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The Relation Between Political Constitutionalism and Weak-Form Judicial Review

*By Mark Tushnet**

Abstract

At least in some subject-matter domains—most notably, social and economic rights—weak-form constitutional review may have become the predominant form of constitutional review in practice. This essay describes the obvious connections between weak-form review and political constitutionalism: Weak-form review allows the courts to bring to legislatures' attention constitutional difficulties that may have been overlooked in the process of enactment. This may occur because of the burdens of inertia and coalition-building, as identified by Rosalind Dixon, or because of unanticipatable difficulties of application in individual cases, the sort of difficulties that are central to Alon Harel's account of constitutional review as justified by a right to a hearing. Once legislatures have been so notified, they can address—or deliberatively refuse to address—the difficulties the courts have identified. Political constitutionalism provides an account of how they do so. This essay then discusses some of the political conditions that must be in place for political constitutionalism to be normatively attractive, relative to judicial constitutionalism. It concludes with some speculations about the utility of weak-form review in dealing with matters at the core of first-generation rights, such as seditious speech, after describing its utility in dealing with more "modern" problems associated with first-generation rights, such as hate speech and sexually explicit expression.

A. Introduction

Political constitutionalism offers an account of the best institutional arrangements for societies committed to implementing basic ideals of individual rights. Nearly everyone agrees that generally democratic forms of government are best across wide ranges of public policy, because they offer the best means of resolving the reasonable disagreements about policy that are inevitable in any large society. Political constitutionalism contends that this is true for equally inevitable disagreements about the *specification* of constitutional fundamentals. By "specification," I mean the concrete implementation of those fundamentals in specific circumstances. Examples of disagreements about specification include controversies over whether particular forms of regulation of hate speech are consistent with fundamental principles of free expression, and controversies

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over what restrictions, if any, can be imposed on the franchise for competent adults. Political constitutionalists argue that reasonable disagreements over these matters should be resolved in the same way that disagreements about other policies are: Through open debate and ultimate decision-making by democratically chosen officials.

The alternative to political constitutionalism is judicial constitutionalism,[1] where reasonable disagreements over specification are resolved by recourse to "independent" courts. This independence consists in some substantial degree of immunity from the immediate control of the voting public and its representatives.[2] Most proponents of judicial constitutionalism assume that its institutional form must be what I call *strong-form constitutional review*. Strong-form review is highly prescriptive: Courts exercising strong-form review determine with a high degree of specificity what the constitution requires with respect to a claimed right. They issue orders directing the relevant political actors to comply with the courts' interpretations.

One of the major innovations in constitutional design in the late twentieth century was weak-form constitutional review, in which the courts' specifications of the constitution's meaning can be reexamined in the ordinary course of legislative activity. The judicially created meaning may then be rejected by the political branches of government through more-or-less ordinary legislation, rather than through the substantially more burdensome method of constitutional amendment. Political constitutionalism rejects strong-form constitutional review. I argue here that weak-form judicial review is at least compatible with political constitutionalism and ought to be treated as an important design feature in the best institutional arrangements for political constitutionalism.

The remainder of this essay has five parts. Part B sketches the argument for the compatibility of weak-form review with political constitutionalism. Part C describes the

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[1] I believe that the more common term is "legal constitutionalism," which I believe is inapt. In brief: Political constitutionalism is instantiated in institutions established by law. It operates within a framework established by law, and through procedures established by law. For these purposes, I regard strong conventions about the way in which political institutions operate as themselves legal, even if not ordinarily enforceable in courts. I leave a more complete development of the terminological point, especially in connection with conventions, for another occasion, because rather little in what follows turns on terminology.

[2] Proponents of judicial constitutionalism acknowledge that "complete" independence is undesirable because the people and their representatives should have some degree of control over initial judicial appointments. Most judicial constitutionalists advocate for appointment and retention methods that reduce that degree to a rather low level: Judicial nominating commissions rather than appointment at the executive's sole discretion, for example, and long terms for judges on constitutional courts. For present purposes, I put these questions to one side, noting however that advocates for weak-form constitutional review have devoted relatively little attention to questions of institutional design at that level of detail.

political conditions that make defensible political constitutionalism supplemented by weak-form review. Part D outlines the argument that weak-form review is especially suitable for the enforcement of second- and third-generation rights. This provides background for considering in Part E the suitability of weak-form review for the enforcement of classical or first-generation rights. Part F is a brief conclusion.

B. Weak-Form Review in Political Constitutionalism

Weak-form review has been described as dialogic in design.[3] In broad outline, this means that legislatures act, and courts respond by saying that the legislative action is inconsistent with the constitution as the courts understand it. Legislatures can then respond by reenacting the same statute, taking the view that the statute is consistent with the constitution as they reasonably understand it.[4] The iterative nature of weak-form constitutional review fits comfortably with at least some versions of political constitutionalism.[5] Indeed, to some extent there is no practical controversy between advocates of judicial constitutionalism and advocates of political constitutionalism independent of the distinction between strong-form and weak-form judicial review. It is almost universally accepted that modern constitutionalism requires *some* form of constitutional review lodged in the judicial system.[6] Any real controversy is over the form of that review.

In light of the modern consensus about the desirability of some form of constitutional review exercised by courts, perhaps political constitutionalism is defective to the extent

[3] Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997). Whether the specific Canadian version of weak-form review that Hogg and Bushell describe is dialogic in practice is a matter of some controversy.

[4] *See infra* note 7. For reasons mentioned therein, political constitutionalists focus on constitutional review of legislation, and are comfortable with review—either "administrative" or "judicial in the traditional sense"—of executive action to determine its conformity with authorizing legislation.

[5] For a more complete discussion of the iterative structure of weak-form review, see Mark Tushnet, *Dialogue and Constitutional Duty* (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 12-10, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026555.

[6] No consensus exists on whether the review should take place in a specialized constitutional court or in a general court with jurisdiction over constitutional matters; there is also disagreement whether constitutional review should be centralized or distributed widely within the judicial system. In my view, which of these designs is chosen is of relatively little significance for stable democracies. I should note that in some of my earlier work I rejected constitutional review altogether, a position I have reconsidered in light of the inconsistency of that position with modern constitutionalism's requirements.

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that it does not accommodate some version of weak-form constitutional review.[7] Consider several of the following possibilities.[8]

I. The "Burdens of Inertia"

A statute was enacted many years ago, when large majorities held constitutional views according to which the statute was constitutional. Popular values change to the point where equally large majorities of today's society would regard that statute as inconsistent with constitutional values as now understood. In theory, the legislature could respond by repealing the statute. But, legislative agendas are tight, and the statute might not be as important to legislative leaders as others that eat up their available time. This is the legislative inertia facing activists who focus on the statute. There is no principled reason why the burden of overcoming this inertia is allocated to them, rather than to those few who still think that the statute remains consistent with the constitution as they understand it. Weak-form review provides an opportunity to cleanse the statute books of legislation that is outdated in this sense.[9] Depending on its precise design, weak-form review either (a) shifts the burden of inertia from those who oppose the old statute to those who support it, without precluding the latter from legislative success, or (b) increases the salience of a constitutional question, teeing it up for express legislative consideration.[10]

II. The "Burdens of Coalition Maintenance"

Consider next a coalition government in this setting: Party A and Party B differ dramatically on issues of national economic policy. Party C has a slight preference for Party A's

[7] *But see infra* text accompanying note 14. I put to one side two forms of "sub-constitutional" review that are consistent with political constitutionalism without weak-form review: (1) Judicial interpretation of statutes influenced by constitutional concerns ("reading down" statutes), and (2) the considerable extent to which judicial review in the traditional administrative law sense—that is, examination of actions by executive officials to determine whether those actions were authorized by law—involves the judicial interpretation of the authorizing statutes influenced by constitutional concerns. For reasons discussed in the text, even in systems in which political constitutionalism is robust, legislatures might sometimes enact statutes that clearly authorize actions that infringe on constitutional values, and so cannot be constrained by sub-constitutional review. Indeed, the point of calling these forms of review "sub-constitutional" is precisely that they allow legislative responses in the form of clear enactment (or reenactment) of constitutionally problematic statutes.

[8] The first two possibilities are examined in Rosalind Dixon, *A Democratic Theory of Constitution Comparison*, 56 AM. J. COMP. L. 947 (2008).

[9] A similar argument can be made for weak-form review of legislation within the jurisdiction of subnational governments in federal systems, where legislation widely adopted years ago has been repealed incrementally in most subnational jurisdictions, but remains on the books in a handful of outliers.

[10] Notably, weak-form review in this context provides a systematic check on the possibility of judicial error in assessing contemporary constitutional values; this is true although it cannot be contended that the possibility of legislative responses in a weak-form system is a perfect mechanism for correcting such errors because of the burden of inertia that weak-form review shifts.

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economic policy, but is much more concerned about enacting its own platform, which consists primarily of constitutionally problematic statutes. Party C insists on the enactment of those statutes as a condition for its support of a coalition partner's economic program. Suppose that Party A and Party B each obtain 40% of the votes and legislative seats. Party C obtains the remaining votes and seats. It joins with Party A or Party B to form a coalition government; the partner is whichever party is willing to support Party C's constitutionally problematic statutes in exchange for securing Party C's support. Under the right circumstances, constitutionally problematic statutes will be enacted that might be inconsistent with the principled constitutional views of 80% of the nation's voters. In this situation, judicial constitutional review might interfere with parliamentary sovereignty, but would not interfere with the principled basis on which parliamentary supremacy rests. Yet, identifying when those circumstances exists calls on talents and expertise not obviously lodged in the courts. Weak-form review gives members of Party A the opportunity to consider to what extent they are willing to subordinate their principled constitutional views to their interest in enacting their preferred economic policies and consider whether their principled constitutional views really are opposed to Party C's policies. That is, Party A's initial position might not have been fully deliberated and therefore might have rested on shaky democratic foundations. Weak-form constitutional review provides an opportunity for more complete deliberation.

III. The Problem of Legislative Detail

Many modern statutes are quite complex, with provisions whose terms interact with each other and with other statutes in ways that might not be readily understood when the statutes are enacted. Buried in the legislation's details might be constitutionally problematic provisions for which there are reasonably good, close substitutes. The provisions might be inherently problematic, or may become problematic only because of interactions with other provisions. Had the legislature been aware of these difficulties, it might have enacted one of the close substitutes. By singling out a specific constitutional question and thereby increasing its salience, weak-form review gives the legislature the opportunity to consider whether it wishes to enact the provision in a "stand alone" way, that is, outside the legislative package of which it was originally part.[11] It might be willing to do so if, in its judgment, the available substitutes are undesirable on policy grounds.

This case points to one connection between weak-form review and political constitutionalism. On some formulations of constitutional principle—roughly, proportionality formulations—reenacting the provision because there are no decent substitutes is an expression of disagreement between the legislature and the courts over

[11] Notably, the British Human Rights Act can serve this function even though it does not shift the burden of inertia because it gives parliament no direct incentives to reconsider the legislation it enacted. The only potential incentive is perhaps triggering a desire to conform the legislation to the judiciary's views of the constitution or, more precisely, the relevant provisions of the European Convention's meaning.

what the constitution requires. If constitutional principle is understood in this way, using weak-form review to deal with the problem of legislative detail is consistent with political constitutionalism. On other formulations—again, roughly, formulations that are substantially more categorical—though, reenactment would amount to a willingness to enact a statute by a legislature that knows the statute is unconstitutional, at least if it accepts the general categorical doctrine. This is not something with which political constitutionalism should be comfortable.

IV. The Right to a Hearing

Alon Harel developed an account of constitutional review focusing on the right of every person adversely affected by a statute to a hearing.[12] Although his exposition is not entirely clear, I believe the argument is best understood in this way: Legislatures enact statutes in general terms, aware that some applications of the statute in specific cases will inevitably work unfairness but unable to identify in advance what those applications are. Constitutional review provides those adversely affected with an opportunity to present arguments that the constitution bars application of the statute to them because of this unfairness.[13] Weak-form review works well here because it provides the legislature with the opportunity to respond to the court's fairness determination. In particular, it allows the legislature to insist on the application to the claimant, on the ground that the statute's effective administration would be undermined were its implementers required to make case-specific fairness determinations.

These four situations show that even those who insist that many constitutional disputes involve reasonable disagreements over the constitution's meaning with respect to specific statutes might reasonably consider political constitutionalism inadequate without some form of judicial review that goes beyond sub-constitutional review. Weak-form review provides an institutional structure for constitutional judicial review in the courts that preserves a large domain for political constitutionalism. Other institutions might serve some of the functions I have previously identified; for example, a special legislative committee might scrutinize proposed legislation for consistency with the constitution. Yet, some legislation might fall through the cracks, so to speak, of these other institutions and—subject to questions of justiciability, a doctrine that modern constitutionalism ought

[12] *See* Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006); Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 227 (2010).

[13] The argument must be that the statute clearly applies to them, so that the courts cannot avoid constitutional review by holding the statute inapplicable on the ground that the legislature would not have intended to apply the statute in cases where it would have the unfair effect. One puzzling aspect of Harel's argument is how the generalized principle of fairness gets brought to ground with respect to specific constitutional rights like freedom of speech or religious exercise.

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to confine rather narrowly—the courts provide a forum for *any* constitutional claim.[14] So, despite what other institutions might accomplish, constitutional review in the courts may be a desirable backstop.

Further, weak-form review is a "forgiving" structure, in the sense that courts might mistakenly intervene when no justification for intervention actually exists. They might find that the case presents a problem of coalition-maintenance, for example, when in fact Parties A and B share a principled commitment to Party B's platform (A, of course, is committed less strongly than B). The courts then would mistakenly claim to be speaking on behalf of the nation's majority with respect to Party B's platform. Weak-form review provides a structure for rectifying that kind of mistake.

One final point: Even the best-designed system of weak-form review will generate cases in which courts have the final word, and that word will be contrary to the considered constitutional judgments of the political branches.[15] In some circumstances, shifting the burden of inertia might effectively end the constitutional dispute. For example, suppose only a slim majority disagrees with the court's specification of the constitution's meaning with respect to a specific statute. That majority might be insufficient to overcome the burden of inertia, so the court's interpretation will prevail. A complete institutional analysis would require consideration of the incremental contribution that weak-form review makes, given its imperfections, to a system of political constitutionalism in which courts exercise sub-constitutional review.

C. The Political Conditions for Political Constitutionalism

It is easy enough to identify the cultural conditions for political constitutionalism: A widespread commitment among the nation's citizens to constitutional values.[16] Citizens with those commitments will be attentive to what political actors do with respect to those values, and will reward or punish them accordingly. Aside from programs of civic

[14] I note that some difficulties—such as a lack of resources or asymmetries in available resources—might give one group systematic advantages over another who seek to mobilize the courts (e.g., the "rich" as against the "poor"). But, (1) those difficulties and asymmetries are likely to attend both weak- and strong-form constitutional review in the courts, and (2) they are likely as well to impede mobilization in the legislature. These difficulties and asymmetries, then, probably do not provide a ground for choosing among political constitutionalism or judicial constitutionalism in either its weak or strong form.

[15] For present purposes, I assume that weak-form review is a stable institutional design, one that will "degenerate" neither into strong-form review nor into pure political constitutionalism.

[16] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

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education,[17] are there institutional arrangements that are conducive to the generation and stability of the required cultural conditions?[18]

The leading candidate is vigorous party competition or a robust culture of intraparty discussion—i.e. "backbencher" independence.[19] Of course, if parties are themselves organized around competing visions of what the constitution means, party competition comes close to directly institutionalizing political constitutionalism. Even if parties offer competing constitutional arguments for purely opportunistic reasons—that is, as grounds for criticizing other parties' policy agendas—their competition might generate and stabilize a culture of constitutionalism. After all, building constitutional positions into a party's platform and criticizing other parties' platforms works for opportunistic politicians only if a substantial number of voters are open to adhering to one or another party and actually will make their decisions based on constitutional arguments. And, because the parties cannot guarantee that only voters on the margin will hear their constitutional messages, their competition serves in itself as a form of civic education.

Weak-form review fits well with party competition over constitutional matters. The possibility of a political response to a judicial decision can place constitutional issues directly on the political agenda, eliciting party competition, sometimes–as in the case of coalition-maintenance—when some party leaders would prefer to avoid dealing with the issues at all.

The picture of weak-form review fitting together with party competition within a system of political constitutionalism needs some shading, though.[20] There are two primary difficulties: (1) Insurance accounts of the emergence and stabilization of constitutional review, and (2) Externalizing the costs of departures from constitutionalism.

I. Insurance Accounts of the Emergence and Stabilization of Constitutional Review

Political scientists have argued—persuasively, in my view—that constitutional review emerges when a previously dominant political party anticipates losing control of the political branches, and is stabilized when all parties anticipate some regular rotation in

[17] Programs of civic education are likewise the product of policy choices made by political actors.

[18] For reasons I discuss, I suspect that the best institutional arrangements one can hope for are institutions that are conducive to the goal of generation and stability of cultural conditions, not institutions whose ordinary operations increase by a large degree the likelihood that the required culture will emerge and be sustained.

[19] I am indebted to Rosalind Dixon for these points.

[20] I merely note here the unsuitability of weak-form review in systems where one political party has a dominant role and the uselessness of any form of constitutional review in systems where one political party regularly obtains majorities larger than needed to amend the constitution. These results follow entirely apart from the dominant party's control over judicial appointments and promotions.

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control of those branches.[21] Constitutional review serves as insurance against too rapid a rejection of the party's program once it loses office. For constitutional review to provide that insurance, though, it has to be strong-form review. Otherwise, the newly defeated party will see its judicial victories regularly rejected by the political branches. Note, though, the almost paradoxical implications: Political constitutionalism works best in conditions of vigorous party competition, but those conditions lead politicians to create and stabilize judicial constitutionalism in its strong form.[22]

II. Externalizing the Costs of Departures from Constitutionalism

Party competition over constitutional values will be most effective when each party can say to voters that their program best advances the constitutional values that voters hold. Politicians may be indifferent to policies that impose costs on non-voters, or at least undervalue those costs compared to the value they would place on them were the costs to be borne by other voters. Sometimes we can reasonably contend that the costs are not *constitutional* ones. So, for example, policies that are said to harm people outside the nation's borders might be "bad" in purely normative terms but, one might contend, are unlikely to be bad simply because they are found to be inconsistent with the nation's domestic constitution.[23] That move may not be available, or at least might not be as fully available, for policies that adversely affect resident aliens.[24] Strong-form review addresses this difficulty, while weak-form review does not. Political constitutionalism, therefore, generates an argument for judicial constitutionalism in some domains.

Thus far, I have provided the barest outlines of an argument about the political conditions for political constitutionalism and the relation between those conditions and forms of constitutional review. Much remains to be done. For example, is it possible to design an institution of constitutional review that is weak-form for some subjects and strong-form for others? For reasons sketched in later sections, I doubt it, but further analysis of weak-

[21] RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); Matthew C. Stephenson, *"When the Devil Turns . . . ": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 58 (2003).

[22] Here too I acknowledge the contribution of Rosalind Dixon to my thinking.

[23] I acknowledge the possibility that the domestic constitution might constrain the actions of national officials acting abroad. For a discussion of constitutional influences abroad, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996). I believe that it would do so for reasons that combine a concern that the actions might lead to a reaction at home, and a weak concern for the interests of non-nationals abroad. "Weak" here means substantially weaker than the concern the constitution has for the nation's own citizens.

[24] In the United States, David Cole has been the most forceful proponent of this argument. *See* DAVID D. COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003).

form systems in particular is needed. I remain open to corrections and even drastic alterations of the argument.

D. Weak-Form Review and the Enforcement of Second- and Third-Generation Rights

Modern constitutionalism requires some degree of constitutional protection for social and economic rights.[25] And, in modern constitutionalism, "protection" means enforcement of these rights in the courts. Yet, strong-form constitutional review is widely understood to be unsuitable for the judicial enforcement of many social and economic rights. The prescriptive nature of strong-form review, and the directives strong-form courts issue to legislatures and executive officials, are ill-adapted to the enforcement of social and economic rights. At the wholesale level of overall policy, determining how to implement social and economic rights is highly information-intensive. So-called public law remedies that seek to develop the needed information and respond to changes as they occur have not proven sufficiently flexible to be vehicles for effective implementation of social and economic rights. In addition, at the retail level, courts can order that individual litigants receive specific benefits; this occurred in several Latin American nations with respect to constitutionally guaranteed rights to medical care.[26] But, as these experiences show, the individual cases create incoherent overall policies.

Weak-form constitutional review, in contrast, seems well suited for the enforcement of social and economic rights. The iterative features of weak-form review elicit additional information, for both the legislature and the courts to use as they engage and re-engage questions of enforcement. The new information allows the legislature and courts to adjust the specification of constitutional meaning. If all goes well, the quality of enforcement improves so that there is effective wholesale enforcement. Effective wholesale enforcement includes the adoption of policies and bureaucratic regimes of implementation that guarantee the effective and systematic provision of social and economic rights.

One can imagine institutional designs in which courts used weak forms of constitutional review for the enforcement of social and economic rights and strong forms for civil and political rights. Yet, the historical record suggests there are difficulties in sustaining a two-track system. Notably, at early stages of the constitutional recognition of social and economic rights, those rights were specifically exempted from judicial review (then understood as necessarily strong-form review). Described as directive principles of public policy, they were defended in expressly political-constitutionalist terms, and were

[25] This requirement extends beyond the application of a weak standard precluding arbitrariness in substance and perhaps a more robust standard of procedural fairness in allocating the goods protected by social and economic rights.

[26] *See* Octavio Luis Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEX. L. REV. 1643 (2011).

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considered the benchmark against which the public could assess the performance of their representatives.[27]

Modern constitutionalism requires some degree of judicial enforcement of social and economic rights, as the Indian experience suggests. Modeled in this respect on the 1937 Irish Constitution, the Indian Constitution expressly describes social and economic rights as directive principles, not to be enforced by the courts. Yet, the Indian Supreme Court has imported social and economic rights into *other* constitutional provisions that are subject to judicial enforcement. They have done so to the point where I think it is fair to describe the Indian courts as enforcing social and economic rights in just the same way that they enforce classical civil and political rights.

This might pose a dilemma for advocates of judicial constitutionalism. The only decent institutional design for the enforcement of social and economic rights is weak-form review. Judicial constitutionalists might wish otherwise,[28] but they probably have to accept only weak-form review to enforce social and economic rights. Otherwise, they must abandon what appears to be a requirement of modern constitutionalism. But, just as in India, strong-form review leached from first- to second-generation rights, and so might weak-form review leach from second- to first-generation rights. In addition, judicial constitutionalists have reasonable concerns about the suitability of weak-form review for the enforcement of classical civil and political rights.

E. Weak-Form Review and Classical Civil and Political Rights

In his seminal work, *Democracy and Distrust*, John Hart Ely identifies what he considered inherent defects in what would come to be known as political constitutionalism.[29] The defects are that those holding power have incentives to structure the political processes on which political constitutionalism depends in ways that insulate them and the policies they favor from challenge. Classical sedition laws, for example, authorize the government to punish—and thereby suppress—the dissemination of criticisms of existing policy. Such a policy makes it nearly impossible to displace through ordinary politics the individuals in power. Laws restricting the franchise can be structured so as to ensure, in practice, that the government-in-power's supporters will vote in larger numbers than its opponents.[30]

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[27] Gary Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1770 (2004) (quoting a speaker during the debates over the adoption of the Irish directive principles: "They will be there as a constant headline . . . something by which the representatives of the people can be judged").

[28] David E. Landau, *The Realities of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189 (2012).

[29] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[30] To state specifically a point already made: The problem of externalization of constitutional costs occurs because the adversely affected population—notably, resident aliens—lacks the right to vote.

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It is important to keep the scope of Ely's analysis in mind. His treatment of "discrete and insular minorities," for example, overstates the difficulties that the existence of such minorities poses for a reasonably well-functioning political constitutionalism.[31] Sedition laws have the distinctive characteristic of insulating all existing policies from political criticism, and therefore limit any effective mobilization to displace those laws. Laws regulating hate speech do not have this characteristic.[32] Furthermore, many modern constitutional controversies involve conflicts between constitutional rights; this is most notable in Europe, between free expression and individual privacy.[33]

Ely's analysis has little to say about rights-versus-rights problems. These and many other constitutional problems are often addressed through proportionality tests. And, it is well known that weak-form review is especially suitable for problems the courts deal with using such tests.[34] The reason is that a great deal of proportionality analysis blends normative analysis with a strong empirical component. Consider one of the steps in proportionality analysis: Are alternatives available that would accomplish the government's goals nearly as effectively as the challenged statute? A court exercising weak-form review offers its assessment of both the government's goals and the statute's effectiveness in advancing those goals. The government then has the opportunity to reassess its goals or—more

[31] Briefly, almost any enfranchised group, no matter how small, can engage in political bargaining by trading its votes on matters less important to it for a near-majority's votes on the matters the minority cares strongly about. The exception is the "pariah" group, with whom no one will deal even if their support would be enough to convert a coalition from one having just under majority support to one have just over a majority. But, it should be noted, pariah groups are different from groups that are merely small ones, and the cases found in actual practice are rare: Arab citizens of Israel, and (in some European nations) Romany people are the most prominent examples. The reason is that "majority" politicians have strong political incentives to form alliances with small groups up to the point where adding the group to the politician's coalition reduces the coalition's support.

[32] In theory, I suppose, a law against hate speech could be invoked against someone who advocated its repeal, but that seems to me highly unlikely and controllable by sub-constitutional review in nearly every imaginable case. And—a point that Learned Hand made that is often parroted but rarely taken to heart—judicial constitutionalism is unlikely to help much in a nation where hate speech regulations were definitively interpreted to bar criticism of hate speech laws. Note that the point here is different from that made by critics of the *prevalence* of hate speech: That its dissemination devalues the voices of its targets and thereby makes it difficult to secure the enactment of hate speech regulations in the first place.

[33] Although this is not necessarily true in the United States, where privacy (as repose and seclusion) is not expressly constitutionally protected.

[34] Indeed, I believe that the emergence of proportionality as a general doctrine was one of the important reasons for the development of weak-form review: With proportionality as the dominant doctrine developed initially in strong-form systems, institutional designers could readily see the advantages of weak-form review applying that doctrine.

important—to specify them more carefully in support of its argument that no alternative accomplishes those goals more effectively.[35]

Over a doctrinal domain encompassing a significant range of controversies implicating classical civil and political rights, then, weak-form review can operate well. Put another way, political constitutionalism supplemented by weak-form judicial review may operate well with respect to that domain. What, though, is to be made of classical sedition laws and laws defining the franchise?

As to the latter, I doubt that there is a solution available within political constitutionalism, aside from a cultural commitment to fair treatment of those who lack the franchise.[36] I note that the United States addressed problems of disfranchisement at the state and local level by transferring decisional authority upwards, to national institutions like the national Congress, through statutes such as the Voting Rights Act of 1965, and the national courts, through their many decisions nationalizing constitutional protections of individual rights.[37] A similar solution might be possible if supranational institutions obtained sufficient democratic legitimacy.

Regarding classical sedition laws, the U.S. experience is instructive. Condensing a decades-long history: U.S. doctrine first began with a proportionality-like analysis called the "bad tendency" test, before moving on to a "clear and present danger" test, which was formulated in increasingly proportionality-like terms. After the "clear and present danger" test, U.S. doctrine evolved into a more categorical approach in which seditious speech can be punished only if it consists of words of incitement uttered in circumstances where the words were intended to, and were likely to cause, imminent lawless action. Doctrine settled on the categorical approach for largely institutional reasons. Experience showed that, in retrospect, prosecutors, juries, and judges were too likely to overestimate the risk that criticisms of the government would lead to violence, after being influenced by the circumstances in which they were called upon to make decisions—i.e. circumstances in which social tensions were heightened. A categorical doctrine restricts discretion at every level, thereby reducing the chance that speech that does not pose a real threat to social

[35] This response is not available at the final stage where the court assesses "proportionality as such," but my sense is that courts rarely reach that stage.

[36] Something along those lines is the usual defense of denials of the franchise on the basis of youth and mental competence, with older people and those regarded as sufficiently competent said to serve as virtual representatives of those groups.

[37] The solution of locating legislative authority in national-level institutions raises important questions about the role of national courts in federal systems or systems with substantial devolved power. As a design matter for weak-form review, national-level courts in such systems might need the power to invalidate subnational legislation, but, if they do, the national legislature must have the power to exercise an "override" of the courts. This is necessary even in areas where, in general, legislative authority lies with the subnational government.

order will be punished.[38] Obviously, these institutional reasons for the development of a categorical doctrine also count against using weak-form review with respect to classical sedition laws.

Though I generally favor weak-form over strong-form judicial review, I believe that only strong-form review offers some reasonable prospect of dealing with the problems posed by classical sedition laws and restrictions on the franchise. The question then arises: Is it possible to confine strong-form review to these relatively narrow domains? I do not think that we have enough experience with weak-form review to know the answer. This is especially so because outside the United States proportionality analysis dominates the analysis of "free speech" law, generally, including laws regulating criticism of the government. And, as I have argued, weak-form review is not a good vehicle for using proportionality analysis to deal with issues of seditious speech and disfranchisement.[39] Elsewhere, I have written of the potential instability of weak-form systems.[40] For myself, I believe that the potential for instability in form is reasonably high. And, relatedly, I doubt that a single institution can be weak-form with respect to many constitutional rights, strong-form with respect to a narrow range of other rights, and still remain stable. But, developing the grounds for that doubt would require more thought than I have given the matter.

Finally, the connection between forms of review and amending formulas deserves mention here. The "strength" of review depends on the ease of amending the constitution. No matter how strong in form, constitutional review can be weakened in practice by an easy amending formula. One implication might be that a system mixing strong-form review for some rights and weak-form review for others might be stabilized by pairing the allocation to forms of review with different amending formulas.[41]

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[38] One risk remains: That the highest court itself will be unable to resist the pressures of circumstances and will apply a nominally categorical doctrine flexibly. See, for example, *Holder v. Humanitarian Law Project*, 560 U.S. 1 (2010). Note that this risk exists even when the constitutional court is a strong-form one, and so provides no ground for choosing between weak- and strong-form review.

[39] For a discussion of the possibility that constitutional analysis tends to evolve toward categorical solutions, see Frederick Schauer, *Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture*, *in* EUROPEAN AND U.S. CONSTITUTIONALISM 49 (Georg Nolte ed., 2005).

[40] MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008).

[41] Examples of allocational pairing include these: The Canadian override mechanism is applicable to many but not all Charter provisions, and the "basic structure" doctrine as developed in India and elsewhere immunizes some constitutional provisions from amendment entirely. The latter example is not precisely on point to this discussion, but it illustrates the allocational strategy.

F. Conclusion

This essay explored some aspects of the relation between weak-form constitutional review and political constitutionalism. I have suggested that weak-form review is compatible with—and may even be functionally desirable for—a system of political constitutionalism. Beyond functionality lies political legitimacy. Frank Michelman has argued, cogently in my view, that securing legitimacy for a political system requires the existence of some institution that is reasonably understood to be somewhat apart from the rest of the system, whose function is to offer regular assessments of the extent to which those other parts are working in ways that conform to basic requirements of self-governance. Though other institutions could perform that function,[42] constitutional courts, whether strong-form or weak-form, can also do so.

[42] Consider electoral commissions, anti-corruption agencies, and other "transparency" institutions.

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