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With a Little Help from the Courts: Mark Tushnet on Judicial Review of Social and Economic Rights

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Abstract

This is a review of Mark Tushnet's "Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law". The review outlines the main arguments in the book and then moves to elaborate on two preconditions, which, I think, are necessary for Tushnet's project to succeed – the existence of a strong civil society and an institutional willingness to implement social welfare rights. In addition, this review seeks to situate the book within Tushnet's broader constitutional theory project. In particular, the review attempts to reconcile this work with Tushnet's "Taking the Constitution Away from the Courts", a work that initially seems to be diametrically opposed to his new book.

A. Introduction

In his new book, "Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law" ("Weak Courts, Strong Rights"), Professor Mark Tushnet continues his constitutional theory project articulated most poignantly in "Taking the Constitution Away from The Courts". At first read this is a paradoxical continuation. In one aspect the book resumes the theme of "Taking the Constitution Away" in that Constitutional Law should be "taken away" from courts and made to make room for, mostly, the legislature and the people. And yet here, Professor Tushnet's central argument about how judicial review can help make socio-

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3 Tushnet has also argued for a less court centered constitutional theory elsewhere. See MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003).
economic rights robust is a seeming departure from, and indeed stands in tension with, the populist project in his earlier works.\textsuperscript{4}

The tension is most striking where Professor Tushnet, known as a strong critic of judicial review as it is performed in the U.S., suggests that judicial review, albeit in a different form, might be beneficial for ensuring the enforcement of socio-economic rights. Indeed, Professor Tushnet argues that to maintain "strong" socio-economic rights we need "weak" courts. The surprising twist, of course, is that we still need courts. And we still need judicial review.

Although this book offers a seemingly different and opposing conceptual framework from his previous work, the two may perhaps be reconciled as a case of political pragmatism. Ideally, Tushnet argues, if we were to design a constitution from scratch, we should not provide for judicial review.\textsuperscript{5} However, given that we live in a system with judicial review, the question is how to design it so that it will, first, meet objections from principles of democratic self government,\textsuperscript{6} and, second, how to design it so that it will be an effective tool in promoting rights, in this case socio-economic rights.\textsuperscript{7} A different, but complementary, reading of this book is that Tushnet takes this opportunity to respond to those who agreed with his diagnosis in "Taking the Constitution Away" – that courts should not have judicial supremacy in

\textsuperscript{5} For examples of suggestions for reform and their feasibility see Lawrence B. Solum, \textit{Constitutional Possibilities}, 83 IND. L. J. 307 (2008).
\textsuperscript{6} For a summary of such objections see Jeremy Waldron, \textit{The Core of the Case Against Judicial Review}, 115 YALE L. J. 1346 (2006).
\textsuperscript{7} By socio-economic rights I mean the group of positive rights such as rights to housing, healthcare and education. Those are also called second generation rights, to distinguish them from first generation civil and political rights. As will be detailed below, Tushnet is not putting forth a normative argument that we should promote these rights.
interpreting constitutions – but criticized him for failing to elaborate exactly how the legislature and the people should perform the interpretative function.  

This review will outline Professor Tushnet's argument and argue that two preconditions must be met for the new kind of judicial review to succeed. Following that, I will attempt to situate this work with Tushnet's previous work in constitutional theory, and argue that despite the seeming tension the two are compatible.

B. Summary of Book

I. On doing comparative constitutional law

Tushnet begins his book by making an argument for the usefulness of comparative constitutional law. This serves as a helpful reminder that the current controversy in the U.S. over the use of comparative law in constitutional interpretation has taken on exaggerated and politicized overtones. Tushnet points out, and rightfully so, that looking at foreign constitutional law, aside from the pure intellectual interest, may be helpful when we encounter a new problem where there is no settled precedent. To be sure, the comparativist must exercise caution when situating the foreign element.

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9 See, e.g., Lawrence v. Texas 539 U.S. 558 (2003); Roper v. Simmons 543 U.S. 551 (2005); Mark Tushnet, When is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law, 90 MINN. L. REV. 1275 (2006); Mark Tushnet, Referring to Constitutional Law in Constitutional Interpretation: An Episode in the Culture Wars, 35 U. BALT. L. REV. 299 (2006), Austen L. Parrish, A Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law, 2007 U. ILL. L. REV. 637 (2007). In 2004 Republican Representatives Tom Feeney of Florida and Bob Goodlatte of Virginia proposed a non-binding resolution against the use of foreign law in judicial decisions. In response, Justice Scalia told Congress it was "none of their business". See, Charles Lane, Scalia Tells Congress to Mind Its Own Business, WASHINGTON POST, May 19, 2006 at A19. It should be noted that in other jurisdictions, such as South Africa, Canada, and Israel, there was never such dispute, and, in fact, it could be argued that using comparative law established constitutional law in these countries.
within the specific institutional framework where it originated, and the foreign approach still needs to be compatible with domestic requirements.

What then, should we make of judicial review? On the one hand, judicial review as it is practiced today seems to be a settled and permanent feature of U.S constitutional law. And yet, this was not always the case. Throughout American history there have been, and still are, disagreements as to the validity and as to the kind of judicial review we should have. Thus, it is not implausible to suggest, as Tushnet does, that in terms of institutional design the question of which form should judicial review take is still an open question. And here comparative constitutional law may be useful.

II. Strong form and weak form judicial review in Constitutional Law

The basic premise underlying Tushnet's argument is that courts and legislatures can have reasonable disagreements about the meaning of a constitutional provision. In these situations both interpretations will fall into a zone of reasonableness. From this it follows that there is no apriori or intrinsic reason to favor a judicial decision over a legislative one. However, the current form of judicial review in the U.S – termed strong form review – explicitly favors the finality of a judicial decision over a legislative one. Yes, constitutional decisions may be overruled by a constitutional

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11 TUSHNET, supra note 1, at 17.
12 Id. at 21.
13 Id. at 79. This assertion assumes that legislatures, executives and courts do reach reasonable disagreements. Tushnet deals with claim in chapters 4 and 5. Using the case studies of Clinton's impeachment in the House of Representatives and the Senate's practice on constitutional points of order, Tushnet argues that legislatures do a reasonable job of constitutional interpretation. Moreover, even if courts may do a better job on occasion, the differences are not likely to be great. It should be noted that Tushnet is not arguing that courts and legislatures are the same. There are important institutional, structural, and procedural differences between the branches (Id. at 93-6).
amendment, but Article V makes that almost impossible. Thus the reality is that the Court is the final expositor of constitutional meaning.\textsuperscript{14}

The problem of strong form review, Tushnet argues, lies precisely with the difficulty of overruling it.\textsuperscript{15} In a strong form system, after a judicial decision the people have no recourse, even if the Court happens to interpret the Constitution reasonably but in a way contrary to the also reasonable interpretation offered by the political branches.

The broader question, then, is how can judicial review be reconciled with democratic self government? The answer proposed by Tushnet is weak form judicial review, which attempts to answer the problem of judicial finality by allowing the legislature to respond in real time to judicial pronouncements. The hope is that this will promote a dialogue between the branches, thus mitigating democratic objections.\textsuperscript{16} The judiciary will still have its say, but the final word will rest with the legislature.

Weak form judicial review can take on various forms. It can be a mandate that the court interpret any enactment so that it complies with enumerated individual rights – an interpretation the legislature can reject by a subsequent enactment.\textsuperscript{17} It can consist of incompatibility declarations – a process by which the court declares an enactment to be incompatible with constitutional commitments. There the legislature can choose not to amend the enactment, but it can also work towards complying with its

\textsuperscript{15} TUSHNET, supra note 1, at 22.
\textsuperscript{16} The dialogic metaphor is accepted jargon for some weak form systems, such as Canada’s and Britain’s. See KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE (2001); Christine Bateup, The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue, 71 BROOKLYN L. REV. 1109 (2006); 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); Tom R. Hickman, Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998, 2005 PUB. L. 306 (2005).
\textsuperscript{17} As is the case in New Zealand.
constitutional commitments. It can be a regime where a court's decision is binding, unless the legislature activelyoverrides it. Finally, weak form review can take the form of weak remedies. These are remedies that relegate the court to a monitoring role while leaving the particulars to other branches.

III. The difficulty of sustaining weak form review

Much has been written in the past few years about weak form review. The initial hope that weak form mechanisms will deliver real-time inter-branch dialogue has turned into skepticism that such dialogue can exist, let alone be ascertained. Less skeptical commentators argue that, at best, such dialogue happens only infrequently. The main concern here is that weak form review is unstable, turning into strong form review, thus bringing back the same democratic tensions familiar from the U.S. context. On this view, weak form review does not seem promising.

Tushnet’s response suggests a different interpretation. He argues that what happened, most notably in Canada, is that the move toward strong form review reflected the considered judgment of the polity which came to favor judicial supremacy. Thus, if the shift to strong form occurs "organically", it gives rise to fewer democratic

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18 *Tushnet*, *supra* note 1, at 27-31 (describing the process in Britain).
19 As is the case in Canada with Section 33 of the Canadian Charter of Rights and Freedoms.
21 For genuine dialogue one needs to show that the legislature received the judgment, considered it, deliberated, and then acted in a certain way which demonstrates some level of thoughtfulness. This will be very difficult to show.
23 *Tushnet*, *supra* note 1, at 44.
Equating weak form review with democratic experimentalism, the repeated interactions between courts and legislatures are viewed as experiments in constitutional law. When experiments end, i.e., when the branches have reached a stable solution they find acceptable, so does weak form review. Thus, we can have strong form areas in a general system of weak form review and weak form areas, i.e., areas where the law isn't established enough, in a general system of strong form review. Therefore, one should view the transformation from weak form to strong form as the reflection of a people on their constitutional commitments.

But an important question, I think, remains. Even if democratic objections are mitigated when the people decide to transfer their rights to the judiciary, what if the people change their minds? It seems then that even if an "experiment has ended" we would need a mechanism which will allow for its reexamination. In other words, strong form review should never be too strong so as to preclude us from revising an existing legal arrangement.

IV. The Sameness of Socio-Economic Rights

Systems of weak form review purport to designate a larger role for legislatures in constitutional interpretation because the institutional mechanisms permit input after a judicial decision. However, it is clear that the original motivation behind weak form

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24 To support his claim Tushnet discusses Section 33 of Canada's Charter of Rights and Freedoms, which allows the national legislature and the provinces to override some judicial decisions. Aside from several notable exceptions, Section 33 has fallen into disrepute. If the legislature goes on the books as admitting it is violating a constitutional right, chances are it will be less inclined to do so, especially if the court's interpretation is a reasonable one, leading to greater parliamentary acquiescence.

25 TUSHNET, supra note 1, at 66, fn. 55.

26 This does not mean that legislatures will use their interpretational authority, but the possibility exists. Experience has shown that legislatures are capable of undertaking such tasks. Id. at 147-8, referring to the process of issuing compatibility statements in the Britain, and "Charter Proofing" in Canada.
review was not to enhance the status of socio-economic rights. In order to make that
collection, Tushnet needs to preempt another argument, that courts should not
enforce such rights in the first place. Enter the state action doctrine. The state action
doctrine, which requires that in order for there to be a justiciable action the claim must
be brought against a government action, is one of the core doctrines of U.S.
constitutional law, and one of the more complex ones.

The purpose of the state action doctrine is to track the public/private act/omission
distinctions, making only public acts actionable while removing private acts from the
scope of constitutional law. Similarly, if the government acts, there is state action.
Failure to act will usually not be considered an "action" warranting judicial review.
While this classification is commonplace in liberal, and especially libertarian, circles,
Tushnet argues the doctrine "does no independent work": A private act is private
because a political authority decides what is private and what is public; a decision not
to regulate is just like a decision to regulate, in the sense that they are both decisions.
Nothing, then, is naturally private or public, because these categories are derived from
a particular and preexisting political philosophy.

This has political and legal implications. Tushnet argues that the doctrine leaves in
place the background rules of contracts, torts, and property, choosing to make
actionable only the decisions emanating from these background rules. In that sense it

27 Id. at 161-195.
28 The prime example here is DeShaney v. Winnebago County, 489 U.S. 189 (1989).
29 TUSHNET supra note 1, at 167. Here Tushnet joins a long list of scholars who critique the distinction,
the first being Robert Hale. See Robert Hale, Coercion and Distribution in a Supposedly Non-Coercive
State, 38 POL. SCI. Q. 470 (1923). See also Morris R. Cohen, Property and Sovereignty, 13 CORNELL
L.Q. 8 (1927); Morris R. Cohen, The Basis of Contract, 46 HARV. L. REV. 553 (1933) For a socio-legal
explanation of the decline of the distinction see Duncan Kennedy, The Stages of the Decline of the
is artificial, because both the background rules and the specific rules are the result of
governmental choice. Think, for example, of our property law. There is nothing
necessary about designing our property regime so as to allow a person complete
control over his property to the detriment of others. But once that rule is in place we
cease to question it. We accept it as natural, choosing only to adjudicate specific
disputes that arise out of our antecedent commitment to that rule. The state action
document attempts to demarcate first order actions from second order choices regarding
institutional design; but, again, these are all choices the state makes.

State action, then, is everywhere. It is in the details of specific state activities and it is
in the second order choices about how legal regimes will look. The problem is that
once we do away with the doctrine, everything is potentially the subject of litigation;
particularly, the background rules responsible for wealth distribution.  

Tushnet's argument is that the background rules – the ones the courts are reluctant to
interfere with – are, in fact, socio-economic rights. When courts employ the state
action doctrine they are saying that they will not enforce (or rather refuse to
acknowledge) socio-economic rights (the rights dealing with allocation of resources).
The doctrine thus serves to maintain a hard distinction between first and second
generation rights. Now, while this may make sense in a jurisdiction that embraces the
public/private distinction, there is nothing necessary with this particular conception of
constitutional law. Moreover, if this line of thought lies with state action, and if state

30 Tushnet, supra note 1, at 168. This was precisely the Court's concern in Washington v. Davis, 426
U.S. 229, 247 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid… if
in practice it benefits or burdens one race more than another would be far reaching and would raise
serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service,
regulatory, and licensing statutes that may be more burdensome to the poor and to the average black
than to the more affluent white") (Opinion of White, J.).
action is unworkable, then so is the distinction between socio-economic rights and civil and political rights which presupposes government "action".\textsuperscript{31}

V. Connecting weak form review with socio-economic rights

The state action doctrine has proven to be less problematic in other jurisdictions, most notably Canada, Germany, and South Africa. Equipped with a social democratic concern for welfare rights, these post World War II constitutions and judiciaries have managed to escape the problem of applying judicial review to socio-economic rights. They did it either by specifically providing for socio-economic rights in their constitution (South Africa), by interpreting non-constitutional norms with an eye to constitutional values (Germany), by changing the common law to cohere with constitutional values (Canada), and/or by holding the state accountable when it fails to regulate an area which has constitutional implications (Canada). For example, if Canada decides to regulate housing, it must provide for all aspects of that right, and a failure to provide a certain aspect which is deemed to be within the scope of that right can be tantamount to a constitutional violation.\textsuperscript{32} Potentially this means that the constitution will have horizontal implications. It will apply not only in conflicts between state and citizen, but also in private conflicts between two citizens.\textsuperscript{33}

\textsuperscript{31} To be sure, there may be social-cultural-expressive reasons why the state action doctrine persists, but they are not analytical. Consequently, traditional judicial deference to legislatures on social and economic issues on grounds of policy, while intervening in civil and political rights such as free speech, may be unwarranted, at least conceptually.

\textsuperscript{32} Tushnet, supra note 1, at 205.

\textsuperscript{33} Consider the Dunmore case, discussed on p. 210. The government repeals a law that required farm employers to bargain collectively with their employees. The workers sued to mandate their employers to enter collective bargaining arguing that the absence of such a mandate violated their Charter right to freedom of association. The Court agreed, holding that government had an affirmative duty in that sphere, and the lack of a mandate impacted the workers' rights. However, it should be noted that the Dunmore case Tushnet relies on has not ushered in a new era of positive right enforcement in Canada, and even the legislative reaction to Dunmore has been lukewarm. See Dunmore v. Ontario (Attorney
The immediate problem is one of scope. Questions of resource allocation, economic policy and social welfare are complex. Even if judicial review is theoretically permissible, there are still issues of judicial competence and democratic legitimacy to address. Unlike free speech cases, for example, there is concern that courts will not be able to enforce their decisions having to do with socio-economic rights.\textsuperscript{34} After all, ordering the state to permit a demonstration is not like ordering an overhaul in the healthcare system. Here weak form review is supposed to address that problem, not by decreeing the ultimate decision, but by partnering with the other branches and facilitating gradual changes without assuming a coercive role.

It should be clear by now that the emphasis of weak form review is on the remedies it provides. Indeed, weak form review calls into question the assumption that judicial review requires coercive orders.\textsuperscript{35} In closing his book, Tushnet illustrates the kind of weak remedies he is referring to. First, courts can issue declaratory judgments regarding violations of socio-economic rights. The hope there is that the political branches will then seek to remedy the declared violation, but without the courts having to specify exactly (or at all) what the solution should look like. In these cases, the rights are, in a sense, non-justiciable,\textsuperscript{36} but there is an expectation that non-binding decision will be bolstered by an active civil society that will apply pressure on the political branches to fix the problem the court indicated.

\begin{footnotesize}
\begin{enumerate}
\item[35] TUSHNET, supra note 1, at 228.
\item[36] Though not exactly, because there is a positive judicial declaration of a constitutional violation. It is non-justiciable in that the claimants will not find a positive (and strong) remedy to that violation. The examples Tushnet uses here are from Ireland and India.
\end{enumerate}
\end{footnotesize}
Second, courts can impose real duties while still leaving the government broad discretion. The South African *Grootboom* case,\(^{37}\) which Tushnet discusses, is a good example of weak remedies. There, petitioners, essentially homeless people who were evicted from private land, relied on South Africa's constitutional guarantee to a right to housing and sued, arguing that the government's plans for affordable housing did not address their plight. The Constitutional Court ordered the government to devise a new housing plan in which it must take into account people in the situation of the petitioners. Although the Court issued a decree, the government still had wide latitude in fashioning the particular plan.

Similar examples are familiar from the U.S. Think of the Supreme Court's use of the "all deliberate speed" formula in *Brown II*,\(^ {38}\) or the school adequacy litigation in state courts. In the latter, some courts have been successful in defining broad standards of an adequate education, allowing the state to design its own educational system and retreating to a supervisory role meant to enforce the ongoing reform process.\(^ {39}\)

Tushnet's ultimate point is this: weak remedies produce increased political and civic participation in the formation of the rights themselves. Further, weak form review is a legitimate and effective method for courts to work together with other branches, without overstepping their boundaries. Moving in such a way may work out to

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\(^{38}\) *Brown v. Board of Education*, 349 U.S. 294 (1955). Tushnet acknowledges that *Brown II* was not particularly successful in promoting integration, but argues that there the remedial approach "did not make conceptual sense given the nature of the constitutional violation". However, he argues that the Court's general approach does provide a model for weak form review (*Tushnet, supra* note 1, at 248).

\(^{39}\) See, e.g., PETER SCHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA'S SCHOOLS (2003).
provide a strong version of the socio-economic right, even though it did not come about through strong form judicial review.

C. Critique

Professor Tushnet's argument is rich and complex, fusing together insights gleaned from disparate constitutional practices. In this review I would like to focus mostly on his conclusion, that weak form review will enable a more robust version of socio economic rights. Parts C.I. and C.II. underscore two important preconditions – a strong civil society and a preexisting institutional willingness to apply socio-economic rights – which, I believe, are imperative for Tushnet's project to succeed. Part C.III. squares "Weak Courts, Strong Rights" with some of Tushnet's previous writings on judicial review. Part D concludes.

I. The Need for a Strong Civil Society

At the outset, I believe it is important not to overstate Tushnet's overarching argument. Tushnet himself seems to recognize that a lot depends on his argument working out.40 Most importantly, it seems to me that Tushnet's argument is regime dependent and context specific to a point which may make generalizations difficult. Here is what may seem a trivial point, but should not, I think, be underestimated: For socio-economic rights to be "strong" in the Tushnetian sense, we need a polity that already possesses an interest in making these rights real, for two reasons. First, there needs to be an active civil society that can complement the work of courts and which

40 For some of his qualifications see TUSHNET, supra note 1, at 251-58.
will make sure weak remedies turn into real results. Second, for courts to issue even weak remedies there must be some institutional legal willingness on their behalf to do so, as opposed to simply rejecting claims relying on these rights.

Regarding the need for a strong civil society, consider, for example, a situation where a court finds that a privately financed healthcare system violates a constitutional right to health because coverage is denied to those who cannot afford to pay. Rather than devise a complete scheme of healthcare coverage for the poor, the court tells the legislature that the problem of poor people without coverage needs to be addressed and gives it a year to come up with a plan that will meet the constitutional standard. So far this is in line with weak form review. Now, without an effective civil society – individuals, politicians, organizations, media – that will continue to push for such a plan, the chances that such a plan will in fact materialize are not clear. This is so because there is no real sanction (other than perhaps public embarrassment) that attaches to the judicial remedy. This enables the legislature to "get away with it". To be sure, the problem of "no sanction" is not confined to weak form review, but its potential does seem to increase there.

It would seem, then, that Tushnet's argument is circular. If weak form judicial review stands to be most effective in countries with a strong civil society, why do we need any kind of judicial review in the first place? Presumably part of the role of weak form review is to remove political blockage or to instigate some kind of governmental action. But if that's the case, then wouldn't a strong civil society have already

\[\text{41}\] To make the issue less complicated, let's assume that the particular constitution provides for a right to health, or can be reasonably interpreted to provide for such a right.
accomplished that? And if not, how can we expect weak form review to live up to its expectations when there's not a strong civil society to reinforce the courts' judgments?

A possible response could take the following approach: Yes, we need a strong civil society which can mobilize politically, but that's often easier said than done. The hope is, then, that weak form review will be able to contribute to the formation of an engaged citizenry, by letting it know that the courts cannot accomplish everything on their own. Here we may think of some sort of tradeoff. Courts will stay out of particular areas, especially when it comes to "policy", leaving more room for the political branches and the people to act. The tradeoff is that in the short run things might not get done as quickly as they might have had had courts been stronger. Moreover, to the extent socio-economic rights are indeed rights, we are legitimizing a time period (short as it may be), in which these rights are not granted a proper defense once a court has found the government to be in violation of the constitution. In the long run, however, weak form review has an educative value, in that it results in better self-government and a more democratic polity.  

This reading also answers the critique that political actors may at times be comfortable with judicial review because it allows for blame shifting. If the difficult and controversial decisions are made by life tenured judges, the legislator will be relatively immune from public criticism and will be better able to retain her seat.

Weak form review undermines the blame shifting argument, because it forces

\[\text{\textsuperscript{42}}\text{That is, if you subscribe to the view that essentially conceptualizes democracy as a majoritarian process. On that view there is something undemocratic about judicial review. Therefore, weakening the institution of judicial review stands to enhance democracy.}\]

\[\text{\textsuperscript{43}}\text{Mark A. Graber, The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary, 7 STUD. AM. POL. DEV. 35 (1993) (arguing that politicians may call upon the judiciary to address issues they would prefer avoiding because of political repercussions such as voter disapproval).}\]
legislators to make the decisions for which they are democratically accountable.

Paradoxically, then, weak form review may contribute more to maintaining the separation of powers scheme than strong form review, even though the latter provides a clearer demarcation between the branches.

At this point it is important to keep in mind that much in the preceding paragraphs is speculative. Weak form review is a relatively young experiment, and whether it can bring about the changes Tushnet hopes for has yet to be determined decisively. It does seem clear, though, that weak form review needs a hospitable environment in which it can succeed. This does not just mean an engaged citizenry, but also institutional willingness from courts, agencies, and legislatures, to cooperate on these issues in a thoughtful and beneficial manner. I turn now to this issue.

II. The Need for Institutional Willingness

As I argued above, for socio-economic rights to be strong we need some form of institutional willingness to implement these rights. When Tushnet is writing for an American audience – which is why, I believe, he discusses the state action doctrine in detail – he is arguing that the traditional American aversion to social welfare rights is unfounded, because it relies on an untenable conceptual distinction (public/private, act/omission). However, if that was all there was to it then we would expect that doctrine to dissipate. And yet it hasn't, suggesting that the real impasse is cultural-philosophical rather than legal.\(^4^4\) This impasse is a view of government as curtailing rights rather than expanding them. In a way, Americans (and this is a generalization of

\(^4^4\) Tushnet alludes to that. TUSHNET, supra note 1, at 177-81.
course) are committed to the notion of negative rights much more than positive rights because human flourishing is best achieved with minimal governmental interference. Embracing socio-economic rights also means a commitment to an enlarged role for the government in the public sphere, something which Americans are traditionally wary of.\(^45\) This, then, calls into question the plausibility for weak form review to be implemented wholesale in the U.S.

It is perhaps no accident then that the relatively few successes of weak form review in the U.S., such as educational adequacy suits, happen at the state level where constitutions are more malleable, less entrenched, constitute less of a non-negotiable identity, and almost all state constitutions contain explicit mentions of some socio-economic rights thus resolving the state action problem.\(^46\) To this we can add that many state judges are elected and thus may have an incentive to designate a larger role for the political branches so as not to alienate politicians whose support will be needed come election time.

The factor of institutional willingness, which is not strictly a part of judicial review, can be as important as how judicial review will be operationalized. To put it differently, judicial review can shift the order of priorities, making particular issues more salient than others. But getting a particular issue resolved will require the

\(^{45}\) See also Steven G. Calabresi, "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Reliance of Foreign Law, 86 B.U. L. REV. 1335, 1406-07 (2006) ("American constitutionalism is exceptional in lacking guarantees of social and economic rights because American history and culture are far more hostile to those rights than are the history and culture of any other major Western democracy").

\(^{46}\) Almost all state constitutions, for example, provide for education rights. See, William E. Thro, To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Litigation, 75 VA. L. REV. 1639, 1661 (1989).
operation of politics. Here courts cannot but rely on the political branches (and by
extension on civil society) for realizing the judicial decision.

In his example for weak form review in the U.S., Tushnet discusses educational
adequacy suits, where states were found to be violating the state constitutional
requirement to provide an adequate education. There have been several lawsuits
stemming from such provisions, some successful and some not.47

A comprehensive study conducted by William Koski suggests that legal norms in and
of themselves are insufficient to bring about educational reform. He pointed to
"judicial attitudes" that made reform in some states possible, and to the inter-
institutional conflict – with governors and legislature – which sometimes made
cooperation difficult.48 In particular, certain courts – based on their preexisting
political leanings – viewed judicial intervention more favorably than others. In other
words, they possessed the institutional willingness needed to carry out such reforms.
Similarly, they needed the cooperation of legislatures and governors to make
progress.

To be sure, every court needs the cooperation of other institutions to carry out its
decisions.49 When it comes to socio-economic rights, however, courts will need even
more cooperation from other co-equal branches because the nature of these matters is

47 For details about each of the lawsuits see www.schoolfunding.info. For an overview and analysis see
William E. Thro, Judicial Analysis During the Third Wave of School Finance Litigation: The
Massachusetts Decision as a Model, 35 B.C. L. REV. 597 (1994); William E. Thro, The Third Wave:
The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance
48 WILLIAM S. KOSKI, FUZZY STANDARDS, INSTITUTIONAL CONSTRAINTS, AND JUDICIAL ATTITUDES:
THE POLITICS OF STATE SUPREME COURT DECISION-MAKING IN EDUCATIONAL FINANCE REFORM
that they require further deliberations and resource allocations. This is, of course, the nature of weak form review, in that it leaves much to be decided after a court has ruled. Therefore, as the potential for institutional conflict and constraint grows, the potential failure of such an enterprise grows as well.

The conclusion is that weak form review can accomplish the task that Tushnet designates for it if there is a good faith effort from all concerned. In other words, weak form review necessitates political conditions hospitable for its implementation. A case in point is the *Grootboom* litigation discussed by Tushnet. *Grootboom* – heralded by legal scholars as perhaps the best example of enforcement of socio-economic rights – has caused quite a stir in comparative constitutional law circles. But the situation in its aftermath has been rather grim. Although South African Justice Albie Sachs begins his 2007 article with the words "Mrs. Grootboom has had enough". Mrs. Grootboom still hasn't received the government housing which was the subject of the litigation that ended in 2001. My point is not that the decision has been a complete failure – recently 277 housing units were given to the group of over 1000 petitioners – but that implementing socio-economic rights requires sustained cooperation over a relatively long period of time from other branches; and that, in itself, necessitates institutional willingness and an active civil society that can push for the implementation of court decisions.

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50 A Lexis-Nexis search shows that the case has been cited 155 times in American law review articles since it came down in 2001.
53 See http://www.abahlali.org/node/3815.
For those who express skepticism that such conditions could ever be met, a recent case from the South African Constitutional Court suggests that this is not impossible. In *Occupiers of 51 Olivia Road Berea Township*, the City wanted to evict 400 people from their homes, citing unsafe and unhealthy building conditions. Petitioners sought relief citing their constitutional right to housing. Instead of definitively resolving the case, the Constitutional Court took a different path, opting for weak form review. It ordered the parties to engage in meaningful deliberations, something it believed had not been done prior to the eviction requests, "in order to alleviate the plight of the applicants… by making the buildings as safe and as conducive to health as is reasonably practicable". The Court held that if the City is aware that its decision to evict is going to make people homeless, and in so doing impact their constitutional right to housing, then it is, at the least, under a duty to meaningfully engage with the occupiers. The judicially sanctioned "meaningful engagement" led to an agreement that the City would not evict the tenants, that it would renovate the buildings and that it would provide temporary accommodation. The parties also agreed to meet and discuss permanent housing solutions.

The lesson of *Occupiers of 51 Olivia Road Berea Township* is important. It demonstrates that weak form review has the potential to induce cooperation between government and the people and the capacity to remove political blockage – here in the area of housing rights – while letting the people fashion their own solutions, keeping the court in a monitoring role. Of course, identifying in advance the types of cases

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54 *Occupiers of 51 Olivia Road Berea Township v. City of Johannesburg*, [2008] ZACC 1; 2008 (3) SA 208 (CC) (S. Afr.).
55 S. Afr. Const. § 26
56 *Occupiers of 51 Olivia Road Berea Township v. City of Johannesburg*, (Opinion of Yacoob, J. §5(2)).
where weak form review will be successful is hard, and perhaps impossible, but the two preconditions I elaborated on – institutional willingness and a strong civil society – seem to be key.

III. Enhancing Popular Democracy – a Constitutional Project in Ideal and Non-Ideal Theory

Readers of Professor Tushnet's previous work, especially "Taking the Constitution Away from the Courts", might be perplexed when reading "Weak Courts, Strong Rights". As Frank Michelman noted in his review of that work, "the background preference is for democracy, the immediately implied default position is against judicial review". In his earlier book Tushnet calls for a new constitutional amendment that will do away with judicial review and that will give the people, i.e. its representatives, the final word on constitutional interpretation. And yet here Tushnet is advocating judicial review, albeit weak, in order to arrive at more robust socio-economic rights. Can the two be squared?

I think they can, and in two ways that are not mutually exclusive. The first is to think about "Taking the Constitution Away" as a political manifesto calling for reconceptualizing the role of judicial review in American society. To borrow from

57 A possible explanation to the success of Occupiers as opposed to the relative success of Grootboom is that in Grootboom the problem was on a very large scale – thousands of families in the most desperate condition needing a home, whereas in Occupiers the problem was limited to 400 people. This explanation, however, is not convincing. In Occupiers the Court recognized that there might be 67,000 people living in unsafe conditions in Johannesburg, but that did not affect the remedy. The scale of the problem might be a factor in the success of weak form review, but it does not seem to be decisive.

58 Supra note...


60 TUSHNET, supra note 2. Of course, the people will also have a say on constitutional interpretation through elections, political mobilizations, civil society, etc.
John Rawls, "Taking the Constitutions Away" is a study in Ideal Theory, whereas Weak Courts, Strong Rights is a project in Non-Ideal Theory. The second is to think of ways by which judicial review develops democratically.

The distinction between Ideal and Non-Ideal theory was first offered by John Rawls in his "Theory of Justice". Roughly, Ideal Theory describes the set of principles that would be appropriate to a morally and politically ideal order. Non-Ideal Theory recognizes that our political order is, well, not ideal. Thus, Non-Ideal Theory accounts for the set of principles that are appropriate in these less than perfect conditions.

Now, if we were to design a legal system from scratch, with an eye toward enhancing popular democracy, majoritarianism, and civic participation, "Taking the Constitution Away" would counsel us against incorporating judicial review in our constitutional structure. In that sense, "Taking the Constitution Away" in an aspirational text. It is a prescription for institutional designers considering, perhaps for the first time, the role constitutional courts play in society. "Weak Courts, Strong Rights", however, is a study in Non-Ideal Theory because, despite the recent popular constitutionalist trend invoked by some scholars, U.S. constitutional history and culture have made it practically impossible to do away with judicial review. For better or worse, strong judicial review has come to be a defining feature of U.S constitutional law.

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63 Here I mean two things. First, public support for judicial review is strong in the U.S. It is not necessarily the situation in other countries. Indeed, there was vigorous public debate before the adoption of the British Human Rights Act, and there is still a controversy over judicial review in Israel, for example. Second, support of judicial review should not be confused with academic criticism. Judicial review has been questioned for many years, but the public support endures and there is
Consequently, we need to figure out what to do with the institution of judicial review, or how to best conceptualize it so that it will fit our current goals (one of them being an original preference against judicial review). This is precisely what "Weak Courts, Strong Rights" sets out to do with regard to socio-economic rights. Indeed, this book has a pragmatic ring to it: If we already inhabit a world with judicial review, here's how we can harness it to our benefit. The way to do this is through weak form review because on the one hand it preserves judicial review, and on the other it "tweaks" it so as to increase the range of democratic possibilities, encourage deliberation, and preserve the ultimate authority over constitutional interpretation with the people – a necessary element of self government.

The second way one can square Tushnet's previous work with this book is by telling a story about how judicial review can develop democratically. Roughly, if the people opt for judicial review then the degree to which it is a counter-majoritarian practice is lessened. But unlike other countries that specifically provided for judicial review, the U.S. Constitution does not. Still, weak form review allows for experimentation with constitutional rights. It enables a back and forth between legislatures, agencies, and

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64 It is important to note that popular constitutionalism of the kind that Tushnet, Kramer subscribe to is not about completely eliminating judicial review. A better characterization would be that when judicial review is confronted with "The People" then the people should have the final word. This is apparent in Kramer's "The People Themselves", where he calls for "judicial review, not judicial supremacy." See, KRAMER, supra note 10. See also Corey Brettschneider, Popular Constitutionalism and the Case for Judicial Review, 34 POLITICAL THEORY 516 (2006). A different case is Jeremy Waldron who opposes judicial review on jurisprudential reasons rather than offering an argument informed by American history, practice and culture. See Waldron, supra note 6.

65 This is true insofar as one supports the essence of Tushnet's constitutional project.

66 Though not discussed in this review, Tushnet suggests (without fully analyzing) that civil and political rights also developed in a similar fashion to what we now see in socio-economic rights.

67 Again, by benefit I mean if one shares Tushnet's ideological position on judicial review.
the courts until the specific issue has been sufficiently crystallized.\textsuperscript{68} This is the dialogic conception of judicial review. Now, if weak form judicial review generates real-time constitutional dialogue then one could argue that it does not raise the same democratic objections because it is the result of deliberations between all branches rather than one branch assuming the role of a final decider.\textsuperscript{69}

D. Conclusion

Weak Courts, Strong Rights takes an instrumentalist approach to judicial review by arguing that the best way to enforce socio-economic rights may be through weak remedies. It is therefore important to note what the book is not saying. Tushnet is not making the argument that people have a right to judicial review,\textsuperscript{70} or that judicial review is an intrinsic aspect of a democratic regime,\textsuperscript{71} or even that people should have constitutional socio-economic rights. Rather, the overarching argument is that if we already have a judicial system with judicial review, and it so happens we are considering enforcing socio-economic rights, weak form review may be a possible way to do it more or less successfully while preserving other important democratic values.

For those among us who look to the courts for large scale societal reform, the message in this book may be disappointing. Tushnet acknowledges that legislatures are

\textsuperscript{68} According to Tushnet, weak form review can be replaced with strong form when enough experience has been accumulated to give us confidence that when the court delivers the final word it will not obstruct the principle of self government. Weak form review accomplishes the right of majorities to enact their will when their enactments comport with a reasonable interpretation of the constitution, even if that interpretation differs from that of the courts. \textsc{Tushnet, supra} note 1, at 263-64.

\textsuperscript{69} For a similar argument see \textsc{Mark Tushnet, Dialogic Judicial Review}, 61 ARK. L. REV. 205 (2008).

\textsuperscript{70} Yuval Eylon and Alon Harel, \textit{The Right to Judicial Review} 92 VA. L. REV. 991 (2006) (arguing that the purpose of judicial review is to provide a mechanism of reasoned justification to the citizen who believes his right has been impinged by the state).

\textsuperscript{71} Indeed, in "Taking the Constitution Away" Tushnet makes the opposite argument.
imperfect, but then so are courts. More often than not, the two branches will have reasonable disagreements. In bringing about societal reform, however, the courts can only play a minor, though important, role. The message in this book is that while courts can have a meaningful and legitimate role in a democratic society, they cannot go at it alone. For the project to succeed we need to immerse ourselves in politics and not just law. Professor Tushnet's thesis will therefore become a reality only when the political branches and the public at large will join the experiment he has outlined.