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The Case for the New Commonwealth Model of Constitutionalism

By Stephen Gardbaum[*]

Abstract

The article presents the normative case for the new Commonwealth model as a novel third way of organizing basic institutional arrangements in a democracy and an alternative to the conventional dichotomy of legal or political constitutionalism. In so doing, it engages with the latest contributions to the debate about the merits of judicial review, and argues that the new model radically and compellingly permits a form of "proportional representation" among the best arguments for and against the practice rather than the "warts-and-all" of the traditional either/or approach. In this way, the new model is to forms of constitutionalism what the mixed economy is to forms of economic organization: a distinct and appealing third way in between two purer but flawed extremes. Just as the mixed economy is a hybrid economic form combining the core benefits of capitalism and socialism while minimizing their well-known costs, so too the new model offers an alternative to the old choice of judicial supremacy or traditional parliamentary sovereignty by combining the strengths of each while avoiding their major weaknesses. Like the mixed economy's countering of the lopsided allocation of power under capitalism to markets and under socialism to planning, the new model counters legal and political constitutionalism's lopsided allocations of power to courts and legislatures respectively.

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A. Introduction

"The new Commonwealth model of constitutionalism" (the new model) refers to the general structure or approach underlying recent bills of rights in Canada, New Zealand, the United Kingdom, the Australian Capital Territory, and the Australian state of Victoria. Other terms in circulation include "weak-form judicial review," "the parliamentary bill of rights model" and "the dialogue model." This general structure consists of a combination of two novel techniques of rights protection: (1) Mandatory pre-enactment political rights review and (2) weak-form judicial review. The second technique decouples judicial or constitutional review[1] from judicial supremacy. As such, the new model is a distinct, intermediate institutional form of constitutionalism in between constitutional supremacy and traditional legislative supremacy. Unlike the latter, it features a general and reasonably comprehensive legalized bill of rights, which is enforced at least in part through granting courts the power of constitutional review; unlike the former, it does not give the legal power of the final word on the validity of a statute to the courts but to the legislature, which may or may not elect to use it. In this way, the new model blends legal and political constitutionalism across the board in its three sequenced stages of pre-enactment political rights review, judicial rights review, and post-judicial political rights review.[2]

If the new Commonwealth model is a distinct institutional form of constitutionalism, how attractive or compelling an alternative is it? What is the general normative case for it? Presenting this case has become an urgent task not only because it remains unfamiliar by contrast with the very well-known and developed arguments for and against the other two traditional options but also because, in the increasingly sophisticated debate between their respective proponents, both sides have begun to move from ignoring the new model to co-opting it for their own camp.

In the last few years there has been a spirited, high quality, and original set of contributions to the old debate about the merits of constitutional or judicial review by both its proponents and opponents. Some of these contributions have been made in the specific context of the opposition between legal and political constitutionalism in the UK.[3] Others have been more general and usefully taken the form of a colloquy between the two

[1] Unless otherwise stated, I shall be using the terms constitutional review and judicial review (in the American sense) synonymously throughout this article.

[2] For a much fuller account of what is new about the new model, see STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL 2 (2013).

[3] *See* ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION (2005); *see also* RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007); AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 338–403 (2009).

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sides.[4] Although this "latest round of contributions"[5] has undoubtedly enriched the overall debate and helpfully focused attention on the critical issues, it has not, however, altered the fact that it is conducted within the traditional bipolar conceptual framework. There are still two, and only two, sides. Despite certain lip-service to the new model, as discussed below, the debate continues to presuppose that these are the only options. To be a proponent of judicial review is to be a proponent of judicial rather than legislative supremacy; to be an opponent of judicial review is to be—and is the only way to be—an opponent of judicial rather than legislative supremacy. What is exciting about the new model is that it recasts this fundamental debate by providing a third, full-fledged alternative option at the outset.

Indeed, both sides in the debate have at least implicitly conceded that the new model is relevant, can no longer simply be ignored, and must be taken into account, although both sides have significantly understated how and to what extent in attempting to co-opt it for their own camp and deny its independent status. Among recent proponents of judicial review, Mattias Kumm has acknowledged the new model but relegates it to an institutional design option within his insightful and sophisticated defense of judicial review as a form of Socratic contestation that, in fulfilling the requirement of reasonable justification of all public acts, is a precondition of the legitimacy of law.[6] Kumm states that "what deserves a great deal of thought is how to design the procedures and institutions that institutionalize Socratic contestation . . . Should judges just have the power to declare a law incompatible with human rights, leaving it to the legislature to abolish or maintain the law?"[7] Similarly, Richard Fallon suggests that the choice between strong and weak forms of judicial review is a "design question" within the overall institution of judicial review he is defending, and that the desirability of one or the other may depend contextually on the "pathological proclivities" of particular societies.[8] Among opponents of judicial review, Jeremy Waldron has also acknowledged the existence of the new model by distinguishing what he terms "weak" from "strong judicial review" and stating that only the latter is the "target of his

[4] *See*, *e.g.*, Richard H. Fallon Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008); Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 1 (2010); Mattias Kumm, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, EUR. J. LEGAL STUD., December 2007, at 1 [hereinafter Kumm, *Socratic Contestation*]; *see also* Mattias Kumm, *Democracy is Not Enough: Rights, Proportionality and the Point of Judicial Review* (N.Y.U. Pub. L. & Legal Theory, Working Paper No. 118, 2009) [hereinafter Kumm, *Democracy is Not Enough*], *available at* http://www.law.harvard.edu/faculty/faculty-workshops/kumm.paper.i.pdf; Mark Tushnet, *How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review?*, 30 OXFORD J. LEGAL STUD. 49 (2010); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1348 (2006).

[5] Kumm, *Socratic Contestation*, *supra* note 4, at 1.

[6] *Id.*

[7] Kumm, *Democracy is Not Enough*, *supra* note 4, at 38.

[8] Fallon, *supra* note 4, at 1733–34.

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critique."[9] More positively, although somewhat cryptically and equivocally, he "suspect[s] . . . there is a place for some sort of [judicial] alert mechanism along these lines, say, in the context of a system of weak judicial review—with declarations of incompatibility—along the lines of those provided for under the United Kingdom's Human Rights Act."[10] Otherwise, I do not believe he has engaged it.

Interestingly, from this it appears that the new model may be acceptable, if grudgingly, to both those who defend and oppose judicial review, which perhaps further suggests its intermediate normative status and appeal. But this appeal needs to be fleshed out and the case for the new model explicitly and systematically presented[11] as a full, independent, and distinct option in its own right at the outset to counter the common attempt to smother it at birth and relegate the new model to the status of an institutional or contextual detail within one or other pole of the traditional framework and as not worthy of serious normative consideration. For on the one hand, whether courts or legislatures should have the power of the final word does not seem like a mere institutional detail but a question at the same level of discourse as whether to have judicial review itself, part of the same important normative issue. On the other, *all* of these issues are in a sense matters of institutional detail, for the point of all three models is to answer the question of how the normative commitment to constitutionalism should be institutionalized within a democratic political system. Moreover, as refined and sharpened by these and other recent contributions, the cases for the two traditional options are well-known and developed; the case for the new model is not. In what follows, I aim to present this case.

B. The Strengths and Weaknesses of Legal and Political Constitutionalism

The essential case for the new Commonwealth model is that it is to forms of constitutionalism what the mixed economy is to forms of economic organization: A distinct and appealing third way in between two purer but flawed extremes. Just as the mixed economy is a hybrid economic form combining the core benefits of capitalism and socialism whilst minimizing their well-known costs, so too the new model offers an alternative to the old choice of judicial supremacy or traditional parliamentary sovereignty by combining the strengths of each whilst avoiding their major weaknesses. Like the mixed economy's countering of the lop-sided allocation of power under capitalism to markets and under socialism to planning, the new model counters legal and political

[9] Waldron, *supra* note 4, at 1354.

[10] Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT'L J. CONST. L. 2, 24 (2009).

[11] For previous, briefer arguments for the new model generally, see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 744–48 (2001). *See also* Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L J. CONST. L. 167, 171–75 (2010); Jeffrey Goldsworthy, *Homogenizing Constitutions*, 23 OXFORD J. LEGAL STUD. 483 (2003); Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for Courts?*, 38 WAKE FOREST L. REV. 635, 662–68 (2003).

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constitutionalism's lopsided allocations of power to courts and legislatures respectively. It recalibrates these two existing options by effectively protecting rights through a reallocation[12] of power between the judiciary and the political branches (adding to judicial power if starting from parliamentary sovereignty and reducing it if starting from judicial supremacy) that brings them into greater balance and denies too much power to either. As such, it is largely an argument for greater subtlety in constitutional engineering. The result is a more optimal institutional form of constitutionalism within a democratic polity[13] than provided by either traditional model alone, one that provides a better working co-existence of democratic self-governance and the constraints of constitutionalism, the twin concepts underlying constitutional democracy.

After the latest round of the debate about judicial review conducted within the conventional bi-polar framework, it seems clearer than ever that there are powerful arguments both for and against legal constitutionalism and that no unanswerable, knock-down case—for one side or the other—that persuades all reasonable people is likely anytime soon. Although both sides have generally been more comfortable in critical mode, focusing rather more on presenting arguments against the opposite position than on the positive case for their own, these are simply two sides of the same coin within a bi-polar debate so that which one to pick mostly reflects choice of rhetorical strategy. Indeed, one of the benefits of the new three-way debate ushered in by the new model is that it becomes necessary to specify what position is being argued *for* and not only against, as there is no single, dichotomous default option but rather two separate alternatives. One net effect of the high quality bi-polar debate has been to helpfully isolate the two key issues as (1) which model better protects rights and (2) whether judicial review is politically legitimate within a democracy,[14] and also provided an enhanced assessment of the strengths and weaknesses of both traditional models with respect to them.

This enhanced assessment is particularly helpful because in order to explain how the new model combines the core strengths of both traditional ones whilst avoiding their major weaknesses, it is of course first necessary to specify what these are. As an institutional form of constitutionalism in a democratic political system, political constitutionalism (or legislative supremacy) has two major strengths or benefits. First, on the issue of legitimacy,

[12] A "reallocation" does not necessarily mean a "transfer" of power from one institution to the other. Thus, in being given the two new powers of declaring an incompatibility and interpreting statutes in a rights-consistent way wherever possible, UK courts are not exercising powers previously held by Parliament. *See* KAVANAGH, *supra* note 3, at 277–78.

[13] Although I am primarily discussing the new model within the framework of the domestic democratic polity, it could also be applied to entities beyond the state.

[14] *See* Waldron, *supra* note 4; *see also* Fallon, *supra* note 4, at 1735; Kumm, *Socratic Contestation*, *supra* note 4; Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275, *passim* (2002).

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by institutionalizing limits on governmental power as political in nature and enforcing them through the twin mechanisms of electoral accountability and structural checks and balances—such as parliamentary oversight of the executive—political constitutionalism coheres easily and unproblematically with democracy as the basic principle for the organization of the governmental power that it limits. Whether these limits that protect individual rights and liberties remain exclusively in the political sphere as moral or political rights, or are given legal effect as common law or statutory rights, they are ultimately within the scope of the democratic principles of equal participation and electorally accountable decision-making as determined or changeable by ordinary legislative act. Second, on the issue of outcomes, given the nature of many, if not most, rights issues that arise in contemporary mature democracies—including the existence of reasonable disagreement about how they should be resolved—legislative reasoning about rights may often be superior to legal/judicial reasoning. As powerfully argued by Adam Tomkins and Jeremy Waldron, high quality rights reasoning often calls for direct focus on the moral and policy issues involved free of the legalistic and distorting concerns with text, precedent, fact-particularity and the legitimacy of the enterprise that constrain, or at least frame, judicial reasoning about rights.[15] Moreover, electorally-accountable representatives are able to bring a greater diversity of views and perspectives to bear on rights deliberations compared to the numerically smaller, cloistered and elite world of the higher judiciary.

At the same time, proponents of judicial review have identified two major weaknesses of political constitutionalism on the key issues. The first is the risk of either understating or under-enforcing constitutionalism's limits on governmental power, especially those taking the form of individual rights, as the result of various "pathologies" or "blind spots" to which electorally-accountable legislatures (and executives) may be prone. These include sensitivity to the rights and rights claims of various electoral minorities—whether criminal defendants, asylum seekers, or minority racial, ethnic or religious groups—given the exigencies and logic of re-election, legislative inertia deriving from tradition or the blocking power of parties or interest groups, and government hyperbole or ideology.[16] Under-enforcement of rights may also result from the circumstance that however high the quality of legislative rights reasoning, it inevitably competes in this forum with other deliberative and decisional frameworks. Undoubtedly, these standard, well-known concerns were

[15] *See* TOMKINS, *supra* note 3, at 27–29; *see also* Waldron, *supra* note 10. Mattias Kumm argues that the sort of legalistic distortions they describe are not a feature of contemporary rights adjudication in Europe under proportionality analysis. Kumm, *Socratic Contestation*, *supra* note 4, at 5–13. However, the second-order task of assessing the reasonableness of the government's justification for a law, which Kumm argues is the point of judicial review, arguably replaces one set of distorting filters with another so that courts still do not directly address the merits of the rights issues. Moreover, the absence of such law-like reasoning may heighten the internal concerns about the legitimacy of the enterprise.

[16] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); *see also* Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235 (2009); Fallon, *supra* note 4; Kumm, *Socratic Contestation*, *supra* note 4; Perry, *supra* note 11 (making the case for the new model).

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primarily responsible for the massive switch away from political constitutionalism towards judicial supremacy around the world during the post-war "rights revolution," as the resources of representative democracy alone were perceived to provide insufficient protection.

Second, just as political constitutionalists have attempted to turn the tables on the conventional argument that rights are better protected with judicial review in the way we have seen, legal constitutionalists have tried to do the same with the standard argument that judicial review is democratically illegitimate. Thus, Richard Fallon has argued that important though democratic legitimacy undoubtedly is, it is not the exclusive source or type of legitimacy in constitutional democracies and that the substantive justice of a society also contributes to its overall political legitimacy. Accordingly, to the extent that political constitutionalism may undermine substantive justice by under-enforcing rights for the above-stated reasons, it also detracts from the overall political legitimacy of a democratic regime.[17] More generally, Mattias Kumm has argued that in addition to electorally-accountable decision-making, a second precondition for the legitimacy of law in constitutional democracies is the requirement of substantively reasonable public justification for all governmental acts burdening individuals' rights.[18] In Kumm's view, as part of our commitment to constitutionalism, legislation unsupported by a reasonable public justification for the burdens it imposes on individuals is illegitimate regardless of majority support. According to him, however, political constitutionalism provides no adequate forum for critically scrutinizing the justification for a piece of legislation to determine if it meets the minimum standard of plausibility in terms of public reasons. Given the various potential pathologies noted above, legislative deliberation and political accountability are insufficient to ensure that burdened individuals are provided with the reasonable justification to which they are entitled, as evidenced by many decisions of domestic and international constitutional courts.[19]

If these are the most important strengths and weaknesses of political constitutionalism to emerge from the recent academic debate, what are the equivalents for legal constitutionalism? One of its strengths is fostering public recognition and consciousness of rights. A reasonably comprehensive statement of rights and liberties, as found in the typical bill of rights, renders rights less scattered and more visible or transparent, more part of general public consciousness than either an unwritten set of moral and political rights or a regime of residual common law liberties supplemented by certain specific statutory rights.

[17] Fallon, *supra* note 4, at 1718–22.

[18] Kumm, *Democracy is Not Enough*, *supra* note 4, at 2128.

[19] *Id.*

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A second strength of legal constitutionalism—in either its "big-C" or common law variations—is that it may help to protect against the above-mentioned tendency towards the under-enforcement of rights resulting from the potential pathologies and blind spots affecting politically accountable legislatures and executives. Where they are politically independent in the sense of not needing to seek re-election or renewal in office after initial appointment, judges exercising the power of judicial review are in a better institutional position to counter or resist such electorally-induced risk of under-enforcement.[20] This is not so much an argument about expertise as about incentives and institutional structure. Courts also decide cases upon concrete facts, some of which may have been unforeseen by legislators,[21] and indeed bring a more context specific or "applied" dimension to rights deliberation that complements the necessarily greater generality of that undertaken by legislatures.

Third, in the positive version of the argument noted above, legal constitutionalists have made the case that judicial review is essential to the overall legitimacy of a constitutional democracy. Thus, Richard Fallon argues that to the extent judicial review promotes substantive justice by helping to protect against under-enforcement of rights, it might "actually enhance the overall political legitimacy of an otherwise reasonably democratic constitutional regime."[22] In this sense, judicial review may result in a trade-off among different sources of legitimacy but not between rights protection and overall political legitimacy. Mattias Kumm has argued that judicial review provides the forum, required for the legitimacy of legislation, in which individual rights claimants can put the government to its burden of providing a reasonable public justification for its acts. As he puts it:

> Human and constitutional rights adjudication, as it has developed in much of Europe . . . is a form of legally institutionalized Socratic contestation. When individuals bring claims grounded in human or constitutional rights, they enlist courts to critically engage public authorities in order to assess whether their acts and the burdens they impose on the rights-claimants are susceptible to plausible justification . . . . Legally institutionalized Socratic contestation is desirable, both because it tends to improve outcomes and because it expresses a central

[20] *See* Dimitrios Kyritsis, *Constitutional Review in Representative Democracy*, 32 OXFORD J. LEGAL STUD. 297, 297–324 (2012); *see also* Perry, *supra* note 11.

[21] Fallon, *supra* note 4, at 1709.

[22] *Id.* at 1728.

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> liberal commitment about the conditions that must be met, in order for law to be legitimate.[23]

Thus, for example, judicial review aims to ensure that an individual burdened by a statutory ban on gays in the military is able to put the government to the task of providing a reasonable public justification for the enacted law, one not relying on prejudice, tradition, disproportionate means, *etc.*, failing which it is illegitimate.[24]

And what are the weaknesses or costs of legal constitutionalism as an institutional form in a democracy? Starting with the issue of rights protection, one is that just as there may be under-enforcement of rights due to electorally-induced or other legislative pathologies, there may also be under-enforcement resulting from certain judicial pathologies.[25] These include (1) the risk of rights-relevant timidity that comes with responsibility for the final decision and its real world consequences; (2) concerns about lack of policy expertise or legitimacy in the context of assessing justifications for limiting rights—the universal second stage of modern rights analysis; (3) the artificially and legalistically constrained nature of judicial reasoning about rights; and (4) the relative lack of diversity of perspectives among the elite members of the higher judiciary. Now, it might be thought that, even if it exists, the risk of judicial under-enforcement of rights is not much of a concern because it simply mirrors a prior under-enforcement by the legislature. Where this occurs, it is true that the countering force of judicial review does not take place, but we are no worse off in terms of rights-enforcement than before the judicial decision.

This response strikes me as at least partially misguided for two reasons. First, assuming a court has under-enforced the right, it is not true that we are no worse off. The judicial decision formally legitimates the statute and the legislative under-enforcement in a way that would not be the case without; there would simply be a controversial statute on the books that many people reasonably believe violates rights and should be repealed. Moreover, there is now a judicial precedent in place, which may affect the political and/or

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[23] Kumm, *Socratic Contestation*, *supra* note 4, at 4. In *The Easy Core Case*, Harel and Kahana present a broadly similar justification of judicial review, which they argue is designed to provide individuals with a necessary and intrinsic right to a hearing to challenge decisions that impinge on their rights, although they do not embed their justification in terms of the general legitimacy of law. *See* Harel & Kahana, *supra* note 4.

[24] Kumm gives this example, based on the 1981 ECHR case of Dudgeon v. United Kingdom. *See* Kumm, *Socratic Contestation*, *supra* note 4, at 22–24 (citing Dudgeon v. United Kingdom, ECHR App. No. 7525/76 (Feb. 24, 1983), http://hudoc.echr.coe.int/).

[25] On judicial under-enforcement of rights generally, see Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). On the argument that rights have been under-enforced by the judiciary under the HRA, see K.D. Ewing, *The Futility of the Human Rights Act*, PUB. L. 829 (2004). *See also* K.D. Ewing & Joo-Cheong Tham, *The Continuing Futility of the Human Rights Act*, PUB. L. 668 (2008), *available at* http://www.law.monash.edu.au/castancentre/events/2008/ewing-tham-article.pdf; K.D. EWING, THE BONFIRE OF THE LIBERTIES: NEW LABOUR, HUMAN RIGHTS, AND THE RULE OF LAW (2011).

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legal treatment of other or future statutes. It is for these reasons that Justice Jackson famously chided the U.S. Supreme Court for taking the case of *Korematsu v. United States*.[26] It is one thing for the elective branches to under-enforce rights during a perceived national emergency; it is another for the highest court to give its seal of legitimacy to that under-enforcement. Second, the response assumes that the existence of judicial review has no effect on the rights deliberations otherwise undertaken by the legislature itself in the course of enacting the statute, that judicial review provides an additional and supplementary layer of rights scrutiny—a safety net—over and above the legislative one. There are plausible reasons to believe, however, that judicial review within a legal constitutionalist framework results in the processes of political rights review being reduced or even bypassed altogether in favor of relying on the courts, which after all have the final word.[27] Why spend precious time on matters you do not decide? That is, judicial and political review may well be more substitutes for each other than supplements within legal constitutionalism, so that before opting for the latter one would need to be persuaded that on balance rights under-enforcement stemming from judicial pathologies is likely to be less than from legislative ones.

A second weakness of legal constitutionalism is that may also lead to the overstatement or over-enforcement of constitutionalist limits on governmental power. There is a term for this weakness and it is "Lochner."[28] So even if, very generally speaking, potential under-enforcement of rights is worse than potential over-enforcement,[29] over-enforcement of the *Lochner* variety is far from harmless error. That is, where courts use their supreme interpretive power to read into a constitutional text certain controversial rights that are the subject of reasonable disagreement, they may be artificially limiting the scope of governmental power in the service of substantive injustice. This type of over-enforcement undermines the overall political legitimacy of an otherwise democratic constitutional regime.

A third weakness of legal constitutionalism is the general weakness and relative ineffectiveness of relying on ex post regulatory mechanisms to the exclusion of ex ante

[26] Korematsu v. United States, 323 U.S. 214 (1944).

[27] The classic statement of this argument was made by James Bradley Thayer. *See* JAMES BRADLEY THAYER, JOHN MARSHALL (1901). Thayer considered that the tendency of legislatures within a system of judicial supremacy to leave consideration of constitutional limits to the courts and to assume that whatever they can constitutionally do they may do, meant that "honor and fair dealing and common honesty were not relevant to their inquiries." Even more famously, he argued that as judicial review involved the correction of legislative mistakes from the outside, it results in the people losing the "political experience, and the moral education and stimulus that come from . . . correcting their own errors. [The] tendency of a common and easy resort to this great function [is] to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." *Id.* at 103–107.

[28] Lochner v. New York, 198 U.S. 45 (1905).

[29] Fallon, *supra* note 4, at 1709.

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ones.[30] If constitutionalism imposes limits on governmental power, some of which take the form of individual rights, then relying primarily or exclusively on courts to enforce them will often be tantamount to closing the barn door after the horse has bolted. Some laws that raise serious rights issues may never be challenged in court, others may be challenged but under-enforced, and in most cases laws will not be challenged until at least some of the damage they are judicially assessed to impose has already been caused. Abstract judicial review acknowledges, and is designed to deal with, this problem but several systems do not permit this type of review and those that do usually limit standing to elected representatives of a certain number or office, whose political interest in challenging a law may or may not coincide with those likely to be adversely affected by it.[31]

Fourth, there is a strong tendency within legal constitutionalism for courts to become the primary expositors of rights in society and yet there are serious weaknesses in judicial modes of rights deliberation from the perspective of this important function. Judicial review may be conceptualized and defended (in common law jurisdictions at least) as incidental to the ordinary judicial function of deciding a case,[32] but deciding a specific case is far from all that a highest court typically does when exercising this power in the context of a controversial rights issue. Rather, depending on the scope of its judgment, it resolves not only the case but the rights issue raised in it as far as lower courts in future cases are concerned and, depending on its accepted or perceived interpretive supremacy within the entire political system, its resolution becomes the authoritative one for all purposes. In this way, the highest court tends to speak for, and in the name of, society as a whole. Here again, the "limitations inherent within judicial forms of decision-making"[33] discussed by Tomkins and Waldron come to the fore, as does the concern with over-legalization or judicialization of principled public discourse generally, whereby the legal component or conception of rights is over-emphasized at the expense of the moral and political.[34]

These first four weaknesses mostly address the issue of whether or not rights are better protected with judicial review. Last, but by no means least, is the familiar and standard

[30] For general works on this issue, see STEVEN M. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987) and Charles D. Kolstad, Thomas S. Ulen & Gary V. Johnson, *Ex Post Liability for Harm vs. Ex Ante Safety Regulations: Substitutes or Complements?*, 80 AM. ECON. REV. 888 (1990).

[31] For the few exceptions to this standing limitation and for general discussion of the merits and critiques of abstract review, see VICTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES 66–70 (2009).

[32] This conceptualization and defense was first presented in *Marbury v. Madison*, 5 U.S. 137 (1803). Harel and Kahana's argument in *The Easy Core Case* seeks to justify "case-specific judicial review" only and not the broader precedential force of these decisions underlying claims of judicial supremacy, although they believe their argument has "implications" for the latter. *See* Harel & Kahana, *supra* note 4.

[33] TOMKINS, *supra* note 3, at 29.

[34] *See*, *e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); *see also* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000); Waldron, *surpa* note 4.

concern with legal constitutionalism from the perspective of legitimacy in a democratically-organized polity, the concern that Fallon and Kumm have attempted to outflank. As this concern is so familiar, I shall be brief. It may perhaps be expressed or captured this way: in the name of attempting to ensure against under-protection of rights, legal constitutionalism gives to an electorally-unaccountable committee of experts unreviewable power to decide many of the most important and weighty normative issues that virtually all contemporary democratic political systems face, even though it turns out that these issues are not ones for which the committee's expertise is especially or uniquely relevant.

The easy, conventional and mostly rhetorical response to this concern is premised on a legal fiction; namely, that a supermajority of citizens has self-consciously, deliberately and clearly pre-committed to a set of higher law solutions to rights issues, and the function of the courts is simply to apply these—in essentially the same way as any other type of law.[35] The legal reality is that many of the most important rights issues as and where they present themselves are inevitably the subject of reasonable disagreement among and between judges, legislators and citizens—as routinely evidenced by closely divided courts, legislatures and referenda on some of the most controversial and difficult topics. Such disagreement—about which rights exist, their meaning, scope and application, as well as permissible limits on them—persists whether or not rights and rights claims are left in the realm of moral and political discourse only, are deemed part of the common law, or have been incorporated into the particular textual formulas of a statutory or constitutional bill of rights. As Jeremy Waldron puts it, "the Bill of Rights does not settle the disagreements that exist in the society about individual and minority rights. It bears on them but it does not settle them. At most, the abstract terms of the Bill of Rights are popularly selected sites for disputes about these issues."[36]

In this context, the case for some of the most fundamental, important and divisive moral and political issues confronting a self-governing society of equal citizens being subject to the rule that the decision of a judicial majority is final and effectively unreviewable, on the legal fiction that they are wholly questions of law akin to the interpretation of a statute or a contract, appears weak—if not duplicitous. So too on the frequently proffered alternative basis that they concern matters of principle (as distinct from policy) best left to, and answered by, courts alone.[37] Even were the distinction between principle and policy to be successfully explained and justified, if "constitutional democracy" is taken to require

[35] This argument originates with Alexander Hamilton in Federalist Paper 78. THE FEDERALIST No. 78 (Alexander Hamilton).

[36] Waldron, *supra* note 4, at 1393.

[37] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81–130 (1977). For an analysis in the UK that draws from Dworkin, see Jeffrey Jowell, *Of Vires and Vacuums: The Constitutional Context of Judicial Review*, PUB. L. 448 (1999).

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excluding the participation and reasonable judgments of equal citizens and their electorally-accountable legislative representatives on all rights-relevant issues of principle in favor of the reasonable judgments of judicial majorities, then the qualifying adjective has largely swallowed what it qualifies.

C. The New Model as a Normatively Appealing Third Way

The persistence of these weaknesses with both traditional models alongside each of their strengths is a major problem because of the structure of the choice between them. In the either-or universe of the bipolar model, we are stuck with one or the other in a "winner-take-all" institutional system that requires the weaknesses of the chosen model to be endured alongside its strengths, whilst the complementary merits of the other model are lost entirely. It is legal constitutionalism *versus* political constitutionalism, judicial supremacy or no judicial review at all. But this "warts-and-all" structure of institutional design choice is unnecessarily crude and disproportionate with respect to the normative costs and benefits of the two models. By contrast, a major advantage of the new model as an intermediate hybrid is that it makes possible a form of "proportional representation" among the strengths of both legal and political constitutionalism, while also severing or minimizing the major weaknesses of each.[38]

The core of the case for the new model is the argument for *both* weaker-form judicial review and weaker-form legislative supremacy versus *either* strong-form judicial review or strong-form legislative supremacy. The central problem with strong-form judicial review is not that rights-based judicial review has no value or cannot be justified at all, but that it is too strong. In the familiar language of proportionality, it is not the least restrictive way of achieving this value with respect to others that are also central and essential within a constitutional democracy. Moreover, as already previewed in the previous section, there are good reasons for believing that at least part of this value—protecting against under-enforcement of rights—may not be optimally or best promoted by strong judicial review, even if it were the case that on balance it affords better protection than political constitutionalism.

Similarly, the central problem with traditional strong-form legislative supremacy is also that it is unnecessarily strong. Just as judicial supremacy effectively gives exclusive voice to the highest court, traditional strong-form legislative supremacy needlessly creates a monopoly for elected representatives, and often mostly the government, in terms of whose voice counts or has legal authority on rights issues. The new model adds two concrete and specific types of constraints on legislative decision-making to the traditional

[38] A different form of "proportional representation," one that allocates greater weight to legal constitutionalism, would be to employ the new model for social rights but to retain strong-form judicial review for civil and political rights. *See* Mark Tushnet, *The Relation Between Political Constitutionalism and Weak-Form Judicial Review*, 14 GERMAN L.J. 2237 (2013).

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moral, political and procedural ones that are part and parcel of parliamentary sovereignty.[39] These are the procedural requirement of pre-enactment rights review and the very visible political constraint of a formal, but not necessarily legally final, judicial opinion on rights issues raised by enacted laws. By challenging the legislature's institutional monopoly of authoritative voice on rights issues, this second constraint in particular can be said to weaken legislative supremacy compared to the traditional version.

I have claimed that the general case for the new model, like the arguments for the mixed economy, is that it combines the strengths of the two purer but flawed extremes whilst avoiding their weaknesses. It is now time to make good on this claim by explaining how this is achieved. As we have seen, to the extent that proponents of legal and political constitutionalism have engaged each others' arguments, it has mostly been in a debate about judicial review in which the common ground is that the two main issues are whether there is reason to suppose that rights are better protected with or without judicial review and whether judicial review is democratically legitimate. So how exactly does the new model accommodate and combine the strengths of both polar positions whilst severing their weaknesses as inessential and dispensable? And what is the argument that the resulting intermediate position better protects rights whilst also maintaining political legitimacy in a democracy?

First, on the issue of rights protection, the case for the new model accepts almost everything that critics of legal constitutionalism say as to why legislative reasoning about the sorts of rights issues confronting all modern societies is or may be better/more appropriate than judicial reasoning, with its inherently artificial and constrained nature and relative inability to focus directly on the moral issues involved. This acceptance is institutionalized in pre- and post-enactment political rights review. At the same time, it also accepts and accommodates the legal constitutionalist argument that judicial review may sometimes help to reduce the risk of certain types of under-enforcement of rights, hence the role of courts in between the two stages of political review. Given what has just been said, this is obviously not because courts are better or more expert than legislatures at rights deliberation but because each institution comes to the task from a different perspective, has different strengths and weaknesses that may usefully be brought to bear on rights issues to help improve outcomes and protect against under-enforcement. Again, the relative strengths of legislatures are those expressed by Tomkins and Waldron, as well as the greater diversity of views mentioned above. The relative weaknesses of legislatures are the potential rights-relevant pathologies to which they may be subject. The relative advantage of courts here is independence from these potential electorally-induced pathologies and the dimension of fact-specific, applied rights deliberation versus the more general and abstract approach of legislatures, but the weaknesses are the parallel

[39] JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 302–303 (2010).

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tendencies towards pathologies of their own and the general problem of relying exclusively on ex post regulation discussed above.

What the argument for the new model rejects as uncompelling, disproportionate, and dispensable in the two polar models on this issue is as follows. First, in the case for political constitutionalism, it does not accept the consequence of concluding that, on balance, legislative reasoning about rights is superior to (or no worse than) judicial; namely, that rights issues should be left exclusively to the former. This consequence is a function of the either-or universe of the bi-polar framework, in which it is necessary to choose between legislative and judicial modes of reasoning about rights. The appeal of the new model here is that it revises the standard implication of this argument by recognizing the respective strengths and weakness of courts and legislatures and providing a significant and appropriate role for both. Accepting the net superiority of legislative over judicial reasoning about rights may determine which has the formal power of the final word, but it does not entail that no role is served by, or afforded to, the latter.

Second, with respect to the legal constitutionalist case for judicial review, the argument for the new model rejects the implication that under-enforcement concerns justify not only *a* judicial role in the protection of rights but also a judicial veto over legislation—what Fallon refers to as one of the "multiple veto points" in the system[40]—or at least one that is not defeasible by ordinary majority vote of the legislature. Rather, for the new model, under-enforcement concerns mean that courts should be a "checking point" in the system, having an interpretive, alerting, and informing function with respect to rights issues, somewhat akin to the delaying power of the House of Lords as the second legislative chamber versus the veto power of the U.S. Senate.[41] This revision, of course, reflects and expresses the difference between weak-form and strong-form judicial review. To the significant extent that the case for legal constitutionalism turns on the incentives and potential rights-relevant pathologies of elected officials, the case for the new model here is that the combined impact of mandatory political rights review and non-final judicial review will sufficiently alter those incentives and counter the pathologies to render the solution of judicial finality unnecessary and disproportionate. This distinct mode of judicial input into rights discourse can be helpful as the legally penultimate word in both informing/spurring rights review by the political branches and raising the costs of legislative disagreement through an alerted citizenry. As with the criminal jury trial to which Fallon analogizes the argument for judicial review as protection against under-enforcement of rights, we may give citizen-members of the jury a veto power in order to minimize erroneous conviction of the innocent, but (and this is the limit of the analogy) we do not give such a power to

[40] Fallon, *supra* note 4, at 1707.

[41] The current delaying power of the House of Lords is one year under the 1949 Parliament Act. *See* Parliament Act 1949, 1949, 12, 13 & 14 Geo. 6, c. 103 (U.K.).

second-guess their decisions to judges.[42] Accordingly, unlike the two traditional models, the new model recognizes and reaps the respective benefits of *both* legislative and judicial reasoning in terms of their contributions to rights deliberation and protection against under-enforcement, but within an institutional structure that affords the power of the final word to the former.

Let us now turn to the issue of legitimacy. Once again, the case for the new model is that it is able to combine and accommodate the core insights of both opponents and proponents of judicial review into a package that is more compelling and proportionate than either alone. The democratic legitimacy of collective decision-making procedures (and especially higher lawmaking procedures) is obviously a centrally important value within constitutional democracies. By granting the legal power of the final word to the legislature, the new model preserves and promotes this value. At the same time, the new model acknowledges and accommodates the broader legitimacy concerns raised by Fallon and Kumm in their defenses of judicial review. To the extent that weak-form judicial review helps to protect against under-enforcement of rights by giving courts checking, alerting, informing and decision-making functions that supplement legislative rights deliberations and counter characteristic potential pathologies, it promotes justice and so enhances overall political legitimacy. But it does so, too, when also countering judicial under- and over-enforcement of rights, against which legal constitutionalism is generally powerless.

With respect to Kumm's argument, it is first necessary to distinguish reasonable public justification for general legislative acts that burden individuals from administrative and judicial decisions, which are typically subject to forms of judicial review for reasonableness even in systems that do not provide for constitutional review of legislation.[43] These are not at issue and clearly perform the legitimating, rule of law function that Kumm prescribes. As for legislative acts, the new model obviously provides the judicial forum for the required critical assessment of reasons. The question, therefore, is whether strong-form judicial review rather than weak is necessary or essential to fulfill this condition of legitimacy and so is justified as a proportionate departure from the norm of democratically-accountable decision-making. I believe the answer is no. To explain why, let me begin by making explicit what has been left implicit in the argument so far: The case for the new model's override power is premised on reasonable disagreement with the courts on a rights issue. The basic principle at work here is that democracy requires a reasonable legislative judgment to trump a reasonable judicial one.[44] In one sense, therefore, if courts and legislatures both

[42] Fallon, *supra* note 4, at 1708.

[43] The most famous of which is "the Wednesbury unreasonableness" test in the United Kingdom. *See*, *e.g.*, Associated Provincial Picture Houses v. Wednesbury Corp., [1947] EWCA Civ. 1, [1948] 1 K.B. 223 (appeal taken from Eng.).

[44] *See* Perry, *supra* note 11, at 661. Mattias Kumm also appears to accept this principle, which is why for him judicial review is limited to policing the boundaries of the reasonable.

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adhere to their normatively assigned roles and (as in Kumm's theory) courts only invalidate legislation for which there is no reasonable public justification, then legislatures would never exercise their override power—which perhaps becomes redundant. But by the same token, under this scenario it cannot be said that strong-form judicial review is necessary, because weak-form review would achieve exactly the same result.

More realistically, however, the risk that both will depart from their normatively circumscribed powers must be taken into account: That courts will invalidate reasonable legislative decisions in favor of the court's view of the correct one and legislatures will exercise their override power in support of unreasonable legislative decisions. In these circumstances, is strong-form judicial review rather than weak justified? In current practice, Kumm's normative standard is not in fact the one that is generally understood to govern judicial review and courts regularly overturn legislative decisions which cannot be said to be unreasonable.[45] But what if it were? Under strong-form review, there is little to counter the risk of judicial overreaching on this issue—as by reason of their very independence, courts face no direct political constraint—and the legislative override power would be a useful institutional check in the absence of others as a form of separation of powers. Moreover, we are by hypothesis here—a court has invalidated a reasonable legislative act—in the situation where the principle of a reasonable legislative judgment trumping a reasonable judicial one applies, so that use of the override would be justified. By contrast, unlike the strong-form judicial power, this legislative power would be subject to a significant institutional or political constraint against the risk of misuse; namely, the fact that a court has issued a formal judgment finding there to be no reasonable public justification for the legislation violating individual rights. Finally, so far we have been discussing the situation in which there have been clear departures from the standard of reasonableness, but as Kumm notes, the limits of reasonable disagreement may also be subject to reasonable disagreement.[46] That is, courts and legislatures may reasonably disagree about whether a legislative act is within the bounds of the reasonable. For the same two reasons just noted—the checking function of the override and the default or tie-breaking nature of legislative power that democracy requires—weak-form review also seems the more justified solution here.

In sum, the conventional democratic legitimacy concerns with judicial review are genuine and powerful in the context of pervasive rights indeterminacy. Again, given this context, the argument that democratic legitimacy requires the reasonable view of a legislative

[45] That is, in applying the second and third prongs of the proportionality principle courts tend to ask whether the legislature's justification for limiting a right is in fact necessary (or the least restrictive means) and proportionate in the strict sense, rather than reasonably necessary and proportionate. I, too, have argued that under ordinary (e.g., strong-form) judicial review courts should limit themselves to asking whether the government's justification for limiting a right is reasonable, contrary to the general practice—although for a somewhat different reason than Kumm. Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789 (2007).

[46] *See* Kumm, *supra* note 4, at 28.

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majority to trump the reasonable view of a judicial majority seems compelling. Fallon and Kumm are correct that democratic legitimacy is not the only source or type of political legitimacy in constitutional democracies, but it is a critically important and presumptive one. Departures from it carry a strong burden of justification. If protecting against under-enforcement of rights and/or the requirement of reasonable public justification for legislative burdens on individuals are the potential bases for such a justified departure, the means of furthering these components of political legitimacy must be proportionate; in particular, they must promote their objectives in ways that least restrictively depart from the democratic legitimacy of electorally-accountable decision-making. Weak-form judicial review is that least restrictive means; strong-form judicial review is not.

Institutionally, then, the strengths of legal and political constitutionalism that the new model combines in its hybrid status are as follows. From the latter, it employs the benefits of the more unconstrained and all-things-considered legislative style of moral reasoning about rights both before and after the exercise of weak-form judicial review. As part of the "after," of course, the new model also retains the possibility of ultimate reliance on the principles of electorally-accountable decision-making and political equality. From legal constitutionalism, the new model first takes the enhancement of general rights-consciousness that generally comes with a specific and fairly comprehensive statement of legal rights. It then attempts to counter potential legislative under-enforcement of rights in part by empowering politically independent and unaccountable judges to give their considered opinions on the merits of rights claims filed by individuals, thereby providing a forum to critically assess the public justification of laws and bolstering the broader legitimacy of the political system.

At the same time, the new model also avoids or seeks to minimize the major weaknesses of both traditional models. From political constitutionalism, it counters the rights-relevant pathologies or blind spots to which electorally-accountable institutions may be prone by, first, mandating rights consciousness and review in the legislative process itself and, second, establishing judicial review. Of the weaknesses of legal constitutionalism, the new model counters certain judicial pathologies that may result in both the under- and over-enforcement of rights by not relying solely on courts for protection of rights but also on rights review and deliberation by the political institutions. This enables the benefits of legislative reasoning about rights to supplement the limitations of judicial rights reasoning. At the pre-enactment stage, this political rights review also introduces the advantages of ex ante regulation in addition to the ex post regulation of judicial review, which may help to prevent rights violations from occurring in the first place. And at the post-enactment stage, it permits the new model to neutralize legal constitutionalism's democratic legitimacy problem.

As part of its hybrid nature, and like the analogous mixed economy, the new model not only selectively incorporates and combines certain existing features (i.e., the strengths) from each of the two polar ones whilst discarding others (the weaknesses), but also *revises*

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them and in the process creates at least two wholly novel features that are not part of either traditional model. The normative appeal of these two exclusive features contributes substantially to the overall case for the new model. The first of these is the checking and alerting rights-protective roles of the courts compared to the full veto power of judicial supremacy just discussed in the context of Richard Fallon's arguments. One version of these more limited powers is institutionalized in the judicial declaration of incompatibility, a novel judicial power when enacted as part of the Human Rights Act (HRA).[47] The second exclusive feature is the new model's dispersal of responsibility for rights among all three branches of government rather than its centralization in either the courts (judicial supremacy) or the legislature (legislative supremacy). This is achieved in the three sequenced stages of mandatory pre-enactment political rights review by the executive and legislature, post-enactment judicial rights review, and post-litigation political rights review by the legislature. In this way, the new model not only produces a better, more proportionate *general* balance of power between courts and legislatures than the two more lopsided models of legislative and judicial supremacy, but also specifically with respect to the recognition and protection of rights.

This dispersal of rights responsibilities has the goal of fostering a stronger and deeper rights consciousness in all institutions exercising public power and is an essential part of the aggregate rights protective features of the new model. Overall, in the three following ways, it creates a different, and arguably more attractive, rights culture than the one produced under judicial supremacy. First, in the context of reasonable disagreement about rights, the dispersal rather than the concentration of responsibility is likely to affect the content of the recognized rights. This is due to both types of "judicial pathologies" about rights discussed above: (1) The artificially and legalistically constrained nature of judicial reasoning about rights that largely excludes direct engagement with the moral issues involved; and (2) the greater diversity of views and perspectives that electorally-accountable representatives can openly bring to rights deliberations compared to the numerically smaller, cloistered and elite world of the higher judiciary. Second, in terms of procedure, rights discussions will be far more inclusive and participatory leading to greater rights consciousness among both elected representatives and electorate. In affirming rather than denying Waldron's "right of rights,"[48] the new model here institutionalizes a

[47] At the time of the HRA's enactment, no other system of constitutional review of legislation in the world—domestic or international, past or present—contained the same or a similar judicial power. It was subsequently adopted in New Zealand by judicial interpretation. *See*, *e.g.*, *Moonen v Film & Literature Review Bd.* [2000] 2 NZLR 9 (CA) 17 (N.Z.). Ireland adopted it as part of the European Convention on Human Rights Act. European Convention on Human Rights Act (Act No. 20/2003). It was adopted in Australia as part of both the Human Rights Act and Victorian Charter of Human Rights and Responsibilities Act. *See Human Rights Act 2004*, (ACT); *Victorian Charter of Human Rights and Responsibilities Act 2006*, (Cth).

[48] Jeremy Waldron, *Participation: The Rights of Rights*, 98 PROC. ARISTOTELIAN SOC'Y 307 (1998), *available at* http://www.jstor.org/discover/10.2307/4545289?uid=3739936&uid=2&uid=4&uid=3739256&sid=21102979858137.

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democratically legitimate rights regime. Third, for standard checks and balances reasons the dispersal rather than the concentration of rights responsibilities reduces the risk of under-enforcement that comes with relying exclusively on any one institution—whether courts or legislatures. As noted above, although better known, under-enforcement concerns are hardly limited to the legislature. The key innovation here is the distinctive new model feature of supplementing ex post judicial rights review with ex ante political rights review by the executive and legislature. For its goal is to internalize rights consciousness within the processes of policy-making and thereby reduce or minimize rights violations in legislative outputs at the outset.

D. Conclusion

As a new intermediate option that breaks open the old bi-polar, either-or choice, the new model provides an institutional arrangement that treats legal and political protection of rights as supplementary rather than as alternatives, and in so doing combines the strengths of each without also importing their characteristic weaknesses. Whilst acknowledging the merits of the core case for judicial review, the new model also acknowledges the merits of the core case against it by providing a more democratically legitimate, and overall no less effective, legal rights regime than the model of constitutional supremacy.

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