and the legal outcome of the case dictated by the supermajority voting requirement could cause confusion for subsequent courts that must interpret the doctrinal meaning of those cases. Should courts follow the reasoning of the majority of Justices in the 5-4 case, or disregard the majority opinion and instead follow the reasoning of the four-Justice minority that controls the outcome of the case under the supermajority requirement? The greater precedential weight given to the minority's opinion, the greater the level of deference produced

by the new supermajority requirement. These issues are novel, as far as we can tell, for U.S. law. Past practice with supermajority voting at the state level is too sparse to establish a clear model for judicial decisionmaking. As noted, other countries with supermajority voting requirements for their highest court apply their rules without substantial difficulty, but these systems are often procedurally distinct from the U.S. system, particularly in terms of appellate structure.[103]

Second, Congress might consider extending a supermajority voting requirement to lower federal courts or state courts in addition to the Supreme Court. As noted, this extension would not change current practice for lower federal courts apart from en banc hearings. Most state supreme courts use majority voting, but their cases generally involve state law rather than federal law, so the effect (assuming it applied only to decisions under the U.S. Constitution) would not be wide-reaching.

A supermajority voting requirement applied only to the U.S. Supreme Court (or to all federal courts) might have the incidental effect of empowering state courts. Even if Congress extended a supermajority voting requirement to state supreme courts when they decide federal constitutional questions, state courts would still remain free to decide the constitutionality of state laws under their state constitutions, which often contain guarantees that parallel the federal Constitution.[104] These state-law guarantees would likely increase in importance if courts were constrained in their authority to decide under the federal Constitution (assuming the supermajority vote requirement applies only to federal constitutional questions). As discussed in connection with jurisdiction stripping, it is not necessarily preferable to have state courts substitute for federal courts in constitutional review of state lawmaking.

Third, in designing a supermajority voting rule, Congress also would need to consider to which laws or actions it would apply. Supermajority voting requirements could be imposed for review of (i) only federal legislation; (ii) federal legislation and federal executive actions; or (iii) all federal and state lawmaking. The reduction in judicial influence vis-à-vis the other branches of government would vary in step with the reach of the supermajority voting requirement. Simply put, the more actions to which the supermajority voting requirement applied, the greater the shift in influence to other institutions such as Congress, the Presidency, and state legislatures.

The proper specification of scope depends on the particular motivation for imposing a supermajority voting requirement. If the motivation is limited to addressing the courts' insufficient constitutional deference to Congress, then extension of the requirement to cases involving executive action or state laws seems unnecessary. However, if the motivation is a broader concern about judicial countermajoritarianism and insufficient judicial deference generally to the full political process, extension of the supermajority voting requirement to cases involving a wider spectrum of democratic actors makes more sense. Again, extension of the requirement beyond federal actors and federal law complicates the constitutional analysis, as we discuss in the next Section.

Another important question of scope is whether the requirements would apply to all laws or just to those that Congress singled out on an issue-specific or even a law-specific basis. For example, instead of specifying a supermajority voting rule for all constitutional decisions of the Supreme Court, Congress might do so only for constitutional review of a wealth tax or only for constitutional review of abortion restrictions. As we discuss further in our constitutional analysis,

whether a supermajority voting rule applies generally or on an issue-specific basis might influence its constitutionality as well.

No matter how the requirement is designed, a supermajority voting requirement is likely to affect only a limited number of cases as a practical matter. By its terms, the requirement would not affect cases where a majority of the Court votes to uphold the action in question. In addition, the requirement would not change the outcome where the Court finds a constitutional violation by a supermajority vote. Unlike other disempowering reforms such as jurisdiction stripping, a supermajority voting rule would leave the Court (and lower courts) with clear authority to invalidate laws for unconstitutionality. The supermajority requirement changes outcomes only where the Court would invalidate a law by a bare majority rather than a supermajority.[105]

Of course, the relatively few close cases where a supermajority voting requirement would affect the outcome may be quite important. *Shelby County v. Holder*, in which a 5-4 majority of the Supreme Court invalidated Section 4 of the Voting Rights Act, was such a case.[106] Similarly, *United States v. Windsor*, where a 5-4 Court majority declared unconstitutional part of the Defense of Marriage Act,[107] also would have been decided otherwise under a supermajority voting rule. Much of the support for disempowering reforms galvanizes around similarly controversial closely decided cases, in which the Court has divided narrowly along ideological or partisan lines. For those critical cases, supermajority voting requirements could marginally redistribute resolution of close constitutional calls to Congress, where these advocates contend they belong.[108] In addition, even if a supermajority voting rule changes the outcomes of only a few Supreme Court cases, the jurisprudential consequences of these decisions may be far reaching, as they may set legal precedent for a large number of lower-court cases as well. For instance, a decision in which only a bare majority, but not a supermajority, of Justices thought the application of a statute to a criminal defendant violated the defendant's constitutional rights would apply potentially to many other cases involving the same statute; similarly situated defendants thus might be precluded from raising the same constitutional claim against the federal criminal statute.

An additional challenge involving the application of supermajority voting rules is that Supreme Court or lower court en banc majorities may be able to achieve their preferred outcomes despite a supermajority requirement by narrowly interpreting laws rather than finding them unconstitutional. A supermajority voting requirement would apply only when courts find a constitutional violation but (we assume) not when a court simply reads a law to have a narrow application that stunts its impact. In those cases, a court would avoid the supermajority requirement by understanding it not to be triggered in the first place. One witness testified before us that courts in Japan and the United Kingdom are widely known for their judicial restraint regarding outright invalidation of legislation, but they nonetheless engage in "wide-ranging sub-constitutional review in the guise of statutory (re)interpretation" that effectively limits the purpose and reach of challenged laws.[109]

C. Deferential Standards of Review

Another means of reducing the power of the judiciary by changing its decisionmaking practices would be for Congress to impose a deferential standard of review in constitutional

cases. (We assume this reform would apply to the judiciary generally, as it appears to make little sense to impose deference only on the Supreme Court.) Like a supermajority voting requirement, this reform would have the purpose of reducing the courts' propensity to invalidate acts of Congress (or acts of the political branches and the states more generally, depending on how the standard is designed).[110] Congress could provide by statute that the federal courts shall not invalidate legislation (or other government action) unless the court concludes that it is clearly unconstitutional (or some similar standard). As mentioned earlier, James Bradley Thayer famously proposed a standard of clear unconstitutionality before courts should invalidate congressional statutes, though his proposal was principally directed to courts themselves rather than as a legislative reform.[111] Notably, the Court on its own initiative has adopted highly deferential standards of review in particular subject areas of constitutional adjudication, such as review of ordinary economic regulation for consistency with the Due Process and Equal Protection Clauses.[112]

Though Congress has sometimes imposed deferential standards of review on the federal courts with respect to statutory and other sub-constitutional questions of law,[113] requiring a more deferential standard of review for constitutional questions has been quite uncommon. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress imposed a highly deferential standard of review on federal courts (in a different context) that might offer a potential example; the statute prohibited federal courts from granting federal habeas corpus relief to state criminal defendants unless the previous state court adjudication of the claim was an "unreasonable application of clearly established federal law" or based on an "unreasonable determination" of the facts.[114] Congress could consider imposing a similarly deferential standard on constitutional review of legislation.

A deferential standard of judicial review would be functionally similar to, but distinct from, a supermajority voting requirement. It would achieve greater deference than current practice by requiring greater subjective certainty as to a law's unconstitutionality from each judge before voting to invalidate a law. But at the Supreme Court only a simple majority of Justices would need to vote in favor of unconstitutionality for a statute to be invalidated. By comparison, a supermajority voting requirement is what some scholars call a "hard solution."[115] It would not require the Justices to adjust their subjective evaluations, but it would seek to protect the decisions of the elected branches by requiring a greater number of Justices to find unconstitutionality. A supermajority voting requirement would not directly impose the clear unconstitutionality standard advocated by Thayer, because it would not restrict judges to voting to invalidate statutes only in cases of clear error. For example, it is possible that a supermajority of Justices could agree that it was a close (not clear) question whether a statute was constitutional but decide that the statute was ultimately unconstitutional. In such a situation, a supermajority of Justices might still decide in favor of unconstitutionality and therefore satisfy the supermajority voting requirement, in spite of the fact that they also agree that the constitutional question is a close or debatable one. Supermajority voting requirements and heightened deference standards thus can produce different outcomes.

A required deferential standard of review seems easier to adopt than a supermajority voting requirement, avoiding some of the complexities mentioned above. It might be less effective in shifting power away from the courts, depending on the extent to which judges were

willing to internalize an externally imposed deference standard. Like a supermajority voting requirement, it might lead courts to reach their preferred outcomes by sub-constitutional means, such as by interpreting statutes narrowly. Also like a supermajority voting requirement, the principal objection would seem to be that it would lessen courts' ability to protect constitutional rights and structure from transgressions by Congress and the executive.

D. The Constitutional Permissibility of Supermajority Voting and Deference Rules

1. *Supermajority rules*

Whether Congress could impose some form of supermajority voting requirement on the Supreme Court without a constitutional amendment is a difficult question.[116] As with jurisdiction-stripping legislation discussed earlier, a central issue would be the constitutional source of Congress's power. Again, like jurisdiction stripping, one possibility is the Exceptions and Regulations Clause of Article III, which grants the Supreme Court "appellate Jurisdiction, as to both Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[117] Reliance on this provision would be subject to many of the difficulties discussed earlier with respect to jurisdiction stripping. Further, it is less clear that this clause allows Congress to regulate decisionmaking procedures of the Court, as opposed to matters affecting its jurisdiction—the term used in the text. However, one could argue that a supermajority voting rule is a "regulation" of the manner in which the Court exercises its appellate jurisdiction.[118]

To the extent the power to create supermajority voting rules is located in the Exceptions and Regulations Clause, that power would likely not extend to matters under the Court's original jurisdiction, which is described in a separate sentence of Article III and so appears not to be covered by the Exceptions and Regulations Clause.[119] That could create an odd situation: The majority required to overturn a statute on constitutional grounds would depend on the route the case took to reach the Court. Although the vast majority of cases currently reach the Court through its appellate jurisdiction, that might change if the supermajority rule applied to one type of jurisdiction but not the other.[120]

Another possible source of congressional authority to impose a supermajority voting rule might be the Necessary and Proper Clause of Article I, Section 8.[121] That clause grants Congress authority to "Make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." It is commonly understood that this clause is the source of Congress's power to legislate with respect to the structure and procedures of the Court. For example, Congress has by statute designated the size of the Court as nine Justices,[122] with a quorum of six required for issuing decisions,[123] and set the start of the Court's annual Term (the first Monday in October),[124] to be held at the "seat of government."[125] These statutory provisions "carry[] into Execution" the judicial power vested in the Supreme Court by the Constitution.

However, one might conclude that Congress's power to carry into execution the powers of the Supreme Court only empowers Congress to facilitate the operation of the Court. Legislation designed to limit the power of the Court (as a supermajority voting requirement might plausibly be described) would arguably not be enacted to carry into execution the Court's power, but rather to frustrate (to some extent) the Court's power. It thus might not be regarded as "necessary and proper" to a constitutionally permissible purpose.

Alternatively, one might locate Congress's power to prescribe judicial supermajority voting rules in Congress's power to make laws necessary and proper to carry into execution Congress's own powers. For example, in legislating to regulate commerce among the states, Congress might think that limiting the Court's review of such legislation is necessary and proper to giving that legislation full effect. But one might also conclude that Congress's power to effectuate its own legislation does not extend to limiting the Court's power of constitutional review (or, in textual terms, that limiting the Court's review is not "necessary and proper" to Congress's exercising its own power).

Regardless of the potential sources of congressional power, the Court might also take the position that judicial action by majority vote is implied by the grant of "the judicial Power" to the Court in Article III,[126] since action by majority is the usual and historical practice of multimember courts and was the presumed way that courts operated at the time of the Founding. At minimum, it might be thought that the power to determine voting rules lies with the courts through the Constitution's vesting of the judicial power. On this view, Congress would not have power to interfere with a power constitutionally granted to another branch. However, judicial action by majority vote could also be viewed merely as a default rule that could be altered by Congress, assuming Congress had an applicable power granted to it by the Constitution.

There is little precedent or practice to inform any of these matters. Congress has rarely acted in ways that materially restrict the Court's decisionmaking procedures. As discussed in Part I of this Chapter, scholars have debated how the Supreme Court's decision in *United States v. Klein*[127] affects Congress's powers to control the Court's decisionmaking. *Klein*'s implications for Congress's power to impose a supermajority voting rule on the Court are uncertain.[128] One reading of *Klein* is that Congress infringes the judicial power when it directs courts to reach an unconstitutional result, which arguably would be the effect of a supermajority voting rule. Thus, the Court might conclude that *Klein* bars Congress from influencing judicial outcomes through devices such as a supermajority voting rule.

A supermajority voting requirement could be restricted by Congress to particular pieces of legislation, or alternately to a specified area of law, where congressional action arguably warrants greater judicial deference. For instance, Congress might understand the Fourteenth Amendment's textual direction that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article" as granting Congress broader prerogatives vis-à-vis the courts. The argument would be that a higher bar should apply before courts can invalidate legislation enacted under the specified congressional enforcement powers. To be sure, this position likely would not withstand review by the Supreme Court, absent a change in doctrine. In a different context, the Supreme Court, in *City of Boerne v. Flores*,[129] largely rejected the view that Congress possesses enhanced authority to interpret the Constitution when acting pursuant to its Fourteenth Amendment enforcement power. Still, four dissenting Justices and many scholars

from across the political spectrum[130] have argued that historical and textual considerations support broader congressional interpretative authority with respect to the Fourteenth Amendment than the Court majority recognized.

Attempts by Congress to impose broad versions of the supermajority voting rule—for example, extending it to state courts or to judicial review of state legislation—seem even more likely to raise constitutional doubts as to the source of Congress's power. Any claim of congressional power to regulate voting requirements in state courts would need to rely on its power under the Necessary and Proper Clause. To the extent that the Necessary and Proper Clause allows Congress to impose a supermajority rule on the Supreme Court's review of federal legislation (an untested proposition), that power might also be thought to extend equally to state court review of federal legislation. Requiring state court supermajorities to invalidate federal legislation might similarly be necessary and proper to implementation of federal policies. Requiring state court supermajorities to invalidate state legislation on federal constitutional grounds seems less capable of justification under the Necessary and Proper Clause, as it would not involve the implementation of federal legislation.

In sum, while definite conclusions are elusive in this area and the analysis will vary depending on the particular contours of any proposed reform, it seems quite plausible that the Court would find a congressional attempt to impose a supermajority rule on the Court's decisionmaking, or courts generally, to be beyond Congress's power. It should be noted that Congress might be able to impose a version of a supermajority rule on the Court by prescribing an even number of Justices. As discussed in Chapter 2, Congress has broad power to establish the number of Justices on the Court.[131] Even using a rule of majority vote, a six-Justice Court in effect requires a 2/3 supermajority vote (four of six) to act, while an eight-Justice Court in effect requires a 62.5% supermajority (five of eight).

2. *Deferential Standards of Review*

The related proposal discussed above—for Congress to limit the Court's authority to situations of clear constitutional error (or a similar standard of review)—would raise generally parallel constitutional issues. There would first be the question of the constitutional source of Congress's power. Congress might claim power from the Exceptions and Regulations Clause or from the Necessary and Proper Clause, each of which would be subject to the potential objections noted above in relation to supermajority voting proposals. There might also be the objection that establishing a standard of constitutional review for the Court, like establishing a voting procedure in constitutional cases, is committed to the Court, not Congress, by the vesting of "the judicial Power" in the courts in Article III, Section 1.

Congress commonly prescribes standards of review for courts in statutory and administrative matters, and this is generally not thought to raise constitutional problems. For example, the Administrative Procedure Act provides for judicial review of certain agency actions under an "arbitrary or capricious" standard, and some statutes wholly preclude judicial review of administrative or executive determinations. As described previously, in AEDPA Congress imposed a deferential standard of review on federal courts' habeas corpus review of state criminal convictions, and the Supreme Court has routinely applied AEDPA without finding constitutional problems.[132] However, a congressionally prescribed standard of review for

constitutional claims more generally is arguably distinguishable. AEDPA applies only to cases on collateral review after state court convictions have been upheld pursuant to nondeferential standards on direct review or otherwise have ripened into final judgments. The Court might well find a congressionally mandated standard of review in constitutional cases to be an infringement of the judicial power.

Of course, a supermajority voting rule or a deferential standard of review could be imposed by constitutional amendment, regardless of any limitations under the current Constitution. Several of the historical proposals for supermajority voting requirements took the form of constitutional amendments.[133] As discussed above, there would be substantial technical issues of implementation, particularly for supermajority rules, but these could conceivably be addressed by careful drafting.

III. Proposals to Enable Legislative Overrides of Supreme Court Decisions

Another way to reduce the Supreme Court's power would be to allow Congress to override Court decisions that strike down federal or state legislation on constitutional grounds.[134] A constitutional amendment adopting a system of legislative overrides was urged in the Progressive Era and during the New Deal period. More recently, the idea of an override has been floated by advocates on both the right and left of the political spectrum as a way to minimize judicial supremacy—i.e., the system under which the Court is the final and authoritative arbiter of the constitutionality of statutes or executive action. Legislative overrides exist in several countries, including in Canada and Israel, and other countries reject judicial supremacy even without a formal system of legislative overrides.

Legislative override systems can take different forms. For example, section 33 of the Canadian Charter of Rights and Freedoms, known as the "notwithstanding clause," allows both the federal Parliament and the provincial legislatures to "expressly declare" by a simple majority that a law "shall operate notwithstanding" a provision in the Charter, whether or not a court has already ruled the law unconstitutional. Only some Charter provisions may be overridden, and an override ceases to have effect five years after it comes into force, though it may be reenacted by the legislature upon its expiration.[135] Israel's legislative override system is similar but allows an override only by the national parliament, applies only to the right to "freedom of occupation," and has a four-year sunset provision.[136]

A constitutional amendment establishing a legislative override system would allow Congress and the President to override Supreme Court decisions that strike down legislation on constitutional grounds. The system could follow the ordinary legislative process of bicameralism and presentment; alternatively, an override could require a super-majority vote by both houses of Congress, as well as presidential signature. A system could allow override of any court decision striking down a statute on constitutional grounds, or it could be limited to decisions involving certain constitutional provisions. It could allow permanent override of decisions or it could specify that the override will sunset after a particular period of time, at which point the courts' prior interpretation would prevail. In addition, the system could allow Congress to act prospectively in anticipation of a negative court decision or only after a court has struck down legislation.[137]

Supporters argue that legislative overrides would cabin excessive judicial power in favor of democratic decisionmaking, while also encouraging greater constitutional discourse and deliberation within the legislative and executive branches and among the public as part of the political process. They contend that the system can be designed in ways to minimize risk to individual rights, structural design, and the stability of law. Perhaps because an explicit override system would very likely require a constitutional amendment, the academic debate on legislative overrides is relatively limited. No recent commentator has offered a programmatic blueprint for overrides, though arguments have long existed to support the assertion of constitutional interpretive authority by Congress (and the Executive) in ways short of an override. In the analysis that follows, we briefly provide a historical background, an evaluation of various forms of legislative overrides, and a constitutional assessment.

A. Constitutional and Historical Background

As discussed in the Introduction to this Chapter, it is widely believed that the Supreme Court has the last word when it comes to constitutional interpretation and that its decisions bind not only the parties in a particular case but also future action by the President, Congress, and the states. This approach to judicial review—known as "judicial supremacy"—has been embraced by the Supreme Court for many decades.[138] Yet the extent of the Court's authority to serve as the final interpreter of the Constitution—or to foreclose contrary interpretation by other branches of government acting in their own spheres—has also long been contested.

In the early years of the Republic, many argued that each of the three branches of government was endowed with the power of constitutional interpretation. As long as legislative and executive branch actors obeyed specific Court orders in specific cases, they could act on a contrary interpretation of the Constitution.[139]

Those who embrace judicial supremacy often point to Chief Justice John Marshall's famous pronouncement in *Marbury v. Madison* that "it is emphatically the province and duty of the judicial department to say what the law is."[140] Indeed, that line has been cited by the Supreme Court in recent decades to support a strong approach to judicial supremacy. However, according to many scholars, Chief Justice Marshall was asserting only the authority of judicial review—i.e., the power of a court to refuse to give effect to an act or mandate of a coordinate branch of government—not the power of judicial supremacy. Moreover, over the course of the country's history, numerous Presidents have claimed the right to engage in independent and co-equal constitutional interpretation. Although nearly all Presidents have conceded that they are bound by direct orders from the Supreme Court, they have also offered their own constitutional interpretations through signing statements, litigation, and enforcement practices that have been in tension with, or even contrary to, Supreme Court precedent.[141] Likewise, Congress has sometimes resisted—or refused to acquiesce to—the Court's constitutional interpretations, for example by attempting to overrule Court decisions through legislation, or by enacting statutes in considerable tension with prior Supreme Court decisions.[142]

On several occasions over the course of U.S. history, advocates have sought to amend the Constitution in order to grant Congress power to overrule the Supreme Court's rulings striking down federal statutes through a formal system of legislative overrides. The Progressive Party, which ran a ticket with Senator Robert LaFollette (Wisconsin) and Senator Burton Wheeler

(Montana) in the 1924 presidential election, included a provision in its platform calling for "a constitutional amendment providing that Congress may by enacting a statute make it effective over a judicial veto."[143] LaFollette was a vocal advocate for the amendment, which would have allowed Congress to override the Supreme Court by repassing any legislation previously declared unconstitutional.[144]

In 1937, Senator Wheeler, who remained a Democratic Senator from Montana following his unsuccessful bid for the Vice Presidency, along with Senator Homer Bone, a Republican from Washington State, introduced a variation on the Progressive Era proposal. Their constitutional amendment would have allowed Congress, by a two-thirds vote of each Chamber, to overturn a Supreme Court decision holding an act unconstitutional—but not until after the election following the Supreme Court decision.[145] Notably, Senator Wheeler was a strong supporter of the New Deal but adamantly opposed President Franklin D. Roosevelt's proposal to increase the size of the Supreme Court.[146] Reportedly, two of President Roosevelt's closest advisors, Benjamin Cohen and Thomas Corcoran, also privately opposed the proposal for Court expansion in favor of a constitutional amendment similar to the one proposed by Senator Wheeler. Their version would have allowed Congress to overturn immediately a Supreme Court constitutional decision striking down a federal statute by a two-thirds vote from each chamber, or to overturn such a decision by a simple majority following the next election.[147]

More recently, proposals for overrides by Congress have appeared only in academic writing and public commentary. For example, in 1996, Robert H. Bork—who served as a judge on the D.C. Circuit and as Solicitor General of the United States—wrote an essay in which he argued that the "most important moral, political, and cultural decisions affecting our lives are steadily being removed from democratic control." He suggested that the Constitution be amended to enable modification or reversal of Supreme Court decisions by a simple majority vote of the Senate and House of Representatives.[148] A few scholars from the opposite side of the political spectrum from Bork have recently expressed support for legislative overrides, albeit without offering any detailed proposal.[149] Meanwhile, at the state level, numerous state legislators have introduced legislation to allow overrides of state court decisions, though none of these efforts has been successful.[150]

B. Evaluation of Override Proposals

In this Section, we consider (a) the goals of a system of overrides and whether such goals are likely to be achieved by the reform; and (b) the overall consequences for the functioning of the constitutional system if overrides are successfully implemented. We also distinguish among different forms of override systems. For the purposes of this analysis, we assume that an override system would be adopted through constitutional amendment, though we discuss the arguments regarding how Congress might engage in independent constitutional interpretation or attempt to limit the reach of Supreme Court decisions in Part III.C.

As with the other reforms discussed in this Chapter, we note that a system of legislative overrides has no inherent or fixed partisan or ideological valence—an override system could be used to advance the goals of any legislative majority or supermajority. However, some commentators have argued that elite interests are more likely to find a favorable audience with the Supreme Court, and therefore to benefit from a system of judicial supremacy; on this

account, shifting power away from the courts and toward the legislature would benefit non-elites.[151] Others, however, have argued that Congress is also more responsive to elites than it is to non-elites or the poor.[152]

1. *Goals and Efficacy*

Congress on occasion has enacted one-off efforts to override a Supreme Court decision. But its efforts, such as its attempt to override the Court's decision in *Miranda v. Arizona*[153] with the Omnibus Crime Bill of 1968, have tended to have subject-specific goals (to change a particular constitutional doctrine) and have generally been rebuffed by the Court.[154] The goals of a constitutional amendment enabling legislative overrides would be more fundamental. Their chief aim would be to allocate power away from the Supreme Court and toward the elected branches. Proponents of legislative overrides, as with other disempowerment reforms, worry that the Supreme Court exercises excessive power over the resolution of major social, political, and cultural decisions—decisions that would be better resolved through the democratic process. As we discuss in the Introduction to this Chapter, for these critics, the Supreme Court's fundamentally "countermajoritarian" character is in tension with the basic commitments of a democracy.

The concern about excessive Court power is not limited to one political camp. Conservatives objected to the Warren Court's assertion of judicial supremacy in desegregation and criminal law cases,[155] as well as to more recent rulings striking down prohibitions on gay marriage and restrictions on abortion. On the left, concerns about judicial supremacy, dominant during the early twentieth century when the Court routinely struck down legislation protective of workers and consumers, have returned in recent years as the Court has exercised less deference to congressional judgments about the scope of the Reconstruction Amendments and civil rights (e.g., in voting rights cases such as *Shelby County v. Holder*),[156] and as it has used the First Amendment to invalidate campaign finance regulation and union security agreements.[157]

Proponents of legislative overrides also emphasize two other, related goals: Overrides would strengthen the system of checks and balances by allowing Congress power to override the Court much like it can override presidential vetoes, and they would strengthen public deliberation and discourse on constitutional matters by empowering the people's representatives to decide constitutional questions and thus returning such questions directly to the political process.[158]

As a theoretical matter, a system of legislative overrides should accomplish all three of the goals their proponents advance. By expressly allowing Congress to overrule the Court's constitutional decisions, the power of Congress over fundamental social, political, and cultural decisions would be augmented, the power of the Court would be checked, and more actors would be engaged in constitutional interpretation.

In practice, however, the evidence from countries with both judicial review and legislative override systems—chiefly Canada and Israel—is mixed.[159] In both Canada and Israel, despite language in the constitutions enabling legislative overrides, the federal legislatures have used the power rarely.[160] One might predict a similar outcome in the United States, particularly if a legislative override system were to require a two-thirds or other supermajority vote by

Congress. Scholars note, however, that even if the use of legislative overrides is infrequent, the mere possibility of legislative overrides may influence the Court, for example by making it more deferential to the elected branches.[161]

Another way in which legislative overrides might not achieve their goals is if they enable Congress to overrule constitutional decisions made only by the Supreme Court. This approach would still leave extensive power in the lower federal courts and the state courts. Because the U.S. Supreme Court is under no obligation to grant certiorari after a lower court or state court rules a federal statute unconstitutional, a legislative override system that did not empower review of lower court decisions striking down federal statutes would leave such decisions more insulated from democratic review than similar decisions of the Supreme Court. This problem is soluble, however, by enabling overrides of lower court or state court decisions, as well as Supreme Court decisions, on federal constitutional grounds.

Finally, some observers question whether legislative overrides are the best way to achieve the ends that their proponents desire. A better approach, they argue, would be to change Article V of the Constitution, making the Constitution easier to amend. Changing the Constitution through amendment, these critics contend, produces more reasoned democratic deliberation; in contrast, overrides are too tied to particular controversies. The Commission notes that there may well be sound arguments for making the Constitution easier to amend. However, because such substantial reform to the Constitution is outside the scope of this Commission's mandate, we do not consider this proposal. In addition, it is worth noting that a system of legislative overrides might have advantages over making the entire Constitution significantly easier to amend: A legislative override process could enable Congress to advance its own constitutional vision, re-enacting statutes that the Court has struck down subject to a temporal sunset or to other limitations, without enabling too-frequent wholesale reforms to the structure of government or the text of the Constitution.

2. *Consequences for the Political Process and Legal System*

Given that legislative overrides would at least partially achieve the goal of reducing the Supreme Court's power vis-à-vis the democratic branches, one important concern is whether they might result in insufficient protection of individual rights and, in particular, minority rights. Another concern is that allowing actors other than the Court to determine the constitutionality of statutes might result in less settled law and less well-reasoned constitutional decisionmaking. In addition, some worry that allowing congressional overrides might have implications for federalism, with Congress potentially more likely to use legislative overrides to favor its own power over states' rights (though some might find that to be an advantage rather than a disadvantage).

Proponents of legislative overrides (and critics of judicial supremacy more generally) respond that, in practice, the Court has not consistently protected rights of underprivileged, politically powerless minorities who lack support from popular majorities; indeed, some argue it has rarely done so.[162] Notably, many scholars observe that parliamentary democracies without American-style judicial supremacy—including Australia, New Zealand, and numerous European countries—are just as effective when it comes to protecting rights (although it is important to note that the comparative analysis is challenging, in part because those jurisdictions have very

different structures of governments and broader commitments to universal social benefits).[163] Proponents of overrides would also argue that federalism concerns are overstated, given that the design of Congress already adequately represents the interests of states.

Meanwhile, concerns about minority rights, rule of law, and deliberation could potentially be addressed in the design of the system. The systemic consequences of congressional overrides would depend significantly on the details of the system adopted. The varying approaches have tradeoffs. For example, requiring a two-thirds majority of both houses of Congress to override the Court would reduce the risk of threat to minority rights and would require significant congressional deliberation about the underlying constitutional issue. But this approach would also make overrides much less likely to occur. Limiting overrides to cases that do not involve certain fundamental rights—as is done in Canada[164]—would limit the risk to those rights, but unless very clearly elaborated, would leave great discretion with the Supreme Court. Adopting a "sunset" element, where Congress's override would last only for a certain number of years and then would need to be reenacted,[165] might also serve as a safeguard against long-term incursions on individual rights and would encourage continued constitutional debate but could introduce greater uncertainty and instability in the law. Finally, a system that only permitted a legislature to issue an override after the Court has rendered its constitutional judgment, rather than insulating its laws preemptively, could help raise the political costs of an override and prompt the legislature to directly engage the constitutional principles at stake.

C. Constitutional Analysis

As noted in the preceding analysis, the most straightforward way to adopt a system of legislative overrides would be through constitutional amendment, as was urged during the Progressive and New Deal eras. Absent constitutional amendment, it is highly likely that the Supreme Court would strike down a statute (or congressional rule of procedure) setting forth a system for legislative overrides. The Court would likely conclude that it—not Congress—has ultimate authority under Article III to determine the constitutionality of federal statutes (as well as state statutes and executive action).[166] On this view, any effort at legislative override absent a constitutional amendment would constitute an impermissible end run around the amendment process established by Article V of the Constitution. Indeed, the Article V amendment process has been used on numerous occasions to overrule Supreme Court opinions.[167]

Nonetheless, Congress may be able to assert greater authority to engage in independent constitutional interpretation or to limit the reach of judicial opinions, short of enacting a system of legislative overrides.[168] As previously noted, numerous scholars have long contended that Article III never expressly states that the Supreme Court is the final or sole arbiter of statutes' constitutionality.[169] Under this view, although specific Court orders must be obeyed, Congress and the President can continue to enforce the Constitution as they see fit, as long as they are not in defiance of a particular order. By way of example, Congress might make it a crime to burn the flag; the Court might hold that such a law is unconstitutional; Congress does nothing wrong by enacting the statute again and saying it does not agree with the Court's interpretation, particularly if it includes new legislative findings. But if someone is prosecuted under the new law, and the Court maintains the view that the law is unconstitutional and enjoins the prosecution, the Court's orders in that case must be followed.

According to this understanding of judicial review, Congress could enact a statute that affirms congressional authority to reenact a statute after a negative Court ruling; Congress could also establish procedures for such reenactment, consistent with bicameralism and presentment requirements. Congress could also attempt to establish a general rule regarding what weight stare decisis ought to carry. The argument would be that determining the prospective precedential effect of opinions is within Congress's "necessary and proper" power to regulate the operations of the federal courts, similar to its power to provide rules of evidence and procedure.[170] Others, however, have argued that determining the significance of stare decisis in constitutional cases is an inherent aspect of the judicial power to interpret the Constitution.[171] In any case, there is widespread agreement that Congress could not prospectively or retroactively deny the reach of a court order to the parties in a particular case.[172]

Apart from possible constitutional difficulties, Congress's assertion of authority to limit the precedential effects of prior Court decisions might raise arbitrariness and unfairness concerns about giving the parties to a particular case the benefit (or burden) of a rule announced by the Court, while denying the same benefit (or burden) to others similarly situated.[173] In other words, the government would remain free to bring prosecutions against individuals who have violated a statute that the Court has declared unconstitutional in another case, leaving it to each individual defendant to raise the constitutional objection anew. Such concerns would be less pressing with a legislative override system achieved by constitutional amendment; such a system would clearly enable Congress to declare that, for all parties, "notwithstanding" a court's interpretation of particular constitutional provisions, a particular statute is permissible, for a defined period of time. However, as discussed above, the broader system may raise other concerns about protection of rights.

D. Conclusion: Legislative Overrides

In short, a constitutional amendment adopting a system of legislative overrides would reduce the power of the Supreme Court over fundamental social questions and would increase the power of Congress. Design of the system might mitigate concerns about rule of law, constitutional structure, and minority rights. However, those design questions are difficult and would require further debate and elaboration, particularly because this reform has attracted less attention than some of the other reforms discussed in this Report. Short of constitutional amendment, some argue that Congress could still do more to resist judicial supremacy, though that, too, would likely face a critical audience from the current Supreme Court. Some proponents of reducing the power of the Court argue that the Supreme Court's commitment to judicial supremacy should not be a concern and that statutory reform to facilitate Congress's ability to assert its own constitutional authority would be worth trying.[174] Others disagree—not only because they question the legality of congressional non-acquiescence to the Court, but also because resistance to judicial supremacy would mark a substantial shift in contemporary practice, the legitimacy of which would be questionable without constitutional amendment.[175] In any event, further public debate could help flesh out the merits of the various approaches.

[1] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 7 (June 30, 2021) (written testimony of Noah Feldman, Harvard Law School) [hereinafter Feldman Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf; *Presidential Commission on the Supreme Court of the United States* 8, 12-13 (Oct. 2021) (written testimony of Philip Bobbitt, Columbia Law School) [hereinafter Bobbitt Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/10/Professor-Philip-Bobbitt.pdf; Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Reexamining Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. (forthcoming 2021) (manuscript at 28-39), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3869128.

[2] *Presidential Commission on the Supreme Court of the United States* 7 (June 30, 2021) (written testimony of Samuel Moyn, Yale Law School) [hereinafter Moyn Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf; *Presidential Commission on the Supreme Court of the United States* 3-5 (June 30, 2021) (written testimony of Nikolas Bowie, Harvard Law School) [hereinafter Bowie Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf; *see also* Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665032; James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893); Robert H. Bork, *The End of Democracy? Our Judicial Oligarchy*, FIRST THINGS (Nov. 1996), https://www.firstthings.com/article/1996/11/the-end-of-democracy-our-judicial-oligarchy.

[3] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) (introducing the term "the counter-majoritarian difficulty"). For academic critiques of judicial supremacy, see, for example, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 249-53 (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 177 (1999); and Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 789 (2002). For a defense, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997).

[4] *See* Bowie Testimony, *supra* note 2, at 15-16, 19, 23 (describing how Justices share the same elite educational backgrounds).

[5] *Presidential Commission on the Supreme Court of the United States* 2 (June 25, 2021) (written testimony of Rosalind Dixon, University of New South Wales) [hereinafter Dixon Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf; *see also* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 21 (2009).

[6] *See generally* Jamal Greene, *Giving the Constitution to the Courts*, 117 YALE L.J. 886, 888 (2008) (reviewing KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007)).

[7] *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958); United States v. Nixon, 418 U.S. 683, 705 (1974); City of Boerne v. Flores, 521 U.S. 507, 516(1997); United States v. Morrison, 529 U.S. 598, 616 n.7 (2000).

[8] *Cooper*, 358 U.S. at 18.

[9] *See infra* notes 139-141.

[10] Dixon Testimony, *supra* note 5, at 7; *Presidential Commission on the Supreme Court of the United States* 3 (June 30, 2021) (written testimony of Kim Lane Scheppele, Princeton University) [hereinafter Scheppele Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppele-Written-Testimony.pdf.

[11] *See* Bobbitt Testimony, *supra* note 1, at 6, 12; Feldman Testimony, *supra* note 1, at 8; Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 197 (1952); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1069 (2001); Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38, 39 (2006); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1805 (2007); NeJaime & Siegel, *supra* note 1, at 39-41.

[12] We note that any future elaboration of these proposals would require addressing a number of technical concerns that we have chosen not to analyze here because of their specificity. These include how the proposals might be drafted to encompass cases brought as both facial and as-applied challenges and how to take into account the range of remedies available to courts. Relatedly, we note that most of the proposals discussed below do not address

another suite of concerns critics raise: that courts sometimes exercise power to rewrite statutes or to arrogate power to themselves by giving statutes meaning, including through the practice of constitutional avoidance.

[13] *See, e.g.*, S. 158, 97th Cong. (1981); H.R. 867, 97th Cong. (1981); H.R. 900, 97th Cong. (1981).

[14] *See, e.g.*, S. 1742, 97th Cong. (1981); H.R. 4364, 109th Cong. (2005).

[15] *See, e.g.*, Patient Protection and Affordable Care Act § 3403(e)(5), 42 U.S.C. § 1395ww(r)(3).

[16] *See, e.g.*, S. 4058, 90th Cong. (1968).

[17] *See, e.g.*, H.R. 2389, 109th Cong. (2005).

[18] *See, e.g.*, H.R. 3313, 108th Cong. (2004); H.R. 4379, 109th Cong. (2005).

[19] *See* Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1785 (2020).

[20] *See generally* Doerfler & Moyn, *supra* note 2.

[21] *See, e.g.*, Dixon Testimony, *supra* note 5, at 8-9.

[22] U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

[23] Forsyth v. United States, 50 U.S. (9 How.) 571, 572 (1850).

[24] *Id.* art. III, § 1, cl. 1.

[25] An Act to Establish the Judicial Courts of the United States, ch. 20, § 11, 1 Stat. 73, 78 (1789).

[26] Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 161, 163-64 (1913).

[27] William W. Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229, 238 (1973). During the Reconstruction Era, Congress enacted the Military Reconstruction Act of 1867 in part to enforce new federal protections for civil rights and civil liberties. The Act sought "to 'regularize' federal military jurisdiction in the South by dividing the region into districts subject to military command." *Id.* at 236.

[28] 74 U.S. (7 Wall.) 506 (1868).

[29] 80 U.S. (13 Wall.) 128, 128 (1871).

[30] *Id.* at 146.

[31] 29 U.S.C. §§ 101-102.

[32] 303 U.S. 323 (1938).

[33] 28 U.S.C. § 1342.

[34] *Id.* § 1341.

[35] Such proposed legislation has frequently triggered debates about constitutional permissibility in both Congress and the executive branch. *See* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 900-16, 920-27 (2011); Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 268-86 (2012).

[36] *See, e.g.*, S. 3930, 109th Cong. (2006).

[37] *See, e.g.*, H.R. 13915, 92d Cong. (1972).

[38] *See supra* notes 13-14 and accompanying text.

[39] The Defense of Marriage Act defined marriage as "only a legal union between one man and one woman as husband and wife" for federal purposes. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2419 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013). For related jurisdiction-stripping proposals, see *supra* note 18 and accompanying text.

[40] *See supra* note 17 and accompanying text.

[41] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 106(b), 110 Stat. 1214, 1220-21 (codified at 28 U.S.C. § 2244(b)(3)(E)).

[42] 518 U.S. 651 (1996).

[43] 553 U.S. 723 (2008).

[44] U.S. CONST. art. I, § 9, cl. 2.

[45] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 16 (July 20, 2021) (written testimony of Jamal Greene, Columbia Law School), https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf (stating that "Congress unquestionably has the constitutional power, via the Exceptions Clause, to require the Court to hear certain appellate cases and not to hear others"); *Presidential Commission on the Supreme Court of the United States* 12 (July 20, 2021) (written testimony of Stephen E. Sachs, Harvard Law School), https://www.whitehouse.gov/wp-content/uploads/2021/07/Sachs-Testimony.pdf (noting that Congress exercising its power under the Exceptions Clause to make "Exceptions" to the Supreme Court's appellate jurisdiction is "wholly constitutional"). Even critics of proposals to limit the Court's jurisdiction, on policy and constitutional grounds, could not conclude that such proposals are categorically or definitively unconstitutional. The most that they conclude is that such proposals would raise constitutional questions. *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 57 (July 16, 2021) (written testimony of Kenneth Geller, Mayer Brown LLP, and Maureen Mahoney, Latham & Watkins, LLP), https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf (expressing significant reservations on proposals to limit the Court's jurisdiction and concluding that such proposals "would raise serious constitutional issues").

[46] *See, e.g.*, Feldman Testimony, *supra* note 1, at 2 (noting that Supreme Court reform proposals ought to be evaluated against two criteria: (a) the function of the Court in the American constitutional context and (b) whether reform proposals would advance or impede that function).

[47] *See, e.g.*, Moyn Testimony, *supra* note 2, at 3; Sprigman, *supra* note 19, at 1858-59.

[48] *See generally* Bowie Testimony, *supra* note 2, at 24, 25; Moyn Testimony, *supra* note 2, at 1.

[49] U.S. CONST. art. VI cl. 2.

[50] *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1384 (2006); *see also* Scheppele Testimony, *supra* note 10, at 6.

[51] However, the power remains a subject of debate. *See, e.g.*, Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 81 (1975); Peter N. Salib & David K. Suska, *The Federal-State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1190 (2018).

[52] Several of the experts who testified before the Commission counseled that any reforms of our current system should be developed and implemented in a manner that reduces partisan polarization and minimizes institutional instability. *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 2 (July 16, 2021) (written testimony of Vicki C. Jackson, Harvard Law School) [hereinafter Jackson Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf; *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Neil S. Siegel, Duke Law School), https://www.whitehouse.gov/wp-content/uploads/2021/07/Siegel-Testimony.pdf.

[53] *See* Feldman Testimony, *supra* note 1, at 9 (noting that jurisdiction stripping "could potentially devastate the Court's ability to fulfill its functions").

[54] Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 897 n.9 (1984) (quoting Letter from William Van Alstyne to Gerald Gunther (Feb. 28, 1983)).

[55] *See* U.S. CONST. art. I, § 8, cl. 18 (conferring congressional power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

[56] *Id.* art. III, § 1.

[57] *Id.* art. I, § 8, cl. 18.

[58] *Id.* art. III, § 2, cl. 2.

[59] 383 U.S. 301 (1966).

[60] *See, e.g.*, California v. Texas, 141 S. Ct. 2104 (2021) (challenge to the Affordable Care Act); Trump v. Hawaii, 138 S. Ct. 2392 (2018) (challenge to the Trump Administration's travel ban); Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (challenge to the Deferred Action for Childhood Arrivals and Deferred Action for Parents of Americans and Lawful Permanent Residents programs), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016);

Massachusetts v. E.P.A., 549 U.S. 497 (2007) (challenge to the Environmental Protection Agency's refusal to regulate greenhouse gas emissions from motor vehicles); *see also* Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (mem.) (rejecting Texas's challenge, brought under the Court's original jurisdiction, to other states' election administration procedures).

[61] *See, e.g.*, California v. Arizona, 440 U.S. 59, 66 (1979) (noting it is "extremely doubtful" that Congress could exclude the Supreme Court's original jurisdiction by granting exclusive jurisdiction to federal district courts over actions for which the United States has waived its sovereign immunity); Kansas v. Colorado, 556 U.S. 98, 109-10 (2009) (Roberts, C.J., concurring) (arguing that Congress cannot infringe on the Court's authority over procedural matters related to its original jurisdiction).

[62] Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

[63] *See, e.g.*, Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637 (1990).

[64] *See, e.g.*, Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1083 (2010); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What* the Dialogue *(Still) Has to Teach Us*, 69 DUKE L.J. 1, 30 (2019); Laurence Henry Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV, C.R.-C.L. L. REV. 129, 149-52 (1981).

[65] 74 U.S. (7 Wall.) 506, 514 (1868).

[66] 80 U.S. (13 Wall.) 128, 145-46 (1871).

[67] *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 583 (1988); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 759 (1961); Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 525-26 (2016); Laurence Henry Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 17-26.

[68] 553 U.S. 723, 798 (2008).

[69] Hart, *supra* note 62, at 1371.

[70] *Id.* at 1369.

[71] Support for this argument would come from James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1435 (2000).

[72] *Id.* at 1441.

[73] 74 U.S. (7 Wall.) 506, 514 (1868).

[74] 518 U.S. 651, 658 (1996).

[75] 14 U.S. (1 Wheat.) 304 (1816).

[76] The relevant articles include Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 271-72 (1985); Akhil Reed Amar, Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 487 (1989); Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651, 1673 (1990); and Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 NW. U. L. REV. 442, 445 (1991).

[77] *See* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); William A. Fletcher, Lecture, *Congressional Power over the Jurisdiction of Federal Courts: The Meaning of the Word "All" in Article III*, 59 DUKE L.J. 929 (2010).

[78] *See, e.g.*, Meltzer, *supra* note 77, at 1575.

[79] Evan Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rules: Lessons from the Past*, 78 IND. L.J. 73, 88 (2003); *id*. at 117 (appendix listing proposals).

[80] H.R. 379, 40th Cong. (1868).

[81] S. 4483, 67th Cong. (1923).

[82] H.R. 11007, 90th Cong. (1967).

[83] Caminker, *supra* note 78, at 83.

[84] *See* Moyn Testimony, *supra* note 2, at 6 (discussing the post-Civil War era); Steven F. Lawson, *Progressives and the Supreme Court: A Case for Judicial Reform in the 1920s*, 42 HISTORIAN 419, 420 (1980) (discussing Senator Borah's Court reform efforts).

[85] N.D. CONST. art VI, § 4; *see* Caminker, *supra* note 79, at 91 (noting that this supermajority voting rule was originally adopted in a 1919 amendment).

[86] NEB. CONST. art. V, § 2; *see* Caminker, *supra* note 79, at 92-93 (noting that this supermajority voting rule was originally adopted in a 1920 amendment).

[87] Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 955-56 (2003).

[88] OHIO CONST. art. IV, § 2 (amended 1968); *see* Caminker, *supra* note 79, at 91-92 (discussing difficulties motivating the elimination of the requirement, including inconsistent caselaw between circuits and confusion surrounding the precedential status of certain decisions); Shugerman, *supra* note 87, at 956-62 (same).

[89] *Presidential Commission on the Supreme Court of the United States* 2 (Sept. 21, 2021) (written testimony of David Law, University of Virginia Law School) [hereinafter Law Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/09/Professor-David-Law.pdf (citing Eric Yik Him Chan, Judicial Review and Supermajority Voting Rules (May 2019) (L.L.M. thesis, University of Hong Kong, Faculty of Law), https://www.whitehouse.gov/wp-content/uploads/2021/09/Professor-David-Law-appendix.pdf)). The cited thesis lists eleven countries with supermajority voting requirements in their highest constitutional court as of 2019; this includes Taiwan, which has switched to majority voting effective in 2022. Chan, *supra*, at 13. In addition, a number of countries require an absolute majority of the entire court, as opposed to a majority or plurality of voting justices, and a few countries have supermajority requirements for decisions in particular subject matters. *See* Chan, *supra*, at 51-60; Law Testimony, *supra*, at 3.

[90] Joon Seok Hong, *Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea*, 67 AM. J. COMP. L. 177, 194 (2019).

[91] *Id*. However, many of these courts—including in South Korea—hear principally or exclusively constitutional claims and do not generally hear cases on appeal from lower courts. Therefore, it is not clear whether their experiences readily translate to the U.S. Supreme Court, which hears statutory as well as constitutional cases and typically reviews decisions of lower courts.

[92] *See, e.g.*, Anthony Harrup, *Mexico's Top Court Sets Back President's Plans for State Power Company*, WALL ST. J. (Feb. 3, 2021, 3:42 PM), https://www.wsj.com/articles/top-mexico-court-rules-electricity-rules-favoring-state-utility-are-unconstitutional-11612381067.

[93] Shugerman, *supra* note 87, at 893-94.

[94] *Id*. at 899-931; *see id*. at 906 (referring to an "explosion of five-to-four decisions invalidating acts of Congress").

[95] Thayer, *supra* note 2, at 144.

[96] Shugerman, *supra* note 87, at 932; *see also* John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 437-38 (1999) (generally advocating for supermajority rules as a tool for achieving better results).

[97] Shugerman, *supra* note 87, at 932-35.

[98] *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 85 (1978) ("A judge who is insulated from the demands of the political majority whose interest the right would trump is, therefore, in a better position to evaluate the argument [about the right].").

[99] Doerfler & Moyn, *supra* note 2, at 40.

[100] Shelby County v. Holder, 570 U.S. 529 (2013); *see* Bowie Testimony, *supra* note 2, at 8-9.

[101] Doerfler & Moyn, *supra* note 2, at 10-11.

[102] *See* Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PA. J. CONST. L. 1201, 1240-43 (2020).

[103] *See* Law Testimony, *supra* note 89.

[104] *See* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

[105] *See* Caminker, *supra* note 79, at 73-75; Shugerman, *supra* note 87, at 1012-19 (listing Court decisions invalidating congressional acts and noting cases decided by a bare majority).

[106] *See* 570 U.S. 529, 532 (2013) (noting 5-4 majority).

[107] Defense of Marriage Act, 1 U.S.C. § 7, *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

[108] *Cf. Presidential Commission on the Supreme Court of the United States* 1 (Aug. 2021) (written testimony of Center for American Progress), https://www.whitehouse.gov/wp-content/uploads/2021/08/CAP-Testimony.pdf (advocating supermajority voting requirements as a mechanism to steer the Court away from "blockbuster political issues"); Bowie Testimony, *supra* note 2, at 3-5 (arguing that rights are more reliably protected through Congress than through the Court).

[109] Dixon Testimony, *supra* note 5, at 10.

[110] *See* Caminker, *supra* note 79, at 88 (comparing deferential review with supermajority rules as ways of limiting the Court's role in constitutional adjudication).

[111] Thayer, *supra* note 2, at 144.

[112] *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

[113] *See, e.g.*, Administrative Procedure Act (APA) § 10(e), 5 U.S.C. § 706(2)(A) (directing courts to "set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); Dep't of Com. v. New York, 139 S. Ct. 2551, 2569 (2019) (describing the APA's arbitrary or capricious standard as "deferential").

[114] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254(d)).

[115] *See* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 685-86 (2007) (arguing that a "hard solution" like a supermajority voting rule is more effective in producing deference than a soft solution like a more deferential standard; judges might not comply, consciously or not, with a statutorily imposed deferential standard and may instead fall back on a traditional, less deferential standard).

[116] For an overview of scholarly views and responses, see Shugerman, *supra* note 87, at 971-88.

[117] U.S. CONST. art. III, § 2, cl. 2.

[118] Congress has a strong claim to broad power to regulate lower federal courts due to its plenary power to decide whether to establish such courts in the first place. *See* U.S. CONST. art. I, § 8, cl. 9. Thus, Congress's powers to impose a supermajority rule on lower federal courts or to prescribe the effect on lower federal courts of the Supreme Court failing to reach the necessary supermajority seem to have fairly firm constitutional foundations.

[119] U.S. CONST. art. III, § 2, cl. 2.

[120] *See supra* text accompanying notes 58-61.

[121] U.S. CONST. art. I, § 8, cl. 18.

[122] Circuit Judges Act of 1869, § 1, 16. Stat. 44 (codified as amended at 28 U.S.C. § 1 (2018)).

[123] 28 U.S.C. § 1 (2018).

[124] *Id*. § 2.

[125] *Id.*

[126] U.S. CONST. art. III, § 1.

[127] 80 U.S. (13 Wall.) 128 (1871).

[128] *See* Shugerman, *supra* note 87, at 972.

[129] 521 U.S. 507 (1997).

[130] *See, e.g.*, Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV L. REV. 1 (2011); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997).

[131] *See* Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73 (creating a Supreme Court composed of one Chief Justice and five Associate Justices).

[132] It is important to note that not everyone has been convinced that AEDPA's deferential review scheme is constitutional. *See, e.g.*, James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 703-04 (1998) (criticizing the AEDPA's review scheme as applied by the Fifth, Seventh, and Eleventh Circuits); Williams v. Taylor, 529 U.S. 362, 378-79 (2000) (Stevens, J., concurring) ("A construction of AEDPA that would require the federal courts to cede this authority [to say what the law is] to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution. If Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA.").

[133] Caminker, *supra* note 79, at 117.

[134] We focus on a system of legislative overrides that would allow Congress to overrule decisions by the Supreme Court or other courts striking down federal or state legislation. However, a broader approach would allow Congress to overrule any constitutional opinion that upholds or rejects claims of constitutional rights, whether or not a statute is involved. Congress would, for example, have power to override such decisions as the Court's rejection of a Free Exercise claim in *Employment Division v. Smith*, 494 U.S. 872 (1990), or of a Takings claim in *Kelo v. City of New London*, 545 U.S. 469 (2005). Because past proposals have not urged such expansive reform, we do not discuss it in any depth, however many of the legal and policy arguments discussed in this Chapter would apply equally or in stronger version to the broader reform.

[135] Constitution Act, 1982, § 33, *being* Schedule B to the Canada Act 1982, c 11 (U.K.); *see* Nicholas Stephanopoulos, *The Case for the Legislative Override*, 10 UCLA J. INT'L L. & FOREIGN AFF. 250, 255 (2005).

[136] Stephanopoulos, *supra* note 135, at 260.

[137] Theoretically, a legislative override system achieved through constitutional amendment could also empower state legislatures but this might raise serious federalism concerns given the overall structure of U.S. government. Because this idea has not been proposed, we do not consider it.

[138] Cooper v. Aaron, 358 U.S. 1, 18 (1958); *see also* United States v. Nixon, 418 U.S. 683, 704-05 (1974); City of Boerne v. Flores, 521 U.S. 507, 536 (1997); United States v. Morrison, 529 U.S. 598, 616 n.7 (2000).

[139] KRAMER, *supra* note 3, at 105-10, 125, 135-36; *see also* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY, at xi (2007) (discussing the theory of departmentalism); *Presidential Commission on the Supreme Court of the United States* 5-7 (June 30, 2021) (written testimony of Ilan Wurman, Arizona State University) [hereinafter Wurman Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Wurman-Testimony-Supreme-Court-Commission.pdf (noting that the modern Supreme Court's view of judicial supremacy departs from antebellum understandings of the three branches' coextensive powers over constitutional interpretation). Notably, the departmentalist view—that legislative and executive branch actors could act on their own interpretations of the Constitution in their respective spheres—seems to have been Hamilton's view, in contrast to the views of the antifederalist writer Brutus, who suggested that the federal courts would have greater interpretative authority under the Constitution and opposed it on that ground. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 245-52 (1994); THE FEDERALIST NO. 78 (Alexander Hamilton); *Essays of Brutus*, No. XI, *reprinted in* 2 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST § 2.9.138-139 (1st ed. 1981).

[140] 5 U.S. (1 Cranch) 137, 177 (1803).

[141] *See* Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 503-05 (2018).

[142] *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 141-43 (2007) (discussing how, in enacting the Partial-Birth Abortion Ban Act of 2003, Congress "responded" to the Supreme Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which invalidated a similar state law, and sought to tailor the federal law to avoid the errors the Court identified in the state analog); Dickerson v. United States, 530 U.S. 428, 431-38 (2000) (describing how Congress sought to override the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), but holding Congress was powerless to do so because the Court's decision in *Miranda* announced a constitutional rule that Congress could not legislatively override); City of Boerne v. Flores, 521 U.S. 507, 511-12, 515 (1997) (invalidating the Religious Freedom Restoration Act of 1993, which "Congress enacted . . . in direct response to the Court's decision" in Employment Division v. Smith, 494 U.S. 872 (1990)); *see also* Barry Cushman, NFIB v. Sebelius *and the*

Transformation of the Taxing Power, 89 NOTRE DAME L. REV. 133, 142-43 (2013) (recounting how in an effort to combat child labor Congress passed the Keating-Owen Act, which the Supreme Court ruled unconstitutional in Hammer v. Dagenhart, 247 U.S. 251 (1918), and that when Congress subsequently "responded" to that decision "by adding a provision to the Revenue Act of 1918" that taxed businesses employing children "in violation of any of the standards established by the Keating-Owen Act," the Supreme Court in turn invalidated that tax in Bailey v. Drexel Furniture, 259 U.S. 20 (1922)).

[143] *Progressive Party Platform of 1924*, AM. PRESIDENCY PROJECT (Nov. 4, 1924), https://www.presidency.ucsb.edu/documents/progressive-party-platform-1924.

[144] *Senate Progressives vs. the Federal Courts*, US SENATE: SENATE STORIES (May 3, 2021), https://www.senate.gov/artandhistory/senate-stories/senate-progressives-vs-the-federal-courts.htm#6.

[145] Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 476-77 n.87 (2001) (citing S.J. Res. 80, 75th Cong. (1937)). *See generally* 81 CONG. REC. 1273 (1937), https://www.govinfo.gov/content/pkg/GPO-CRECB-1937-pt2-v81/pdf/GPO-CRECB-1937-pt2-v81-3.pdf (noting Senators Wheeler and Bone's introduction of the proposed amendment).

[146] Marian C. McKenna, *Prelude to Tyranny: Wheeler, F.D.R., and the 1937 Court Fight*, 62 PAC. HIST. REV. 405, 405 (1993).

[147] *See* William Lasser, *Justice Roberts and the Constitutional Revolution of 1937—Was there a "Switch in Time"?*, 78 TEX. L. REV. 1347, 1372 (2000) (citing Memorandum from Benjamin V. Cohen & Thomas G. Corcoran on Constitutional Problems, Cohen Papers, Library of Congress, https://www.loc.gov/item/mm83061590) (reviewing BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998)).

[148] Robert H. Bork, *Our Judicial Oligarchy*, FIRST THINGS (Nov. 1996).

[149] *E.g.*, Doerfler & Moyn, *supra* note 2; Nicholas Stephanopoulos, *supra* note 135, at 264-69, 290-92 (2005).

[150] Alicia Bannon & Nathan Sobel, *Assaults on the Courts: A Legislative Round-Up*, BRENNAN CTR. (May 8, 2017), https://www.brennancenter.org/our-work/research-reports/assaults-courts-legislative-round.

[151] *See* Bowie Testimony, *supra* note 2, at 23; *see also* William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1129-30 (1989) (noting that courts played a proactive role in fashioning an economic system that was hostile to workers during the Gilded Age).

[152] LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (1st ed. 2008); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565 (2014).

[153] 384 U.S. 436 (1966) (holding that the Fifth Amendment bars the prosecution from "us[ing] statements, whether exculpatory or inculpatory," made by a person in police custody "unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination," and that those safeguards require that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney").

[154] *See* Dickerson v. United States, 530 U.S. 428, 444 (2000) (holding that Congress could not overrule Miranda v. Arizona, 384 U.S. 436 (1966), by legislation, since "*Miranda* announced a constitutional rule").

[155] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 1-3 (Aug. 2021) (written testimony of William G. Ross, Samford University), https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-William-G.-Ross.pdf.

[156] 570 U.S. 529 (2013).

[157] *See, e.g.*, Doerfler & Moyn, *supra* note 2, at 11; *Presidential Commission on the Supreme Court of the United States* 10-11 (Aug. 17, 2021) (written testimony of Mark Tushnet, Harvard Law School), https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Mark-Tushnet.pdf.

[158] *See* Stephanopoulos, *supra* note 135, at 264-69, 290-92; Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 247, 265, 275 (1995).

[159] *See* Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. TORONTO L.J. 221, 222 (2002); Peter H. Russell, *Standing up for Notwithstanding*, 29 ALTA. L. REV. 293, 297 (1991); Stephanopoulos, *supra* note 135, at 254-59; Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457, 457-59 (2012).

[160] *See* Kahana, *supra* note 159, at 223 (Canada); Weill, *supra* note 159, at 461 (Israel). In Canada, the provincial legislatures, particularly Quebec, have been the primary proponents of legislative overrides, known as "notwithstanding clauses," in legislation. Early on, the province of Quebec attempted to craft an omnibus notwithstanding clause to immunize its laws against all court attacks. This approach was invalidated by the Canadian Supreme Court but narrower approaches have had some limited success. *See* Stephanopoulos, *supra* note 135, at 255-56; *see also* Law Testimony, *supra* note 89, at 4-5 (discussing Canada's experience and noting that "[a]t 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," while "[a]t the other extreme, the federal government has effectively abandoned the override power").

[161] Weill, *supra* note 159, at 461.

[162] Bowie Testimony, *supra* note 2, at 4-5; Moyn Testimony, *supra* note 2, at 6.

[163] For example, in Australia and New Zealand, judicial review is "constrained," with courts exercising a "privileged, but not a supreme, role," without any evidence of resulting harm to minority rights. Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 INT'L J. CONST. L. 950, 951-52 (2012). Moreover, in most European countries, constitutional questions typically are reviewed by specialized courts and through referral by parliamentary or executive officials, rather than in individualized cases. In this model, the court serves as an aide to the legislature in determining the conformity of legislation to the constitution. Albert H. Y. Chen, *The Global Expansion of Constitutional Judicial Review: Some Historical and Comparative Perspectives* 3 (Univ. of H.K. Faculty of Law Research Paper No. 1, 2013). Such inquiries take place on a theoretical level and not in terms of a case or controversy involving the rights of an individual allegedly harmed by such a law. This approach, it has been argued, is equally if not more protective of rights than the U.S. model. *See, e.g.*, VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE, at xiii-xvi (2009). Of course, it bears remembering that Europeans' rights are also protected by the European Court of Human Rights and the European Court of Justice, among other institutions. *See* Waldron, *supra* note 50, at 1353 n.20.

[164] Canadian Charter of Rights and Freedoms § 33, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 c. 11 (U.K.) (excluding from the "notwithstanding clause" democratic rights, mobility rights, language rights, and education rights); *see* Dixon Testimony, *supra* note 5, at 7.

[165] *See* Canadian Charter of Rights and Freedoms § 33.

[166] *See*, e.g., City of Boerne v. Flores, 521 U.S. 507, 536 (1997); United States v. Morrison, 529 U.S. 598, 616 n.7 (2000); Shelby County v. Holder, 570 U.S. 529, 556 (2013) (citing Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

[167] The Eleventh Amendment, immunizing states from certain lawsuits, overruled the Supreme Court's ruling in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); the Thirteenth, Fourteenth, and Fifteenth Amendments—the Reconstruction Amendments—effectively overruled the Court's decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); the Sixteenth Amendment gave Congress the authority to enact income taxes, overturning the Supreme Court's ruling in *Pollack v. Farmers' Loan and Trust Co*., 157 U.S. 429 (1895); the Nineteenth Amendment enfranchised women, overruling *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875); the Twenty-Fourth Amendment abolished poll taxes, overruling the Supreme Court's decisions in cases like *Breedlove v. Suttles*, 302 U.S. 277 (1937); and the Twenty-Sixth Amendment made clear that all U.S. citizens eighteen years of age and older have the right to vote in 1971, overruling *Oregon v. Mitchell*, 400 U.S. 112 (1970).

[168] *See* Moyn Testimony, *supra* note 2, at 19; *see also Presidential Commission on the Supreme Court of the United States* 8-9 (Aug. 15, 2021) (written testimony of Christopher Jon Sprigman, New York University School of Law) [hereinafter Sprigman Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Christopher-Jon-Sprigman.pdf.

[169] *See* KRAMER, *supra* note 3, at 105-10, 125, 135-36; WHITTINGTON, *supra* note 139, at xi; Wurman Testimony, *supra* note 139, at 5-7.

[170] *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1543 (2000). It is important to note, however, that such an argument likely would not extend to limiting the stare decisis of state court decisions.

[171] *See* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001)

[172] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

[173] *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 537 (1991) ("[S]elective prospectivity . . . breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally."). Some Justices have also expressed concern that applying decisions only to subsequent litigants violates the judicial power established by Article III. *See* Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring); *James B. Beam Distilling Co.*, 501 U.S. at 549 (Scalia, J., concurring).

[174] *See* Sprigman, *supra* note 19, at 9 ("There is nothing standing in the way of Congress asserting its power to override judicial decisions save the will to do so and the political judgment to do so successfully. As a matter of practical politics, Congress can draw the outlines of its own authority by using its Article III power effectively and in ways that voters approve.").

[175] *Cf.* Dixon Testimony, *supra* note 5, at 7-8 (emphasizing importance of formal amendment to change longstanding norms); Jackson Testimony, *supra* note 52, at 14 (suggesting, while evaluating term limit proposals, that constitutional amendment would be needed to "significant[ly]" depart from longstanding norms surrounding Justices' tenure on the Court); *see also* Fallon, *supra* note 171, at 582 (arguing that "deeply entrenched practices" greatly inform the American constitutional order).