

# THE U.S. SUPREME COURT IN GLOBAL COMPARISON

TESTIMONY FOR THE PRESIDENTIAL COMMISSION  
ON THE SUPREME COURT  
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## AN INTERNATIONAL PERSPECTIVE

My purpose in this testimony is to provide an international framework to inform the Commission's discussions. If the Commission sees how other comparable constitutional democracies structure their high courts, it might enlarge the Commission's imagination about what is possible, in addition to providing useful cautions about how changes to the present US Supreme Court might backfire.

The perspective I bring to bear in this testimony is the perspective of the comparative constitutional law scholar looking at the U.S. Supreme Court from outside the system, as it were. I have worked as a researcher at the Constitutional Courts of Hungary and Russia, spent decades discussing constitutional issues with judges from many countries, and taught comparative constitutional law both in the U.S. and abroad. I know your Commission will be considering a limited set of proposals unique to the U.S. Supreme Court. But what I hope to do in this testimony is to give you a sense for how other constitutional democracies organize their judiciaries, particularly with regard to constitutional jurisdiction. What other countries do may not be possible here, but knowledge of those practices may be useful to think with anyway.

For a comparative constitutional law scholar, the most compelling reason for Supreme Court reform is that the U.S. has fallen behind its peer democracies in thinking about how to structure the role of the Supreme Court and its responsibilities in the constitutional order. The U.S. has an old constitution, and the most ancient power of judicial review<sup>1</sup> in the world. It

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<sup>1</sup> A word on terminology. In the U.S., the term "judicial review" customarily means the assessment of a legal norm or state action for its constitutionality. In much of the rest of the world, this process is called "constitutional review," while the term "judicial review" is reserved for cases where courts assess whether executive actions are lawful under statutory

shows. Since the U.S. invented judicial review, other countries have modernized the practice to the point where U.S. system now looks rickety and quaint.

In this testimony, I will first discuss the institutional ecosystem in which national “peak courts” (the highest courts in national legal systems) function to show why the U.S. Supreme Court is presently a target of so much criticism and explain how other constitutional systems have handled the problems that the U.S. Supreme Court faces. Part II will review the various ways that the key functions of peak courts are divided across different institutional homes. Part III explores methods of judicial appointment to the courts that make constitutional decisions. A conclusion follows explaining the relevance of the comparative analysis for the task before the Commission.

## I. CONSTITUTIONAL INTERDEPENDENCIES

Constitutions are complex webs of institutions, rules, values and practices. Experience with many constitutional systems shows that it is generally a mistake to think of one institution in isolation from the others because changes to any one institution has knock-on effects throughout the constitutional system. Altering election rules affects party structures.<sup>2</sup> Eliminating upper chambers of legislatures<sup>3</sup> (a constitutional fad at the moment) typically requires changes in other rules ranging from more clearly defining the opposition role in parliament to the increased use of popular referenda to the creation of new checking institutions to ensure that the remaining parliamentary chamber functions properly.<sup>4</sup> In short, the comparative study of constitutional design has taught us that constitutions should be thought of as systems, in which modifying one part affects other aspects of the constitution that may not at first seem connected.

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delegations of power, even if this does not involve a reference to the constitution. In this testimony, I’ll use the U.S. convention of “judicial review” to refer to the assessment of legal norms and state action for its constitutionality.

<sup>2</sup> ACE: The Electoral Knowledge Network: Parties and Candidates (2d Ed, 2012) at <https://aceproject.org/ace-en/topics/pc/default>.

<sup>3</sup> National Democratic Institute for International Affairs, One Chamber or Two? Deciding Between a Unicameral and Bicameral Legislature, 10-11. N.d. at [https://www.ndi.org/sites/default/files/029\\_ww\\_onechamber\\_0.pdf](https://www.ndi.org/sites/default/files/029_ww_onechamber_0.pdf). Some countries that have abolished their upper houses of the legislature include Sweden, Peru, Iceland, Denmark and New Zealand.

<sup>4</sup> Eliot Bulmer, Bicameralism 2. International IDEA 7-8 (2017) at <https://www.idea.int/sites/default/files/publications/bicameralism-primer.pdf>. See also the Constitution Unit: Checks and Balances in Single Chamber Parliaments: A Comparative Study (1998) at [https://www.ucl.ac.uk/constitution-unit/sites/constitution\\_unit/files/24\\_0.pdf](https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/24_0.pdf).

As you consider whether to recommend reforming the U.S. Supreme Court, you might consider why there has been such clamor for changing the Court at this moment. I would submit that a very powerful Supreme Court with the power to nullify laws for unconstitutionality combined with a nearly-impossible-to-amend constitution produces impossible pressures on the Court, pressures that push the institution to the breaking point with increases in political polarization. If the Supreme Court makes high-stakes decisions because that is its job and if political supermajorities (or even very persistent and vocal minorities) have nowhere to turn within the democratic system to alter Court decisions that they believe are wrongly decided, their only recourse is to put pressure the Court itself so that it will reverse its own rulings. This dynamic, intensified over decades in the United States, has severely strained the judicial nomination and confirmation process because the most obvious way to change the decisions of the Court is to change the judges who make them. Many of the proposals that will come before your Commission emerge from the sense that the process of confirming judges to the Court has ceased to function properly and that the Court has been captured by one political faction over others. Seen from a comparative perspective, if a peak court has the final word on what the constitution means and there is nothing that can be done if substantial parts of a polarized public disagree with its decisions, then the Court itself will be targeted.

How can this pressure be lessened? Looking across comparative cases, I suggest that there are two ways that involve changing other parts of the constitutional system even more than changing the Court itself: a) making the Constitution easier to amend so that there is an available super-majoritarian route to alter unpopular judicial decisions through democratic means or b) providing checks and balances on the Supreme Court by adopting a version of what has been called the “Commonwealth model” or “weak-form judicial review” in which court decisions may be overridden, either temporarily or permanently, by the democratically accountable branches of government.

#### *A. Making Constitutional Amendment Easier*

The world is full of powerful courts that can nullify laws for unconstitutionality. But the most powerful and successful among them tend to be located in constitutional systems in which the constitution itself is much easier to amend than is the U.S. Constitution.

Take Germany, for example. The German Federal Constitutional Court

is one of the world's most powerful and respected courts.<sup>5</sup> In Germany, as in the U.S., the most important questions about the organization of politics and the meaning of rights are raised before the Federal Constitutional Court on a routine basis, and the Court pulls no punches in answering them.<sup>6</sup> But the German Basic Law (constitution) can be amended with a simple two-thirds vote in both chambers of the Parliament.<sup>7</sup> Period. As Dieter Grimm, a former constitutional judge, noted, the Basic Law was amended sixty times in the first fifty-four years of its existence, sometimes quite extensively.<sup>8</sup> It is rare for Federal Constitutional Court decisions to be overturned by constitutional amendment, but the fact that they can be if the relevant parliamentary supermajorities can be mustered acts like an escape valve to take pressure off the Court.

The most powerful court in Africa, the South African Constitutional Court, has been given a wide jurisdiction and has developed a powerful case law. But it, too, sits in a constitutional system with a relatively easy amendment rule. Section 74 of the South African Constitution, like the German Basic Law, provides that the Constitution can be amended by a single two-thirds vote in both houses of Parliament.<sup>9</sup> More complicated procedures are involved if the rights provisions of the Constitution are amended or if the powers of the provinces (states) are changed. In its first 20 years of operation, the Constitution was amended seventeen times, which demonstrates that democratic supermajorities have somewhere to go if they find that the Constitution blocks important change – and that in turn means that the Court is not the only focal point for constitutional updating.

The Colombian Constitutional Court is the most powerful high court in

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<sup>5</sup> For two recent books in English on this court, see MICHAELA HAILBRONNER, *TRADITIONS AND TRANSFORMATIONS: THE RISE OF GERMAN CONSTITUTIONALISM* (2015) and JUSTIN COLLINGS, *DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT, 1951-2001* (2015).

<sup>6</sup> The Court's leading cases have been made available in English with expert commentary: DONALD KOMMERS AND RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY*. (3d Ed. 2012).

<sup>7</sup> BASIC LAW (GERMANY), Article 79(2). Despite the general ease of amendment, Article 79(3) indicates that two articles of the constitution – the one grounding the constitution on the principle of human dignity and asserting the legally binding force of basic rights and the other laying down the basic principles of the structure of the German state as democratic, social and federal – are unamendable. For an official English translation of the Basic Law, see <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

<sup>8</sup> Dieter Grimm, *The Basic Law at 60 – Identity and Change*. 11 GERMAN L. J. 33 (2010) at <https://doi.org/10.1017/S2071832200018411>.

<sup>9</sup> CONSTITUTION (SOUTH AFRICA) 1966, Section 74 at <https://www.gov.za/documents/constitution-republic-south-africa-1996>.

Latin America.<sup>10</sup> Here, too, the Colombian Constitution that created a powerful Constitutional Court also included a relatively easy constitutional amendment procedure. The Constitution may be amended by referendum<sup>11</sup> or by two different votes of both houses of Parliament with absolute majority support.<sup>12</sup> If the amendment implicates the rights provisions of the Constitution, parliamentary passage must be confirmed by a referendum.<sup>13</sup> That said, the Constitutional Court has held that constitutional amendments must be substantively limited to changes to the existing text and must not engage in what the court calls “substitution of the constitution” which would turn the present governmental system into a different form.<sup>14</sup> That assertion of the power to review constitutional amendments – and to strike some of them down – has predictably heightened tensions over the role of the court in the Colombian constitutional system, which makes my point that if a route through the peak court is the only way to modify the constitutional order, then that Court will be frequently under attack from competing sides.<sup>15</sup>

In Canada, the powers of the Supreme Court were greatly expanded in 1982 when the Charter of Rights and Freedoms was adopted, entrenching judiciable rights in the Canadian Constitution for the first time and giving the Supreme Court of Canada the power to enforce them. The Charter was part of the Constitution Act 1982 which also included five new amendment procedures;<sup>16</sup> the use of each depends on which part of the constitution is being altered. Some procedures are simple and quick; others which amend core features of the constitutional order (particularly rights and federalism) are more onerous. The Constitution Act 1982 also includes a provision for

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<sup>10</sup> A recent English-language casebook for this court makes its jurisprudence accessible to new audiences. MANUEL JOSÉ CEPEDA ESPINOZA AND DAVID LANDAU, *COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES* (2017).

<sup>11</sup> CONSTITUTION (COLOMBIA) Art. 378. (Official English translation at <https://www.corteconstitucional.gov.co/english/Constitucion%CC%81n%20en%20Ingle%C%81s.pdf>.)

<sup>12</sup> CONSTITUTION (COLOMBIA) Art. 375. An absolute majority is the majority of all members of the chamber regardless of the number present for the vote.

<sup>13</sup> CONSTITUTION (COLOMBIA) Art. 377.

<sup>14</sup> Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT'L J. CONST. L. 339 (2013).

<sup>15</sup> Gonzalo Andres Ramirez-Cleves, *The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy*, in *DEMOCRATIZING CONSTITUTIONAL LAW: PERSPECTIVE ON LEGAL THEORY AND THE LEGITIMACY OF CONSTITUTIONALISM* 213-20 (THOMAS BUSTAMANTE & BEMARDO GONGALVES FERNANDES EDS., 2016).

<sup>16</sup> CONSTITUTION ACT 1982 (CANADA), Part V. <https://laws-lois.justice.gc.ca/eng/const/page-13.html#docCont>

temporarily overriding a Supreme Court decision,<sup>17</sup> which I will discuss more below. But the fact that the Supreme Court was strengthened at the same time that constitutional amendment was made easier provides further evidence that these two features of constitutional design are linked.

There are many courts; I have few pages. Suffice it to say that, in well-functioning constitutional systems, the more powerful the court, the easier it should be to change the constitution, lest the peak court be caught making counter-majoritarian decisions when there are no alternative democratic political channels for updating the constitution. Of course, constitutional amendments should still be harder to pass than ordinary laws, but an amendment procedure that makes constitutional change nearly impossible spells trouble for a powerful peak court because there is no way to change its decisions without attempting to pressure it to change its rulings.

### *B. The Commonwealth Model or Weak-Form Judicial Review*

Many of America's closest constitutional relatives – other common-law systems<sup>18</sup> – have discovered a way to reverse or suspend decisions of a peak court without resorting to constitutional amendment. Called the “new Commonwealth model”<sup>19</sup> (with reference to the Commonwealth of Nations that is the legacy of the British Empire) or simply “weak-form judicial review,”<sup>20</sup> peak courts in these systems either do not have the power to nullify laws at all, being limited to identifying contradictions with a constitution without being able to correct them, or they can nullify laws and then be overridden by ordinary legislation that falls short of a constitutional amendment. Both methods weaken the finality of judicial review and turn the relationship between peak courts and their respective legislatures into something more of a dialogue rather than a one-way slap-down. Both famously give democratically elected legislatures ways to override courts.

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<sup>17</sup> CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Section 33. For the text and context, see Canadian Department of Justice, Section 33 – Notwithstanding Clause at <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art33.html>.

<sup>18</sup> The United States and the other countries once colonized by the United Kingdom are generally common law countries. The distinguishing characteristic of the legal system is that the decisions of courts count as a source of law. In civil law countries – most of the rest of the world – decisions of courts resolve particular cases but do create general principles of law. Some jurisdictions (for example, Scotland, Canada, Israel and South Africa) are “mixed” common law and civil law jurisdictions.

<sup>19</sup> Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

<sup>20</sup> MARK TUSHNET, *WEAK COURT, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE PERSPECTIVE* (2008).

The United Kingdom's Constitution embraces parliamentary supremacy which means, among other things, that the courts cannot nullify laws of the Westminster Parliament.<sup>21</sup> But can the courts say nothing at all if an act of Parliament violates basic rights? When the Parliament adopted the Human Rights Act in 1998,<sup>22</sup> bringing the European Convention on Human Rights into the U.K. Constitution, it gave courts the power to identify rights violations without themselves violating the principle of parliamentary supremacy. Courts were permitted to declare statutes "incompatible" with the Convention while leaving those statutes in force.<sup>23</sup> Declarations of incompatibility passed the question of constitutional compliance back to the Parliament. While the Parliament is not compelled to adjust the law to bring it into compliance with the Human Rights Act, public pressure to act on declarations of incompatibility has forced Parliament's hand in virtually every case. A review of the Parliament's track record on declarations of incompatibility completed by the Parliament's Human Rights Joint Committee in 2015 revealed that there was only one case in which the Parliament failed to correct the law after the courts had identified incompatibilities with the Human Rights Act. All other laws had been modified by the Parliament along the lines of the courts' decisions.<sup>24</sup> In short, declarations of incompatibility had accomplished what constitutional rulings of peak courts are supposed to accomplish: they succeeded in changing the laws that contravened the constitution. But in the U.K., it is the Parliament and not the court that makes the final decision on what the law should be and is.

Canada, which innovated in its approach to constitutional amendment, also innovated in its approach to judicial review. The Canadian Supreme Court, like its American counterpart, can nullify laws that violate the constitution, including violations of the Charter of Rights and Freedoms. But under Section 33 of the Constitution Act 1982, the national or provincial parliaments may reenact the impugned law, as long as the parliament declares that it is doing so "notwithstanding" the fact that the Supreme Court has found the law unconstitutional. An impugned and reenacted law may only remain on the books for five years before it automatically lapses or is self-

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<sup>21</sup> The courts are permitted to nullify laws of the devolved parliaments in Scotland, Northern Ireland and Wales for violating higher-level norms, however.

<sup>22</sup> HUMAN RIGHTS ACT 1998, c. 42 at <https://www.legislation.gov.uk/ukpga/1998/42/contents>

<sup>23</sup> *Id.* at sec. 4.

<sup>24</sup> U.K. Parliament Human Rights Joint Committee, Declarations of Incompatibility by U.K. Courts. March, 11, 2015 at <https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/13006.htm> .

consciously reenacted despite its unconstitutionality. This procedure allows the legislature to override the court – but it also forces the legislature to admit that it is acting unconstitutionally, which not surprisingly has meant that the national and regional parliaments do not use the option very often. In fact, the “notwithstanding” clause has been used far less than anyone predicted at the outset.<sup>25</sup> But if there were a real uprising against a decision of the Supreme Court of Canada, there would be a democratic safety-valve to take the pressure off the Court.

As these examples show,<sup>26</sup> giving legislatures the opportunity to override or simply not respond to peak courts’ decisions does not mean that the courts become powerless. Rather the reverse. Public esteem for courts is generally so much higher than it is for legislatures that it is often a big political mistake for a legislature to refuse to follow court decisions. But having a greater role for the legislature in constitutional compliance ensures that the courts do not shoulder alone the burden of harmonizing laws with the constitution. And, most crucially, it means that there is a democratic avenue through the legislature to reverse or simply not apply a court’s judgment if the decision is politically untenable. The legislative override option ensures that responsibility to maintain a constitutional order is shared between courts and democratically accountable institutions – and that takes unbearable pressures off the courts.

These two mechanisms – making the constitution easier to amend and/or providing a legal path for democratic override of constitutional decisions – have been tried in systems in which peak courts have been given increased powers of judicial review. While neither of these mechanisms have been used very often, their existence means that controversial court decisions do not lead directly to attempts to pack or pressure the courts as we have seen in the United States.

## II. THE INSTITUTIONAL ARCHITECTURE OF JUDICIAL REVIEW IN CONSTITUTIONAL DEMOCRACIES

In the common-law world, most countries have retained a general

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<sup>25</sup> Rosalind Dixon, *Weak-Form Review and American Exceptionalism*. 32 OXFORD J. LEG. STUDIES 487 (2012).

<sup>26</sup> Australia and New Zealand also permit legislative overrides of constitutional decisions by courts, as Dixon, *id.*, explains. See also Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism* 8 INT. J. CON. LAW 167 (2010) for further elaboration of the Australian and New Zealand models.



jurisdiction supreme court that performs at least two different functions: a) it is the highest general court for all legal questions arising under national law and b) it is the final judicial arbiter of what the national constitution requires. But, unlike in the U.S., most of these other supreme courts use different procedures and different numbers of judges to decide constitutional cases than they use to decide final appeals in matters of ordinary law. Once you step outside the common law world into the rest of the world's democracies, however, constitutions written after World War II have often created a completely separate court to hear constitutional questions, leaving non-constitutional appellate review in the "ordinary"<sup>27</sup> courts.

Why consider separating ordinary appellate jurisdiction from constitutional jurisdiction? Given what I have said above, there may be special reasons to believe that peak courts come under particular pressures when they make constitutional decisions because constitutions cannot be changed as easily as ordinary laws. Plus, constitutional decisions are by their very nature more political on average than other sorts of cases. Many countries have therefore concluded that there are good reasons to not mix up the two kinds of cases because legal certainty of the system as a whole may be undermined when the enforcement of ordinary laws is carried out by a more openly political institution. Because constitutional issues involve the actions of government and the behavior of elected and partisan officials, however, it is hard to avoid collisions with politics. Many jurisdictions have therefore concluded that constitutional cases should be separated from ordinary cases, precisely to have more options to design institutional frameworks that can respond to these special characteristics of constitutional decision-making and also to keep non-constitutional matters in courts with less of a political caseload.

In the common law world, this separation is usually accomplished by using different procedures for constitutional and ordinary cases in the same peak court. For example, the twelve justices of the Supreme Court of the United Kingdom rarely sit together as a bench. In the typical case before the court, only five justices will hear the case. But where the case raises important constitutional questions, the Supreme Court may at its discretion decide to increase the number of judges hearing the case.<sup>28</sup> In the two most crucial recent constitutional cases involving Brexit, for example, *Miller I*<sup>29</sup>

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<sup>27</sup> In systems with specialized constitutional courts, the non-constitutional courts are typically called the "ordinary" courts.

<sup>28</sup> U.K. Supreme Court, Panel Numbers Criteria at <https://www.supremecourt.uk/procedures/panel-numbers-criteria.html>

<sup>29</sup> *R (on the application of Miller and another) v Secretary of State for Exiting the European*

and Miller II,<sup>30</sup> fully eleven judges heard each case (there being one vacancy on the Court each time).

Similarly, the Supreme Court of Canada, with a bench of nine judges, has a five-judge quorum,<sup>31</sup> which is the number of judges assigned to the typical case. But where a case is of constitutional importance, then the full bench will hear it. The Supreme Court of Ireland has twelve judges, but usually decides cases in panels of three or five.<sup>32</sup> In a case involving judicial review of a statute, however, the constitution requires that least five judges must sit,<sup>33</sup> and in practice panels of seven or nine are common in such cases. The High Court of Australia sits in panels of two on most questions that come as appeals from lower courts, though the full bench of seven sits in constitutional cases and in cases where the court is being asked to overturn precedent.<sup>34</sup> The Supreme Court of India, with thirty-four judges in full complement, decides ordinary cases in panels of two or three, but constitutional matters must be decided in panels of at least five.<sup>35</sup> In India, the importance of a case can be measured in the number of judges assigned to it. The largest ever bench constituted within the Indian Supreme Court had thirteen judges deciding whether constitutional amendments could ever be unconstitutional.<sup>36</sup> (The answer was yes and ran to more than 800 pages of seriatim opinions.)

Some common law supreme courts create an even sharper distinction between cases involving constitutional questions and those involving only ordinary law. The Supreme Court of Israel, for example, sits in two different formations: 1) as the Supreme Court, the highest court of appeal for civil and criminal cases and 2) as the High Court of Justice (*Bagatz*) which hears only administrative and constitutional law questions. The same fifteen judges sit on both courts, usually in panels of three for substantial cases.<sup>37</sup> For cases of

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Union, [2017] UKSC 5 at <https://www.supremecourt.uk/cases/uksc-2016-0196.html> .

<sup>30</sup> R (on the application of Miller) v The Prime Minister, [2019] UKSC 41, available at <https://www.supremecourt.uk/cases/uksc-2019-0192.html> .

<sup>31</sup> Supreme Court Act (R.S.C., 1985, c. S-26), Art. 25 at <https://laws-lois.justice.gc.ca/eng/acts/s-26/page-2.html>

<sup>32</sup> The Supreme Court of Ireland, Composition of the Court, at <http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/pagecurrent/36C4492DCD6C52E780257315005A419C>.

<sup>33</sup> CONSTITUTION (IRELAND), Art 26(2). <http://www.irishstatutebook.ie/eli/cons/en/html>

<sup>34</sup> High Court of Australia, Operation of the High Court <https://www.hcourt.gov.au/about/operation> .

<sup>35</sup> CONSTITUTION (INDIA), Article 145(3).

<sup>36</sup> Kesavananda Bharati Sripadagalvaru v. Kerala, Writ Petition (Civil) 135 of 1970.

<sup>37</sup> The court has a huge caseload: About 60% of the 10,000 cases brought to the two sides of the court each year are deemed minor and decided by a single judge.

extraordinary importance – constitutional matters in the High Court of Justice – the chief justice may decide to expand the panel to any larger uneven number of judges.<sup>38</sup> For example, in a high-profile recent case involving the determination of whether the Knesset (Parliament) had in fact enacted a new section of the constitution (Basic Law) or abused its “constituent assembly” powers, a nine-judge panel of the High Court of Justice decided by six to three that the Knesset had acted improperly.<sup>39</sup>

For many countries, though, particularly among the newer democracies, separating constitutional from non-constitutional cases by internal rules within a single peak court hasn’t been enough. These countries have instead opted for “concentrated” review in which only a court with the unique jurisdiction to hear constitutional cases can decide constitutional questions<sup>40</sup> by contrast with a “diffuse” system like that of the U.S. in which constitutional questions can be asked and answered by any court with jurisdiction over the underlying dispute.

A constitutional court is distinctive because not only is it the only court with the power to hear constitutional questions, but it also has the jurisdiction to hear *only* constitutional questions, which means that questions of routine interpretation of other legal sources are simply never on a constitutional court's docket. To ensure concentrated review, all constitutional questions must be referred to the constitutional court from “ordinary” courts as those cases come up in ordinary litigation, using a system similar to an interlocutory appeal.<sup>41</sup> Cases can also reach the constitutional court from other offices in the political system that have been given the power to ask for advisory opinions or abstract review of laws before they come into effect.

Why do countries set up constitutional courts instead of merging

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<sup>38</sup> The Supreme Court of Israel, About the Supreme Court at <https://supreme.court.gov.il/sites/en/Pages/Overview.aspx>.

<sup>39</sup> Noa Shpigel and Netael Bandel, *Israel's Top Court Overrides a Basic Law as Knesset Speaker Decries a 'Coup'*, HAARETZ, May 23, 2021 at <https://www.haaretz.com/israel-news/.premium-top-court-rules-it-can-override-a-basic-law-as-knesset-speaker-decries-coup-1.9836685>.

<sup>40</sup> The section that follows about the structure and power of constitutional courts was adapted from Kim Lane Scheppelle, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*. 154 U. PENN. L. REV. 1757 (2006).

<sup>41</sup> The usual procedure is to freeze the case below, ask the constitutional question of the constitutional court and then take the answer and apply it to the facts of the case before the lower-level judge after the constitutional court decides. That means that the constitutional court is not making the final decision on the case, but merely providing constitutional guidelines for how questions arising in that case should be handled.

constitutional jurisdiction into the supreme court? First, by segregating constitutional jurisdiction in a separate court, the constitutional court can be established with quite different rules and procedures from the ordinary judiciary. If ordinary judges are promoted through a civil-service judiciary and have life tenure, which is the case in the vast majority of the world's legal systems, then a separate constitutional court can more easily feature judges who are appointed in a more politically accountable process and for fixed terms.

If the ordinary courts in a country do not have the ability to create law through their decisions, as is true in virtually all civil law systems,<sup>42</sup> then having one separate court – a constitutional court – whose opinions *do* count as binding law makes it easier to integrate the rules that this and only this court made into a system of positive law. Similarly, if the Commission moves toward recommending something like weak-form judicial review for constitutional cases in the United States, then attaching an override possibility only to constitutional cases is easier where one court issues only constitutional rulings.

Practically speaking, however, many constitutional courts were set up when their respective countries were emerging from war, dictatorship or constitutional malfunctions and when it was necessary to turn the government sharply in a different political direction. At such a critical moment in the history of a country, there is generally no spare judiciary to use when re-launching a legal system. Constitutional courts added to the top of a judiciary can ensure that the new constitution is being enforced. In in post-horror countries<sup>43</sup> monitoring the ordinary judiciary to ensure that it is not still in ideological thrall to a prior regime is a crucial function of such courts.

Even without having a catastrophic immediate past as a reason for launching judicial reform, the U.S. can stand to learn from the way in which constitutional courts – precisely because they are not part of the ordinary judiciary – actively participate in the creation of a constitutional culture among the other branches of government, with which they frequently interact. A constitutional court's daily activities involve determining the room for

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<sup>42</sup> Civil law systems – or code systems – use only codified law as a source of law. But perhaps it is easier to think of civil law systems primarily as legal systems in which judicial decisions do not count as a source of general rules, but only as solutions to particular disputes.

<sup>43</sup> I developed the idea of post-horror constitutionalism to explain the many ways new constitutional systems need to come to terms with a bad past, but also not repeat it. Kim Lane Scheppele, *Constitutional Interpretation After Regimes of Horror*, in *STUDIES IN LAW, POLITICS AND SOCIETY* (PATRICIA EWICK & AUSTIN SARAT EDS., 2005).

maneuver of the other branches of government and enforcing the rights that every state authority must honor. By separating out constitutional jurisdiction in a separate court, the court becomes be a routine player in political life without pulling ordinary appellate jurisdiction into this much more political space.

Between the common-law supreme courts that separate constitutional and ordinary legal matters inside the court and wholly separate constitutional courts that can only hear constitutional cases is a hybrid form: A constitutional chamber inside a supreme court. The Supreme Court of Estonia, for example, has nineteen judges divided across four chambers devoted to civil law, criminal law, administrative law and constitutional review.<sup>44</sup> The civil, criminal and administrative law chambers are each the highest court of appeal in their respective areas while the constitutional review chamber is composed of a rotating set of the other judges on the supreme court and it has the sole jurisdiction to rule on constitutional issues, including the constitutionality of laws, decrees and treaties. In especially important cases, the Supreme Court sits *en banc* as the constitutional review chamber. Like the Supreme Court of Israel which sits one day as the Supreme Court and the next day as the High Court of Justice, the Estonian Supreme Court converts its judges from ordinary judges to constitutional judges through an intra-institutional procedure.

Other courts have experimented with this structure as well, though under less advantageous circumstances. The El Salvadorian Supreme Court has a separate constitutional chamber within it, though that chamber met is demise a few weeks ago when the president fired all five of the judges, along with the attorney general, as part of democratic retrogression in that country.<sup>45</sup> The Kyrgyz Supreme Court also has a specialized constitutional chamber within its Supreme Court,<sup>46</sup> and it too is under pressure as the country slips into autocracy.<sup>47</sup> But these difficulties are not a fault of the structure. If anything, it is harder to pressure just one chamber of a multi-chambered court

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<sup>44</sup> The Supreme Court of Estonia, <https://www.riigikohus.ee/en/supreme-court-estonia>

<sup>45</sup> Mneesha Gellman, *El Salvador's Façade of Democracy Crumbles as President Purges his Political Opponents*. THE CONVERSATION, June 24, 2021 at <https://theconversation.com/el-salvadors-facade-of-democracy-crumbles-as-president-purges-his-political-opponents-161781> .

<sup>46</sup> The Supreme Court of Kyrgyzstan, The Constitutional Chamber of the Supreme Court in the Kyrgyz Republic, at <http://constpalata.kg/en/about/> .

<sup>47</sup> Ayzirek Imanaliyeva, *Kyrgyzstan: Constitutional Chamber Nixes Attempt to Halt Power Grab*. EURASIANET, Dec. 2, 2020 at <https://eurasianet.org/kyrgyzstan-constitutional-chamber-nixes-attempt-to-halt-power-grab> .

than to attack a separate constitutional court.<sup>48</sup> Moreover, in the U.S. context, where the Constitution dictates that “[t]he judicial power of the United States, shall be vested in one Supreme Court,”<sup>49</sup> it would be easier to change the internal structure of the Supreme Court by statute to add separate chambers than to amend the Constitution to split the jurisdiction of the Supreme Court across two separate courts. That said, it would not be unheard of to create a constitutional court within an existing constitutional system. Every constitutional court in the world (and at last count, there were constitutional courts in 65 countries) was created in a system that once had only a high court of appeal.

To summarize this section, the United States is one of the few remaining jurisdictions in the world in which cases arrive at the peak court and are *not* sent into a separate procedural or institutional track if the case poses a constitutional question.. While dual-track supreme courts – in which the same court handles both constitutional and ordinary cases through different procedures -- are common in the common-law world, much of the rest of the world has shifted over to a model in which constitutional questions are sent to a specialized court.

As the Commission considers reform of the U.S. Supreme Court, it might want to consider whether to recommend ways that constitutional jurisdiction might be separated from final discretionary appeals on ordinary legal matters. This might be useful for other reasons. If, for example, the Commission moves toward recommending fixed terms of office for U.S. Supreme Court judges, it will be a departure from the usual rules for other federal judges, and you might want to consider whether fixed term judgeships should apply to the Supreme Court in its role as the highest court of appeal for ordinary cases or only when it is deciding constitutional questions – or both. If the Commission is considering recommending enlargement of the Supreme Court by adding more judges, it might do so as part of a reform that would create separate chambers within the Court which might, in turn, require the appointment of more judges. In short, separating constitutional and non-constitutional cases, something that would make sense in any event because almost all peak courts do it, might provide additional justifications for the sorts of reforms presently being urged before the Commission.

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<sup>48</sup> I analyze the political pressures which functionally shut down the two constitutional courts I worked in – Hungary and Russia – in Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*. 154 U. PENN. L. REV. 1757 (2006).

<sup>49</sup> U.S. CONST. Article III, Sec. 1.

### III. JUDICIAL SELECTION

The United States Constitution specifies that Supreme Court justices are nominated by the President and appointed with advice and consent of the Senate.<sup>50</sup> But though other constitutions often specify little more than this in laying out the process for selecting peak court judges, the U.S. is unusual in not elaborating additional criteria or additional procedures beyond those specified in the Constitution, thereby leaving a great deal to politics, discretion and chance.

In Canada, for example, the formal constitutional process is simple: The Governor General (the Queen's representative in Canada), makes the appointment. But of course, behind the ceremonial announcement, the Prime Minister gives the Governor General the name of the judge to be appointed. Beginning in 2016, however, a new process has been created through which the Prime Minister is now formally advised by the Independent Advisory Board for the Supreme Court of Canada, which consists of seven members variously appointed by the Minister of Justice, the Canadian Bar Association, the Federation of Law Societies, the Canadian Judicial Council and the Council of Canadian Law Deans.<sup>51</sup> This body assesses candidates for each opening and presents the Prime Minister with a list of three to five names, from which he chooses. Those who want to be considered must apply, fill in various questionnaires and submit some of their prior work as either judges or lawyers so that the Advisory Board can assess its quality.<sup>52</sup>

The Independent Advisory Board is given terms of reference which specify their own role (which include conflict of interest rules and requirements of impartiality, integrity and objectivity). The terms of reference also explain the criteria to be used in assessing the candidates.<sup>53</sup> In

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<sup>50</sup> U.S. CONST. Art II, Sec. 2.

<sup>51</sup> Office of the Commissioner for Federal Judicial Affairs in Canada, The Independent Advisory Board for Supreme Court of Canada Judicial Appointments 2021 at <https://www.fja-cmf.gc.ca/scc-csc/2021/establishment-creation-eng.html> .

<sup>52</sup> Office of the Commissioner for Federal Judicial Affairs in Canada, How to Apply and Instructions at <https://www.fja-cmf.gc.ca/scc-csc/2021/form-formulaire-eng.html> .

<sup>53</sup> Office of the Commissioner for Federal Judicial Affairs in Canada, Terms of Reference of the Advisory Board 2021 at <https://www.fja-cmf.gc.ca/scc-csc/2021/mandate-mandat-eng.html> . For example, the terms of reference indicated that the members of the Board should “in establishing a list of qualified candidates, seek to support the Government of Canada’s intent to achieve a gender-balanced Supreme Court of Canada that also reflects the diversity of members of Canadian society, including Indigenous peoples, persons with disabilities and members of linguistic, ethnic and other minority communities including those whose members’ gender identity or sexual orientation differs from that of the

this last round, the criteria included not only expertise and analytical ability, but also include personal integrity, respect and consideration for others, ability to appreciate a diversity of views including those relating to groups historically disadvantaged in Canadian society, moral courage, discretion and open-mindedness.<sup>54</sup> The career qualifications for Supreme Court judges are specified in the *Supreme Court Act*<sup>55</sup> which, among other things, requires that at least three of the judges be from Quebec.

In short, while the power to appoint seems to lie solely in the hands of the Prime Minister if one only consults constitutional texts, a set of institutional practices has grown up around this appointment power to make it less discretionary and more responsive to the professional qualifications and personal integrity of the candidates. While it has never been common in Canada to pick judges for their political agreement with the party in power, it is even less likely to happen under this system in which the selection committee has a majority of members selected by professional groups, taking nominations out of the daily grind of politics.

The U.K. has also been through a recent revolution in judicial appointments, a revolution that came when the twelve “Law Lords” – a committee of the upper chamber of the British Parliament that constituted the highest court in the United Kingdom – were transformed in 2009 into twelve independent judges of the new and free-standing U.K. Supreme Court.<sup>56</sup> The judicial appointments procedure was radically altered at that point with the creation of the selection committees – specially convened committees for Supreme Court vacancies and the standing Judicial Appointments Committee (JAC) for all other positions throughout the judiciary.<sup>57</sup> The screening panel for the U.K. Supreme Court judgeships consists of the president of the Supreme Court, another senior U.K. judge, and one member each from the Judicial Appointments Committee, the Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission. Candidates must apply, be screened by this committee and are assessed on their merits. Though the formal constitutional procedure – as in Canada – is that the Prime Minister advises the Queen who makes the appointment

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majority.” Functional bilingualism is also an important qualification.

<sup>54</sup> Office of the Commissioner for Federal Judicial Affairs in Canada, Qualifications and Assessment Criteria 2021 at <https://www.fja-cmf.gc.ca/scc-csc/2021/qualifications-eng.html>.

<sup>55</sup> R.S.C. 1985, c. S 26, sec. 5.

<sup>56</sup> CONSTITUTIONAL REFORM ACT 2005. C. 4 at <https://www.legislation.gov.uk/ukpga/2005/4/contents>.

<sup>57</sup> U.K. Supreme Court, Appointment of Justices at <https://www.supremecourt.uk/about/appointments-of-justices.html>.



precisely as recommended by the Prime Minister, the Constitution Reform Act requires that the Prime Minister give the Queen the one name produced by the selection committee. In short, the process has been taken completely out of the hands of political officials and lodged in a body that is composed primarily of those already affiliated with and knowledgeable about the legal system and the judiciary.

While some judicial appointment reforms have moved toward greater professional scrutiny that minimize the role of the executive in judicial appointments, as we have seen in the U.K. and Canada, another set of judicial appointment processes leans in the opposite direction, toward making more prominent a role for partisan politics while nonetheless creating a system in which partisan nominations cancel each other out.

In Germany, the Federal Constitutional Court is divided into two panels (Senates) of eight judges each, one of which handles individual rights cases and the other of which handles separation of powers, international law and criminal law matters. The Constitution specifies that half of the judges are appointed by the upper house of Parliament (the Bundesrat) while the other half are appointed by the lower house (the Bundestag). Three members of each Senate must have worked for at least three years as judges on the Federal High Court.<sup>58</sup> All must be lawyers and at least 40 years old.

After that, however, the procedure disappears behind closed doors.<sup>59</sup> At this point, since it is a parliamentary process after all, the main political parties in the Parliament have an enormous say in who is put forward as a judge. Moreover, there is an understanding, nowhere written into law, that in each Senate on the Court, four of the judges should come from parties on the left side of the political spectrum and four should be from parties of the right. For years, the Christian Democrats (on the right) and the Social Democrats (on the left) dominated the process as the two largest parties. But as the Parliament has started to fracture and the dominant parties now control fewer of the seats, the Social Democrats have given two of “their” seats on the Court (one in each Senate) to the Green Party and the Christian Democrats have given one of “their” seats to the Free Democrats. (Many are concerned that this way of dividing up seats on the Court by party may mean that the far-right AfD should get a seat on the Court soon but the other parties are so

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<sup>58</sup> BASIC LAW (GERMANY), Art. 94.

<sup>59</sup> What follows is partly described in Christine Landfried, *The Selection Process of Constitutional Court Judges in Germany* in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 196 (KATE MALLESON AND PETER RUSSELL, EDS. 2006). The rest comes from my discussion with German professors of constitutional law and current and former judges.

far united in wanting to block this possibility.) When a seat comes open, then, everyone knows whose turn it is to fill it. When a CDU seat comes open, a person nominated by the CDU will fill it. When a Green seat comes open, a person nominated by the Green party will fill it.

While this system is quite overtly partisan, the end result is the opposite. To get a majority in a Court Senate that is split evenly between left-leaning judges and right-leaning judges, the Senate must move its decision toward the middle. Only when one side can pull someone from the other side over can a decision meet the requirement to be a majority decision. As a result of this complex process, the German Federal Constitutional Court as an institution is not easily identifiable with any particular political fraction even though every seat on the Court is. But it is the overall agreement about political balance in each Senate that does the work of making the Court neutral again.

When I worked at the Constitutional Court in Hungary, a similarly partisan process in judicial selection produced a neutral court. The constitutional rule in the 1990s (changed in 2010 by the current Fidesz government) required that each candidate for a judgeship on the Constitutional Court pass through two votes in the Parliament. First, a committee was formed in which each political party in the Parliament cast one vote. For much of the first two decades of Hungary's post-communist existence, there were six parties in the Parliament so a judicial candidate had to win over at least four of the parties. After that, the candidate would go to the floor of the Parliament where he would have to win two-thirds of the votes of all of the members of Parliament.

Because people chosen in the first half of the process (in which little parties had an outsized influence) often couldn't get through the second half of the process (in which the big parties dominated the vote), a compromise was necessary. In practice, though nowhere written into the rules, the Parliament would wait for at least two vacancies to emerge so that one would be given to the smaller parties to ensure their votes for the other candidate, who was always backed by one of the bigger parties. Precisely which small and large parties were able to select their preferred candidates depended on the vote totals in the Parliament and what mathematical combination it would take in stage one to guarantee that the candidate could get through stage two. The end result, as in Germany, was that the partisan candidates basically cancelled each other out once they got onto the Court. Given this system, no one party could dominate. All decisions made at the Court had to win the approval of judges backed by very different parties in order to build a

majority. That is what permitted the Court to stand above partisan politics, even though partisan politics drove the judicial appointments process.

The Commission might consider, as it examines the judicial selection process for the U.S. Supreme Court whether supplementary procedures or qualifications could be added by statute to the present constitutional requirements. As these examples have shown, the additional procedures could either pull in the direction of qualification committees designed to take the politics out of the process or *more* political procedures designed to get onto the Court candidates from the different political parties so that they are guaranteed roughly equal numbers of seats. There are many more examples than these out there (so many courts, so few pages!), but these examples might provide a place to start in thinking about how to make the U.S. more like the rest of the democratic-constitutional world.

#### CONCLUSIONS

In this testimony, I have covered only some of the topics in which the comparative analysis of peak courts might be relevant to your inquiry. But I hope that what I have provided here whets your appetite for more. Virtually all of our peer democracies have wrestled recently with the problem of how to structure their peak courts. Seeing the variety of ways that other democracies have tried to guarantee both the political independence of the judiciary and its political responsiveness to shifting majorities might open our American eyes to different ways of framing the issues.

By emphasizing the role of the Supreme Court in a constitutional system in Part I, I have argued that some of the most important changes you could consider might come from outside the direct constitutional and statutory regulation of the judiciary. If the constitutional amendment process of Article V were to be made easier or Article I of the Constitution were to give the Congress power to override decisions of the Supreme Court (one would hope not by simple majority vote but by a process similar to the override of a presidential veto), then new avenues for updating a very old Constitution will appear that don't run through the Supreme Court. Such release valves would lower the stakes in the judicial nomination and confirmation process because the Supreme Court's interpretation of the Constitution would not any longer be the primary roadblock in the way of modernizing it. Comparative constitutional analysis shows that combining strong courts with impossible-to-amend constitutions generates unbearable political pressures on those courts.

By showing in Part II how most of our peer democracies have separated decisions about ordinary law from decisions that interpret or apply the constitution, I hope to have invited you to think about whether the various functions of the U.S. Supreme Court might be better carried out in different institutional forms. Since World War II, sixty-five countries in the world have created constitutional courts with different judicial appointment procedures and term-limited judges, something that is probably too heavy a lift for a Commission to recommend in the United States. But the hybrid idea of having different chambers *within* the Supreme Court to handle different kinds of cases – something that might be associated with the addition of new judges to the Court to handle the increased workload – might be a way to separate the more political constitutional cases from the cases that involve the interpretation of “ordinary law.”

Finally, in Part III, I explained how minimally defined formal procedures laid out in constitutions for appointing peak-court judges have been routinely supplemented in many constitutional systems by new formal and informal procedures that ensure that the peak court cannot be captured by any one political party. Given that the current debates in the United States over the Supreme Court tend to flare up when new judges are added to the Court, perhaps the most effective way to ensure that the Court is not a continuing target of political capture is to design procedures for vetting and nominating judges that put partisan capture out of reach. I have provided examples of several such procedures; designing such a set of procedures for the United States will be a function of the politically possible. But the idea that the constitution says everything there is to say any particular aspect of governance is no more true about judicial appointments than it is about the structure of the executive branch, or the internal structure of Congress or many other topics on which the Constitution is the beginning rather than the end of the conversation about how American political institutions are structured.

Comparative constitutional law counsels that one cannot just pick up a foreign idea and plunk it down, without more, into a new legal system. But I hope that a plunge into comparative constitutional law sparks your imagination as you see the many different ways that constitutional systems are organized. The United States may have invented judicial review, but its operation in the countries that started with our idea and ran with it provide us with new ways to think about an old Constitution.

