

Discretionary Review in the Common Law: A Montesquieuan Headache

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Abstract

Discretionary review complicates Montesquieu's theory of judicial restraint by allowing courts to control their own dockets, selectively shaping legal and constitutional development with minimal external oversight. While traditionally framed as a tool for judicial efficiency, discretionary review expands judicial autonomy in ways that blur the boundaries between adjudication and policymaking. This paper examines its evolution across six common law jurisdictions—the United States, the United Kingdom, Australia, Canada, India, and Pakistan—and demonstrates how courts have adapted this power within their distinct constitutional, political, and institutional environments. Although discretionary review enables courts to manage caseloads and resolve legally significant disputes, it also functions as a mechanism of judicial gatekeeping, allowing courts to avoid politically sensitive cases or strategically revisit established precedents. In systems where judicial discretion is expansive, such as Pakistan and India, discretionary review has facilitated judicial interventions in political affairs, often shaping governance beyond the judiciary's conventional mandate. In the United States, the opaque nature of certiorari denials has entrenched judicial agenda-setting, allowing ideological factions within the Court to dictate which constitutional questions receive national adjudication. Conversely, jurisdictions like Australia and Canada impose structured constraints on discretionary review, mitigating judicial overreach while maintaining institutional autonomy. This paper argues that discretionary review, while indispensable for judicial independence, requires procedural safeguards to prevent its use as an instrument of unchecked power. By comparing discretionary frameworks across jurisdictions, it identifies systemic vulnerabilities and proposes reforms to enhance accountability, including mandatory reasoning for case denials, broader selection panels, and codified review criteria. Without such measures, discretionary review risks entrenching judicial supremacy at the expense

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of democratic oversight, fundamentally altering the balance of powers in ways Montesquieu never envisioned.

Introduction

While the idea of separation of powers predates Montesquieu, his articulation of the doctrine remains one of the most influential in shaping modern legal systems. Writing during the Era of Absolutism, Montesquieu was particularly concerned with unchecked state power and criticised instruments such as *Lettres de Cachet*, which allowed imprisonment without trial at the king's discretion. He observed that a well-functioning system of government required three distinct branches—the legislature (which made laws), the executive (which implemented laws), and the judiciary (which interpreted laws). However, unlike the other two branches, Montesquieu viewed the judiciary as the least dangerous and the most restrained, believing it should operate with minimal discretion to prevent arbitrary rulings.¹ This assumption that the judiciary would remain a passive interpreter rather than an active policymaker is central to the debate over discretionary review. While Montesquieu advocated for judicial independence, he also feared judicial overreach, warning against judges assuming legislative functions:

The judges ought to be of the same rank as the accused person, or his peers, that his condition may not render him subject to oppression. If they were to be a body that continued for ever, they might be tempted to perpetuate their own power; and judges should be, as it were, invisible and pass unnoticed.²

Modern discretionary review—where courts choose which cases they hear—complicates this vision by granting the judiciary significant control over its docket, effectively allowing it to shape legal and constitutional developments through selective intervention. The expansion of judicial power through discretionary review shifts the balance within the separation of powers, giving courts a decisive role in legal and political outcomes. The implications of this tension are particularly evident in common law jurisdictions, where courts possess broad discretion in case selection, enabling them to influence the development of legal precedent beyond Montesquieu's envisioned role for the judiciary.

¹ Maurice Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund 1998) 97.

² Montesquieu, *The Spirit of the Laws* (Cambridge University Press 1989), ch 5.

Judicial independence, within this framework, was not merely a safeguard but a sentinel, standing watch over the ambitions of the executive and the legislative. Montesquieu, however, did not rigidly espouse the actual form that judicial independence should take, which would explain the differences in how various societies have manifested the abstract notion of judicial independence, while still appealing to a common origin in Montesquieuan thought. In the United States, for example, judges of the Supreme Court ('SCOTUS') hold life tenure to insulate their decisions from political pressure.³ This form of judicial independence allows judges to rule without fear of political retaliation or the need to seek reappointment, reducing the influence of transient political majorities. However, this model has also led to criticisms, particularly concerning the lack of direct democratic accountability and the potential for ideological entrenchment over decades-long tenures. For instance, Bickel famously described this as the 'countermajoritarian difficulty'.⁴ Unlike parliamentary systems, where judicial appointments usually involve legislative confirmation and periodic review, SCOTUS judges wield significant discretionary power over case selection, granting them influence over which constitutional questions are adjudicated at the highest level. Coupled with life tenure, discretionary review fortifies judicial autonomy, yet it also casts a long shadow of unease: does it foster a judiciary insulated from democratic accountability, an untouchable elite steering the law at will?

Discretionary review is a defining feature of judicial authority in common law systems, granting courts the power to select which cases they will hear. While mandatory jurisdiction compels courts to hear all properly filed cases, discretionary review lets higher courts choose cases with major legal, constitutional, or policy consequences. Appellate courts like SCOTUS use discretionary review through certiorari, while the United Kingdom's Supreme Court ('UKSC') requires permission to appeal in most cases. Discretionary review is justified on the grounds of judicial efficiency—preventing courts from being overwhelmed with frivolous or redundant cases, that is, the so-called 'floodgates' principle—but it also raises fundamental questions about accountability and the separation of powers. By

³ Staff, 'The Court as an Institution' (*Supreme Court of the United States*) <<https://www.supremecourt.gov/about/institution.aspx>> accessed 12 August 2024.

⁴ Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986).

selecting cases, courts shape legal precedent and steer constitutional interpretation. This power may be necessary for judicial autonomy but can also insulate courts from public scrutiny, allowing judges to sidestep politically sensitive or inconvenient cases—or continually seek opportunities to overturn established precedent for ideological reasons. As such, discretionary review stands at the intersection of judicial independence and institutional oversight, exposing the broader tensions within Montesquieu’s framework of the separation of powers.

Montesquieu’s model of separation of powers has often been interpreted as a rigid tripartite structure, but his writings also suggest a more pragmatic adaptation to political realities. While he believed that the judiciary should be the ‘least dangerous’ branch, functioning purely as the mouthpiece of the law,⁵ he did not anticipate the judiciary exercising discretionary control over case selection. The judiciary, in his model, was meant to be reactive, not proactive. By granting courts the authority to dictate which legal questions demand engagement, discretionary review does more than complicate Montesquieu’s vision—it subtly edges the judiciary into the realm of quasi-legislation, endowing it with a hand in sculpting constitutional destiny. This raises the question: is discretionary review a necessary adaptation to modern governance, or does it undermine the balance of powers Montesquieu envisioned?

While Montesquieu’s model of separation of powers has profoundly influenced constitutional thought, it is not the only way judicial independence and institutional balance are maintained in common law systems. Parliamentary democracies such as the United Kingdom, Canada, and Australia depart from the strict tripartite structure he envisioned, operating instead on a model where the executive is drawn from the legislature rather than existing as a distinct branch. Despite this fusion, judicial independence is upheld through conventions, procedural safeguards, and entrenched legal principles rather than rigid institutional separation. Similarly, discretionary review itself has taken different forms—ranging from the highly structured leave-to-appeal system in the United Kingdom to the more expansive discretionary docket of the SCOTUS—demonstrating that separation of powers in the common law world is neither uniform nor static.

⁵ Montesquieu (n 2) ch 6.

However, the existence of alternative frameworks does not diminish Montesquieu's relevance in assessing discretionary review. His concern was not merely with the formal separation of institutions but with the concentration of unchecked authority in any one branch of government. Whether or not a system adheres strictly to his tripartite model, the power of courts to control their own dockets raises the very concerns he warned against: a judiciary that extends beyond mere interpretation into the realm of policy and governance. Even in jurisdictions that deviate from his precise formulation, discretionary review challenges the balance of power by allowing courts to shape legal and constitutional development selectively. The fact that separation of powers has evolved in different ways across common law systems does not weaken this critique—it underscores its urgency. If discretionary review permits courts to operate with minimal external restraint, the risk of judicial supremacy persists, regardless of whether the system in question adheres to Montesquieu's structural model in its purest form.

This paper argues that the idea of discretionary review complicates Montesquieu's theory of the separation of powers by allowing courts to control their own dockets with minimal external oversight. This power may be necessary to make the judiciary more efficient, but it undermines judicial accountability, particularly in jurisdictions where judicial discretion is highly expansive. Through a comparative analysis of discretionary review in six common law jurisdictions—the United States, the United Kingdom, Australia, Canada, India, and Pakistan—this study explores how courts maintain autonomy while facing institutional limits.

While Montesquieu emphasised the institutional separation of powers, Dicey refined this argument by grounding it in the rule of law, which he defined as a system where 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.'⁶ This principle points to two critical concerns about discretionary review: (i) the unpredictability of case selection; and (ii) the absence of legal certainty in how judicial discretion is exercised.

Dicey warned that excessive discretion enables arbitrary governance, arguing that law should be based on fixed, established principles rather than judicial

⁶ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan and Company 1915) 188.

prerogative. Modern discretionary review mechanisms—where courts have near-total control over which cases to hear—depart from Dicey’s model by allowing judges to shape constitutional law without predefined legal standards.

Although the United States, Pakistan, the United Kingdom, and the rest of the jurisdictions discussed in this paper are each the product of distinct historical, cultural, and political trajectories, they are united by a foundational common law heritage that shapes their judicial review mechanisms. Of course, it is true that the distinct political challenges and democratic experiences in these countries differ significantly—for example, the United States has maintained a stable constitutional order without military coups or severe constitutional crises that have affected Pakistan. The United Kingdom’s appellate courts, constrained by parliamentary sovereignty, apply a limited form of discretionary review through the leave-to-appeal system. In contrast, Pakistan’s judiciary, despite inheriting British common law traditions, has developed an expansive interpretation of discretionary powers, particularly through its *suo motu* jurisdiction, which used to enable the Supreme Court of Pakistan (‘Court’) to take up cases of ‘public importance’ without a formal petition, before this power was scrapped through the Constitution (Twenty-sixth Amendment) Act, 2024 (‘26th Constitutional Amendment’). Therefore, this comparison does not suggest that these jurisdictions face identical legal issues. Rather, by examining how each system adapts the common law tradition to manage discretionary review and safeguard judicial independence, the analysis highlights both universal principles and context-specific modifications.

Pakistan’s judiciary has historically exercised broad discretionary review powers, particularly through the *suo motu* jurisdiction, allowing it to take up politically sensitive cases without requiring a formal petition. This power, before it was scrapped, often positioned the judiciary as an active player in political disputes, as seen in the disqualification of Prime Ministers Yousaf Raza Gillani (2012) and Nawaz Sharif (2017).⁷ Unlike the United States, where discretionary review is primarily used to manage judicial workload, the Court has leveraged it to assert direct influence over governance. At the same time, judicial appointments have been a focal point of power struggles between the judiciary and the Parliament. The

⁷ The disqualification of both former prime ministers did not originate through *suo motu* notices, but the emboldened stance of the activist judiciary in the 2010s had much to do with *suo motu* powers.

Constitution (Eighteenth Amendment) Act, 2010 ('18th Constitutional Amendment') introduced a Parliamentary Committee for judicial appointments, mirroring elements of the United States confirmation system. However, Chief Justice Iftikhar Chaudhry, emboldened by the Lawyers' Movement and his role in President Musharraf's ousting, challenged the 18th Constitutional Amendment, arguing that it compromised judicial independence. In response, the Constitution (Nineteenth Amendment) Act, 2010 ('19th Constitutional Amendment') reasserted the judiciary's dominance in appointments, reinforcing the Court's autonomy.⁸ This consolidation of power coincided with an increase in *suo motu* cases in the post-Chaudhry era, where discretionary review became a tool for judicial intervention in executive and legislative affairs. These developments show how discretionary review in Pakistan has expanded beyond case selection. Instead, it has functioned as an instrument of judicial activism, enabling the Court to shape political outcomes in a way that diverges significantly from other common law jurisdictions.

The 26th Constitutional Amendment has fundamentally altered how discretionary review operates in Pakistan by abolishing the Court's unilateral *suo motu* powers and introducing designated Constitutional Benches to handle constitutional cases. Previously, any bench of the Court—often formed at the discretion of the Chief Justice—could take up constitutional matters, giving the judiciary significant flexibility in selecting politically or legally sensitive cases. With the removal of the *suo motu* jurisdiction, the Chief Justice and individual judges now have far less discretion in initiating cases, as constitutional issues must be funnelled through pre-designated panels rather than being taken up at will.

This change represents a structural shift in Pakistan's approach to judicial discretion. By centralising constitutional adjudication within specific benches, the amendment imposes a procedural constraint on judicial intervention, reducing the likelihood of politically motivated case selection. However, this newfound rigidity also limits the Court's responsiveness to urgent constitutional crises. In jurisdictions such as the United States and the United Kingdom, discretionary review allows apex courts to take up cases of significant national importance, shaping constitutional law incrementally. Similarly, Pakistan's 26th Constitutional

⁸ Saroop Ijaz, 'Judicial Appointments in Pakistan: Coming Full Circle' (2018) 1 LLJ 86, 89.

Amendment, in eliminating *suo motu* powers, moves discretionary review towards a more bureaucratic framework, limiting judicial agility while potentially increasing institutional accountability.

The removal of *suo motu* powers is particularly consequential because historically, the Court's discretionary review powers have played a decisive role in shaping political outcomes. *Suo motu* cases have led to the dismissal of elected leaders, investigations into government corruption, and even interventions in electoral matters—functions rarely exercised by apex courts in other common law jurisdictions. With the 26th Constitutional Amendment, discretionary review in Pakistan is now more in line with the system in the United States, where SCOTUS retains full control over its docket through the writ of certiorari but cannot initiate cases on its volition, and even the United Kingdom, where the permission-to-appeal system still allows the courts to filter cases strategically but not initiate new ones. Whether the 26th Constitutional Amendment corrects a history of judicial overreach or merely shifts discretionary power to a smaller, more centralised judicial body remains a contested issue.

The 26th Constitutional Amendment is unusually controversial, with legal and political challenges well underway and unlikely to be resolved soon. Following the passage of the 18th and 19th Constitutional Amendments, some commentators suggested that the question of judicial independence had finally been settled. However, following years of media and political pressure, the federal government, led by the Pakistan Democratic Movement coalition, introduced legislation⁹ aimed at reducing the discretionary review powers of the Chief Justice, particularly the *suo motu* powers, which was immediately challenged in the Court on grounds of undermining the independence of the judiciary. Some judges, like Justice Qazi Faez Isa, complained of the almost dictatorial nature of *suo motu* powers because they grant the Chief Justice absolute and unaccountable authority to issue *suo motu* notices, regardless of the views of the other members of the now 25-member Court. Thus, discretionary review must achieve a delicate balance: while expansive powers to choose opportunities for adjudication can protect the judiciary from undue political influence, they also risk compromising accountability if not checked by appropriate safeguards. Pakistan's legal framework, however, is

⁹ Supreme Court (Practice and Procedure) Act 2023.

marked by episodes of military intervention and constitutional upheaval—factors that have fundamentally altered its judicial landscape compared to the relatively stable political evolution of countries like the United States or the United Kingdom. This divergence necessitates a careful contextualisation of common law principles within each nation's unique environment.

Discretionary review and judicial independence are interrelated concepts that lie at the heart of this analysis. For clarity, it is reiterated that discretionary review refers to the power of appellate courts to decide which cases to hear, serving as a filtering mechanism against an overwhelming caseload. This power allows judges to select cases that have significant legal or constitutional implications, thereby supporting judicial independence by enabling them to deliberate without direct external pressures. However, the inherent subjectivity of discretionary review opens it to criticisms of arbitrariness and a lack of accountability. Judicial independence is the cornerstone of any constitutional system, ensuring that judges can render decisions based solely on legal principles rather than political expediency. It is essential to distinguish procedural discretionary review, which determines case selection, from substantive judicial review, which assesses the validity of executive or legislative actions on the touchstone of the Constitution of the Islamic Republic of Pakistan, 1973 ('Constitution'). While procedural discretion governs docket management, substantive review wields broader political influence by shaping legal precedents. Many critiques of discretionary review conflate these two forms, yet they serve distinct purposes in maintaining judicial independence. A nuanced understanding of both is crucial to assessing whether discretionary power genuinely threatens the separation of powers. This autonomy is vital for maintaining public confidence in the legal system and for preserving a balanced separation of powers. When the criteria for case selection are vague or inconsistently applied, the discretion exercised may inadvertently undermine public trust and the system of checks and balances. In essence, while discretionary review can bolster judicial independence by insulating the judiciary from political interference, it can simultaneously threaten that independence if it leads to perceived or actual judicial overreach. This paper explores whether, and under what circumstances, discretionary review ultimately reinforces or complicates the principle of judicial independence within common law systems.

This paper also examines whether discretionary review enhances or disrupts the separation of powers by granting courts unchecked authority over case selection. Discretionary review strengthens judicial efficiency and independence, but its use across jurisdictions exposes tensions between judicial power and democratic accountability. In some systems, it operates as a neutral case-management mechanism whereas in others, it has been leveraged as a vehicle for judicial intervention in political affairs.

To explore these dynamics, the paper proceeds as follows. The first section examines the development of discretionary review in the United States, focusing on the evolution of the writ of certiorari and how it has allowed SCOTUS to exercise selective constitutional interpretation while maintaining judicial legitimacy. The subsequent section turns to the United Kingdom, where the permission-to-appeal system demonstrates how discretionary review operates within the constraints of parliamentary sovereignty. Australia and Canada provide additional perspectives on how discretionary review can function as a judicial efficiency tool while still maintaining public trust. The paper then shifts to India and Pakistan, where discretionary review has been instrumental in shaping political and constitutional developments, often blurring the boundaries between legal adjudication and governance. The discussion also considers potential reforms that could introduce greater transparency and institutional checks on judicial discretion, particularly in jurisdictions where courts have historically exercised this power expansively. Finally, the conclusion synthesises these findings, assessing whether discretionary review reinforces the balance of powers envisioned by Montesquieu or whether it allows courts to assume an outsized role in shaping national policy.

The United States of America

Although most commonly associated with the American justice system, the term ‘certiorari’ originates from Latin, meaning ‘to be made certain’. In its earliest form, certiorari was used in English common law as a writ directing lower courts to send records to higher ones for review. By the medieval period, English royal courts employed certiorari to supervise local tribunals, ensuring uniformity in legal decisions. Over time, it became a mechanism for judicial oversight, guaranteeing consistency and fairness in appellate decisions. This was the culmination of a unique trend.

In the United States, certiorari has taken on a distinct role as the primary tool for discretionary review by SCOTUS. However, the Court did not always have this power. Prior to the Judiciary Act of 1925, SCOTUS was obligated to hear all properly filed cases, placing immense strain on its appellate jurisdiction.¹⁰ Although the United States Constitution has long provided for judicial review, *Marbury v. Madison*¹¹ is seminal not only because it expanded SCOTUS's formal jurisdiction but because it redefined SCOTUS's role as an active arbiter of constitutional issues. By affirming judicial review as a fundamental principle, the decision set the stage for SCOTUS to rigorously examine legislative and executive actions. But on its own, accepting William Marbury's lawsuit for hearing was an act of discretionary review. Over time, as SCOTUS embraced this power of determining the limits of its power, the number of cases challenging governmental conduct increased significantly. This surge did not result from an expansion of constitutional jurisdiction per se but from SCOTUS's evolving role in addressing a growing array of constitutional questions. Consequently, without an effective filtering mechanism—namely, discretionary review—the Court would face an unsustainable caseload, thereby risking delays and a decline in the quality of its judgements.

This is the essence of the floodgate argument: that unchecked judicial review can lead to an inundation of cases, overwhelming even a well-established judiciary. To deal with this new issue, judges started pressing for a mechanism to reduce the cases they would have to hear without compromising judicial independence. However, not all solutions were acceptable to SCOTUS. For instance, congressional determination of a fixed number or range of cases was not acceptable on grounds of judicial independence. The result was the writ of certiorari, whereby SCOTUS itself was given the discretionary review powers to decide which cases to hear. This had been first instituted in limited circumstances under the Judiciary Act of 1891, but now it expanded to become the rule rather than the exception. This owed to the fact that by the late nineteenth century, SCOTUS's docket had become unsustainable, with judges struggling to manage the growing number of appeals, despite the creation of circuit courts and the institution of minimal certiorari powers in 1891. Justice Willis Van Devanter, amongst others,

¹⁰ J. Warren Madden 'One Supreme Court and the Writ of Certiorari' (1963) 15 HLJ 153.

¹¹ *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803).

warned that without a mechanism to filter cases, SCOTUS would be unable to function effectively as a constitutional court.¹² Legislative attempts in 1916 did not succeed in reducing the caseload because they only allowed SCOTUS to refuse adjudication on frivolous claims.¹³

To solve this problem, the Judiciary Act of 1925 granted SCOTUS broad discretionary review powers,¹⁴ allowing it to decline cases at will through the writ of certiorari. This marked a fundamental shift in judicial authority, as SCOTUS gained near-total control over its docket. Unlike lower courts, which must hear all cases within their jurisdiction, SCOTUS was now free to selectively determine which legal questions warranted national adjudication. This shift gave courts greater discretion, letting them define constitutional law by choosing which cases to hear and which to ignore. The Judiciary Act of 1925 remains one of the few statutes where the judiciary played an active role in drafting legislation. Justices Van Devanter, McReynolds, and Sutherland were central in this regard while Chief Justice Taft undertook a trip to the United Kingdom to observe appellate court procedure there. This is why the draft was commonly referred to as the Judges Bill.¹⁵ The result was an incredible reduction in the number of cases being heard by SCOTUS. This was a far cry from the views of Chief Justice Marshall on the subject:

(The Supreme Court has) no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgement, and conscientiously to perform our duty.¹⁶

Nevertheless, the floodgates argument can be seen in action here because the writ of certiorari was aimed to reduce the number of cases SCOTUS had to decide.

¹² Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (The Macmillan Company 1928) 16.

¹³ *Ibid* 255.

¹⁴ Judiciary Act of 1925 [1925] 43 Stat. 936.

¹⁵ Frankfurter and Landis (n 12) 260.

¹⁶ Sternberg J, 'Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court' (2008) 33 JSCH 1.

SCOTUS judges have taken the notion of ‘discretion’ very seriously, such that the only way academics have been able to understand the procedure for certiorari writs is through the volitions of the judges themselves. A party seeking review must file a petition for certiorari, but the vast majority of these requests are denied. The ‘Rule of Four’, a procedural safeguard, requires that at least four judges agree to hear a case, blocking ideological factionalism on the docket.¹⁷ Yet, the low grant rate—typically between 1% and 2% of petitions per term—shows the extent of judicial discretion in determining which issues are deemed worthy of review.¹⁸

Another significant innovation is the ‘cert pool’. Originally, judges’ clerks would go through every petition, drafting brief memoranda which the judges would then use to decide whether to vote for the granting of certiorari for each individual petition. This meant that every petition would, in theory, have at least nine memoranda. Unsurprisingly, the cumbersome nature of this process became increasingly intolerable. Therefore, in 1973, Chief Justice Burger, heeding the suggestion made by Justice Powell,¹⁹ created the cert pool. In this system, all the petitions are consolidated in one place before being randomly allocated to judges’ clerks. The clerks draft memoranda of only the petitions they are assigned.

The Supreme Court Case Selections Act of 1988 further streamlined the selection process.²⁰ Section 1 of this Act repealed Section 1262 of Title 28 of the United States Code, meaning that appeals that previously had to be reviewed by SCOTUS as a matter of right were now subject to discretionary certiorari review. Section 2 repealed Section 1254, removing the right of direct appeal from federal appellate courts to SCOTUS. Section 3 did the same for Section 1257 and state courts. There were other provisions as well, but the aim was to consolidate the reforms in SCOTUS’s administrative machinery.

¹⁷ Peter Linzer, ‘The Meaning of Certiorari Denials’ (1979) 79 CLR 1227–1305.

¹⁸ ‘The Supreme Court at Work’ (*Supreme Court of the United States*) <<https://www.supremecourt.gov/about/courtatwork.aspx>> accessed 25 February 2025.

¹⁹ Adam Liptak, ‘Gorsuch, in Sign of Independence, Is out of Supreme Court’s Clerical Pool’ *The New York Times* (New York City, 1 May 2017) <<https://www.nytimes.com/2017/05/01/us/politics/gorsuch-supreme-court-labor-pool-clerks.html>> accessed 24 February 2025.

²⁰ Supreme Court Case Selections Act of 1988, 102 Stat. 662.

While certiorari is framed as an efficiency mechanism, its impact extends far beyond mere docket management. SCOTUS's discretionary review power allows it to shape constitutional law by controlling which legal questions reach the national stage. This is particularly evident in cases involving circuit splits, where federal appellate courts have issued conflicting rulings on similar legal issues. By selectively resolving these disputes, SCOTUS ensures doctrinal consistency across jurisdictions. However, certiorari also enables judicial gatekeeping, allowing judges to strategically advance or sideline contentious legal debates based on their interpretive priorities.

Importantly, a denial of certiorari does not constitute an endorsement of a lower court's ruling. SCOTUS has repeatedly clarified that refusals to hear a case should not be interpreted as implicit approval of the decision below. In *Missouri v. Jenkins*,²¹ SCOTUS reaffirmed that a certiorari denial carries no precedential weight, meaning it neither validates nor invalidates the legal reasoning of lower courts. It simply means that SCOTUS chose to remain silent on the matter or that it did not involve a justiciable question of law.

Despite its institutional safeguards, discretionary review is not entirely neutral. Studies have shown that SCOTUS's paid certiorari docket disproportionately favours litigants with extensive legal resources, while petitions from *in forma pauperis* applicants—often involving indigent or incarcerated individuals—face significantly lower grant rates, possibly because such petitions are read almost exclusively by clerks rather than the judges.²² This structural disparity suggests that access to SCOTUS review is not determined solely by the legal merits of a case but is also shaped by SCOTUS's internal priorities and resource allocation. There have been criticisms of the disproportionate importance accorded to clerks in discretionary review. Kenneth Starr, former clerk to Chief Justice Burger, has described the cert pool as having achieved 'efficiency...at the expense of informed judgement.'²³ Clerks are also not as well trained as appellate judges in separating their values from the job, meaning the decision to grant

²¹ *Missouri v. Jenkins* 495 U.S. 33 (1990).

²² R.C. Black and C.L. Boyd, 'US Supreme Court Agenda Setting and the Role of Litigant Status' (2010) 28 JoLEO 286.

²³ Kenneth W. Starr, 'The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft' (2006) 90 MLR 1363.

certiorari depends, at least partially, on the value judgements of liberal or conservative clerks. Furthermore, even when certiorari is granted, SCOTUS sometimes limits its review to specific legal questions, strategically narrowing its role in shaping judicial precedent.²⁴

While the power to grant certiorari allows SCOTUS to set the national legal agenda, the equally powerful ability to deny review enables it to avoid politically volatile issues. By declining cases without explanation, SCOTUS exercises judicial restraint not through rulings, but through silence. This discretion to engage—or disengage—from major constitutional debates is a defining feature of discretionary review, allowing judges to strategically delay, deflect, or completely evade contentious legal questions. SCOTUS has historically avoided cases that might force it to rule on deeply divisive political issues. One prominent example is gerrymandering. In *Gill v. Whitford*,²⁵ SCOTUS had the opportunity to establish a constitutional limit on partisan redistricting, but instead ruled on procedural standing grounds, avoiding the central issue. SCOTUS later declined to intervene in *Rucho v. Common Cause*,²⁶ effectively leaving gerrymandering as a non-justiciable political question, despite mounting concerns about electoral fairness. Similarly, SCOTUS has, on multiple occasions, refused to reconsider qualified immunity for law enforcement officers despite widespread bipartisan criticism of the doctrine. After the killing of George Floyd in 2020, SCOTUS received several petitions challenging the legal protections that shield police officers from civil liability, yet it denied certiorari in all of them, leaving the doctrine intact. By avoiding these cases, SCOTUS ensured that lower courts would continue to apply qualified immunity without SCOTUS clarification, reinforcing the legal status quo without issuing an explicit ruling.

Avoidance is not limited to politically sensitive issues—it can also perpetuate legal uncertainty in areas where SCOTUS’s guidance is needed to resolve inconsistent lower court rulings. SCOTUS is often expected to intervene when federal appellate courts issue conflicting decisions on the same legal issue, creating circuit splits that lead to geographically inconsistent applications of federal

²⁴ Margaret Meriwether Cordray and Richard Cordray, ‘The Supreme Court’s Plenary Docket’ (2001) 58 WLLR 737.

²⁵ *Gill v. Whitford* 585 U.S. 48 (2018).

²⁶ *Rucho v. Common Cause* 588 U.S. 684 (2019).

law. However, SCOTUS frequently declines to resolve such disputes, effectively leaving key constitutional questions unanswered. For example, SCOTUS refused to hear several cases on whether religious exemptions apply to COVID-19 vaccine mandates, leaving lower courts divided on the extent to which religious freedom claims override public health policies.

This strategic silence has significant legal consequences. By choosing not to hear certain cases, SCOTUS allows lower court rulings to stand without national precedent, and therefore constitutional rights and federal laws can be interpreted differently depending on jurisdiction. This creates a fragmented legal landscape, where rights and obligations vary across the country based on where a case is decided. In effect, discretionary review allows SCOTUS to pick and choose when and where constitutional change happens, a power that is often overlooked in discussions of judicial discretion.

Another major consequence of avoidance is its impact on public trust in the judiciary. When SCOTUS refuses to hear cases on controversial or socially significant issues, it risks being perceived as shirking responsibility rather than acting as a neutral arbiter of justice. The selective nature of discretionary review can lead to accusations that judges prioritise cases that align with their ideological leanings while ignoring those that might challenge their views. This criticism has been particularly strong in areas such as campaign finance law, where SCOTUS has aggressively entertained cases that expand corporate political spending (*Citizens United v. FEC*²⁷), while avoiding cases that challenge existing financial regulations on elections.

The lack of transparency in certiorari denials further compounds these concerns. Unlike lower courts, which must provide written opinions explaining their decisions, SCOTUS can reject thousands of cases without any justification. While the judges may have legitimate institutional reasons for avoiding certain cases—such as waiting for more developed legal arguments or clearer factual records—this absence of explanation leaves the public, legal scholars, and policymakers in the dark. Thus, discretionary review is not only a tool of judicial engagement but also one of judicial inaction. By choosing which cases to hear and

²⁷ *Citizens United v. Federal Election Commission* 2010 U.S. LEXIS 766.

which to ignore, SCOTUS exerts influence not only through its rulings but through its silence. This ability to shape the legal landscape without issuing decisions is a powerful but often underexamined aspect of discretionary review—one that raises fundamental questions about judicial accountability, transparency, and the role of SCOTUS in the democratic process.

Moreover, SCOTUS has jealously guarded these processes and powers. It has consistently refused to allow the Congress to intervene in settling a fixed standard for the granting of certiorari. For some, this standard is deliberately vague to free SCOTUS from rigid rules and congressional intervention.²⁸ For instance, if SCOTUS limits its granting of certiorari to cases involving the Fifth Amendment only, it would eventually be bound by its own convention, and/or Congress may codify it.²⁹ However, several broad trends may be identified from an analysis of the past certiorari writs granted by SCOTUS. The first is that SCOTUS is always cognisant of what is happening in the American society, and its actions result from and respond to those events. For instance, in *Brown v. Board of Education of Topeka*,³⁰ SCOTUS did not just overturn old precedent but responded to broader issues of race in the United States, veterans' rights, and rhetorical defence of the West from onslaughts by the Third World.³¹ Secondly, SCOTUS keeps itself up to date on legislative developments. A good example would be *Dickerson v. United States*.³² In this case, SCOTUS responded to Congress's assertion that it could overrule Miranda rights, as enumerated in *Miranda v. Arizona*,³³ by allowing the *Dickerson* case in the docket and then using it to disagree with the Congress.

Lastly, the personal views of judges could also be seen as important in this regard. While SCOTUS, like other supreme courts, presents itself as an apolitical institution, its discretionary review powers allow judges to selectively engage with legal and constitutional issues that align with their ideological preferences. Because SCOTUS is not obligated to hear most cases, its judges can control the pace of legal change by choosing which issues to address and which to ignore. This gatekeeping

²⁸ Tejas N. Narechania, 'Certiorari in Important Cases' (2022) 122 CLR 923–1018.

²⁹ Ibid.

³⁰ *Brown v. Board of Education of Topeka* [1954] 347 U.S. 483.

³¹ Mary L. Dudziak, 'Brown as a Cold War Case' (*USC Gould School of Law*, 2004) <<https://ssrn.com/abstract=550443>> accessed 25 February 2025.

³² *Dickerson v. United States* [2000] 530 U.S. 428.

³³ *Miranda v. Arizona* [1966] 384 U.S. 436.

function is particularly powerful because denying certiorari can delay or prevent legal shifts, ensuring that certain precedents remain intact while others are more aggressively challenged.

Historically, ideological factions within SCOTUS have strategically used discretionary review to shape the legal landscape.³⁴ During the 1930s, the conservative bloc known as the ‘Four Horsemen’ consistently voted against hearing cases that might validate President Franklin D. Roosevelt’s New Deal policies, while the liberal ‘Three Musketeers’ sought to bring such cases before SCOTUS. This resulted in a period of judicial resistance to economic regulations, which ended only after President Roosevelt’s court-packing threat altered SCOTUS’s stance. More recently, SCOTUS’s discretionary docket has reflected the ideological composition of its judges. The conservative supermajority has granted certiorari in cases involving gun rights (*New York State Rifle & Pistol Association v. Bruen*³⁵), religious freedoms (*Kennedy v. Bremerton School District*³⁶), and abortion restrictions (*Dobbs v. Jackson Women’s Health Organization*³⁷). Conversely, SCOTUS has been more hesitant to grant review in cases that might expand voting rights protections or enhance federal regulatory power.

The decision to hear *Dobbs* illustrates how discretionary review serves as a mechanism for judicial agenda-setting. SCOTUS had repeatedly declined to hear earlier challenges to *Roe*, including in *Whole Woman’s Health v. Hellerstedt*,³⁸ when a more liberal majority was in place. However, following the appointments of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, SCOTUS’s ideological shift made it more likely to grant certiorari in cases that directly challenged *Roe*. The eventual ruling in *Dobbs* was not just a decision on abortion rights—it was the culmination of a deliberate effort to bring the issue before a more favourable SCOTUS. President Biden also acknowledged the role played by President Trump in getting *Roe v. Wade* overturned.³⁹ Conversely, SCOTUS can

³⁴ C. Jeddy LeVar, ‘The Nixon Court: A Study of Leadership’ (1977) 30 WPQ 484–492.

³⁵ *New York State Rifle & Pistol Association, Inc. v. Bruen* 2022 U.S. LEXIS 3055.

³⁶ *Kennedy v. Bremerton School District* 2022 U.S. LEXIS 3218.

³⁷ *Dobbs v. Jackson Women’s Health Organization* 597 U.S. 215.

³⁸ *Whole Woman’s Health v. Hellerstedt* 579 U.S. 582 (2016).

³⁹ Lawrence Hurley, ‘Analysis: Trump’s Justices Decisive in Long Campaign to Overturn *Roe v. Wade*’ *Reuters* (Washington, 24 June 2022) <<https://www.reuters.com/legal/government/trumps-justices-decisive-long-campaign-overturn-roe-v-wade-2022-06-24/>> accessed 12 August 2024.

also use discretionary review to avoid politically volatile cases. Despite repeated petitions, SCOTUS has declined to hear cases challenging partisan gerrymandering, presidential powers, and certain police immunity doctrines, allowing lower court rulings to stand without intervention.

This section has demonstrated that certiorari, as a form of discretionary review, is a double-edged sword. On one hand, it is a practical necessity, allowing courts to manage overwhelming caseloads and prioritise legally significant cases. On the other hand, however, it grants the judiciary extraordinary control over constitutional interpretation, public policy, and legal precedent, enabling judges to shape the trajectory of the law through selective case selection. This power, though essential for judicial efficiency, can obstruct transparency and accountability while also institutionalising ideological bias. The ability of courts—particularly SCOTUS—to deny review without explanation means that judicial discretion extends beyond deciding cases; it also includes deciding which cases are never heard at all. This form of judicial gatekeeping allows courts to sidestep politically sensitive issues, delay legal questions they wish to avoid, and consolidate ideological influence over time. The discretionary docket is not a neutral filter; it is shaped by internal judicial priorities, the interests of institutional litigants, and structural imbalances that favour corporate and government actors over individual petitioners.

The United Kingdom

The political and legal system of the United Kingdom operates under a distinct framework of parliamentary supremacy, which differs significantly from the constitutional supremacy of the United States. Unlike the United States, where Montesquieu's model of separated powers is central to the constitutional structure, the United Kingdom follows a system where Parliament remains the supreme legal authority, and the executive derives its legitimacy from the legislature. The Prime Minister is not independently elected but emerges from the House of Commons, reinforcing the fusion of legislative and executive powers. Before the Constitutional Reform Act of 2005,⁴⁰ the House of Lords functioned as the United

⁴⁰ The Constitutional Reform Act 2005, s 4.

Kingdom's highest appellate court, blurring the boundary between the judiciary and the legislature.

However, while the United Kingdom does not adhere strictly to Montesquieu's separation of powers, judicial independence has strengthened over time. The Constitutional Reform Act transformed the judicial landscape by removing the Law Lords from the legislative branch and establishing the Supreme Court of the United Kingdom ('UKSC') as an entirely separate entity. This body plays an active role in reviewing executive decisions, particularly in cases concerning human rights, administrative law, and judicial review of governmental action. Cases such as *R (Miller) v. Prime Minister*,⁴¹ where the UKSC ruled that Prime Minister Boris Johnson's prorogation of the Parliament was unlawful, illustrating that the superior judiciary now exercises significant oversight over the executive.

Therefore, while discretionary review in the United Kingdom operates within the constraints of parliamentary supremacy, the judiciary is not entirely subordinate to the Parliament. The flourishing of judicial review, the influence of the Human Rights Act of 1998, and the UKSC's willingness to intervene in governmental matters demonstrate that judicial independence remains a key concern, even within a system that prioritises legislative authority.

Discretionary review in the UKSC operates through a permission-to-appeal system, which serves a function similar to the writ of certiorari in SCOTUS. Unlike lower courts, the UKSC is not obligated to hear all cases appealed to it—instead, appellants must apply for permission (also called 'leave') to appeal, and the UKSC exercises discretion in determining which cases warrant full review. The decision to grant permission to appeal is made by an Appeals Committee composed of three judges, who assess whether a case meets the threshold for the UKSC's intervention. Unlike SCOTUS, where four judges out of nine must vote in favour of certiorari, the UKSC's permission-to-appeal system relies on a smaller judicial panel,

⁴¹ *R (on the application of Miller) v. The Prime Minister Cherry and others v. Advocate General for Scotland* [2019] EWHC 2381 (QB).

ensuring a tightly controlled case selection process.⁴² The UKSC grants permission to appeal only in cases that: (i) raise an arguable point of law of public importance; (ii) concern legal principles that require further clarification by the highest court; and (iii) have significant implications for statutory or common law interpretation.

Here, too, the floodgates argument reigns supreme. The Julian Assange extradition case exemplifies how this gatekeeping function operates in practice. Assange sought permission to appeal his extradition to the United States, arguing that his case raised fundamental questions about press freedom and diplomatic assurances. However, the UKSC denied his application, ruling that it did not raise an arguable point of law,⁴³ effectively closing the door to further appeals. This illustrates how discretionary review enables courts to filter out politically or legally contentious cases that do not meet the strict threshold for review. By limiting access to only the most legally significant cases, the UKSC's discretionary review process shapes the trajectory of legal precedent, much like SCOTUS. This selective case curation ensures that the UKSC functions not just as a final appellate body, but as a strategic arbiter of key constitutional and statutory questions. However, unlike SCOTUS, which does not respond to petitions not granted certiorari, the Registrar of the UKSC writes to appellants about the lack of jurisdiction of the UKSC.⁴⁴

The origins of discretionary appellate review in the United Kingdom can be traced to the medieval writs of certiorari and recordari, which were developed as mechanisms for transferring cases from inferior local courts to the King's central courts.⁴⁵ These writs were crucial in shaping the modern understanding of judicial discretion in case selection, as they allowed the central administration to intervene only in cases deemed significant or requiring royal adjudication. The Norman

⁴² 'Court of Appeal & Supreme Court' (*Richard Buxton Solicitors*) <<https://www.richardbuxton.co.uk/legal-process/court-of-appeal-supreme-court/>> accessed 12 August 2024.

⁴³ Haroon Siddique & Ben Quinn 'Julian Assange Denied Permission to Appeal against US Extradition' *The Guardian* (London, 14 March 2022) <<https://www.theguardian.com/media/2022/mar/14/julian-assange-denied-permission-to-appeal-against-us-extradition>> accessed 12 August 2024.

⁴⁴ Supreme Court of the United Kingdom, 'A Guide to Bringing a Case to The Supreme Court' (*UKSC*) 5-6 <https://supremecourt.uk/uploads/A_guide_to_bringing_a_case_to_The_Supreme_Court_The_Supreme_Court_fe900010bd.pdf> accessed 25 February 2025.

⁴⁵ Jerome J. Hanus, 'Certiorari and Policy-Making in English History' (1968) 12 *AJLH* 63–94.

conquest of England in 1066 significantly altered the legal system by strengthening feudal structures and establishing the principle that all land was held from the King. Under this system, local feudal lords had jurisdiction over disputes concerning their lands, but their rulings could be challenged before the King's courts.⁴⁶ This led to the development of writs—royal orders that facilitated legal appeals from local to higher authorities.

Certiorari ('to be made certain') was used to transfer cases from lower courts to royal courts, ensuring that the Crown could review disputes of greater significance. Recordari ('to be recorded') allowed a higher court to demand a full record of proceedings from a lower court, often used when questions of legal procedure were at stake. The early use of these writs was an exercise of the discretionary power of the monarch, who acted as the ultimate legal authority in cases where justice was perceived to be inadequately served at the local level. Initially, only the King could decide which cases warranted review because appellate review was a privilege rather than a right. Over time, however, this power was delegated to centralised royal courts, such as the Court of King's Bench and the Court of Common Pleas, where judges exercised their own discretion in granting or denying appeals.

One of the primary justifications for these early discretionary writs was judicial efficiency—much like modern discretionary review, they prevented frivolous or routine cases from overwhelming royal courts. Additionally, as local feudal courts were often corrupt or incompetent, the availability of certiorari and recordari allowed the central judiciary to correct injustices.⁴⁷ The writ of habeas corpus—which ensured that individuals could not be unlawfully detained—also emerged from this tradition of centralised judicial intervention.

The transition from monarchical discretion to institutionalised judicial discretion was not immediate. Throughout the medieval and early modern periods, royal prerogative courts, such as the Star Chamber, exercised unchecked discretionary power, often in ways that undermined the rule of law. The struggle between the monarchy and the Parliament, culminating in the English Civil War (1642-1651) and the Glorious Revolution (1688-1689), gradually shifted legal

⁴⁶ Ibid.

⁴⁷ Edward Jenks, 'The Prerogative Writs in English Law' (1923) 32 YLJ 523–534.

authority away from the Crown and towards the judiciary and the Parliament.⁴⁸ By the nineteenth century, the discretionary use of certiorari and recordari had become embedded in common law appellate procedure, laying the groundwork for modern permission-to-appeal systems.

Today, all branches of government in the United Kingdom act in the name of the monarch, even though the monarch no longer has the authority to grant certiorari or recordari writs.⁴⁹ The process, which was the product of violent and bloody revolutions in continental Europe and the Americas, took place gradually as the Parliament went about dismantling the centuries-old powers of the monarch and co-opting them for itself.⁵⁰ This evolution directly shaped the modern case selection system in the House of Lords, and later the UKSC. By virtue of the Appellate Jurisdiction Act of 1876,⁵¹ leave to appeal was necessary for a case to enter the House of Lords. The UKSC now requires permission to appeal, a discretionary mechanism that mirrors historical certiorari principles while operating within a modern constitutional framework. The criteria for granting permission—to address points of law of general public importance—reflects the same selective approach that defined judicial review under earlier common law traditions.

Australia

The Commonwealth of Australia is a unique golden mean between the rigid American separation of powers and the British concentration of powers. To understand this, it is essential to go over the political history of Australia briefly. As an Anglo-Saxon territory owned by Britain, it was reorganised into six colonies, with a Supreme Court in New South Wales.⁵² Gradually, political power was devolved to the colonies, which joined a common federation in 1901.⁵³ Subsequent

⁴⁸ Hanus (n 45).

⁴⁹ Polly Botsford 'Relationship between UK Crown and Law in Focus as Carolean Era Begins' *International Bar Association* (London, 22 September 2022) <<https://www.ibanet.org/Relationship-between-UK-Crown-and-law-in-focus-as-Carolean-era-begins>> accessed 12 August 2024.

⁵⁰ Frank J. Goodnow, 'The Writ of Certiorari' (1891) 6 PSQ 493–536.

⁵¹ The Appellate Jurisdiction Act 1876, 39 & 40 Vict. c. 59.

⁵² David Kemp, *The Land of Dreams: How Australians Won Their Freedom, 1788–1860* (Melbourne University Press 2018).

⁵³ The Constitution of Australia.

moves towards independence took place in 1931⁵⁴ and 1986,⁵⁵ when Australia achieved self-governing dominion status and independence, respectively. However, Australia is still a monarchy, and King Charles III of the United Kingdom also heads Australia. Formally, that is the only legal link existing between the United Kingdom and Australia.

On the surface, the Australian constitutional framework and its judiciary's structure seem to resemble that of the United States and the United Kingdom. While the executive may be handed over some legislative functions under the United Kingdom's system of concentration of powers, the judiciary is an exception, as is seen in the United States. Judicial independence echoes loudly when the state allows only judicial functions to the judiciary; allowing judges power over non-judicial functions obstructs judicial independence as greater authority leads to greater accountability.⁵⁶ The Commonwealth of Australia represents a unique hybrid between the discretionary review traditions of the United Kingdom and the United States. While the High Court of Australia ('HCA') serves as the apex judicial body, its approach to discretionary review is structured by clear legal criteria, making it less discretionary than its American counterpart but more flexible than the British model.

Unlike the UKSC, where appeals must pass the permission-to-appeal threshold, or SCOTUS, where judges vote under the Rule of Four, HCA's discretionary review is guided by statutory and constitutional standards. Appeals to the HCA require special leave, meaning that the HCA has discretion to deny review unless a case meets specific legal criteria. The HCA grants special leave based on criteria enumerated in Section 35A of the Judiciary Act of 1903 (Cth): (i) the case presents a question of law of public importance; (ii) there are conflicting interpretations of law between lower courts that require resolution; (iii) a lower court has made a jurisdictional error—that is, exceeded its lawful authority in deciding a matter; and (iv) the case involves significant constitutional questions affecting federal-state relations. This system mirrors aspects of both the United States and the British models—it allows for judicial selectivity but does so within

⁵⁴ Statute of Westminster 1931, 22 & 23 Geo. 5, s 4.

⁵⁵ Australia Act 1986, s 2.

⁵⁶ S.A. de. Smith, 'Separation of Powers in Australia' (1957) 20 MLR 391–394.

a more structured framework that ensures case selection remains legally and procedurally constrained.

One of the most significant limits on judicial discretion in Australia is the concept of jurisdictional error.⁵⁷ The HCA generally does not grant leave to appeal unless it determines that a lower court has committed such an error. A jurisdictional error occurs when a lower court or tribunal exceeds its lawful authority, such as: (i) misinterpreting statutory provisions in a way that removes or expands its jurisdiction; (ii) deciding matters that were beyond its legal authority; and (iii) failing to comply with essential procedural requirements that affect the fairness of the decision.

This contrasts with the United States, where certiorari is often granted based on policy or ideological considerations rather than strictly legal error. By prioritising jurisdictional error, the HCA's discretionary review process remains focused on correcting fundamental legal mistakes rather than engaging in judicial policymaking.

Another limitation on discretionary review in Australia is the requirement that alternative remedies be exhausted before seeking review before the HCA.⁵⁸ The HCA will typically deny leave to appeal if a legal dispute can be resolved through: (i) an injunction or declaration in a lower court; (ii) a statutory appeal process in a federal or state tribunal; or (iii) an administrative review mechanism. This preserves judicial efficiency and limits the role of discretionary review.

A major distinction between Australia and other common law jurisdictions is the existence of the Administrative Decisions (Judicial Review) Act of 1977.⁵⁹ This Act provides a statutory basis for judicial review of administrative decisions and allows for judicial intervention even when no common law basis for review exists. Additionally, it is meant to ensure that government decisions meet standards of legality, rationality, and procedural fairness.

⁵⁷ Downes Garry, 'Judicial Review' (*Administrative Appeals Tribunal*, 24 March 2011) <<https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pres/judicial-review>> accessed 12 August 2024.

⁵⁸ *Minister for Labour and Industry (NSW) v. M.L.C. Assurance Co. Ltd* (1931) 46 CLR 422.

⁵⁹ Administrative Decisions (Judicial Review) Act 1977 (Cth).

Unlike the United States, where discretionary review by SCOTUS is almost exclusively constitutional, and the United Kingdom, where review is based on common law and parliamentary sovereignty, the HCA has a dual framework of discretionary review—one rooted in the common law tradition and another in statutory administrative oversight. Therefore, the HCA's discretionary review system represents a hybrid approach, combining elements of judicial independence, statutory regulation, and procedural selectivity. While it retains the power to choose its cases, it does so within a structured legal framework that limits ideological and policy-driven interventions. The dual influence of common law precedent and statutory review mechanisms ensures that discretionary review in Australia remains both selective and accountable, positioning it as a middle ground between the broad discretionary powers exercised in the United States and the restrained appellate mechanism employed in the United Kingdom.

Canada

The case of the Great White North is similar to that of the kangaroos: both were marred by settler colonialism (which almost entirely eradicated the native population), were British colonies, and were primarily populated by Anglo-Saxons.

Yet, Canada is unique in that when the Confederation of Canada was formed in 1867,⁶⁰ the notion of judicial review did not exist there, at least not in the form it assumed in subsequent decades. The roots of judicial review in Canada can thus be traced to British colonists who took it upon themselves to ensure that laws passed by local legislatures did not violate British law. This they did through the Judicial Committee of the Privy Council,⁶¹ which meant that the latter became the apex court in the Canadian Confederation.

The same tradition continued in a qualitatively different form after 1867 when the Supreme Court and the Exchequer Court were formed—the latter was replaced by the Federal Court in 1971 and became responsible for judicial review. In 1970, the scope for this review was expanded.⁶² The key word here, as discussed

⁶⁰ British North America Act 1867, 30 & 31 Vict., s 3.

⁶¹ Jennifer Smith, 'The Origins of Judicial Review in Canada' (1983) 16 CJPS 115–134.

⁶² Federal Court Act, S.C. 1970, c.1.

previously, is discretion. Certain broad criteria do exist, such as the requirement for the issue to be of public importance,⁶³ but since 1867, the demarcation between private and public spheres has changed to such an extent that judges, seemingly bound by the British North America Act of 1867,⁶⁴ can exercise tremendous discretion in deciding whether to hear an appeal.

Of course, there are other requirements concerning standing and jurisdiction. But those minuscule and basic conditions exist in the United States as well—no court can carry on with the proceedings if the plaintiff does not have standing or if the matter is beyond the jurisdiction of the court. So, a similar practice exists across the Canadian border.

Another similarity between the two North American jurisdictions is the emphasis on federalism. The British North America Act of 1867 Act explicitly delineated the powers of the federal and provincial governments.⁶⁵ The Canadian Supreme Court ('SCC') emerged as the *Marbury*-styled protector of such constitutional guarantees. Likewise, following the adoption of the Canadian Bill of Rights,⁶⁶ the SCC's ambit for judicial review broadened to include fundamental rights.

The SCC exercises significant discretionary review powers, similar to SCOTUS and the UKSC, but with distinct procedural and constitutional features. Since its establishment, the SCC has gradually transitioned from a body interpreting British imperial law to an independent constitutional authority governing Canadian legal dispute. While judicial review in Canada originated through colonial oversight mechanisms, modern discretionary review is tightly controlled through a structured leave-to-appeal system, balancing case selectivity with constitutional oversight.

Unlike SCOTUS, where discretionary review is exercised through certiorari, and the UKSC, where permission to appeal is required, the SCC grants

⁶³ David Elliot, *Judicial Control of Administrative Action* (Captus Press 2011).

⁶⁴ British North America Act 1867, 30 & 31 Vict. s 3.

⁶⁵ Richard Benwell and Oonagh Gay, 'Separation of Powers: The Canadian Experience' (2009) 47 DLR 731.

⁶⁶ Canadian Bill of Rights, S.C. 1960, s 44.

leave to appeal based on clearly defined legal standards. Each year, the SCC receives approximately 600 applications for leave to appeal, of which only about 70 are accepted—a selection rate of roughly 10-12%.⁶⁷ Under Section 40(1) of the Supreme Court Act of 1985,⁶⁸ the SCC grants leave to appeal in cases that meet at least one of the following criteria: (i) public importance—the case presents a legal question of broad significance, such as issues related to the Charter of Rights and Freedoms; (ii) national significance—the case has implications beyond a single province or region, impacting federal law or the division of powers between provincial and federal governments; or (iii) important points of law—the case clarifies unsettled legal principles or resolves inconsistencies in provincial appellate court decisions.

Unlike the United States, where judicial philosophy and ideological considerations often influence certiorari decisions, the SCC follows a more structured framework in determining whether a case deserves discretionary review. The three-judge panel reviews each petition for leave to appeal before deciding whether it should proceed to a full hearing. This mirrors the United Kingdom's Appeals Committee but operates within a federal constitutional structure that resembles the United States model. The only exception to this discretionary system is criminal appeals, where leave to appeal is automatically granted if the case involves an issue of law. This creates a key distinction between discretionary review in Canada and other jurisdictions—the SCC has less control over its docket in criminal matters than the UKSC or SCOTUS.

Like other apex courts, the SCC applies discretionary review as a safeguard against excessive caseloads.⁶⁹ Without this filtering mechanism, the SCC would be overwhelmed with appeals from provincial courts, preventing it from focusing on cases of national importance. The floodgates argument is central to discretionary review in Canada, as it ensures that the SCC's limited resources are dedicated to legally significant disputes rather than routine appeals.

⁶⁷ Department of Justice Canada, 'Canada's Court System' (*Government of Canada*) <<https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/>> accessed 12 August 2024.

⁶⁸ Supreme Court Act, RSC 1985, s 40(1).

⁶⁹ William H. Angus, 'Judicial Review in Canada: Do We Need It?' (1974) 26 ALR.

One of the most distinctive and controversial aspects of Canadian discretionary review is the reference jurisdiction, which allows the federal government to directly refer legal questions to the SCC.⁷⁰ Unlike typical appeals, which arise from lower courts, references bypass normal judicial processes, enabling the government to seek advisory opinions on constitutional matters. The SCC's jurisdiction over references is outlined in Section 53 of the Supreme Court Act, which allows the Governor-General (on advice from the government) to submit legal questions directly to the SCC. There are also past references which include landmark cases, such as the *Reference Re Secession of Quebec*,⁷¹ where the SCC ruled on whether Quebec could legally secede from Canada under both domestic and international law.

While references serve a functional purpose—helping the government clarify constitutional uncertainties—they also risk politicising the judiciary, as governments may strategically refer cases to the SCC to validate political agendas. In Pakistan, the Court has the jurisdiction to hear references too, which has led to many instances of politicising the judiciary and encroaching on the separation of powers.⁷² The risk of judicial politicisation in Canada's reference jurisdiction resembles the use of *suo motu* powers in Pakistan, where the Court has been accused of judicial overreach by taking up politically charged cases at its discretion.

While Canada's leave-to-appeal system is more structured than SCOTUS's certiorari model, it remains more flexible than the United Kingdom's permission-to-appeal process. This hybrid approach ensures that the SCC retains significant discretionary authority while maintaining judicial accountability, positioning Canada as a model of judicial discretion that balances efficiency, selectivity, and constitutional oversight.

⁷⁰ Department of Justice Canada (n 67).

⁷¹ *Reference Re Secession of Quebec* [1998] 2 SCR 217.

⁷² Yasser Kureshi, 'Politics at the bench: The Pakistani Judiciary's Ambitions and Interventions' (*Carnegie Endowment for International Peace*, 23 June 2022) <<https://carnegieendowment.org/2022/06/23/politics-at-bench-pakistani-judiciary-s-ambitions-and-interventions-pub-87371>> accessed 12 August 2024.

India & Pakistan

India and Pakistan inherited a common law framework from the British. However, unlike settler colonies such as Australia and Canada, British India was governed through an extractive colonial administration.⁷³ This shaped the development of discretionary review in both countries, as colonial courts were designed to adjudicate disputes while maintaining centralised state control. Judicial discretion was often exercised to uphold colonial interests, and this legacy persisted in the post-independence judicial structures of India and Pakistan.

While the common law heritage binds India and Pakistan to discretionary judicial review, other Global South jurisdictions provide alternative approaches. South Africa's Constitutional Court, for example, employs a structured 'leave to appeal' process but allows direct access to litigants in human rights cases, ensuring equitable access without overburdening the judiciary.⁷⁴ Similarly, Singapore's 'judicial filtering system' limits discretionary power through explicit legislative criteria.⁷⁵ These models present possible avenues for reform in South Asia, where discretionary review faces accusations of selective judicial activism.

Since India and Pakistan have written constitutions, judicial review in their legal frameworks closely follows the American model. Whereas the United States has the Bill of Rights, India and Pakistan have scheduled lists of fundamental rights, which serve as a basis for judicial review of executive and legislative actions. However, the extent to which these cases reach the respective Supreme Courts depends on the discretionary review exercised under Articles 136 (India) and 184(3) and 199 (Pakistan) of their respective Constitutions, which allow selective case admission.

The procedures for the two countries are strikingly similar. Both require a writ petition, which must concern fundamental rights and issues of public importance, which the court grants or sets aside. In India, the Chief Justice is

⁷³ Jason Hickel, 'How Britain Stole \$45 Trillion from India' *Al Jazeera* (Doha, 19 December 2018) <<https://www.aljazeera.com/opinions/2018/12/19/how-britain-stole-45-trillion-from-india>> accessed 12 August 2024.

⁷⁴ Constitution of the Republic of South Africa, s 167(6)(a).

⁷⁵ Rules of Court 2022, Order LIII.

responsible for formulating benches for all cases, including appeals.⁷⁶ However, in cases where petitions are ‘frivolous’ or ‘scandalous’, the Registrar rejects the petition on their own initiative.⁷⁷ In Pakistan’s case, an appeal is filed in the Court through the Office of the Registrar. A preliminary hearing is conducted where the appellant is allowed to demonstrate the points of law which need to be decided by the Court. A notice is sent to the respondent, who may or may not choose to appear at the preliminary hearing.⁷⁸ The hearing is supervised by a bench of at least two judges of the Court.⁷⁹

The procedure for leave to appeal in the Supreme Courts of India and Pakistan follows a discretionary framework but diverges in key procedural aspects. In India, leave to appeal is governed by Order XIX (Appeals on Certificate by High Court) and Order XXI (Special Leave Petitions – Civil) of the Supreme Court Rules of 2013, under which a Special Leave Petition under Article 136 must be filed within 60 days if the High Court refuses a certificate of fitness⁸⁰ and within 90 days in other cases.⁸¹ The Registrar⁸² conducts an initial screening before forwarding the case to a bench of three judges,⁸³ which may either summarily reject it or grant leave, converting it into an appeal. If leave is granted, notices are sent to all relevant parties, and the High Court record is transmitted to the Supreme Court. In Pakistan, the right to appeal to the Court is provided under Article 185 of the Constitution. Leave to appeal is governed by Order XIII (Civil Appeals) and Order XXIII (Criminal Appeals) of the Supreme Court Rules of 1980, whereby a petitioner must file an appeal within 60 days for civil cases⁸⁴ and 30 days for criminal cases.⁸⁵ The Chief Justice used to wield greater discretionary power over case selection and bench formation,⁸⁶ while the Registrar initially reviewed petitions.⁸⁷ In both jurisdictions, the criteria for granting leave involve determining whether the case

⁷⁶ Supreme Court of India Rules 2013, Order VI, Rules 1–5.

⁷⁷ Rules 2013 (n 76) Order XV, Rule 5.

⁷⁸ Supreme Court of Pakistan Rules 1980, Order XIII, Rule 5.

⁷⁹ Rules 1980 (n 78) Order XI.

⁸⁰ Rules 2013 (n 76) Order XIX, Rule 1.

⁸¹ Rules 2013 (n 76) Order XXI, Rule 2.

⁸² Rules 2013 (n 76) Order XV, Rule 5.

⁸³ Rules 2013 (n 76) Order VI, Rule 1.

⁸⁴ Rules 1980 (n 78) Order XIII, Rule 2.

⁸⁵ Rules 1980 (n 78) Order XXIII, Rule 1.

⁸⁶ Rules 1980 (n 78) Order IV, Rule 4.

⁸⁷ Rules 1980 (n 78) Order V, Rule 1.

raises significant constitutional or legal questions. However, Pakistan's system was more centralised, as the Chief Justice had the authority to decide which cases merited review. Additionally, while both systems grant discretionary review, Pakistan's process has been historically criticised for being more susceptible to judicial activism due to its Chief Justice's erstwhile dominant role in case selection, whereas India's system distributes authority across multiple judges, reducing individual discretion in the selection process.

The Court's erstwhile *suo motu* jurisdiction was one of the defining features of its discretionary review framework. *Suo motu* (Latin for 'on its own motion') refers to a court's power to take up cases without a formal petition. While both India and Pakistan inherited this principle, their applications diverged. India's Supreme Court still retains *suo motu* jurisdiction under Articles 32 and 226 of the Constitution of India, empowering both the Supreme Court and the High Courts to intervene in cases concerning fundamental rights violations. In contrast, the Court previously relied on Article 184(3) of the Constitution to take up cases of 'public importance'. However, the 26th Constitutional Amendment has abolished these *suo motu* powers entirely, doing away with the judiciary's unilateral ability to intervene without a petition. Common law jurisdictions outside the subcontinent do not have such powers, and SCOTUS explicitly rejected it for lacking any constitutional basis in *Carlisle v. United States*.⁸⁸

Former Chief Justices like Iftikhar Chaudhry, Saqib Nisar, and Umar Ata Bandial are well-known for having issued a significant number of *suo motu* notices, a considerable proportion of which dealt with political matters. The idea that one strongman, political or otherwise, can challenge everyone else delights some people who relish the thought of a Messiah but discourages others who find no legal or constitutional basis for such an extraordinary power. The frequent use of discretionary review for political cases raises concerns about judicial overreach. While judicial activism has been celebrated for addressing human rights violations, it has also enabled judicial intervention in political disputes. For instance, the Court's decision in *PPPP v. Federation of Pakistan* exemplifies how discretionary review has been wielded to shape national politics.⁸⁹ When Qasim Khan Suri, the

⁸⁸ *Carlisle v. United States* [1996] 517 U.S. 416.

⁸⁹ *Pakistan Peoples Party Parliamentarians (PPPP) and others v. Federation of Pakistan and others* PLD 2022 SC 290.

Deputy Speaker of the National Assembly, set aside the motion for Vote-of-No-Confidence against Prime Minister Imran Khan, the Court, led by Chief Justice Bandial, reviewed Suri's actions⁹⁰ and subsequently invalidated them. This trend, seen in both India and Pakistan, blurs the distinction between judicial independence and judicial supremacy, undermining the separation of powers.

The use of discretionary review in times of crisis reflects its dual role as both a safeguard and a political tool. The Court has intervened in constitutional emergencies, such as the aforementioned attempt to dissolve the National Assembly in 2022, to prevent executive overreach. However, such interventions have also been criticised for selectively targeting political opponents, raising concerns about the judiciary's role in stabilizing—or destabilizing—democratic institutions. Defenders of such a system point to its successes in protecting the fundamental rights of the marginalized. For example, in 2017, Chief Justice Saqib Nisar issued a *suo motu* notices over a minor's rape⁹¹ and a year later over the rape and murder of another young girl in Kasur.⁹² Besides his role during the attempt to dissolve the National Assembly in 2022, Chief Justice Bandial also issued a *suo motu* notice over the delay in the subsequent general elections.⁹³ Defenders have argued that the *suo motu* method is the only way the Court can ensure implementation of its orders. Without the *suo motu* weapon, marginalized groups in society would have no recourse or protections in law. However, that does not explain why other judges cannot be allowed into this decision-making. Justice Qazi Faez Isa, the former Chief Justice, was unusually vocal about this problem,

⁹⁰ Shivani Kumar, 'Pak Chief Justice Says SC Will Issue "reasonable Order" on Crisis, Imran Calls PTI Meet Tomorrow' *Hindustan Times* (New Delhi, 4 April 2022) <<https://www.hindustantimes.com/world-news/pakistan-supreme-court-resumes-hearing-on-political-crisis-imran-calls-pti-meet-tomorrow-101649065662800.html>> accessed 12 August 2024.

⁹¹ PTI, 'Pak Chief Justice Takes *Suo Motu* Notice of Teenage Girl's Rape' *The Indian Express* (Noida, 27 July 2017) <<https://indianexpress.com/article/pakistan/pak-chief-justice-takes-suo-motu-notice-of-teenage-girls-rape-4769652/>> accessed 12 August 2024.

⁹² Web Desk, 'Chief Justice Takes *Suo Moto* Notice of Zainab Rape, Murder in Kasur' *The News International* (Islamabad, 10 January 2018) <<https://www.thenews.com.pk/latest/266861-chief-justice-takes-Suo-Moto-notice-of-zainab-rape-murder>> accessed 12 August 2024.

⁹³ Hasnaat Malik 'CJP Takes *Suo Motu* Notice over Polls Delay' *The Express Tribune* (Islamabad, 22 February 2023) <<https://tribune.com.pk/story/2402654/Chief-Justice-takes-suo-motu-notice-over-polls-delay>> accessed 12 August 2024.

particularly before his retirement.⁹⁴ He believed that the power to issue *suo motu* notices lied, like the case in India, with the Court in general, not the Chief Justice alone.⁹⁵

Regardless of what happens behind closed doors, the fact remains that one of the motives behind the Supreme Court (Practice and Procedure) Act, 2023 ('Practice and Procedure Act') was to do away with the dictatorial nature of the *suo motu* powers.⁹⁶ The Practice and Procedure Act, prior to its amendment in 2024, effectively mandated that *suo motu* notices be issued through a majority decision of the Chief Justice and the next two senior-most judges of the Court. Ironically, this same legislation was obstructed by the wielding of the very *suo motu* powers it sought to reform. However, the question of *suo motu* is now moot owing to the 26th Constitutional Amendment, which has constitutionally mandated the removal of these powers.

The Supreme Courts of Pakistan and India face an unsustainable backlog—over 57,000⁹⁷ and 79,000⁹⁸ pending cases, respectively—necessitating a recalibration of discretionary review. Unlike the United States, where certiorari restrictions have concentrated judicial power, the problem in South Asia is excessive case admission, which dilutes Supreme Courts' function as courts of law rather than fact. Given the existence of Sessions Courts and High Courts as appellate bodies, appeal to the Supreme Courts should not be a matter of right. Unrestricted access to apex courts burdens judicial resources and incentivises litigants to bypass lower court finality. Expanding discretionary review would correct this inefficiency by ensuring that only cases involving unsettled or conflicting points of law are admitted. This would align Pakistan and India with

⁹⁴ PTI, 'Pak President Alvi Appoints Justice Qazi Faez Isa as Next Chief Justice' *The Indian Express* (Islamabad, 21 June 2023) <<https://indianexpress.com/article/pakistan/pak-president-alvi-appoints-justice-qazi-faez-isa-next-chief-justice-8678087/>> accessed 12 August 2024.

⁹⁵ News Reporter, 'Suo Motu Powers Lie with SC, Not Just CJP: Justice Qazi Faez Isa' *Dawn* (Islamabad, 19 April 2023) <<https://www.dawn.com/news/1748501>> accessed 12 August 2024.

⁹⁶ Practice and Procedure (n 9).

⁹⁷ Hasnaat Malik, 'SC Grapples with Unprecedented Caseload' *The Express Tribune* (Islamabad, 23 April 2024) <<https://tribune.com.pk/story/2463605/sc-grapples-with-unprecedented-caseload>> accessed 26 February 2025.

⁹⁸ Gauri Kashyap, '80,221 Cases Pending in the Supreme Court in January 2024' (*Supreme Court Observer*, 23 May 2024) <<https://www.scobserver.in/journal/80221-cases-pending-in-the-supreme-court-in-january-2024>> accessed 26 February 2025.

jurisdictions like the United Kingdom and Canada, where permission-to-appeal mechanisms filter cases to preserve judicial economy. Without such a shift, the Supreme Courts will remain overwhelmed by routine appeals, undermining their capacity to develop coherent legal doctrine.

The above discussion shows how Pakistan's separation of powers has been undermined by the judiciary's historical entanglement in political conflicts, inconsistent application of constitutional principles, and a lack of institutional checks on judicial discretion. The Court's use of Article 184(3) of the Constitution for politically sensitive cases, combined with executive and military interventions, has contributed to an unstable balance of power between state institutions. While discretionary review and judicial independence are contested issues in many common law jurisdictions, the extent of judicial entanglement in political conflicts varies. In the United States, judicial review has historically been insulated from direct political interference whereas in Pakistan, the judiciary's role in disqualifying elected leaders and engaging in judicial populism has led to more overt power struggles with the executive and the legislature. While SCOTUS in the United States exercises strong judicial review, its authority is subject to checks through mechanisms such as congressional amendments, legislative overrides of statutory interpretations, and judicial ethics scrutiny. However, the absence of a formal accountability mechanism for discretionary review decisions, such as case selection under the writ of certiorari, has raised concerns about the judiciary's unchecked power over its docket. Considering the resistance of Chief Justice Roberts to congressional accountability,⁹⁹ with the tacit support of Justice Thomas,¹⁰⁰ it seems like the separation of powers is about to get messier still, and discretionary review may be one of the casualties.

Reforming discretionary review could have divergent effects depending on the jurisdiction. In some cases, greater judicial accountability might enhance the separation of powers by ensuring courts do not overstep their constitutional role. However, excessive constraints on judicial discretion could weaken the judiciary's

⁹⁹ Muhammad U. Faridi, 'Congress Can and Must Enact a Supreme Court Ethics Code' (*New York City Bar Association*, 19 October 2024) <<https://www.nycbar.org/blogs/congress-can-and-must-enact-a-supreme-court-ethics-code>> accessed 25 February 2025.

¹⁰⁰ Devin Dwyer, 'All 9 Supreme Court Justices Push Back on Oversight: "raises More Questions," Senate Chair Says' (*ABC*, 28 April 2023) <<https://abc7.com/supreme-court-justices-scotus-ethics-code-clarence-thomas/13192491>> accessed 25 February 2025.

ability to check executive overreach and uphold fundamental rights. A manner of reconciling these opposing consequences must be sought, primarily through reform of the discretionary review system, renewing the trust other branches have for the judiciary.

Reforming Discretionary Review in Common Law Jurisdictions

I. Mandatory Written Explanations for Granting or Denying Review

The problems with discretionary review in the United States, United Kingdom, Australia, Canada, India, and Pakistan stem primarily from a lack of transparency in case selection, excessive judicial discretion concentrated in small groups of judges, the absence of clear criteria for review, and the politicisation of judicial interventions. The following reforms address these issues directly.

A fundamental flaw in discretionary review is that courts refuse to explain why they accept or reject cases, leaving case selection opaque and vulnerable to ideological biases. In the United States, SCOTUS denies more than 98% of certiorari petitions without explanation, creating uncertainty over why some cases are deemed worthy of review while others are not. A requirement that at least one judge must provide a written statement when a certiorari petition is denied in a constitutional case would introduce some transparency. In the United Kingdom, UKSC's refusal to grant permission to appeal is also not accompanied by detailed reasoning, leaving parties uncertain about how 'arguable points of law' are determined. Requiring a one-paragraph explanation for refusals would reduce ambiguity. Pakistan and India's Supreme Courts, which exercise broad discretionary powers over writ petitions, should be required to justify denials of constitutional petitions in cases where fundamental rights are at stake.

It is suggested that all discretionary review refusals, at least in constitutional cases, must include a short, written explanation detailing why the case was rejected. This prevents arbitrary denials and ensures that discretionary review does not shield courts from accountability.

II. Expanding Case Selection Panels to Prevent Concentration of Power

A major issue in Pakistan, India, and the United States is that a small group of judges—often led by the Chief Justice—dominates case selection decisions. In Pakistan, the Chief Justice has historically had unilateral control over bench formation and discretionary review, allowing case selection to be shaped by individual judicial preferences. In India, the Chief Justice plays a major role in deciding discretionary petitions and forming benches, which has led to accusations of bench fixing in politically sensitive cases. The case selection process should be entrusted to a randomly selected panel of five judges rather than being determined by the Chief Justice or the Registrar's Office alone.

In the United States, the Rule of Four, which allows four judges to grant certiorari, means that a minority of SCOPUS can control case selection. Expanding this rule to require five judges (a majority) for case selection in constitutional matters would prevent cases from being selected purely on ideological preferences. However, considering the settled conservative supermajority in SCOTUS, this suggestion may not be entirely effective.

It is suggested that all Supreme Courts should require a minimum of five judges to approve case selection in constitutional matters to prevent discretionary review from being monopolised by judicial factions or the Chief Justice.

III. Codifying Case Selection Criteria to Reduce Subjectivity

Courts often claim to use broad principles like 'public importance' (Canada, United Kingdom, India, Pakistan, etc.) or 'substantial federal question' (United States) to determine case selection. However, these principles are vague and inconsistently applied, allowing judges excessive discretion in choosing politically or ideologically significant cases while ignoring others.

In Australia, the HCA's 'jurisdictional error' framework restricts discretionary review to cases where lower courts have acted outside their authority. This clear legal threshold reduces the possibility of politically motivated case selection. In Canada, the 'public importance' criterion for leave to appeal is flexible but ensures that cases involve broad legal implications rather than purely individual

grievances. Pakistan and India lack structured criteria for discretionary review, allowing judges to take up cases on vague public interest justifications.

Courts should adopt a structured, multi-factor test for discretionary review case selection, requiring at least two of the following criteria to be met: (i) conflict amongst lower courts on a major constitutional question; (ii) demonstrable national legal significance; (iii) jurisdictional error by a lower court; or (iv) violation of fundamental rights requiring apex court intervention. This would prevent judges from selectively choosing cases that align with personal or political priorities while still allowing courts to manage their dockets efficiently.

IV. Restricting the Use of Discretionary Review for Political Disqualifications

A major problem in Pakistan and India has been the use of discretionary review to remove elected officials from office, raising concerns about judicial overreach into democratic processes. For instance, the Court disqualified Nawaz Sharif in 2017 through discretionary review, leading to accusations that the judiciary was weaponised against political opponents.¹⁰¹ India's Supreme Court has intervened in election disputes, sometimes barring candidates from running under unclear discretionary justifications. Rahul Gandhi, leader of the Indian National Congress, was disqualified on charges of defaming Prime Minister Narendra Modi.¹⁰² Dicey argued that the rule of law cannot function if legal decisions appear arbitrary or politically motivated. He warned against judicial power being 'exercised in an irregular and unaccountable manner, which subjects individuals to the risk of punishment without established rules.'¹⁰³

Constitutional disqualifications of elected officials should be explicitly removed from discretionary review jurisdiction and should require: (i) a full

¹⁰¹ Shuja Nawaz, 'The Disqualification of Nawaz Sharif: Will Pakistan's Courts Drain the Swamp?' (*Atlantic Council*, 28 July 2017) <<https://www.atlanticcouncil.org/blogs/new-atlanticist/the-disqualification-of-nawaz-sharif-will-pakistan-s-courts-drain-the-swamp>> accessed 25 February 2025.

¹⁰² The Associated Press, 'India Opposition Leader Loses His Parliament Seat after Being Convicted of Defamation' (*NPR*, 24 March 2023) <<https://www.npr.org/2023/03/24/1165822683/india-rahul-gandhi-parliament-seat-defamation-modi>> accessed 25 February 2025.

¹⁰³ Dicey (n 6) 204.

Supreme Court bench (not a discretionary panel); (ii) mandatory appeal rights; and (iii) legislative review before judicial disqualification. This prevents courts from unilaterally removing political leaders based on vague constitutional provisions, ensuring that judicial review does not become a political tool.

V. Limiting the Use of Discretionary Review to Overturn Established Precedents

Discretionary review is sometimes exploited to overturn long-standing legal precedents, leading to legal instability. In the United States, SCOTUS used discretionary review to overturn *Roe* in *Dobbs* after decades of precedent. In Pakistan, judicial doctrine has been reversed multiple times under different Chief Justices, particularly in cases involving constitutional interpretation.

Courts should require a supermajority vote (two-thirds of judges) to accept a case for discretionary review if the stated purpose is to overturn a precedent that has existed for decades. This prevents sudden ideological shifts from erasing long-established legal protections.

VI. Strengthening Parliamentary Oversight Without Undermining Judicial Independence

While judicial independence is a core principle of common law systems, the lack of external accountability in discretionary review enables judges to operate without democratic checks. In the United Kingdom, parliamentary scrutiny of judicial decisions provides a minimal check on judicial power. In Pakistan, judicial decisions have historically been immune from parliamentary review, leading to power struggles between branches of government.

Discretionary review case selection trends should be subject to annual review by an independent legal commission which would: (i) publish reports on discretionary case selection patterns; (ii) identify ideological biases in case selection; and (iii) provide recommendations for procedural improvements. This would preserve judicial independence while ensuring discretionary review is not abused for political or ideological purposes.

Discretionary review is an essential function of common law courts, but its unchecked nature has created legitimacy crises in multiple jurisdictions. By implementing the six reforms outlined above—mandatory reasoning for denials, expanded case selection panels, codified selection criteria, restrictions on political disqualifications, limits on precedent reversals, and independent oversight—courts can maintain their autonomy while ensuring greater institutional accountability. These reforms will protect the credibility of discretionary review and prevent judicial discretion from being exploited for political purposes.

Conclusion

Discretionary review occupies a paradoxical space within the legal frameworks of common law jurisdictions. It is simultaneously a safeguard against judicial overload and a mechanism that grants courts the power to shape legal and constitutional discourse with little oversight. This paper has examined how discretionary review functions across six common law jurisdictions—the United States, the United Kingdom, Australia, Canada, India, and Pakistan—demonstrating that while the principle remains consistent, its application varies widely depending on historical, institutional, and political contexts.

The evolution of discretionary review across common law jurisdictions presents a departure from Montesquieu's model, where the judiciary was meant to exercise minimal discretion. However, Montesquieu also emphasised the spirit of the laws, which suggests that legal structures should adapt to the specific political and institutional needs of a society. In this sense, discretionary review can be seen as both a pragmatic necessity—preventing courts from being overwhelmed—and a constitutional anomaly, granting the judiciary an agenda-setting function that Montesquieu never envisioned. The challenge, therefore, is not just about limiting judicial discretion but ensuring that it operates within principled constraints that maintain institutional balance without compromising judicial efficiency.

The core tension underlying discretionary review is its dual role as both a protector of judicial independence and a potential threat to the separation of powers. On the one hand, discretionary review ensures that courts are not overwhelmed with frivolous or redundant cases, allowing them to focus on legal questions of significant constitutional or public importance. On the other hand, the absence of

clear criteria, the concentration of power within small judicial panels, and the lack of transparency in case selection raise concerns about judicial accountability. The ability of courts to choose which cases they hear inherently means that certain issues—especially politically sensitive ones—can be either prioritised or ignored based on judicial preferences rather than purely legal considerations.

This analysis has revealed that while some jurisdictions, such as Australia and Canada, have introduced structured frameworks for discretionary review, others, particularly the United States, India, and Pakistan, continue to rely on opaque, highly discretionary mechanisms that grant courts broad authority without adequate oversight. The problem is most acute in Pakistan and India, where discretionary review has been wielded as a political tool, influencing electoral processes, executive decisions, and legislative actions. The United States, while often held as a model of judicial independence, has similarly struggled with the unilateral nature of certiorari decisions, which lack any requirement for explanation and allow ideological biases to shape constitutional adjudication.

The need for reform is evident. The lack of transparency in discretionary review decisions must be addressed through mandatory reasoning for denials, ensuring that courts provide at least minimal explanations for case selection in constitutional matters. The concentration of power in small judicial panels should be mitigated by requiring larger case selection committees, preventing ideological factions from monopolizing judicial agendas. Furthermore, the absence of clear selection criteria should be resolved by codifying structured, multi-factor tests to guide discretionary decisions, ensuring consistency and fairness.

Most crucially, discretionary review must not become a mechanism for judicial interference in democratic processes. The history of judicial disqualifications in Pakistan, politicised rulings in India, and precedent reversals in the United States illustrate the dangers of an unchecked judiciary acting as an unaccountable constitutional arbiter. While courts must retain independence from political influence, this does not mean they should be beyond institutional checks. Introducing independent oversight commissions, performance evaluations, and procedural safeguards can ensure that discretionary review serves its intended purpose—strengthening the judiciary as an impartial constitutional guardian rather than an unchecked political actor.

Ultimately, discretionary review is not inherently flawed, but its unchecked nature creates systemic vulnerabilities. Without reforms that introduce greater transparency, clearer criteria, and structural accountability, discretionary review risks undermining the very judicial independence it seeks to protect. Courts must not only interpret the law but also demonstrate institutional integrity and public accountability. A judiciary that remains immune to scrutiny loses credibility, and discretionary review, if left unregulated, risks eroding public trust in the courts as impartial arbiters of justice. Reforming discretionary review is not about limiting judicial power—it is about ensuring that such power is exercised with legitimacy, fairness, and responsibility.

If the judiciary is to remain the guardian of constitutional order, then discretionary review must be a scalpel, not a sledgehammer—precise, principled, and wielded with restraint, lest it carve away the very balance it was meant to preserve.