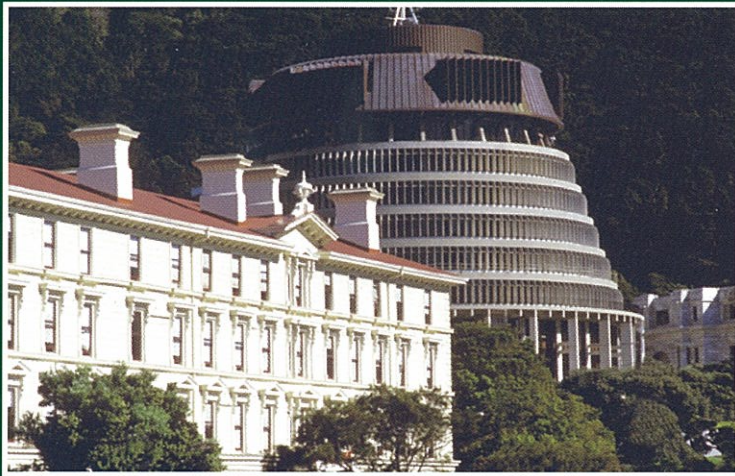


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George Williams

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Ronald Sackville

Lord Cooke of Thorndon

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VICTORIA UNIVERSITY OF WELLINGTON
Te Whare Wānanga o te Ūpoko o te Ika a Māui



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WEAK-FORM JUDICIAL REVIEW: ITS IMPLICATIONS FOR LEGISLATURES

Mark Tushnet*

In this paper, Professor Tushnet considers two aspects of the "weak-form" model of judicial review: the extent to which legislatures in weak-form systems are able to evaluate questions of constitutionality, and the long-term stability of the weak-form model. He concludes that the success of weak-form judicial review depends on a particular commitment on the part of legislators to constitutional values.

I INTRODUCTION

We can—for convenience—identify three important intellectual or theoretical issues of concern to students of comparative constitutional law.¹ First, how do different constitutional systems deal with federalism, the allocation of legislative competence between or among different levels of government? For a scholar from the United States, the primary interlocutor on this question is the European Union, precisely because the issue there is framed as whether the European Union is or is not, or is on the way to becoming, a federal state.

Second, what substantive rights do, should, or can constitutions guarantee? Here the interlocutor is the international human rights community, and the issues concern the identification and enforceability (in various venues) of first-generation classical liberal political rights, second-generation social and economic rights, and third-generation cultural and environmental rights.

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1 A fourth issue—the choice between parliamentary and separation of powers systems—is sometimes of concern to scholars of comparative constitutional law. See for example Bruce Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 633. More commonly, though, that issue is the domain of political scientists.

The third important issue is the one on which I focus here: the question of judicial review, and the role of courts in constitutional systems that generally comply with rule of law requirements. Here the interlocutor is what Stephen Gardbaum has called the "new Commonwealth model" of judicial review.² In that model, courts assess legislation against constitutional norms, but do not have the final word on whether statutes comply with those norms. In some versions the courts are directed to interpret legislation to make it consistent with constitutional norms, if doing so is fairly possible according to (previously) accepted standards of statutory interpretation. In other versions the courts gain the additional power to declare statutes inconsistent with constitutional norms, but not to enforce such judgments coercively against a losing party.³ In still others, the courts can enforce the judgment coercively, but the legislature may respond by reinstating the original legislation by some means other than a cumbersome amendment process.⁴

Proponents of this new model of judicial review describe it as an attractive way to reconcile democratic self-governance with constitutionalism. As Jeffrey Goldsworthy puts it, the new model:⁵

offer[s] the possibility of a compromise that combines the best features of both the traditional models, by conferring on courts constitutional responsibility to review the consistency of legislation with protected rights, while preserving the authority of legislatures to have the last word.

This new model of judicial review gives rise to a new set of questions for comparative constitutional law.⁶ Despite the recency of the invention of weak-form review, we can

2 Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2001) 49 Am J Comp L 707.

3 Ordinarily, of course, the government.

4 In these versions, the degree to which the courts are likely to prevail depends in part on the formalities of the process of reinstating the legislation found by the courts to be inconsistent with constitutional norms. A court could have full power to invalidate legislation and yet the system of judicial review would conform to the "new Commonwealth model" if the process of constitutional amendment were extremely easy—for example, one that authorised amendment by simple parliamentary majority in a single session. As the requirements for amendment increase—to require a 60 per cent or two-thirds majority in a single session, or to require parliamentary majorities in successive sessions, for example—the more the system resembles older forms of judicial review.

5 Jeffrey Goldsworthy "Homogenising Constitutions" (2003) 23 OJLS 483, 484.

6 Another question is whether this new model should indeed be called a "Commonwealth" model. That is, is there something that connects the new model of judicial review to the common law tradition shared by Commonwealth nations? Gardbaum properly observes that the new model was invented in and propagated among Commonwealth nations (above n 2, 709), although it is worth noting as well that South Africa and some other Commonwealth nations adopted the old

identify some of its structural features and, in particular, some of the ways in which institutional incentives might push weak-form review in one or another direction.

The issues I address here, in a quite preliminary way, are these: Proponents of weak-form review treat it as an attractive way to reconcile democratic self-governance with the constraints that constitutionalism necessarily places on self-governance. The people get a chance to enact the policies they prefer, to consider the views of expert judges about whether those policies are consistent with constitutional constraints, and then to consider whether they agree with the judges about whether the policies do transgress constitutional constraints.⁷ This defence places a lot of weight on the ability of legislative bodies to evaluate questions of constitutionality independently of their evaluation of policy questions. The first issue, then, is whether legislatures in systems with weak-form judicial review are likely to do a decent job of constitutional evaluation.⁸

form of judicial review. The connection between the Commonwealth and the new form of judicial review therefore cannot be a strong one. (One possibility is that the nations of the Commonwealth are the ones in which the idea of parliamentary sovereignty, or its practice, was most strongly developed.)

Still, it might be that something about the common law law-making process conduces to adoption of the new model of judicial review. One possibility is that texts play a different role in common law systems from their role in civilian systems, and that perhaps this different role makes it easier to adopt the new form of judicial review in Commonwealth nations. The civil law's emphasis on the role of courts in enforcing written texts might make the old model of review particularly attractive to lawyers trained in that tradition. Yet, precedents—and, in the modern world, statutes—play the role in common law systems that the code plays in civil law systems. It is unclear to me that anything in the common law tradition is distinctively conducive to the new model of judicial review. For that reason, I prefer to call the new model one of "weak-form" judicial review, distinguishing it from the older "strong-form" system and making no claims about its relation to the Commonwealth or to the common law tradition. Perhaps as we gain experience with weak-form judicial review we will be able to figure out whether it does have some connection to the common law tradition.

- 7 Formally, the sequence could vary, with the experts weighing in early—through an advisory opinion rendered on a reference as can occur in Canada, or through post-enactment, pre-promulgation review as in the French system—or later, through immediate review on request or through review in the course of adjudicating ordinary cases.
- 8 This issue implicates intertwined issues of incentives and expertise. I want to be clear that strong- and weak-form systems *do not* necessarily differ in the degree to which courts are aggressive in enforcing their views of fundamental rights, or in whether courts defer or refuse to defer to legislative judgements about whether legislation is consistent with constitutional guarantees. The differences between the systems reside in the relative ease or difficulty of a legislative response to judicial determinations. So, for example, a court in a weak-form system could say, "We hereby hold the statute at issue unconstitutional, exercising our own independent judgement about the constitution's meaning and giving no weight whatever to the legislature's judgement. But, of course, we acknowledge that the legislature can reinstate its own judgement by overriding our decision or by making it clear as crystal that it wishes to enforce a statute that we judges believe to

Second, is weak-form review likely to be stable? The question here is whether the distinction between weak-form and strong-form systems (in one direction), or between weak-form systems of judicial review and systems of parliamentary supremacy (in another), is illusory. Proponents of weak-form review typically assert that they anticipate that legislatures will accept the courts' rulings: confronted with a judicial decision that arguably distorts a statute to ensure that it is consistent with constitutional constraints, the legislature will refrain from further action;⁹ or, confronted with a declaration of incompatibility, the legislature will repair the defects the courts have identified. Yet, if those assertions are credited, it is not entirely clear how weak-form systems differ from strong-form ones, except in the purely formal sense that the legislature has the (never-to-be-exercised) power to disregard the courts. And, on the other side, if legislatures regularly disregard the courts' actions, as they are entitled to do in a weak-form system, it becomes hard to distinguish such a system from the system of parliamentary supremacy it was designed to replace.

II THE QUESTION OF LEGISLATIVE RESPONSIBILITY

The arguments in favour of some form of judicial review are familiar and, to many, compelling.¹⁰ Constitutions are supposed to place constraints on the policies representative legislatures enact because, constitution-makers fear, the values they identify provide benefits in the long run while imposing costs in the short run, and elected representatives concerned about re-election are likely to focus on the short run. Elected representatives will therefore undervalue (if not ignore) constitutional values when they enact statutes. Committing the protection of constitutional values to elected representatives is, in the familiar phrase, like setting the fox to guard the chicken coop. And yet, weak-form judicial review does just that – or, at least, it relies on the fox to guard the chickens effectively most of the time. We can call this a *public-choice* scepticism about the likelihood that legislatures will respect constitutional values, and so, indirectly, about the value of weak-form review.

be unconstitutional". And, similarly, a court in a strong-form system could say, "We refuse to hold this statute unconstitutional because it embodies the legislature's judgement that the statute is consistent with the constitution, even though, were we to examine the question anew, we might well disagree".

9 Rather than, for example, re-enacting the same statute, this time with a pellucid statement that it wants to do what the courts have said would be inconsistent with constitutional constraint.

10 My perspective is of course that of a scholar of United States constitutional law, and my initial comments are framed with reference to the United States experience, but eventually I broaden the frame so that it incorporates parliamentary systems as well.

There is an additional difficulty, which we can call a *legalist* scepticism. Constitutionalism involves enforcing *pre-existing* constraints on policy-making, constraints that are typically embodied in canonical texts ("the constitution", in shorthand).¹¹ Participants in constitutional systems orient themselves to the interpretation of those canonical texts, using them to identify the constraints on legislative power. According to the legalist scepticism, legislatures may be quite good at determining what would be good policy for the future, but they have few incentives to engage in the interpretive activity associated with constitutional law, and little expertise in that activity either.

I believe that the public-choice scepticism is overstated, and that well-designed constitutional systems do give legislators incentives to take constitutional values into account as they legislate. The legalist scepticism is, I think, more substantial, although far less emphasised in the literature on constitutionalism.¹²

Elected legislators can develop concern for constitutional values when their electoral prospects depend on their having such concern. James Madison's famous argument about the way in which relatively large electoral districts limit the effects of faction offers some insights into why elected legislators might be concerned about avoiding actions that transgress constitutional limits.¹³ Some of the factions Madison identifies do want to do things that violate the constitutional rights of others, or that exceed the power affirmatively granted to the legislature. But, Madison argues, a large enough jurisdiction will have enough factions that a person seeking to be elected cannot secure election by promising to satisfy any faction's demands. Faction A wants to violate the rights of faction B, and faction B wants to violate the rights of faction A. And, even if neither one of them likes faction C, still faction C has some bargaining power, residing in its ability to throw its votes to the candidate preferred by either A or B depending on whether that candidate promises to protect faction C against its enemies. In the end, in a large enough jurisdiction, according to Madison, a candidate cannot get votes by promising to violate rights. In effect, the factions' competing demands cancel each other out.

11 Particular systems may have a number of texts that, taken together, are the nation's constitution. And I would not rule out the creation of a constitution by judicial decision, in which case the canonical texts would be the courts' precedents.

12 I note an additional complication, associated with the transition from a system without judicial review to one with it. The very fact of transition is likely to bring home to legislators their responsibility to assess policy proposals in light of constitutional constraints. As a result, in the immediate aftermath of the transition, legislators are likely to be particularly alert to constitutional norms. That effect, though, will dissipate over time. I ignore the transition effect because I want to concentrate on the more permanent structures and incentives associated with weak-form judicial review.

13 See *The Federalist* no 10.

The Madisonian argument works reasonably well with respect to issues of public policy.¹⁴ It works, but I think less well, with respect to questions of constitutional constraints on public policy. I personally think the residuum of public-choice scepticism that remains after the Madisonian argument is taken into account ought to be dealt with by rejecting the strongest assumptions that animate public-choice scepticism. I can identify one mechanism that would *allow* an elected representative to vote (ordinarily) only for proposals that, in the representative's view, are consistent with constitutional values, and another that would *encourage* him or her to do so.¹⁵

The first mechanism is this: Suppose that a representative does an exceptionally good job of advancing the (factional) interests of the constituency and that, generally speaking, those interests, while narrow and not in the nation's overall interest, do not conflict with constitutional values. That kind of performance will give the representative freedom to act on his or her conscientious views about what the constitution requires or prohibits—at least as long as those views do not conflict with the constituency's special interest or with extremely strongly held views among the constituency. The idea here is that the representative can get a free pass on most constitutional issues as long as he or she provides exceptionally good constituency services, including advancing narrow or special interest legislation of particular concern to the constituency. And, by the Madisonian argument, different representatives will get free passes on different constitutional issues, so that, in the aggregate, the legislature will enact only legislation consistent with the constraints the constitution places on it.¹⁶

The second mechanism is that constituents themselves might have principled views about what the constitution requires or prohibits.¹⁷ A representative responsive to the

14 It has to be supplemented by the obvious point that a representative who wants to be re-elected has to do *something*. Because the representative cannot enact the programme favoured by either faction A or faction B, the representative will enact good—that is, non-factional—public policy.

15 I note, but put aside as analytically irrelevant, the fact that representatives are likely to develop views of the constitution according to which the policy proposals they favour on policy grounds are constitutional, and that they might often hold those views in good faith because of the openness of constitutions to alternative reasonable interpretations. I believe this observation is analytically irrelevant because I see nothing normatively problematic about adopting a tenable position on the constitution's meaning for the reason that that position is compatible with one's policy preferences.

16 This mechanism can have some effect even if some constituents affirmatively want to violate constitutional rights, provided that this preference is localised—that is, if only the constituents in a particular district want to violate a specific constitutional right and constituents in other districts do not (or want to violate some other constitutional right).

17 The pervasiveness and strength of such preferences will of course vary, and perhaps weak-form systems of judicial review are particularly well-adapted to political-legal cultures in which citizens are especially alert to constitutional values. Or, in a slightly different variant, such

constituency would then seek votes by acting in conformity with the constituency's constitutional—not merely policy—preferences. This effect need not be strong in individual districts for it to have a significant effect on legislative output. Consider a weakened version of the Madisonian argument, in which factional interests do not completely offset each other, but merely reduce the net impulse toward factional legislation. A mild constitutional view in the constituency might induce a representative to act in accord with that view, and, even though small, the effect might be enough to offset the (diminished) factional impulse.

So far I have focused on the individual legislator and his or her incentives to comply with the constitution. But legislators act in institutions, and ordinary institutional arrangements may give the legislature as a whole an incentive to comply with constitutional norms. The basic mechanism here is separation of powers. Consider first the United States style of separation of powers, with the executive elected independently of the legislature. As Madison said, separation of powers sets ambition to counteract ambition.¹⁸ The legislature will be alert to executive encroachments, and vice versa. Neither branch will yield when the other proposes to violate the constitution, and the product of their competition and resistance is compliance with the constitution.

Madison was particularly concerned about one branch's encroachments on the other, and the metaphor of competition and combat pretty clearly works most effectively in that setting. Yet, it is not irrelevant where one branch proposes action that might violate constitutional rights outside the separation of powers scheme. The reason is that a party with substantial support in the legislature, say, can use the executive's proposed constitutional violation as a weapon in its electoral battles against the executive and the executive's supporters in the legislature—if constituents have some concern for ensuring that legislation conforms to the constitution. Even when the same party controls the executive and the legislature, the risk of electoral defeat because of proposals that can effectively be portrayed as unconstitutional will exercise some constraint on the party's behaviour.¹⁹

systems might be well-adapted to cultures in which citizens trust their representatives to be constitutionally responsible (even if the citizens themselves are not that responsible).

18 *The Federalist* no 51: "Ambition must be made to counteract ambition."

19 Separation of powers need not take the relatively strong form it does in the United States for it to provide the opportunity I have described. In particular, a separately elected and effective upper house may be enough. (My thinking about this issue has been influenced by Allison Martens "Reconsidering Republican Institutions as Guardians of Rights: Lessons from Australia" (Paper presented at the annual meeting of the American Political Science Association, Philadelphia, 27 August 2003). Martens describes how an effective parliamentary committee on the Constitution

The next question, then, is whether similar effects can be achieved in Westminster-like parliamentary systems of party government, where the chief executive can command legislative majorities by insisting on party discipline.²⁰ That such effects can *sometimes* be achieved seems obvious; one need only note the possibility that the executive will allow a free vote, releasing all members from party discipline. And, indeed, one observes serious constitutional debate on some proposals—notably, abortion—when party discipline has been lifted. It would be convenient if there were reasons to believe that governments would allow free votes generally when legislative proposals raised important constitutional concerns, but I know of no such reasons.

Rather, the mechanism in systems of party government that parallels separation of powers in other systems is the creation of an analogue to separation of powers *within* party government. We can see the analogue in operation when there is a coalition government. The parties negotiating the coalition agreement stand in relation to each other as the legislature stands to the executive in a separation of powers system. And for the same reason that separation of powers conduces to respect for constitutional norms, so will coalition government.

But not all party governments are coalition governments.²¹ Yet, something *like* a coalition government can exist within an apparently unified government. The reason is that an apparently unified party is, quite often, a coalition of informal (sometimes formal) factions. The coalition is formed before the election rather than after it, and within a single party rather than in forming a government. Still, the unified party's platform can be seen as the analogue of the coalition agreement.²² So, to the extent that coalition governments can reproduce the effects of separation of powers on inducing sensitivity to constitutional norms, so can single-party governments.

So far I have dealt with the incentives individual representatives have to consider constitutional questions seriously with respect to particular proposals. That, though, can be time-consuming. Representatives who know—because of the incentives I have

was created in Australia when the Senate came to see itself as what Martens describes as a "Senate of Opposition.")

20 The question is particularly pressing because weak-form review has been adopted in such systems.

21 Duverger's Law holds that constitution designers can induce a tendency to coalition government by establishing proportional representation as the electoral scheme. Perhaps, then, we ought to think of weak-form judicial review in party government systems as forming a package with proportional representation.

22 Debate over constitutional matters can occur in the party caucus, even if it does not occur in the legislature itself.

described – that they will (sometimes) want to deal seriously with constitutional questions can ease the burden of decision by delegating some portion of the task to a committee within their institution.²³

A committee on constitutional matters can amplify the institution's consideration of constitutional questions. As a general matter, those who staff any relatively permanent body become invested in the body's mission. Set up a committee on constitutional matters, and its members will take their mission more seriously than they would were they simply members of the house.²⁴ Assignment to such a committee might not be particularly attractive, because service is unlikely to provide constituents with any specific benefits, in the way that assignment to more substantive committees (such as those dealing with agriculture or shipping) might.²⁵ Still, those assigned to the committee will be marginally more invested in the mission than others. Some will take the constitution as their area of specialisation within the house. And, of course, anyone who volunteers for such a committee is likely to be particularly alert to constitutional matters. Finally, there are at least some representatives who see themselves as good institutional citizens. They have no aspirations beyond service in the house, and take their personal mission to be protecting the house – and, perhaps, the constitution more generally – from the erosion of its power.²⁶ And those institutional citizens who are lawyers may have a particularly strong sense of a duty to protect the constitution.

None of this is to say, of course, that legislatures will *always* respect constitutional norms. I have identified mechanisms that give rise to the possibility that legislatures will be sensitive to constitutional norms, but nothing in my arguments establishes how sensitive legislatures will be. Some of the mechanisms seem to me clearly much stronger than others, and some seem to me rather weak taken in themselves. My argument is only that we have a number of reasons for thinking that public-choice scepticism about the possibility of responsible legislative consideration of constitutional norms is overstated.

23 That is, representatives have incentives both to consider constitutional questions seriously and to delegate that consideration to a sub-unit of the institution of which they are members.

24 As will the professional staff assigned to such a committee.

25 Committee members might have an advantage in obtaining a judicial appointment, and so membership might attract those who see themselves as potential judges. In Germany a legislator who served on the committee that selects judges for the Constitutional Court sometimes becomes a member of that Court.

26 In conversation, Janet Hiebert pointed out that these institutional citizens may play a particularly important role in party-government systems. These are permanent back-bench members, who have no hope of ever becoming a member of the executive government. They continue to serve in part because of their concern for their constituents, but also in part because of their concern for their institution.

Weak-form judicial review might work well when legislatures are moderately responsive to constitutional norms, as my arguments suggest (but do not establish) that they might be.²⁷

What of the legalist scepticism? Recall that it arises because constitutional responsibility means respect for canonical texts, by means of some sort of interpretive activity. But, the legalist sceptic suggests, legislators—even when acting with the advice of a specialised committee—are unlikely to engage in a serious interpretive enterprise.

In an earlier study I examined a small practice in the United States Senate in which Senators formally debate constitutional questions.²⁸ I found that the Senators generally *were* attempting to interpret the Constitution (and, sometimes, the Supreme Court's decisions interpreting the Constitution). The legalist sceptic, though, wonders what incentives legislators have for such behaviour.²⁹ One, I think, is obvious: efficiency. The responses I have sketched to the public-choice sceptic suggest that legislators have incentives to *address* constitutional questions. But how are they to do so? They could rethink constitutional values from the bottom up. That would be time-consuming. Casting their discussions in already existing terms—that is, addressing constitutional issues by referring to the language of the constitution, judicial decisions interpreting it, and the like—cuts down on the effort legislators must expend. If legislators are to address constitutional questions, then, their concern for disposing of their work efficiently gives them an incentive to do so by means of interpretation.

Interpretation of pre-existing constitutional texts may enter a legislator's deliberations in a more subtle way. The idea here is that constitutional documents can become embedded in a nation's constitutional culture and self-understanding, to the point where major legislation, at least, comes to be understood as embodying the nation's constitutional commitments. Legislators (at least when dealing with major legislation) then can see themselves as carrying forward the nation's constitutional commitments—that is, as interpreting the nation's constitution as embedded in its traditions. A legislator taking this approach may refer to specific constitutional provisions or judicial opinions, particularly those that have deep cultural resonance, such as the Equal Protection Clause or *Brown v Board of Education* in the United States.³⁰ More often, perhaps, such a legislator will refer

27 I believe that nothing in my analysis so far turns on whether the system is weak- or strong-form, but I have not thought through the issue enough to be confident in that belief.

28 Mark Tushnet "Non-Judicial Review" (2003) 40 Harv J Legis 453.

29 Without incentives, the activity I described could simply be the result of an essentially random set of decisions by Senators.

30 US Constitution, amendment XIV § 1; *Brown v Board of Education* (1954) 347 US 483.

generically to traditions of equality or, to use another example from the United States, the Declaration of Independence or the Constitution's Preamble. The latter are indeed documents, but as a formal matter they have no legal status. And yet, a legislator who refers to them is, I think, engaged in a constitutional *and* an interpretive enterprise.

The practice I have just described invokes the constitution in a highly abstract form. As it turns out, the question of what level of abstraction we think appropriate in constitutional analysis has some bearing on the second topic I address here, the stability of weak-form judicial review.

III THE QUESTION OF STABILITY

Weak-form judicial review is interesting because it offers a new way of reconciling democratic self-government with constitutionalism. It does so by recognising that the general or abstract terms of the constitution can be specified in numerous reasonable ways, and that legislatures might sometimes adopt unreasonable specifications or, more likely, fail to attend to constitutional considerations in enacting legislation. Weak-form systems allow the courts to remind legislatures of their constitutional obligations, without making the courts' specification unreviseable except by constitutional amendment. Legislatures and courts interact on questions of the constitution's meaning, and proponents of weak-form review suggest that the outcome of the process will advance both self-governance and constitutionalism, as legislators, instructed but not compelled by the courts, modify the policies they adopt to conform to constitutional limits on their power, and – importantly – as courts, instructed but not compelled by legislators, modify their views of what the constitution requires.

The question of stability is this: Can weak-form review be sustained over a long term, or will it become such a weak institution that the constitutional system is, for all practical purposes, indistinguishable from a system of parliamentary supremacy or such a strong institution that the courts' decisions will be taken as conclusive and effectively coercive on the legislature? Experience with weak-form systems is, as I have indicated, thin, but I think there is some evidence, mostly from Canada but some from New Zealand, that weak-form systems do become strong-form ones.

The evidence, such as it is, is that judicial interpretations generally "stick". That is, legislatures have the *formal* power to respond to a judicial interpretation with which its members disagree through legislation rather than constitutional amendment, but they exercise that power so rarely that a natural inference is that the political-legal cultures in nations with weak-form review have come to treat judicial interpretations as authoritative and final.

The evidence of practice is hard to analyse, though. The basic problem lies in distinguishing between *agreement* with the court's result, and mere resigned *acceptance* of it.

An example of the difficulty is provided by *Baigent's Case*.³¹ The case involved a search conducted by police relying on a warrant that had been issued based on false factual assumptions, where the police continued to search even after they knew that they were searching the wrong house. The targets of the search sued for damages, alleging that their rights under the New Zealand Bill of Rights Act 1990 had been violated. Their difficulty was twofold. The New Zealand Act is declaratory and interpretive; although it tells courts to interpret legislation to be consistent with its provisions,³² it provides no remedies for violations of the rights it identifies. It seemed, then, that the plaintiffs had to rely on their common law remedies against the police officers. But the second difficulty was that the police officers were immunised by a statute from liability under the common law.

By a majority of four to one, the Court of Appeal held in favour of the plaintiffs nonetheless. It held that the Bill of Rights Act authorised the courts to create a new "public law" remedy.³³ Such a remedy was different from common law remedies. In particular, the statutory immunity Parliament provided was, the Court held, directed solely at common law tort actions. As a result, the plaintiffs could pursue their new cause of action and the police officers could not assert a statutory immunity from damages.

The Government then asked the New Zealand Law Commission to consider whether a legislative response to *Baigent's Case* should be developed. The Commission endorsed the Court of Appeal's analysis and told the Government that it should not introduce legislation to eliminate the "public law" remedy, the contours of which, the Commission said, should be fleshed out by further *judicial* action.³⁴ The Government agreed with that recommendation. *Baigent's Case* has been the object of substantial criticism—and admiration—in the New Zealand legal literature. At the end of the day, though, does the Government's non-response represent agreement with the decision or simple acquiescence in it?³⁵

Baigent's Case illustrates another way in which the difficulty of distinguishing between agreement and acceptance can arise. Weak-form systems have focused on human rights protections, as in the Canadian Charter of Rights and Freedoms³⁶ and the United Kingdom

31 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA).

32 New Zealand Bill of Rights Act 1990, s 6.

33 See *Baigent's Case*, above n 31, 675–678 Cooke P, 690–692 Casey J, 697–703 Hardie Boys J.

34 New Zealand Law Commission *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick* (NZLC R37, Wellington, 1997) 26–29.

35 My sense is that, in accepting the Law Commission's "do nothing" recommendation, the Government at least came quite close to accepting the decision as an appropriate one.

36 Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B).

Human Rights Act 1998. But, human rights are *also* protected by international human rights norms, which are themselves sometimes enforceable coercively and which, in any event, have deep cultural resonances. To the extent that a weak-form court enforces a domestic right that tracks an international human rights norm, a legislature's failure to respond might result not from agreement with the court, but from recognition that some international institution may enforce the international norm directly, or from acceptance of the fact that the courts' invocation of international human rights norms creates a new political impediment to the enactment of purely domestic legislation.³⁷

In *Baigent's Case*, one judge referred to the International Covenant on Civil and Political Rights, which mentions the power of courts to "develop the possibilities of judicial remedy", as a justification for the creation of the public law remedy.³⁸ He continued by observing that it would be "strange" to say that Parliament expected New Zealand citizens to be able to complain to the United Nations Human Rights Committee, as authorised by the Government's agreement to the Optional Protocol authorising individual complaints to the Committee, but did not want the very same citizens to be able to get a domestic remedy under the Bill of Rights Act, which, he said, was one means of implementing the Covenant.³⁹ But, with the threat of intervention from outside in the background, is the Government's acquiescence in the case's outcome properly taken to represent acceptance of the Court of Appeal's approach to enforcing fundamental rights?

A second difficulty arises from the way in which weak-form review is conceptualised, as expressed in the provisions creating it. Constitutions describe limits on government power in general terms, which have to be applied to particular statutes. A court (weak- or strong-form) can find a statute unconstitutional for basically two reasons. It might think that the legislature overlooked some constitutional value, or it might think that the legislature disregarded such a value, or gave it less weight than the constitution requires that it be given. Consider the legislature's response after a weak-form court finds a statute

37 In the United Kingdom, for example, the Human Rights Act by its s 4 authorises the highest courts to declare legislation incompatible with the European Convention on Human Rights and Fundamental Freedoms ((4 November 1950) 213 UNTS 222). Commentators have observed that, under such circumstances, Parliament would be ill-advised to refuse to modify the legislation, because the European Court of Human Rights is likely to take the domestic court's declaration of incompatibility as strong evidence that the legislation *does* violate the Convention (and, in particular, that the legislation does not fall within the margin of appreciation accorded laws that respond to peculiar local conditions). For a discussion, see Tushnet, above n 28, 483 n 173.

38 *Baigent's Case*, above n 31, 691 Casey J (citing the International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 2(3)(b)).

39 *Baigent's Case*, above n 31, 691 Casey J.

unconstitutional.⁴⁰ Where invalidation is based on a judgement that the legislature overlooked a constitutional value, the legislature might take the overlooked value into account now that it has been brought to its attention, and it might agree with the court. Or, it might take the overlooked value into account and conclude that, on balance, the legislation remains desirable. At that point, the first type of invalidation blends into the second. The court has specified what the constitution means, and the legislature simply disagrees with that specification.

In such a situation, the conceptualisation of weak-form review becomes important. Recall that weak-form systems reconcile democratic self-governance with constitutionalism by recognising that the general or abstract terms of the constitution can be specified in numerous reasonable ways. Legislatures might overlook constitutional values and might need to be reminded of them. But once legislatures are so reminded, weak-form systems should conceptualise the legislature's action as offering an alternative specification of the meaning of the constitution's general or abstract terms.

Some verbal formulations of weak-form review can interfere with such a conceptualisation. This is notably true of Canada's version, which requires the legislature to declare that it wishes its legislation to take effect notwithstanding Charter rights.⁴¹ The notwithstanding clause has been invoked so rarely that I cannot provide a real example of the difficulty, but a stylised one can make the point. Parliament enacts a statute, which the Supreme Court of Canada finds to violate a Charter right. Parliament then invokes the notwithstanding clause, declaring that the statute should take effect notwithstanding the fact that it violates the Charter right. But, in Parliament's view, the statute does *not* violate the Charter right. What it wishes is that the statute take effect notwithstanding the Supreme Court's mistaken (though reasonable) specification of the Charter right's meaning. It is not hard to imagine that it is politically more difficult to enact a statute notwithstanding the fact that it violates the Charter than to enact one notwithstanding the views expressed about the Charter by the courts. In this way, the terms used in creating Canada's system of weak-form review make it more difficult to determine when legislative action consistent with the courts' decision expresses agreement with the courts or mere acquiescence in the near-inevitable.⁴²

40 I use this as a shorthand formulation to encompass all weak-form systems. In some, the form of the court's judgment is a statement that the statute would violate constitutional norms were it to be interpreted in one way rather than another.

41 Canadian Charter of Rights and Freedoms, s 33.

42 A parallel problem might emerge under the United Kingdom Human Rights Act, although here it would depend on the language *courts* use in making declarations of incompatibility. In my view, British judges should avoid flat statements to the effect that legislation *is* incompatible with

Weak-form systems that direct courts to interpret statutes in a manner consistent with fundamental rights present the problem of conceptualising weak-form systems in a slightly different form. Interpretive directives typically carve out an exception for statutes that cannot be fairly interpreted to be consistent with fundamental rights. So, for example, the United Kingdom Human Rights Act reserves the possibility of a declaration of incompatibility for such statutes. The interpretive directive, though, is likely to induce judges to strive hard to find interpretations that make the statutes compatible with fundamental rights. In doing so, the judges will inevitably run the risk of opening themselves to charges that they are distorting rather than interpreting the statutes. The language of distortion versus faithful interpretation is language that can obscure the underlying question, which is whether the courts are rejecting a reasonable specification of fundamental rights.

A recent British case offers an instructive example.⁴³ The case involved the process by which income support for asylum applicants would be terminated when their applications for asylum were rejected. The relevant regulation provided that support would be ended when the applicant ceased to be an asylum seeker, which occurred "on the date on which it is ... recorded" by the Secretary of State for the Home Department "as having been determined".⁴⁴ The Secretary of State rejected the application for asylum on 20 November 1999, and the rejection was recorded within the Secretary's internal system on that date. The applicant did not receive notice of the denial for another four or five months. She claimed that she was entitled to income support for the period between the denial and her receipt of notice of the denial. One judge in the House of Lords thought that the applicant's claim was barred by the regulation's plain language: She ceased to be an asylum applicant when her application was denied and recorded, which occurred in November.⁴⁵ The other Law Lords disagreed. Invoking what he called fundamental principles of the rule of law, Lord Steyn "interpreted" the regulation to mean that the denial had to be *properly* recorded, and that rule of law principles meant that the denial could not be properly recorded until the applicant received notice that her application had been denied.⁴⁶ At the least, this is

Convention rights, and adopted more circumspect formulations, such as statements that legislation is "in my view" incompatible.

43 *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2003] 3 All ER 827.

44 Income Support (General) Regulations 1987 (UK), reg 70(3A)(b)(i).

45 *R (on the application of Anufrijeva) v Secretary of State for the Home Department*, above n 43, paras 10–20 Lord Bingham.

46 *R (on the application of Anufrijeva) v Secretary of State for the Home Department*, above n 43, paras 840–843.

creative interpretation. More important for present purposes, calling what Lord Steyn did *interpretation* may obscure the more basic question: Were the Government's procedures for ending income support to those whose applications for asylum had been rejected a reasonable approach to providing fair procedures? Lord Steyn made a powerful case that they were not,⁴⁷ which suggests that decisions that purport to interpret statutes can openly address the underlying question. In other cases, though, the form of "interpretation" may make less apparent the disagreement between the courts and the government on what a reasonable specification of fundamental rights is.

A related conceptual difficulty arises from what might be called the myth of objective rights.⁴⁸ Suppose that we have a political-legal culture in which two beliefs are widespread: first, that there *are* objective rights (or, more generally, objective limits placed on government power in the constitution), and second, that courts have some comparative advantage over legislatures in specifying the content of general or abstract rights. In such a culture, one would expect legislatures never to override a court's invalidation, because legislators would believe both that there were rights and that the courts were more likely than they to identify what those rights are. That is, weak-form review does not make sense in such a culture. Perhaps the transformation of weak- into strong-form review, if it occurs, indicates only that the nations that have adopted weak-form review actually have political-legal cultures more suitable for strong-form review.

Yet, judicial review in any form makes no sense unless courts have *some* comparative advantage over legislatures in specifying the constitution's meaning. So, the two conditions for the stability of weak-form review seem to be these: First, the nation's political-legal culture accepts the possibility of a range of reasonable specifications of general or abstract rights. Second, the courts' comparative advantage over legislatures in specifying the constitution's meaning is relatively modest.⁴⁹ I have my doubts about whether the first condition can ever be satisfied. Many legal academics in the United States are comfortable with the idea of a range of reasonable specifications, but, I believe, most academics, judges, lawyers, and non-lawyers think that there are, in Dworkin's terms, right answers to questions about rights.

If my belief is correct, the dynamics of weak-form review's transformation into strong-form review are straightforward. The courts specify the meaning of the constitutional

47 He wrote, for example, "There simply is no rational explanation for such a policy" (*R (on the application of Anufrijeva) v Secretary of State for the Home Department*, above n 43, para 24), and referred to Kafka in describing the system as one involving "hole in the corner decisions"(para 28).

48 Janet Hiebert suggested this line of argument to me.

49 The second condition matters because a weak-form system *properly* becomes a strong-form one when the courts' comparative advantage is large.

right. This is taken to identify the correct meaning of the right. The constitution authorises legislatures to respond to that specification. But, in the political-legal culture I am considering, the legislature can respond only by overriding not the specification, on the ground that the legislature disagrees with the court's evaluation, but the very right itself. Overriding a right, while authorised, is politically costly—beyond the political costs associated with the underlying policy. Legislators therefore must expend political capital to overcome the incremental cost of overriding a right. Doing so reduces the political capital available for other policy proposals.

Weak-form review affects public policy even if the cost of overriding a right is relatively small. It reorders the government's legislative priorities by taking political capital away from alternative proposals. Observing a legislature failing to respond to a weak-form invalidation thus tells us little about whether the legislature accepts the court's decision on the merits. It could be that the legislature disagrees with the decision on the merits, but believes that expressing its disagreement would preclude it from adopting some other policy that seems more important than the invalidated one.

And, if the cost of overriding a right is high, as I suspect it is likely to be, a legislative response is extremely unlikely. The cost of doing so would be too high, in terms of other policies forgone. At least in this case, which I think is likely to be the common one, weak-form review becomes strong-form review because of the political costs—not with respect to the invalidated statute, but with respect to other policies forgone—of invoking the mechanisms of response authorised by the constitution.

IV CONCLUSION

The promise held out by proponents of weak-form systems of judicial review is that they reconcile constitutionalism and self-governance in a particularly attractive way. I have suggested that this promise can be fulfilled only under some (I believe) rather restrictive conditions. Legislators, and their constituents, must be committed to some degree to advancing constitutional values even when those values conflict with immediate interests. They must believe that courts have some advantage over legislators in interpreting what the constitution means, but that the courts' advantage is not too large. Weak-form systems with legislators not committed to constitutional values might override judicial interventions too readily, re-establishing a system of parliamentary supremacy. Weak-form systems whose legislators believe that courts have a large advantage over them will defer to the courts' interpretations too often, transforming the system into one of strong-form review.

Weak-form judicial review is an extremely interesting innovation in constitutional design. Whether it will endure and fulfil the promises of its proponents remains to be seen.

