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Professor Gardbaum's scholarship focuses on comparative constitutional law, constitutional theory and federalism. His book *The New Commonwealth Model of Constitutionalism* (Cambridge University Press, 2013) develops the theory and explores the practice of a novel form of human rights protection in Canada, New Zealand and the United Kingdom. He was the keynote speaker at the 2009 Protecting Human Rights Conference in Australia, part of the debate in that country about adopting this new model. A book-length collection of his work on the comparative structure of constitutional rights was recently published by the European Research Center of Comparative Law. Professor Gardbaum's articles have appeared in the *Harvard Law Review, Stanford Law Review, Michigan Law Review, University of Chicago Law Review* and the *American Journal of Comparative Law*, among other places. His scholarship has been cited by the U.S. and Canadian Supreme Courts, and widely translated.

THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE*

Stephen Gardbaum

As a recent and ongoing experiment in constitutional design, the new Commonwealth model of constitutionalism may be something new under the sun. It represents a third approach to structuring and institutionalizing basic constitutional arrangements that occupies the intermediate ground in between the two traditional and previously mutually exclusive options of legislative and judicial supremacy. It also provides novel, and arguably more optimal, techniques for protecting rights within a democracy through a reallocation of powers between courts and legislatures that brings them into greater balance than under either of these two lopsided existing models. In this way, the new Commonwealth model promises to be 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. Or, it may be, as some have claimed, more like a comet that shone brightly and beguilingly in the constitutional firmament for a brief moment but quickly burned up, a victim of the inexorable law of the excluded middle. In exploring the theory and practice of the new Commonwealth model, the book from which this article is excerpted assesses whether ink or eraser is the better response to its current penciled-in status on the short list of alternatives from which constitutional drafters everywhere make their momentous decisions.

"The new Commonwealth model of constitutionalism" ("the new model" for short) refers to a common general structure or approach underlying the bills of rights introduced in recent years in Canada (1982), New Zealand (1990), the United Kingdom (1998), the Australian Capital Territory (ACT) (2004) and the state of Victoria (2006). This approach self-consciously departs from the *old* or traditional Commonwealth model of legislative supremacy, in which there is no general, codified bill of rights; rather, particular rights are created and changed by the legislature through ordinary statutes on an *ad hoc* basis. Under this traditional model, courts have no power to review legislation for infringing rights, as rights are not limits on legislation but its product, and are changeable by it. In this way, legislatures are supreme because they ultimately determine what legal rights there are and how rights issues are resolved. The judicial function is limited to faithfully interpreting and applying whatever laws the legislature enacts.

At the same time, however, the new model also contrasts with the alternative standard option for institutionalizing basic constitutional arrangements: namely, judicial or constitutional supremacy. Here, there is a general, codified bill of rights, which imposes constitutional limits on legislative power. These limits are enforced by authorizing courts to review legislation for consistency with the bill of rights and to invalidate statutes that, in their final view, infringe its provisions. As a result, courts are supreme because they have the last word on the validity of legislation and the resolution of rights issues, at least within the existing bill of rights.

The new model carves out a distinct third answer to the general question of how constitutionalism's core limits on governmental power should be institutionalized in a democracy. Its novel approach calls for the enactment of a bill of rights—although not necessarily one that imposes constitutional limits on the legislature—and its enforcement through the twin mechanisms of judicial *and* political rights review of legislation, but with the legal power of the final word going to the politically-accountable branch of government rather than the courts. In this way, the new model treats legislatures and courts as joint or supplementary rather than alternative exclusive protectors and promoters of rights, as under the two traditional models, and decouples the power of judicial review of legislation from judicial supremacy or finality.

I. WHAT IS NEW ABOUT THE NEW MODEL?

In essence, the new Commonwealth model of constitutionalism consists of the combination of two novel techniques for protecting rights. These are mandatory pre-enactment political rights review and weak-form judicial review.

The first technique requires both of the elective branches of government to engage in rights review of a proposed statute before and during the bill's legislative process. The formalized, mandatory and deliberate nature of political rights review under the new model distinguishes it from characteristic practices under both other forms of constitutionalism, where if any such review occurs it tends to be *ad hoc*, voluntary and unsystematic.[1] Political rights review is a direct and alternative response to the standard concerns about legislative/majoritarian rights sensibilities that underlie the traditional argument for judicial review of legislation. It is designed to take this concern seriously and to address it directly, at the horse's mouth as it were, by ensuring that the general rights consciousness of the executive that proposes bills and the legislature that considers and enacts them is raised and that specific rights concerns are identified and aired during the legislative process.[2] In other words, political rights review provides an internal solution to this potential problem that transfers some of the responsibility for rights protection from the external and more indirect mechanism of judicial review to the legislature itself. As such, it also

supplements a purely *ex post* technique of rights protection with an *ex ante* one, with many of the associated general advantages of this type of regulation. In this context, *ex ante* regulation provides the only protection against those outputs of the legislative process that are never litigated for one reason or another,[3] and a second layer in addition to *ex post* review for those that are.

The second technique of rights protection that is constitutive of the new model is weak-form judicial review. It is this technique that decouples judicial review from judicial supremacy, meaning that although courts have powers of constitutional review they do not necessarily or automatically have final authority on what the law of the land is. Unlike the case under judicial supremacy, their decisions are not unreviewable by ordinary legislative majority. This is because one of the defining features of the technique (and so of the new model) is that it grants the legal power—but not the duty—of the final word to the legislature. That is, in giving political discretion to the legislature on whether or not to use it in any particular case, the new model creates a gap between this legal power and its exercise that distinguishes it from the other two models. Whereas under both strong-form judicial review and legislative supremacy, the institution with the power of the final word is essentially bound to exercise it and does so routinely, almost automatically—courts in the context of deciding a case or abstract review and legislatures because the act of passing a law *is* the final word—this is not so under the new model. In deciding whether (rather than how) to use their power, legislatures may be heavily influenced by the prior exercise of weak-form judicial review.

Here it is necessary to clarify both the relevant sense of judicial supremacy that the new model rejects and what is novel about the technique. The term judicial supremacy has become a little clouded as a result of the rise of "dialogue theory," which originated and has its strongest hold in Canada. Its proponents argue that the frequency of "legislative sequels" following the judicial invalidation of statutes means there is judicial-legislative dialogue and often *de facto* legislative supremacy, especially where such sequels are upheld by the courts.[4] Even in the United States, it has been noted that a similar practice of legislative sequels and inter-institutional dialogue sometimes occurs, as exemplified by Congress' continuing to create hundreds of legislative vetoes of executive action after the practice was declared unconstitutional by the Supreme Court in *I.N.S.* v. *Chadha*.[5] This, it has been argued, means that in reality the meaning of the Constitution depends on interpretations put forward by legislators in opposition to those proposed by the judiciary and that no single institution, judiciary included, has the final word on constitutional questions.[6]

Putting aside the fact that this *Chadha* episode is unrepresentative of U.S. constitutional law as a whole because on separation of powers (as distinct from rights) issues it is well-known that legal resolutions generally play a lesser role than political ones,[7] this train of thought misses the specific and relevant finality issue. This is who has the final legal word on the validity and continuing operation of the particular existing law at issue in the litigation, not whether the judicial decision binds *future* legislative or executive acts—an issue about which there has long been divided opinion in the United States.[8] But on this relevant issue for our purposes, there is no doubt or controversy: short of constitutional amendment, the judiciary has the final word on whether the specific law (or part of it) challenged in *Chadha* is the law of the land—and indeed, on the validity of any of the subsequently enacted legislative vetoes that may come before them. This is what, in context, strong-form judicial review refers to.[9] By contrast, weak-form judicial review under the new model means that the legislature and not the judiciary has *de jure* finality, the legal power of the final word with respect to the specific law at issue, unlike in the United States or other regimes of judicial supremacy.

On the novelty of the technique, the concept of weak-form judicial review *per se* may not be original to the new model. This is because there are arguably other pre-existing constitutional theories that have a similar basic structure of judicial review without judicial finality and so can perhaps properly be called such. These include certain versions of departmentalism (each branch of government is the final interpreter of its own powers)[10] and popular constitutionalism (the people are the final interpreters of constitutional meaning).[11] Nonetheless, weak-form judicial review as institutionalized within the new model is innovative in at least three ways. First, it is the general mode of judicial review under the new model, whereas it is only a partial or supplementary mode under these other theories, employed in certain areas but not others (*e.g.*, separation of powers type issues under departmentalism) or triggered exceptionally or only periodically (*e.g.*, popular constitutionalism). Secondly, the new model's general mechanism of "penultimate judicial review"[12] followed by possible exercise of the legislative override power is not one that is present in the other theories, because either courts defer to the relevant other branch in the first place or it is the people themselves who have the final say. Indeed, the new model's distinctive allocation of powers provides a far more tangible and concrete institutional mechanism of judicial non-finality than is present in most versions of popular constitutionalism and departmentalism.[13] Thirdly, two of the new model's specific mechanisms of weak-form review were entirely novel when introduced: namely, the "notwithstanding mechanism" contained in section 33 of the Canadian Charter of Rights and Freedoms 1982 (the Charter) and also section 2 of its predecessor, the Canadian Bill of Rights 1960 (CBOR),[14] and the power of the higher United Kingdom courts to issue declarations of incompatibility under section 4 of the Human Rights Act 1998 (HRA).[15]

These two techniques of political rights review and weak-form judicial review, which in combination define and distinguish the new model, can be further broken down into the following four essential institutional features, or jointly necessary and sufficient conditions. The first is a legalized and codified charter or bill of rights—as distinct from purely moral and political rights, residual common law liberties or a piecemeal collection of specific, stand-alone statutory rights. This bill of rights forms the subject-matter or focus of both political and weak-form judicial review and may have either constitutional or statutory status.

The second feature is mandatory rights review of legislation by the political branches before enactment. This is typically institutionalized by a requirement that a government minister provide a formal statement where he or she is of the opinion that a bill is incompatible with protected rights on its introduction in the legislature, which triggers both prior executive vetting and subsequent legislative scrutiny.

The third is some form of constitutional review of legislation by the courts. That is, a form of judicial power to protect and enforce these rights going beyond an interpretive presumption that the legislature does not intend to violate them or ordinary modes of statutory interpretation. From the perspective of traditional legislative supremacy, these are *enhanced* or greater judicial powers to protect rights than previously existed. As we shall see momentarily, the required form of constitutional review may range from a duty to interpret legislation consistently with protected rights where reasonably possible to a judicial power of invalidation.

The fourth feature, notwithstanding this judicial role, is a formal legislative power to have the final word on what the law of the land is by ordinary majority vote. The specific form of this legislative power will vary according to the version of the constitutional review power granted to the courts, ranging from the power to amend legislation as interpreted by the courts under their rights-respecting duty to the power to override the judicial invalidation of legislation, with others in between.[16]

In combination, the first and third features distinguish the new model from traditional legislative supremacy and the fourth from judicial or constitutional supremacy. These essential features of the new model are quite general and permit a range of different specific instantiations, particularly with respect to the second and third features, some of which have in fact been adopted in various countries. So, on a spectrum in which traditional judicial and legislative supremacy mark the two poles, the new model has at least five different possible variations, thereby occupying five slightly different intermediate positions.

Starting from the judicial supremacy pole, the first of these is exemplified by the Charter: (1) a constitutional bill of rights (2) granting the judiciary power to

invalidate conflicting statutes but (3) with a formal legislative final word in the form of the section 33 power exercisable by ordinary majority vote.[17] The second is a statutory bill of rights granting the judiciary the same power to invalidate conflicting statutes, with a similar legislative override power. This position is most closely, although not exactly, illustrated by the still operative CBOR.[18] The third version is exemplified by the HRA, the ACT Human Rights Act 2004 (ACTHRA) and the Victorian Charter of Human Rights and Responsibilities Act 2006 (VCHRR): a statutory bill of rights without the power of judicial invalidation of legislation but instead one new judicial power to declare statutes incompatible with protected rights that does not affect their continuing validity, and a second new judicial power (and obligation) to give statutes a rights-consistent interpretation wherever possible. Both types of judicial decision—declaratory and interpretive—are subject to the ordinary legal power of the legislature to have the final word, a default power in the case of the former and requiring affirmative action in the case of the latter. The fourth variation is a similar statutory bill of rights containing the second judicial power, the interpretive power/duty, but lacking the first or declaratory power. This was exemplified by the New Zealand Bill of Rights Act 1990 (NZBORA), at least until 2000 when the latter power was seemingly implied by the courts.[19] A fifth variation would be granting the courts the declaratory power but only ordinary and traditional powers of statutory interpretation.[20]

A statutory bill of rights alone without either the interpretive duty or the declaratory power would not satisfy the third necessary feature of the new model and thus, whatever its independent merits, does not depart from traditional parliamentary sovereignty. Similarly, pre-enactment political rights review alone, with or without a bill of rights.[21] Weak-form judicial review by itself is also insufficient, which is why certain stand-alone legislative override mechanisms in non-Commonwealth jurisdictions amount to no more than a "partial" adoption of the new model.[22]

We have already seen that what is new about the new model is the following: (1) it transcends the standard dichotomy in institutional forms of constitutionalism, providing a third choice; (2) it does so by combining two novel techniques of rights protection; and (3) as part of this second feature, it provides a clear institutional mechanism for decoupling judicial review from judicial supremacy. Also as part and parcel of these characteristics, the new model establishes a distinctive and more balanced allocation of powers between courts and legislatures than under the two lopsided existing models. Thus, with their authority to engage in constitutional review, courts have greater powers than under political constitutionalism but their lack of *de jure* finality means less power than under any form of legal constitutionalism. And conversely, legislatures are faced with greater legal and judicial constraints on their actions than under political constitutionalism, but fewer than under legal constitutionalism.

This allocation of powers demonstrates that the new third option is specifically an intermediate one in between the two standard and traditional choices. Its intermediate nature can be further elaborated and explained in the following ways. First, it takes certain key ideas from each of the other two models and combines them into a distinct third option. By borrowing from *both*, the new model creates something in between. From the "big-C" version of legal constitutionalism, the new model first takes the importance of a comprehensive set of affirmative legal rights,[23] as distinct from the (a) mostly moral and political, (b) *ad hoc* statutory and/or (c) default, or negative, conception of rights and liberties as whatever is left unregulated by government that characterizes the traditional model of parliamentary sovereignty. It also accepts the importance of judicial protection and enforcement of rights, as compared with exclusively political. And from legislative supremacy, the new model takes the importance of the notion that there is no form of law set above and wholly immunized from legislative action.

Secondly, the new model can be said to create a distinct blending of legal and political constitutionalism across the board. Although the discourse of political versus legal constitutionalism tends to suggest that the choice is an either-or one, in reality most legal systems have elements of both even where one or the other is predominant.[24] Thus, a paradigmatically legal constitutionalist regime such as the United States still has swathes of putatively constitutional law that are typically politically rather than judicially enforced, such as separation of powers between Congress and the President.[25] Australia is perhaps the best example of a formally "mixed regime" at the national level, with a legal constitutionalist treatment of structural issues—federalism and separation of powers—and a mostly political constitutionalist treatment of rights.[26]

By contrast with such formally or informally mixed regimes that apply one or other model to different substantive areas, the new model blends political and legal constitutionalism across the board. It provides a sequenced role for both legal and political modes of accountability as its general mode of operation. In its various instantiations the new model begins with political rights review at the legislative stage, whereby the government is required to consider whether proposed legislation is compatible with protected rights and make its conclusion known to parliament.[27] The second stage involves judicial rights review, whereby in the context of a litigated case courts may exercise one or more of their enhanced powers to protect and enforce the rights. The third and final stage involves post-legislative political rights review, whereby the legislature may exercise its power of the final word and enforce any disagreement with the courts. Indeed, the new model not only combines legal and political modes of accountability, but also (1) legal and moral/political conceptions of rights and (2) judicial and legislative rights reasoning,[28] rather than a general systemic choice of one rather than the other.

Thirdly, and most formally, the new model offers a set of intermediate legal positions to the essential and conflicting postulates of constitutional and legislative supremacy. Despite interesting differences in the institutionalization of legal constitutionalism since the end of World War II, most notably between centralized and decentralized judicial review, contemporary systems of constitutional supremacy around the world uniformly adhere to the basic principles first established by the United States in its legal revolution against Great Britain that closely followed the political one. These are that the written—or, rather codified—constitution, including its rights provisions, is (1) the supreme law of the land, (2) entrenched against ordinary majoritarian amendment or repeal and (3) enforced by the judicial power to invalidate or disapply conflicting statutes and other government actions, against whose decisions the legislature is powerless to act by ordinary majority vote. The contrary principles of traditional parliamentary sovereignty, which the U.S. Constitution was deliberately designed to reject, are that statutes are (1) the supreme law of the land, (2) not entrenched against ordinary majoritarian amendment or repeal and (3) not subject to a judicial power of review and invalidation on substantive grounds.[29]

The new model provides intermediate positions on each of these three basic issues. In a legally significant sense, the protected rights have some form of higher law status compared to ordinary statutes but not one that wholly immunizes them from legislative action. This may, for example, be conventional constitutional status but subject to a legislative override, as in Canada, or "constitutional statute" status as has been argued for under the HRA[30] and occasionally applied in practice in New Zealand, whereby the earlier statutory right prevails over a conflicting later ordinary statute unless expressly amended or repealed.[31] Such non-application of the normal doctrine of implied repeal also provides a mode of partial entrenchment that straddles the full and no entrenchment of the other two models.[32] And, as discussed, the new model grants courts greater powers to protect rights than under traditional parliamentary sovereignty, powers that amount to forms of constitutional review, but not powers against which legislatures are wholly powerless to act by ordinary majority, as under constitutional supremacy. These include the power of Canadian courts to disapply conflicting statutes subject to the legislative power in section 33, the power of higher U.K. courts to issue declarations of incompatibility under section 4 of the HRA, and the power/duty of U.K. and New Zealand courts to interpret statutes consistently with rights provisions whenever possible.[33] These new, "weak-form" powers occupy the space in between strong-form judicial review against which there is no legislative recourse by ordinary majority vote *vis-à-vis* the particular statute at issue and no constitutional review at all.

The Commonwealth model does not only, however, provide a new form of judicial review; it also provides a new justification of judicial review. For once shorn of

judicial supremacy, the task of defending a judicial role in rights protection is a different—and easier—one. A model of constitutionalism that provides for judicial rights review of legislation but gives the legal power of the final word to ordinary majority vote in the legislature is normatively, and not only practically, different from one that does not.

II. THE FULLER SPECTRUM

From a systemic perspective, the new model suggests the novel possibility that the universe of constitutionalism, rather than a bifurcated one clustered around one or other of two mutually incompatible poles, is more of a continuum based on the scope and role of legal/judicial versus political/legislative decision-making in resolving rights issues and enforcing other limits on political power. The continuum stretches from what can be thought of as pure political constitutionalism or strong legislative supremacy at one end to pure legal constitutionalism, or what has been termed "the total constitution,"[34] at the other. On this continuum, unlike on the bipolar model, many constitutionalist systems will occupy positions somewhere between the two ends.

For pure political constitutionalism, the answer to the general question of what type or number of rights-relevant issues and conflicts in a society should be resolved by judicially enforceable higher law is zero. All such issues/conflicts should be resolved politically, through ordinary, non-constitutional laws made and executed by political actors who remain fully accountable for them to the electorate. The judicial role is limited to fairly interpreting and applying this law. The opposite answer is given by pure legal constitutionalism. Its instrument is the "total constitution," a constitution that decides or strongly influences virtually all rights-relevant issues and conflicts in a society. It does this by broadly defining the rights it contains, imposing affirmative duties on government and/or by creating greater horizontal effect on private law and private individuals.[35] In this way, the total constitution effectively constitutionalizes all law by requiring it to be not merely consistent with, but effectively superseded by, the comprehensive higher law of the constitution. Here there is relatively little room for discretionary, autonomous political decision-making or lawmaking as the total constitution provides mandatory answers to almost all issues, leaving ordinary law in effect as a form of administrative law. What defines this polar position, then, is the scope or reach of legal constitutionalism.

Moving along the continuum from total constitutionalism, we come to more standard or limited versions of legal constitutionalism, in which the written or unwritten higher law as construed and applied by the constitutional judiciary resolves some but not all of the rights-relevant issues and conflicts in a society. Again, as compared with the polar version, this will typically be because of its fewer

and more narrowly defined rights, lesser reach into the private sphere and/or fewer affirmative duties on government. Here, legal constitutionalism still leaves significant space for discretionary and autonomous political decision-making in that it removes some but not all topics from the political sphere and, within those remaining, some but not all approaches to those topics. In other words, within conventional legal constitutionalism, higher law (as interpreted and applied by the courts) provides answers to certain issues and narrows the range of permissible political options on others, but its lesser scope compared to the pure or polar version maintains greater space for politically accountable decision-making. Just as important as its better-known function of taking some issues off the political agenda[36] is that ordinary legal constitutionalism *leaves others on it*—and this has been central to its appeal in an era that has seen the rise of world constitutionalism alongside, and as part and parcel of, the rise of world democracy.[37]

The new Commonwealth model occupies that part of the continuum in between this more limited and common form of legal constitutionalism on the one side and pure political constitutionalism on the other. With its blending and sequencing of legal and political accountability and modes of reasoning, its form of judicially enforced higher law influences but does not automatically or necessarily resolve any rights-related issues, distinguishing it from the neighboring positions on either side. Within the space occupied by the new model and on the basis of the introductory discussion of the range of different specific instantiations above, it might be suggested that Canada is slightly closer to the limited legal constitutionalism part of the continuum than the other new model jurisdictions, with the original version of the NZBORA slightly closer to the political constitutionalism pole than the HRA, ACTHRA and VCHRR.

To give a concrete example of how these various positions on the continuum affect how and by whom rights issues are decided, let us consider the case of abortion. On this issue at least, Germany approximates pure legal or total constitutionalism.[38] As interpreted by the Federal Constitutional Court, the Basic Law largely determines how this most controversial issue is resolved, leaving relatively little space for discretionary political decision-making. As is well-known, because the fetus' right to life is protected by Article 2(2)[39] and the state has a constitutional duty to protect this life even against its mother, the state must treat all abortions as unlawful with the exception of the few judicially defined "unexactable" situations, such as rape, incest or severe birth defects.[40] Discretionary political decision-making is limited to the narrow window of selecting constitutionally permissible means, apart from the criminal law, for effectively fulfilling the state's duty while still maintaining the required general unlawfulness of abortion. Even here, however, the Federal Constitutional Court has prescribed much of the content of mandatory counseling as a permissible alternative.[41]

The United States exemplifies the second position on the continuum, the more conventional or limited version of legal constitutionalism, in its written or enacted form. Here, judicially enforced higher law determines what legislatures *cannot* do—namely, as currently interpreted by the Supreme Court, prohibit or place "undue burdens" on pre-viability abortions or post-viability ones necessary to protect the life or health of the mother—but leaves a greater amount of space for discretionary political decision-making within the parameters of the constitutionally permissible.[42] Thus, the scope of legislative choice runs from no regulation of abortion at all to twenty-four hour waiting periods, prohibiting so-called partial birth abortions, and perhaps mandatory viewing of fetal ultrasounds.[43]

In the U.K., the HRA as interpreted and applied by the judiciary may influence the abortion issue but does not definitively decide any aspect of it—either what legislatures must or cannot do. So, even if a higher court were to interpret Convention rights as bestowing a right to life on the fetus and declare the current U.K. abortion statute inconsistent with it—or, conversely, declare a future statute criminalizing abortion inconsistent with a woman's right to privacy—Parliament would be free to exercise its power to disregard the declaration.[44] Indeed, this first was the specific scenario cited by the Home Secretary during legislative debate on the HRA as the type of situation where Parliament might reject a declaration.[45] Similarly, if a court were to interpret the current abortion statute narrowly to render it consistent with its finding of a right to life, Parliament would be free to amend the statute to make its intention and disagreement with the judicial decision clear.

At the federal level in Australia, one of the last surviving bastions of a fairly pure form of political constitutionalism in the rights context, the abortion issue is fully and exclusively decided by politically accountable lawmaking, with no substantive role for the judiciary—apart, of course, from interpreting it according to traditional principles of statutory interpretation and applying it in litigated cases.

To be sure, other factors than the four defining the new model and differentiating it from both conventional legal and pure political constitutionalism may also help to locate the relative position of any particular system on this continuum. These are factors that might be said to affect the depth or strength of legal/judicial decision-making, as distinct from its breadth or scope, such as the ease or difficulty of constitutional amendment,[46] the independence and tenure of the judiciary, and access to (individual standing) and systemic consequences of judicial review. Thus, on these issues, the U.S. system, with its very high bar for constitutional amendment, life tenure for federal judges without a mandatory retirement age, relatively easy access to judicial review due to individual standing and decentralization, and system-wide effects of judicial decisions is closer to the polar position than most

other systems of conventional legal constitutionalism or constitutional supremacy. At the margin, this may even result in some blurring of the boundary between pure and ordinary legal constitutionalism, especially if or where a total constitution bestows lesser depth to legal/judicial decision-making through its position on these issues. Ultimately, however, depth issues of this sort are subordinated to the prime criterion of the scope of such decision-making within the political system.

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1. Under their pre-new model systems of legislative supremacy, there were essentially no such mechanisms or institutions in these countries so that, for the most part, new bodies and practices have been established at both executive and legislative levels. Within systems of judicial supremacy, where it is undertaken at all, political rights review tends to occur in a less formal and more partisan way. Where there is abstract judicial review, for strategic reasons legislators sometimes express their policy differences in the language of constitutional law with an eye towards the final, judicial stage of the legislative process. *See* Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe 61-90 (2000); Janet Hiebert, *Constitutional Experimentation: Rethinking How a Bill of Rights Functions*, *in* Comparative Constitutional Law 307 (Tom Ginsburg & Rosalind Dixon eds., 2011).
2. *See* Janet Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?*, 82 Tex. L. Rev. 1963 (2004); Janet Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 Mod. L. Rev. 7 (2006); James B. Kelly, The Commonwealth Model and Bills of Rights: Comparing Legislative Activism in Canada and New Zealand (Jul. 20-22, 2006) (paper presented at conference on Parliamentary Protection of Human Rights, University of Melbourne).
3. Brian Slattery, *A Theory of the Charter*, 25 Osgoode Hall L. J. 703, 714 (1987); Janet Hiebert, Charter Conflicts: What is Parliament's Role? 14 (2002).
4. Peter W. Hogg and 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).
5. 462 U.S. 919 (1983). *See* Neal Devins & Louis Fisher, The Democratic Constitution 94 (2004).
6. Devins & Fisher, *supra* at 238-39.
7. *See*, *e.g.*, Jerome Barron & C. Thomas Dienes, Constitutional Law 132 (1999) ("the courts have tended to avoid judicial review of executive actions, especially in the area of foreign affairs and national security"). Indeed, Jesse Choper influentially argued that separation of powers questions should generally be treated as political questions inappropriate for judicial resolution. Jesse Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (1980).
8. Compare the U.S. Supreme Court's statement in *Cooper* v. *Aaron*, 358 U.S. 1 (1958), that its interpretations of the Constitution are the supreme law of the land and bind all legislative and executive officials, with the statements to the contrary by Presidents Jefferson, Jackson, Lincoln, and Franklin Roosevelt, *see* Kathleen Sullivan & Gerald Gunther, Constitutional Law 22-25 (2010), as well as then-incumbent Attorney General Edwin Meese, Edwin Meese III, *The Law of the Constitution*, 61 Tul. L. Rev. 979 (1987). It is uncontroversial that, under the doctrine of precedent, decisions of the Supreme Court bind all other courts in subsequent cases.
9. *See* Dickerson v. United States, 530 U.S. 428 (2000) (then-Chief Justice Rehnquist noting that "Congress may not legislatively supersede our decisions interpreting and

applying the Constitution"). There is, however, some controversy over the existence and scope of Congress's ability under its Article III, section 2 power to make "Exceptions" to the Supreme Court's appellate jurisdiction to respond to judicial decisions by stripping the Supreme Court (and other federal courts) of jurisdiction over specific subject matters. *Cf.* Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129 (1981) *with* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895 (1984).

10. *See* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 Cal. L. Rev. 1027 (2004); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L. J. 217 (1994).
11. Larry Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004). By contrast, where it exists, the judicial practice of deferring to the elective branches in particular areas or generally is not an instance of weak-form review because the judiciary still has the legal power of the final word, it simply chooses to exercise it in a way that tends to uphold the challenged governmental measure.
12. This helpful term was coined by Michael J. Perry in *Protecting Human Rights in a Democracy: What Role for Courts?*, 38 Wake Forest L. Rev. 635 (2003).
13. *See* Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 Int'l J. of Const. Law 950 (2012).
14. The notwithstanding mechanism is a Canadian invention that first appeared in the prototype new model bill of rights, the statutory CBOR, which under section 2 permits the federal Parliament to exempt a statute from its operation. "Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe . . . any of the rights and freedoms herein recognized and declared . . . ." Canadian Bill of Rights, S.C 1960, c. 44, § 2. Versions of this mechanism were also included in the pre-Charter provincial human rights codes of Quebec, Charter of Human Rights and Freedoms, S.Q. 1975 c. 6, § 52, Saskatchewan, Saskatchewan Human Rights Code, S.S.1979, § 44, and Alberta, Human Rights, Citizenship and Multiculturalism Act, 1980, § 2. The version of the mechanism contained in section 33 of the Charter permits legislative override of a judicial decision as well as such pre-emptive use. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11, § 33 (1982).
15. 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 implication), Ireland as part of the European Convention on Human Rights Act (2003), and as part of both the ACT Human Rights Act and the Victorian Charter of Human Rights and Responsibilities Act 2006. The Supreme Court of Canada's suspended declaration of invalidity is quite different in that the legislature acts in the shadow of a legally authoritative reversion to a judicial order invalidating the relevant statute.

16. Practically speaking, a legislative power to amend the constitution by ordinary majority vote without any special procedures (such as a referendum or successive majorities) is a fully equivalent power to override a judicial decision and have the final word, which is why it is such a rarity among codified constitutions where courts have the invalidation power. Indeed, I am not aware of any written constitutions that have such flexible general amendment procedures. The Indian Constitution contains three specific exceptions to its general requirement under Article 368 of a two-thirds parliamentary majority for constitutional amendments. India Const. art. 368. These exceptions, permitting amendment by simple majority, are citizenship matters (India Const. art. 11), abolition or creation of Legislative Councils of a State (India Const. art. 169) and the creation of local legislatures or councils of ministers for certain union territories (India Const. art. 239A). Although there is a conceptual difference between applying a constitution which empowers the legislature to trump the judicial view and amending a constitution which does not (even if by ordinary majority vote), this seems too fine and formal a distinction for denying that such a flexible amendment procedure would satisfy this necessary fourth feature. I am grateful to Vicki Jackson for persuading me of the need to include discussion of amendment procedures.
17. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11, § 33 (1982). Under sections 33 (3) and (4), a declaration made under section 33 ceases to have effect after five years but may be renewed any number of times. *Id.*
18. Under the CBOR, the judicial power to invalidate is not expressly granted but implied by the Supreme Court of Canada in the case of *R* v. *Drybones*, [1970] S.C.R. 285, analogously to *Marbury* v. *Madison*, 5 U.S. 137 (1803) in the United States. It is not an exact example because the legislative override power granted was pre-emptive only, insulating legislation against subsequent judicial review. But there is no reason why a section 33-style power, or even a reactive only power, could not be included in a statutory bill of rights.
19. Although note that the current status of the unused implied power is questionable. See Claudia Geiringer, "*On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act*," 40 Victoria University Wellington L. Rev. 612 (2009).
20. Arguably, this reflects the current position in both the ACT and Victoria.
21. This is the current situation at the federal level in Australia, but without a bill of rights, following enactment of the Human Rights (Parliamentary Scrutiny) Act 2011.
22. In Israel, the Basic Law: Freedom of Occupation, one of eleven Basic Laws, was re-enacted in 1994 with a "notwithstanding" provision (in section 8) permitting the Knesset to immunize a statute from the Basic Law by a vote of a majority of its members if expressly so stated when enacted. Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 8 (Isr.) (Basic Law: Freedom of Occupation originally enacted in 1992, replaced in 1994). Between 1991 and 2003, Article 145(1) of the Romanian Constitution permitted the legislature to override a constitutional court decision on abstract review before promulgation of a statute by re-enacting the statute with a two-thirds majority vote in each of the two chambers. Romania Const. art. 145(1). Finally, in enacting the European Convention on Human Rights Act 2003, Ireland borrowed much of the structure of the U.K.'s Human Rights Act 1998, including the judicial declaration of incompatibility mechanism. However,

within the Irish legal system this amounts to a supplementary set of statutory rights (incorporating those under the European Convention on Human Rights (ECHR)) to the ones already contained in its supreme law constitution, and so reflects only partial rather than general adoption of the new model.

23. Affirmative in the sense of contrasting with a residual conception of rights, not in the sense of positive versus negative constitutional rights, *i.e*., constitutional entitlements.
24. *See* Richard Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy (2007); Tom Hickman, *In Defence of the Legal Constitution*, 55 U. Toronto L. J. 981, 1016 (2005); Graham Gee & Gregoire C.N.Webber, *What Is a Political Constitution?*, 30 Oxford J. Legal Stud. 273 (2010).
25. Again, this is why the example of the post-*Chadha* episode as calling into question judicial supremacy in the U.S. is hardly characteristic of the system as a whole. On the role of law in limiting presidential power, see Richard H. Pildes, *Law and the President*, 125 Harv. L. Rev. 1381 (2012) (reviewing Eric A. Posner, The Executive Unbound: After the Madisonian Republic (2010)).
26. The one major exception is the judicially implied federal right of political speech.
27. In some jurisdictions the government is required to make a formal statement only when it is of the opinion that a statute is inconsistent with rights; in others, either way.
28. On the difference between the two, see Jeremy Waldron, *Judges as Moral Reasoners*, 7 Int'l J. of Const. Law 2 (2009).
29. Obviously, these general principles of parliamentary sovereignty do not require the absence of an uncodified constitution as traditionally in the Commonwealth. The first four French republics, for example, all had written constitutions but adhered to the model of parliamentary sovereignty.
30. Thoburn v. Sunderland City Council, [2003] Q.B. 151 at 60 (Eng.).
31. *R* v. *Pora* [2001] 2 NZLR 37 (CA).
32. There is some controversy as to whether this suspension of the normal rule of implied repeal applies under the HRA.
33. Human Rights Act, 1998, c. 48 (U.K.); New Zealand Bill of Rights Act § 6 (1990).
34. Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law—Part I/II*, 7 German L. J. 341 (2006).
35. *Id*.
36. Stephen Holmes, *Gag Rules, or the Politics of Omission, in* Constitutionalism and Democracy 19-58 (John Elster & Rune Slagstad eds., 1988).
37. *See* Stephen Gardbaum, *The Place of Constitutional Law in the Legal System*, *in* The Oxford Handbook of Comparative Constitutional Law (Michele Rosenfeld & Andras Sajo eds., 2012).
38. Kumm argues it does more generally. *See* Kumm, *supra* note 34.
39. Grundgesetz fur die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I art. 2(2) (Ger.) ("Everyone has the right to life and physical integrity").
40. First Abortion Case, 39 BVerfGE 1 (1975).
41. As affirmed and applied in the Second Abortion Case, 88 BVerfGE 203 (1993).
42. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

43. See *Casey*, *supra* note 42; Gonzales v. Carhart, 550 U.S. 124 (2007).
44. This would be true especially if the European Court on Human Rights continues its longstanding practice of staying out of the abortion issue.
45. 317 PARL. DEB., H.C. (6th ser.) (1998) 1301 (U.K.):

> Although I hope that it does not happen, it is possible to conceive that, some time in the future, a particularly composed Judicial Committee of the House of Lords reaches the view that provision for abortion in . . . the United Kingdom . . . is incompatible with one or another article of the convention. . . . My guess—it can be no more than that—is that whichever party was in power would have to say that it was sorry, that it did not and would not accept that, and that it was going to continue with the existing abortion legislation.

46. Although, as noted above, at the extreme of ease, constitutional amendment by ordinary majority vote of the legislature satisfies the final element of the new model as a form of legislative override of judicial decisions.