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[Partly Laws Common to all Judge-Kind: The
Commonality and Divergence of Conforming
Constitutional Interpretation]

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Partly Laws Common to all Judge-Kind:

The Commonality and Divergence of Conforming Constitutional Interpretation

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I. Introduction

Doctrines of constitutionally conforming interpretation (CCI) require that a court should, where more than one reading of a statutory provision is open, adopt the interpretation that saves the provision from constitutional invalidity. CCI itself is indifferent to the norms that a constitution contains or how those norms should be interpreted. Its sole injunction is that any declaration of unconstitutionality that would be reached following the accepted norms of interpretation for a given constitutional system should be avoided through the adoption of a constitutionally consistent statutory interpretation, *where possible*. The 19 jurisdictions analysed in Volume I show CCI emerging in remarkably similar form across very different constitutional contexts: old and new constitutional systems; consolidated and partial democracies; dispersed and centralised constitutional review. The commonality of CCI across constitutional systems is accompanied, however, by significant divergence within and between systems over the import of that *where possible* caveat: to what extent can CCI legitimately be pushed to protect a statutory provision from a finding of invalidity? For some judges, CCI remains a largely technical device for minimising the disruption of constitutional review to settled legal expectations. But CCI frequently evolves into a more far-reaching suffusion of constitutional standards and constitutional thinking throughout the entire legal system. I therefore characterise CCI – adapting Waldron – as a constitutional doctrine partly common to all judge-kind.¹

This chapter addresses the intriguing puzzle raised by the national reports. Why is there such commonality in the adoption of CCI yet such divergence over its application?

* I am grateful to all who commented on a draft of this chapter at the Taipei Comparative Constitutional Law Roundtable on 12 June 2023 and to Conor Casey and Daniel Gosch who read subsequent drafts.

¹ Jeremy Waldron, *'Partly Laws Common to All Mankind': Foreign Law in American Courts* (Yale University Press 2012).

Answering these essentially empirical questions requires one to read the national reports in a subtly different way from how they are written. For the most part, the national reports are written from the participant's perspective, providing a *legal* analysis of the legitimate use of CCI within each constitutional system. Some reports adopt this perspective exclusively.² Others, perhaps reflecting different cultures of legal scholarship, present both the participant's perspective and external explanations of that perspective that could not be advanced – at least not without embarrassing self-reference and regress – by the participants themselves.³ Each mode of scholarship is legitimate and makes a valuable contribution to our understanding of CCI. But this chapter, addressing empirical questions about 19 constitutional systems, cannot be written from the participant's perspective: there is no such participant and, even if there were, the norms of valid legal argumentation might compel them to justify their actions in ways that did not reveal their motivations for action. The national reports, however, provide the evidence base on which this chapter addresses the empirical questions. In sections II and III, I draw on the national reports to provide a picture of how CCI emerges and is practised across jurisdictions. The intensification of CCI over time, I argue, is best understood as an interaction of four dimensions: suffusion of the legal system with constitutional values; semantic stretching of statutes; pre-emption of legislative choices; dispersing authority for constitutional interpretation. Each of these dimensions admits of degrees; even one judgment may vary in its intensity on different dimensions. To address the question of *why* CCI emerges and develops in this way, section IV takes two different approaches. It takes the participant's perspective seriously, repurposing the legal, conceptual and normative arguments canvassed in the national reports as potential motivations for judicial decisions. It then explores the strategic reasons in the form of bureaucratic incentives that might motivate judges to adopt CCI. In section V, I review the interaction of these motivations and suggest that CCI is a legal doctrine partly

² See, for instance, Christoph Bezemek and Daniel Gosch, 'Constitutionally Confirming Interpretation in Austria' in Matthias Klatt (ed), *Constitutionally Confirming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023).

³ As we shall see below, Daly attributes a difference in Canadian approaches to differences between Type A and Type B judges. The explanation is illuminating, but it is not open to a judge to say they adopt a particular approach *because* they are a Type A/B judge; the judge must explain why they are *correct* to adopt that approach. Paul Daly, 'Constitutionally Confirming Interpretation in Canada' in Matthias Klatt (ed), *Constitutionally Confirming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023).

common to all judge-kind because there are multiple motivations for its adoption but those motivations have different implications for the extent to which it should intensify.

This analysis has four implications for our assessment of CCI and the development of judicial doctrine more generally. First, the framework of intensification allows for a more nuanced account of the extent to which CCI increases judicial power at the expense of the legislature, a critical element both for the assessment of CCI's normative legitimacy and for any cross-jurisdictional or cross-temporal comparison. Second, because CCI is common across constitutional systems but is almost exclusively a judicial artifact, it provides a unique case study of the factors that drive judicial expansion of judicial power. Third, because CCI is indifferent to the substantive constitutional values at stake and because it is largely common across constitutional systems with different values, its development highlights the strategic rather than attitudinal factors that may motivate judicial expansion of judicial power. Fourth, while the national reports provide ample evidence for the relevance of bureaucratic self-interest to judicial motivation, the commonality and divergence of CCI cannot be explained solely on these terms, suggesting that judges remain – to some extent – ideationally motivated actors, emphasising the importance of participants' perspectives even to empirical questions of the type explored in this chapter.

II. The commonality of CCI

CCI is practised in the 19 jurisdictions addressed in Volume I. Of course, a selection bias is at play: countries were not included for consideration if CCI was not practised; CCI is not universal.⁴ Nevertheless, there is remarkable similarity in the emergence, formulation and evolution of the doctrine. CCI typically emerges early in the development of a constitutional system, on the basis of judicial reasoning, with little or no cross-reference to other constitutional systems. With the exception of South Africa, CCI has emerged through judicial decision-making rather than explicit textual authorisation.⁵ Eight of the National Reports

⁴ Shanil Wijensinha informs me that CCI is not practised in Sri Lanka.

⁵ Stacey writes that South Africa's interim Constitution (1993) expressly mandated courts to interpret legislation to conform to the Constitution, including legislation that appeared on its face to limit constitutional rights, as long as the text of the statute in question was 'reasonably capable of a more restricted interpretation' that did not limit rights. This precise direction did not reappear in the Constitution ultimately adopted, but the courts continued with the approach of CCI. Richard Stacey, 'The Siren Call of Constitutionally Confirming Interpretation: Statutory Validity at the Expense of Constitutional Values' in

specifically mention that CCI was adopted at or close to the beginning of their country's constitutional governance.⁶ With the exception of Taiwan and Brazil, where German case law and scholarship have been cited,⁷ there are few references in the National Reports to transnational judicial influences, still less explicit borrowing. Notwithstanding the paucity of explicit cross-reference, the formulation of CCI across jurisdictions is strikingly similar. To take two examples, in 1996 the Czech Constitutional Court stated:

If a certain provision of a legal regulation allows for two different ways of interpretation, one of which conforms to constitutional laws ... and the other contradicts them, there is no reason to invalidate this provision. It is up to the courts to interpret and apply the given provision in a manner conforming to the Constitution.⁸

In 1992, the Canadian Supreme Court expressed CCI in these terms:

if there are two possible interpretations of a statutory provision, one of which embodies the Charter values and the other does not, that which embodies the Charter values should be adopted.⁹

CCI is initially presented as almost axiomatic, an obvious and uncontroversial truth about constitutional and statutory interpretation. In this regard, CCI differs markedly from, for example, the practice of suspended declarations of unconstitutionality, where academic commentary assisted the migration of a constitutional idea that challenged embedded

Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt I.

⁶ The Czech Republic, Hungary, Italy, Brazil, India, Indonesia, South Africa, Australia.

⁷ Chien-Chih Lin, 'Constitutionally Conforming Interpretation in Taiwan' in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt I; Diego W Arguelhes and Rafael B De Lima, 'Constitutionally Conforming Interpretation in Brazil: From Restraint to Preemption?' in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt II 2.

⁸ Judgment of the Constitutional Court of 26 March 1996, File No. Pl. ÚS 48/95 (on the condition of conformity of a statute with the constitutional order) (author's translation). See Pavel Ondřejek, 'Constitutionally Conforming Interpretation in the Czech Republic' in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) Pt II.

⁹ *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606, 660. See Daly (n 3) pt IV 1. Daly adverts to important but nuanced differences in formulation in different Canadian cases but this qualification does not detract from the core point here about the similarity of expression across different systems.

conceptions of the judicial role in declaring legislation unconstitutional.¹⁰ In contrast, CCI is taken to need little by way of textual grounding or extra-textual justification.

Judicial convergence on the axiomatic character of CCI is all the more striking because it occurs across constitutional systems that diverge in highly salient respects. CCI has markedly different implications depending on whether the same court is vested with the power both to interpret statutes and consider whether statutes are constitutional. Where constitutional review is vested in a constitutional court while ordinary courts retain the power of statutory interpretation, CCI raises institutional difficulties: either the constitutional court must get involved in statutory interpretation, or the ordinary courts must get involved in constitutional interpretation, or both. Similar issues could arise in a federal system, depending on whether the national apex court has the jurisdiction to interpret provincial or state-level statutes. No such issue arises in a non-federal system where a general apex court is vested with the power of both constitutional review and statutory interpretation. Yet CCI arises across all these systems without any obvious difference. Of further significance in this regard is that CCI is not confined to countries with a mastertext constitution. In both the UK and New Zealand, we see a principle of legality, operating as an interpretative presumption that the legislature does not intend powers conferred in general terms to authorise the doing of acts that adversely affect the legal rights of the citizen or the basic principles of the law.¹¹

CCI thus emerges as an axiom of judicial practice, without textual authorisation, irrespective of any commitment to legal-constitutional supremacy and notwithstanding significantly different implications for the extent of judicial power. Notwithstanding this core commonality, however, practices of CCI begin to diverge – within systems as much as

¹⁰ See Robert Leckey, 'Remedial Practice Beyond Constitutional Text' (2016) 64 *The American Journal of Comparative Law* 1.

¹¹ Nick Friedman, 'Constitution-Conforming Interpretation in the United Kingdom. The Human Rights Act and the Principle of Legality' in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt IV; Hanna Wilberg, 'Legislators' Understanding as a Constraint on Interpretive Presumptions in Aotearoa New Zealand' in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt II 2 c. In Australia, the principle of legality operates as a free-standing doctrine, independent of the supremacy of the mastertext constitution. Lael K Weis, 'Constitutionally Conforming Interpretation in Australia', *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt IV. In this chapter, however, I focus on the UK and New Zealand as the clearer examples of the potential independence of CCI from notions of constitutional supremacy.

between systems – as judges adopt differing views on the extent to which CCI should intensify.

III. Intensification of CCI

1. *The trend of evolution*

A recurring theme in the National Reports is that CCI is almost always initially presented as a modest interpretative approach, but frequently develops into something far more intense.

Two typical statements of initial application can be seen in Hungary and South Africa.

Bodnár describes the interpretative limits of the Hungarian approach in the following terms:

‘The limit of the constitutional requirement is that the Constitutional Court cannot give an interpretation to a norm that cannot be read into it, because in this instance, the Court would eliminate the lawmaker’s competence, and the Court cannot override the lawmaker’s own authentic interpretation.’¹² Stacey notes that the South African Constitutional Court ‘has emphasised in just about every case where a CCI is urged upon it, that courts can prefer a CCI only where the text of the statute reasonably accommodates it. The CCI must not “unduly strain” statutory language.’¹³

But courts routinely push at these boundaries. Assessing the approach of the Spanish Constitutional Court, Lifante-Vidal writes that despite the declarations on the boundaries of CCI, ‘numerous Constitutional Court judgments seem to have clearly exceeded these limits’.¹⁴ Arguelhes and de Lima provide a detailed account of how the Brazilian Supreme Court has expanded CCI. They recount Judge Moreira Alves delivering a majority opinion in 1987, concluding that CCI ‘cannot go against the rule’s meaning, including when it derives from its unequivocal legislative origins, because this Court cannot act as a positive legislator,

¹² Eszter Bodnár, ‘Constitutionally Conforming Interpretation in Hungary: Conflicts Over Competence’ in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt IV 1.

¹³ Stacey (n 5) pt I.

¹⁴ Isabel Lifante-Vidal, ‘Constitutionally Conforming Interpretation in Spain’ in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt V.

that is, one that creates news rules'.¹⁵ They summarise later approaches of the Court, however, in the following terms:

[The Court] reads into the law many elements that might have not been deliberated upon and decided at all by legislators and policymakers. The court is not saying that a particular path taken by the legislator is unconstitutional, but rather that any statute on that topic could only be constitutional if it included a set of specific elements. In doing so, the [Court] uses CCI to directly raise and answer questions that have not yet been asked, foreclosing future legislative discussions that a more restrained judicial stance would instead keep open.¹⁶

The transition in Brazil is a particularly acute example of a trend common across many of the national reports: over time, courts apply CCI with increasing intensity. What starts as an anodyne mechanism for selecting between permissible interpretation variants becomes a tool for reshaping legislation in very specific ways, often quite at odds with any plausible account of what the legislature might have intended.

The National Reports frequently analyse CCI and its evolution in terms of whether a court has shifted from negative to positive legislating. This approach reflects the Kelsenian idea of a constitutional court as negative legislator, substantively repealing laws but not amending them.¹⁷ In striking down a law, a constitutional court permissibly acts as a negative legislator but it cannot extend this power to the enactment of new laws. One challenge to the legitimacy of CCI – particularly as it intensifies – is that the statutory reinterpretation demanded by CCI is tantamount to the enactment of new legislation. In other words, it involves the court impermissibly acting as a positive legislator. Assessing challenges in Austria to the legitimacy of CCI, Bezemek and Gosch defend CCI as consistent with the Constitutional Court's role as a negative legislator, implicitly endorsing the positive/negative legislator distinction as the relevant heuristic for legitimacy.¹⁸ The Spanish Constitutional

¹⁵ BRASIL. Supremo Tribunal Federal (Pleno). Representação 1417. Relator: Min: Moreira Alves, 09 de dezembro de 1987, available at <https://stf.jusbrasil.com.br/jurisprudencia/2803880/representacao-rp-1417-df>. Arguelhes and De Lima (n 7) pt II 2.

¹⁶ *ibid* pt I.

¹⁷ Simon Butt, 'Constitutional Conformity in Indonesia: "Conditional" Decisions in the Constitutional Court' in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt IV.

¹⁸ Bezemek and Gosch (n 2) pt III.

Court grounds its inability to reconstruct a statutory norm ‘in a way that is contrary to its obvious meaning’ on the basis that such would amount to positive legislation beyond the scope of its powers.¹⁹

The distinction between positive and negative legislation does not, however, provide a helpful framework for grappling with the intensification of CCI. While a declaration of unconstitutionality can be formally understood as negative legislation – a statutory provision is removed from the statute book – CCI can never formally amount to either positive or negative legislation: the law on the statute book remains in the same form irrespective of any CCI. If we shift our focus from formal legal status to substantive legal effect, however, we see that every CCI has implications for people’s legal obligations. CCI will nearly always require that the Court adopt a statutory interpretation that it otherwise would not have. Even in the most minimal case theoretically possible, CCI renders mandatory a statutory interpretation that was previously only optional, itself an alteration of people’s rights and obligations. Even if we accept, which is far from obvious, that substantive alteration of people’s legal rights and obligations is tantamount to legislation, there are no criteria to divide CCIs into positive and negative legislation. We could perhaps attach the label of ‘positive legislation’ to a CCI that we consider excessive, but any such judgment of excess depends on a prior assessment of how intrusive or activist that CCI is.

In the remainder of this section, I propose a framework of intensification that captures the four different dimensions along which CCI can become more activist or intrusive: whether the courts view the constitution as a control on the content of the legal system or a repository of values to suffuse the legal system; the extent to which the courts are prepared to stretch semantic constraints; the extent to which the courts are prepared to pre-empt legislative decision-making; the extent to which bodies other than courts are empowered and required to adopt and act on CCIs. There is no necessary correlation between intensity levels on the different dimensions, although some contingent correlations are likely. I label the phenomenon ‘intensification’ to capture how the cumulative effect across different dimensions is at least as salient as where a particular CCI lies on one dimension. Having

¹⁹ Lifante-Vidal (n 14) pt V.

analysed each dimension in turn, the section concludes with a consideration of their possible interactions.

2. *Constitutional control versus constitutional suffusion*

Constitutional standards can be understood as a control on legislative measures, setting outer boundaries for permissible content, or as a repository of values that should suffuse the entire legal system. This distinction runs through the National Reports and is explicitly called out in several. Barczentewicz and Matczak follow Polish legal theory in distinguishing between CCI as ‘interpretation of statutes in conformity with the Constitution’ and CCI as ‘pro-constitutional interpretation’. Interpretation in conformity with the constitution uses the constitution to rule out certain interpretations as impermissible or identify the interpretation that most supports constitutional values. Pro-constitutional interpretation, in contrast, ‘realizes the postulate that constitutional values and constitutional axiology should “saturate” the entire system of laws. It consists in using particular substantive rights in interpreting and applying legal regulations and can be understood as the co-application of the Constitution and other legal acts’.²⁰

Stacey identifies two different approaches of the South African Constitutional Court to CCI.²¹ One treats CCI as meaning ‘that courts should always prefer a statutory interpretation that does not limit a right protected in the Bill of Rights. As long as the court can find such an interpretation, it does not need to make a declaration that the statute or parts of it are invalid.’ The other suggests that ‘avoiding statutory invalidity is not the primary objective of CCI. Rather, courts should favour whatever result promotes the spirit, purport and objects of the Bill of Rights, even if this means finding that a statutory provision is unconstitutional.’ The Polish and South African distinctions do not map precisely onto each other: a crucial implication of the second approach, for Stacey, is that courts should reject CCI where a declaration of unconstitutionality would better promote constitutional values. But each

²⁰ See Mikolaj Barczentewicz and Marcin Matczak, ‘Constitutionally Conforming Interpretation in Poland’ in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt I references omitted.

²¹ Stacey (n 5) pt I.

envisages a form of CCI that does not merely control legislative provisions for unconstitutional content but rather seeks actively to promote constitutional values.

Daly articulates a similar distinction but framed as an attitude on the part of lawyers to the law, rather than as an objective property of the doctrine.²² Type A lawyers place a premium on legal certainty and only apply CCI where statutory meaning is ambiguous. Type B lawyers ‘believe that statutory language must be woven into the fabric of the constitutional order, in a way which contributes to the ongoing creation and maintenance of a coherent pattern in the common law tradition.’ While there is more to Daly’s distinction between Type A and Type B lawyers (see further below), these elements again point to the distinction between a controlling and suffusion approach. Type A lawyers approach CCI – and constitutional enforcement generally – as a minimal exercise, with remedies to be deployed only to the extent necessary to prevent a discrete constitutional infringement. Type B lawyers, in contrast, use CCI to suffuse legislation with constitutional values, even where there is no clear case of a definitive unconstitutionality. CCI under a suffusion model is more intense because it reduces the scope for independent legislative action.

3. *Semantic stretching*

The second dimension of intensity involves the extent to which courts are prepared to stretch the semantic meaning of words to accommodate a CCI. While it is conceptually possible for CCI to act simply as a tiebreaker between two equally plausible statutory interpretations, we are unlikely ever to perceive a CCI without some degree of semantic stretching. The UK House of Lords decision in *Ghaidan v Godin-Mendoza* provides an instructive debate on the extent of semantic stretching.²³ *Ghaidan* involved a challenge to a provision of the Rent Act 1977, which allowed surviving spouses to succeed to the tenancy of the original tenant only if they were ‘living with the original tenant as his or her wife or husband’ before that tenant’s death. All five members of the House of Lords agreed that this provision unjustifiably violated the Article 8 and 14 ECHR rights of same-sex couples, but there was significant disagreement over whether it fell within the bounds of CCI to extend

²² Daly (n 3) IV 2.

²³ [2004] UKHL 30.

the scope of the section to include same-sex couples.²⁴ The majority viewed their interpretative obligation under section 3 of the Human Rights Act 1998 as being ‘of an unusual and far-reaching character ... [which] may require a court to depart from the unambiguous meaning [of] the legislation’. Lord Nicholls held that courts could not be too bound by ‘the particular form of words adopted by the parliamentary draftsman in the statutory provision’, which ‘would make the application of section 3 something of a semantic lottery.’ Lord Millett in dissent agreed that section 3 permitted courts to ‘do considerable violence to the language and stretch it almost (but not quite) to breaking point.’ That breaking point, as Lord Nicholls put it, was that courts cannot ‘adopt a meaning inconsistent with a fundamental feature of legislation’; their interpretation ‘must be compatible with the underlying thrust of the legislation’. The disagreement between the majority and minority reduced to the question of whether the proposed CCI would be inconsistent with a fundamental feature of the Act. For the majority, the underlying legislative policy was a broad one of protecting couples who share each other’s life and make a home together; for the minority, protection of specifically opposite-sex couples was an essential feature of the statute.

In Taiwan, Justice Hsu has repeatedly criticised majority judgments of the Taiwan Constitutional Court that deployed CCI.²⁵ In Interpretation No 585 (2004), the Court considered a statute – enacted by the opposition-controlled legislature – that established an independent commission to investigate controversial events, including an assassination attempt, surrounding the President’s re-election. The Court upheld the constitutionality of the commission on the grounds that it served to assist the legislature in exercising its constitutionally granted investigative powers. Justice Hsu considered that this CCI distorted the intention of the Act’s supporters, who had intended the commission to be independent of the organs of government. The majority’s CCI, in his view, distorted legislative intent and imposed the judges’ understanding of the law.

Daly’s distinction between Type A and Type B lawyers also captures the extent to which judges are prepared to engage in semantic stretching.²⁶ For Type A lawyers, statutes owe

²⁴ Friedman (n 11) pt III 2.

²⁵ Lin (n 7) pt III 2.

²⁶ Daly (n 3) pt IV 2.

their authoritative force to the status of the body that enacted them. Ascertaining statutory intent is therefore critical and CCI should only be permissible where the statute truly is ambiguous. For Type B lawyers, the capacity of a statutory provision to bind depends on its place in a coherent normative pattern; given the open texture of language, statutory provisions can better acquire authoritative force through their place in a coherent scheme of principles informed by constitutional values.

4. Prescription and legislative pre-emption

The third dimension of CCI's intensity concerns the extent to which the CCI makes detailed prescriptions about what is constitutionally permissible, thereby pre-empting legislative action. In some senses, every CCI makes these sorts of prescriptions: it provides a legally binding interpretation of a statutory provision that helps resolve the particular case before the court. Nevertheless, there seems to be a distinction – at least in intensity if not in kind – between a judicial decision that can be understood as a choice between two or more interpretations of a statutory phrase and a judicial decision that can only be understood as the court interpolating new text into the statutory provision. This roughly follows the South African distinction, noted by Stacey, between reading down and reading in.²⁷ In South Africa, however, only reading down is understood to be CCI. If a CCI is insufficient, the court must declare the legislation invalid and then decide whether to read words out (severance) or read words in. In other jurisdictions, 'reading out' is entailed by the declaration of unconstitutionality, while reading down and reading in are both available as forms of CCI that can avoid a declaration of unconstitutionality. In this regard, Lin draws a distinction between traditional CCI, which 'requires courts, when interpreting a law, to choose a single interpretation that is most harmonious with the constitution and to exclude unconstitutional interpretations' and a second type of CCI where 'courts read in several words that do not exist in the text' as the only means of upholding the statute.²⁸

A brief diversion into Irish constitutional law helps to illustrate these points. The first Irish example of CCI involved an extensive reading in, prescribing how a statutory process ought to be conducted and pre-empting the freedom of the legislature to choose alternative

²⁷ Stacey (n 5) pt III.

²⁸ Lin (n 7) pt II 1.

approaches. In *McDonald v Bord na gCon*, the Supreme Court considered the constitutionality of provisions of the Greyhound Industry Act 1958 that allowed the Greyhound Board effectively to exclude persons from participating in the industry.²⁹ Walsh J provided a formulation of CCI very similar to those we considered in section II:

The Greyhound Industry Act of 1958, being an Act of the Oireachtas, is presumed to be constitutional until the contrary is clearly established. One practical effect of this presumption is that if in respect of any provision or provisions of the Act two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction and a Court called upon to adjudicate upon the constitutionality of the statutory provision should uphold the constitutional construction. It is only when there is no construction reasonably open which is not repugnant to the Constitution that the provision should be held to be repugnant.³⁰

To ensure that the legislation could be held constitutional, Walsh J read in provisions to the effect that a proper investigation with natural justice – respecting the rights of *audi alteram partem* and *nemo iudex in causa sua* – would be carried out before an exclusion order was made:

The wording of the provisions of sections 43 and 44 does not exclude the application of the principles of natural justice to these investigations. While the Board may determine the manner in which the investigation shall be carried out the clear words or necessary implication which would be required to exclude the principles of natural justice from such investigation are not present in the sections.³¹

The Court did not spell out the provisions that were constitutionally necessitated in the Act, but it effectively stipulated in considerable detail the process that the Greyhound Board would have to follow in Mr McDonald's case.³² The Court read provisions into the Act rather

²⁹ [1965] IR 217.

³⁰ [1965] IR 217, 239.

³¹ [1965] IR 217, 243.

³² An alternative characterisation of this case is Daly's constitutionally conforming administration, which I will discuss further in section I.5. In this characterisation, the Court was holding that administrative bodies – such as the Greyhound Board – had a constitutional obligation to exercise their discretion in a manner that complied with natural justice, without mediating that constitutional requirement through a CCI. While this characterisation is open, it does make it more difficult for us to perceive a crucially different element of CCA,

than interpreted words that were already there, thereby prescribing legislative content. Moreover, the Court effectively put the legislature on notice that any future statute that failed to respect the requirements of natural justice would be reinterpreted to include those requirements, thereby pre-empting future legislative choices.

Similarly but with greater prescriptiveness, the Taiwan Constitutional Court upheld the constitutionality of a provision authorising police inspections or traffic stops at public places to question suspicious people, but only on reading the following conditions into the law: the requirement of a reasonable belief that the person might cause harm; informing the person of the reason for the search and identifying themselves as police officers; conducting the search on the spot; a prohibition on asking the person to go to the police station; once a person has confirmed their identification, they had to be permitted to leave immediately unless they were suspected of crimes that would be followed up by criminal procedures.³³

The Brazil National Report provides the most extreme example of this sort of prescriptiveness and pre-emption.³⁴ In 2008, the Brazilian Supreme Court considered the constitutionality of a statute that authorised the use of surplus human embryos from *in vitro* reproduction processes in research on the therapeutic potential of embryonic stem cells. While a narrow majority of 6:5 upheld the law without resort to CCI, the five dissenting judges would have read conditions into the law to ensure its constitutionality. These conditions included narrowing the definition of *in vitro fertilisation*, providing for public authority assessment of proposals for research on embryonic stem cells, and determining the composition of future oversight bodies and their relationship with the Ministry of Health. The minority judges accepted that this was a creative decision, since the statute made no provision for public oversight of private research projects, but nevertheless considered it within the bounds of CCI. For Arguelhes and Lima, pre-emptive decisions of this type lie beyond both any idea of interpretation and any conceivable perspective of judicial restraint. Judges were both methodologically and institutionally going beyond the text and reaching into the future. Had the minority position prevailed, the legislature would

where state agencies are under an obligation to apply the constitution themselves even if this involves breaching their statutory obligations. This is the focus of section I.5

³³ Lin (n 7) III 3.

³⁴ Arguelhes and De Lima (n 7) pt IV.

have been pre-empted from considering the issue on a clean slate because the Supreme Court had prescribed in such detail the scope of constitutionally permissible legislation.

5. The locus of interpretative authority

Which actors within a legal system are responsible and authorised to provide constitutionally conforming interpretations? Daly suggests a concept of constitutionally conforming administration, where public agencies must exercise their powers in a constitutionally conforming manner.³⁵ But a crucial question arises as to whether public agencies are themselves empowered to adopt a constitutionally conforming interpretation that runs counter to what would ordinarily be the most plausible interpretation of a statute. Writing in the German context, Klatt rejects the argument that ordinary courts should not, because they lack the power to declare statutes unconstitutional, be empowered to adopt CCI. He argues that interpretation variants cannot be void; they can only be more or less convincing. Rejection of one interpretation variant in favour of another does not imply a finding that the rejected variant is void and so does not depend on a competence to declare laws void. Klatt's argument opens up space for the suggestion that all public agencies, not just courts, should be vested with the power of CCI, i.e. to exercise their powers – subject always to subsequent judicial correction – on the basis of a CCI that they adopt rather than the most obvious 'normal' reading of a statute. It appears from the National Reports that this potential has been realised in several jurisdictions.

Writing about the Czech Republic, Ondřejek states that CCI is used as a general method of interpretation by public authorities, who are required to apply the constitution in their decision-making under all circumstances. The Constitutional Court has specifically held that 'it is the task of all governmental authorities to interpret any given provision in a constitutionally conforming manner'.³⁶ Writing of Poland, Barczentewicz and Matczak state 'CCI, as a purposive interpretation, ensures that interpretative results at the bottom of the legal system (eg the interpretations of administrative agencies and courts in their decisions vis-à-vis individuals) realise those values'.³⁷ Specifically, the Constitutional Tribunal

³⁵ Daly (n 3) pt IV.

³⁶ Ondřejek (n 8) pt I and III.

³⁷ Barczentewicz and Matczak (n 20) pt II.

encourages all organs applying the law to choose from competing interpretations the one that is consistent with constitutional norms and values.³⁸ Writing about Taiwan, Lin comments, 'CCI is a method of constitutional interpretation, which means that, in a constitutional state, all law-enforcement officials in the broadest sense of the term, ranging from police officers and prosecutors to politicians, may apply CCI when necessary because they are all bound, in their professional duties, by the Constitution.'³⁹

This development intensifies CCI by removing the sort of scrutiny that is generated by court processes. It does not necessarily follow from the desirability of state agencies conforming to the constitution that those agencies should be empowered to adopt CCIs that expand or restrict their apparent legal powers and obligations. Where CCI occurs in the context of a court case, there will be an opportunity for those affected by the CCI to argue why it should or should not be adopted. There will also be publicity for the fact that a CCI has been adopted, so affected parties will know that a statutory provision has been reinterpreted in a way that alters their legal obligations. Consider, in contrast, a parking regulator who impounds cars based on a sincere belief that the constitution, properly understood, protects the rights of nature which are infringed by driving cars. Or a police officer who decides that the constitution's references to common good vest them with a power of a detention to protect against crime, without any of the commonly understood procedural safeguards. Such CCIs would be open to correction by a court, but there might be no record of a CCI ever being adopted, correction could take time, and irreparable harm might have done by the time of correction. Others take a more optimistic view of diversifying the *loci* of interpretative authority.⁴⁰ In many African countries, there are explicit and wide-ranging obligations on citizens, state agencies and others to ensure observance of the constitution, perhaps suggesting that the *loci* of constitutional interpretation are necessarily diversified.⁴¹ Whether there are good normative or textual grounds for diversifying the *loci* of constitutional interpretation, such diversification intensifies the practice of CCI.

³⁸ *ibid* pt III.

³⁹ Lin (n 7) pt II.

⁴⁰ See, for instance, Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 2008).

⁴¹ See, for instance, Constitution of Ethiopia 1994, Article 9.2.

6. *Cumulative intensification*

Each dimension of intensification allows for differences of degree, not differences of kind. The distinction between constitutional control and constitutional suffusion is not clear-cut in application. Statutory language may be semantically stretched to greater or lesser degrees. Depending on the constitutional norms involved, the prescription of legislative content may pre-empt legislative competence to a greater or lesser extent. State agencies obliged to adopt CCIs might be limited to administrative tribunals that follow court-analogous procedures – thereby providing opportunities for notice and argument prior to the adoption of a CCI – or might extend to all public officials. There are contingent correlations between the dimensions, as illustrated by Daly’s distinction between Type A and Type B lawyers tracking across both the suffusion dimension and the semantic dimension. But it is theoretically possible and empirically observable that intensification can occur along one dimension but not another. The willingness of the Irish Supreme Court in *McDonald* to read in requirements of natural justice, thereby pre-empting legislative choices, reflects a technical control to respect constitutional supremacy rather than any broader commitment to suffuse the legal system with constitutional values. Nevertheless, by taking the dimensions separately and then considering their cumulative effect, we can provide a more reasoned basis for any assessment of the intensity of CCI.

Intensification of CCI on the first three dimensions – and possibly the fourth – results in increased judicial power. Courts hold ultimate authority over the interpretation of constitutional norms, so a judicial decision to give a wider reach to constitutional norms – suffusion rather than control – increases judicial power. The greater the semantic stretching that judges deem permissible, the greater their power. Constitutionally mandating certain words to be read into a statute restricts legislative power more than simply adopting a particular interpretation of words the legislature itself had chosen. If subordinate authorities follow judicial interpretations of the constitution, allowing those authorities to engage in CCI will enhance the scope of judicial power. In each instance, judicial power is enhanced not only for the case before the court but also by expanding the scope of what counts as appropriate judicial activity for future cases.

IV. **Factors motivating adoption of CCI**

1. Overview

Written judgments seek to justify the decision reached based on legal material interpreted in accordance with accepted norms. While these judgments may record what motivated judges to reach a particular conclusion, this is not necessarily the case. It is also possible that judges are motivated by their own personal values, or by a desire to increase the power of the judiciary within the constitutional and political system. Writing about the US Supreme Court, Segal and Spaeth reject what they term the legal model in favour of an attitudinal model, attributing decisions of that court to the attitudes and values of the justices.⁴² The attitudinal model, however, is inapt to explain the adoption of CCI and its subsequent divergence, given that CCI itself is indifferent to substantive constitutional values (i.e. rights and freedoms, separation of powers, etc) and emerges across widely different systems in support of widely different values. Of greater potential relevance in the context of CCI is strategic decision-making on the part of judges, serving their own bureaucratic self-interest. In *Towards Juristocracy*, Hirschl argues that judicial empowerment through constitutionalisation is best understood as the by-product of a strategic interplay between political elites, economic elites, and 'judicial elites and national high courts that seek to enhance their political influence and international reputation'.⁴³ Hirschl focuses on the decision to introduce judicially interpreted and legally binding bills of rights, but CCI – almost universally a judicial innovation – might also be the result of strategic action on the part of judicial elites to increase their own power.

In any given case, it is difficult to disentangle these three motivations. A strategic desire to enhance judicial power might well coincide with a sincerely held belief that judges ought to have more power, which in turn could be defended – and hence plausibly motivated – by sound legal argumentation. Norms of legal argumentation do not permit judges to justify their decisions on the grounds that they personally prefer a particular outcome or that they wish to increase the power of judges, so there will seldom be any direct evidence of attitudinal or strategic decision-making. Nevertheless, if we consider the corpus of decisions, both within and across systems, the broad trends are best explained as a product

⁴² Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002).

⁴³ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007) 43.

of these largely converging but partially diverging motivations. In this section, I draw on the national reports to identify the range of factors that may motivate the adoption of CCI. I repurpose the normative and conceptual justifications advanced in the reports as ideational factors, identifying two that might motivate adoption of CCI – idealistic commitments of constitutional order and reconciling the interests of parties to litigation – and one that might motivate rejection of CCI – illegitimate usurpation of legislative power. In relation to strategic factors, Hirschl shows how judges can be sophisticated strategic decision-makers, tailoring their judgments to reduce the risk of reversal by other branches while seeking ‘to maintain or enhance [their] position vis-à-vis other major national decision-making bodies’.⁴⁴ Courts may take opportunities to ‘strengthen their own position by extending the ambit of their jurisprudence and fortifying their status as crucial national policy-making bodies’.⁴⁵ Drawing on those insights, I explore two strategic factors in the context of CCI: enhancing judicial power relative to the legislature and enhancing the powers of constitutional and ordinary courts relative to each other.

2. *Idealistic commitments of constitutional order*

The ideas of constitutional supremacy and legal unity present themselves as similar but slightly different normative foundations for CCI. Where constitutional supremacy pictures a hierarchically ordered legal system with the constitution limiting the permissible content of statutory norms, legal unity pictures a normatively integrated legal system where constitutional values infuse statutory norms. The difference between these pictures is ill-defined and a matter of degree, but the orientation of the former is that the constitution functions as a set of external limits on statutory norms while under the latter the constitution provides a font of norms that ought to infuse statutes. By selecting statutory interpretations that conform to the constitution, courts could be understood as underwriting either constitutional supremacy or legal unity. The canonical account of CCI in Taiwan captures both the supremacy and unity rationales: CCI is ‘one kind of systematic interpretation and its purpose is to solve legal conflicts, harmonise the legal order, and

⁴⁴ *ibid* 47.

⁴⁵ *ibid* 48.

ultimately implement the Constitution'.⁴⁶ But neither constitutional supremacy nor legal unity on its own suffices to justify CCI, since a declaration of unconstitutionality would be equally effective to that end. Responding to this deficiency, Klatt grounds the legitimacy of CCI in a combination of legal unity and *favor legis*, the principle of preserving legislation where possible.⁴⁷

For Klatt, the principle of *favor legis* derives from the proposition that judges are bound *both* by statute *and* by the constitution. Faced with an unconstitutional statute – or an unconstitutional interpretation variant of a statute – these obligations pull in opposite directions. The competing obligations can best be reconciled by an approach that declares legislation unconstitutional only to the extent necessary. Where an interpretation variant exists that is constitutional, the court respects its role vis-à-vis the legislature by choosing that interpretation variant. While Klatt proposes the principle of *favor legis* as a complement to the principle of legal unity, it functions equally effectively as a complement to the principle of constitutional supremacy. Whether the prior objective is to ensure that statutes do not exceed constitutional limits or more broadly that constitutional values infuse the statute book thereby enhancing legal unity, *favor legis* recommends CCI over a declaration of unconstitutionality because CCI also respects the courts' obligation to give effect to the will of the legislature.

CCI in countries without a mastertext constitution⁴⁸ cannot, however, be motivated by the principle of *favor legis* because there is no possibility that a statute can be declared invalid. Similarly, neither constitutional supremacy nor legal unity in the senses explicated above can motivate CCI, since there is no mastertext constitution operating as a supreme legal norm or font of values to integrate into the rest of the legal system. Nevertheless, the constitutions of the UK and New Zealand both express values that are taken to be important, if not supreme, allowing us to understand the principle of legality as a response to the demand of legal unity. In the UK a statute ought not to be interpreted to authorise the doing of acts 'which adversely affect the legal rights of the citizen or the basic principles

⁴⁶ Judicial Yuan Interpretation No. 437 (1997) (Justice Wang concurring), available at <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310618>. Lin (n 7) pt II 1.

⁴⁷ Matthias Klatt, 'The Legitimacy of Constitutionally Conforming Interpretation' in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) III 3.

⁴⁸ John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP Oxford 2012) 90.

on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament'.⁴⁹ In New Zealand, 'fundamental common law rights can be abrogated only by express words or necessary implication'.⁵⁰ In both these ways, courts interpret statutes to reflect important values, subject to the sovereignty of parliament.

This analysis of the principle of legality highlights the similarities between CCI and principles that operated in the classical legal tradition. Casey has shown how the Roman law principle that the prince could not be jurisdictionally or coercively bound to obey positive law was not a warrant for despotic government, partly because classical jurists interpreted the commands of the prince consistently with unwritten legal principles.⁵¹ For instance, Casey quotes the Italian jurist Baldus de Ubaldis as saying that 'nothing is presumed to please the emperor except what is just and true ... and the emperor wishes all his actions to be ruled by divine and natural justice as well as human';⁵² and interprets Aquinas as counselling jurists to understand all ordinances as guided and informed by right reason and the natural law.

Casey also identifies a presumption that the prince would not act contrary to the existing law or custom (where the latter did not conflict with natural law). Helmholz identifies cases of statutory interpretation from the late 15th to 19th centuries which show the law of nature, conceptualised as above princes, being used as an interpretative guide that might lead to the acts of princes being interpreted in a manner at odds with the princes' interests and probable intentions.⁵³ Sometimes, a judge might go so far as 'to suppose a tacit condition in the lord's command that its effect was meant to stop short of iniquity'.⁵⁴

Casey draws the connection between these principles of classical law and CCI, in the form of the Irish double construction rule mentioned above in section III.4. But for present purposes, I wish to derive three somewhat different points. First, Waldron's argument for a contemporary *ius gentium* encompassed analysis that was 'typical of lawyerly thinking and

⁴⁹ Friedman (n 11) pt IV citing Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, 575.

⁵⁰ Wilberg (n 11) II 2 c.

⁵¹ Conor Casey, 'What Pleases the Prince: The Relevance of Classical Legal Principles to Contemporary Public Law' (2023) 70 *Revue Internationale des Droits de l'Antiquité* forthcoming.

⁵² *ibid* citing James Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge, 2002) 79.

⁵³ RH Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Harvard University Press 2015) 75–79.

⁵⁴ *ibid* 77.

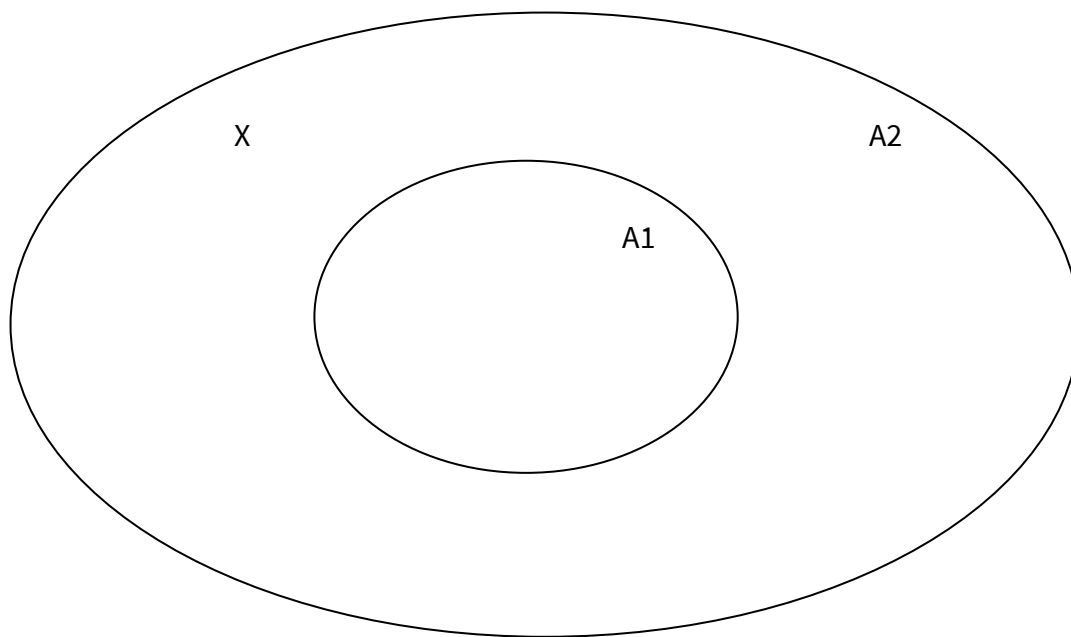
lawyer's mentality the world over'.⁵⁵ In Waldron's view, a lawyer 'when he confronts a problem, tries to anatomize it, uncover its underlying structure and the order in which the issues entangled in the problem are best addressed'. Classical legal principles evidence a thought process – interpreting the norms stipulated in one text in the light of other norms – that might qualify as an aspect of Waldron's typical lawyerly thinking. Given that this mental manoeuvre has been a feature of legal thinking in the western tradition for centuries, it is unsurprising that CCI would be adopted in western legal systems and, as western notions of constitutionalism migrate, in other jurisdictions also.⁵⁶ Second, classical legal thought helps to explicate how a different type of legal unity – conformity with non-positd, important if not legally supreme norms – underpins the principle of legality. In the UK and New Zealand, the values protected by the principle of legality are more limited than those of classical legal thought's natural law. But the interpretative move reflects a similar desire for legal unity, at least in terms of respect for basic principles of legality. Third, viewed in this way, we can see CCI under both mastertext constitutions and the principle of legality as responding to the same desire for the legal unity of a system whose norms are interpreted in accordance with precepts of justice, the difference being the range and source of those precepts, as well as their legally superordinate status.

3. Reconciling the interests of parties to litigation

A different type of justification for CCI lies in reconciling the interests of parties to litigation. Two scenarios illustrate the appeal of CCI from this perspective. CCI can narrow the scope of a statute so that the claimant avoids a detriment, while preserving the statute to meet many of the legislature's objectives. But CCI can also broaden the scope of a statute to allow the claimant a benefit that would not have been attainable through a declaration of unconstitutionality, while again preserving the statute to provide benefits to those whom the legislature intended to benefit. The following diagram illustrates these two scenarios.

⁵⁵ {Citation}

⁵⁶ Similar arguments may play out in the context of domestic courts in dualist systems interpreting legislation to conform to an international treaty that the state has ratified but not incorporated into international law. See Jaclyn Ling-Chien Neo, 'Calibrating Interpretive Incorporation: Constitutional Interpretation and Pregnancy Discrimination Under CEDAW' (2013) 35 Human Rights Quarterly 910.



There is a statutory provision, A, which can be interpreted either narrowly (A1) or broadly (A2). X is the claimant. In scenario 1, X objects to being subject to A, arguing that it unconstitutionally imposes a detriment on them. Assume that A1 is a constitutional variant of A, while A2 is an unconstitutional variant. CCI allows the court to adopt A1 and preserve the validity of A, while providing a remedy to X on the grounds that they no longer fall within the scope of A. In litigation terms, there is a full victory for X but a mitigated loss for the legislature.

In scenario 2, X claims that they have been unconstitutionally deprived of the benefit of A. In this context, a declaration of unconstitutionality would not serve the interests of the claimant; such a declaration would merely remove the benefit of A from everyone, not provide those benefits to X. A suspended declaration of unconstitutionality would provide the legislature with a choice – remove the benefit entirely or provide it to the additional class of persons – which might ultimately benefit the litigant although this approach might lack retrospective effect and therefore fail to provide a remedy. But CCI can provide a claimant with a remedy immediately. If the court opts for the broader A2 interpretation, X then falls within the scope of A and receives the benefit alongside those whom the legislature intended to benefit.

The latter scenario is well illustrated by the result in the UK case of *Ghaidan v Godin Mendoza*.⁵⁷ As we saw above, *Ghaidan* involved a challenge to a provision of the Rent Act 1977, with the House of Lords dividing over whether the phrase ‘living with the original tenant as his or her wife or husband’ before that tenant’s death could be semantically stretched to accommodate same-sex couples. For present purposes, the relevant point is that the decision extended a benefit which the legislature had not decided to confer. A declaration of incompatibility under the Human Rights Act 1998 is never a wholly satisfactory remedy for a litigant. But even a declaration of unconstitutionality with *erga omnes* effect would have done nothing to assist a litigant in the *Ghaidan* scenario: it would merely withdraw from opposite-sex couples the benefit of surviving to the tenancy. In these circumstances, CCI may be the only way of providing a meaningful benefit for a claimant who has suffered from an unconstitutionality.

This reason for CCI is mentioned in several of the National Reports, although perhaps fewer than might have been expected.⁵⁸ Writing about France, Carpentier comments that litigants may prefer CCI because it may ‘be more profitable to the claimant to have the law remain in force, but with an altered meaning or scope, rather than have it repealed altogether. Sometimes a litigant prefers that a different law be applied to his case rather than there being no applicable law at all.’⁵⁹ In Indonesia, the Constitutional Court has identified a broader rationale that legal instruments sometimes require urgent change to protect constitutional rights but invalidation would leave a lacuna to be filled by a notoriously slow and unresponsive legislature.⁶⁰ The Czech Constitutional Court semantically stretched the definitions in a scheme of compensation for victims of Nazi persecution and their relatives, with the result that a widow would qualify for compensation.⁶¹ Ondřejek does not state that

⁵⁷ [2004] UKHL 30. I draw this account from Friedman (n 11) pt III 2.

⁵⁸ Daniel Gosch suggests to me that this approach would be problematic in constitutional systems, such as the German, that accept a strict semantical barrier of interpretation (Wortlautgrenze), perhaps explaining why such cases do not feature prominently in the national reports.

⁵⁹ Mathieu Carpentier, ‘Constitutionally Conforming Interpretation in France’ in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt IV 1.

⁶⁰ Butt (n 17) pt I and IV.

⁶¹ Judgment of the Constitutional Court of 7 May 1997, File No. Pl. ÚS 23/96 (conditions for compensation for victims of Nazi persecution) (author’s translation). Ondřejek (n 8) pt II.

CCI provided a remedy to the widow that a declaration of unconstitutionality would have denied, but such seems to be the case.

The ideational force of these factors rests not on the idealistic commitments of constitutional order but rather on a pragmatic concern to give effective remedies and balance the interests of parties to litigation. To be sure, they rest on an underlying principle of respect for the constitutional order. But their orientation is not deep reflection on the nature of constitutional order but rather more simple propositions that (a) where a constitutional right has been infringed, a remedy should be provided, and (b) that remedy should be as minimally restrictive of the legislature's aims as possible. As such, where notions of legal unity and the principle of *favor legis* may motivate judges minded to reflect on deep questions of constitutional theory and structure, the factors considered in this subsection may hold greater motivational force for pragmatic judges focused on the justice of the case before them. Of course, a judge could be simultaneously motivated by both types of factor.

4. *Illegitimate usurpation of judicial power*

As well as the ideational factors motivating adoption of CCI, we must consider the ideational factors that might militate against adoption of CCI. This task requires repurposing the arguments from the National Reports for the illegitimacy of CCI as ideational factors counting against adoption of CCI. These arguments principally turn on the contention that CCI amounts to an illegitimate interference with legislative power, frequently formulated in terms of the court acting impermissibly as a positive legislator. We have seen in section III.1, however, that CCI never formally amounts to positive legislation and that every CCI substantively alters the obligations of those subject to the law. Fleshing out this argument somewhat, Schauer contends that the necessary indeterminacy in language means that CCI is always activist in character.⁶² Most statutes will be partially indeterminate, but one plausible interpretation will be more plausible than another. If the more plausible interpretation would be inconsistent with the constitution, then CCI appears to prefer the

⁶² Frederick Schauer, 'Constitutional Avoidance As Constitutional Conformation: The Case of the United States' in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt III.

worse interpretation to the better interpretation. The primary focus of Schauer's remarks is to establish that the US doctrine of constitutional avoidance does not truly avoid the constitutional decision.⁶³ But his critique goes beyond nomenclature to encompass the claim that CCI, at least if one believes that the text of the law is the law, involves a court in law-making.

The attractiveness of this illegitimacy argument is lessened considerably, however, where the alternative to CCI is a declaration of unconstitutionality. Subject to the level of intensification, a CCI will typically alter people's legal obligations less than would a declaration of unconstitutionality. For this reason, we would not expect legitimacy concerns to militate against adoption of CCI where it is accepted that a declaration of unconstitutionality is a judicially permissible means of altering people's legal obligations. This expectation is consistent with the fact that the US, where the practice of constitutional review has no clear textual foundation, sees greater resistance to CCI than any other jurisdiction in Volume I.⁶⁴ If the alternative of a declaration of unconstitutionality were considered critical to the legitimacy of CCI, however we would not see the principle of legality in the UK and New Zealand. These jurisdictions perhaps suggests that the illegitimacy arguments against *CC per se* are not perceived to carry great weight. The legitimacy concerns strengthen, however, as CCI itself intensifies along the dimensions explored in section III. Intensification represents a greater expanse of judicial power at the expense of other constitutional actors. In the context of intensification, CCI becomes a subject of normative conflict, explaining why we see divergence between judges, between systems, and over time.

5. *Judicial power relative to legislative power*

As we saw in section III, CCI does not in principle expand the scope of judicial power over legislative power. As CCI intensifies, however, it becomes more intrusive of judicial power. Accordingly, although the balance between judicial and legislative power does not provide

⁶³ Weis correctly notes that the constitutional question cannot be avoided, but what CCI attempts to avoid is declarations of constitutional invalidity. Weis (n 11) pt III 1 a.

⁶⁴ Schauer (n 61) pt V. One possible explanation is that the practice of constitutional review itself rests on insecure foundations in the US compared to other jurisdictions. This insecurity may also problematise related constitutional approaches such as CCI.

judges with an incentive to adopt CCI in the first place, it does provide an incentive to intensify an existing doctrine of CCI.

Writing about Taiwan, Lin suggests a separate motivation for adoption of CCI. Treating CCI as non-expansive of judicial power, he suggests that the Taiwan Constitutional Court has sometimes deployed CCI to navigate intense political storms and avoid a head-on clash with the political branches. He further describes CCI as sometimes an attempt – not always successful – to avoid political revenge.⁶⁵ This analysis identifies a different bureaucratic self-interest that could motivate the adoption of CCI, a desire to avoid provoking a more powerful branch of government and thereby preserve judicial power for exercise in a subsequent case. The further relevance of this insight is that – where CCI is motivated by bureaucratic self-interest – that self-interest may warrant a narrow version of CCI as much as an expansive one. Everything will depend on the balance of power between different constitutional actors, with judges motivated by bureaucratic self-interest deciding whether it is an opportune moment for the consolidation or expansion of judicial power.

6. *Constitutional courts and ordinary courts*

Judicial incentives to adopt CCI come most clearly into view in the context of intra-judicial relationships between constitutional courts and ordinary courts. In a system of concentrated judicial review, CCI is only possible if either a constitutional court engages in statutory interpretation or an ordinary court engages in constitutional interpretation. There are ways of softening the intrusion by one type of court into the domain of the other type. For instance, a constitutional court's CCI might only bind the parties to the case; or an ordinary court could only adopt a CCI if the relevant constitutional meaning had already been determined by the constitutional court. But the expansion of judicial power – by either or both courts – is manifest. This dynamic has formed the basis for jurisdiction-specific criticism of CCI.⁶⁶ The purpose of this section is not to rehearse that legitimacy debate but rather to see how the bureaucratic self-interest of different types of court could motivate adoption of CCI.

⁶⁵ Lin (n 7) II 2. [Note to editor: first reference to Lin in this paragraph is to an opening section that comes before the first Roman Numeral so I can't cite it. It will be p.1 of his chapter.]

⁶⁶ Klatt (n 47) pt IV 3; Bezemek and Gosch (n 2) II.

While the expansion of power could be an unspoken motivator for adoption of CCI, it sometimes appears explicitly. In Italy in 1956, within the first four months of its existence, the Constitutional Court adopted CCI – upholding the constitutionality of a referred norm by giving it a different interpretation. In Valentini’s analysis, this move extended the Constitutional Court’s jurisdiction to the interpretation of ordinary statutes, while also advising ‘regular courts to broaden their interpretation and enter the realm of constitutional values’.⁶⁷ She reports that subsequently, in 1965, a meeting of the Italian National Association of Magistrates invited ordinary judges, before raising questions of constitutional legitimacy, to utilise the Constitution as a normative resource, including CCI.⁶⁸ This meeting is an unusually clear example of a deliberate judicial strategy – as distinct from incidental to a decision in a particular case – to adopt CCI. The result was broader powers for both the Constitutional Court and the ordinary courts, leading to difficulties in harmonising constitutional and statutory interpretations that have been mediated differently at different times.

Poland provides an even more striking example. Responding to the compromised Constitutional Court, a conference attended by judicial and academic figures in 2017 put forward a strategy that included implementation of dispersed constitutional review and extending the ordinary courts’ use of CCI.⁶⁹ These moves were controversial; justifications were proffered partly on the basis of the constitutional text but more directly on the basis of the threat to constitutional governance posed by a flawed tribunal holding a monopoly on constitutional interpretation. Barczentewicz and Matczak see CCI as an important element of the strategy since ‘it saturates sub-constitutional regulations with the constitutional axiology’ particularly important in the context of expansive assertions of legislative power. Alongside the Italian example, the Polish case foregrounds and renders explicit the power-based explanations for adoption of CCI.

This section illustrates how bureaucratic self-interest can, whether on its own or in conjunction with one or more of the ideational factors considered in the previous section,

⁶⁷ Chiara Valentini, ‘Constitutionally Conforming Interpretation in Italy’ in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt V 1.

⁶⁸ *ibid* pt V 2.

⁶⁹ Barczentewicz and Matczak (n 20) pt V.

motivate judges to adopt CCI. If we assume that courts act in their own bureaucratic self-interest, we can see that their incentives will sometimes be to take minimal steps and preserve the power they already have, but at other times to take assertive steps to expand their own power. The appropriate strategy will depend on the balance of power with other institutions – whether the legislature or other courts – at the relevant time.

V. CCI: synthesis

In the previous section, I drew attention at various points to the ways in which judicial motivations – whether ideational or of bureaucratic self-interest – contribute to the commonality of CCI identified in section II or the divergence over intensification traced in section III. I shall now explore these connections more comprehensively and systematically. A wide range of ideational factors and bureaucratic incentives converge to motivate judges to adopt CCI: commitments to constitutional supremacy and/or legal unity, combined with a commitment to implementing the will of the legislature wherever possible; the desire to harmonise statutory requirements with higher law notions of justice; a pragmatic desire to give effective benefits to those who have suffered from unconstitutional legislation; and finally – in countries with centralised constitutional review – incentives for both constitutional and ordinary courts to expand their powers by undertaking at least some of the statutory or constitutional interpretation respectively assigned to the other courts. These factors appeal to different types of judges – constitutional idealists and constitutional pragmatists, as well as self-serving judges seeking to increase their own power. This congruence of factors explains how CCI has become a doctrine common to all judge-kind. Ideational factors and bureaucratic incentives have different implications, however, for the extent to which CCI should intensify along different dimensions. At first blush, bureaucratic self-interest suggests that CCI should intensify along the first three dimensions: constitutional suffusion, semantic stretching, legislative pre-emption. It is less clear whether judges intent on expanding their own power should support diversifying the authority for constitutional interpretation. On the one hand, allowing state agencies to engage in CCI might reduce judicial power; on the other hand, perhaps such state agencies could be expected on to follow judicial interpretations, effectively expanding the reach of judicial power. The motivation provided by bureaucratic self-interest is not quite so unidirectional

as this analysis suggests, however. Judges intent on increasing their own power must step carefully for fear of provoking a backlash: sometimes the imperative is to preserve rather than extend power. Nevertheless, in the long run, the incentives of bureaucratic self-interest would lead us to expect an expansion of CCI.

The ideational factors differ in their implications for intensification. A judge motivated by the idea that the entire legal system should consist of norms conforming to those in the mastertext constitution (legal unity) should be inclined to take a suffusing rather than controlling approach and should not be troubled by semantic stretching. Moreover, such a judge is unlikely to see difficulty with prescribing the scope of permissible legislation to the point of pre-empting legislative choices. A judge motivated by a narrower notion of constitutional supremacy or by a desire simply to balance the interests of parties to litigation while providing effective remedies should be inclined to favour a controlling rather than suffusing approach, should be more inclined to place limits on semantic stretching, should be slow to prescribe and pre-empt legislation and should balk at diversifying the *loci* of interpretative authority.

It would be difficult to disaggregate these motivations sufficiently to test the correlation between them and the extent to which CCI is intensified in a particular system. Different judges – potentially sitting on a collegiate court – are likely to be differently motivated. Even one judge could simultaneously act on different motivations. Judges who are primarily ideationally motivated are still likely to have some regard to bureaucratic self-interest, if only as a check on significant intensification. Conversely, the ideational and bureaucratic motivations may be covarying: judges who believe that the values of the mastertext constitution should suffuse the entire legal system are perhaps more likely to favour an expansion of judicial power; judges who favour a legalistic conception of the constitution as an external check on legislative action may likewise be more sceptical of expanding judicial power. And finally, as intensification increases so too do the legitimacy concerns over CCI that may prompt a backlash from other constitutional actors or a counteracting motivational force for judges themselves, or for enough judges to block intensification.

Nevertheless, linking judicial motivations to the intensification of CCI in this way generates several important insights about the development of judicial doctrine. First, because CCI is indifferent to substantive constitutional commitments – social rights or property rights;

equal protection or laissez-faire liberalism – its development illuminates judicial attitudes to constitutionalism and judicial power for their own sake rather than as instruments in support of broader policy preferences or general moral commitments. Second, the general but contested trend towards intensification, with few if any jurisdictions intensifying on all four dimensions, suggests that the trend towards increased judicial power is real but not unqualified. Third, the level of variation between judges, between jurisdictions and between periods is inconsistent with the proposition that judges are motivated solely by bureaucratic self-interest. Judges are – at least partially and probably to a considerable extent – ideationally motivated actors who respond to deep understandings of what constitutions are and the role they should play in regulating public decision-making. Judicial idealists and judicial pragmatists may differ in their approach to CCI, but they each respond to fundamental ideas about law, its value and its function. Fourth, while we could attribute divergence over intensification of CC to differing judicial assessments of how best to increase their power, it is at least equally plausible that such divergence is simply a continuation of the oldest debates in law and legal theory: between narrow and expansive approaches to law’s scope and law’s interpretation prompted by profound commitments as to the sort of thing law is.

VI. Conclusion

The purpose of this chapter has not been to conduct an evaluation of CCI but rather to draw on the examples, conceptualisations, and normative argumentation in Volume I in order to provide an explanation of why CCI emerges in such common form across diverse legal systems, only then to diverge – as much within systems as between systems – in relation to the appropriate degree of intensity with which CCI should be conducted. I have attributed the commonality to the convergence of several motivations supporting CCI in its original anodyne form, with different motivations suggesting different levels of intensification along four discrete but contingently related dimensions. This framework allows us to grapple with the reality of CCI more convincingly than the rather conclusory distinction between positive and negative legislation. It enables us meaningfully to compare the intensity of CCI between different judges, different systems, and different periods. By providing a more fine-grained account of CCI’s intensity, it facilitates a more reasoned debate on whether particular

instances of CCI represent an illegitimate intrusion on legislative power. That debate will turn, however, on prior commitments to a particular vision of law in general and constitutional law in particular. Those who conceive of law primarily as a human artifact are likely to favour less intense CCI. Those who conceive of law primarily as an aspiration towards a more just social ordering are likely to favour more intense CCI. Debates over the legitimacy of CCI are not amenable to technocratic or doctrinal resolution, a realisation that enhances our understanding of this surprisingly multi-textured doctrine, partly common to all judge-kind.