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WHAT IS JUDICIAL SUPREMACY?

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Revised and updated version forthcoming in G. Jacobsohn & M. Schor eds.,
Comparative Constitutional Theory, Edward Elgar Press, Second Edition, 2025

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Stephen Gardbaum*

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1. Introduction

Judicial supremacy is a concept frequently employed in both domestic and comparative constitutional theory but rarely carefully defined and systematically analyzed. Scholars typically either assume its meaning or quickly state how they are using the term before warming to their major theme, focusing on some other aspect of judicial supremacy: how did it emerge,¹ what explains its acceptance by other branches of government,² is it or should it be tempered in practice by courts not straying too far from the popular will,³ is it a good, bad, or practically necessary feature of a constitutional system, what are (the merits of) its alternatives?⁴ Jeremy Waldron's observation that the term has "no canonical definition"⁵ suggests that it is not always used in uniform fashion but rather in somewhat different ways in different contexts. Moreover, this range of uses helps to explain why, on only slightly closer inspection, various critics or

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¹ Barry Friedman & Erin Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUMB. L. REV. 1137 (2011)

² See KEITH WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007).

³ BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

⁴ Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

⁵ Jeremy Waldron, *Judicial Review and Judicial Supremacy* 11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510550

skeptics of "judicial supremacy" around the world -- departmentalists, "hollow hoppers,"⁶ constitutional dialogists -- do not all seem to be making the same point, but appear to be interlocutors in a number of separate conversations, differing in both the type and content of their arguments and the positions they are marshaled to support.

In this chapter, I attempt to provide the systematic analysis of the concept that is mostly missing and that is a prerequisite for understanding and assessing the several debates in which it plays a central role. I also aim to evaluate its usefulness as a concept in the toolbox of comparative constitutional theory. Part 2 identifies and disaggregates four distinct senses or conceptions of judicial supremacy in the relevant literatures, what I shall refer to as "interpretive," "attitudinal," "decisional," and "political supremacy" respectively. It also shows that corresponding to each of the meanings is a distinct opposing or skeptical position. Part 3 aims to illustrate and illuminate the conceptual analysis and multiple meanings by looking at recent resolutions of the same-sex marriage issue by different institutions and mechanisms -- courts, legislatures, popular referenda, courts *and* legislatures -- in many constitutional systems around the world over the past two decades. Part 4 attempts to assess the utility of judicial supremacy as a concept in comparative constitutional theory by asking what and how much is at stake in the debates between each conception and its critics. The chapter concludes that, as carefully delimited by the four senses identified, though not as sometimes exaggerated or conflated, judicial supremacy is a useful, non-unitary concept. Its essential status in the field, however, likely turns on further comparative experience.

⁶ See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (1991).

2. Four distinct senses of judicial supremacy

(a) Interpretive supremacy

Within contemporary U.S. (and Canadian) constitutional law and theory, by far the most common sense of judicial supremacy concerns the legal authority of a Supreme Court interpretation of the constitution. Does it determine *for all purposes*, or only for the more limited one of deciding the case in which it is made, what the law of the constitution is? Does the judicial interpretation have the same legal status as the constitution itself as the supreme law of the land, and thereby bind state and federal non-judicial officials? It is of course undisputed that the Supreme Court's interpretation and resulting decision in a case definitively and authoritatively resolves the issue of the constitutionality of the specific law or other state action in question, at least for the time being. Moreover, given the doctrine of precedent and the unarguable status of the U.S. Supreme Court as the supreme *court* in the country on questions of federal law, it is also undisputed that all other courts, state and federal, are bound by its decisions, including its interpretations of the constitution in future cases involving similar laws that come before them. Finally, it is similarly uncontested that, like any other individual, a state or federal non-judicial official who is a party to a case before a court is legally bound to act in accordance with an otherwise valid court order addressed to that official.⁷ For example, had the Supreme Court ordered Secretary of State James Madison to deliver the judicial commission to William Marbury, he would have been legally bound to do so.

The less certain and more contested issue is whether the legal authority of a Supreme Court decision extends beyond the judiciary and the parties before the court to similarly bind legislatures and executives in their future official actions. In other words, does the interpretation

⁷ "Otherwise valid" is meant to take into account the possibility that the relevant official (e.g., the President of the United States) may enjoy the privilege of certain legal immunities.

of the constitution given by the Court in case x at T1 fix its meaning for all other governmental actors in all contexts at T2 and beyond, at least until the court itself changes its interpretation or the provision of the constitution in question is formally amended? Or, by contrast, are such officials, who have sworn an oath to uphold the constitution, free to disregard the Supreme Court's interpretation of one of its provisions and act on their own independent interpretation in carrying out their future duties? Is Congress or a state legislature considering a piece of legislation bound by a prior Supreme Court interpretation of the constitutional limits on its power? Is the President or the governor of a state so bound in carrying out her/his powers as chief executive?

The claim that they are so bound, most famously made by the U.S. Supreme Court in the case of *Cooper v. Aaron*,⁸ is what judicial supremacy is primarily taken to mean within the discourse of North American constitutionalism, and has been defended on the ground of the settlement function of the law.⁹ The claim that they are not was famously expressed, albeit in slightly different ways, by several of the most highly regarded Presidents of the United States in history, in response to specific decisions of the Court with which they disagreed. The most common label attached to the denial of this claim, and hence the opposing position, is "departmentalism", and sometimes "coordinate construction": the three departments or branches of the federal government (at least) have coordinate or co-equal interpretive authority and, accordingly, each is entitled to act on the basis of its own independent understanding of the constitution in exercising its powers and duties, with no one branch "supreme" over any other. Presumably, for some proponents of strong state authority, this co-equal authority argument also applies to the states vis-à-vis the federal government as a whole. The claim of judicial

⁸ 358 US 1 (1958).

⁹ Alexander & Schauer, *supra* note 4.

supremacy in this sense is denied in a second way by proponents of "popular constitutionalism": the notion that ultimate authority to interpret the constitution rests neither with the Supreme Court alone nor coequally with the other ordained and established organs of government but by the people themselves, *whether or not* they act through their constituted mechanism of the formal amendment process.¹⁰ As positions skeptical of judicial interpretive supremacy, departmentalism and popular constitutionalism can and do come in either/both descriptive and normative versions.

Although this first sense of judicial supremacy is usually stated to turn specifically on the interpretation of a constitutional provision, the meaning given to it, as distinct from any other parts or steps of the judicial decision, analytically the key issue here is not limited to its interpretive component but is rather whether future legislative or executive actions are bound by the judicial decision as a whole. In practice, however, the focus is on interpretation for two reasons. First, it is mostly this part of the decision that renders judicial supremacy problematic or necessary, depending on your point of view. If constitutional provisions were sufficiently precise, specific and unambiguous as to make interpretation/construction rarely necessary, we would not be discussing judicial, but constitutional supremacy, a less controversial and more easily acceptable principle. That is, the institutional issue arises mostly because of interpretive ambiguity. Second, it is typically only the interpretation of a constitutional provision that is sufficiently general, or abstracted from the particular facts of the decided case, to be capable of binding future legislative or executive actions.

From a comparative perspective, the practical bite of judicial supremacy in this sense generally depends on two (partly related) factors: how much scope a constitutional text leaves for

¹⁰ See Bruce Ackerman's concept of the "structural amendment," BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2005).

interpretation, and so the operation of interpretive supremacy, and the all-things-considered ease or difficulty of amending the text under the constituted formal mechanism. So, a more code-like constitution will confine judicial supremacy in this sense more than a brief one filled with "majestic generalities,"¹¹ ambiguities, and under-determinate rights provisions. Similarly, notwithstanding analytical and normative differences between interpreting an existing constitutional text and changing it through formal amendment,¹² the relative significance and role – indeed, the existence -- of interpretive supremacy depends on the overall ease or difficulty of amending a constitution. This in turn is mostly a function of four factors: (1) how much of a supermajority requirement the formal amendment rules require, (2) whether a constitutional court has the legal and political power to review the substance of a constitutional amendment, (3) whether there is a temporarily or permanently dominant political party or coalition able to command the necessary votes for an amendment, and (4) whether the cultural status of the constitution inhibits amendment. Where these factors align to render amendment relatively easy, it is harder to maintain that, for practical purposes, the judiciary is the final or ultimate interpreter of a constitution. It is precisely because the U.S. Constitution is both brief/general and (like the Canadian) practically hard to amend that the claim of judicial supremacy in this sense has bite, and that the opposing claims are worth making.

The debate between judicial supremacy in this sense and its alternatives exists in the United States (and elsewhere) because (1) judicial interpretive supremacy is not a necessary or automatic feature of judicial review and (2) the issue is not clearly resolved by either authoritative constitutional materials or longstanding practice. But this need not be so and a constitutional system might more obviously operate either way. Thus, perhaps on the basis of an

¹¹ *West Virginia State Bd of Ed. v. Barnette*, 316 U.S. 624, 639 (Jackson, J.)

¹² I discuss these differences in *infra* TAN 30-31.

express textual provision to this effect, a system might routinely treat judicial interpretations as binding the future actions of legislative and executive branches. By contrast, in Japan the longstanding practice is that the Supreme Court accepts the constitutional interpretations of the executive branch Cabinet Legislation Bureau, which therefore effectively exercises interpretive supremacy.

(b) Attitudinal supremacy

The second distinct sense of judicial supremacy is the one identified and discussed by Jeremy Waldron in his essay/lecture *Judicial Review and Judicial Supremacy*.¹³ Unlike the first, this second meaning does not concern the legal power or authority of the judiciary, or how far it extends, but rather the way an apex court *exercises* its given power of constitutional or judicial review. Here, judicial supremacy is a particular approach, attitude, mode, or style of the highest court or certain members of it that goes beyond the function of reviewing laws for compatibility with the constitution. According to Waldron, it is epitomized by three types of judicial behavior or approach. First, taking an inappropriately "programmatic" approach to judicial review rather than a discrete, case-by-case, on the merits one as, for example, during the *Lochner* era in the United States where the Supreme Court was arguably engaged in a crusade on behalf of free market principles against the progressive political tide. Second, a judicial attitude in which "judges pay attention only to their own thought about the constitution, as though they were the *owners* of it, and the other branches of government and the people in general were not entitled to a view."¹⁴ Such a proprietary, monopolistic or "monologic" approach, in which important

¹³ See *supra* n. 5.

¹⁴ *Id.* at 32.

"watershed" issues are "to be settled decisively and exclusively by the reasoning of the court,"¹⁵ is, for Waldron, exemplified by Justice Kennedy's majority opinion in *City of Boerne v. Flores*. Third, where a court employs a "living constitution" or "living tree" approach to bring the constitution up to date, then this document "is no longer the constraining basis of the court's power. The court is now unconstrained, and is to that extent a Hobbesian sovereign, beyond the reach of the rule of law...[and] taking on the role of *pouvoir constituant*."¹⁶

Although there is some overlap between the second and third of these modes and the first sense of judicial supremacy, insofar as both are interpretive, the difference is that for Waldron, this is an issue of style or attitude towards judicial decision-making, something that may vary from time to time, issue to issue, and from judge to judge, and not about the legal authority of the decisions themselves. Waldron argues that judicial supremacy in his sense is especially relevant to, and manifested in, the United States, reflecting a particular "evil" there and limits his discussion to it, but there is no reason to believe it is necessarily so limited or may not in principle apply elsewhere. Obviously, for him, as a particular and distinct evil, it is no necessary part of judicial review.

So, from a comparative perspective, one might look at how other courts exercise their powers of judicial review to construct a supremacy-subordinacy spectrum. For example, formally, the Supreme Court of Japan has essentially the same powers of judicial review as that of the United States on which it was modeled, and yet from this perspective acts at the opposite end of this spectrum. Not only does it almost never engage in the sort of approaches to its task that Waldron argues amount to judicial supremacy but it rarely even exercises the more "normal," "appropriate," or "restrained" approach to judicial review as it rarely finds government

¹⁵ Id. at 37.

¹⁶ Id. at 41.

action to violate the constitution.¹⁷ Other courts perhaps exemplify the "proper," non-supremacist position of respectfully but independently exercising their judicial review powers.

Because this sense of the term focuses exclusively on judicial attitudes, style, or approaches to constitutional adjudication, its opposite must presumably do the same. Accordingly, candidates might include judicial modesty, comity, respectfulness, discipline, co-equality.

In the current era of democratic backsliding, part of the “evil” of attitudinal supremacy is that it may help to undermine a public culture of mutual respect, trust, and inter-institutional collaboration in the common enterprise of constitutional governance,¹⁸ which facilitates the appeal of more polarized and “hardball” democratic politics in general and its authoritarian populist version in particular. A programmatic and proprietary approach to their role can also contribute to democratic erosion by placing a target on the backs of the higher judiciary, leading to various types and degrees of backlash, including court-packing, undermining of their independence, and outright capture, as we have seen in various countries around the world in recent times. This, in turn, has led to instances of “abusive judicial review,”¹⁹ where courts are employed as a more direct tool of democratic backsliding, although, arguably, this is an inherent risk of all senses of judicial supremacy, even in the case of independent courts.²⁰

¹⁷ See, e.g., David Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, in PUBLIC LAW IN EAST ASIA (Albert H. Y. Chen & Tom Ginsburg eds., 2013); Shigenori Matsui, *Why is the Japanese Supreme Court So Conservative?*, 88 WASH. UNIV. L. REV. 1375 (2011).

¹⁸ On the collaborative model of constitutionalism, see AILEEN KAVANAGH, *THE COLLABORATIVE CONSTITUTION* (2023).

¹⁹ David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 UC DAVIS L. REV. 1313 (2020).

²⁰ For an argument that courts in the United States are comparatively less likely to be captured but also somewhat more likely to facilitate democratic backsliding on their own account, see Stephen Gardbaum, *Courts and Democratic Backsliding: A Comparative Perspective on the United States*, 46 LAW & POLICY (forthcoming 2024).

(c) Decisional supremacy

The third distinct sense of judicial supremacy is mostly employed in comparative constitutional law. It has arisen as the result of certain recent novel approaches towards institutionalizing constitutional review that, taken together, have suggested a new design choice beyond centralization or decentralization. Like the first, but unlike the second, this third sense is a legal one, and provides an affirmative answer to the following question: does the power of judicial review include the legal authority to conclusively resolve whether or not a particular challenged statute remains the law of the land and may continue to be applied? As noted above, this authority is an undisputed feature of judicial review in the United States; it is *not* what the interpretive supremacy debate is about. But whether or not such "decisional supremacy" exists turns on the potential disaggregation of the two distinctive steps of traditional judicial review: (1) a judicial determination that the challenged law conflicts with the governing constitution or bill of rights, and (2) a judicial disapplication of the law against which the political institutions are legally powerless to act directly within the existing constitution or bill of rights. So if, despite a judicial determination of conflict, courts have no legal power to disapply such a law or, if they do, the disapplication (or other remedy) can be overridden by the legislature, we have a practical distinction between the two steps. In this context, judicial supremacy is the position that the power to take the second step is entailed by the first.²¹ But the distinction between the two steps permits the design possibility that courts are empowered to take the first but not the second: hence, judicial review without "judicial supremacy."

²¹ Of course, to say these are the two "distinctive" steps of traditional judicial review is not to say they are the exclusive ones or always taken. Thus, in any given case, courts may choose to exercise any "passive virtues" they possess, or not to exercise the power of disapplication but to issue an alternative remedy. Moreover, disapplication may follow immediately or after a judicially prescribed time period; i.e., a suspended declaration of invalidity.

Decisional supremacy is part and parcel of the standard modern power of judicial review of legislation that now exists in the vast majority of countries around the world. It is precisely the innovation of how judicial review has recently been institutionalized in certain countries to show that judicial supremacy in this sense is *not* a necessary or essential part of it. So in New Zealand and the United Kingdom, statutory bills of rights provide that judicial decisions finding legislation incompatible with protected rights are *never* legally authoritative in that such a decision does not affect the validity of the legislation and courts are still required to apply it in the case at hand.²² In Canada, judicial decisions on most constitutional rights issues²³ can be said to be *conditionally* legally authoritative in that the Charter of Rights and Freedoms empowers federal and provincial legislatures to reinstate statutes invalidated by the courts through ordinary majority vote for a renewable period of five years.²⁴ In other words, the major issue here is do courts or the elected branches of government have the legal power to ensure that their view prevails as to whether a statute conflicts with the constitution/bill of rights and remains the law of the land. In these three countries, the position of courts and legislatures is reversed as compared with judicial decisional supremacy: the judicial view is relevant and may be taken into account by the legislature, but it is not -- or not necessarily -- the legally authoritative one.

In the literature, this possibility has frequently come to be referred to as "weak-form judicial review," as distinct from the more traditional "strong-form judicial review" that does not disaggregate the two steps.²⁵ As with most labels, the fit is not perfect in that the overall

²² New Zealand Bill of Rights Act 1990, section 4; UK Human Rights Act 1998, section 4. By contrast, where it is possible to (re)interpret such a statute consistently with the relevant right, courts are empowered to do so and this decision has immediate legal effect, subject to possible subsequent legislative amendment.

²³ Not all because a few specific Charter rights are expressly excluded from the operation of section 33. See *infra* n. 30.

²⁴ Canadian Charter of Rights and Freedoms, section 33.

²⁵ Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003).

"weakness" or "strength" of courts cannot, as it might appear to suggest, be assessed or explained by this one (formal) factor alone, but is rather multi-dimensional.²⁶ There are clearly many other legal, political, institutional, cultural, and contextual factors that help to determine where, in a broader, all-things-considered or Gestalt sense, the power of courts in any given system -- or on any given occasion -- lies on a spectrum running from strong to weak. These factors are canvassed in part (d) below in the context of the fourth and final sense of judicial supremacy. The strong-form/weak-form distinction does not deny or overlook this, which is a different issue. But within its stipulated terms as about whether or not legislatures have the legal power to respond to specific court decisions by ordinary majority, in this third sense judicial supremacy *is* simply strong-form judicial review. This sense of judicial supremacy, therefore, challenges or problematizes what is a given in the context of the U.S. debate; namely, that the Supreme Court is empowered to authoritatively resolve the fate of any particular law at issue in a case before it. In other words, this third sense of judicial supremacy is *narrower* than the first in that it does not concern the broader issue of the constitutional/supreme law status of such a resolution or its legal authority to bind non-judicial officials in their future official action.²⁷ Unlike, for example, Canada and the United Kingdom, the United States clearly and indisputably has judicial supremacy in this third, narrower sense but not so clearly or indisputably in the first. Accordingly, these meanings are distinct.

²⁶ Aileen Kavanagh, *What's So Weak About "Weak-Form Review"? The Case of the UK Human Rights Act 1998*, 13 INT'L. J. CON. L. 1008 (2015); TAMAS GYORFI, *AGAINST THE NEW CONSTITUTIONALISM* (2016).

²⁷ There is a sense in which decisional supremacy might be thought to be broader than interpretive supremacy. This is that rights adjudication involves a two step process of determining whether a right has been infringed and whether the infringement is justified, and only this first step involves interpretation: interpreting the scope and meaning of a right. So, even if (first step) interpretive supremacy is granted, it does not follow that courts have full decisional supremacy, that they authoritatively resolve the other, subsequent parts of the case. However, as I argued above, the key issue in the debate about interpretive supremacy is not about "interpretation" per se but the binding effect of judicial decisions on future legislative or executive action.

So, in the context of a case like *Obergefell v. Hodges*,²⁸ which declared a constitutional right to same-sex marriage, the main issue understood to involve judicial supremacy in the United States is whether the decision has the same status as the constitution and so binds all non-judicial officials; whether it is part of the constitution that they are bound to uphold and support, and so applies to them automatically without any need for a specific court order. It is *not* an issue that the specific state laws successfully challenged by the plaintiffs in the case are disappplied and that no legal mechanisms exist, apart from a formal constitutional amendment, whereby any other institution can determine their fate. But with "weak-form" review, there *is* such a mechanism, and an issue involving judicial supremacy. In this precise sense -- the fate of the particular laws -- it decouples judicial review and judicial supremacy: that the law is subject to constitutional review by the courts does not necessarily mean or imply that the courts are empowered to conclusively determine whether it remains the law of the land.

A concrete example of this difference between judicial review with and without decisional supremacy is the issue of whether blanket bans on prisoner voting during the period of incarceration violate a bill of rights, which has arisen in several countries in recent years. The Canadian Supreme Court in 1993 and 2002, the New Zealand High Court in 1993 and 2015, the South African Constitutional Court in 2004, and the Scottish Registration Appeal Court in 2007 all held that similar statutory bans were in conflict with their respective bills of rights.²⁹ In Canada, the right to vote is one of the handful of Charter rights expressly excluded from potential operation of the section 33 "notwithstanding" provision, so that on this particular issue

²⁸ 576 U.S. __ (2015).

²⁹ Canada: *Sauvé v. Canada (Attorney General)* [1993] 2 SCR 438, *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519; New Zealand: *Re Bennett* (1993) 2 HRNZ 358 (HC), *Taylor v Attorney-General* [2015] NZHC 1706; South Africa: *Minister of Home Affairs v. National Institute for Crime Prevention (NICRO)*, 2004 (5) BCLR 445 (CC).

legislatures are legally powerless to disagree and overrule the courts by ordinary majority.³⁰ In South Africa, this latter is the uniform situation under the 1996 constitution and bill of rights. By contrast, in New Zealand and the United Kingdom, under section 4 of their respective bills of rights, a judicial indication or declaration of incompatibility, such as in the two prisoners' voting rights cases, has no legal effect on the continuing validity of the statute at issue. In the UK, the legislature has not chosen to amend or repeal the relevant statute, which remains the law of the land.³¹ In New Zealand, the blanket ban was only amended in 2020 to permit those serving a sentence of less than three years to vote because of a change of government.³² The bottom line is that today in Canada and South Africa prisoners vote in parliamentary elections *because* of the judicial rulings; while in the UK they do not -- *despite* a similar court decision. Accordingly, in this third sense, the former exemplifies judicial review with judicial supremacy, the latter without.

The opposite of judicial decisional supremacy is not departmentalism or popular constitutionalism, but perhaps "judicial penultimacy."³³ Whatever label is used, the idea is to recast the traditional dichotomy between either no judicial review at all or judicial review without disaggregation of its two steps. It bespeaks the possibility of a new third, intermediate option in which there is judicial power to review legislation for consistency with a constitution/bill of rights -- unlike traditional legislative supremacy -- but no (or at least no

³⁰ Canadian Charter of Rights and Freedoms, section 33(1) (excluding from its operation rights contained in sections 3-6 and 16-23).

³¹ As a compromise with the Committee of Ministers, tasked with enforcing the judgements of the European Court of Human Rights, which had repeatedly held the blanket ban unlawful under the European Convention and whose decisions are legally binding, the British Government agreed to let fewer than one hundred prisoners on remand or temporary release vote, but without a vote of Parliament or amending the statute.

³² The Labour government of Jacinda Ardern enacted the Electoral (Registration of Sentenced Prisoners) Amendment Act 2020. The blanket ban had been reinstated by the previous National Party government in the 2010 Electoral (Disqualification of Sentenced Prisoners) Amendment Act, which was the subject of the 2015 declaration of inconsistency in *Taylor v Attorney-General*, *supra* note 29.

³³ The term was coined by/in Michael Perry, *Protecting Human Rights in a Democracy: What Role for Courts?*, 38 WAKE F. L. REV. 635 (2003).

conclusive) judicial power to disapply a piece of legislation deemed inconsistent by the courts -- unlike traditional judicial review and judicial supremacy in this third sense. The judicial view on the consistency and fate of the legislation does not automatically trump that of the legislature, and so is not legally supreme. At the same time, the legislative view does not automatically prevail just because it is the only one there is, as under traditional legislative supremacy; rather, the legislature has the legal power to ensure that it prevails *in the face of* the judicial view. It has been argued that this new third option provides a better, more democratically defensible, balance of power between courts and legislatures than under either of the traditional ones.³⁴

Finally, does the amendability of a constitution so as to effectively reinstate a particular disapplied law negate judicial decisional supremacy? Is the amendment option fully equivalent to the legislative override power in Canada or the other weak-form mechanisms? Only where relatively easily exercisable? As under interpretive supremacy, I believe there are relevant analytical, normative, and practical differences here. Analytically, although a constitutional amendment (where enacted) may practically require a different outcome if and when a new case is brought, it does not alter the general power of the courts to issue authoritative rulings on whether there is a conflict between the (amended) constitution and a statute. To be sure, the raw material over which this power is exercised has changed, and therefore the currency/relevance of its original decision on this issue, but not the power itself. Normatively, "weak-form" powers are typically conceptualized and justified as a mechanism to resolve reasonable disagreements about contestable rights issues between courts and legislatures. The point is to reject the legal authoritativeness of the judicial position on the basis that "democracy requires that a reasonable

³⁴ STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE 74-5 (2013).

view of the legislative majority trumps the reasonable view of a judicial majority."³⁵ By contrast, the constitutional amendment procedure *concedes* the authoritativeness of the judicial position and changes the first-order "raw material" on which it was based. Practically, it may be politically more costly to tamper with a bill of rights that does not contain a legislative override power than to exercise it in one that does. Moreover, constitutions are rarely, if ever, amendable by ordinary majority vote of the legislature. This all said, realistically the staying power of particular judicial decisions, and so the *relative strength* of judicial decisional supremacy in a given legal system, will vary depending on the same four factors relating to the ease/difficulty of constitutional amendment discussed above on interpretive supremacy. It will also depend on the staying power of the court that rendered them and the constitutional politics of judicial replacements.

(d) Political supremacy

The fourth and final sense of judicial supremacy is an empirical claim about the actual *political* power of the courts (or the highest court) to control and resolve constitutional issues, relative to that of the other branches of government. It means that, in terms of constitutional politics and not only constitutional law (or in the way that political science studies and measures), courts are the most powerful or consequential branch of government on constitutional issues and are able to impose their will on other recalcitrant political actors and institutions, either in particular instances or generally.³⁶ From this perspective, judicial supremacy is not a matter of legal power, formal authority, or what judges say or assert in their opinions, but is all about empirical assessments of inter-branch politics, policy outcomes, and the various roles that

³⁵ *Id.*, at 655.

³⁶ This conception of political power derives from Robert A. Dahl, *The Concept of Power*, 2 BEHAVIORAL SCIENCE 201 (1957).

courts play in the polity. Are courts supreme (or sovereign) in the sense of having the greatest political power to determine how constitutional issues end, or are the real drivers of what ultimately transpires in the register of constitutionalism one or more of the other political actors or institutions? So, for example, if the Supreme Court had ordered Madison to deliver the commission to Marbury, he may have been legally obligated to do so, but this does not tell us whether or not the Court would have had the political power to determine the outcome of the episode and command obedience. Indeed, the usual understanding of its actual decision is that it did not. In the school segregation context, did the Supreme Court (which ordered desegregation not immediately but "with all deliberate speed" in *Brown II*) or Congress (the Civil Rights Act, 1964) have the greater role and impact in ending the practice?

Accordingly, like the others, this sense of the term has its own distinction between judicial review and judicial supremacy. Here, by no means do all instances of judicial review involve, imply, or reflect the type or degree of political power that constitutes judicial supremacy. Rather, this latter is additionally taken to require the imposition of constitutional rulings by courts on other political actors and institutions, and the general conditions for this are (a) that there is genuine conflict or disagreement among them, and (b) that judges are able to thwart the policy preferences of elected officials.³⁷

Most often, this sense of judicial supremacy has been employed, explicitly or implicitly, by political scientists -- especially in the United States -- to puncture what are perceived to be the overly legalistic, politically myopic, or naively adulatory claims and assumptions sometimes made by constitutional lawyers.³⁸ But, analytically, it need not be so limited or linked to such a

³⁷ George Lovell & Scott Lemieux, *Assessing Juristocracy: Are Judges Rulers or Agents?*, 65 MARYLAND L. REV. 100, 103-4 (2006).

³⁸ Leading works in this vein include ROSENBERG, *supra* note 6. For a work specifically looking at judicial supremacy from this perspective, see Lovell & Lemieux, *id.*

skeptical perspective/verdict. If one were to address the question of the relative political power or all-things-considered "strength" of courts versus the elected branches on constitutional issues in any given system,³⁹ the answer would almost certainly be a function or mix of formal institutional powers, legal and judicial practice, and political context.⁴⁰ It would also often vary by circumstance and contingency.⁴¹ So among the important questions of legal or formal authority affecting the overall institutional role and political power of the courts in any system are the following. Does the country have a written or codified constitution, or a bill of rights with constitutional status, that one or more courts are empowered to enforce in a non-minimal way? As Tocqueville was perhaps the first to state explicitly, judicial review of legislation is in and of itself a significant political power of the courts.⁴² What is the scope of such a constitution? Does it purport, or has it been interpreted, to regulate a wide range of actors and activities in that society (at the extreme, a so-called "total constitution"⁴³) or a relatively narrow range, perhaps limited to creating the governing institutions and ground rules of political engagement, and a handful of defensive or negative rights against the state? Is the constitution in question a transformative one, thereby tasking all public officials, including the judiciary, with bringing about fundamental change in the political society?⁴⁴ How specific or general are its

³⁹ See *supra* TAN 26-27.

⁴⁰ I attempted to address this question systematically in Stephen Gardbaum, *What Makes for More or Less Powerful Constitutional Courts?* 29 DUKE J. OF COMP. & INT'L L. 1 (2018).

⁴¹ Scott Lemieux & George Lovell, *Legislative Defaults: Interbranch Power Sharing and Abortion Politics*, 42 POLITY 210, 216 (2010).

⁴² "So an American judge is exactly like the magistrates of other countries. Nevertheless, he is invested with immense political power. How does this come about?....The reason lies in this one fact: the Americans have given their judges the right to base their decisions on the *Constitution* rather than on the *laws*. In other words, they allow them not to apply laws which they consider unconstitutional." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 100-101 (J.P. Mayer ed., Harper & Row 1969) (1835).

⁴³ Matthias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341 (2006).

⁴⁴ See Dirk Kotzé, *Constitutionalism and Democratic Transitions: Lessons from South Africa*, in VERONICA FEDERICO & CARLO FUSARO EDS., *CONSTITUTIONALISM AND DEMOCRATIC TRANSITIONS: LESSONS FROM SOUTH AFRICA* 81, 82 (2006) ("The Constitution therefore clearly visualizes itself as a transitional and transformational

provisions; i.e., how much scope for judicial interpretation does it contain? Are courts granted strong or weak-form powers of judicial review? What remedial powers do they possess? How onerous or flexible are the formal constitutional amendment rules? Are courts empowered to review not only statutes and administrative action for constitutionality, but also the substance of constitutional amendments? What is the jurisdiction of the constitutional/supreme court and can the political branches reduce it? May ordinary citizens petition it, do politicians have relatively easy or difficult access? Is constitutional review centralized in a single court or decentralized? In the current era of democratic backsliding, a single constitutional court may be an easier or more tempting target of capture than a plurality.⁴⁵ How are constitutional judges appointed and what is their tenure? Is their appointment controlled by existing members of the judiciary (e.g., the "collegium" system in India), by an independent commission, or by the executive and/or legislative branches? Are they appointed for life, with or without a mandatory retirement age, or for a renewable/nonrenewable fixed term?

Apart from a completely sham constitutional system in which formal powers bear no or very little relation to political realities, it is hard to imagine that if a constitutional system were to answer these questions by granting the maximalist legal powers to its constitutional court, these would not convert into the currency of "actual political power" vis-à-vis the other political institutions in that system. Similarly, a judiciary with few formal powers, such as that in China, is highly unlikely to have much political power in practice. In between these poles, more typically, legal powers will be an important but often not sufficient factor by which to ascribe or predict strength. Two courts might have broadly similar formal powers across many or all of these factors, as for example the U.S. and Japanese Supreme Courts, and yet be very different in

instrument: one involved in political and social engineering."); *see also* Micheala Hailbronner, *Transformational Constitutionalism: Not Only in the Global South*, 65 AM. J. COMP. L. 527 (2017).

⁴⁵ See WOJCIECH SADURSKI, *POLAND'S CONSTITUTIONAL BREAKDOWN*, chap. 3 (2019); Gardbaum, *supra* note 40.

terms of judicial power. At the very least, the differences in judicial power may be far greater than, and not closely correspond with, any differences in formal powers. Similarly, a single constitutional court might become significantly more or less powerful over time or in a given time period without changes in its formal powers, as the examples of the U.S. and Indian Supreme Courts suggest.

Beyond formal authority, legal and judicial practice is a significant component of the power of a constitutional court. Thus, whether and how courts use the substantive and remedial powers just canvassed is obviously highly relevant to measuring their actual overall strength or weakness, as are also, for example, the norms and practices surrounding judicial appointments (age, politicization, etc.); the scope of any self-granted jurisdiction;⁴⁶ a court's own interpretation of its standing rules; creativity in remedial practice; and the quality of a court's judicial reasoning.

At the same time, among the range of key questions of political practice, culture and context that will also help to determine the real distribution of power on constitutional issues in any given system are the following. As a threshold matter, to what extent does the formal constitution or constitutional system reflect or impact the way politics operates? Even apart from the sham constitution scenario, there are significant variations here even among liberal democracies as well as the various instances of "illiberal" or "authoritarian constitutionalism."⁴⁷ Beyond this threshold issue, does the general political culture of the system support robust or minimal exercise of the judicial review powers of the courts, where they exist? Is this political culture perhaps reflected in or "enhanced" by the practice of judicial appointments? I am

⁴⁶ For the most famous example in all of constitutional law, *see* *Marbury v. Madison*. For more recent examples, from the Supreme Court of India, *see infra* TAN 50-53.

⁴⁷ See Li-Ann Thio, *Constitutionalism in Illiberal Politics*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 133 (Andras Sajó & Michel Rosenfeld eds., 2012); Mark Tushnet, *Authoritarian Constitutionalism*, 100 *CORNELL L. REV.* 391 (2015).

thinking here of the conventional Japanese practice of promoting judges to the Supreme Court at an age just a few years before mandatory retirement. Does the immediate, short-term electoral and political landscape, in combination with the appointment rule (and perhaps also the voting system used), make it relatively easy or difficult to "pack" or capture a constitutional court or enact constitutional amendments to overrule its decisions?⁴⁸ On a longer-term basis, does judicial review operate in the context of a competitive political party system, a dominant political party system, or a one-party state?⁴⁹ The relative concentration or dispersal of political power, among parties as well as institutions, helps to determine the political space available for consequential judiciaries.

Other key, political science-type questions include: do (certain) strong judicial powers, including judicial supremacy in any of its senses, serve the interests of other political actors and institutions and so help to explain their existence and toleration?⁵⁰ Are courts in fact able to impose their constitutional will on the other branches, or do assertions or apparent instances of this tend to dissolve under closer scrutiny because, for example, there is no genuine conflict between, say, the U.S. Supreme Court and the federal government in bringing a state legislature into constitutional line or a Supreme Court decision does not in fact prevent the political actor from achieving its goal.⁵¹

India provides a useful example of the interplay of formal powers, judicial practice, and political realities that shape the "actual," empirical power of its courts. In some respects, the Indian Supreme Court has powers that other constitutional courts can only dream about. In addition to the standard power of judicial review of legislation granted by the text of the

⁴⁸ As, for example, in Hungary since 2010.

⁴⁹ See PO JEN YAP, *COURTS AND DEMOCRACIES IN ASIA* (2017).

⁵⁰ WHITTINGTON, *supra* note 2; RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003).

⁵¹ See Lovell & Lemieux, *supra* n.37.

constitution,⁵² the court has essentially given itself complete control over its membership through the collegium system of appointment and the power to review constitutional amendments for their substantive constitutionality under the basic structure doctrine. In October 2015, these two combined when the court employed the doctrine to invalidate a constitutional amendment to replace the collegium system with an independent judicial appointments commission on which sitting judges would have been in a minority.⁵³ The judicial creation of the basic structure doctrine was itself a response to the relative ease and frequency of amending the constitution to overrule the Supreme Court, given the formal amendment rule of two-thirds of both house of the legislature *and* the political dominance of the Congress Party until the late 1980s. With its decline and in the absence of a replacement, amendment has become practically more difficult and relatively rarer, in response to which the court has only infrequently used its basic structure power, notwithstanding the recent instance. But although the struggle for political power between the executive and the judiciary as "guardians of the constitution" continued, it was only after the end of Congress Party dominance that the court began to be spoken of as one of the most powerful in the world.⁵⁴ The Supreme Court's extensive and unorthodox powers to adjudicate public interest litigation have effectively made it an institution of governance. On the other hand, in addition to the amendment rule, the Constitution's Ninth Schedule formally immunizes specific legislation placed in it from judicial review, although its similar requirement of a two-thirds vote means that it has also been employed far less in recent decades than formerly. Despite the judiciary's extraordinarily high social status, the

⁵² CONST. OF INDIA, arts. 13, 131-36.

⁵³ Supreme Court Advocates-on-Record v. Union of India, Writ Petition (civil) No. 13 of 2015.

⁵⁴ S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POL'Y 29 (2001) ("The Supreme Court of India has become the most powerful apex court in the world."); Clark D. Cunningham, *The World's Most Powerful Court: Finding the Roots of India's Public Interest Litigation Revolution in the Hussainara Khatoon Prisoners Case*, in S.P. SATHE ED., LIBERTY, EQUALITY AND JUSTICE: STRUGGLES FOR A NEW SOCIAL ORDER 83-96 (2003).

constitutional retirement age of sixty-five in combination with the collegium system's seniority bias leads to relatively frequent turnover and inhibits justices from taking the "long view." Moreover, the growing size of the court and its tendency to sit in smaller and smaller panels -- a function of its increased jurisdiction and caseload with the effective abolition of standing requirements under PIL -- have caused concerns to be expressed about its doctrinal coherence and consistency, and a weakening of the precedential effect of its decisions.⁵⁵ Also, as the political dominance and democratic backsliding of Prime Minister Modi and his BJP party has increased since their initial electoral victory in 2014,⁵⁶ the perceived power of the Supreme Court has declined and it is now rarer than it was before to find it spoken of as among the world's most powerful. Finally, any realistic assessment of judicial power in India must take into account the general socio-economic context: near-unimaginable poverty, a very low tax base and hugely underfunded state, bureaucratic inertia and corruption, and a vast gap between the legal elite/system and the mass of the population.

* * *

Overall, the four distinct uses of judicial supremacy reflect and derive from two somewhat different, although related, senses of the underlying concept of "supremacy"; one employed primarily in legal and constitutional doctrine and the other in political theory and science. The legal/constitutional conception of supremacy is that of a functionally required systemic conflict-resolution mechanism in various contexts of legal pluralism. As exemplified by "the supremacy clause" of the U.S. Constitution, the legal principle of supremacy determines the normative hierarchy among different sources of otherwise valid law where they conflict with

⁵⁵ See Madhav Khosla, *The Problem*, 642 SEMINAR 12 (2013) (arguing that small bench decisions threaten the doctrine of precedent and the rule of law); Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 62 AM. J. COMP. L. (2013).

⁵⁶ See, e.g., Tarunabh Khaitan, *Killing a Constitution by a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 LAW & ETHICS OF HUMAN RIGHTS 49 (2020).

each other; it provides the answer as to what happens, which law prevails, in this situation.

Thus, the principle of "constitutional supremacy" means that a provision of the constitution has higher normative authority, and therefore, will trump a conflicting statute, as well as a common law rule or administrative regulation. Similarly, "federal supremacy" means that a provision of federal law will trump a conflicting provision of state law. In this context, by extension, "statutory" or "legislative supremacy" means that a statute trumps conflicting common law rules and administrative regulations.⁵⁷

Interpretive and decisional supremacy may be seen as extensions of this legal conception of supremacy: which or whose constitutional interpretation of an ambiguous text has higher normative authority within the legal system where they conflict (interpretive) and which institution's view of the consistency of a particular law with the constitution/bill of rights prevails where, in the context of a specific lawsuit, they conflict (decisional). Thus, these two conceptions of judicial supremacy similarly concern a hierarchy of norms, but operate not in the context of what happens when two laws conflict but rather of *whether* they do. In other words, they resolve a second-order conflict between parties/institutions rather than a first-order one between laws.

By contrast, the political conception of supremacy is about the location of supreme, or sovereign, power in a political society. Starting in the sixteenth century with Bodin and until relatively recently, political theorists generally believed in the necessary existence of a single, indivisible sovereign power and, over historical time and development, it has been located in different sources ranging from the monarch, to the legislature, to the "party," and finally, in

⁵⁷ This (mostly unstated) principle of statutory supremacy explains the U.S. Supreme Court's decision in *Burwell v. Hobby Lobby, Inc.*, 573 U.S. __ (2014): an earlier federal statute, the Religious Freedom Restoration Act of 1993, trumps a later administrative regulation, issued by the Obama administration under authority of the 2010 Affordable Care Act, containing the "contraceptive mandate."

democratic contexts, mostly to the people. In this context, "legislative supremacy" means something quite different, expressing the historical shift from the monarch to the legislature as the source of ultimate political authority in the society somewhere between the seventeenth and early twentieth centuries in most European countries. The rise of "second" European empires⁵⁸ and, most recently, supranational or multi-level constitutional orders, such as the European Union, as well as the "constitutionalization" of international law more generally, have problematized the notion of a single supreme or sovereign body per political society, and indeed challenged the very concept of "sovereignty" itself.⁵⁹

The second and fourth senses of judicial supremacy mostly employ or rely on this more general, political conception of supremacy. Thus, the particular ways or modes of exercising their judicial review powers that Waldron identifies as constituting and epitomizing the "evils" of judicial supremacy are those which, in their apparent disdain and arrogance vis-à-vis the other branches, exhibit the tendency to view themselves as not merely the supreme *court* but the supreme *institution* of government as far as constitutional issues are concerned. Indeed, Waldron talks of the court becoming an "unreviewable Hobbesian sovereign," and generally equates judicial "supremacy" and "sovereignty." More directly, the fourth sense asks whether, in the currency of actual political power, courts are the ultimate or most powerful actor in determining the outcome of constitutional/political issues.

⁵⁸ ANTHONY PAGDEN, *THE BURDENS OF EMPIRE: 1539 TO THE PRESENT* (2015)

⁵⁹ See, e.g., NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2011); Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 IND. J. GLOB. LEG. ST. 629 (2013).

3. Same-sex marriage as a case study in the meaning and application of judicial supremacy

Over the past twenty years or so, the issue of same-sex marriage has been raised, addressed, and resolved in a significant number of constitutional systems around the world, with legalization the outcome in thirty-six countries at the time of writing.⁶⁰ For current purposes, what is extremely interesting about this series of developments is less *how* the issue was resolved as a matter of substance than *which* institution(s) or mechanism(s) resolved it. For, as we will see, the variety and range of institutions and mechanisms illustrate something about judicial supremacy in each of its four senses.

Let me briefly set out the relevant case studies, which come from countries in five continents and involve five different institutions, combination of institutions, or mechanisms. These are: (1) constitutional courts resolving the issue themselves in favor of same-sex marriage; (2) courts acting in combination with legislatures and/or executives; (3) the political branches acting alone; (4) popular resolution by referendum to amend legislation or the constitution; and (5) constitutional courts upholding existing legislative bans on same-sex marriage.⁶¹

In six countries, constitutional courts essentially resolved the issue themselves in favor of same-sex marriage. Of these, perhaps the best-known example is the U.S. Supreme Court's 2015 decision in *Obergefell v. Hodges*, in which it declared a constitutional right to same-sex marriage and immediately struck down the challenged state statutory bans on it. Obviously the court did not act in complete isolation or on a blank page, in that between its decisions in *Lawrence v.*

⁶⁰ March 2024.

⁶¹ Sources for this section include Pew Research Center, Same-Sex Marriage Around the World, available at: <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/>; Josephine Rozzelle, Brianna Navarre & Megan Trimble, Same-Sex Marriage Legalization by Country, US NEWS, June 27, 2023, available at: [Where Same-Sex Marriage Has Been Legalized Around The World | Best Countries | U.S. News \(usnews.com\)](https://www.usnews.com/stories/news/2023/06/27/same-sex-marriage-legalization-by-country); Marriage Equality: Global Comparisons, Council on Foreign Relations, available at: [Marriage Equality: Global Comparisons | Council on Foreign Relations \(cfr.org\)](https://www.cfr.org/marriage-equality/global-comparisons).

*Texas*⁶² in 2003 and *Obergefell* many other actors -- state legislatures and courts, the people through state constitutional amendments, and especially lower federal courts -- had issued decisions on both sides of the issue. Nonetheless, acting by itself in the course of an appeal, the court issued a legally authoritative resolution of the conflict, at least for the time being, creating a uniform national constitutional rule in favor of same-sex marriage. Somewhat similarly, in June 2019, relying significantly on an Inter-American Court of Human Rights judgment of a few months before, the constitutional court of Ecuador ruled that the 2009 constitutional text's definition of marriage as between a man and a woman was unenforceable and void, and it also amended the relevant provisions of the Civil Code to remove gender-specific terms with immediate effect.⁶³

Slightly less definitive is the Brazilian Supreme Federal Court's 2011 decision interpreting the existing federal marriage law to permit same-sex civil unions, though not marriage per se, followed by the 2013 decision of the National Judicial Council, the body that supervises the national judiciary, that all notaries -- the officials who register civil marriages -- must recognize same-sex marriage.⁶⁴ The Supreme Federal Court rejected an appeal against this decision on technical grounds in May 2013, and it has still not held oral arguments on the revised appeal.

In both Austria and Costa Rica, apex courts held, in 2017 and 2018 respectively, that existing statutory bans on same-sex marriage violated the constitutional right to equality and issued suspended declarations of invalidity giving the countries' legislatures a deadline to amend the laws, failing which the bans would automatically be invalidated. In both cases, the

⁶² 539 US 558 (2003).

⁶³ Ecuador's top court approves same-sex marriage, BBC, June 13, 2019, available at: <https://www.bbc.com/news/world-latin-america-48620744>

⁶⁴ <http://www.bbc.com/news/world-latin-america-22534552>

legislatures did not amend the law by the deadline and so the courts' orders came into effect, in 2019 and 2020 respectively.⁶⁵ Similarly, in Colombia the legislature failed to act in response to the Constitutional Court's two year suspended declaration of invalidity, following its 2011 decision that same-sex couples in de facto unions have the constitutional right to form a family, but that it did not have the power to change the law itself.⁶⁶ In April 2016, the Constitutional Court returned to the issue and definitely declared a fundamental right to be married without discrimination.⁶⁷

The first of five combined court and legislative (as well as executive) resolutions of the issue was in Canada. In the early 2000s, trial and appellate court decisions in nine of the country's thirteen provinces and territories had held that the existing common law ban on same-sex marriage violated the Charter's right to equality, although most of them suspended the invalidation of the ban in their respective jurisdictions for two years in order to permit the federal government to change it at the national level. In 2003, the federal government proposed a bill permitting same-sex marriage nationwide, but before introducing it into parliament sent a series of reference questions to the Supreme Court for advice on its constitutionality. It also faced, and narrowly defeated (by 137-132 on a free vote), a motion by then leader of the opposition Stephen Harper that would have authorized parliament to use all means (presumably, including section 33) to preserve the traditional definition of marriage. Following the court's answers, which (1) affirmed the proposed bill's constitutionality, as well as (2) exclusive federal jurisdiction over the topic and (3) a constitutional requirement of granting exemptions to religious institutions,⁶⁸ the bill was enacted into law as the Civil Marriage Act in July 2005.

⁶⁵ See "Same Sex Marriage Legalization by Country," *supra* note 61.

⁶⁶ <http://thecitypaperbogota.com/news/countdown-to-gay-marriage/2904>

⁶⁷ <http://www.abc.net.au/news/2016-04-29/colombia-legalises-same-sex-marriage/7371962>

⁶⁸ Reference Re Same-Sex Marriage [2004] 3 SCR 698.

Five months later, on December 1, 2005, the Constitutional Court of South Africa held that the existing common law and statutory exclusions of same-sex marriage violated the constitution's rights to equality and dignity, and issued a suspended declaration of invalidity for one year, after which it would read language permitting same-sex marriage into the Marriage Act 1961 if the parliament had not acted.⁶⁹ On November 28, 2006, two days before the expiration of the deadline, parliament enacted the Civil Union Act, which in its final form legalized same-sex marriage. In Taiwan, a similar story unfolded, with the legislature eventually meeting the Constitutional Court's two year deadline, set in 2017, by amending the law on the final day.⁷⁰ By contrast, in Slovenia, the legislature acted within just over three months of the six month suspended declaration imposed by the Constitutional Court in its ruling of July 9, 2022 that the existing statutory ban was unconstitutional.⁷¹

Finally, as a "jurisprudential thesis," the Mexican Supreme Court's ruling in June 2015 that state bans on same-sex marriage violate the constitutional rights to equality and against discrimination contained in Articles 1 and 4, did not empower it to invalidate such laws, but nonetheless required state compliance. By the end of 2021, all 32 Mexican states had legalized same-sex marriage, almost all by legislative change.⁷²

In twenty-one countries, the political branches have acted alone to pass legislation recognizing same-sex marriages, without the "help" of any directly relevant court decisions influencing the issue.⁷³ These include the UK (2013), New Zealand (2013), Germany (2017), and most recently Greece (2024). In France, the legislature did the same in 2013, *despite* a 2011

⁶⁹ Min. of Home Affairs v Fourie [2005] ZACC 19.

⁷⁰ See "Same-Sex Marriage Legalization by Country," *supra* note 61.

⁷¹ *Id.*

⁷² *Id.*

⁷³ The closest, indirectly relevant case in New Zealand was Quilter v. Attorney-General [1998] 1 NZLR 523 (CA)(changing the existing law on same-sex marriage not within court's interpretive power/duty under section 6 of the Bill of Rights Act 1990, but was a matter for the legislature to address if it saw fit).

Constitutional Council decision that the existing statutory ban was constitutional and the matter up to the National Assembly.⁷⁴ Ditto in Chile in 2022, where a 2011 Constitutional Court ruling had upheld the existing legislative ban. By contrast, in Italy a similar 2010 Constitutional Court decision has not yet resulted in any change in the law.

Finally, four countries have legalized same-sex marriage as a result of favorable popular referendums. To the surprise of many given its continuing stance on abortion at the time⁷⁵ and the role of the Catholic Church, in May 2015 Irish citizens voted by 62% to 38% in a popular referendum following the recommendation of the constitutional convention to amend the country's constitution to permit same-sex marriage. Australia (2017), Cuba (2022), and Switzerland (2021) amended their marriage legislation after popular referenda had approved the change.⁷⁶

What, if anything, do these interesting and important recent developments tell us about judicial supremacy? How do they illustrate or exemplify the different senses of the term discussed above? First, *Obergefell* is a fairly straightforward, if vivid, example of judicial decisional supremacy. The Supreme Court's five-four decision amounts to a legally authoritative resolution of a highly contested -- and litigated -- rights issue. The view of a bare majority of its members prevails over, has higher legal status than, the conflicting constitutional view of the defending states, which have no legal mechanism of response. Moreover, it is not only the particular state bans on same-sex marriage at issue in the case that are disappplied, but henceforth, under the doctrine of precedent, any state or federal entity that enacts or enforces a similar ban -- perhaps because it disagrees with the Supreme Court's interpretation of the Constitution -- may

⁷⁴ “French gay marriage ban upheld by constitutional court,” BBC, January 28, 2011, available at: <https://www.bbc.com/news/world-europe-12305858>

⁷⁵ The country’s position on abortion has also subsequently changed, in 2018, through the same mechanism of popular approval of a constitutional amendment.

⁷⁶ See sources in *supra* note 61.

be sued by a party with standing and the ban will eventually be invalidated on the authority of *Obergefell*. Of course, the Supreme Court may overrule its decision in a subsequent case, but as the only actor that can do so (within the existing constitution), this is part of its supremacy. A federal constitutional amendment to reinstate bans is a remote political possibility.

Whether or not, under the first sense of judicial supremacy, the *Obergefell* court's interpretation of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the constitution *also* legally binds such state and federal entities in the first place as the supreme law of the land is, as usual, a matter of dispute. Following *Obergefell*, a court clerk in Kentucky, one of the states with bans on same-sex marriage that was a party to the litigation, refused to issue marriage licenses to same-sex couples on religious grounds. She was ordered by a federal district judge to do so on the direct authority of *Obergefell*. Certain state officials in non-party states, including the chief justice of the Alabama state supreme court, denied that they or their states were bound by the Supreme Court's decision and asserted their interpretive freedom. Nothing in the actual majority opinion in *Obergefell* would appear to qualify as an instance of attitudinal supremacy, although all four of the dissenting opinions engage in rhetorical overdrive in an attempt to portray it as the very epitome of judicial overreach and usurpation of the democratic decision-making power of the sovereign people.

Finally, *Obergefell* seems like a reasonable exhibit for the proposition that, as an empirical matter, courts have significant political power to bring about constitutional change and impose their will on recalcitrant actors, although, as ever, such a conclusion depends on how high the bar is set in terms of degree and evidence of "genuine conflict" with other actors and institutions. It also partly depends on whether one views the decision as imposing the Court's will on the nation or the nation's will on the "holdout" states. So although momentum and public

opinion on this issue had clearly shifted a great deal (in significant part due to lower federal court decisions, which were responsible for legalization of same-sex marriage in 26 of the 37 states prior to *Obergefell*), and the Obama administration eventually made its support for same-sex marriage clear, majorities in several states, including those subject to the decision in *Obergefell*, appeared to prefer to maintain their bans, and (assuming, probably counterfactually, that this would be within the authority of Congress) a federal law permitting same-sex marriage, along the lines of those in Canada, the UK and New Zealand, would be a non-starter given current Republican control of the House of Representatives.

Second, where it exists, the choice by courts to employ the remedy of the suspended, rather than immediate, declaration of invalidity is certainly more respectful of legislatures and bespeaks the sort of collaborative or "dialogic" approach to constitutional issues that is directly contrary to a judicial supremacist one in the Waldronian sense. But it does not detract from decisional supremacy because, even where a court decides to use this remedy, the legislature is provided with the "Hobson's choice" of legislate on our terms or else we invalidate or modify the existing law. It does not have the legal power to resist or disagree, perhaps just the ability to test the outer margins of obedience in the resulting statute. In terms of *political* supremacy, however, use of the suspended declaration remedy may reveal differing power relations. For example, the opposite outcomes in South Africa and Taiwan on the one hand, and Colombia, Costa Rica, and Austria on the other, perhaps suggest differences between the positions of the courts in these countries. All the indications are that the South African and Taiwanese governments and parliaments were not particularly enthused about enacting a same-sex marriage statute and would not have done so otherwise,⁷⁷ but felt unable or unwilling to defy their courts. So this seems like

⁷⁷ As evidenced, for example, by the initial attempt to limit legalization to civil partnerships and the subsequent appointment by the government of a gay rights skeptic, Mogoeng Mogoeng, as the new chief justice.

an "imposition" of its will on the elected branches. By contrast, legislatures in Colombia, Costa Rica, and Austria were able to "defy" the courts in the limited sense that no legislation has been enacted to date. It obviously requires a more fine grained analysis that is beyond the scope of this chapter in order to support any firmer conclusions, and the different legal contexts may have played some role in that Colombia's civil law heritage might explain its Constitutional Court's seemingly greater reluctance to change the marriage rule by judicial decision, at least initially in 2011.⁷⁸ Nonetheless, the examples are suggestive of greater political power of the courts in South Africa and Taiwan. Accordingly, the main difference between "court alone" versus "court and legislature" resolutions may be in attitudinal and political, rather than interpretive and decisional, supremacy.

Third, where the political branches act alone, this can be thought of as a case of coordinate interpretation in that the legislature is saying what the law is and what rights exist. In terms of decisional and political supremacy, it is perhaps not purely coincidental that legislatures acted alone in the United Kingdom and New Zealand, without being "prodded" into action by court decisions. This is emphatically not to say that in "weak-form" judicial review jurisdictions, courts never use their powers of constitutional review either to modify the law through statutory interpretation or to create pressure on legislatures to amend statutes declared incompatible with the constitution/bill of rights,⁷⁹ but it is to underscore that a major aim of such review is to leave greater leeway for legislatures in the resolution of important constitutional issues, as here. Similarly, it would perhaps be surprising if the different institutional mechanisms of resolution in these two countries as compared with the United States and Brazil -- legislatures alone versus courts alone -- did not reflect and express differences in their relative political power. To the

⁷⁸ The Colombian court was also less definitive than the others on what it would do in the event of noncompliance.

⁷⁹ These are the two main judicial powers under the New Zealand and UK versions of "weak-form review."

extent they illustrate a general systemic view that not all important and divisive rights issues are to be determined by the courts, they are evidence against judicial political supremacy.

Fourth, public referenda to amend a constitution, as in Ireland, are a form of popular constitutionalism that, like more conventional modes of constitutional amendment by elected representatives, may undermine or negate claims of interpretive, decisional or political supremacy, at least where relatively easily and regularly used. Thus, although again there are analytical, normative and practical differences between the power to authoritatively interpret an existing constitution and the power to formally amend it, in practice a court is not the ultimate or final interpreter of a constitution that can relatively easily be amended if a judicial interpretation meets with significant/sufficient opposition. Compare here the situation under the California constitution, where a popular initiative (Proposition 8) overruled a decision of the California Supreme Court declaring a ban on same sex marriage in violation of the state constitution, with that under the federal constitution. *Obergefell* had the effect through the doctrine of precedent of definitively overturning Proposition 8, and a constitutional amendment to permit such a ban is a political non-starter. Similarly, with respect to a particular law under decisional supremacy: although in Ireland the referendum did not overrule a judicial decision on the issue, if in practice a constitutional amendment reinstating a law invalidated or disapproved by the courts is a realistic possibility, then judicial review is not as "strong" or "supreme" as when it is not. Finally, as an act of direct popular sovereignty, the availability of such referenda (or their equivalents) may call into question the political power of the courts to impose their will on other actors more than in systems where this channel does not exist or is rarely used.

4. Is judicial supremacy a useful or essential concept?

The concepts of constitutional and federal supremacy are undoubtedly useful, and perhaps essential, ones in that they answer important practical questions that arise in any legal system with either/both a body of constitutional norms and a federal structure. Which type of law -- constitutional or statutory, federal or state -- prevails or has higher normative authority where they conflict? The concept of legislative supremacy, despite its multiple meanings discussed above, is also a useful one in its best-known version in that it describes or captures the practical situation in a legal system that rejects constitutional supremacy: namely, statutes are the highest form of law known to it. What about judicial supremacy? Do any of its four meanings have similar clear and distinctive utility in marking out a position with important practical -- or normative or analytical -- consequences? Is it an essential legal or political concept in this sense? Would we lose much by decommissioning it?

Let us approach this question by looking at each sense in turn and playing devil's advocate by presenting a robust critique of its utility. So, starting with the first, what is at stake in the debate between judicial interpretive supremacy and departmentalism, between whether or not the highest court's interpretation of the constitution legally binds non-judicial officials who are not parties to the case in which it is made? Two situations where the answer clearly appears to be "nothing" come to mind. First, where there is no actual or likely future judicial opinion on a constitutional issue -- for example, the War Powers Resolution of 1973, or many other separation of powers issues in the United States -- then departmentalism is the only horse in the race and the issue will be resolved (or not) politically. Judicial supremacy in this sense is about the legal authority of a judicial interpretation, and so does not come into play if there isn't one. Second, where a political institution independently believes its constitutional powers are less

than a court's interpretation of them provides, both judicial supremacy and departmentalism would presumably permit the institution to act on its belief and not exercise what the court has determined are its full powers, at least where they are not understood to impose affirmative duties.

Turning to situations where there is greater likelihood of practical implications, let us begin with (state/provincial or federal) legislatures. Are they legally free to enact or reenact a statute that conflicts with the supreme court's previously declared interpretation, assuming they were not parties to that earlier case? At least in legal systems that treat the previous constitutional interpretation as a binding precedent *de jure* or *de facto*, such a statute will not be enforced by any other court on the authority of that interpretation, so that the practical difference between whether or not the legislatures themselves are bound -- between judicial supremacy and departmentalism -- seems to amount only to that between not legislating in the first place and having a court disapply the legislation, possibly by interim stay, as a result of a lawsuit.

So, for example, in 2016 North Carolina enacted a statute prohibiting state and municipal entities from providing legal protection against sexual orientation discrimination that appears to be more or less identical in content to the Colorado constitutional amendment struck down by the U.S. Supreme Court in *Romer v. Evans*⁸⁰ in 1996. If we stipulate such identity for current purposes, on the judicial supremacy view, it seems to follow that both the state legislators who voted for the bill and the governor who signed it into law are bound by *Romer* and so have violated the supreme law of the land and their oaths of office. On the departmentalist view, assuming it extends to state officials, they are not bound but are free to act as they did on the basis of their independent interpretation, until such time if any in which a court enjoins

⁸⁰ 517 U.S. 620 (1996). Although there is a difference in legal form between the two laws -- a state constitutional amendment versus a statute -- the Supreme Court's decision in *Romer* did not rely on the constitutionalization of Amendment 2 in making either its rare literal violation of equal protection/stranger to the law or animus arguments.

enforcement of the statute on the authority of *Romer*. If departmentalism does not so extend, imagine a federal statute state with this content instead.⁸¹ To be sure, there *are* practical differences between these two positions, in terms of time, resources, loss suffered by those initially subjected to the new law, who has standing or the incentive to sue, etc., but they do not seem to be that significant. Moreover, even on the judicial supremacy view, if the second statute reaches the highest court, the latter may overrule its previous interpretation.

With respect to executive officials, the practical situations in which the debate between judicial interpretive supremacy and its opponents is engaged seem to be the following.

(1) Within a federal system, are executive officials of state A bound by the interpretation of the constitution given by the highest court in a case involving the constitutionality of a law of state B (the *Cooper v. Aaron* and resistance to *Obergefell* situations)? (2) Is the (national) chief executive legally bound to enforce the court's interpretation against state B, absent a court order to do so (roughly the situation facing President Eisenhower in deciding whether to send federal troops to Little Rock, Arkansas)? Or is he/she legally free to disagree with the court's interpretation and choose not to enforce it in the present case? In the United States, would this violate the President's duty to faithfully execute the laws or oath to support the Constitution? (3) May the chief executive decline in the future to enforce a law that the highest court has held valid on the basis of her independent interpretation of the constitution as prohibiting the law? Would this violate the same duties or fall within prosecutorial discretion? (4) May the chief executive prosecute individuals under a law that the highest court's interpretation of the constitution finds unconstitutional but that the chief executive's independent interpretation finds

⁸¹ Or take the different example of the Texas flag burning statute struck down by the Supreme Court in *Texas v. Johnson*, 491 U.S. 397 (1989), followed by an essentially identical federal statute enacted immediately afterwards.

valid? Finally, (5) may the chief executive call for or otherwise seek the judicial overruling of a highest court interpretation with which he/she disagrees?

Given the doctrine or practice of following precedent, only situations (2), (3) and (5) appear to be questions with potentially significant practical consequences turning on their answers. By contrast, both (1) and (4) are similar to the situation involving legislatures, just discussed: the practical difference given that a lower court will apply the highest court's interpretation in a subsequent case do not seem significant. But even in situation (5), it seems unlikely that judicial supremacy in this sense entails preventing a chief executive from arguing for a change in the *judicial* interpretation of the constitution, or making judicial appointments with this end in view, as long as s/he otherwise acts consistently with it. So in sum, the only situations in which judicial interpretive supremacy (and the debate with its opponents) appears to have significant practical implications -- (2) and (3), which themselves really raise the same issue, in present and future cases -- are sufficiently rare to cast doubt on its general utility.⁸² The claim and the debate seem to boil down to far less than initially appeared.

By contrast, in the Waldronian sense of the term, the main challenge to its utility is less the practical issue of what is at stake -- the use of living constitutionalism, whether courts take a "programmatic" or a case-by-case approach to their judicial review powers -- than duplication. Is this meaning and use of judicial supremacy necessary or essential, given fairly-well established neighboring terms that arguably cover the same type of judicial conduct? Is the aggressive, proprietary, disdainful, superior, "infallible" mode or style of exercising the power of

⁸² Even President Thomas Jefferson, one of the great "departmentalists" in history, did not decline to enforce the Alien and Sedition Acts which, unlike the Supreme Court, he thought to be unconstitutional. Rather, in pardoning those convicted under the Act, he exercised an independent presidential power that may be exercised for any reason. Similarly, with respect to the Deferred Action on Childhood Arrivals (DACA) program, neither Presidents Obama nor Trump declined to enforce a congressional statute that the courts had upheld but they believed to be unconstitutional. In creating DACA, Obama claimed to be acting within his executive prosecutorial discretion, and in ending it, Trump claimed that the program (not the underlying statute) was unconstitutional as beyond presidential power. There has been no judicial decision upholding the constitutionality of DACA.

judicial review at least as well captured by such terms as "judicial activism," "overreach," "imperialism," or "policymaking," as "supremacy"? Does the latter encompass something importantly distinct and missing from the others, especially given the potential confusion resulting from its several other, more commonly used, senses? Is adding a negatively-inflected normative use of the term to more neutral, descriptive or analytical legal and empirical ones helpful?

Turning to the third sense, as a constitutional design issue, does the distinction between judicial review with and without judicial decisional supremacy reflect a real, or enough of a, difference, especially in practice?⁸³ Does it create a false or misleading binary? If (1) constitutional courts may and do exercise their strong-form powers in weaker, more minimalist or deferential ways and (2) weak-form courts may and do have similar impact as strong-form ones because legislatures rarely, if ever, exercise their power of "the last word,"⁸⁴ then is not the utility of this conception of judicial supremacy fatally undermined? With respect to (1), the answer is not really. First, as we have seen, where courts choose to use more "dialogic" remedies, such as the suspended declaration of invalidity, over "stronger" ones that they possess, this does not amount to weak-form judicial review in the specific sense used, as legislatures are not empowered to resolve the fate of the law at issue; at most, they merely have some limited discretion in how to implement the judicial decision.⁸⁵ Second, choosing to defer to another's judgment in a certain case or set of circumstances is quite different from being required to, from not having -- or that other possessing -- the power of decision. Finally, the fact that for reasons

⁸³ Or strong-form/weak-form, dialogic/nondialogic review, and penultimate/ultimate judicial review, to list other labels that have been used for this distinction.

⁸⁴ Here I am very briefly summarizing Aileen Kavanagh, *supra* note 26. For my response, also very briefly summarized here, see Stephen Gardbaum, *What's So Weak About "Weak-Form Review"? A Reply to Aileen Kavanagh*, 13 INT'L J. CON. L. 1040 (2015).

⁸⁵ For an argument that suspended declarations actually increase rather than reduce judicial power over the legislature, see Robert Leckey, *The Harms of Remedial Discretion*, 14 INT'L J. CONST. L. 584 (2016).

of legal/political culture and context discussed in Part 1(d) above, certain individual constitutional courts might more or less permanently abstain from using their judicial review powers in an independent or reasonably robust way does not challenge the *general* usefulness of the distinction.

With respect to (2), however, if this does generally turn out to be the case, then the experiment of trying to carve out some intermediate ground -- of institutionalizing judicial review without judicial decisional supremacy -- will have been a failure in practice. But, as the comparison between the UK/New Zealand and Canada/South Africa on prisoners' voting rights discussed above suggests, it is too soon to reach a definitive verdict on this issue. And counterfactually, if countries like the United States and Germany were to switch to this model, is it likely that this would make no difference in practice? Would we not expect certain highly controversial and divisive court judgments made in the institutional context of judicial decisional supremacy to be candidates for employment of the legislative power of authoritative decision, if one existed? Accordingly, the practical utility of this conception of judicial supremacy as part of what differentiates two constitutional design options for institutionalizing judicial review (ultimate/penultimate, or strong-form/weak-form) and three models of distributing relative legal powers between legislatures and courts (judicial decisional supremacy, this new model, and traditional legislative supremacy) remains an open question. In the meantime, it forms the basis of an analytically and normatively interesting alternative involving a form of constitutional review with lesser judicial power.

It will be recalled that in isolating this ("formal") feature, the notion of weak-form review does not deny or overlook all the other legal, political, and cultural factors relevant to a more general assessment of the "strength" or "weakness" of particular courts and/or decisions. This is

a different issue and sense of the terms. Even with respect to this feature, however, formal allocations of power are of course never sufficient for understanding how any operates. But this does not mean they have no impact. From a constitutional design perspective, if you were opposed to judicial decisional supremacy, would you likely think that formal powers are formal *only*, ignore them, and place all your bets on the emergence of de facto legislative decisional supremacy, or vice-versa? At least until the contrary is shown, it seems reasonable to believe that both are outcome-influencing variables. Note that this same power/practice distinction might apply to the other types of "supremacy" within constitutional discourse. So, for example, where states are well-represented in a federal legislature, in practice it might be said that there is no federal supremacy as things that states oppose do not get enacted. Or because legislatures are heavily constrained by moral, political, and practical factors, legislative supremacy at the ground level looks little different from its alternatives. Does it follow that federal or legislative supremacy are illusory or useless concepts, reflect false binaries, or that the choice among various institutional allocations of power is practically irrelevant? Variation in practice among models -- whether constitutional versus legislative supremacy, presidentialism versus parliamentarism, or judicial decisional supremacy and its alternatives -- is to be expected and neither itself renders the model redundant nor negates its status qua model.

Finally, on judicial political supremacy, are the conditions on what counts as a genuine case of supremacy too onerous, so that they fail to include what might otherwise be thought of as useful instances of this phenomenon? So, for example, is the underlying conception of political power -- the ability of one actor to impose its political will on others -- the appropriate one for understanding judicial supremacy? Where politicians are happy, and prefer, to delegate divisive and contested constitutional issues to courts, why should this be understood to necessarily detract

from the judiciary's political power? Similarly, where political culture reflexively looks to and relies on courts to resolve such issues? Is the measurement of such power too difficult, too dependent on context or the vagaries of whether there is "genuine conflict" between branches, too varied from issue to issue and/or from time to time to make this a useful concept? Is it mostly limited to descriptions of individual or episodic exercises of judicial review (i.e., does it satisfy the additional requirements of judicial supremacy in particular cases⁸⁶) rather than more systemic characterizations of power relations in any polity?

On this latter point, by contrast, take for example the term "executive supremacy" to describe the approximate but quite general reality of political power and its concentration in many contemporary political regimes, democratic or otherwise. This is perhaps especially the case in parliamentary democracies with first-past-the-post voting rules and competitive two-party systems that tend to assure single party government and its control of and over the legislature. Here, the indicia of relative political power seem easier to measure and quantify. Moreover, where such Westminster-style systems are (still) combined with the absence of a codified, higher law constitution/bill of rights and/or judicial review, the meaning and utility of executive supremacy by contrast with that system's *formal or legal* doctrine of legislative supremacy, seem readily apparent. Similarly, the utility of the actual political power sense of "legislative supremacy" is evidenced by the contrasting descriptive accuracy of the regimes that modern executive supremacy has mostly displaced, such as the Third and Fourth French Republics or Great Britain for approximately the period between the Great Reform Act of 1832 and the First World War.

⁸⁶ See Lemieux & Lovell, *supra* note 37.

5. Conclusion

Judicial supremacy variously refers to the authoritativeness of interpretations of constitutional provisions by courts on the other branches of government and of judicial decisions on the continuing validity of challenged statutes, the attitude of courts and judges in exercising judicial review, and the political power of courts relative to the other branches on constitutional issues. Taking these four distinct senses in order, as a concept, although not always as a descriptive or normative matter, interpretive supremacy is uncontested but situations in which it identifies a significant practical issue are relatively rare. The term itself could also perhaps be replaced by "interpretive finality" (or exclusivity, a slightly different claim) without loss. Decisional supremacy identifies a common but, in principle, detachable feature of judicial review, which may provide conceptual and institutional space for a meaningful design alternative in practice. It is perhaps replaceable by "judicial ultimacy" (versus penultimacy). Attitudinal supremacy helpfully designates a way that courts sometimes choose to exercise their judicial review powers rather than their extent, although similar or neighboring terms do or could be made to cover much the same ground. Political supremacy is an analytically clear empirical concept but one that is hard to operationalize, and tends to point to more of an episodic than a general structural feature of a polity (unlike "executive" or "legislative" supremacy). It is also perhaps replaceable by "judicial sovereignty" on constitutional issues.

Overall, then, as carefully delimited by the four senses identified, judicial supremacy appears to be a useful, non-unitary concept in the toolbox of comparative constitutional law/theory. Unlike "constitutional," "federal," or "legislative" (in the highest type of law sense) supremacy, however, its absolutely essential status within the field perhaps depends on further evidence: of how distinctly judicial review without decisional supremacy works in practice. In

the meantime, to avoid the continuing risks of the term being used more as a slogan than a genuine analytical category, and to do derive the utility that can be had, it is critical (at a minimum) that the sense in which it is being used in any context be isolated and specified, perhaps by using one of the four relevant adjectives -- interpretive, attitudinal, decisional, or political -- suggested above.