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Introduction

The adoption of a system of "strong-form"[1] judicial review poses the perennial question of law's relationship to politics in a particularly stark form. Complex in its origins,[2] morally controversial,[3] and yet remarkably popular over the last thirty years,[4] the most striking feature of this institution is that it thrusts the judiciary into the center of politics while at the same time requiring judges to rationalize their decision-making processes in ways sufficiently different from politics to justify the powers given to them. Unless and until judicial review is disestablished, the judiciary may assert final decision-making power over aspects of public policy formerly reserved to the political branches. Political actors, in turn, may either embrace this move, cognizant of judicial review's legitimating potential, or push back against it, arguing that the judiciary has overreached its authority.

According to "dialogue theory"[5] and conceptualizations of judicial review as "separation-of-powers games,"[6] the back-and-forth interaction of judicial and political-branch interpretations of the constitution is an iterative policy-

[1] The precise meaning of this term is defined in Chapter 1.

[2] The two leading comparative studies of this issue are Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003) and Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2007).

[3] The leading, non-jurisdiction specific critique is Jeremy Waldron, "The Core of the Case against Judicial Review" (2006) 115 *Yale Law Journal* 1346.

[4] See Tom Ginsburg, "The Global Spread of Constitutional Review" in Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (eds.), *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008) 85.

[5] Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" (1997) 35 *Osgoode Hall Law Journal* 75.

[6] See Jeffrey A. Segal, "Separation-of-Powers Games in the Positive Theory of Courts and Congress" (1997) 91 *American Political Science Review* 28.

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making process: judicial decisions and legislative and executive responses to them are conversational gambits or strategic moves in which each branch of government tries to influence public policy in line with its prerogatives. These accounts are instructive as far as they go, but they focus on slice-in-time events rather than the slower-moving, sociological process that underlies them. Beneath the contest over the constitutionality of particular legislative provisions or executive acts there may be a long tradition in the society concerned of thinking about law's claim to authority and its relationship to political authority. It is this tradition to which legal and political actors appeal when justifying their actions. In older constitutional democracies, for example, there will usually be a well-developed tradition of thinking about the role of judges in checking the abuse of political power and securing the conditions for free democratic competition. In authoritarian societies, the traditions on which legal and political actors draw are different, but may be no less powerful or deep.[7] The real story of judicial review, on this view of things, is not the surface-level contestation between the judiciary and the political branches for control of aspects of public policy, but the constantly evolving complex of legitimating ideas through which legal and political actors make their respective claims to authority.

Each society, of course, has its own, idiosyncratic tradition of thinking about law and its relationship to politics. The adoption of a system of judicial review will both influence that tradition and be influenced by it – in the institutional form that it takes and the constitutional politics to which it gives rise. For comparative purposes, however, traditions of thinking about the law/politics relation may be conceptualized as varying according to the extent to which, on the one hand, law is thought of as being autonomous from politics and, on the other, legitimate political authority is thought to derive from a democratic mandate. Depending on the time that they have had to codetermine each other, these two aspects of a tradition, even when they are called on to justify divergent outcomes, may be mutually supporting. This may occur, for example, where judicial rights enforcement legitimates claims to political authority based on the authenticity of a democratic mandate. In situations like that, the judicial resolution of politically controversial questions need not undermine, and may in fact reinforce, settled understandings of the law/politics relation. In other circumstances, however, where unprecedented threats to national

[7] See, for example, Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (New York: Cambridge University Press, 2009); Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse, and Legitimacy in Singapore* (New York: Cambridge University Press, 2012); Mark Tushnet, "Authoritarian Constitutionalism" (2015) 100 *Cornell Law Review* 391.

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security, say, prompt democratic legislatures to limit individual rights to a greater extent than they have before, such settled understandings may unravel. In this scenario, the external development, perhaps aided by inherent tendencies in the existing tradition, may open the way to societal reconsideration of law's claim to authority and its relationship to political authority.

The primary aim of this book is to develop a typological theory of this phenomenon that may be used in the comparative study of *judicial review regimes* ("JR regimes") – clusters of legitimating ideas about the law/politics relation in societies that have adopted a system of judicial review. At a conceptual level, the theory claims, the historical development of judicial review in such societies may be understood as a process of consolidation, transformation, and incremental development of their JR regimes. While such regimes are infinitely various, in practice they tend to conform to one of four main ideal types: democratic legalism, authoritarian legalism, authoritarian instrumentalism, and democratic instrumentalism.

The first type denotes a situation in which a constitutional culture that is committed to the ideal of law's autonomy from politics coexists with a well-functioning democratic system. In this style of regime, judicial review is conceived as the politically impartial enforcement of the constitution's prescriptions for democratic government. The second ideal type, authoritarian legalism, denotes a situation in which a commitment to the autonomy of law from politics has become distorted in the sense that it functions to separate social life into spheres where law rules and spheres where politics rules. The stability of this kind of JR regime comes from the residual legitimating role that law continues to play in those circumstances coupled with a political authority claim that justifies the repression of democratic rights by reference to some or other overarching goal that the power holder claims to be pursuing. Authoritarian instrumentalism, the third ideal type, denotes a situation in which law acts as a mere instrument of politics, and where law and politics are thus not separate social systems in any real sense. Here, stability is a function of the success of a sustained, state-sanctioned ideological presentation of law as necessarily subordinate to the pursuit of important societal goals. Finally, democratic instrumentalism describes a situation in which law's claim to authority is premised, not on the alleged impartiality of judicial reasoning techniques, but on judicial review's capacity to serve as a vehicle for competing, ideologically motivated conceptions of constitutional justice. In JR regimes that approximate this ideal type, the political system has either for some

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reason adjusted to tolerate this more politicized kind of legal authority claim or is unable to resist it.

The fact that actually existing JR regimes tend to approximate these ideal types makes it possible to compare the historical evolution of conceptions of the law/politics relation in different societies and to look for recurrent patterns. In some societies, for example, the process of JR-regime consolidation is driven by increasing returns as contingently chosen conceptions of the law/politics relation are politically accepted and legitimated. JR-regime transformation, too, exhibits certain patterned qualities that may be expressed in the form of an underlying causal mechanism. Understanding these processes and the politico-legal dynamics of each JR-regime type provides an empirical basis for normatively assessing them. Insights into the conditions for JR-regime change may also assist judges, legal practitioners, and democratic activists to influence the practice of judicial review in the society in which they find themselves.

In presenting this typological theory, the secondary aim of this study is to contribute to the burgeoning, but still a little uncertain-of-itself, field of "comparative constitutional studies" aka "comparative constitutional law" or "comparative judicial politics."[8] The absence of an agreed name for the field betrays its participants' ongoing and perhaps futile search for a uniform identity. It is that line of scholarly research, at any rate, which is devoted to describing, explaining, and normatively assessing the "global expansion of judicial power"[9] – the tremendous growth in both the coverage and the influence of judicially enforced constitutionalism in the wake of the end of the Cold War. The constitutional democracies that were established in the first decade after that momentous event have lost their youthful allure and are now entering a different phase of their institutional life, some strengthening and others showing signs of weakness. In Hungary, for example, the 1949 Constitution – as amended in 1989 to provide for judicial review – was replaced in 2011 and again amended in 2013 in ways that curtail the Constitutional Court's powers.[10] In Colombia, by contrast, the

[8] The term "comparative constitutional studies" was coined by Ran Hirschl in his book, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014). See Chapter 1 for a discussion of the suitability of this term and for this study's understanding of the field.

[9] C. Neal Tate and Torbjörn Vallinder (eds.), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

[10] See Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele, "Hungary's Illiberal Turn: Disabling the Constitution" (2012) 23 *Journal of Democracy* 138; András Jakab and Pál Sonnevend, "Continuity with Deficiencies: The New Basic Law of Hungary" (2013) 9 *European Constitutional Law Review* 102; Bojan Bugarič, "A Crisis of Constitutional

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Constitutional Court's forcefulness and popularity appear to have no limits, with each year bringing another raft of decisions that test conventional wisdom about the role of constitutional courts in national politics.[11] These and other similar developments present new opportunities for research and reflection. If the initial phase of comparative scholarship was directed at the causes of the judicialization of politics, the time is now ripe to consider the long-term effects and evolutionary dynamics of this phenomenon.

The most obvious of these effects is the contribution that judicial review is making to the quality of democracy in the countries concerned. That was, after all, the promise of the new constitutionalism – that far from detracting from democracy, judicial review would help to enhance and consolidate it. Contrasting opinions on this question are already emerging, with Samuel Issacharoff's somewhat optimistic account competing with Tom Daly's call for caution.[12] This conversation is just beginning and more scholars are sure to enter the debate. Beneath the complex question of constitutional courts' role in democracy building, however, lies an even deeper question about the process of ideational development that the adoption of a system of judicial review sets in motion – not just in democratic societies, but in authoritarian ones as well. In the end, if we are to understand the full potential and moral worth of this institution, we need to understand its impact on conceptions of the law/politics relation in the societies in which judicial review has been introduced.

Clearly, for judicial review to be established at all, there has to be some political rationale for it, whether that be the provision of "insurance" to reluctant democratizers,[13] the preservation by legal, political, and judicial elites of their "hegemony,"[14] or something as seemingly mundane as getting a federal constitutional system off the ground.[15] Whatever the rationale, however, judicial review becomes significant only to the extent that it acts as an effective counterweight to, and source of legitimacy for, claims to political authority. The battleground on which this drama is played out is essentially an ideological one – a clash of ideas in which competing conceptions of the law/

Democracy in Post-Communist Europe: 'Lands in-between' Democracy and Authoritarianism" (2015) 13 *International Journal of Constitutional Law* 219.

[11] See Manuel José Cepeda Espinosa and David Landau (eds.), *Colombian Constitutional Law: Leading Cases* (New York: Oxford University Press, 2017).

[12] Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (New York: Cambridge University Press, 2015); Tom Daly, *The Alchemists: Questioning our Faith in Courts as Democracy-Builders* (Cambridge: Cambridge University Press, 2017).

[13] See Ginsburg, *Judicial Review in New Democracies*.

[14] See Hirschl, *Towards Juristocracy*.

[15] This is true of the 1900 Australian Constitution, for example, as discussed in Chapter 3.

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politics relation are invoked and continually revised. To the extent that judicial review has real consequences – for the protection of individual freedom and the distribution of material resources – its effectiveness as an institution depends on the extent to which, and the manner in which, the judiciary's power to strike down legislative and executive conduct is accepted, institutionalized, and made real in the national political life of the country concerned. That, at root, is a question of constitutional culture – of the way in which the formal promise of law's social-systemic distinctiveness from politics is embedded in societal conceptions of the law/politics relation.

Researching this issue calls for a different combination of approaches to the ones that have thus far been deployed in comparative constitutional studies (to use, for the moment, the most capacious term for the field). On the one hand, the evolution of societal conceptions of the law/politics relation is something that is amenable to the historical case study method in comparative politics.[16] On the other, the process through which law in certain circumstances establishes its autonomy from politics is something with which sociologists of law have long been preoccupied.[17] The changing nature of law's claim to authority, for its part, is a question of the presentational style of judicial decisions and other public documents, for which the techniques of close textual analysis developed by legal academics are best suited. Finally, the normative dimension of the question requires sensitivity both to the way in which concepts like "authority" and "legitimacy" are understood in legal and political theory and to the more specific literature around the moral justification for judicial review. Blending all these approaches together is no simple task, but it is made easier by using a typological theory that allows, first, for rigorous definition of the core concepts and, second, for comparative exploration of a complex sociological process in which there are multiple lines of causation that cannot be reduced to a simple set of independent and dependent variables.

The first motivation for writing this book, then, is to extend the field of comparative constitutional studies into an area where it has yet to go – to provide a theoretical framework within which the historical development of competing ideas about the purpose and moral legitimacy of judicial review in different societies may be compared. While there are several studies of the evolution of judicial review in this sense in older constitutional democracies –

[16] See Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA: MIT Press, 2005).
[17] See the discussion of the literature in Chapter 2, Section 2.1.

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like the US,[18] Germany,[19] and India[20] – the field at present lacks a conceptual vocabulary and framework for considering the general nature of this phenomenon.

The second motivation is to correct some of the American bias in the field. As will be stressed over the course of this study, there are numerous ways in which the relationship between law and politics is understood in different constitutional cultures. To date, however, much of the field has been premised on the unconscious scientization of the specifically American conception of this relationship. That has had a profoundly distorting effect on the field that is in urgent need of remedying. Indeed, it will be one of the main contentions of this study that comparative work on judicial review, if it is to be at all persuasive, must take questions of constitutional culture into account. This is an old insight from comparative law, but one that appears to have been lost in the search for generalizable theories of judicial behavior.

The third motivation for this study is a desire to reconnect legal-academic research on constitutionalism and judicial review to perspectives from comparative law and legal sociology. As the broader field of comparative constitutional studies has developed, academic lawyers have been sucked into a conversation with political scientists that has seen them abandon, or fail even to take up, many of the intellectual resources available to them in these older and arguably more appropriate disciplines. Comparative constitutional lawyers thus tend to be national constitutional scholars in the first instance, who began to work comparatively as judicial review spread and threw up recurrent problems of doctrinal interpretation, moral justification, and constitutional design. They are not, with rare exceptions,[21] comparative lawyers who happen to have chosen to specialize in comparative *constitutional* law. This has had an impact on how comparative constitutional law is conducted and on the kinds of interdisciplinary conversations that have developed. Driven by the need to respond to political scientists, comparative constitutional

[18] See, for example, Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992).

[19] Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford: Oxford University Press, 2015).

[20] Manoj Mate, "Public Interest Litigation and the Transformation of the Supreme Court of India" in Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (eds.), *Consequential Courts: Judicial Roles in Global Perspective* (New York: Cambridge University Press, 2013) 262.

[21] See, for example, Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge: Cambridge University Press, 2013).

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lawyers have mostly lost contact with comparative law and legal sociology.[22]

The latter discipline, in particular, has several qualities that could be of assistance. One is its openness to understanding law as a motivating ideal and a constitutive influence on judicial decision-making.[23] Another quality is its long-established tradition of operationalizing law as a comparative variable – whether that be law in the form of legal culture or law in the form of traditions of legal reasoning.[24] While there are some concerns in the sociological literature about the extent to which the concept of legal culture may be deployed comparatively,[25] these concerns are addressed by the typological approach used here. When the focus falls on competing conceptions of the law/politics relation, what matters is the extent to which the constitutional culture concerned remains committed to the ideal of law's autonomy from politics. Fine-grained variations in the strength of this ideal, of course, are not measurable in any practical way. But much sociological work on law uses a broad distinction between, on the one hand, legal cultures in which the ideal of law's autonomy from politics is hegemonic and, on the other, legal cultures where this ideal has either never had much purchase or has significantly declined in strength.[26] For the typological approach pursued in this study, that simple distinction suffices.

The turn to sociology, it is hoped, may help to correct the current obsession in the field with the direct causal influence of politics on judicial decision-making. This emphasis is essentially a hangover from the American debate

[22] See Stephen Gardbaum, "How Do We and Should We Compare Constitutional Law" in Samantha Besson, Lukas Heckendorn, and Samuel Jube (eds.), *Comparing Comparative Law* (Geneva: Schulthess, 2017).

[23] As discussed in Chapter 1, the historical institutionalist school in political science is also open to this understanding, as indeed was one of the leading legal realists, Karl Llewellyn. (See particularly Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston, MA: Little Brown, 1960).) In the nature of things, however, historical institutionalism has been difficult to deploy comparatively, and thus has not exerted a great deal of influence on comparative constitutional studies to date.

[24] See Martin Krygier, "Law as Tradition" (1986) 5 *Law and Philosophy* 237.

[25] See Roger Cotterrell, "The Concept of Legal Culture" in David Nelken (ed.), *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997) 13; David Nelken, "Using the Concept of Legal Culture" (2004) 29 *Australian Journal of Legal Philosophy* 1; David Nelken, "Comparative Legal Research and Legal Culture: Facts, Approaches, and Values" (2016) 12 *Annual Review of Law and Social Science* 45.

[26] See, for example, Max Weber, *Economy and Society*, ed. Günther Roth and Claus Wittich (New York: Bedminister Press, 1968); C. Roberto Mangabeira Unger, *Law in Modern Society* (New York: Free Press, 1976) 52–3; Phillippe Nonet and Philip Selznick, *Toward Responsive Law: Law & Society in Transition* (New Brunswick, NJ: Transaction Publishers, 2001 [1978]); Niklas Luhmann, *Law as a Social System* trans. K. A. Ziegert (2004) 112.

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about the determinacy of law, which may be traced all the way back to the legal realist critique of formalist modes of legal reasoning in the 1920s and 1930s. While important, and used in this study in a self-consciously disruptive way,[27] that historical episode is what lies behind the constitutional-cultural bias in the field alluded to earlier. US political scientists and comparative lawyers, socialized as they are in a postrealist conception of the law/politics relation, have constructed the field of comparative constitutional studies on those foundations, seldom interrogating the extent to which their constitutional-cultural assumptions affect the research questions they are asking. In consequence, much research in comparative constitutional studies either leeches out relevant constitutional-cultural differences, or strains to fit complex social processes under general covering laws, in the process flattening out, homogenizing, and draining those processes of color.[28]

A similar criticism may be made of the contribution of legal and political theory to the field. One might mention here particularly Jeremy Waldron's presentation of the "Core of the Case against Judicial Review." In that highly influential paper, Waldron expresses a desire to "identify a core argument against judicial review that is independent of both its historical manifestations and questions about its particular effects."[29] No enterprise could be more destined to fail from a sociological perspective, according to which everything hinges on how judicial review is instantiated in practice and what social processes it actually triggers. In any case, Waldron's project fails on its own terms because the assumptions that he says must hold if his normative argument is to apply are assumptions that depend on assessments that are no less sociologically complex than the ones he wants to avoid.[30] Even where one's interests are principally normative, there is no way of escaping the need to assess judicial review in all its empirical complexity.

[27] See Chapter 2.

[28] Again, rare exceptions are Javier A. Couso, Alexandra Huneeus, and Rachel Sieder (eds.), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press, 2010) and Hailbronner, *Traditions and Transformations*.

[29] See Jeremy Waldron, "The Core of the Case against Judicial Review" (2006) 115 *Yale Law Journal* 1346, 1351.

[30] Waldron's assumptions include, for example, the assumption that democratic institutions should be in reasonably good working order (ibid 1360). For a full critique of the way in which Waldron's assumptions undermine his argument, see Theunis Roux, "In Defence of Empirical Entanglement: The Methodological Flaw in Waldron's Case against Judicial Review" in Ron Levy and Graeme Orr (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press, 2018) 203. Chapter 7 develops this critique of Waldron's argument.

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In short, this study is theoretically informed, empirically grounded, and normatively inflected. It takes as its main concern the evolutionary dynamics of JR regimes, understood as complexes of legitimating ideas about the law/politics relation in societies that have adopted a system of judicial review. The aim is to investigate: first, whether this abstract concept provides a useful lens through which to examine the historical development of judicial review in different societies; second, to examine whether there are any systematic patterns in the way JR regimes change character over time; and, third, to assess the strengths and weaknesses of the different types of JR regimes from the standpoint of a commitment to liberal democracy. Those three topics may be expressed in the form of the following research questions: What drives the development of JR regimes and what different forms do they take? Do JR regimes, once stabilized, ever change their fundamental character? If so, what causes that to happen – their internal developmental logic or exogenous factors? Are some types of JR regime more normatively attractive than others? And, finally, what are the practical implications of the answers to these questions for judges, legal practitioners, democracy activists, and others engaging with the practice of judicial review?

Chapter 1 starts by assessing the current state of comparative constitutional law/comparative judicial politics, both with a view to situating this study in this line of research and to flesh out some of the observations made in this overview about its limitations. The chapter first defines the institutional scope of this study and what its main aims and objectives are. It then explains how comparative research on constitutionalism and judicial review has come to be formed around a pair of mutually reinforcing blind spots: political scientists' relative inattention to the ideational dimension of judicial review and academic lawyers' lack of interest in general theorizing. The chapter ends by explaining the methodology to be followed and the choice of case studies.

Chapter 2 presents the typological theory of JR-regime change that grounds the entire study. The adoption of a system of judicial review, the theory goes, sets in train a dynamic, interactive process in which legal and political actors lay claim to distinct forms of authority. The interaction of these claims is structured by competing understandings of law's legitimate claim to authority and its relationship to political authority. The process is dynamic in so far as societal understandings of the law/politics relation, even as they are called upon to justify particular outcomes, are constantly evolving. Three such evolutionary processes are identified: the *consolidation* of a JR regime, which describes the emergence of a relatively stable, dominant societal understanding of the law/politics relation; the *transformation* of a JR regime, which describes a situation where one dominant societal understanding of the law/

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politics relation transitions to another; and *incremental change* to a JR regime, which refers to any observable change in societal understandings of the law/politics relation short of wholesale transformation.

Chapters 3–5 develop this theory through in-depth case studies of the evolution of societal conceptions of the law/politics relation in Australia, India, and Zimbabwe. Each case study both uses the theory as a heuristic device and refines it, in this way creating a dialogue between the theory and the local literature on judicial review in the country concerned.

A detailed explanation for the choice of case studies is given in Chapter 1. In essence, the drivers were the need to find a relatively small number of societies whose JR regimes could be used to illustrate the four ideal-typical JR regimes and the processes of consolidation, transformation, and within-regime incremental change. The fact that these three societies evince very different histories of JR-regime change, notwithstanding their shared status as former British colonies with legal systems based on the common law, at the same time helps to eliminate those two background factors as explanatory variables. By demonstrating in the detailed case studies that the historical development of judicial review in Australia, India, and Zimbabwe may be represented in terms of the evolution of their respective JR regimes, Chapters 3–5 show that the typological theory has real-world application.

Chapter 6 conducts a comparative analysis of JR-regime change in ten additional countries: Colombia, Chile, Singapore, Germany, Myanmar, South Africa, Hungary, Indonesia, Egypt, and the OPT. These countries were chosen for reasons explained at the beginning of that chapter: to populate the typology and demonstrate its application beyond the former British colonial context, and to provide a richer empirical basis for exploring the processes of consolidation, transformation, and incremental change. After demonstrating the geographic coverage of the theory, Chapter 6 identifies four recurrent pathways to JR-regime consolidation and the causal mechanism driving JR-regime transformation.

Chapter 7 summarizes this study's main findings and sets out its normative and practical implications for those engaged in designing, implementing, and utilizing systems of judicial review.

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