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In the Shadow of Judicial Supremacy: Putting the Idea of Judicial Dialogue in Its Place

Ming-Sung Kuo·

<Abstract>

I aim to shed theoretical light on the meaning of judicial dialogue by comparing its practice in different jurisdictions. I first examine the practice of dialogic judicial review in Westminster democracies and constitutional departmentalism in American constitutional theory, showing the tendency toward judicial supremacy in both cases. Turning finally to continental Europe, I argue that the practice of constitutional dialogue there is reconciled with its postwar tradition of judicial supremacy through the deployment of proportionality analysis-framed judicial admonition. I conclude that constitutional dialogue may take place amid the judicialization of constitutional politics, albeit in the shadow of judicial supremacy.

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I. INTRODUCTION

The idea of dialogic judicial review has gained currency in constitutional scholarship.[1] Yet, the meaning of (institutional) dialogue in theories of constitutional/ judicial dialogue is not clear. Does it simply refer to the fact that legislature or other political departments respond to the results of judicial review? If so, there is little added value inhering in the idea of judicial dialogue. After all, each decision by judicial review is part of the process of constitutional politics involving different departments of constitutional power and thus subject to modification rendered by statutory changes or constitutional revision if necessary.[2] If the idea of judicial dialogue is not simply an alternative expression for the traditional relationship between the courts, and legislature as well as the executive power, how do we make sense of it in terms of its implications to the political vs. judicial institutional dynamics in constitutional democracy?

This paper aims to shed theoretical light on these questions by comparing the

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[1] Jeremy Waldron, *Some Models of Dialogue between Judges and Legislators*, 23 SUP. CT. L. REV. 577 (2d ed. 2004.); Luc B. Tremblay, *The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures*, 3 IN'T J. CONST. L. 617(-48) (2005); Andrew Petter, *Look Who's Talking Now: Dialogue Theory and the Return to Democracy*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 519 (Richard W. Bauman & Tsvi Kahana eds., 2006). For the deployment of the idea of judicial dialogue in the transnational context, see, e.g., Miguel Poiares Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 356 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

[2] *See* Mark Tushnet, *The Hartman Hotz Lecture: Dialogic Judicial Review*, 61 ARK. L. REV. 205, 209-15 (2009); *see also* Tremblay, *supra* note 1, at 644-45

domestic contexts of constitutional politics in which contemporary constitutional theory takes the dialogic turn: the emergence of the "new Commonwealth model of constitutionalism" in traditional Westminster democracies, the recent resurgence of constitutional departmentalism in the United States (US),[3] and the practice of constitutional dialogue in continental Europe. I argue that upon closer inspection, these comparative constitutional experiences show that the dialogic approach does not hold up in the face of the prominent role of judicial review in constitutional democracies. As more and more political and policy issues are turned into questions of constitutional interpretation through judicial review of executive/ administrative and legislative acts, contemporary constitutionalism has become associated with the judicialization of politics. As a result, with judicial review standing out as the defining feature of constitutional democracy, judicial supremacy,[4] instead of departmentalism or judicial dialogue, is

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[3] The departmentalist view of constitutional interpretation holds that "each branch, or department, of government has an equal authority to interpret the [c]onstitution in the context of conducting its duties" and "is supreme within its own interpretive sphere." *See* Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C.L. REV 773, 782-83 (2002). *See also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 106-11 (2004). Notably, under the system of parliamentarianism, theories of constitutional dialogue espoused in Westminster democracies focus on the institutional relationship between judges and legislators. *See also* ALISON L. YOUNG, PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT 117 (2009).

[4] Judicial supremacy refers to the position of treating the interpretations of the constitution made by judicial review as an integrated part of constitutional law and thus de facto or de jure superior to those made by other departments of constitutional power. Judicial supremacy hereby also includes the situation in which the power of constitutional review resides in special constitutional courts and extra-judicial institutions. Judicial supremacy is characteristic of what Tushnet calls strong-form judicial review. *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL

characteristic of the practices of constitutional interpretation. Moreover, the post-WWII practice of judicial review in continental Europe suggests that the idea of constitutional/ judicial dialogue centers on the deployment of "admonitory judicial decisions" to manage inter-departmental relations in constitutional decision making, which is another form of judicial supremacy. Taken as a whole, judicial dialogue and judicial supremacy are not contradictory; rather, judicial dialogue takes place in the shadow of judicial supremacy.

II. AFTER PARLIAMENTARY SUPREMACY: TAKING THE PATH OF JUDICIAL DIALOGUE IN WESTMINSTER DEMOCRACIES?

In this section, I first analyze how bills of rights in Canada, New Zealand, and the UK bolster the power of judicial review with the provision of new robust interpretive mandates. I then discuss the distinct features of this new type of bolstered judicial review in Westminster democracies and suggest that the practice of judicial review in these countries deviates from the expectation of the model of judicial dialogue and moves in the direction of strong-form judicial review instead.

A. Interpretive Mandate and Judicial Empowerment: Bolstering Judicial Review in the Shadow of Parliamentary Supremacy

The powers conferred on the courts by the bills of rights in Canada, New Zealand, and the UK can be classified into two major types. The first type is the authorization of judicial review by way of interpretive mandate, which is provided in Section 6 of the Bill

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of Rights Act of New Zealand (hereinafter NZBoRA)[5] and Section 3 of the Human Rights Act 1998 of the UK (hereinafter UKHRA).[6] At first blush, courts are simply given an interpretive mandate to construe the statute in question in a way otherwise allowed in ordinary interpretive methods. Nevertheless, this interpretive mandate amounts to a form of (quasi)constitutional/ judicial review to the extent that it "gives the courts an effect on policy that is different from the effect they have using their traditional methods of statutory interpretation," indicating what Mark Tushnet calls "weak-form judicial review."[7] Notably, compared to New Zealand's weak-form judicial review based on a pure interpretive mandate, the new powers of judicial review in HRA are more robust.[8] Alongside Section 3, Section 4 of UKHRA authorizes courts in the UK to issue a declaration of incompatibility as to a disputed statute if courts are unable to interpret it to be compatible with the rights protected in the European Convention on Human Rights (Convention),[9] which HRA was enacted to incorporate into the UK domestic legal

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[5] "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning." Bill of Rights Act 1990, s. 6.

[6] "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." HRA, s. 3 (1).

[7] *See* TUSHNET, *supra* note 3, at 18-19, 25-27.

[8] Despite the lack of an express authorization of the courts to declare a statute inconsistent with the Bill of Rights Act, the New Zealand Court of Appeals in *Moonen v. Film and Literature Board of Review* ([2000] 2 N.Z.L.R. 9) suggested the possibility of making a declaration of inconsistency. *See* James Allan, *The Effect of a Statutory Bill of Rights where Parliament Is Sovereign: The Lesson from New Zealand*, *in* SCEPTICAL ESSAYS ON HUMAN RIGHTS 375, 384 (Tom Campbell et al. eds., 2001).

[9] Human Rights Act 1998, s. 4 (4) (Eng.).

system.[10] Nevertheless, as the disputed statute is still binding despite being declared Convention rights-incompatible, Section 4 functions as another interpretive mandate.[11]

The second type of power conferred on the courts in the Commonwealth model of constitutionalism is exemplified by the creation of judicial review in the Canadian Charter of Rights and Freedoms 1982 (hereinafter the Charter), which is an integrated part of the Canadian constitution.[12] In contrast to courts in New Zealand and the UK, under the Charter, courts may set aside statutes if the statutes at issue are regarded as violating the Charter rights.[13] Nevertheless, what characterizes the post-1982 judicial review in Canada is that legislatures may override judicial decisions through ordinary legislative processes. According to Section 1, the general limitations clause,[14] the rights

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[10] Human Rights Act 1998, s. 1 (Eng.).

[11] Sections 3 and 4 of HRA jointly constitute what Tushnet calls "an augmented interpretive mandate." *See* TUSHNET, *supra* note 3, at 27-31. *But cf.* YOUNG, *supra* note 3, at 116; TOM HICKMAN, PUBLIC LAW AFTER THE HUMAN RIGHTS ACT 82 (2010).

[12] Part I of the Constitution Act, 1982.

[13] The Constitution Act, 1982, s. 52.

[14] In their 1997 groundbreaking paper, Peter Hogg and Allison Bushell Thornton also discussed the role played by the provision of special limitation in some qualified charter rights (Sections 7, 8, 9, and 12) in contributing to the emergence of a weak-form judicial review in Canada. *See* Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such as Bad Thing at All)*, 35 OSGOODE HALL L.J. 75, 87-90 (1997); *see also* Peter W. Hogg et al., *Charter Dialogue Revisited— Or "Much Ado About Metaphors*, 45 OSGOODE HALL L.J. 1, 3 (2007). Notably, their paper was aimed at contrasting the practice of judicial review under the Canadian Charter with the strong-form judicial review in the United State (US), suggesting that different constitutional designs in these two countries played a role in the distinct style of judicial review. Thus, they emphasized that some Charter rights were framed in qualified terms, which is distinctive from the absolutist style in which the US Constitution provided for fundamental rights. Along this line of argument, they also discussed the

guaranteed by the Charter are subject to "such limitations as are demonstrably justified in a free and democratic society." Legislatures, federal and provincial, are thus allowed to respond to judicial decisions by reenacting the invalidated statute with a bolstered justification. For example, legislatures may proclaim in the preamble to the reenacted legislation that there is a better justification for the statute than what the court interpreted when it struck down the original statute.[15] In addition, legislatures may choose to invoke the so-called "notwithstanding clause" of Section 33: Legislatures can make statutes effective for renewable five-year periods, "notwithstanding their inconsistency with the Charter rights."[16] Under the notwithstanding clause, legislatures can either preempt judicial review of the consistency of statues with the Charter rights by including a notwithstanding clause in the legislation, or override judicial decisions to resurrect the invalidated statute by using the notwithstanding clause at least for five years.[17]

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equality rights in the Charter. *See* Hogg & Bushel, *supra*, at 76-78, 87-91. Yet, in terms of the way fundamental rights are framed and provided for in modern constitutions around the globe, the absolutist US Constitution is an outlier. *See* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*. 107 MICH. L. REV. 391, 401 (2008). Thus, Hogg and Bushell's argument on how the qualified Charter rights would move the Canadian judicial review towards a weak form is limited.

[15] "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The Constitution Act, 1982, s. 1. Tushnet calls legislative invocations of Section 1 power "in-your-face" responses. *See* TUSHNET, *supra* note 4, at 31-33, 44.

[16] "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." The Constitution Act, 1982, s. 33.

[17] In its preemptive use, once the invocation of the notwithstanding clause lapses without renewal

Apparently, the three cases of judicial review as noted above are distinct from one another in terms of the powers conferred on the courts of individual jurisdictions. Yet, they share some features, which set the new model of judicial review in Canada, New Zealand, and the UK apart from the traditional judicial role under the doctrine of parliamentary sovereignty. Under the tradition of parliamentary sovereignty, judicial review in Westminster democracies was restricted to administrative acts. Statutes lay beyond the scope of judicial review.[18] Even in the limited situations in which parliamentary legislation seems to have been subject to judicial scrutiny such as the interpretation of the so-called "ouster clauses"[19] and the conformity of the UK legislation with the European Community/ Union law, the exercise of judicial power and the judicial interpretation of statutes have been conceived as the means to achieve the legislative end.[20] In this way, legislative intent is construed as controlling in judicial interpretation of statues and thus the idea of parliamentary sovereignty is preserved.

Yet, with the new interpretive mandate provided by a bill of rights, parliamentary intent is no longer a controlling factor in statutory interpretation. Rather, by way of the

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on the expiration of the five-year period, the compatibility of the disputed legislation with the Charter rights will be subject to judicial review. *See* Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L. REV. 1963, 1967 (2004).

[18] *See* T.R.S. Allan, *Constitutional Dialogue and the Justification of Judicial Review*, 23 OXFORD J. LEGAL STUD. 563 (2003).

[19] A statutory provision that ousts the courts' common law power of judicial review is called "ouster clause." *See* IAN LOVELAND, CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND HUMAN RIGHTS: A CRITICAL INTRODUCTION 77 (5th ed. 2009).

[20] *See* HICKMAN, *supra* note 11, at 65.

new interpretive mandate as provided in Section 6 of the Bill of Right Act in New Zealand and Section 3 of HRA in the UK, parliamentary intent can be pushed aside as judicial interpretation of statutes in light of the bill of rights defines the meaning of statutory texts in question.[21] Furthermore, judicial power provided in the Charter expressly authorizes Canadian courts to set aside parliamentary legislation if it is interpreted as inconsistent with the Charter rights, although the effect of judicial decisions can be modified under the conditions stipulated in Section 1 and Section 33. Taken together, the doctrine of parliamentary sovereignty in these three jurisdictions seems to be preserved in form but rewritten in substance.[22]

On the other hand, they depart from the prototype of judicial review that the US Supreme Court exemplifies. The underlying principle of this new type of judicial review noted above is that parliaments (as well as other legislatures) in the three Westminster democracies can choose to restore the disregarded legal meaning through a more specific redrafting of the statutory text in question. In the situations where judicial interpretation of statutes takes the place of parliamentary intent, the parliament is not strictly bound by the judiciary. By means of its ordinary legislative power, it can override judicial decisions. In the cases of New Zealand and the UK, given the statutory status of the bill of rights, the parliament can resort simply to ordinary legislative procedures to restore the

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[21] Comparing the distinct impacts of Section 3 and Section 4 of UKHRA, Young concludes that "Section 3 tips the balance of power in favor of the court," while "Section 4 tips the balance of power in favor of the legislature." *See* YOUNG, *supra* note 3, at 129; *see also* AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS 118-43 (2009).

[22] *See* KAVANAGH, *supra* note 21, at 322-24.

original meaning of the legislative provision that has been set aside by judicial interpretation.[23] With respect to Canada, legislatures can challenge judicial interpretation of the Charter rights either by using the Section 1 procedure or by invoking the notwithstanding clause without going through the cumbersome constitutional amendment procedures.[24]

B. Dialogue in Question: Emerging Strong-Form Judicial Review in the Commonwealth Model of Constitutionalism?

The dynamic interactions envisaged between legislature and courts with the installation of bolstered judicial review in Westminster democracies are most evident in the Canadian case. As noted above, in response to judicial decisions on the compatibility of statutes with the Charter rights, legislatures are empowered to use ordinary legislative procedures to restore invalidated statutes at least for five years by invoking the notwithstanding clause.[25] Or, legislatures may choose to go by Section 1 of the Charter instead of defying the courts. In the latter way, with mere minor "tinker[ing]," legislatures can easily reinstate the invalidated statute in what Hogg and Bushell Thornton call "legislative sequels" without going through the cumbersome constitutional amendment process.[26] Together, the Charter adds new powers to judicial review by constitutionalizing the bill of rights without subjugating legislatures to the courts. Rather, legislatures are expected

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[23] *See* TUSHNET, *supra* note 4, at 24; *see also* YOUNG, *supra* note 3, at, 116.

[24] *See* Part V of the Constitution Act, 1982; *cf.* Hogg & Bushel, *supra* note 14, at 82-91.

[25] *See* The Constitution Act, 1982, s. 33.

[26] *See* Hogg & Bushel, *supra* note 14, at 82, 84-87.

to respond to the judicial position on the meaning of the Charter rights through a kind of institutional dialogue. This is why the Canadian case is considered the paradigm case of the dialogic mode of judicial review.[27]

As departure from the tradition of parliamentary sovereignty, the dynamics between courts and the parliament in the cases of New Zealand and the UK also suggests the emergence of judicial dialogue. On the one hand, when the original meaning of the legislative provision is replaced by judicial interpretation that is given to make that disputed provision consistent or compatible with the Bill of Rights or the HRA, parliaments are not bound by the courts. Rather, given the statutory status of the bill of rights, parliaments in these two countries can override judicial interpretation through ordinary legislative procedures.[28] The judiciary and the legislative are seen as conducting constitutional dialogue in the exchange of statutory enactment, judicial interpretation, and (potential) legislative override.[29]

On the other hand, in the cases where courts are unable to interpret a statute in a way compatible with the bill of rights, the dynamics between courts and the parliament in

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[27] *See* Hogg & Bushel, *supra* note 14; Hogg et al., *supra* note 14; Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391, 393 (2007) [hereinafter Dixon, *Creating Dialogue*]; Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235 (2009) [hereinafter Dixon, *Charter Dialogue, and Deference*]; Kent Roach, *Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States*, 4 INT'L J. CONST. L. 347 (2006). *See also* TUSHNET, *supra* note 4, at 31; *but cf.* YOUNG, *supra* note 3, at 115; HICKMAN, *supra* note 11, at 71-81.

[28] *See* TUSHNET, *supra* note 4, at, 24.

[29] *See* HICKMAN, *supra* note 11, at 82; YOUNG, *supra* note 3, at 116-18, 128-32.

the UK and New Zealand also moves in the direction of judicial dialogue. In the UK context, under Section 4 of HRA, judges are authorized to make a declaration of incompatibility should they fail to interpret the disputed statute in a way compatible with the Convention rights. Accordingly, legal reasoning in court decisions is expected to demonstrate how rights-compatible readings of statutory texts are mulled over and exhausted before judges reach the rights-incompatible end of statutory language. With the rights-incompatible statutory language exposed and the meaning of the bill of rights illuminated in judicial interpretations, the public would put pressure on the parliament to revise the disputed statutory provision to make it compatible with the Convention rights, even if judges stop short of making a declaration of incompatibility.[30] This is why in the UK context, commentators who advocate judicial dialogue have focused on Section 4 of HRA.[31] In the case of New Zealand, the court has suggested that the Bill of Rights Act can be interpreted as conferring on judges the power to make a similar "judicial indication," which "should be of value",[32] to the effect that the statutory provision in question is inconsistent with the Bill of Rights Act.

Taken as a whole, the new model of judicial review resulting from the adoption of a statutory or constitutional bill of rights in these Westminster democracies designedly loosens the tradition of parliamentary sovereignty without turning into judicial supremacy. Judicial decisions are open to legislative reconsideration through ordinary lawmaking processes. The institutional interactions between legislatures and courts are

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[30] *See* TUSHNET, *supra* note 4, at 27-33.

[31] *See* HICKMAN, *supra* note 11, at 86.

[32] *Moonen*, *supra* note 8, at 17.

expected to be more dynamic than that under traditional parliamentary supremacy or the US-style of "strong-form judicial review," laying the foundations for the new Commonwealth model of constitutionalism.[33] In terms of the possible exchange of institutional opinions as to the meaning of the bill of rights through legislative enactment and judicial decision, at least in theory, the new Commonwealth model of constitutionalism, the Canadian type of judicial review in particular, is further praised as the institutional embodiment of the idea of constitutional/ judicial dialogue.[34]

While the Commonwealth model of judicial review is designed to reconcile parliamentary sovereignty with better protection of human or fundamental rights, a closer look at the subsequent developments reveals that the extent to which judicial review emerging from the new Commonwealth model of constitutionalism has broken with the mode of judicial supremacy is questionable. As recent studies have noted, the practice in these countries seems to deviate from this expectation.

First, take the claimed prototype of judicial dialogue, Canada. A juxtaposition of Peter Hogg and his collaborators' landmark studies of the Canadian Supreme Court decisions shows an obvious decline in the interaction between the court and the legislature in recent years. From 1983 to 1996, Hogg and Bushell records that of the 66 cases in which a law was held to be in breach of the Charter, 53 elicited some response

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[33] *See* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

[34] *See* Kent Roach, *Dialogic Judicial Review and Its Critics*, 23 SUP. CT L. REV. 49 (2d ed. 2004); *see also* HICKMAN, *supra* note 11, at 81-96.

from the competent legislature.[35] During the first fifteen years following the passage of the Charter, approximately 80 per cent of the decisions in which a law was held to be in breach of the Charter generated some legislative response.[36] Yet, in the 2007 sequel to their 1997 study, Hogg and his collaborators observe that over the 1996-2006 period, the percentage of legislative response to judicial decisions declined to short of 61 percent.[37] Although during this later period, a majority of the decisions in which the Canadian Supreme Court held a law to be in breach of the Charter elicited legislative responses,[38] the decline in percentage (over 19 per cent) is undeniably substantial.

Even if we focus only on the majority of cases that elicited legislative responses,[39] it is hard to judge whether they can be taken as evidence of judicial dialogue in action. To do justice to the continuing legislative response in this regard, we need to distinguish between policy and law in constitutional cases. In the constitutional orders with some form of judicial review, whether it is strong or weak, a judicial decision that strikes down a law on constitutional grounds usually has great policy implications. In the wake of a successful constitutional challenge, the legislature not only has to revise the impugned legal instrument to make it compatible with the constitution but needs to address the policy implications by revamping the impacted laws. Yet, if the legislative response is confined to the latter, it seems to suggest that judicial interpretation holds sway over the

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[35] *See* Hogg & Bushel, *supra* note 14, at 96-124.

[36] *See id*. at 97.

[37] *See* Hogg, et al., *supra* note 14, at 51.

[38] *See id*. at 52.

[39] *See id*. at 53-54.

meaning of the constitution, returning to the traditional division of labor between courts and the legislature under a strong-form judicial review. Thus, the legislative response alone is not sufficient to indicate the emergence of a new mode of inter-branch interaction in Canada. Also, it is noteworthy that no legislative sequel amounted to overriding the judicial interpretation during the same period.[40]

Extending our view beyond the Supreme Court and taking a close look at "the critical and distinctive feature of [judicial review under] the Charter", the notwithstanding clause,[41] we will see how judicial review in Canada has moved away from its dialogic prototype. The legislative invocation of the Section 33 power has become a rarity except for its early controversial usage by the provincial government of Quebec. According to Barbara Billingsley, outside Quebec it has only been used three times in total,[42] never above the provincial level, and not at all since 2000,[43] meaning that it has effectively fallen into "desuetude".[44] Moreover, on those occasions when the notwithstanding clause

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[40] *See id*. at 51-52

[41] *See* Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L J. CON. L. 167, 182 (2010).

[42] *See* Barbara Billingsley, *Section 33: The Charter's Sleeping Giant*, 21 WINDSOR Y.B. ACCESS JUST. 331, 339-40 (2002). It should be noted that there is disagreement among Canadian scholars on how many times section 33 has actually been used. *See* Jeffrey Goldsworthy, *Judicial Review, Legislative Override and Democracy*, *in* PROTECTING HUMAN RIGHTS – INSTRUMENTS AND INSTITUTIONS 263, 275 (Tom Campbell et al. eds., 2003).

[43] *See* Billingsley, *supra* note 42, at 340. However, the insertion of the notwithstanding clause in the 2000 amendment to the Marriage Act of Alberta is dubious since the definition of marriage is within the federal jurisdiction. Goldsworthy notes that the notwithstanding clause has never been used at all since 1988. *See* Goldsworthy, *supra* note 42, at 275.

[44] *See* Goldsworthy, *supra* note 42, at 274-78; *but cf*. Billingsley, *supra* note 42, at 341-43.

was reactively invoked, it turned out that judicial interpretations of the Charter rights to which the notwithstanding clause was invoked as response eventually carried the day.[45]

Notably, even with the notwithstanding clause in a state of dormancy, the inter-branch dynamics between courts and the political branch in Canada may still be regarded as "dialogic" as long as a genuine "interpretive disagreement" takes place in the interplay of statutory (re)enactment and judicial decision in constitutional practice.[46] Some scholars have thus incisively pointed out that due to the very existence of the notwithstanding clause, judicial review in Canada is more oriented toward the dialogic model than the US Supreme Court, especially with the legislative exercise of the section 1 power to narrow judicial decisions.[47] Even taking this broader view, it is undeniable that the prominence of the notwithstanding clause in the Charter plays a pivotal role in the judicial self-conception of the relationship between courts and the legislature, leaving room for legislative responses in judicial interpretation. Yet, with the power of legislative override in the notwithstanding clause gradually turning into "constitutional atrophy" as consequence of its continuing dormancy, the role that the notwithstanding clause has been expected to play in conditioning how the court positions itself towards the legislature could be further weakened.[48] It may remain true that the relationship between

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[45] *See* Billingsley, *supra* note 42, at 339-43.

[46] *See* Dixon, *Charter Dialogue, and Deference*, *supra* note 27, at 242.

[47] *See* Dixon, *Charter Dialogue, and Deference*, *supra* note 27, at 252-56; *see also* Billingsley, *supra* note 42, at 341-43; Rosalind Dixon, *Weak-Form Judicial Review and American Exceptionalism*, 32 OXFORD J. LEGAL STUD. 487, 495-501 (2012); Gardbaum, *supra* note 41, at 178-83.

[48] For the normative implications of the long-term disuse of constitutional power for constitutional

courts and the political branch in Canada is still characteristic of the so-called Charter dialogue.[49] Nevertheless, taking account of the development since 1982 as a whole, judicial review in there are strong signs that Canada appears to be moving in the direction of a strong form.[50]

Second, according to a report of the UK Ministry of Justice, of the nineteen declarations of incompatibility that have become final in the UK as of July 31, 2013, the Westminster never disregards the judicial declaration of the incompatibility (with Convention rights) as to the statute in question.[51] To be sure, against this statistical record, there remains no consensus that judicial practice in the UK has betrayed the legislative intent to install a weak-form judicial review.[52] The controversy concerning the prisoners' voting rights appears to defy the development recorded by the Ministry of Justice.[53]

Yet, in terms of the UK government reaction, a distinction needs to be made between the decision made by the European Court of Human Rights (ECtHR) and those

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practice, see Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEGAL STUD. 421 (2012).

[49] *E.g.*, Hogg et al., *supra* note 14.

[50] *See* TUSHNET, *supra* note 4, at 52-66.

[51] MINISTRY OF JUSTICE, RESPONDING TO HUMAN RIGHTS JUDGMENTS: REPORT TO THE JOINT COMMITTEE ON HUMAN RIGHTS ON THE GOVERNMENT'S RESPONSE TO JUDGMENTS 2012-2013, at 43-60 (2013).

[52] *See* Stephen Gardbaum, *How Successful and Distinctive is the Human Rights Act? An Expatriate Comparatist's View*, 74 MOD. L. REV. 195 (2012).

[53] *See* Merris Amos, *The Dialogue between United Kingdom Courts and the European Court of Human Rights*, 61 INT'L & CONTEMP. L.Q. 557 (2012).

made by domestic courts. Considering the complex interaction among Parliament, the UK courts, and the ECtHR, the parliamentary defiance may be understood more as resistance to the adjudication of a foreign court than as reaction to domestic courts.[54] Moreover, the UK government is still considering how to respond to the declaration of incompatibility made by a domestic court decision[55] in this regard instead of simply affirming the impugned legislation.[56] As it stands, the post-UKHRA judicial review also shows signs of an emerging "de facto judicial supremacy".[57]

Lastly, even with respect to the case of New Zealand, its record of balancing judicial review with parliamentary sovereignty is not beyond dispute. It is true that compared with the inclination toward judicial supremacy in Canada as well as the UK, New Zealand is considered "working reasonably well and as anticipated."[58] However, in the face of the lack of an express authorization of the courts to declare a statute inconsistent with the Bill of Rights Act, the New Zealand Court of Appeals in *Moonen v. Film and Literature Board of Review* suggests the possibility of making a declaration of inconsistency.[59] Along this line thought, some scholars even suggest that it would be

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[54] *Cf. id*. at 577-79.

[55] Smith v. Scott, [2007] C.S.I.H. 9.

[56] Ministry of Justice, *supra* note 51, at 57; *see also* KAVANAGH, *supra* note 21, at 282-83.

[57] *See* Gardbaum, *supra* note 52, at 200-01.

[58] *See* Gardbaum, *supra* note 41, at 178-98.

[59] Section 5 of NZBoRA stipulates, "Subject to Section 4 of the Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Relying implicitly on an expansive reading of Section 5, the Court of Appeals in *Moonen* notes that "the Court ha[s] the power…to indicate that although a statutory provision must be enforced according to its proper

difficult for the New Zealand Parliament to resist a *Moonen*-styled judicial declaration of inconsistency.[60]

Notably, the New Zealand Supreme Court seems to have retreated from *Moonen* in its 2007 decision of *R v Hansen*.[61] Yet, *Hansen* at least left unchallenged the judicial power to make "[an] 'informal' indication of inconsistency."[62] In the light of the interaction between the parliament and courts in New Zealand in practice, concerns have been raised over the conversion of the statutory Bill of Rights Act into "a full-blooded constitutionalized Bill of Rights" through judicial decisions.[63]

III. AWAY FROM JUDICIAL SUPREMACY? PITTING CONSTITUTIONAL DEPARTMENTALISM AGAINST THE LEGACY OF *MARBURY V. MADISON*

In this section, I take a closer look at constitutional politics behind the resurgence of

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meaning, it is inconsistent with the Bill of Rights" (Moonen, *supra* note 8, at 17. *See* Allan, *supra* note 8, at 384.

[60] *See* Grant Huscroft & Paul Rishworth, *"You Say You Want a Revolution": Bill of Rights in the Age of Human Rights*, *in* A SIMPLE COMMON LAWYER: ESSAYS IN HONOUR OF MICHAEL TAGGART 147 (David Dyzenhau et al. eds, 2009).

[61] [2007] N.Z.S.C. 7. The New Zealand Supreme Court was established as the highest court and the court of last resort in New Zealand in 2003. It started to exercise this power in 2004. Prior to the establishment of the Supreme Court, the New Zealand Court of Appeals was the highest domestic court with the Judicial Committee of the Privy Council in London functioning as the appellate body of last resort.

[62] STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE 139-40 (2013).

[63] *See* Allan, *supra* note 8, at 385; *cf.* Tushnet, *supra* note 2, at 214.

constitutional departmentalism and the call for a dialogic approach to judicial review in US constitutional scholarship. I first trace the appeal of the departmentalist resurgence to the recurrent debate surrounding the meaning of the Constitution and its interpretation in American history. Then I proceed to show that the latest call for constitutional departmentalism arose as the legitimacy of judicial review was called into question again in reaction to the progressive jurisprudence of the Warren Court. Finally, I assess the state of constitutional departmentalism in US constitutional practice and conclude that the practice of judicial interpretation in the US Supreme Court shows that the legacy of judicial supremacy set out in *Marbury v. Madison*[64] endures.

A. Constitutional Departmentalism vs. Judicial Supremacy: An Inconclusive US Debate in Quest for Constitutional Supremacy

Concerns arose over the role of the judiciary in relation to other departments of the federal government in the United Sates as the US constitution was still in the making. At the center of this early debate surrounding the constitution was how to effectively implement the constitution with no single department of constitutional power emerging as the dominant enforcer of the constitution.[65] To the Founding generation, while the supremacy of the constitution defined the government under the rule of law, how to implement the idea of constitutional supremacy through institutional design in the constitution was not clear.[66] This issue became more complicated as constitutional

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[64] 5 U.S. (1 Cranch) 137 (1803).

[65] *See* KRAMER, *supra* note 3, at 73-92.

[66] *See generally* THE FEDERALIST (Jacob E. Cooke ed., 1961).

interpretation was associated with the institution of judicial review,[67] constituting the underlying theme of the constitutional departmentalism vs. judicial supremacy debate.[68]

Amid this debate stood the following issues. Was the interpretation of the constitution made by the designated institution of judicial review binding on other departments of constitutional power? Should interpretations of the constitution made by the judicial branch be considered integrated part of the constitution? Would it take a constitutional amendment to change the meaning of a judicial interpretation of a constitutional provision if the department of judicial review did not change its own interpretation in subsequent decisions?

As the answers to these questions are not crystal clear, the debate surrounding these fundamental issues of constitutional democracy has remained unsettled. One position is judicial supremacy, the core of which is illustrated in the following statement:

> It is emphatically the province and duty of the judicial department—*and no one else*—to say what the law is. Once [the judicial department] say[s] what the law is, that's the end of it. After that, no one obliged to support the Constitution can fairly assert that the Constitution means something different from what [the judicial department] said it meant.[69]

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[67] *See* KRAMER, *supra* note 3, at 105-27; *see also* CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 74-75 (2004).

[68] *See* James E. Flemming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377 (2005).

[69] This is Tushnet's paraphrase of Chief Justice John Marshall's statement in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is." *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 6-7 (1999) (emphasis

On this view, constitutional supremacy, which is characterized by checks and balances between departments of constitutional power, amounts to judicial supremacy as the judiciary dominates constitutional interpretation.[70]

It should be noted that the view of judicial supremacy never dominated US constitutional politics in history. Rather, as Kramer indicates, the departmentalist approach to constitutional interpretation, which purports that "each of the three departments [of constitutional power] has equally the rights to decide for itself what is its duty under the constitution, without regard to what the others may have decided for themselves under a similar question", has a long history in the US constitutional development.[71] As the so-called "Bank War" over the chartering of the Second United States Bank launched by President Jackson, President Lincoln's ignorance of the *Dred Scott* decision, [72] and other constitutional controversies showed, constitutional departmentalism has continued as a countervailing position against judicial supremacy through US constitutional history.[73]

Even so, the history of the US constitutional development in the past century

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added).

[70] *See* TUSHNET, *supra* note 69, at 6-7; *see also* FRIED, *supra* note 67, at 74. For a discussion on the relationship between constitutional supremacy and judicial supremacy in the context of continental Europe, see ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 34 (2000).

[71] *See* KRAMER, *supra* note 3, at 105-14 (quoting THOMAS JEFFERSON, *Letter from Thomas Jefferson to Spencer Roane* (Sept. 6, 1819), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 140, 142 (Paul Leicester Ford ed., 1898)).

[72] Dred Scott v. Sandford, 60 U.S. 393 (1857).

[73] *See* KRAMER, *supra* note 3, at 207-18.

indicated the rise of judicial supremacy at the expense of constitutional departmentalism. While a "constitutional settlement" was reached between the New Dealers and their judicial opponents with the Supreme Court's "switch in time" in 1937 in response to the looming threat of "court-packing" from President Roosevelt, the Supreme Court did not make an unconditional surrender.[74] Rather, in this New Deal settlement, for issues concerning the Bill of Rights[75] and the Reconstruction Amendments,[76] the Supreme Court shored up its stand by reserving to itself the role of the guardian for fundamental rights in the face of the malfunctioning of representative democracy.[77] In this way, the trend was set in motion toward the conflation of constitutional supremacy and judicial supremacy, culminating in *Cooper v. Aaron*.[78]

This 1958 case was among the many judicial decisions by the Warren Court to enforce the school desegregation requirement declared in the 1954 landmark case, *Brown v. Board of Education*.[79] To address the delays in desegregation and the intransigency of the state governments in American South in the wake of *Brown*,[80] the *Cooper* Court stated that *Marbury v. Madison* "declared the basic principle that the federal judiciary is

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[74] *See id*. at 219.

[75] Amendments I-X.

[76] Amendments XIII, XIV, and XV.

[77] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75-77 (1980).

[78] 358 U.S. 1 (1958). S*ee also* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 286 (1992); KRAMER, *supra* note 4, at 220-21.

[79] 347 U.S. 483 (1954).

[80] *See* BURT, *supra* note 78, at 271-86.

supreme in the exposition of the law of the Constitution."[81] Furthermore, the Supreme Court inferred that "the interpretation of [the constitution] enunciated by this Court…is the supreme law of the land."[82] On this view, alongside the constitution as well as federal laws and treaties,[83] judicial decisions regarding the constitution constitute the supreme law of the United States.[84] Viewed through the lens of the *Cooper* Court, *Marbury v. Madison* not only fathered modern judicial review but also left the legacy of "strong-form judicial review."[85]

B. Courts under Attack: Reviving the Departmentalist Tradition in US Constitutional Politics

Although the position of judicial supremacy adopted in *Cooper v. Aaron* gradually gained currency,[86] the legitimacy of judicial review was called into question again in the United States since the late 1970s. As the Supreme Court extended its reach to social issues in the 1970s, it fundamentally shook the foundations of traditional values, exercising enormous impact on the social fabric. *Roe v. Wade*,[87] which legalized abortion, was the prime example.[88] It was criticized as crossing the line of constitutional interpretation,

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[81] Cooper, 358 U.S. at 18.

[82] *Id*.

[83] *See* U.S. Const. art. VI, § 2.

[84] *See* RICHARD H. FALLON, JR, IMPLEMENTING THE CONSTITUTION (2001).

[85] *See* KRAMER, *supra* note 3, at 221; TUSHNET, *supra* note 69, at 6-7.

[86] *See* KRAMER, *supra* note 3, at 221.

[87] 410 U.S. 113 (1973).

[88] *See* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 32-34 (1999).

bordering on rewriting the constitution.[89] As a consequence, the legitimacy of the Supreme Court and the supremacy of judicial decisions that rested on the New Deal settlement were put into doubt.[90] After Ronald Reagan took presidency in 1981, judicial supremacy was confronted head-on.[91] On the one hand, the progressive jurisprudence of the Warren Court was criticized as deviating from the original meaning of the constitution, stepping into the territory of constitution-remaking. To curtail the influence of courts through the purposive construction of the constitution, "originalism" and "strict constructionism" became the litmus test for federal judicial nominations under Republican presidencies.[92] It is true that politicians' attack on the judiciary's final say over constitutional interpretation soon relented.[93] Nevertheless, the question of the legitimacy of activist judicial review, which has been the underlying theme of the debate on the methodology of judicial interpretation of the constitution,[94] has since been drawn into the vortex of US constitutional politics.

Paralleling the political criticism of the Supreme Court, some scholars have even taken on *Cooper*, emphasizing that the constitution only, not the interpretations of the

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[89] Robert Bork exemplifies this line of critique of *Roe v. Wade*. *See* Robert F. Nagel, *Meeting the Enemy*, 57 U. CHI. L. REV. 633, 642 n. 23 (1990).

[90] *See generally* BURT, *supra* note 78.

[91] *See* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

[92] *See id*. *See also* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 232-33 (2011).

[93] Larry Kramer notes that Edwin Meese quickly backed down after his departmentalist criticism of the Supreme Court in 1986 was soon accused of "inviting anarchy." *See* KRAMER, *supra* note 3, at 221.

[94] *See* ELY, *supra* note 77.

constitution by the judicial department, counts as constitutional law. The goal of this conservative judicial philosophy is to restore the lost, original constitution.[95] As the position of regarding judicial interpretations of the Constitution as part of constitutional law was disputed, however, the idea of constitutional departmentalism has resurfaced to challenge judicial supremacy. Despite variations on its meaning,[96] the underlying idea of constitutional departmentalism is to carve out the space for "extrajudicial constitutional interpretation" from the court.[97] The political branches are advocated as coequal institutional players in constitutional interpretation.[98]

In the wave of constitutional politics in the post-Warren Court era, the idea of departmentalism, which poses theoretical challenge to judicial supremacy, has been influential. It has appealed not only to conservative lawyers who were repulsed by the progressive jurisprudence in the Warren Court era but also to liberals who have been concerned about the conservative turn evidenced in the "federalism revolution" of the Rehnquist Court and its successor.[99] Varieties of departmentalist constitutional theories have been proposed to support interpretations of the constitution made by the political

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[95] *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2003).

[96] *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (2004).

[97] *See* Whittington, *supra* note 3.

[98] *Cf.* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO L.J. 217 (1994). Notably, sometimes "the people" is also considered coequal "departments" of constitutional power with the political branches and the judicial department. *See* Johnsen, *supra* note 96, at 105, n. 1.

[99] *See* KRAMER, *supra* note 3, at 230.

branches, which differ from those declared in the decisions of the Supreme Court.[100]

In addition to constitutional politics revolving around judicial interpretation, the resurgence of constitutional departmentalism benefited from an epistemic change with respect to constitutional rights. Taking account of the reality of cultural pluralism, many constitutional scholars have come to terms with the existence of reasonable disagreement over the meaning of the constitutional provisions, especially those pertaining to fundamental rights.[101] From this perspective, the different view each constitutional department holds of the meaning of constitutional texts simply reflects "the possibility of a range of reasonable specification of general or abstract rights."[102] No constitutional department is superior to its institutional coequal partners in constitutional interpretation.[103] Thus, constitutional departmentalism goes beyond an ideological confrontation with judicial supremacy. Rather, as the society becomes more pluralistic and the value hegemony falls apart, the departmentalist view of constitutional decision-making sheds light on the way forward for the constitution. It is here where theories of constitutional interpretation in the US take the dialogic turn.[104]

Invoking the idea of dialogue as the institutional metaphor to steer the relations

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[100] For conservative departmentalist theory, see Paulsen, *supra* note 98. A systematic justification of liberal departmentalism, see KRAMER, *supra* note 3.

[101] *See*, *e.g.*, JEREMY WALDRON, LAW AND DISAGREEMENT 224-31 (1999); Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 MOD. L. REV. 1 (2003).

[102] *See* TUSHNET, *supra* note 4, at 51.

[103] *See also* YOUNG, *supra* note 3, at 128-32.

[104] *See* MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 99-101 (1994); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

between the political branches and the judicial department, constitutional departmentalism is reconceived as a better way to settle constitutional disputes and to make sense of the meaning of constitutional provisions, especially those regarding fundamental rights.[105] Under this view, neither the political branches, the legislature in particular, nor the judicial department reigns supreme in interpreting the constitution; none of the three coordinate departments in the separation of powers system hold the key to the right answer of constitutional meaning. Rather, all three departments of constitutional power are regarded as engaged in constitutional dialogue through which constitutional disputes can be resolved without subordinating any of the coordinate departments to its coequal institutional partners.[106] Considered the embodiment of the dialogic model of constitutional decision-making in comparative constitutional law,[107] the post-parliamentary supremacy type of judicial review underpinning the new Commonwealth model of constitutionalism thus receives close attention among US constitutional scholars.[108]

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[105] *See* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004).

[106] *See id.*; *see also* YOUNG, *supra* note 3, at 122-28.

[107] *Cf.* Po Jen Yap, *Rethinking Judicial Review in America and the Commonwealth: Judicial Protection of Human Rights in the Common Law World*, 35 GA. J. INT'L & COMP. L. 99 (2006); Sarah Jackson, *Designing Human Rights Legislation: 'Dialogue', the Commonwealth Model and the Roles of Parliaments and Courts*, 13 AUCKLAND U.L. REV. 89 (2007).

[108] *See* Dixon, *Creating Dialogue*, *supra* note 27; Gardbaum, *supra* note 41; TUSHNET, *supra* note 4, at 18-76.

C. Constitutional Departmentalism in Reality: The Practice of Judicial Supremacy Endures

It is true that constitutional departmentalism has been advocated by scholars of diverse political persuasions. Nevertheless, concerns have been raised that constitutional departmentalism may undermine judicial authority and thus chip away at the rule of law. Regardless of its controversial and sometimes unpopular decisions, the Supreme Court has commanded wide public acceptance of its overall performance, especially when compared to the political branches.[109] Moreover, the public veneration of the Supreme Court pivots, in large part, on the general perception that the core of the rule of law, predictability and stability, relies on the final settlement of legal disputes, which is found in judicial decisions. Decisions of the Supreme Court are supposed to be final. On this view, the Supreme Court should hold the final say over constitutional interpretation and thus play the role of providing constitutional settlement to legal controversies.[110] For this reason, judicial review evolves into judicial supremacy as judicial supremacy is viewed as laying the foundation for the rule of law.

To be sure, the association between judicial supremacy and the rule of law is disputable. The idea of legal finality and constitutional settlement may simply be illusion. My point here is neither to dispute nor to endorse this notion of judicial supremacy that builds on the pursuit of legal predictability and stability.[111] Rather, the fact that judicial

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[109] *See* KRAMER, *supra* note 3, at 232.

[110] *See id*. at 234.

[111] *Cf. id*. at 234-42.

rulings command wide public acceptance has relegated constitutional departmentalism into sporadic pockets of legal academics.[112] As Kramer notes , constitutional scholars have called for strong defense of judicial supremacy with concerns hovering over the unraveling of judicial authority as a result of the departmentalist view of constitutional interpretation.[113]

Outside the ivory tower of legal academia, the prospect for a resurgent constitutional departmentalism is even dimmer. On the one hand, although government officials and elected politicians continue to question some decisions of the Supreme Court, their focus has shifted from the judicial role in constitutional interpretation to the substance of those decisions. The general acceptance of the highly controversial *Bush v. Gore*[114] indicates that after the initial departmentalist confrontation on the Supreme Court during Reagan's presidency, mainstream politicians have come to terms with the fait accompli of judicial supremacy.[115]

More importantly, in the face of the vicissitudes of constitutional scholarship and political landscape, the Supreme Court has never subscribed to constitutional departmentalism either in the field of constitutional rights or in that of government

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[112] *See id*. at 234-35, 243-46.

[113] *See id*. at 234 (citing Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMM. 455 (2000)).

[114] 531 U.S. 98 (2000). For the continuing confidence in the Supreme Court after *Bush v. Gore*, see Erwin Chemerinsky, *How Should We Think About* Bush v. Gore, 34 LOY. U. CHI. L.J. 1(-22), 3 (2002).

[115] *See* KRAMER, *supra* note 3, at 231-32.

power. In *City of Boerne v. Flores*,[116] a case concerning freedom of religion, Justice Kennedy in the majority opinion repeated a theme line of the Supreme Court jurisprudence, noting that "[w]hen the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is." [117] Moreover, in declaring the Religious Freedom Restoration Act of 1993 unconstitutional, the Supreme Court further bluntly repudiated the departmentalist view of constitutional interpretation and reiterated its preeminent role in constitutional interpretation:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis,* and contrary expectations must be disappointed.[118]

Alongside its interpretation of constitutional rights and the scope of congressional power under the so-called enforcement clause in the reconstruction amendments,[119] the Supreme Court has also asserted judicial authority at the expense of congressional power with

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[116] 521 U.S. 507 (1997).

[117] *Id*. at 536.

[118] *Id*. at 536.

[119] *See* KRAMER, *supra* note 3, at 224-25. In addition to the Reconstruction Amendments (U.S. Const. amend. XIII-XV), the Enforcement Clause also exists in Amendments XIX, XXIII, XXIV, and XXVI (U.S. Const.). The Enforcement Clause in these amendments has been written in the same style: "The Congress shall have power to enforce this article by appropriate legislation."

respect to the interpretation of the commerce clause,[120] which has been at the center of the contested federalism cases.[121] For example, when it comes to the issue of the commerce clause in *United States v. Morrison*,[122] Chief Justice Rehnquist on behalf of five Justices emphasized, "No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the *ultimate* expositor of the constitutional text."[123] Taken together, from the perspective of the Supreme Court, "it is the responsibility of [the Supreme] Court, not Congress, to *define* the substance of constitutional guarantees."[124] Defying the calls for a departmentalist and dialogic approach to constitutional interpretation, the Supreme Court has posited "a strengthened version of judicial supremacy."[125]

The growing trend of judicial supremacy also exerts transformative impact on the political question doctrine, which holds that the opinions of political branches are

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[120] Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." US Constitution art. I, § 8, cl 3.

[121] *E.g.,* United States v. Alfonso D. Lopez, Jr., 514 U.S. 549 (1995); National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012); *see also Erwin Chemerinsky, The Federalism Revolution*, 31 NEW MEXICO L. REV. 7, 9-12 (2001)

[122] 529 U.S. 598 (2000). It should be noted that the Supreme Court also addressed the issue of the enforcement clause in *United States v. Morrison*. *See id.* at 619-27. What sets it apart from *City of Boerne v. Flores*, however, is that it also raised the issue of the commerce clause, which is of particular relevance to my present discussion.

[123] *Id*. at 617 n. 7 (emphasis added).

[124] Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 365 (2001) (emphasis added). *See also* JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 159 (2005).

[125] *See* Johnsen, *supra* note 96, at 107.

decisive in the so-called political questions.[126] Traditionally, political prudence was seen to take precedence over legal argument in the political question doctrine.[127] However, corresponding to the general trend toward judicial supremacy, the political question doctrine has only limited application of late.[128] Besides, the decisive factor for the Court to decide whether to invoke the political question doctrine is no longer political prudence. Rather, it is the law alone that decides. Decisions on the issue as to whether to apply the political question doctrine amount to "an exercise in ordinary constitutional interpretation."[129] As Tushnet observes, "[with] the acceptance in [American] political and legal culture of a strong form of judicial supremacy," the political question doctrine jurisprudence has grown into "a constitutional jurisprudence of boldness predicated on refusing to temper legal with political judgment."[130] The tendency toward judicialization in the political question doctrine reveals the reality of constitutional departmentalism. If the political branches cannot even maintain its role of constitutional interpretation in the category of political questions, it is hard to expect that constitutional departmentalism can succeed in resisting judicial supremacy in other areas of constitutional interpretation.

In sum, constitutional departmentalism does not gain much ground in US

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[126] *See* Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C.L. REV. 1203 (2002); *see also* KRAMER, *supra* note 3, at 223-24.

[127] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 125 (1962); *see also* Tushnet, *supra* note 126, at 1204-05.

[128] *See* Tushnet, *supra* note 126, at 1208, 1230-31.

[129] *See id*. at 1213.

[130] *Id*. at 1230-34.

constitutional practice even with some enthusiastic support from legal academia. The jurisprudence of the Supreme Court in various fields only testifies to the solidity of judicial supremacy despite departmentalist challenges. The legacy of *Marbury v. Madison* endures as strong-form judicial review.[131]

IV. JUDICIAL SUPREMACY REDUX: ADMONITION, COMMAND, AND DIALOGUE IN THE CONTINENTAL MODEL OF JUDICIAL REVIEW

As indicated above, the idea of constitutional/ judicial dialogue emerging from the introduction of judicially enforceable bills of rights to some Commonwealth countries and the revival of constitutional departmentalism in the United States converge on their departure from judicial supremacy.[132] However, the practices of judicial review in Westminster democracies and the United States disappoint the advocates for constitutional/ judicial dialogue. Thus, in this section, I look beyond these common law jurisdictions, drawing up the experience of judicial review in the civil law countries, continental Europe in particular. I first discuss the institutional features of judicial review in continental Europe and then proceed to discuss why constitutional dialogue has been identified as characteristic of constitutional politics under the continental model of judicial supremacy. I argue that two factors contribute to the perceived dialogic constitutional politics in continental Europe: a legal culture in which judicial reasoning is

[131] *See* Frank I. Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579 (2003).

[132] *See* KRAMER, *supra* note 3; TUSHNET, *supra* note 4, at, 18-42.

framed by proportionality analysis; the use of special judicial techniques by which the efficacy of judicial review is the function of both admonition and command in judicial decisions. Considering that the efficacy of judicial admonition is guaranteed by the threat of judicial command in future decisions, however, constitutional dialogue under judicial admonition is conducted in the shadow of judicial supremacy. Finally, I try to provide an explanation for the tendency toward judicial supremacy in the light of the judicial role in contemporary constitutional culture.

A. Looming from the Judicialization of Lawmaking: Judicial Supremacy in the Continental Model of Judicial Review

The continental model of judicial review, a centralized and specialized type of judicial review, which has been attributed to Hans Kelsen,[133] first appeared in Austria and Czechoslovakia after World War I. These seminal constitutional courts did not last long as constitutional orders in these countries were short-lived and soon plunged into WWII.[134] Following the end of WWII, judicial review was regarded as one of the pillars in rebuilding constitutional democracy in postwar Germany and Italy. Judicial review in charge of what is termed "constitutional jurisdiction" was expected to act out the role of the guardian of the constitution as Kelsen had advocated.[135] Decades later, this Kelsenian

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[133] *See* Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183 (1942). Notably, while this type of judicial review is prevalent in continental Europe, there are some exceptions. *See* VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 3-4 (2009).

[134] *See* FERRERES COMELLA, *supra* note 133, at 3.

[135] *See* DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND

type of judicial review has been adopted in many new constitutional democracies in the third wave of democratization.[136]

Without delving into the complex and sometimes technical issues of institutional design and organizational arrangement, it is noteworthy that this continental type of judicial review has been designed to overcome the traditional theory of separation of powers in continental Europe. Under this continental tradition, judges were subordinate to the sovereign will of the parliament, while lawmaking and law application were strictly separated.[137] Against this backdrop, the core institutional design in the postwar reconstruction of constitutional orders in Germany and Italy was concerned with how to make the constitution an enforceable law against parliamentary legislation without replacing parliamentary supremacy with judicial supremacy. To this end, an institution specialized in judicial review, i.e., constitutional court (and other equivalents), was established alongside ordinary courts as the institutional guarantor of constitutional supremacy. Set apart from ordinary judicial systems, constitutional courts were expected to enforce constitutions through judicial review without turning the exercise of judicial review into judicial supremacy.[138]

Obviously, the strategy of deflating judicial supremacy in constitutional interpretation by setting constitutional jurisdiction apart from ordinary courts is not very

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HERMANN HELLER IN WEIMAR 70-85, 108-32 (1997).

[136] *See* FERRERES COMELLA, *supra* note 133, at 4-5; *cf.* HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN THE POST-COMMUNIST EUROPE (2000); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

[137] *See* STONE SWEET, *supra* note 70, at 32-33; FERRERES COMELLA, *supra* note 133, at 10-19.

[138] *See* STONE SWEET, *supra* note 70, at 34-38; FERRERES COMELLA, *supra* note 133, at 5-6, 79-85.

successful. Notably, the style of decision, the mode of reasoning, and the composition of personnel of constitutional courts are modeled after ordinary courts. As a consequence, the exercise of judicial review by separate constitutional courts ends up being judicial in nature.[139] Moreover, as Ferreres Comella observes, this continental type of judicial review has an inbuilt "'anti-Bickelian' bias."[140] Bickel famously pleaded the "passive virtues" as the judicial techniques for the US Supreme Court to avoid judicial incursion into policy-making.[141] In stark contrast, Ferreres Comella points out, judicial self-restraint, underpinned by passive virtues, is anathema to the designed robust judicial review of constitutional courts in continental Europe.[142]

In addition to activist judicial ethos,[143] constitutional courts are driven further in the direction of strong-form judicial review by their broad jurisdiction. Unlike the US-type judicial review, in which the jurisdiction of federal courts is strictly limited to "cases and controversies,"[144] continental constitutional courts are tasked to provide guidance and as well as advice to the political branches as to in matters of constitutional significance.[145] For one thing, prior review is no longer inconceivable in the eye of the continental

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[139] *See* STONE SWEET, *supra* note 70, at 34-35, 48; FERRERES COMELLA, *supra* note 133, at 39-50; *see also* MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 175 (2002).

[140] *See* FERRERES COMELLA, *supra* note 133, at 75.

[141] *See* BICKEL, *supra* note 127, at 111-98.

[142] *See* FERRERES COMELLA, *supra* note 133, at 75-79.

[143] *See id.*, at 71-72, 77-79.

[144] *See* U.S. Const. art. III, § 2, cl. 1.

[145] *See* Wiltraut Rupp-Brünneck, *Admonitory Functions of Constitutional Courts: Germany*, 20 AM. J. COMP. L. 387, 391-99 (1972).

judicial review. In some countries, it is even considered a better way to ensure the conformity of legislation with the constitution and resolve constitutional issues before constitutional challenges arise from the implementation of unscrutinized legislation.[146]

With the mechanism of abstract review, prior or posterior, constitutional courts are allowed to focus attention on the legislative text without regard to actual factors. In this way, judicial review arguably engages with the political branches only on the general questions of constitutional principle at the abstract level without intervening in concrete policy choices in legislation. Through these jurisdictional devices of constitutional courts, there is an inbuilt inclination toward strong-form judicial review in the continental model of judicial review.[147]

Moreover, constitutional provisions regarding fundamental rights are understood in a more expansive way than the Bill of Rights in the US constitution. They are not simply treated as the catalogue of individual rights. Rather, they are regarded as the entrenched textual placeholder of fundamental values the constitutional framers have enshrined in the constitution. These constitutionalized fundamental values are judicially enforceable and binding on the political branches, providing the normative framework within which legislative and administrative policies are to be decided.[148] Going beyond the settlement of individual complaints centering on constitutional rights, the underlying principles of

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[146] *See* STONE SWEET, *supra* note 70, at 45; FERRERES COMELLA, *supra* note 133, at 16-17.

[147] *See* FERRERES COMELLA, *supra* note 133, at 66-85.

[148] *See* Dieter Grimm, *The Protective Function of the State*, *in* EUROPEAN AND US CONSTITUTIONALISM 119, 124-29 (Georg Nolte ed., Council of Europe 2005); *see also* STONE SWEET, *supra* note 70.

the constitutional rights provisions empower constitutional courts to scrutinize the validity of legislation and administrative regulations from a normative perspective of constitutionalized fundamental values.[149]

On the other hand, for fear of the voiding of their legislation by judicial review, the political branches, particularly the parliament, have to incorporate the assessment of constitutionality into the process of policy analysis in drafting legislative bills and making administrative rules. In the shadow of judicial review, debates on important political issues have to take into account the constitutional principles concerned.[150] In this way, the constitution penetrates into policy making, underpinning what Stone Sweet calls the "judicialization of law making".[151]

B. Living with Judicial Supremacy: Constitutional Dialogue under Proportionality Analysis-Framed Judicial Admonition

As noted above, it is a necessary condition for judicial dialogue to acknowledge that the interpretation of a constitutional provision or principle can be rendered in multiple ways. Yet, to make judicial dialogue possible under the prevalence of judicial supremacy further requires an analytic framework within which judicial review can define the perimeters of constitutional provisions and the underlying values without submitting its forthright position in the first place. Proportionality analysis provides the continental

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[149] *See* STONE SWEET, *supra* note 70, at 61-63.

[150] *See* STONE SWEET, *supra* note 70, at 73-79.

[151] *See id.* at 194-203; *see also* SHAPIRO & STONE SWEET, *supra* note 139, at 187-92.

model with such a framework of legal argumentation.[152]

Despite tracing its roots back to the nineteenth-century Germany, the principle of proportionality has become an integral part of European legal culture with its adoption by the courts through continental Europe and beyond.[153] Of particular pertinence to the present discussion is its role in framing judicial reasoning apart from being a legal doctrine.[154] What is characteristic of proportionality as a framework of legal analysis is that it enables the courts to pivot their constitutional judgment more on the context of cases than on the definition of constitutional text and the underlying principles.[155] As the question of constitutionality evolves into one of justifiability of the tested legal means and is decided in the light of the contextual contingency of constitutional values in individual cases, the political departments can address the constitutionality concerns raised by the courts by recalibrating the proportionality of the means to its end. Thus, the courts can adapt their constitutional interpretation to new contexts, including the responses from the political departments, without compromising the constitutional ethos of judicial supremacy.

In addition to the legal culture of proportionality analysis, a special set of judicial techniques emerge, leaving room for a seemingly dialogue-inclined judicial review under the ethos of judicial supremacy in continental Europe. Under the traditional doctrine that

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[152] *See* AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 397-418 (2012).

[153] *See id*. at 178-210.

[154] *See* Vlad Perju, *Proportionality and Freedom—An Essay on Method in Constitutional Law*, 1 GLOBAL CONSTITUTIONALISM 334, 339-40 (2012).

[155] *See id*. at 350-51.

a law declared unconstitutional be null and void ex tunc, declaring disputed legislation unconstitutional would result in a legal vacuum.[156] As judicial review in continental Europe always takes on legislative policies beyond the scope of individual complaints, one central issue has been how to confine the effect of judicial review. In response, constitutional courts in continental Europe have developed different techniques in their judicial decisions under the rubric of "admonitory decisions" to lessen the impact of the declaration of unconstitutionality with respect to disputed legislation.[157]

Through the deployment of judicial admonition, the continental model has managed to play a balanced role in safeguarding the constitution. In some cases, constitutional courts declare the disputed legislation unconstitutional without setting it aside immediately. In this way, it allows the legislature to revise the legislation and to make it consistent with the constitution but at the same time avoids the possible legal void. If the legislature fails to respond to this judicial decision, the constitutional court can add pressure on the political departments by declaring the unrevised legislation unconstitutional and thus null and void in the next constitutional litigation.[158] In others, constitutional courts postpone the effect of their declaration of unconstitutionality by setting a time limit on the repeal of the disputed legislation. After the expiration of this time limit, the disputed legislation, which has been declared unconstitutional, will be

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[156] Wolfgang Zeidler, *The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Terms*, 62 NOTREME DAME L. REV. 504, 508 (1987).

[157] *See id*. at 508-19; STONE SWEET, *supra* note 70, at 71-73; FERRERES COMELLA, *supra* note 133, at 9; Rupp-Brünneck, *supra* note 145, at 387, 395-99.

[158] *See* Rupp-Brünneck, *supra* note 145, at 393-95, 398-99; Zeidler, *supra* note 156, at 513-14.

regarded as having been repealed automatically. By doing so, the constitutional court allows the legislature to make necessary transitional arrangements.[159]

In some other cases, constitutional courts simply decide on constitutional principles and indicate the direction in which policies should be pursued to fulfill constitutional requirements without undertaking a substantive scrutiny of legislation at issue. In this way, the legislature is left with discretion to decide on concrete measures in furtherance of constitutional values.[160] Notably, in this situation, legislative choices do not preempt judicial review of their constitutionality. Judicial review may revisit the underlying constitutional issue of the new legislative choice in future constitutional litigation. If judicial review finds the new legislation still falling short in fulfilling constitutional requirements, it may strike it down. In sum, the constitutional court "admonishes" the political departments of constitutional values and of the way the legislation under review can be changed to consist with the constitution.

In the light of these various admonitory judicial decisions, the continental model is praised as brining constitutional values to ordinary lawmaking processes, deepening the constitutionalization of policy-making and political debates.[161] Backed by judicial admonition, constitutional values become the reference point for policy-making and political debates within and beyond the parliamentary hall. On the other hand, judicial

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[159] *See* Zeidler, *supra* note 156, at 517.

[160] *See id*. at 511-13; WOJCIECH SADURSKI, CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 153 (2002).

[161] *See* FERRERES COMELLA, *supra* note 133, at 55-70; STONE SWEET, *supra* note 70, at 194-294.

review leaves the political departments the liberty to make concrete policy choices. Judicial admonition enables constitutional courts to exercise effective judicial review without making unnecessary incursion into the area of policy-making.[162] As a result, institutional conversations on constitutional values are seen to flow between constitutional courts and policy makers, spilling over into the civic debate on public issues.[163] On this view, constitutional politics between judicial review and the political departments reflects the idea of constitutional/ judicial dialogue.

Yet, it should be noted that the judicial declarations of constitutional principles do not succeed in "nudging" the political branches toward making policy legislation consistent with the constitution simply through admonition. Once judicial admonition does not work, constitutional courts can easily change tack. Specifically, if the political departments fail to fully implement the constitutional requirements as laid out in an admonitory decision, judicial review will turn to the tactic of judicial command, striking down the disputed policy legislation in a sequel to its prior judicial admonition.[164] Moreover, some judicial decisions penetrate deep into the core of policy legislation despite seemingly taking the form of judicial admonition.[165] Along this development of penetrating and exacting judicial scrutiny, the continental model of judicial review has evolved into judicial management of policy choices by way of judicial admonitions.[166]

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[162] *See* Rupp-Brünneck, *supra* note 145, at 395-99; Zeidler, *supra* note 156, at 511-20.

[163] *See* FERRERES COMELLA, *supra* note 133, at 60-63.

[164] *See* Rupp-Brünneck, *supra* note 145, at 395-99; Zeidler, *supra* note 156, at 511-20, 522.

[165] *See* Rupp-Brünneck, *supra* note 145, at 391-95.

[166] *See id.*, at391-95; Zeidler, *supra* note 156, at 519.

Even with respect to the residual discretion of the political departments in the implementation of constitutional principles, it remains doubtful whether the interaction between judicial review and the political departments is indeed dialogic. As Tushnet perceptively points out, for the dialogic mode of judicial review to function, there must exist a particular politico-legal culture in which "the possibility of a range of reasonable specification of general or abstract rights" is accepted.[167] If a correct meaning is believed to materialize in the interpretation of general fundamental rights, there will be no room for a genuine dialogic model of judicial review. Yet, as the practices in the continental model of judicial review indicate, a distinction is assumed between matters of constitutional principles and those of policy choices, while the former is reserved for judicial review.[168] On this view, it is in the constitutional court, not the political departments, where the correct meaning of constitutional provisions is believed to materialize.[169] Moreover, the question of whether conflicting principles in individual cases, which lie at the heart of proportionality analysis, are rightly balanced, is reserved for the constitutional court, regardless of its context-sensitive character.[170] Thus, while there seems to be dialogic interaction between the political departments and constitutional courts, a closer look reveals that underlying judicial admonition in the continental model

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[167] *See* TUSHNET, *supra* note 4, at 351. *See also* WALDRON, *supra* note 101, at 211-81.

[168] *See* Rupp-Brünneck, *supra* note 145, at 400-01.

[169] *See* Mirjan Damăska, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustments*, 116 U PA. L. REV. 1363 (1968).

[170] *Cf.* BARAK, *supra* note 152, at 396-99.

is the idea of judicial supremacy.[171]

C. Looking beyond the Continent: Constitutional Dialogue, Judicial Supremacy, and the Judicialization of Constitutional Politics

The reason why the legal culture in continental Europe evolves into trusting the interpretation of constitutional principles with judicial review is complicated. However, together with the practices in the United States and the Commonwealth countries of Canada, New Zealand, and the UK as shown above, the general development of judicial review in the landscape of comparative constitutional law seems to move closer to judicial supremacy than to constitutional/ judicial dialogue.[172] It is too complex for the present paper to adequately address how this trend toward judicial supremacy has taken roots in such diverse jurisdictions. Nevertheless, the experience of the continental model of judicial review illustrates why the idea of constitutional/ judicial dialogue fails to withstand the trend toward judicial supremacy.

As noted above, the judicialization of lawmaking results from the penetration of the constitution into policy-making by judicial review. This development reflects one of the features of the contemporary expansion of constitutionalism. Judicial review is expected to play a role beyond settling disputes in individual cases or controversies as expected of traditional judges. Rather, it is also expected to lay out the fundamental constitutional

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[171] *See* Rupp-Brünneck, *supra* note 145, at 400; *see also* Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 74, 85-87 (2008); David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 YALE J. INT'L L. 1, 37 (2011).

[172] *See* Fontana, *supra* note 171, at 36-37.

principles through its rulings.[173] For this reason, judicial decisions on highly contested constitutional issues read more like essays on social justice and political philosophy than ordinary adjudications.[174] Setting out the fundamental principles, these judicial decisions provide the framework within which constitutional values are to be balanced and institutional designs are to be hammered out.[175] In this way, government policies are reconstructed in constitutional terms set out by judicial review.

The judicialization of lawmaking not only drives the constitutionalization of politics but also contributes to the rise of "juristocracy" as judicial review gradually plays a managerial role in projecting constitutional values into detailed institutional designs.[176] Moreover, the inclination toward seeking constitutional guidance from judicial review echoes what Tushnet observes of the truncated attempts to substitute dialogic judicial for strong-form judicial review.[177] In the present legal culture, the law and the court are intertwined and judicial judgments are treated as resulting from deliberations on principle. In contrast, policy choices of the political branches are regarded as decisions

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[173] *See* STONE SWEET, *supra* note 70, at 40-46; *see also* Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2005-17 (2005). Even in the United States where judicial review is restricted to cases and controversies. Shapiro and Stone Sweet observe, the doctrine of overbreadth is evocative of abstract review, which is concerned mainly with general constitutional principles. *See* SHAPIRO & STONE SWEET, *supra* note 139, at 347-75.

[174] *See* DAVID ROBERTSON, THE JUDGE AS POLITICAL THEORIST: CONTEMPORARY CONSTITUTIONAL REVIEW 347-62 (2010).

[175] *See* FERRERES COMELLA, *supra* note 133, at 46-47.

[176] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); *see also* STONE SWEET, *supra* note 70, at 20-30, 194-204.

[177] *See* TUSHNET, *supra* note 4, at 51.

out of expediency. Viewed in this light, it is hard to conceive of resting the *legal* interpretation of constitutional rights and their underlying principles with the political branches.[178]

Take the post-1982 judicial review in Canada again. Some scholars have argued that the practice of Canadian judicial review reflects the dialogic model of judicial review because of the high-percentage judicial endorsement of the so-called "legislative sequels."[179] However, the fact that judicial review "endorses" legislative sequels can be interpreted either as judicial deference to the legislative reconsideration of constitutional principles or as the *approval* of the legislative concretization of constitutional rights by judicial review: the former points to judicial dialogue; the latter suggests judicial supremacy. Notably, dialogue-leaning scholars tend to focus on the surface disagreement on constitutional interpretation between judicial review and the political branches as indicated in the exchange of legislative enactment, judicial decision, legislative sequel, and the judicial second look.[180] Yet, once we step out of the ivory tower of constitutional scholars, the reality may not be as rosy as the advocates for dialogic judicial review have portrayed. Rather, in light of the general legal culture, the legislative reconsideration of the judicial declaration of constitutional principles may well be regarded by the public as a political defiance of judicial decisions rather than an institutional dialogue over the

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[178] *See id.*, at 51; *see also* Rupp-Brünneck, *supra* note 145, at 400.

[179] *See* Dixon, *supra* note, 47, at 496-98; *see also* Hogg & Bushel, *supra* note 14; Roach, *supra* note 27, at 368-69.

[180] Dixon, *supra* note, 47, at 496-98.

meaning of constitutional provisions.[181]

In contemporary legal culture, courts are likely to move to the institutional center in constitutional decision-making, tipping the constitutional separation of powers system toward judicial supremacy.[182] The emergence of judicial supremacy in diverse legal jurisdictions bears witness to the prominence of the judicial role in the implementation of the idea of the rule of law and the belief in the objectivity of rights in contemporary political-legal culture.[183]

V. CONCLUSION

In this paper, I have tried to shed light on the dialogic turn in contemporary constitutional theory by comparing the domestic contexts of constitutional politics in different jurisdictions. I first discussed the supposed emergence of dialogic judicial review with the adoption of bills of rights in Canada, New Zealand, and the UK and the recent resurge of supposedly dialogic constitutional departmentalism in the United States. Both take shape in reaction to a certain type of institutional supremacy in constitutional decision-making. While the Commonwealth model of judicial review is designed to reconcile parliamentary sovereignty with the better protection of human or fundamental rights, constitutional departmentalism responds to judicial supremacy in the United States. A

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[181] *See* Tremblay, *supra* note 1, at 638-44.

[182] This corresponds to the problem of juridification that Habermas observes of in modern society. *See* Jürgen Habermas, *Law as Medium and Law as Institution*, *in* DILEMMAS OF LAW IN THE WELFARE STATE 203 (Gunther Teubner ed., 1988).

[183] *See* TUSHNET, *supra* note 4, at 50-52.

closer look at subsequent developments in these jurisdictions reveals that the dynamics of constitutional politics in these two examples is less dialogic than anticipated. A move toward strong-form judicial review has emerged in the Commonwealth jurisdictions discussed above; the supposed resurgence of departmentalism has failed to make a dent in the enduring legacy of *Marbury v. Madison* and strong-form judicial review in the United States.

To understand the phenomenon of judicial supremacy better, I continued to draw inspiration from the experience of constitutional/ judicial review in continental Europe, which has been characterized as the exemplar of the idea of constitutional dialogue in the face of its postwar tradition of judicial supremacy. I argued that the postwar tradition of judicial supremacy and the seeming practice of constitutional dialogue in continental Europe have been reconciled through the deployment of judicial admonition. I further suggested that this development needs to be understood in light of the prominent role of the judiciary and the general trend toward a judicialization of constitutional politics in contemporary legal culture.

To conclude, comparative constitutional experience shows that the dialogic approach underpinned by a departmentalist view of constitutional meaning does not hold up in the face of the prominent role of judicial review in constitutional democracies. With judicial review standing out as *the* defining feature of constitutional democracy, the practice of constitutional interpretation is entwined with the judicialization of politics as more and more political and policy issues are turned into questions of constitutional interpretation through judicial review of executive/ administrative and legislative acts. As a result, judicial supremacy instead of constitutional departmentalism characterizes the

practice of constitutional interpretation. As suggested in admonitory judicial decisions in the continental type of judicial review, constitutional dialogue may take place in the face of the judicialization of constitutional politics, but only in the shadow of judicial supremacy.