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Between Choice and Tradition: Rethinking Remedial Grace Periods and Unconstitutionality Management in a Comparative Light

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<Abstract>

Recent experiences of constitutional review in the Common Law world have received increasing attention in comparative constitutional law scholarship. Looking beyond the Common Law jurisdictions, this Article investigates into the influence of variations on unconstitutionality management and changing constitutional politics on the functional mutation of remedial grace periods. Through a case study of Taiwan in a comparative light, it argues that legal tradition and the court's role vis-à-vis the political branch in the dynamics of constitutional politics jointly contribute to the multifunctional role of remedial grace periods in unconstitutionality management. As part of unconstitutionality management across constitutional jurisdictions, the granting of remedial grace periods is not simply the manifestation of judicial strategy. The argument unfolds in three main Parts. Part II first compares the use of remedial grace periods in constitutional review under the Civilian-Continental and the Common Law models. After drawing out the different paths toward unconstitutionality management in comparative constitutional review, Part III conducts a functional analysis of remedial grace periods in the case law of the Taiwan Constitutional Court (TCC). It is observed that the three forms of remedial grace periods—bridging, nudging, and hedging—as indicated in the TCC case law are informed by the conceptual framework of graduated unconstitutionality borrowed from the Civilian-Continental model. Part IV further analyzes how remedial grace periods have been instrumental to the TCC's realization of its institutional potential. In conclusion, the TCC's continuing and frequent prescription for remedial grace periods indicates its default position in constitutional remedies, which is both informed by the Civilian-Continental model and shaped by its formative experience at the dawn of democratization.

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<Table of Contents>

I. INTRODUCTION

Stories about *Marbury v. Madison*[1] have been told time and again in constitutional scholarship.[2] Obscured in its political twists and turns and the all too familiar end result—the accidental impregnation of modern constitutional review[3]—is an arcane legal

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

[2] *See*, *e.g.*, ARGUING *MARBURY V. MADISON* (Mark Tushnet ed., 2005); BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 163-98 (2005); PAUL W KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTRUCTION OF AMERICA (1997).

[3] *See* MAARTJE DE VISSER, CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE PERSPECTIVE 94 (2014). For a critical discussion of such characterization of *Marbury v. Madison*, see Mark Tushnet, *Marbury v. Madison around the World*, 71 TENN. L. REV. 251 (2004). In this Article, constitutional review refers to the review of the conformity of statutes (as well as other state acts) to the constitution by courts or other quasi-judicial but independent institutions such as the French Constitutional Council. In this sense, constitutional review is a special type of judicial review. For discussion of the pre-*Marbury v. Madison* traces of constitutional review in Europe, see DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL

question: Did the Supreme Court have the power to issue a writ of mandamus?[4] Though the Supreme Court acknowledged William Marbury's and his co-petitioners' legal right being infringed, it eventually denied them the remedy that would bring them the withheld commissions for their appointment as the justices of the peace on constitutional grounds.[5] As the way Chief Justice Marshall framed the legal issues concerned suggested, *Marbury v. Madison* not only fathered modern constitutional review but also indicated the distinctiveness and significance of the question of remedy by linking constitutional review to the vindication of individual rights.[6] Viewed thus, remedy stands as a distinct issue apart from the judgment as to the constitutional compatibility of the impugned state act[7] in constitutional review.

In the long shadow of *Marbury v. Madison*, the granting of a grace period for a state act found constitutionally invalid is considered a choice as to remedies in constitutional review.[8] Seen in this light, granting a "remedial grace period"[9] amounts to a legal technique to suspend or delay the declaration of (constitutional) invalidity of an impugned state act while a "suspension order" or a "suspended declaration of invalidity" becomes a new addition to

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JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 4 (3rd ed. 2012). Judicial review of statutes according to a statutory bill of rights in Britain, New Zealand as well as part of Australia is not within the scope of the present Article. For judicial review under a statutory bill of rights, see STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE (2013); *cf.* ROBERT LECKEY, BILLS OF RIGHTS IN THE COMMON LAW (2015) (observing continuities and changes between the earlier review of provincial and colonial legislation and judicial review under the bill of rights in Canada, South Africa as well as Britain).

[4] *See* Susan Low Bloch, Marbury *Redux: A Comment on Suzanna Sherry*, *in* ARGUING *MARBURY V. MADISON*, *supra* note 2, at 60.

[5] 5 U.S. (1 Cranch) at 173-80.

[6] *Id.* at 154. *See also* Bruce K. Miller & Neal E. Devins, *Constitutional Rights without Remedies: Judicial Review of Underinclusive Legislation*, 70 (3) JUDICATURE 151, 153-54 (1986).

[7] For present purposes, a state act under constitutional review is that which is subject to judicial review for its constitutional conformity, or rather, constitutionality. It can result from the political branch, such as statutes, executive decisions, and administrative rules. In this sense, a judicial ruling is a state act by the court.

[8] *E.g.*, LECKEY, *supra* note 3, at 102-06, 137-44; Po Jen Yap, *New Democracies and Novel Remedies*, [2017] PUB. L. 30; Holning Lau, *Comparative Perspectives on Strategic Remedial Delays*, 91 TUL. L. REV. 259 (2016); Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA. L. REV. 322, 339-40, 360-62 (2016); Kent Roach, *Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience*, 40 TEX. J. INT'L L. 537, 546-53 (2005); Kent Roach & Geoff Budlender, *Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?*, 122 S. AFR. L.J. 325, 334-35, 338-41 (2005).

[9] Lau, *supra* note 8.

the toolkit of constitutional remedies.[10] Along these lines, decisions such as *Minister of Home Affairs v. Fourie* of the South African Constitutional Court[11] and *W v. Registrar of Marriages* of the Hong Kong Court of Final Appeal[12] have been labeled as "suspension orders with bite" in comparative studies of constitutional remedies.[13] Besides prescribing a grace period, those decisions further provide for the legal framework needed to redress constitutional injustice caused by the impugned legislation should the legislature fail to act at the grace period's end.[14] Taken as a whole, the granting of grace periods and suspension orders (with or without bite) are remedy choices aimed at delaying the invalidity (or invalidating/ voiding effect) of the impugned state act resulting from its being found constitutionally incompatible.

Paralleling the foregoing account mainly based on the Common Law jurisdictions, this Article aims to shed light on how variations on the management of unconstitutionality and changing constitutional politics bear on remedial grace periods becoming a permissible choice in constitutional review through a comparative study of the Taiwan Constitutional Court (TCC) (1949-2018).[15] As will become clear, in contrast to judicial practices in other constitutional jurisdictions, remedial grace periods are more of rule than of exception in Taiwan,[16] evolving into the defining feature of the TCC's case law. Mindful of the TCC's unique case law in comparative jurisprudence of remedial grace periods, I shall argue that it is a function of both Taiwan's received continental model of constitutional review, under which invalidity is distinguished from incompatibility to manage the implications of unconstitutionality, and the role of the TCC vis-à-vis the political regime in Taiwan's

[10] Yap, *supra* note 8.
[11] [2005] ZACC 19.
[12] [2013] 2 HKLRD 90.
[13] Yap, *supra* note 8, at 37-39.
[14] *Id.*
[15] The argument submitted in this Article is based on the TCC case law in the period between 1949 and December 31, 2018 during which the TCC promulgated 773 decisions (officially designated as Interpretations). The TCC's latest decision is Interpretation No. 774, which was issued on January 11, 2019. The full-text Chinese version of all the TCC interpretations discussed in this paper is available at http://www.judicial.gov.tw/constitutionalcourt/p03.asp. Full-text English translation (holding and reasoning only) of all the TCC interpretations except Interpretation No. 744, 747, 749-51, 753, 756, 758-74 is available at http://www.judicial.gov.tw/constitutionalcourt/en/p03.asp.
[16] *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 143 (2003).

changing constitutional landscape. Seen in this light, the continuing and frequent granting of remedial grace periods in Taiwan is more reflective of the TCC's default option in deciding on the constitutionality of the impugned state act than of its strategic choice of remedy in individual cases. With the distinction between incompatibility and invalidity brought to the fore in comparative constitutional law, the subtle difference between the practice of judicial admonitions of incompatibility in the continental model of constitutional review[17] and the remedial suspension orders as employed in the Common Law jurisdictions can be thrown into sharp relief. As part of unconstitutionality management across constitutional jurisdictions, the granting of remedial grace periods is not simply the manifestation of judicial strategy but rather a function of legal tradition and the calculated judicial choice in light of changing constitutional politics.

Apart from Introduction and Conclusion, the argument unfolds in three Parts. Part II compares the use of remedial grace periods in constitutional review under what I call the Civilian-Continental and the Common Law model. Notably, constitutional review is traditionally classified into two types—centralized and decentralize—in scholarship with the former being conventionally associated with continental European countries, which share the Civil Law tradition, and the latter prevailing in the Common Law countries.[18] To indicate the role legal tradition plays in the management of unconstitutionality,[19] I instead adopt the terms the "Civilian-Continental model" and the "Common Law model" to denote the two conventional types of constitutional review respectively in my ideal-type approach to comparative studies of remedial grace periods.[20] As will become clear, the granting of

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[17] Judicial admonitions refers to "admonitory decisions" (*Appellentscheidungen*) in German constitutional jurisprudence. *See* Wiltraut Rupp-v. Brünneck, *Germany: The Federal Constitutional Court*, 20 AM. J. COMP. L. 387 (1972). I shall further address the substance of judicial admonitions when I discuss the TCC case law in Part III, *infra*.

[18] For a classical discussion, see Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 CALIF. L. REV. 1017 (1970).

[19] Víctor Ferreres Comella notes the influence of the Civil Law tradition on the countries that adopt a centralized system of constitutional review. VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 20-24 (2009).

[20] For the ideal-type approach to comparative law, see generally MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1991). Needless to say, not all the Civil Law countries adopt centralized constitutional review as exemplified by the German Federal Constitutional Court (GFCC). For example, Japan, some Latin American countries, and Nordic countries have

remedial grace periods in constitutional review in the Common Law jurisdictions is considered a judicial choice in remedy in response to the impugned state act's invalidation. In contrast, under the Civilian-Continental model, constitutional courts have granted grace periods to allow themselves to steer a middle course between the lameness of declarations of incompatibility (vis-à-vis invalidity) and the sweeping voiding/ invalidating effect of striking down unconstitutional state acts.

After drawing out the different paths in the Civilian-Continental and the Common Law jurisdictions, I continue with a case study based on the TCC case law in light of the foregoing comparative analysis. Part III provides a tripartite typology following an overview of the use of remedial grace periods in Taiwan. Remedial grace periods have been prescribed for three distinct functions—bridging, nudging, and hedging—each of which is centered on the distinction between incompatibility and invalidity in the Civilian-Continental model of constitutional review. Part IV explains why the TCC's granting of remedial grace periods falls short of its deliberate strategic choice of constitutional remedies by tracking the development of remedial grace periods along the TCC's evolving role in Taiwan's changing political landscape.

A terminological clarification is due before proceeding. A declaration of invalidity refers to a judgement of an unconstitutional state act (especially in the case of statutes) that results in the immediate invalidation of the impugned state act. In this sense, a declaration of invalidity corresponds to the practical effects (vis-à-vis the logical conclusion) of a "declaration of nullity" (*Nichtigkeitserklärung*) in German constitutional jurisprudence.[21] In this Article, I adopt the more popular Common Law term, the declaration of invalidity, to

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modelled constitutional review after the US-style decentralized judicial review. *See* FERRERES COMELLA, *supra* note 19, at 4-5. Notably, South Africa is a hybrid case. On the one hand, as a legacy of its colonial past, South African legal system contains elements of the Roman-Dutch law and the English common law alongside its local customary law. *See* JENS MEIERHENRICH, THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA, 1652-2000, at 92-95 (2008). On the other hand, it has installed a powerful constitutional court at the end of the Apartheid while other high courts are allowed to exercise constitutional review on some issues. South African Constitution s. 172 (2). When it comes to the compatibility of state acts with the constitutional bill of rights, South Africa has been studied along with other Common Law countries. *See*, *e.g.*, LECKEY, *supra* note 3, at 48-51; Yap, *supra* note 8.

[21] GFCC, *Constitutional Justice: Functions and Relationship with the Other Public Authorities*, NATIONAL REPORT FOR THE XVTH CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS 12, 39 (2011).

include the declaration of nullity under the German and other Civilian-Continental model of constitutional review. As regards the declaration of incompatibility, it refers to a simple declaratory judgment of an unconstitutional state act to the effect that the impugned act is found incompatible or inconsistent with the constitution but is left unaltered in terms of enforceability.[22]

II. REMEDIAL GRACE PERIODS IN COMPARISON: TWO APPROACHES TO MANAGING UNCONSTITUTIONALITY

In this Part, I first discuss the granting of remedial grace periods in the Civilian-Continental model of constitutional review, tracing its origin to the distinction between invalidity/ nullity and incompatibility in constitutional doctrine. I suggest that instead of an innovation in judicial remedy, the granting of remedial grace periods, together with the doctrinal invalidity-incompatibility distinction, is part of the constitutional court's endeavors to reconceive of the concept of unconstitutionality and thus manage its consequences. Next I discuss whether and, if so, to what extent the granting of grace periods in constitutional review in the Common Law jurisdictions is new in terms of their traditional equitable approach to judicial remedy.

A. *Toward Graduated Unconstitutionality: The Civilian-Continental Model*

The German Federal Constitutional Court (GFCC) has established itself as the exemplar of the Civilian-Continental model of constitutional review since its inauguration in 1951 when the nascent Federal Republic was only beginning to take shape as a constitutional democracy.[23] It takes pride in its role as the guardian of the constitution and the protector of

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[22] Section 4 of the Human Rights Act 1998 (UK) may be the most noted example of the declaration of incompatibility (vis-à-vis invalidity) in judicial review, although it is not in the constitutional context as defined in this paper. *See* GARDBAUM, *supra* note 3, at 29-30. In Germany, the functional equivalent is the declaration of the condemned state act as "simply incompatible (*unvereinbar*)" instead of "null and void (*nichtig*)." *See* KOMMERS & MILLER, *supra* note 3, at 35-36.

[23] JUSTIN COLLINGS, DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL

fundamental rights for which the GFCC is regarded as "the model to emulate."[24] Although the procedure for constitutional complaint (*Verfassungsbeschwerde*) has been installed since its early days, the framers of the Basic Law, inspired by the experience of the Austrian Constitutional Court of the 1920s (ACC),[25] were mainly concerned with guarding the abstract constitutionality of state acts (especially statutes) when they conceived of the institution of constitutional review.[26] The early focus on the compatibility (or consistency) of state acts with the constitution in the institutional design of the GFCC sheds illuminating light on the granting of grace periods under the Civilian-Continental model of constitutional review.

Conceived in Hans Kelsen's image of the *Stufenbau* of the legal system, the ACC, the prototype of the Civilian-Continental model of constitutional review, was created to guarantee the integrity of the hierarchical legal system with the constitution sitting atop it.[27] According to Kelsen's pure theory of law, as the legal authority of a regulation under that hierarchical system derives from the law at higher level, a statute that deviates from the authorization of the legal rule above it, i.e., the constitution, should be devoid of legality. Allowing an unconstitutional statute, which has no legal authority, to remain in force would be contradictory to the very idea of the legal system as a hierarchical structure (*Stufenbau*). Thus, to Kelsen, constitutional review is more than an institutional choice. Instead, it is a conclusion necessitated by the hierarchical order of the legal system. As Kelsen's brainchild, the ACC functioned as a "negative legislator" tasked to guard the integrity of the Austrian constitutional system against internal contradiction resulting from unauthorized legal rules, especially unconstitutional statutes, even though no personal interest or individual right would be actually affected because of an unconstitutional statute.[28]

COURT, 1951-2001, at xxviii-xlii.

[24] DE VISSER, *supra* note 3, at 62.

[25] *See* KLAUS VON BEYME, AMERICA AS A MODEL: THE IMPACT OF AMERICAN DEMOCRACY IN THE WORLD 94-95 (1987).

[26] KOMMERS & MILLER, *supra* note 3, at 8-9, 12.

[27] F. Rubio Llorente, *Constitutional Jurisdiction as Law-Making*, *in* LAW IN THE MAKING: A COMPARATIVE SURVEY 156, 165-66 (Alessandro Pizzorusso ed., 1988).

[28] *Id.* at 166.

Through this lens, as a rule, an unconstitutional statute is naturally null and void at its enactment as it never acquires legality because of its unconstitutionality. [29] Correspondingly, the finding of unconstitutionality of the impugned statute by constitutional review must be declaratory in nature as it is essentially an authoritative restatement of what has already taken place and has continued to exist, the state of unconstitutionality.[30] Once such an authoritative judgment is promulgated, the impugned statute is considered invalid since its enactment. Viewed thus, a declaration of unconstitutionality would result in the *ex tunc* invalidation of the impugned state act.[31] Nullity is not so much a chosen remedy in response to an unconstitutional state act as the only logical conclusion dictated by the finding of its unconstitutionality.[32] Unconstitutionality (*Verfassungswidrigkeit*) is synonymous with nullity (*Nichtigkeit*) or invalidity.

Problems with such a conceptual approach to the constitutional control of state acts arose quickly when the GFCC was still in incubation. One of the most pressing issues concerned the impact of a declaration of nullity/ invalidity on the stability and certainty of the legal order.[33] For example, a judicial decision based on a statute that was later declared unconstitutional and thus invalid would be annulled because conceptually it was regarded as legally groundless despite *res judicata*.[34] Moreover, with constitutional review extending to the protection of fundamental rights, a declaration of unconstitutionality could do more harm than good to the claimant, especially when the impugned statute concerned beneficial entitlements or equal treatment. Notably, such drastic effects were not the result of unwise choices in judicial remedy but the logical conclusion drawn from the conceptual framework

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[29] DE VISSER, *supra* note 3, at 317. It is noteworthy that Kelsen himself softened the link between unconstitutionality and voidness for reasons of legal certainty by replacing the latter with the concept of "voidability." Llorente, *supra* note 27, at 167. In this way, the effects of the ACC's judgements of unconstitutionality have been prospective in principle since its inception. *Id.*; FERRERES COMELLA, *supra* note 189 at 25, 176 n. 25.

[30] Llorente, *supra* note 27, at 167.

[31] DE VISSER, *supra* note 3, at 317.

[32] *Id*. at 312, 320.

[33] Rupp-v. Brünneck, *supra note* 17, at 390-91.

[34] DE VISSER, *supra* note 3, at 317.

informing the GFCC and other Civil Law jurisdictions of constitutional review.[35]

To mitigate the severe effects of declarations of unconstitutionality, the GFCC and its designers have taken pains to reshape the foregoing conceptual framework through constitutional jurisprudence as well as legislation, pointing in the direction of graduated unconstitutionality. On the one hand, the GFCC designers managed to restrict the retroactive effects of a declaration of unconstitutionality while continuing to maintain the rule that a declaration of unconstitutionality would lead to the *ex tunc* invalidation of the impugned state act.[36] Interestingly, though the effects of invalidating unconstitutional state acts have been mostly *ex nunc* in practice, such practices are still considered to be ad hoc instances of pragmatic measures that do not displace the rule of *ex tunc* invalidation.[37] On the other hand, the GFCC gradually separated the decision on legal effects from the judgment of unconstitutionality by declaring the impugned state act "incompatible" (*unvereinbar*) with the constitution or simply unconstitutional without ordering it to be invalid/ void (*nichtig*).[38] As a result, unconstitutionality, incompatibility, and invalidity were no longer synonyms. Only a declaration of unconstitutionality buttressed with an order of invalidity would lead to the annulment of the impugned state act. In contrast, a state act found incompatible with the constitution only would remain in force since it was not legally invalidated.[39] With unconstitutionality understood as a graduated state rather than a unitary concept, the doctrinal distinction between invalidity and incompatibility emerged, providing the GFCC with the conceptual tool needed to mitigate the legal effects of finding a state act unconstitutional.

Yet, that new conceptual framework soon raised further issues about the legal effects of

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[35] *Id*. at 320.

[36] Rupp-v. Brünneck, *supra note* 17, at 391; Wolfgang Zeidler, *Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*, 62 NOTRE DAME L. REV. 504, 518 (1987).

[37] *Compare* DE VISSER, *supra* note 3, at 317, *with* Llorente, *supra* note 27, at 167.

[38] KOMMERS & MILLER, *supra* note 3, at 35-36; DE VISSER, *supra* note 3, at 320-24; Rupp-v. Brünneck, *supra* note 17, at 398; Llorente, *supra* note 27, at 173-74, 178; Zeidler, *supra* note 36, at 516-18.

[39] The conventional wisdom holds that German state authorities should and actually have exercised prudence in the continuing enforcement of the state act found incompatible with the constitution, regardless of whether the GFCC prescribed a grace period at all. Zeidler, *supra* note 36, at 519. Yet, the German experience should not be taken for granted in light of the mixed record of other jurisdictions that subscribe to the distinction between declarations of invalidity and incompatibility. *See* DE VISSER, *supra* note 3, at 320-24.

the GFCC's negative decisions on the constitutionality of the impugned state act. What would happen to such an unconstitutional but not invalid act? Could the administration continue to enforce a statute having been declared incompatible with the constitution? Would such a declaration of incompatibility implicate any legal obligation to rectify to the administration or the parliament? What if the administration and the parliament failed to act? In response to these questions resulting from the distinction between invalidity and incompatibility, the GFCC jurisprudence drew inspiration from the Austrian experience and embraced the legal technique of granting grace periods for state acts found incompatible with the constitution.[40]

Granted, the granting of grace periods has been just part of the GFCC's robust strategy of self-enforcement in response to state acts found incompatible with the constitution without being invalidated.[41] Nevertheless, the variations on the granting of grace periods themselves, which are of particular pertinence to my present purposes, merit close examination. In some cases, the GFCC has prescribed that the impugned state act be amended within a fixed period of time or by a definite deadline apart from declaring it incompatible with the constitution. For example, in a case concerning the inheritance tax, the GFCC stipulated that the impugned statutory provision be further applied "'until a new provision' and set a deadline for this new provision of 31 December 2008 at the latest."[42] In other cases, the GFCC has instead ordered that the impugned state act continue to be valid until a set date along with a declaration of incompatibility. For example, in a case regarding the constitutionality of the property tax statute, the GFCC ordered that the impugned statute "continue to apply until 31 December 1996 'at most.'"[43]

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[40] Rupp-v. Brünneck, *supra note* 17, at 395.

[41] The GFCC Act s. 35 reads, "The Federal Constitutional Court may specify in its decision who is to execute it; in individual cases it may also specify the method of execution." The official English translation of the GFCC Act is available at http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=5. *See* GFCC, *supra* note 21, at 12-15, 38-43; *see also* KOMMERS & MILLER, *supra* note 3, at 36; Rupp-v. Brünneck, *supra* note 17, at 391-95; Llorente, *supra* note 27, at 173-74; Zeidler, *supra* note 36, at 516-18.

[42] GFCC, *supra* note 21, at 43 (discussing BVerfGE 117, 1).

[43] *Id*. (discussing BVerfGE 93, 121).

It is noteworthy that the above two types of grace periods make no practical difference in Germany as the parliament and the administration as well as other public authorities have been faithfully responsive to the GFCC's calls for rectification virtually without exception.[44] Yet, they are distinct in legal terms. In the first type as the inheritance tax case illustrated, grace periods were mainly aimed to urge the parliament or the administration to take rectificatory actions; in the second, grace periods were granted to avoid immediate invalidation in situations like the property tax case. Thus, in terms of legal effects, a fundamental distinction needs to be drawn between the orders of granting grace periods as discussed above. In the first case, had the parliament failed to amend the impugned inheritance tax statutory provision by the deadline of December 31, 2008, that provision would have continued to apply as it was only declared incompatible rather than invalid and remained in force.[45] In contrast, in the second case, had the impugned property tax statute not been rectified by December 31, 1996, the impugned statute would have lapsed after the expiry of the deadline as the GFCC had sunset its validity besides the declaration of incompatibility.[46] Although both cases are examples of declarations of incompatibility accompanied by grace periods, their legal effects are different. While the judgment in the second case amounted to a suspended declaration of invalidity as it actually rendered the validity of the impugned statute time-bound, the first judgment was merely a declaration of incompatibility since the elapse of the court-prescribed grace period would have no direct legal effects on the impugned statutory provision.[47] The doctrinal distinction between incompatibility and invalidity informs the differentiated legal effects of the GFCC's granting of grace periods.

In sum, how to mitigate the drastic legal effects of a state act being declared unconstitutional, i.e., the *ex tunc* invalidation, is a central concern to German constitutional

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[44] *Compare id. at* 42-43, *with* Zeidler, *supra* note 36, at 519. For rare instances of public defiance on the GFCC, see COLLINGS, *supra* note 23, at 260-74.

[45] GFCC, *supra* note 21, at 43.

[46] *Id.*

[47] The GFCC has been increasingly assertive when making a declaration of incompatibility. Apart from turning it into a suspended declaration of invalidity by setting a deadline for the validity of the impugned state act, it has added more and more specific instructions as to the anticipated statutory reform or imposed interim measures on its own. For further discussion, see *id*. at 38-43.

framers. Since such effects are considered the logical conclusion drawn from the traditional conceptual approach to constitutional interpretation, the solution begins with the conceptual distinction between invalidity and incompatibility in doctrine. Once that distinction is recognized, a concept of graduated unconstitutionality develops, enabling the GFCC to work adroitly around the issues surrounding the unconstitutionality of a state act. With grace periods, the GFCC has further saved itself from the hard choice between the lameness of declarations of incompatibility and the drastic effect of declarations of invalidity. Seen in this light, granting grace periods is more part of the efforts to address the practical issues resulting from the doctrinal distinction between incompatibility and invalidity than a legal technique in judicial remedy. The incompatibility/ invalidity distinction holds the key to understanding the granting of grace periods under the Civilian-Continental model of constitutional review,[48] including Taiwan.

B. *"New" Choices in Judicial Remedy? The Common Law Model*

Although *Marbury v. Madison* of the United States has long been considered the origin of modern judicial review, there is no consensus as to whether the introduction of constitutional review in other Common Law jurisdictions is a continuity or a break with their shared legal tradition of parliamentary sovereignty.[49] Yet, despite the debate over the newness of the recent adoption of (quasi-)constitutional review in Canada and South Africa and other Common Law jurisdictions, scholars agree on the novelty of granting grace periods in judicial declarations of (constitutional) invalidity as to state acts.[50] But how novel is it? Is it novel only in the Common Law world? Is it distinctive in the broader landscape of comparative constitutional law?

In contrast to the Civilian-Continental model of constitutional review aimed at the abstract constitutional control of state acts as discussed above, constitutional review

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[48] *See* DE VISSER, *supra* note 3, at 317-24.

[49] *Compare* GARDBAUM, *supra* note 3, *with* LECKEY, *supra* note 3. *See also* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008).

[50] *See* LECKEY, *supra* note 3, at 102-03; Yap, *supra* note 8; Roach, *supra* note 8, at 546.

developed out of the traditional judicial function in the Common Law world.[51] Corresponding to its traditional common law review, remedy choice in constitutional review in the Common Law jurisdictions is an issue distinct from the validity of the impugned state act.[52] To make sense of how novel a suspended declaration of invalidity is, the dual structure of validity judgment and remedy in constitutional adjudication holds the key.

As Chief Justice Marshall emphasized in *Marbury v. Madison*, considering the constitution as "the fundamental and paramount law,"[53] "an act of the [l]egislature repugnant to the Constitution is void."[54] A state act that is incompatible with the constitution is thus "unconstitutional and void."[55] The link between constitutional incompatibility and legal voidness has cast a long shadow on the Common Law approach to constitutional review. Finding an impugned state act incompatible with the constitution leads to its invalidation in the Common Law jurisdictions where constitutional review has recently been installed. For example, in Canada, the legal basis of making judicial declarations of invalidity is attributed to the provision of constitutional supremacy.[56]

On the face of it, this seems to reflect the conceptual approach to the unconstitutionality of state acts in the Civilian-Continental model as discussed above. On closer examination, however, the distinctiveness of the Common Law model will become clear. First, though *Marbury* declares that "an act of the [l]egislature repugnant to the Constitution is void,"[57] it does not suggest a real concept of statutes *void ab initio*. Rather, the impugned state act is valid until held unconstitutional in specific cases. Paralleling the precedential, i.e., forward-looking effect of the holding of unconstitutionality, prior actions (especially already

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[51] DE VISSER, *supra* note 3, at 94; Suzanna Sherry, *The Intellectual Background of* Marbury v. Madison, *in* ARGUING *MARBURY V. MADISON*, *supra* note 2, at 47, 52-53; *see also* LECKEY, *supra* note 3, at 56-63.

[52] *See* Fish, *supra* note 8, at 330; *see also* Miller & Devins, *supra* note 6, at 153.

[53] Marbury, 5 U.S. (1 Cranch) at 177.

[54] *Id.*

[55] McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 436 (1819).

[56] The Constitution Act 1982 s. 52 (1) provides "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." *See also* LECKEY, *supra* note 3, at 103; Roach, *supra* note 8, at 546; Sarah Burningham, *A Comment on the Court's Decision to Suspend the Declaration of Invalidity in* Carter v. Canada, 78 SASKATCHEWAN L. REV. 201, 201 (2015).

[57] 5 U.S. (1 Cranch) at 177.

adjudicated ones) that were taken on the basis of the impugned state act would not be affected as a result of a declaration of unconstitutionality.[58] This limited effect of unconstitutionality distinguishes the Common Law tradition from the prototype of the Civilian-Continental model under which a declaration of unconstitutionality would lead logically to the impugned state act's *ex tunc* invalidation.[59]

Second, under the Common Law model of constitutional review, a declaration of invalidity actually plays a double role: a declaration of invalidity is not only a judgment as to the (un)constitutionality of the impugned state act (A) but also a remedy in response to the unconstitutional state act (B). To put it differently, a declaration of invalidity is essentially a judicial order that is issued to remedy an impugned state act that is declared unconstitutional (A) with the measure of invalidation or nullification (B). Moreover, as invalidation has been habitually chosen as the judicial remedy in cases concerning the non-constitutional judicial review of the compatibility of subordinate legislation with a parental statute,[60] the dual character of declarations of invalidity in constitutional review has thus been eclipsed. Yet, when the supposed invalidation effect that results from an impugned state act found unconstitutional in a declaration of invalidity becomes problematic, the foregoing dual character of the declaration of invalidity has resurfaced in the differentiating responses in constitutional decisions. While a judgment of the unconstitutionality of the constitution still results in a judicial declaration of invalidity (or nullity), the legal effects of such a declaration become a question of remedy choice to be addressed separately. In this light, the emphasis seems to be shifting from the equation of unconstitutionality with invalidity in the judgment of the impugned state act's constitutional conformity to the consideration as to whether a declaration of invalidity is the best judicial remedy for unconstitutionality in individual cases.[61]

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[58] I am indebted to Mark Tushnet for a detailed comment on the distinctiveness of the Common Law model of constitutional review, especially in the US.

[59] *See supra* text accompanying notes 28-36.

[60] Such practices, which had long existed in the several Common Law countries, are considered the source of inspiration for their formal adoption of constitutional review. *See* LECKEY, *supra* note 3, at 56-63.

[61] *Id*. at 115-22; Yap, *supra* note 8, at 30; Roach & Budlender, *supra* note 8; Burningham, *supra* note 56, at 202; *see also* TUSHNET, *supra* note 49, at 247-50.

As noted above, constitutional review in the Common Law tradition is concrete and centers on individual cases with emphasis on the vindication of individual rights.[62] Seen in this light, contextualized responses (including suspension orders) are not foreign to judicial remedy for the constitutional invalidity of the impugned state act.[63] Thanks to the equitable and discretionary character of the law of judicial remedy in the Common Law tradition,[64] responses to the legal effects of declarations of invalidity in constitutional review have been characterized by judicial creativity. Combined with other remedial measures, declarations of invalidity have adopted unconventional and complex forms. The granting of a remedial grace period is merely a technical choice among the various skills of judicial remedy in response to the invalidity of the impugned state act.[65] With a remedial grace period granted, the effects of the declaration of invalidity are suspended, leaving the enforceability of the impugned state act unaltered during the grace period. The granting of remedial grace periods in constitutional review in the Common Law jurisdictions gives rise to the remedial form of suspended declarations of invalidity.

With the dual character of declarations of invalidity disclosed, answers to the questions put forward earlier also become clear. The legal effect of granting a grace period to a declaration of invalidity—the suspension of the declaration of invalidity—is novel as it results in the situation of unconstitutional state acts remaining in force in jurisdictions rooted in the Common Law tradition. Yet, situated in the Common Law tradition of discretionary and equitable judicial remedy, remedial grace periods can be seen as a contextualized remedy choice. From this perspective, the granting of remedial grace periods is not as unconventional as it appears.

To sum up, under the Common Law tradition that remedy choice stands apart from the judgment of (in)validity/ (un)constitutionality, the granting of remedial grace periods has been virtually absorbed into the question of judicial remedy with the dual character of declarations of invalidity obscured. Drawing heavily on the recent experience of

[62] DE VISSER, *supra* note 3, at 97; TUSHNET, *supra* note 49, at 247.
[63] *But cf.* Fish, *supra* note 8, at 347-73; TUSHNET, *supra* note 49, at 247.
[64] Fish, *supra* note 8, at 329-33; Roach & Budlender, *supra* note 8, at 325-27 and n. 6.
[65] *See* Roach & Budlender, *supra* note 8; TUSHNET, *supra* note 49, at 248-49; *see also* Fish, *supra* note 8.

constitutional review in the Common Law jurisdictions, current literature tends to characterize it as a novel judicial remedy choice in the form of the suspension order as to the declaration of invalidity.[66] Framed this way, the granting of remedial grace periods is tied to declarations of invalidity, regardless of whether it is prescribed in a suspension order simpliciter or in its augmented edition, i.e., a suspension order with bite. As a result, the potential functions of grace periods in constitutional review beyond suspending declarations of invalidity are not given due attention.

Before proceeding to the case study, it will help to reflect on the use of remedial grace periods in constitutional review by juxtaposing the Common Law model with its Civilian-Continental counterpart. It is true that remedial grace periods emerge in the judicial management of the consequences of unconstitutional state acts in both models of constitutional review. Nevertheless, juxtaposed with the Common Law model, the Civilian-Continental model shows that the granting of remedial grace periods does not necessarily give rise to the state of suspended declarations of invalidity. This suggests the wider role of remedial grace periods in the management of unconstitutionality than has been contended in the existing Common Law model-based scholarship. In the following, Taiwan is to be closely studied to shed light on why the full potential of remedial grace periods can only be appreciated by taking account of legal tradition and the political landscape in which a constitutional jurisdiction is situated.

III. REMEDIAL GRACE PERIODS IN THE TCC CASE LAW: A FUNCTIONAL ANALYSIS

Deferring the question of why the TCC has turned to remedial grace periods to Part IV, this Part presents an observation of the TCC's granting of remedial grace periods in practice to illustrate the manifold functions of remedial grace periods. In the first place, I offer an overview of the use of remedial grace periods in the TCC case law. Besides indicating the TCC's growing trend toward remedial grace periods in its unconstitutionality judgments, I

[66] *See* sources cited in *supra* note 8.

shall point out that not all the TCC judgements attached with a remedial grace period can be classified as suspension orders. Instead, they need to be further differentiated in terms of the distinction between incompatibility and invalidity. Following the overview, I provide a tripartite typology of the TCC judgements accompanied by a remedial grace period in terms of the function of granting grace periods in the TCC constitutional jurisprudence.

A. *More than Suspension Orders: An Overview of the TCC's Use of Remedial Grace Periods*

In its seventy years of existence, the TCC has issued 774 interpretations.[67] Since Interpretation No. 218 issued in 1987,[68] the TCC's first use of a remedial grace period, the TCC has granted remedial grace periods eighty-six times in total.[69] All of them were

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[67] The TCC was inaugurated in 1948. Statistics concerning the TCC case law referred to *infra* are based on the case law as of December 31, 2018. For the explanation, see *supra* note 15. Until the end of the Fourth Council of Grand Justices of the Judicial Yuan in September 1985, only 199 interpretations were promulgated. A terminological note is due. The Judicial Yuan is the umbrella governing body of judicial administration, which is one of the five highest constitutional powers under Taiwan's quintpartite separation of powers system. The Judicial Yuan exercises constitutional review in the form of the Council of Grand Justices, which is popularly known as the TCC. The Council of Grand Justices is set to be replaced by the Constitutional Tribunal when the new Constitutional Litigation Act comes into effect on January 3, 2022. *See also* Tzu-Yi Lin et al., *Seventy Years On: The Taiwan Constitutional Court and Judicial Activism in a Changing Constitutional Landscape*, 48 HONG KONG L.J. 995, 1023 & n. 140 (2018). For an introduction to the current judicial organization in Taiwan, see generally Wen-Chen Chang, *Courts and Judicial Reform in Taiwan: Gradual Transformations towards the Guardian of Constitutionalism and Rule of Law*, *in* ASIAN COURTS IN CONTEXT 143, 145-51 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2014).

[68] In Interpretation No. 217, which was issued just two days after martial law being formally lifted on July 15, 1987, the TCC upheld an interpretive circular issued by the Ministry of Finance. I further discuss the significance of Interpretation No. 218 in Part IV, *infra*.

[69] Interpretation Nos. 261, 282, 599, and 631 are excluded for the following reasons. As regards Interpretation Nos. 261 and 282, some scholars include both in the studies of "judicial deadline." *See, e.g.,* JIUNN-RONG YEH, DEMOCRATIC TRANSITION AND CONSTITUTIONAL CHANGE ch. 8 (2003) (in Chinese); WEN-CHEN CHANG ET AL., CONSTITUTIONALISM IN ASIA: CASES AND MATERIALS 455 (2014). I exclude them in the discussion of remedial grace periods as it is questionable whether the deadlines set in those two interpretations are remedial in character. Interpretation No. 261 (1990) ordered the members of the First Parliament Legislative Yuan elected in 1947 and 1948 to vacate their parliamentary seats by December 31, 1991 and thereby resolved the foremost political issue in Taiwan's democratization. *See* Lin et al., *supra* note 67, at 1011. Given that the very long First Parliament was also ordered to close in December 1992, the deadline imposed in Interpretation No. 261 was more of part of the TCC's constitutional disapproval of those parliamentarians serving for decades on end since the elections of 1947 and 1948 than a remedial grace period. As regards Interpretation No. 282 (1991), it is essentially the postponement of Interpretation No. 282 itself instead of a remedial grace period corresponding to a judgment of unconstitutionality. With respect to Interpretation No. 599 (2005), a preliminary junction decision in relation to Interpretation No. 603 (2005), it is an instance of what Neal Katyal calls "judicial sunset." *See* Neal Katyal, *Sunsetting Judicial Opinions*, 79

attached to unconstitutionality judgments concerning the political branch's acts, including statutes and administrative rules. The proportion of the interpretations attached with a remedial grace period to the entire TCC case law is inconspicuous but deceptive, falling far short of reflecting its role in the TCC approach to constitutional review in practice. Thus, as will be further discussed in Part IV, the better foil for the role of remedial grace periods in the TCC jurisprudence is the TCC's interpretations issued after its formative stage (1948-85) when the influential Fifth Council of Grand Justices (of the Judicial Yuan) (hereinafter the Fifth Council) assumed office in October 1985.[70] Since then, the TCC has issued 574 interpretations, approximately 15% of which included a remedial grace period. As a remedial grace period must be prescribed to redress the unconstitutionality judgment as to state acts, the percentage substantially changes when compared to the TCC's unconstitutionality judgments in its post-formative stage: 39% (86/223). Moreover, when we exclude those judgements concerning advisory opinion referrals and unconstitutional judicial precedents (or interpretations) and focus on the TCC's judgments as to the constitutionality of the political branch's acts,[71] the real face of the TCC's use of remedial grace periods is unveiled. Among the 191 judgements that declare the invalidity or incompatibility of the political branch's acts, 86 (45%) are attached with a remedial grace period.[72]

NOTRE DAME L. REV. 1237, 1244-47 (2004). It is also noteworthy that Interpretation No. 631 (2007) seems to prescribe a remedial grace period in correspondence to the effective date of the prospective legislative amendment to the Communications Privacy Act, the repealed provision of which was declared invalid by the TCC. Given that the impugned statutory provision had already been amended, Interpretation No. 631 was only rendered so that the petitioner could request retrial on the decision. Thus, the grace period was not remedial but to be synchronized with the legislatively designated effective date of the statutory amendment. Taken as a whole, Interpretation No. 631 amounts to the TCC's endorsement of the statutory amendment. For these reasons, I exclude Interpretation No. 631 as well.

[70] For the relationship between the Council of Grand Justices and the TCC, see *supra* note 67.

[71] Apart from constitutional interpretations, the TCC has jurisdiction over "unification interpretation." For the distinction between constitutional and unification interpretation in the TCC's jurisdictions, see Jau-Yuan Hwang et al., *"The Clouds Are Gathering": Developments in Taiwanese Constitutional Law — The Year 2016 in Review*, 15 INT'L J. CON. L. 753, 755-56 (2017). For the present purposes, I exclude unification interpretations from my discussion of the TCC's approach to constitutional remedies.

[72] Interpretation No. 535 (2001) is ambiguous. The TCC was ambivalent on the constitutionality of the impugned Policing Act as the TCC seemed to suggest that the impugned statute was barely constitutional only when several provisions of the impugned statute were read down. Even so, the TCC prescribed a remedial grace period of two years and admonished the political branch to amend the Policing Act, though the TCC fell short of declaring it incompatible with the constitution. Strictly speaking, Interpretation No. 535 was an

[Table 1]

(1)	Period (2)	Total Interpretations (3)	Cases Declared Unconstitutional (4)	Cases Prescribed with a Grace Period (5)	Percentage (6) [(5) ÷ (4)]
5th Council	10.01.1985 – 09.30.1994	167	28	9	32%
6th Council	10.01.1994 – 09.30.2003	200	65	22	34%
Yueh-sheng Weng Court	10.01.2003 – 09.30.2007	67	26	8	33%
In-jaw Lai Court	10.01.2007 – 10.01.2010	48	25	17	68%
Hau-min Rai Court	10.13.2010 – 10.31.2016	59	31	19	61%
Tzong-li Hsu Court	11.01.2016 – 12.31.2018	33	16	11	69%

Notes: From October 1, 2003 on, Grand Justices have been appointed to staggered terms of eight years (except half of those who were appointed in 2003 for a four-year term, including President-Grand Justice Yueh-Sheng Weng). "Cases" in (4) and (5) columns only include the state acts of the political branch, namely, statutes and administrative rules.

As noted above, the TCC first included a remedial grace period in Interpretation No. 218 in the early years of the Fifth Council. During that term (October 1985—September 1994), the TCC issued 167 interpretations in total, 28 of which were unconstitutionality judgments on the political branch's acts that included a remedial grace period.[73] During the Sixth Council (October 1994—September 2003), the TCC issued 65 unconstitutionality judgments on the political branch's acts that included a remedial grace period among the 200 interpretations issued.[74] With the Sixth Council replaced by the Grand Justices appointed to staggered terms of eight years,[75] however, the use of remedial grace periods has soared. From October 2003 on, over 56% (55/98) of unconstitutionality judgments on the political

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"admonitory decision" (*Appellentscheidung*) proper rather than a declaration of incompatibility, at least in form. Thus, I include Interpretation No. 535 in my count of the TCC interpretations that make declarations of invalidity or incompatibility with a remedial grace period prescribed.

[73] Interpretation Nos. 200-366 were issued during the Fifth Council.

[74] Interpretation Nos. 367-566 were issued during the Sixth Council.

[75] JIUNN-RONG YEH, THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS 160 (2016).

branch's acts have included a remedial grace period.[76]

Moreover, as indicated in Table 1, the recent rise of the TCC's use of remedial grace periods has more to do with personnel composition than the change on the terms of Grand Justices. 2007 was the year when President-Grand Justice Yueh-Sheng WENG (翁岳生), the last holdover from the Fifth Council, during the term of which remedial grace periods were initially adopted, retired from the TCC. Before he left the TCC, remedial grace periods appeared thirty-nine times over a span of twenty-two years. Since President-Grand Justice Weng's retirement in 2007, the TCC has issued another forty-seven interpretations attached with a remedial grace period just for over a decade.

Apart from the recent increasing use of remedial grace periods, the TCC case law suggests that a declaration of unconstitutionality attached with a remedial grace period does not necessarily point in the direction of "suspension orders" that delay the invalidation of the impugned state act.[77] As the foregoing discussion of the Civilian-Continental model shows, while remedial grace periods are prescribed in declarations of incompatibility (vis-à-vis invalidity), their legal effects depend on the varying judicial orders. In contrast, the TCC has further prescribed remedial grace periods in declarations of invalidity. Even so, informed by the GFCC doctrinal distinction between incompatibility and invalidity under the concept of unconstitutionality, the TCC carefully distinguished between declarations of incompatibility and those of invalidity in its interpretations where a grace period was granted.[78] Should the impugned state act remain unchanged after the prescribed grace period elapses, a declaration of incompatibility attached with such a grace period will not affect that state act's legal effects. In other words, a remedial grace period does not suspend or delay the TCC's declaration of incompatibility as such a declaration does not affect the

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[76] The first interpretation issued by the TCC staffed with Grand Justices appointed to staggered terms is Interpretation No. 567 (2003).

[77] Yap, *supra* note 8. For the impact of the recent Interpretations Nos. 725 and 741 on the judicial enforceability of the law that was declared invalid with a remedial grace period attached, see CHANG ET AL., *supra* note 69, at 761.

[78] Yueh-Sheng Weng (翁岳生), *Guardian of Constitution: Reflection and Expectation*, *in* CONSTITUTIONAL INTERPRETATIONS: THEORY AND PRACTICE, VOL. VI (PART I) 1, 31 n. 94 (Fort Fu-Te Liao ed., 2009) (in Chinese).

legal validity of the impugned state act. Thus, not all the eighty-six interpretations where a remedial grace period is granted are suspended declarations of invalidity. Specifically, while seventy interpretations are suspended declarations of invalidity, others are declarations or admonitions of incompatibility attached with a remedial grace period having different legal implications, to which I shall shortly turn next.

Before proceeding, a methodological and definitional note is due. In contrast to the GFCC, the TCC has followed a much gentler approach when it condemned the impugned state act's unconstitutionality, regardless of whether the condemned act was invalidated or not.[79] As a result, it requires discerning the code phrases chosen by the TCC to communicate the judgment of incompatibility, including "not entirely compatible" (未盡相符) and "compatible with the constitution only if…" (…始與憲法相符), and that of invalidity, including "invalid" (失其效力) and "inoperative" (停止適用).[80] For this reason, some of the TCC's declarations of incompatibility are hardly distinguishable from its "admonitory decisions" (*Appellentscheidungen*), which in German law are considered to be holding the impugned state acts constitutional albeit with warnings about the defects that need to be rectified to avoid constitutional condemnation in the future.[81] Given the seeming extension of admonitory decisions to those declaring the impugned state act incompatible or issuing judicial advice as to the required reform,[82] I choose the term admonitions of incompatibility in the place of declarations of incompatibility when discussing the TCC case law.[83] In addition, to determine the TCC's intention as to incompatibility, invalidity, or just admonition, not only the holding but also the reasoning needs to be carefully examined.[84]

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[79] I shall further discuss this legacy from its early case law during the martial-law era in Part IV.A., *infra*.

[80] Weng, *supra* note 78, at 29-30.

[81] Rupp-v. Brünneck, *supra note* 17, at 395-99.

[82] *Id*. at 388-95; *see also* GFCC, *supra* note 21, at 41.

[83] Interpretation No. 535 (2001) illustrates the TCC's ambivalence about admonitory decisions. For the ambiguities surrounding Interpretation No. 535, see *supra* note 72.

[84] Interpretation No. 549 (2002) is thus classified as a proper declaration of incompatibility with a remedial grace period, even though the TCC only intimated its unconstitutionality judgment in the reasoning. The official English translation misses the genuine meaning of Interpretation No. 549 in its Chinese original.

B. *Between Dialogue and Directive: Toward a Functional Typology*

Echoing literature on dialogical judicial review in comparative constitutional law,[85] some scholars have interpreted the granting of remedial periods as part of the TCC's grand strategy to engage the political branch in an institutional dialogue aimed at the cooperative solution to unconstitutional state acts.[86] Departing from this dialogical view, I suggest that the TCC's use of remedial grace periods be divided into three types: bridging, nudging, and hedging. In the first type, the granting of remedial grace periods essentially provides the doctrinal *bridge* for the TCC to move toward a normal constitutional court that can realize its institutional potential to strike down the political branch's unconstitutional acts. In the second type, the granting of remedial grace periods is meant to focus public attention on the TCC's judgment of or admonition about the unconstitutionality of the impugned state act, thereby *nudging* the political branch to rectify it but without affecting its validity. In the third type, the TCC further buttresses its nudging judgments with suspended interim measures to *hedge* against the constitutional risk of political inaction at the elapse of the remedial grace period. As the temporal sequence of the TCC's use of remedial grace periods suggests, the development of bridging, nudging, and hedging reflects the TCC's move from institutional dialogue to constitutional directive in prodding the political branch to effectively rectify the declared unconstitutional acts.

1. Bridging: Suspended Declarations of Invalidity

Of the eighty-six interpretations attached with remedial grace periods, seventy were suspended declarations of invalidity in terms of comparative constitutional law, or as I call it, "bridging" judgment.[87] As will be further discussed, the first bridging judgment

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[85] *E.g.*, Roach, *supra* note 8; Roach & Budlender, *supra* note 8.

[86] *E.g.*, Jiunn-rong Yeh, *The Politics of Unconstitutionality: An Empirical Analysis of Judicial Deadlines and Political Compliance in Taiwan*, *in* EMPIRICAL STUDIES OF THE JUDICIAL SYSTEMS 2011 1, 15-20 (Yun-chien Chang ed., 2013) (in Chinese).

[87] They are Interpretation Nos. 218, 224, 251, 289, 300, 313, 324, 365, 366, 367, 373, 380, 384, 390, 392, 402, 423, 436, 443, 450, 452, 454, 491, 523, 551, 573, 580, 586, 588, 598, 613, 616, 619, 636, 638, 640, 641, 645, 649, 654, 657, 658, 663, 664, 666, 669, 670, 677, 680, 687, 694, 696, 702, 704, 707, 708, 709, 710, 711, 716, 718, 724, 730, 731, 733, 734, 739, 749, 756, and 765.

Interpretation No. 218, which concerned an administrative rule, was issued in August 1987 when martial law had just been lifted a month ago. Soon it extended to the invalidation of statutes. A notable early example was Interpretation No. 251 issued in 1990, which was a sequel to Interpretation No. 166 issued in 1980. With an eighteen-month grace period,[88] the TCC finally gave meaning to the toothless Interpretation No. 166 in Interpretation No. 251, ending the condemned long life of the Police Punishment Act.[89] Since then, bridging has been widely used. It has been applied to both statutes and administrative rules concerning a wide range of issues, including the equal parental rights under the Civil Code,[90] the judicial due process for pre-trial detention and other enforcement measures under the Criminal Procedures Act,[91] the judicial review of martial-court decisions under the Martial Court Procedures Act,[92] the right to freedom of assembly under the Assemblies and Demonstrations Act.[93] In addition, the TCC has issued bridging judgments in relation to sundry administrative regulations. Though a substantial proportion concerns taxes,[94] bridging has been used to address the constitutional issues raised by various regulatory policies such as the administration of civil aviation,[95] the suspension of containers depots,[96] the regulation of apothecary,[97] land redevelopment,[98] city general planning,[99] benefits for school teachers,[100] and immigration and border control.[101]

Generally speaking, the remedial grace period the TCC prescribed in bridging judgments ranged from six months to two years. Although the TCC tended to grant the political branch longer remedial grace periods in the cases concerning statutes than those

[88] Interpretation No. 251, issued on January 19, 1990, declared the Police Punishment Act unconstitutional and invalid from July 1, 1991.

[89] The TCC first intimated that the Police Punishment Act was unconstitutional in Interpretation No. 166 (1980). I shall further discuss Interpretation Nos. 166 and 251 in Part IV.A., *infra*.

[90] Interpretation No. 365 (1993).

[91] Interpretation No. 392 (1995).

[92] Interpretation No. 436 (1997).

[93] Interpretation No. 718 (2014).

[94] *E.g.*, Interpretation Nos. 218, 224, 289, 367, 616, 640, 641, 657, 663, 687, 694, and 696.

[95] Interpretation No. 313 (1993).

[96] Interpretation No. 324 (1993).

[97] Interpretation No. 711 (2013).

[98] Interpretation No. 739 (2016).

[99] Interpretation No. 709 (2013).

[100] Interpretation No. 707 (2012).

[101] Interpretation Nos. 708 (2013) and 710 (2013).

about administrative rules, how the TCC decided on the length of remedial grace periods in individual cases was not clear.[102] Moreover, there were some conspicuous exceptions. For example, Interpretation No. 677 gave the political branch only two weeks to respond to the declared invalidity of a statutory provision that stipulated that a prisoner be released by noon of the next calendar day following the end date of her prison sentence.[103] Obviously, the short remedial grace period was not issued to solicit legislative response but to allow the correctional facilities to make corresponding arrangements.[104] Another outlier was Interpretation No. 613 regarding the National Communications Commission (NCC) Act according to which the independent NCC was created, despite the Democratic Progressive Party (DPP)-controlled Executive's objections.[105] Considering the politically charged context of Interpretation No. 613, the TCC unusually gave the opposition-controlled Legislative Yuan twenty-nine months to rectify the impugned statute, which effectively allowed the unconstitutional NCC to sit out the DPP presidential term.[106]

It is noteworthy that not all the seventy bridging judgments are genuine bridging or suspended declarations of invalidity. Rather, some of them are bridging in form only. Instead, those judgments are effectively "reading down" or "reading in" interpretations.[107] Take Interpretation No. 373 for example. In this judgment, the statutory ban on the unionization of employees in the education sector was formally declared invalid, with a one-year grace period attached, *to the extent* that the ban unconstitutionally included technicians (技工) and laborers (工友).[108] As a result, the political branch simply left the

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[102] *See* YEH, *supra* note 69, at 334; Weng, *supra* note 78, at 37.

[103] Interpretation No. 677 (2010). As the case concerned unlawful imprisonment to the extent that the prisoner was imprisoned beyond the end date of her prison sentence according to the impugned provision of the Prison Act, the TCC also mandated an interim measure before the expiry of the two-week grace period. According to the TCC-mandated interim measure, the prisoners shall be released by noon instead of midnight on the end date of her prison sentence. The exceptional TCC-mandated interim measure will be further discussed in Part III.B.3., *infra*.

[104] This parallels *Buckley v. Valeo* (424 U.S. 1 (1976)), which set a grace period of thirty days to allow the Federal Election Commission to exercise its powers. Fish, *supra* note 8, at 360 n. 184.

[105] Interpretation No. 613 (2007).

[106] For further discussion of the political background of Interpretation No. 613 (2007), see Ming-Sung Kuo, *Moving towards a Nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan's Constitutional Politics*, 25 WASH. INT'L L.J. 597, 617-19 (2016).

[107] Such ostensibly bridging judgments include Interpretation Nos. 373, 704, and 718.

[108] Interpretation No. 373 (1995).

impugned statutory provision unchanged as it would cease applying to technicians or laborers in the education sector after one year from the promulgation of Interpretation No. 373.[109] As will be discussed shortly, Interpretation No. 373 was a "hedging" judgment in essence as the TCC actually hedged its judgment against the risk of the political branch's non-compliance with the remedy of its own choosing in the same judgment.

More important, the example of Interpretation No. 373 illustrated the fundamental question: How responsive has the political branch been to the TCC's bridging judgments? Taking into account the ostensible bridging judgments,[110] the total number of the lapse of the impugned statutes or administrative rules because of the political branch's failure to respond is twenty-one.[111] In other words, around 30% (21/70) of the bridging judgments have failed to solicit timely effective responses from the political branch.[112] As a result, the state of unconstitutionality in those cases was only resolved with the lapse of the impugned state acts. If bridging was aimed to solicit legislative or administrative responses to resolve the state of unconstitutionality,[113] the above record was not very encouraging. There may be different reasons for the political branch not to act. As the ostensible bridging judgment of Interpretation No. 373 suggests, the political branch's inertia could be attributed to the TCC's directive-like interventions. In ostensible bridging judgments, the political branch did not

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[109] The right to unionize in the education sector was formally recognized in 2010.

[110] *See supra* note 107.

[111] By failure to respond, I refer to the lapse of the impugned state acts at the end of the prescribed remedial grace period, even though the political branch reacted later or with stopgap measures as Interpretation No. 718 illustrated. The cases of lapse are Interpretation Nos. 218, 313, 366, 373, 380, 390, 402, 450, 573, 580, 586, 640, 654, 657, 677, 696, 704, 718, 731, 733, and 734. If we include the examples of statutory or regulatory amendments promulgated after the elapse of the prescribed remedial grace period due to procedural delay (Interpretation Nos. 300, 523, and 598), the number will reach 24. In an empirical evidence-based analysis, Jiunn–rong Yeh notes that during the period 1987-September 30, 2011, the political branch amended the condemned statutes within the TCC-prescribed grace period around 67%. Yeh, *supra* note 86, at 21. Yet, it is unclear how that percentage was calculated as Yeh did not explain or list the cases concerned. It is also worth pointing out that Yeh did not distinguish between bridging and nudging judgments.

[112] How the political branch will respond to Interpretation Nos. 749, 756, and 765 remains unclear as their corresponding remedial grace period has not elapsed.

[113] The rare examples in the US Supreme Court jurisprudence suggest two contrasting functions of remedial grace periods. In contrast to the purpose of granting a one-month grace period in *Buckley v. Valeo* to allow the Federal Election Commission to exercise power, the US Supreme Court granted a three-month grace period in *Northern Pipeline Construction Co v. Marathon Pipe Line Co* (458 U.S. 50 (1982)) to solicit legislative response to rectify the Bankruptcy Act of 1978. Unfortunately, *Northern Pipeline* proved to be a disappointing experiment with the legislative response-soliciting remedial grace periods in the US. *See* Fish, *supra* note 8, at 360-62.

have much incentive to act as no legal vacuum would occur thanks to the TCC's reading down or reading in. Yet, this also calls the wisdom of bridging into question. As the twenty-odd lapse cases suggested, the political branch did not seem to be always concerned about the eventual lapse of the impugned state acts as the rationale of bridging assumed.

Against that backdrop, the concerns behind the TCC's wide use of bridging became clear. Though the seventy bridging judgments covered a wide range of subjects, they were mainly concerned with the restriction of civil rights and liberties.[114] Even so, over 41% (29/70) of bridging judgments declared the political branch's impugned acts invalid according to the constitutional doctrine of "statutory reservation" (*Rechtsvorbehalt*) under the formal rule of law (*Rechtsstaat*) principle to the effect that the impugned rights-infringing administrative rule was *ultra vires* or rendered so because of insufficient statutory basis.[115] For the twenty-nine cases in which the political branch's acts were condemned for the breach of the constitutional doctrine of statutory reservation, the political branch could redress the constitutional wrong by simply giving the impugned administrative rule a statutory basis or even further to reconsider its substance. Put differently, as the TCC came down on the political branch only for the reasons of the formal rule of law principle in those twenty-nine interpretations, its adoption of bridging judgments reflected its restraint from getting involved in the substance of the impugned acts.

It is true that legal certainty has carried considerable weight with the TCC in bridging.[116] Yet, it was not the only value in the TCC's calculation. As the TCC noted, bridging judgments enabled itself to strike the hoped-for balance between legal certainty and other constitutional values. With a grace period granted, the political branch could review

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[114] *Cf.* Yeh, *supra* note 86, at 17-18.

[115] The twenty-nine bridging judgments concerned are Interpretation Nos. 218, 289, 313, 324, 367, 380, 390, 402, 423, 443, 454, 491, 586, 598, 619, 638, 640, 657, 658, 680, 707, 710, 711, 724, 730, 734, 739, 756 and 765. For a discussion of the relationship between "statutory reservation" and the rule of law principle, see Ricardo Gosalbo-Bono, *The Significance of the Rule of Law and Its Implications for the European Union and the United States*, 72 U. PITT. L. REV. 231, 242 (2010).

[116] Jau-Yuan Hwang, *Unconstitutional But Not Invalid: A Reappraisal of the TCC Judgments on Unconstitutional Statues and Administrative Rules*, No 262 TAIWAN L.J. 39 (2014) (in Chinese).

substantive constitutional values without being pushed by judicial fiat,[117] only the record suggests that the TCC's bridging judgments did not always bear fruit. Instead of taking a substantive review of the impugned act proactively, the political branch actually allowed the prescribed grace period to elapse in eight cases decided on the bases of statutory reservation, including Interpretation No. 218, the first bridging judgment.[118] In view of such mixed experience, the TCC tweaked bridging in face of new constitutional challenges, to which now I turn.

2. Nudging: Emphatic Admonitions of Incompatibility

Although the TCC's first experience with remedial grace periods was not particularly reassuring as suggested in the political branch's mixed response to the bridging judgements, bridging remained the TCC's handy weapon to make a constitutional strike. Should the political branch fail to respond by the end of the prescribed remedial grace period, just let the impugned act lapse. So be it. Nothing is worse than the continuing state of unconstitutionality.

Yet, the TCC soon faced new constitutional issues for which lapse was not an option the TCC could afford. Here came Interpretation No. 455, the first nudging judgment. Until the TCC issued Interpretation No. 455 in 1998, it had made twenty-two bridging judgments since the remedial grace period was first adopted in 1987.[119] Although seven of the first twenty-two bridging judgments had resulted in the lapse of the impugned state acts, this did not particularly trouble the TCC when the impugned state acts only concerned the restriction of civil rights and liberties. Yet, it became a problem when the impugned state act provided the legal basis for beneficial entitlements. Should it be allowed to lapse, the eligible beneficiaries would lose their legal entitlements. Thus, to address issues concerning

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[117] The TCC did not explain why the declaration of invalidity was suspended in the first bridging judgment Interpretation No. 218 (1987). Yet, more than a generation later, it provided a retrospective justification in the reasoning of Interpretation No. 725 (2014) along the lines of thinking as noted above.

[118] The impugned interpretive circular lapsed on February 14, 1988 when the sixth-moth grace period ended while the Ministry of Finance incorporated its content into the Implementation Rule of the Income Tax Act on May 30, 1988.

[119] Interpretation No. 218 (1987).

differential treatment, Interpretation No. 455 only declared the impugned interpretive circular incompatible with the constitutional principle of equality and prescribed a one-year remedial grace period.

In contrast to the TCC's previous declarations of unconstitutionality, Interpretation No. 455 had two features. First, it was not a (suspended) declaration of invalidity as the impugned administrative act was only declared constitutionally incompatible. With the elapse of the prescribed remedial grace period, the declared unconstitutional state act would have remained in force had the administration failed to respond.[120] Second, Interpretation No. 455 was not just a traditional declaration of incompatibility or an admonitory decision proper. Rather, with a remedial grace period attached to the declaration of incompatibility, it was aimed to bring the state of unconstitutionality resulting from the political branch's act to the foreground of public attention. With such a nudge, the TCC expected the political branch to act accordingly.[121]

Since then, the TCC has issued nine nudging judgments in total.[122] Although the TCC initially applied nudging to issues concerning equal treatment,[123] it has extended it further to issues requiring structural adjustment, including the national health insurance plan,[124] the organization of the Judicial Yuan,[125] the statutory basis of policing activities,[126] and the provision for judicial review of remand prisoners' complaints.[127] Apart from the first two nudging judgments that concerned administrative rules and the deviant Interpretation No.

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[120] Although the TCC usually included legislative advice in its nudging judgments, it was not legally binding on the political branch.

[121] The then Senior Grand Justice Weng published one of his few concurring opinions to elucidate the TCC's move from bridging to nudging in Interpretation No. 455 along these lines. He further suggested that should the political branch fail to rectify constitutional flaws within the prescribed remedial grace period, the state would then incur liability and the courts could make remedial orders case by case. Unfortunately, the TCC did not move in that direction in its subsequent nudging judgments.

[122] Interpretation Nos. 455, 457, 524, 530, 535, 549, 653, 745, and 760.

[123] Interpretation Nos. 455 and 457 were issued in 1998. The TCC further issued three nudging judgments in this regard: Interpretation Nos. 549 (2002), 745 (2017), and 760 (2018).

[124] Interpretation No. 524 (2001).

[125] Interpretation No. 530 (2001).

[126] Interpretation No. 535 (2001).

[127] Interpretation No. 653 (2008).

760,[128] all the other six interpretations required statutory amendment. For this reason, the TCC prescribed a two-year remedial grace period in those six cases while requesting the administration to change the impugned administrative rules within six months in other nudging judgments. Yet, facing the TCC's nudging, the political branch did not often budge.

The record of how the political branch responded to the TCC's nudging raised serious doubt about its wisdom. The political branch responded to the first two nudging judgments in a timely and effective manner indeed.[129] Yet, when it concerned issues concerning structural adjustment, nudging mostly fell short of moving the political branch.[130] The first sign of trouble emerged from the first structural nudging judgment, Interpretation No. 524, which concerned the complex national health insurance plan. Taiwan instituted national health insurance in 1994. Before Interpretation No. 524 was issued in 2001, the TCC had issued an admonitory decision in 1999,[131] requesting the political branch to address the concerns raised over some provisions of the National Health Insurance Act. The political branch was unresponsive to the TCC's admonition. In its second encounter, the TCC made a declaration of incompatibility with respect to other provisions of the National Health Insurance Act and prescribed the political branch to rectify its constitutional flaws as well as address the issues raised in its 1999 admonitory decision within two years. Yet, it took the political branch almost another ten years to fully address the issues raised in both judgments.[132] In the event, the political branch did budge but only after the prescribed

[128] The latest nudging judgment, Interpretation No. 760 (2018), deviates from the previous ones in one important aspect. Although what was found constitutionally incompatible is a statutory provision, the prescribed six-month grace period is concerned with the remedial measures expected of the administrative departments involved.

[129] Interpretation Nos. 455 and 457. A more recent example falling in this line is Interpretation No. 745 (2017). The impugned statutory provision was amended one year before the expiry of the two-year grace period.

[130] The exception was Interpretation No. 535 (2001) concerning the statutory basis of policing activities. Still, it is noteworthy that in this admonitory decision, the TCC read in the proportionality principle with respect to the core provision of the impugned Policing Act. In response to Interpretation No. 535, the political branch left that core provision unchanged in the new statute.

[131] Interpretation No. 472 (1999).

[132] The National Health Insurance Act and the delegated administrative rules had been amended several times after Interpretation No. 524 (2001). Yet, those amendments did not satisfy all the requirements prescribed in Interpretation No. 524 until 2011.

grace period in nudging had expired.

If Interpretation 524 fell short for it only solicited late responses from the political branch, the other structural nudging interpretations failed conspicuously. In Interpretation No. 530, the TCC declared the existing Judicial Yuan, which had stood as the umbrella body of judicial administration since its reconstitution in 1947,[133] incompatible with the constitutional provision for the Judicial Yuan as the supreme judicial body and prescribed that the Judicial Yuan be reorganized accordingly through legislation within two years. Since its promulgation in 2001, the Judicial Yuan has remained as unconstitutional as it was over eighteen years ago.

The political branch's indifference to nudging in the foregoing two cases could be attributed to the broad ramifications from legal complexity or structural reorganization involved. Yet, facing Interpretation No. 549 issued in 2002, the political branch was explicitly defiant. Before the TCC were several provisions concerning the entitlement of the insured's child to receive the insured's payment under the Workers Insurance Act. For reasons of moral hazard, the impugned statute imposed additional restrictions on the insured's adopted child, which the TCC declared incompatible with the constitutional principle of equality. Interpretation No. 549 nudged the political branch with a prescribed two-year remedial grace period to rectify it. The political branch did not amend the impugned statute until 2008 when the grace period had already elapsed four years ago. Worse, the core provision (article 27), which the TCC declared constitutionally incompatible, was left unchanged. Again nudging did not result in budging.

The next nudging judgment, Interpretation No. 653 issued in 2008, was the last straw. Apart from the implicated structural adjustment, it concerned a core issue of civil rights and liberties: remand prisoners' right to judicial review of complaints about their treatment under the pre-trial detention. Though the Pre-Trial Detention Act provided for administrative review of such complaints, the TCC declared the impugned provision incompatible with the

[133] The current working constitution in Taiwan came into effect in 1947. *See* YEH, *supra* note 75, at 29-32; *see also* Hwang et al., *supra* note 71, at 754-55.

constitutional requirement of judicial protection and prescribed the political branch to make provision for judicial review of remand prisoners' complaints through legislation within two years. Notably, the TCC did not issue a declaration of invalidity for fear of the lapse of the existing administrative review mechanism should the political branch fail to respond in time. Again the political branch did not budge and the unconstitutional deprivation of remand prisoners' right to judicial review continued for another six years after the TCC's nudging in 2008. It took another judicial intervention, Interpretation No. 720, to rectify the unconstitutional Pre-Trial Detention Act.[134] Only this time, the TCC did not turn to a bridging judgment or a straightforward declaration of invalidity, let alone another nudging judgment. Instead, Interpretation No. 720 itself made provision for judicial review of remand prisoner's complaints by extending the Criminal Procedures Code to cases of pre-trial detention, paving the way for the TCC's further tweak about the granting of remedial grace periods.

Taken as a whole, nudging turns out to be the TCC's disappointing experiment with the blending of different declarations of unconstitutionality with the granting of remedial grace periods, though it is not a total failure. With the TCC's intervention in constitutional issues requiring structural adjustment deepened, the political branch becomes more and more reluctant to budge in face of nudging judgments. Apart from its early successes, nudging judgments are mostly tantamount to admonitions of incompatibility albeit with the emphatic note of a prescribed remedial grace period.

3. Hedging: Nudging Buttressed with Suspended Interim Relief

With the defects of nudging exposed in the interpretations as discussed above, the TCC was forced to mull over its choices. If the disappointing nudging judgments failed for their falling short of a declaration of invalidity, reverting to bridging seemed to be the way out. Interpretation No. 707 was such an example. Interpretation No. 707 issued in 2012 concerned a non-statutory administrative rule regarding the benefits of school teachers.

[134] Interpretation No. 720 (2014).

Though it fell in line with the first nudging judgment as both concerned legal entitlements, the TCC departed for bridging this time.[135] Notably, the TCC granted an unusually generous three-year remedial grace period so the political branch could provide for the required statutory framework, which was eventually legislated six months before the end of the prescribed grace period.

Bridging could have been the TCC's response to the political branch's indifference to its nudging judgments. Yet, the initial concerns behind the TCC's move from bridging to nudging remained. What if the political branch failed to respond to Interpretation No. 707? Would it have been better for the TCC to turn to bridging in the frustrated nudging judgment concerning judicial administration? Had the political branch remained unresponsive to a bridging judgement in that case, would it be wise to let the Judicial Yuan's unconstitutional organization collapse at the end of the prescribed remedial grace period? All things considered, bridging was too risky to be applied to cases implicating structural adjustment or beneficial entitlements, even though Interpretation No. 707 turned out to be a success story in 2015.

With the result of Interpretation No. 707 still uncertain, the TCC issued the abovementioned Interpretation No. 720 in 2014 to realize the purpose of the nudging Interpretation No. 653 whose prescribed two-year remedial grace period had already elapsed in 2010. The TCC imposed interim relief to rectify the constitutional flaws it had condemned in Interpretation No. 653 in 2008. Taken together, Interpretation Nos. 653 and 720 were not so much two separate interpretations as two parts of a single judgment: nudging followed by the TCC-prescribed interim relief six years later. Down this road was the third type of the TCC's applications of remedial grace periods: hedging, a nudging judgment buttressed with suspended interim relief.

A thought experiment will help to see the distinctiveness of hedging judgements. Suppose Interpretation No. 653 had mandated the same interim relief the TCC later imposed

[135] Both Vice President-Grand Justice Yeong-Chin SU (蘇永欽) and Grand Justice Justice Chang-fa LO (羅昌發) noted that Interpretation No. 707 was the first bridging interpretation concerning beneficial entitlements.

in Interpretation No. 720, alongside a declaration of incompatibility, but suspended the interim measures until after the political branch failed to provide the required constitutional redress within a grace period of six instead of two years. The result of this hypothetical judgment would be exactly the same as the joint effect of Interpretation Nos. 653 and 720. In this hypothetical scenario, the TCC buttressed its nudging judgment with interim measures that would only be enforceable when the political branch failed to respond at the end of the prescribed remedial grace period. In this way, the remedial grace period is not just be a legal technique to focus public attention. Nor will it suspend the declaration of unconstitutionality as, strictly speaking, a declaration of incompatibility (mere unconstitutionality) implicates no legal effects that need to be suspended for reasons of legal certainty. Rather, a remedial grace period granted in such judgments effectively suspends the prescribed interim measures, allowing the political branch the first say over how to rectify the constitutional wrong. With interim measures prescribed but suspended until the end of the remedial grace periods, the TCC hedges its judgment against the political branch's indifference to its emphatic admonitions or declarations of incompatibility in issues implicating structural adjustment or beneficial entitlements. Here come the TCC's hedging judgments.

Since the TCC issued its first hedging judgment, Interpretation No. 737, in 2016, it has issued five interpretations that declare the impugned statutory provisions constitutionally incompatible and which are buttressed with suspended interim measures.[136] All these five judgments concern statutory underinclusiveness.[137] Take the most famous hedging judgment, the Same-Sex Marriage Case,[138] for example. In this case, the TCC declares the marriage provisions in the Civil Code incompatible with the constitutional provisions for equal protection and freedom of marriage to the extent that the current Civil Code only provides for opposite-sex marriage. Instead of striking down the existing marriage

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[136] Interpretation Nos. 737, 742, 747, 748, and 762.

[137] *See* Miller & Devins, *supra* note 6, at 151.

[138] Interpretation No. 748 (2017). *See generally* Ming-Sung Kuo & Hui-Wen Chen, *The* Brown *Moment in Taiwan: Making Sense of the Law and Politics of the Taiwanese Same-Sex Marriage Case in a Comparative Light*, 31 COLUM. J. ASIAN L. 72 (2017). For the post-Interpretation No. 748 politics about Taiwanese same-sex marriage legislation, see *id*. at 140-45; Lin et al., *supra* note 67, at 1020-22.

provisions, the TCC has granted the political branch a two-year grace period to redress the constitutional wrong. Yet, mindful that the political branch may fail to respond accordingly, the TCC further provides for a suspended interim measure by decreeing that the current Civil Code will extend to same-sex couples at the expiry of the grace period.

Obviously, a bridging judgment, not to mention a straightforward declaration of invalidity, was not the best way to address the condition of unconstitutionality in the Same-Sex Marriage Case. Had the case been decided in the form of a bridging judgment and should the marriage provisions lapse at the end of the remedial grace period, it would simply result in the dismantling of the entire marriage institution instead of realizing same-sex couples' equal right to marriage. To avoid such a scenario, the TCC only made a declaration of incompatibility as to the marriage provisions in the Civil Code. At the same time, the TCC has prescribed and suspended interim relief to avoid repeating the mistakes it had made in the nudging judgments. Seen in this light, hedging is an offshoot of nudging, not bridging.

It is noteworthy that not all issues implicating structural adjustment or beneficial entitlements are suitable for a hedging judgment. For example, it would be inconceivable for the TCC to prescribe how to deicide and calculate deductible cost and taxable income under the Income Tax Act on its own.[139] In contrast, as the Same-Sex Marriage Case illustrates, hedging judgments have concerned the state of unconstitutionality resulting from the underinclusiveness of the impugned statutory provision. In such cases, the TCC have prescribed interim relief by simply extending the impugned marriage provisions to same-sex couples.

As noted above, hedging amounts to as an offshoot of nudging, or rather, nudging buttressed with suspended interim relief. In line with this development, nudging can be even further fortified with immediate interim relief, giving rise to the augmented edition of hedging. Interpretation No. 755 is such a case.[140] At issue in this interpretation was the

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[139] Interpretation No. 745 (2017) (a nudging judgment).
[140] Interpretation No. 755 (2017).

preclusion of judicial review of prisoners' complaints about the administrative and disciplinary measures taken by the correctional facilities under the Prison Act and the corresponding enforcement rule. The TCC declared the impugned statutory and regulatory provisions incompatible with the constitution *to the extent* that the measures taken by the correctional facilities infringed prisoners' fundamental rights beyond the *de minimis* exception and were excluded from judicial review. Paralleling the classical hedging judgments, this case concerned a state of unconstitutionality resulting from statutory overinclusiveness,[141] for the rectification of which the TCC has granted the political branch a two-year remedial grace period.

What makes Interpretation No. 755 a hedging instead of a nudging judgment is that the TCC has further prescribed interim relief. Prisoners would be allowed to seek judicial review of the non-*de minimis* administrative or disciplinary measures taken by the correctional facilities under another statutory scheme governing administrative litigation should the political branch fail to respond at the expiry of the two-year period. Yet, in contrast to hedging simpliciter, the TCC has taken a step further as the remedial grace period did not apply to the TCC-mandated interim measure. In other words, instead of suspending the interim measure, the TCC has given immediate effect to it. By substituting its own interim measure for the impugned statutory and regulatory provisions without delay, the TCC has effectively set aside the impugned statutory and regulatory provision albeit short of a straightforward declaration of invalidity.

The foregoing features raise issues about the function of the two-year remedial grace period granted in Interpretation No. 755. As the granted grace period suspends neither the effect of constitutional invalidity nor the interim measure, it seems to come closer to its counterpart in the nudging judgments, which is prescribed to focus public attention on the TCC's judgment. Yet, Interpretation No. 755 is anything but a nudging judgment as the rectification of the state of unconstitutionality does not rely on the political branch's

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[141] For the closeness of overinclusiveness to underinclusiveness in constitutional review, see Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1061(1979).

cooperation. In this sense, Interpretation No. 755 is a hedging judgment, and an augmented one at that, as it does not suspend the effect of the TCC-mandated interim measure.

A close read further suggests that augmented hedging is a new twist in the TCC's prescription for remedial grace periods in a deeper sense. As observed above, the TCC effectively set aside the impugned statutory and regulatory provision with immediate effect with its own interim measure in their place, despite the remedial grace period. In other words, the TCC could achieve the same effect by making a straightforward declaration of invalidity and prescribing a more detailed interim measure.[142] Seen in this light, the granting of a remedial grace period in the augmented edition of hedging judgments cannot be duly grasped with reference only to hedging simpliciter or fully explained within the tripartite functional typology.

Since 2016, the TCC has issued seven hedging, simpliciter and augmented, judgments in total.[143] Considering the complex calculation of interim relief, the TCC may soon reach its institutional limit in its expansion of hedging judgments. Yet, the emergence of the augmented edition seems to suggest otherwise. As the TCC's new self-image as a court is being gradually shifting focus from the pronouncement on constitutional principles to the implementation of constitutional rights for the people,[144] augmented hedging can be seen as the TCC's early attempt at the provision of equitable remedies required in individual litigations. Even so, that the TCC has continued to prescribe a remedial grace period in the augmented hedging judgments where it plays no functional role remains a puzzle to be solved.

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[142] Grand Justice Chang-Fa LO (羅昌發) alluded to this point in his concurring opinion.

[143] Among them, two are augmented. Apart from Interpretation No. 755, the other augmented hedging judgment is Interpretation No. 763 (2018). For other hedging judgments, see *supra* note 136.

[144] This is embodied in the recent Constitutional Litigation Act, which is set to come into effect in 2022. *See* Lin et al., *supra* note 67, at 1022-26.

IV. CHOICE OR DEFAULT? WHEN REMEDIAL GRACE PERIODS BECOME ROUTINE

The foregoing functional analysis shows how the TCC has endeavored to apply the framework of graduated unconstitutionality it borrowed from the Civilian-Continental model of constitutional law to address constitutional wrongs resulting from the political branch's unconstitutional acts with the help of remedial grace periods. Nevertheless, that account leaves the key question unanswered: Why has the TCC turned to remedial grace periods in the first place? As noted in Part III, one school of thought answers this question from the perspective of judicial politics, arguing that the TCC has strategically chosen to prescribe remedial grace periods in its unconstitutionality judgments to engage the political branch in institutional dialogue.[145] From the doctrinal perspective, another attributes the TCC's use of remedial grace periods to considerations of legal certainty.[146] I take issue with such views.

Tracking the TCC's use of remedial grace periods, I argue that the granting of remedial grace periods has become routine as a function of the TCC's evolving role in Taiwan's changing constitutional landscape. In the following, I first sketch out the TCC's performance record under martial law and the rare instances of its intimation of the constitutional incompatibility of the political branch's acts. Then, apart from pinning down the critical juncture when remedial grace periods were first adopted in the TCC case law, I explain why instead of a deliberate choice, the granting of remedial grace periods has been routinized as the TCC's default option in face of unconstitutional state acts.

A. *Speaking (Half) Truth to Power: The TCC's Delphic Intimations of Constitutional Incompatibility under Martial Law*

The TCC has been praised for its active role in Taiwan's transition from a party-state to a robust constitutional democracy starting from the 1980s so much so that two of its most perceptive observers even allude to a parallel between the TCC and the acclaimed South

[145] YEH, *supra* note 75, at 181-83; Yeh, *supra* note 86, at 15-21.
[146] Hwang, *supra* note 117, at 40.

African Constitutional Court.[147] Yet, before it started to flex muscle with its democracy-facilitating interpretations, the TCC had already built up its case law during its formative years (1948-85) soon after its inauguration in the then Chinese national capital, Nanjing, in 1948. Although the early TCC case law was mostly concerned with the run-of-the-mill issues about conflicting legal interpretations between government departments or ordinary courts,[148] the TCC did exercise its constitutionally ordained jurisdiction of constitutional interpretation during that period.[149] Despite their fading influence, the few instances of constitutional review decided in the TCC formative years has cast a long shadow on its subsequent case law, including the use of remedial grace periods.

The TCC has exercised jurisdiction of constitutional interpretation since its inception even though it was then engulfed in the Chinese civil war.[150] This by no means suggests that the early TCC was the TCC as we know it. Instead, apart from setting aside some judicial precedents or pre-constitutional judicial interpretations,[151] the TCC was anything but an active constitutional player. It was more of a convenient problem-solver for the political branch when the political branch needed constitutional cover for its decisions than an independent guardian of the constitution.[152] That said, the early TCC was not reduced to a constitutional rubberstamp, either. Rather, it had issued two unconstitutionality judgements before the influential Fifth Council took office in 1985:[153] Interpretation No. 86 and 166, which had preconditioned the way the TCC approached the constitutional validity of the political branch's acts in post-authoritarian Taiwan.[154]

The TCC issued Interpretation No. 86 in 1960 when Taiwan was still at the height of

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[147] *See* David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 538 (2011).

[148] These interpretations concern unification interpretations.

[149] For the TCC's early history and role under the martial-law rule, see Lin et al., *supra* note 67, at 1002-09.

[150] Interpretation Nos. 1 and 2 were issued in 1949 when the TCC remained seated in Nanjing. *See* Hwang et al., *supra* note 71, at 755.

[151] *See* Lin et al., *supra* note 67, at 1009-10.

[152] YEH, *supra* note 75, at 171-72.

[153] *See supra* text accompanying note 70-72.

[154] *See* Lin et al., *supra* note 67, at 1009-10 & n. 67.

"White Terror."[155] Interpretation No. 86 concerned whether the Judicial Yuan was exclusively responsible for judicial administration.[156] At stake was the constitutionality of the then Ministry of Judicial Administration under the Executive Yuan, which sat atop all the judicial courts apart from the TCC, the Supreme Court, and the High Court of Administrative Litigations as well as the Civil Servants Disciplinary Commission. If the Ministry of Judicial Administration was found unconstitutional, the executive's direct control over the judiciary would be weakened. Although the TCC dodged the question of whether the Ministry of Judicial Administration was constitutional or not, it was explicit that the Judicial Yuan was exclusively responsible for the entire judicial administration according to the constitution and further noted that the statutes concerned should be amended accordingly.[157]

Interpretation No. 86 was unprecedented as it was the first TCC judgment that put the constitutionality of the political branch's act (the Organic Law of the Ministry of Judicial Administration) into question. It is true that the TCC fell far short of providing a clear answer to the constitutional question in Interpretation No. 86. Nevertheless, its gist is hard to miss when read in light of the referral document. Even so, Interpretation No. 86 failed to put paid to the Ministry of Judicial Administration as the TCC barely declared it unconstitutional, not to mention invalid (or void). It was not until 1980 that judicial administration was returned to the Judicial Yuan while the Ministry of Judicial Administration was reorganized as the current Ministry of Justice. Seen in this light, Interpretation No. 86 is the TCC's first intimation of constitutional incompatibility concerning the political branch's acts.

After Interpretation No. 86, it took twenty years for the TCC to question the constitutionality of the political branch's act again in Interpretation No. 166.[158] According to the Police Punishment Act, which had already existed before the constitution came into effect in 1947, the police were given the power to punish those who committed

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[155] *See generally* Ketty W. Chen, *Disciplining Taiwan: The Kuomintang's Methods of Control during the White Terror Era (1947-1987)*, 4 (4) TAIWAN INT'L STUD. Q. 185 (2008).
[156] *See supra* note 67.
[157] For a helpful guide to Interpretation No. 86, see CHANG ET AL., *supra* note 69, at 456-57.
[158] Interpretation No. 166 (1980).

misdemeanours with a brief jail sentence or compulsory labor without a court trial. The legal question before the TCC was whether the Police Punishment Act was consistent with the due process provision in the constitution. As that statute had been frequently invoked by the police for the purposes of social control, the authoritarian police state regime was effectively put under the spotlight because of Interpretation No. 166. In 1980 when the end of the martial-law rule was still seven years away, the TCC issued its landmark decision relating to fundamental rights, Interpretation No. 166, urging the political branch to amend the Police Punishment Act in accordance with the constitutional requirement of judicial due process. It was historic indeed. Yet, the TCC again dodged the question of whether the Police Punishment Act was constitutional or not. Instead, it simply paraphrased the constitutional provision of due process and then urged the political branch to act accordingly without condemning the constitutional invalidity of the impugned statute directly. It came as no surprise that the political branch was unmoved in face of the TCC's intimation of constitutional incompatibility. Eventually it took another ten years for the TCC to realize the goal of Interpretation No. 166 with another judicial intervention, Interpretation No. 251[159], in which the Police Punishment Act was ordered to lapse after July 1, 1991 unless amended according to Interpretation Nos. 166 and 251.

Standing as exceptions to the TCC jurisprudence under martial law, Interpretation Nos. 86 and 166 have exerted disproportionate influence on the TCC's subsequent exercise of constitutional review. As noted above, neither Interpretation No. 86 nor Interpretation No. 166 attacked the unconstitutionality of the political branch's acts. To be more precise, neither interpretation addressed the constitutionality of the impugned state acts directly. Instead, the unconstitutionality judgment had to be inferred from the TCC's veiled reasoning in these two interpretations. In other words, the TCC barely made any declaration of constitutionality, whether in the form of invalidity or incompatibility, during the martial-law era. Only by reading between the lines were the TCC's delphic intimations of constitutional incompatibility in these two decisions disclosed. The TCC did speak truth to power but just failed to reveal the whole truth. In sum, the TCC did not make any declaration of invalidity

[159] Interpretation No. 251 (1990).

with respect to the political branch's acts in its early exercise of constitutional review apart from two frustrated intimations of constitutional incompatibility.

The TCC's quiet and indirect disapproval of the political branch in its formative stage may result from the TCC's prudent choice in face of a quasi-military dictatorship. Yet, with the early intimations of constitutional incompatibility translating into the TCC's gentle approach to the question of the constitutionality of the political branch's acts, the TCC's decisions on the constitutionality of the impugned state acts have since been meandering and elusive. As a legacy of the delphic style set out in its early case law, judicial euphemism has become the hallmark of the TCC's constitutional jurisprudence.[160] This explains why the TCC's declarations of invalidity read like the GFCC's declarations of incompatibility while the line is sometimes blurred between declarations of incompatibility and admonitory decisions in the TCC case law as noted in Part III.

More important, as Interpretation Nos. 86 and 166 indicated, mere declarations of incompatibility, not to mention cautious intimations, were nothing more than a paper tiger in the eyes of the recalcitrant political branch. To bring about meaningful changes, the TCC itself must change. Thus, how to tame the political beast without being devoured by the remaining forceful leviathan sets the future direction of the cautious TCC on its move toward becoming the constitution's guardian as we know it.

B. *The Coming of Constitutional Grace: Democratization, Judicial Awakening, and Remedial Grace Periods in Taiwan*

To shed light on how remedial grace periods were employed in the TCC's response to the political branch's unconstitutional acts, I first trace their adoption when Taiwan was in transition from an autocratic party-state to a full-fledged constitutional democracy in the late 1980s. After drawing out the relationship between the TCC's awakening and the emergence of remedial grace periods, I then explain why the granting of remedial grace periods is more a default position than a strategic choice in constitutional review in Taiwan.

[160] *Cf.* Lin et al., *supra* note 67 (discussing the influence of institutional continuity on the TCC).

1. At the Dawn of Democratization: Reining in the Political Branch with Grace

As suggested above, the TCC experienced a long formative stage starting from 1948 to the end of September 1985 when the term of the Fourth Council came to an end. At that time, the Nationalists (also known as Kuomintang, KMT) defeated in the Chinese civil war had ruled Taiwan with martial law for over thirty-five years and the strongman Chiang Ching-Kuo's poor health was continuingly deteriorating after assuming the mantle of Chiang dynasty at the death of his father Generalissimo Chiang Kai-Shek in 1975.[161] While the winds of change were blowing, there was still no sign for the lifting of martial law when the Fifth Council took office in October 1985. Against this backdrop, the TCC set out to turn itself into the constitution's guardian.

The reconstituted TCC soon issued its first decision in November 1985. Continuing with the previous cautious approach to the constitutionality of the political branch's act, the TCC affirmed the impugned administrative regulation's constitutionality.[162] Yet, it did not take long for the TCC to break new ground in constitutional review. Approximately a year after assuming office, the recently appointed Grand Justices declared a political branch's act unconstitutional for the first time. Interpretation No. 210, which was promulgated on October 17, 1986, expressly declared unconstitutional an interpretive circular concerning taxation issued by the Ministry of Finance for its failure to comport with the constitutional requirement of statutory reservation.[163] Despite the technical character of the impugned interpretive circular, the declaration of unconstitutionality/ incompatibility itself, which found support in the Civilian-Continental framework of graduated unconstitutionality, was ground-breaking as the TCC had never directly condemned any act of the political branch before that judgment. Ten months later, the TCC delivered its first declaration of invalidity as to the political branch's acts, another two tax interpretive circulars issued by the Ministry

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[161] Chiang Ching-Kuo was Premier of the Executive Yuan when his father died and elected President in 1978.

[162] Interpretation No. 200 (1985).

[163] According to the TCC, the impugned interpretive circular was an *ultra vires* administrative act as it lacked statutory basis.

of Finance, in Interpretation No. 218 on August 14, 1987. As noted in Part III, a remedial grace period was granted in Interpretation No. 218, making it the TCC's first a bridging judgment, i.e., a suspended declaration of invalidity. Read together, Interpretation Nos. 210 and 218 appeared to suggest that the TCC marked its departure from its decades-long formative stage by making a straight declaration of incompatibility and then took a strategic turn. With the granting of a grace period, Interpretation No. 218 delayed the impact of a declaration of invalidity yet without repeating the mistake of the abovementioned Interpretation Nos. 86 and 166 if the political branch would remain as aloof as it had been. In this light, Interpretation Nos. 210 and 218 jointly exerted a seminal influence on the TCC's dual role in Taiwan's transition to constitutional democracy: the TCC awakened to the public calls for liberty and democracy with its transition-facilitating decisions while exercising judicial prudence to engage rather than confront the political branch with strategic interpretations.[164]

On closer inspection, however, the storyline of the TCC as the democracy facilitator turns out to be more tortuous than suggested in the foregoing rosy projection. As noted above, Interpretation No. 210 declared an interpretive circular of the Ministry of Finance incompatible with the constitution. Juxtaposed with Interpretation Nos. 86 and 166, Interpretation No. 210 nonetheless seemed to be a big stride made by the TCC as it no longer just intimated the unconstitutionality of the political branch's acts gingerly in its judgment. Yet, a close read of the TCC's reasoning reveals that the stride turned out to be merely a symbolic and little step. Interpretation No. 210 was a posthumous announcement of a "dead" administrative act: the impugned interpretive circular had already been rescinded before the judgment was promulgated.[165] Instead of sentencing it to death, the TCC essentially issued an obituary about the deceased interpretive circular. Speaking the words of constitutional incompatibility, Interpretation No. 210 was the epitome of judicial symbolism.[166] Even such a little symbolic step was still significant indeed, only it was not

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[164] *See* GINSBURG, *supra* note 16, at 106-57.

[165] Only in the reasoning was Interpretation No. 210's posthumous character disclosed.

[166] With its posthumous declaration of the unconstitutionality of the impugned interpretive circular, Interpretation No. 210 enabled the individual claimant whose rights had been infringed because of that circular

symbolic of gradual judicial awakening in Taiwan but of the TCC's sensitivity to signs of political change. October 17, 1986, the promulgation date of Interpretation No. 210, was revealing.

As suggested above, when the newly appointed Grand Justices assumed office in October 1985, the political atmosphere was tense in Taiwan. Winds of political change were blowing but nobody knew whither the blowing wind would take Taiwan. Defying the standing strict ban on new political parties under martial law, the leading political dissidents convened the DPP's founding assembly on September 28, 1986. Political crackdown was anxiously anticipated. When Taiwan was kept in suspense, the frail Chiang Ching-Kuo gave his most important interview to Washington Post on October 7, 1986, surprising the world with the announcement that martial law would be lifted shortly.[167] Ten days later came the obituary-like Interpretation No. 210, suggesting the TCC's symbolic change in its institutional posture vis-a-vis the political branch. Yet, considering its posthumous declaration of incompatibility and its virtual synchronization with the intimations of political liberalization in 1986, Interpretation No. 210 instead attested to the reconstituted TCC's continuation with the habitual cautious approach to constitutional review when political thaw was beginning in Taiwan but spring was not there yet.

If Interpretation No. 210 was the TCC's symbolic move at the outset of political thaw, the granting of a remedial grace period in Interpretation No. 218 was indicative of the TCC's restrained method of striking down the political branch's acts in its maiden declaration of invalidity. Time matters again. When Interpretation No. 218 was promulgated on August 14, 1987, the ground for political liberalization in Taiwan had been readily prepared. It was not by chance that the TCC made its first frontal strike against the political branch exactly one month after martial law was formally lifted on July 15, 1987. Nevertheless, the character of political rule remained authoritarian in Taiwan as the KMT still kept a firm grip on the political power with the help of the (rump) First Legislative Yuan elected in China in

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to apply for retrial.

[167] Daniel Southerland, *Taiwan President to Propose End to Island's Martial Law; Action Would Mean the Lifting of Restrictions After 37 Years*, WASH. POST, Oct. 8, 1986, at A18.

1948.[168] In line with the symbolic Interpretation No. 210, the TCC struck the political branch with gentle grace in Interpretation No. 218: striking down the political branch's unconstitutional act while delaying the invalidation for six months.

In the post-martial law era, the TCC kept up its new constitutional posturing. Between the historic Interpretation No. 218 and the well-commented "bootstrapping" Interpretation No. 261 of June 21, 1990 whereby the very long parliament (1948-1991) was put to an end,[169] the TCC made another two declarations of invalidity vis-à-vis the political branch's acts.[170] Notably, both Interpretation Nos. 224 and 251 were declarations of invalidity as to statutes and were attached with a remedial grace period. The former concerned a statute on taxation; the latter was a sequel to the toothless Interpretation No. 166, whose delphic intimations of the constitutional incompatibility of the pre-constitutional Police Punishment Act had fallen flat on its face since its promulgation ten years ago. At that time, not only administrative rules but also primary legislation was within the TCC's strike distance, though the TCC's strike remained gentle. It was not until Interpretation No. 268, issued nearly five months after Interpretation No. 261, that the TCC struck down a political branch's act with an immediate declaration of invalidity for the first time in its history.[171]

The story from then on is one well told: the TCC emerged as the constitution's reliable

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[168] *See* Lin et al., *supra* note 67, at 1010-11.

[169] *See* YEH, *supra* note 75, at 40-41. For the concept of judicial bootstrapping and the bootstrapping character of Interpretation No. 261, see Lin et al., *supra* note 67, at 1011; *see also* Kuo, *supra* note 106, at 604.

[170] During that period, the TCC also made an immediate and *ex tunc* declaration of invalidity as to the ban on polygamy in the civil code in Interpretation No. 242 in 1989. Yet, it was an outlier in every aspect. Formally, it was a declaration of invalidity with immediate and retroactive effects. In essence, it was a read-down of the polygamy ban provision in the civil code to redress the petitioner's unique personal circumstance. The petitioner had married his first wife in China before he settled in Taiwan after 1949. Later he married his Taiwanese wife because of the long frozen Chinese civil war. In 1987, the Taiwan Supreme Court annulled the petitioner's second marriage on the application from the petitioner's Chinese wife from his first marriage. As many of those who migrated to Taiwan after 1949 were in the same situation, the TCC made the extraordinary Interpretation No. 242 to avert the annulment of numerous marriages officiated in Taiwan after 1949. Notably, the impugned provision of the civil code has since remained unchanged.

[171] Interpretation No. 268 (1990) (invalidating an administrative rule). In Interpretation No. 264 (1990), the TCC formally issued a declaration of invalidity as to a parliamentary resolution requesting the increase of government expenditure in the legislative vetting of the government budget bill. Given that the administration had already expressed its intent not to be bound by the impugned resolution, Interpretation No. 264 actually rendered that resolution non-binding rather than invalid. It raised the question of the TCC's role in the interdepartmental conflict within the political branch. *See* Kuo, *supra* note 106.

guardian and democracy's facilitator with a mix of diverse judicial strategic choices, including the granting of remedial grace periods.[172] Through this lens, the TCC deliberately granted remedial grace periods to address the issues the TCC faced in the fulfilment of its institutional role. From the perspective of judicial politics, the TCC granted remedial grace periods to engage other constitutional players, including the political branch and citizens, in democratic dialogues about solutions to the unconstitutionality of state acts. Through engagement instead of confrontation, the TCC helped to facilitate Taiwan's transition to constitutional democracy by strategically granting remedial grace periods when it tackled the political branch's unconstitutional acts.[173] Alternatively, as with the GFCC's approach to safeguarding the integrity of the German constitution through managing the legal effects of unconstitutionality, the granting of remedial grace periods was the TCC's deliberate choice to uphold the rule of law principle by striking balance between constitutional integrity and legal certainty.[174] Both take the view that the granting of remedial grace periods was the TCC's deliberate choice. Does the granting of remedial grace periods really result from choice?

2. Beyond Strategic Choice: The Road toward Grace by Default

As indicated in Part III, the TCC has granted remedial grace periods in a wide range of subjects. Against this backdrop, the theory based on the strategy of institutional dialogue is less convincing than it seems as it holds that the TCC's strategic choices to engage the political branch in solving the unconstitutionality of the latter's acts converged on the granting of remedial grace periods across diverse cases. As most cases attached with remedial grace periods centered on bridging rather than the more dialogical nudging (or hedging), the claimed dialogical function of granting remedial grace periods is even more ambiguous. Moreover, given the high percentage (around 30%) of the political branch's inaction vis-à-vis its bridging judgments, it is hard to see why the TCC failed to reconsider

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[172] *See* GINSBURG *supra* note 16, at 105-58; YEH, *supra* note 75, at 174-91; Lin et al., *supra* note 67, at 1011-14.
[173] YEH, *supra* note 75, at 181-83; Yeh, *supra* note 86, at 15-20.
[174] *See* Hwang, *supra* note 117, at 40.

its strategy. The judicial dialogic argument does not fly.

The rule of law argument does not carry the explanation of the TCC's frequent use of remedial grace periods as a result of institutional choice very far, either. As the TCC has granted remedial grace periods in such diverse situations, the suggestion that they all resulted from the TCC's careful balance of constitutional integrity and legal certainty is unconvincing.[175] Had the diverse use of remedial grace periods been the result of balancing according to the rule of law principle, this would suggest that the TCC tipped the rule of law balance in favor of legal certainty *by default*. If so, the TCC's use of remedial grace periods is more of a default option than a deliberative choice in judicial remedy.

True, to say that the TCC has granted remedial grace periods almost by default does not mean that the TCC has automatically prescribed a grace period to any new judgement without considering the issues before it. As discussed in Part III, the TCC has consciously tweaked its use of remedial grace periods to prod the political branch into action in face of new challenges resulting from structural issues or unconstitutional under-/overinclusive legislation. The problem is that bridging, the original model, has remained to be the staple of the TCC's use of remedial grace periods since the steep rise of granting grace periods in 2007,[176] even though nudging and hedging are more suitable choices for such issues.[177] Again, this defeats the explanation based on the TCC's institutional choice when confronted with complex constitutional issues.

Another possible choice-based explanation is based on the correlation between the sharp increase in the use of remedial grace periods and the replacement of the Sixth Council with Grand Justices appointed to staggered terms.[178] On this view, with the resulting weakening of ideological homogeneity, remedial grace periods may have been invoked as the medium to bring the Grand Justices together in face of the two-thirds majority required for

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[175] *Cf. id*.
[176] *See supra* Table 1.
[177] This proposition was not borne out until 2016. In the period 2016-18, there have been thirteenth interpretations attached with a remedial grace period: four bridging judgments, two nudging judgment, and seven hedging judgments. Given the short period, however, it is unclear that a pattern is emerging.
[178] *See supra* text accompanying note 75.

constitutional review of statutes.[179] Viewed thus, the granting of remedial grace periods appeared to help to bridge the gap between the Grand Justices who were more assertive about the TCC's ordained constitutional guardianship and those who were more sympathetic to the political branch's position.[180]

There are some pieces missing from this explanation. As indicated in Table 1, the granting of remedial grace periods increased steeply after October 1, 2007 when the terms of the sitting Grand Justices began to become staggered, with the percentage spiking to over 60%. To replace the retired Grand Justices appointed in 2003 for a four-year term, the new Grand Justices were appointed by the same DPP president who had appointed the holdovers for an eight-year term in 2003. It was not until a year later that another cohort appointed by the new KMT president joined the TCC. Yet, between October 1, 2007 and October 31, 2008, during which all sitting Grand Justices were appointed by the same president, the TCC prescribed remedial grace periods six times in its nine judgments of unconstitutionality.[181] This shows that before the appearance of ideological divide in November 2008, the percentage had already risen sharply. Seen in this light, the post-2007 change has more to do with the personnel replacement, including the longest serving President-Grand Justice Weng's retirement in 2007,[182] than ideological differences.

Another reason that the ideological difference-based explanation does not hold water is that the TCC was virtually sidelined in significant constitutional cases in the period 2008-16.[183] The cases coming before the TCC during that period did not bear on underlying ideological differences among Grand Justices, which would have to be bridged by the employment of remedial grace periods. Building majority by bridging ideological divide thus fails to account for the continuing increase on the use of remedial grace periods when

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[179] This is set to be changed with the coming into effect of the new Constitutional Litigation Act in 2022. *See* Lin et al, *supra* note 67, at 1025.

[180] Yeh, *supra* note 86, at 24-26.

[181] Those six interpretations are Interpretation Nos. 636, 638, 640, 641, 645, and 649.

[182] Justice Weng was first appointed to the Third Council of Grand Justices as an Associate Grand Justice in 1972.

[183] Kuo, *supra* note 106, at 625-39.

the TCC steered clear of contentious constitutional issues.[184] In addition, the TCC's recent move from the lame nudging to the biting hedging belies the majority-building explanation as such move would only intensify the fighting between the opposing camps among the Grand Justices. In sum, managing ideological differences does not explain the continuing growth of remedial grace periods in the TCC case law.

If none of the above explanations suffice, what on earth has made the TCC continue to look to remedial grace periods in dealing with the political branch's unconstitutional acts? Look beyond the horizon of institutional choices. As noted above, the TCC granted a remedial grace period in its first declaration of invalidity following the lifting of martial law in Taiwan.[185] Yet, without the innovative technique of remedial grace periods, the wait would have been much longer for the TCC's departure from its past practice of delphically intimating the constitutional incompatibility of the political branch's acts in its formative stage. Seen in this genealogical light, suspended declarations of invalidity in the form of bridging judgments emerged as the TCC's archetype of strike against the political branch's unconstitutional acts when the TCC was rising from its formative years.

As indicated in Table 1, October 2007 is the watershed in the TCC's employment of remedial grace periods. It is when President-Grand Justice Weng, the last Grand Justice who took part in the first granting of a remedial grace period in 1987,[186] retired from the TCC. Since then, over half of the total of eighty-six cases attached with a remedial grace period have been issued.[187] With the TCC's collegiate memory fading at President-Grand Justice Weng's retirement and its formative experience of striking by bridging receding into the background of institutional consciousness,[188] the frequent granting of remedial grace

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[184] *Id*. at 625-33.
[185] Interpretation No. 218 (1987).
[186] *Id*.
[187] Forty-seven judgements attached with a remedial grace period have been issued during this period.
[188] This needs to be distinguished from the collegiality claim that because of the weakening of collegiality following the staggering of the terms of Grand Justices, the TCC turned to remedial grace periods as a means to build the crucial two-thirds majority. It is true that the weakening of collegiality may make reaching a unanimous judgment harder and this explains the TCC's recent move towards a "plurivocal court." *See* Lin et al., *supra* note 67, at 1025-26. For the notion of a plurivocal court, see MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 244-45

periods reflects the TCC's sedimented position on judicial remedy, despite the tweaks of nudging and hedging. Taken together, bridging, nudging, and hedging are a function of the TCC's default option in unconstitutionality management set at the dawning of Taiwan's transition to constitutional democracy.

V. CONCLUSION

Remedial grace periods have been in the toolkit of apex courts for decades but only comes to the fore in comparative constitutional law recently thanks to scholarship on constitutional review in the Common Law jurisdictions. Through this lens, the granting of remedial grace periods is treated as part of remedial measures in constitutional review, while the focus is on how "biting" a suspended declaration of invalidity is.[189] Looking beyond the Common Law realm, I argued that variations on the use of remedial grace periods reflect how the concept of unconstitutionality is understood and how its consequences are managed in different legal traditions. Through a case study of Taiwan in a comparative light, I showed how the court's role vis-à-vis the political branch in the dynamics of constitutional politics and the legal tradition jointly contribute to the multifunctional role of remedial grace periods in unconstitutionality management. On the one hand, in light of comparative constitutional review, the TCC's granting of remedial grace periods does not consist with theoretical models built on the Common Law jurisdictions. Rather, as with the Civilian-Continental model of constitutional review, remedial grace periods in Taiwan were not always attached to declarations of invalidity but have functionally evolved in forms of bridging, nudging, and hedging as part of the judicial strategy to rein in the political branch under the conceptual framework of graduated unconstitutionality. On the other hand, remedial grace periods have been instrumental to the TCC's realization of its institutional potential in constitutional review. Thanks to such measures, the TCC could strike the still untamed political branch with gentle grace when Taiwan was just ridding herself of the authoritarian yoke. The TCC's continuing and frequent prescription for remedial grace

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(2004). Nevertheless, it is unclear whether collegiality bears on the judgment as to the impugned state act's constitutional conformity.

[189] *See* Yap, *supra* note 8, at 37-39.

periods in the post-martial law era is indicative of its default position in constitutional remedies informed by the Civilian-Continental model and molded in its formative experience at the dawn of democratization. In a comparative light, the granting of remedial grace periods is not just a strategic choice in constitutional remedies. The significance of remedial grace periods only becomes clear in light of legal tradition and the politics of unconstitutionality management.