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NEW FORMS OF JUDICIAL REVIEW AND THE PERSISTENCE OF RIGHTS- AND DEMOCRACY-BASED WORRIES

*Mark Tushnet**

Recent developments in judicial review have raised the possibility that the debate over judicial supremacy versus legislative supremacy might be transformed into one about differing institutions to implement judicial review. Rather than posing judicial review against legislative supremacy, the terms of the debate might be over having institutions designed to exercise forms of judicial review that accommodate both legislative supremacy and judicial implementation of constitutional limits. After examining some of these institutional developments in Canada, South Africa, and Great Britain, this Article asks whether these accommodations, which attempt to pursue a middle course, have characteristic instabilities that will in the long run lead constitutional systems back to either judicial or legislative supremacy.

I. INTRODUCTION

Two models of constitutionalism were on offer in the last century. One was the so-called Westminster model of parliamentary supremacy, in which democratically elected legislatures had power unconstrained by anything other than the cultural presuppositions embedded in a majority's will.¹ The other was the United States ("U.S.") model of constrained parliamentarianism, as Bruce Ackerman has labeled it.² In this model, the legislature's powers are

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1. These presuppositions could be unwritten, as in Great Britain, or written into a constitution that could serve as a reference point for political debate about whether a particular proposal was consistent with the culture's presuppositions.

2. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 664-87 (2000) (describing some components of some systems of constrained parliamentarianism). I use the somewhat more graceful term *parliamentarism* here.

limited by the terms of a written constitution that courts will enforce. Each model promoted some values of liberal constitutionalism and raised worries about others. The Westminster model maximally advanced democratic self-governance, but made it possible for empowered democratic majorities to violate rights that liberal systems should protect. The U.S. model gave the courts a wide-ranging power to invalidate legislation on the ground that the legislation violated those rights, but made it possible for reckless courts to interfere needlessly with policy choices democratic majorities should be allowed to make.

For all practical purposes, the Westminster model has been withdrawn from sale. This Article examines some aspects of the situation that have resulted. Do the versions of liberal constitutionalism presently available do an acceptable job of reconciling empowered democracy with protected rights? First, I describe what I call *strong-form* judicial review, for which the United States provides the primary example. Strong-form judicial review generated a set of debates over judicial activism and judicial restraint, which threaten to reproduce themselves in newer systems of constrained parliamentarism. Following the example of Professor Kent Roach, I point out that it would be a large mistake to structure debates in some of the newer systems around the terms activism and restraint, because some of these newer systems adopt what I call *weak-form* judicial review.³ Weak-form systems hold out the promise of protecting liberal rights in a form that reduces the risk of wrongful interference with democratic self-governance. After describing several types of weak-form review, I raise some questions about the stability of weak-form judicial review as a version of constrained parliamentarism.⁴ My most important points are that weak-form judicial review may degenerate into a return to parliamentary supremacy or escalate into strong-form review, and

3. One might say that weak-form systems of judicial review are, by definition, systems that design the institution of judicial review so that courts are necessarily restrained, whereas in strong-form systems restraint results from choices made by the judges themselves. I think this formulation is a bit misleading, though, because judges in some weak-form systems can choose to be as “activist” as judges in strong-form systems; weak-form systems differ from strong-form ones because some weak-form systems have institutions that supplement judicial review and produce a system of constitutional review that, taken as a whole, reduces the role even the most activist-minded judges can play in developing the actual restraints the constitution places on the legislature.

4. Another essay, Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. (forthcoming Aug. 2003), continues my exploration of differences between strong- and weak-form systems of judicial review.

that there is some evidence that it will do one or the other, and sometimes both. The promise that weak-form review may in practice substantially reduce democracy-based concerns about judicial review, that is, may not be fulfilled.

II. WHY THE DEBATE BETWEEN ACTIVISM AND RESTRAINT MAY NOW BE MISLEADING

Every constitution-maker in the past generation has adopted some form of constrained parliamentarism, and at present Australia and New Zealand provide the only significant examples of nations committed to something even approaching the Westminster model.⁵ For years, the only real alternative to parliamentary supremacy appeared to be U.S.-style strong-form judicial review. Strong-form judicial review generated its own debate, this one between advocates of what was labeled judicial restraint and what was labeled judicial activism.⁶ Advocates of judicial restraint argued that restrained courts would interfere with democratic self-governance only when doing so was truly necessary; advocates of judicial activism argued that a more aggressive posture was necessary to ensure that liberal

5. Even this has to be qualified. Australia's High Court does enforce the federalist limitations on legislative power in the nation's constitution, and has toyed with doctrines that would allow it to enforce some human rights on the ground that the written constitution's commitment to government responsible to the people presupposes such rights. *Austl. Capital Television Proprietary, Ltd. v. Australia* (1992) 177 C.L.R. 106, 107-08 (Austl.) (invalidating a campaign finance law as inconsistent with Australia's constitutional commitment to representative government); *Lange v. Austl. Broad. Corp.* (1997) 189 C.L.R. 520, 520-21 (Austl.) (limiting *Australian Capital Television Proprietary, Ltd.*). As for New Zealand, James Allan has argued perhaps a bit too forcefully that New Zealand's judges have made that nation's Human Rights Act, which on its face simply instructs judges to interpret statutes to be consistent with basic human rights, into a document that gives judges authority to displace legislative authority quite broadly. See, e.g., James Allan, *The Effect of a Statutory Bill of Rights Where Parliament is Sovereign: The Lesson from New Zealand*, in *SCEPTICAL ESSAYS ON HUMAN RIGHTS* 375 (Tom Campbell et al. eds., 2001).

6. At times that debate seemed to reproduce within the confines of the U.S. system the larger debate between parliamentary supremacy and constrained parliamentarism. That is, people who were at heart committed to parliamentary supremacy found themselves located in a political system with some constraints on parliamentary power, and did the best they could by arguing that courts should enforce only quite weak restrictions on legislative power. Proponents of judicial activism argued in favor of more robust limits, although the content of those limits varied with the political inclinations of the proponents—some would have the courts actively protect liberal-leaning civil rights, others would have the courts actively protect conservative-leaning property rights.

rights were protected. The extended U.S. experience, coupled with the force of the U.S. example in worldwide constitutional deliberations, has produced debates over activism and restraint in constitutional systems that have moved toward constrained parliamentarism. So, for example, Kent Roach has described how critics of the Canadian Supreme Court have called it an activist court.⁷ Roach argues that it is misleading to transfer the U.S. debate to the Canadian context,⁸ and I want to use his argument to open up a different discussion.

We can see the structure of the debate between judicial activism and judicial restraint by returning to the contrast between parliamentary supremacy and constrained parliamentarism. Parliamentary supremacy actually had two forms, which I call absolute and liberal. Under absolute parliamentary supremacy, legislatures had the *legal* power to enact anything they wished, and they had the *practical* power to do so because the political cultures in which they were located did not acknowledge that legislative authority was under *moral*, if not political, limits. Liberal regimes with parliamentary supremacy were different. The legislature's legal power was unlimited, but the political culture recognized moral limits on what a legislature could properly do.⁹ Sometimes a government would propose a policy, and its opponents would argue that the proposal should not be adopted because doing so would violate moral (or prudential, or practical) limits on government power recognized in the political culture. A liberal government would respond, not that the objection was irrelevant because the government had the sheer legal power to do whatever it wanted, but rather that its proposal was consistent with those limits. That is, interpretive debates occurred within liberal systems of parliamentary supremacy, but they tended to be debates over the proper interpretation of largely implicit cultural commitments rather than over the interpretation of authoritative documents.

Constrained parliamentarism gives those interpretive debates a somewhat different shape, and a definitively different venue. The constraints in modern systems are written, so the debates are about what the relevant documents mean.¹⁰ More interestingly, the

7. KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* 3-5 (2001). Note the presence of the term *activism* in the subtitle.

8. *Id.* at 69.

9. I do not insist on the term *moral* here; other terms, such as *practical* or *prudential*, might do as well. The important point is that the political culture in liberal systems of parliamentary supremacy in practice limited what legislatures could actually do.

10. I use the plural here because sometimes the relevant documents

debates take place in courts as well as in legislative fora. The latter feature of constrained parliamentarism shaped the U.S. discussions of judicial restraint and activism. The question that divided the sides was, what weight should be given to the legislature's resolution of the interpretive question? That is, proponents of judicial restraint noted that, in enacting the challenged statute, the legislature had—sometimes explicitly but always at least implicitly—taken the view that the constitution, properly interpreted, did not limit its power to enact the statute. Proponents of judicial restraint argued that courts should give this legislative interpretation substantial weight, on the assumption that legislators were conscientiously attempting to discern and act within the limits the constitution placed on them. Their critics were skeptical about the seriousness with which legislatures took their interpretive obligations, and, at the most general level, sometimes argued that courts were *required* to arrive at interpretive judgments independent of prior judgments by other political actors on the same question.

Roach's analysis begins with the observation that the debate between judicial activism and restraint is predicated on the assumption that courts exercise strong-form judicial review, in which the courts' interpretive judgments are final and unreviewable.¹¹ The modern articulation of strong-form judicial review is provided in *Cooper v. Aaron*,¹² where the U.S. Supreme Court described the federal courts as "supreme in the exposition of the law of the Constitution," and inferred from that a duty on legislatures to follow the Court's interpretations.¹³

A contemporary version came in *City of Boerne v. Flores*.¹⁴ That well-known case involved Congress' power to enact the Religious Freedom Restoration Act of 1993 ("the Act")¹⁵ pursuant to its power to "enforce" the prohibitions placed on state governments by Section One of the Fourteenth Amendment.¹⁶ Previously, the Supreme Court had interpreted the guarantees of religious exercise protected by Section One to bar states from targeting religious exercises for proscription, but otherwise to allow them to enforce general laws that happened to have an adverse impact on religious exercise.¹⁷ The Religious Freedom Restoration Act swept more broadly,

include international agreements such as the European Convention on Human Rights as well as national constitutions.

11. ROACH, *supra* note 7, at 29. Of course, judicial finality can be overcome through a difficult process of constitutional amendment.

12. 358 U.S. 1 (1958).

13. *Id.* at 18.

14. 521 U.S. 507 (1997).

15. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

16. *City of Boerne*, 521 U.S. at 516-17.

17. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872, 877-79 (1990).

requiring states to have strong justifications even for general laws that burdened religious exercise.

The question for the Court was whether the Act “enforced” Section One. Analytically, one could take the position that the scope of Section One is open to reasonable alternative interpretations, the Supreme Court’s prior interpretation being the first and Congress’ more recent one the second. On that view, the Act did enforce Section One, when Section One received the interpretation Congress gave it. The Supreme Court took a different view.¹⁸ For the Court, the only rights to be enforced were those the Court itself recognized. According to the Court, “[l]egislation which *alters* the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.”¹⁹ It continued, “If Congress could define its own powers by *altering* the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’”²⁰

The deep assumption of strong-form review is found in the word *alter*. A proponent of some other version of judicial review might have written, “Congress has the power to *specify* the meaning of the Fourteenth Amendment, at least so long as its specification is reasonable, although different from the specification we ourselves would provide.” Similarly, that proponent might have written:

The Constitution defines the powers of Congress in broad terms; when Congress provides a reasonable specification of those terms’ meaning in a particular context, courts should give considerable weight to that judgment. This does not allow Congress to alter the Fourteenth Amendment’s meaning, but merely follows from the Constitution’s allocation of interpretive power to both Congress and the courts.

This formulation shows the connection between the assumption that the United States has strong-form judicial review, and the debate over activism and restraint.

For Roach, the U.S. debates are misleading because constrained parliamentarism now can take a weak form. Weak-form systems of judicial review openly acknowledge the power of legislatures to provide constitutional interpretations that differ from—or, in the U.S. Supreme Court’s terms, alter—the constitutional interpretations provided by the courts. Roach, a Canadian scholar,

18. No judge disagreed with the position taken in *City of Boerne* about the finality to be given to the Court’s interpretation of Section One, although several justices expressed their disagreement with that interpretation.

19. *City of Boerne*, 521 U.S. at 519 (emphasis added).

20. *Id.* at 529 (emphasis added) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

concentrates on the role of section 33, the notwithstanding clause.²¹ That provision allows a legislature to make effective a statute “notwithstanding” the enumerated provisions of the Canadian Charter of Rights (“Charter”). As Jeffrey Goldsworthy points out, the precise formulation of the section 33 power may be unfortunate.²² Legislatures can invoke section 33 prospectively—that is, before the courts have indicated that the new statute is inconsistent with the courts’ interpretation of Charter rights—or after the courts have acted.²³ Invoking the section 33 power before the courts have acted, legislatures must say to the public, “We believe that what we are about to do might well violate Charter rights, but we want the statute to go into effect notwithstanding that possible violation.” Invoking the power after the courts have acted, legislatures can easily be misled into saying, “Although the statute does indeed violate Charter rights, as the courts have held, we want the statute to be effective notwithstanding that violation.” What weak-form systems should do is highlight the possibility of reasonable interpretive disagreement between courts and legislatures. When invoked prospectively, the message should be, “We are afraid that the courts will reasonably but erroneously misinterpret the Charter to preclude us from enforcing this statute, which we reasonably believe to be consistent with the Charter properly interpreted. We invoke section 33 to insulate the statute from a mistaken judicial interpretation.”²⁴ In this setting, it would

21. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33. For further discussion, see Jeffrey Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, 38 WAKE FOREST L. REV. 451 (2003).

22. Goldsworthy, *supra* note 21, at 468; see also Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 279-80 (1995) (pointing out the problems with the phrasing of section 33).

23. For the validation of prospective invocation, see *Ford v. Quebec*, [1988] 2 S.C.R. 712, 742-45 (Can.). The only other significant invocation of section 33 also has been prospective, in Alberta’s insulation of its marriage statute from a challenge based on equality claims by those seeking to establish gay marriages. For a discussion, see ROACH, *supra* note 7, at 199-200. (I agree with Goldsworthy’s observation that the list of section 33 invocations by Tsvi Kahana overstates the importance of the invocations she identifies. See Goldsworthy, *supra* note 21, at 466-67 (discussing Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 CAN. PUB. ADMIN. 255 (2001)).)

24. Formulating a provision that would allow legislatures to send this message is not easy. One version would explicitly say that legislatures can make statutes effective notwithstanding a judicial interpretation of constitutional rights, but that version makes it difficult to invoke the provision prospectively, in anticipation of a judicial decision projected from what the

be clear that the language of judicial restraint or activism would be misplaced. Rather, interpretive disagreements between courts and legislatures would be at stake, which is in fact what the controversy over activism and restraint is actually about anyway.

III. TYPES OF WEAK-FORM JUDICIAL REVIEW

The “notwithstanding” clause provides the most studied example of weak-form judicial review, and the one with which there has been the most experience. There are other types of weak-form review, however. Stephen Gardbaum has identified several, which he calls the “new Commonwealth model” of constitutionalism.²⁵ The “new Commonwealth model” consists of instructions to courts that they should construe legislation whenever fairly possible to be consistent with constitutional norms, without giving them the power to displace legislation that, once interpreted, is inconsistent with those norms.²⁶ Gardbaum identifies the possibility that there may be a variety of types of judicial review, lying along a continuum measuring the strength of the judicial role relative to that of the legislature.

The weakest form within the “new Commonwealth model” is the

courts have previously done. (Tushnet, *supra* note 22, at 279, suggested that section 33 should have been interpreted to allow only retrospective invocations of section 33, but I now regard that suggestion as mistaken; prospective invocations can be useful where legislatures fear what courts might do.) The trick lies in highlighting the fact that courts and legislatures can reasonably disagree about how the constitution should be interpreted, and not giving either’s interpretation any necessary priority.

It should be noted that section 33 was developed rather late in the process of drafting the Charter, and, while its proponents had a reasonably clear idea of what they were trying to do, they may not have had time to draft terms that would do precisely what they wanted—or, at least, what they should have wanted.

25. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 710 (2001). I prefer to use the more general label *weak-form* for the variants Gardbaum describes, largely because I do not think that there is an intrinsic connection between the form of review and the fact that the nations that have adopted weak-form systems of judicial review are, or were, members of the British Commonwealth.

26. I think it worth emphasizing that I focus here on the effects of weak-form statutes on the courts. Designers of weak-form systems typically also include instructions to legislatures, in particular developing some mechanism by which legislative proposals are vetted for constitutionality within the legislative process before they are adopted. The British Human Rights Act 1998, for example, requires the minister responsible for introducing a bill to declare either that the bill is compatible with the European Convention on Human Rights, or that he or she is unable to make such a declaration. Human Rights Act, 1998, c. 42, § 19 (Eng.).

pure interpretive requirement, for which the New Zealand Bill of Rights Act²⁷ is the prime example. Here courts are charged *only* with the new interpretive task. The British Human Rights Act 1998²⁸ is a somewhat stronger version. It directs courts to interpret statutes in a manner that makes them consistent with the European Convention on Human Rights (“the Convention”), if such a construction is possible. Courts unable to do so may declare the statute incompatible with the Convention. The minister responsible for the statute’s enforcement is then authorized to invoke a fast-track procedure for enacting a new statute that would be compatible with the Convention or even, in special circumstances, to place in force a revised statute pending its enactment by Parliament.

That the pure interpretive requirement is a form of judicial review can be seen by comparing what happens to a statute in a system without such a requirement to what happens in a system with one. Suppose the courts, without an interpretive requirement, routinely interpret statutes according to their plain language on the theory that the statute’s language is the surest guide to the purposes the legislature sought to achieve. That is, the courts say, in effect, “You told us what you wanted to do in the statute’s plain language, and that’s what we will do.” Add on the interpretive requirement, and the courts say something quite different:

The language of this statute tells us what you wanted to do, but if we did that you would be violating constitutional norms. You’ve also told us that you don’t want to do that. So, we’ll interpret the statute to be consistent with constitutional norms, even though that leads us to enforce a statute that does something other than what the statutory language says you wanted to do.²⁹

Weak-form judicial review in the form of an interpretive mandate

27. New Zealand Bill of Rights Act, 1990 (N.Z.).

28. Human Rights Act, 1998, c. 42 (Eng.).

29. Two points should be noted: (1) The analysis does not depend on the particular “plain language” theory of interpretation I have used in the example. All that matters is that courts acting under the interpretive requirement will do something they would not do absent such a requirement; (2) Analytic problems arise in connection with statutes enacted before *and* after the “new model” of judicial review is adopted. For those enacted earlier, the difficulty is that the legislature cannot be said to have wanted the courts to accommodate the legislature’s purposes to the (newly enforceable) constitutional norms. For those enacted afterwards (particularly those enacted with a ministerial statement of compatibility), the difficulty is that the legislature may have believed that its statute was consistent with constitutional norms (and the legislature’s judgment should be given some weight), or the legislature may have wanted the statute to be enforced even though it was inconsistent with those norms.

gives the courts an effect on policy that is different from the effect they have using their traditional methods of statutory interpretation.

*Government of South Africa v. Grootboom*³⁰ of South Africa's Constitutional Court provides another variant, which itself can be seen as a version of a broader type of weak-form judicial review that Michael Dorf and Charles Sabel identify with what they call democratic experimentalism.³¹ *Grootboom* involved a challenge to South Africa's housing policy, which was said to be inconsistent with the constitution's guarantee of a right to housing.³² To escape the "appalling" conditions of their residences, a group of people moved onto land designated by the government for subsidized low-cost housing, which had not, however, been constructed yet.³³ They were evicted from the land, and challenged the government's policy, which had not produced any housing for them.³⁴ The Constitutional Court upheld the challenge.³⁵ It did not direct that housing be provided to the challengers, however. Its precise holding was that the government's housing policy was unconstitutional because it lacked a component to deal with the housing needs of those in desperate need—that is, the plaintiffs.³⁶ The court's remedy was to direct the government to revise its policy to include such a component, even while acknowledging that the litigants might not themselves benefit from the revised policy.³⁷

Dorf and Sabel treat approaches like that taken in *Grootboom* as exemplifying a distinctive variant of weak-form judicial review, part of a group of legal techniques they call democratic experimentalism.³⁸ A democratic experimentalist court begins with a constitutional principle stated at a reasonably high level of abstraction, such as the South African provision purporting to guarantee access to adequate housing. It begins the experimentalist project by offering an incomplete specification of the principle's meaning in a particular context, such as the requirement that the government's housing programs specifically address the housing needs of those in desperate need. The court then asks legislators and executive officials to develop and begin to implement plans that

30. 2000 (11) BCLR 1169 (S. Afr.).

31. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

32. 2000 (11) BCLR ¶¶ 1-2.

33. *Id.* ¶ 3.

34. *Id.* ¶¶ 3-4.

35. *Id.* ¶ 99.

36. *Id.* ¶ 95.

37. *Id.* ¶ 96. The following paragraph is drawn from Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435 (2002).

38. Dorf & Sabel, *supra* note 31.

have a reasonable prospect of fulfilling the incompletely specified constitutional requirement. The next step involves examining the results of this experiment. Perhaps legislators and executive officials will be able to demonstrate that their programs are moving in the right direction. A democratic experimentalist court might respond by fleshing out the constitutional requirement a bit more, specifying in somewhat more detail what the government must do to fulfill its broad obligation to ensure access to adequate housing. Or, perhaps legislators and executive officials will be able to show that the task they initially set for themselves in response to the court's first decision could not be accomplished within a reasonable time, or with reasonable resources, and propose some modification in the constitutional standard. For example, they might have proposed to build permanent housing for those in desperate need, but, having discovered that land is unavailable at a reasonable cost for such purposes, propose now to develop temporary shelters for those people. A democratic experimentalist court could revise its judgment about the constitution's requirements in light of experience. Notably, that adjustment might be upward, imposing more requirements on the government, or downward, imposing fewer. The revisability of a court's constitutional judgments makes this a weak-form version of judicial review.

I think it worth emphasizing that *Grootboom* and democratic experimentalist judicial review should be understood as providing *general* variants of weak-form judicial review. The social-welfare context in which *Grootboom* arose might make weak-form judicial review particularly attractive in light of widespread misgivings—among constitutionalists familiar only with strong-form systems of judicial review—about judicial enforcement of social-welfare rights.³⁹ But, weak-form judicial review in the form of planning or experimentalism might be appropriate in more traditional civil liberties contexts as well. Consider free expression, for example. One might balk at adopting experimentalist approaches to the question of regulating political dissent.⁴⁰ The cases of regulating the

39. See Tushnet, *supra* note 37 (discussing those misgivings and arguing that they are not well-founded).

40. See Richard A. Epstein, *Classical Liberalism Meets the New Constitutional Order: A Comment on Mark Tushnet*, 3 CHI. J. INT'L L. 455, 464 (2002). I believe that Epstein might be correct in being nervous about using experimentalist approaches in connection with traditional First Amendment doctrine regarding political dissent, but only because judicial experience has been sufficiently thick that we can fairly say that experiments conducted in the past have produced near definitive results. Put another way, an experimentalist might describe the common-law-like evolution of constitutional doctrine dealing with the regulation of political dissent as an example of experimentalism rather than seeing the application of the doctrine in its

Internet, or regulating campaign finance, might be different, though. There, experience with forms of regulation is thinner, the problems are either new, or take new forms, or are complex in ways not readily seen until regulatory systems are put in place. Rather than invoke traditional doctrines that ask whether a regulation is content-based or content-neutral, courts might profitably require that governments develop coherent plans for regulation, or engage in the kind of interactive process with legislatures contemplated by democratic experimentalism.⁴¹

IV. THE POSSIBLE DEGENERATION OR ESCALATION OF WEAK-FORM JUDICIAL REVIEW

Systems of weak-form judicial review are attractive objects of study, if only because they provide an opportunity to think about judicial review outside the tired categories of activism and restraint.⁴² But, are they truly distinctive systems? I suggest some reasons for thinking that weak-form systems may be unstable in practice. That is, they may well be transformed in either direction—reducing their scope so that weak-form systems are actually systems of parliamentary supremacy (and thereby reproducing the worry about inadequate protection of liberal rights), or expanding their scope so that weak-form systems are actually strong-form systems (and thereby reproducing the worry about interfering with democratic self-governance). The thought here is that, while there may be in theory a continuum of forms of judicial review, in practical operation of institutions in the real world, institutions are likely to cluster near the poles of U.S.-style strong-form review and traditional parliamentary sovereignty, with very little judicial review.

Notably, these possibilities are open for each system, and the tension within my arguments should be emphasized at the outset. I will be producing arguments explaining why a weak-form system might become a system of parliamentary supremacy, and why that exact same system might become a strong-form system. Obviously, the arguments cannot both be correct with respect to every

current, apparently final form as a refutation of experimentalism.

41. For a suggestion regarding campaign finance regulation that I regard as compatible with democratic experimentalist theory, see William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 390 (2000) (suggesting that states be allowed to develop campaign finance regulations under standards that might differ from those applied to the national government).

42. I doubt that they can readily be emulated in the United States, where the structure of judicial review and, perhaps more important, the legal culture seem to support strong-form review with little qualification.

constitutional question presented to the courts. Perhaps only one of the arguments I develop is correct with respect to any particular national system. Or, more interestingly, perhaps a weak-form system will degenerate into parliamentary supremacy with respect to some questions, and escalate into a strong-form system with respect to other questions.⁴³

Another preliminary is that the actual operation of weak-form systems may be highly dependent on context. I will discuss some implications of political organization in the course of dealing with section 33, but dependency on historical circumstances is worth noting at the start. The basic idea is that a constitutional system's early experiences with judicial review may set the constitutional culture on a distinctive path. In the United States, for example, it is said that Chief Justice John Marshall's assertion of the power of judicial review in *Marbury v. Madison*⁴⁴ established strong-form review in the United States because, basically, he got away with it.⁴⁵ Goldsworthy and I both suggest that Canadian legislatures have been reluctant to use the section 33 power because that power was discredited by its invocation by Quebec to insulate all Quebec legislation from review under the Charter.⁴⁶ Its most recent use, to forestall a contemplated decision finding that provinces giving heterosexual marriage legal status must give the same status to gay marriages, seems unlikely to lend more luster to the section 33 power.

In the other direction, it will be interesting to see how the South African constitutional system reacts to *Grootboom*, which imposed a rather mild planning requirement on the government, and the nevirapine case, which imposed a somewhat more substantial requirement.⁴⁷ There the government had limited the provision of nevirapine, an effective drug treatment against the transmission of HIV from pregnant mothers to their children.⁴⁸ The government

43. If so, perhaps we might end up thinking that the system is weak-form "on balance"; that is, as interpreted within the nation's constitutional culture, even though there is no single question on which judicial review actually takes a weak form.

44. 5 U.S. (1 Cranch) 137 (1803).

45. For one version of this account, see ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 25 (revised by Sanford Levinson, 3d. ed. 2000) (describing *Marbury* as "a masterwork of indirection, a brilliant example of Marshall's capacity to . . . advance in one direction while his opponents are looking in another").

46. Goldsworthy, *supra* note 21, at 464-65; Tushnet, *supra* note 22, at 295-97.

47. *Minister of Health v. Treatment Action Campaign*, 2002 (10) BCLR 1033 ¶ 135 (S. Afr.).

48. *Id.* ¶¶ 10-11.

made the drug available at a few experimental sites, where it also provided counseling on nevirapine use, breast-feeding, and other matters relevant to reducing the risk of mother-to-child transmission of HIV.⁴⁹

The Constitutional Court held that the government had to rethink its plan for preventing mother-to-child transmission of HIV.⁵⁰ The court agreed that monitoring nevirapine administration at a limited number of research sites made “good sense from the public health point of view,”⁵¹ but observed that such monitoring was not inconsistent with administering the drug more widely, at sites where no research-monitoring occurred.⁵² The new comprehensive plan had to include extending the provision of nevirapine from the limited number of sites to all public facilities, and expanding the training of counselors at all public facilities to include counseling on the use of the drug.⁵³ The court’s language suggests that the comprehensive plan might have to go even farther, although the court did not specify further details.

The nevirapine case illustrates the path-dependence of judicial review. Although nothing to this effect appears in the opinion, South African legal elites knew that the government’s policy was motivated in large measure by President Thabo Mbeki’s expressed view that AIDS was not caused by HIV. Further, the government’s litigation posture was weak: Nevirapine had passed through the ordinary processes for the approval of drugs, indicating that its use was not dangerous, the government conceded that providing nevirapine to all women using public facilities would not be excessively expensive,⁵⁴ and the government conceded that counselors already present at public hospitals could include nevirapine counseling in their programs. Finally, the government had decided to make nevirapine generally available by the time the Constitutional Court decided the case.

In short, the nevirapine case was a perfect one for exercising judicial review. The government’s position was discredited and had been abandoned. The Constitutional Court could pretty much do whatever it wanted in the case. One can imagine a next stage in which *Grootboom* and the nevirapine case become precedents for insisting that substantial plans be developed and implemented. The

49. *Id.* ¶¶ 14-15.

50. *Id.* ¶¶ 124-33.

51. *Id.* ¶ 15.

52. *Id.* ¶ 68.

53. *Id.* ¶ 135.

54. According to the plaintiffs, nevirapine had been “offered to the government for free.” *Id.* ¶ 11.

nevirapine case in particular might be assimilated into South Africa's constitutional culture as an example of the effective use of strong-form judicial review. But perhaps not. Perhaps the culture will take as more important the unusual circumstances of the nevirapine case, treat the case as a sport, and give judicial review a weak form again.⁵⁵

A. *Degenerating Into Parliamentary Supremacy*

Accustomed to strong-form judicial review, U.S. scholars may be particularly attracted to the idea that weak-form judicial review is fundamentally a sham, parliamentary supremacy parading under the guise of effective judicial review. The Human Rights Act might offer such skeptics a strong example, but the problem can arise in all systems of weak-form review. Consider a statute adopted after a minister makes a statement of compatibility, reflecting the government's judgment that the statute is consistent with the European Convention. A court comes along and issues a declaration of incompatibility. True, the minister now has the authority to introduce fast-track legislation to modify the statute, and the commentary routinely asserts that everyone expects such a response. But, why should a minister use that authority? If the statute is one to which the government is committed in principle, the minister and the government can express their disagreement with the courts on the interpretive question—as to which they had already expressed their views in the statement of compatibility—and insist on enforcing the statute as adopted.⁵⁶

Grootboom and related approaches can degenerate into

55. Of course, the South African Constitutional Court has exercised strong-form judicial review in more traditional civil liberties cases. That, too, might push it away from adopting weak-form review in some restricted subset of constitutional cases. (The obvious candidate for such a subset is social welfare rights, but, as I argued briefly above, there is no reason in principle to restrict weak-form review to social welfare rights.)

56. For a qualification, see *infra* text accompanying notes 72, 74-75. Another qualification, for a government truly insistent on achieving its purposes, is that the European Convention itself authorizes governments to derogate from its provisions under quite limited circumstances. A government could introduce legislation conceding its incompatibility with the Convention and simultaneously derogating from the Convention with respect to such legislation. (That is what the Blair government did in introducing the Anti-Terrorism, Crime, and Security Act, 2001, c. 24 (Eng.)) It is an open question whether the *British* courts could review the question whether the conditions for derogation as set out in the Convention were satisfied, although I assume that the European Court on Human Rights can do so. For a brief discussion, see Mark Tushnet, *Nonjudicial Review*, 40 HARV. J. ON LEGIS. (forthcoming July 2003).

parliamentary supremacy as well. On its face *Grootboom* requires only that the government submit a plan for public housing that contains a component dealing with the desperately needy. *Grootboom* itself would be satisfied once the government has submitted such a plan. That is, the government can fully comply with *Grootboom* by developing a plan that it has no intention of implementing. The plan would be like the Soviet five-year plans, existing on paper but having no beneficial real-world impact. These sorts of paper rights are not unknown in constitutional law. The Supreme Court of India, for example, has been extremely aggressive in articulating a wide range of constitutional rights. But, according to one observer, that court operates "in almost metaphysical isolation from social reality."⁵⁷

Perhaps more interesting, because more likely, is nominal compliance with a weak-form court's requirements, followed by a judicial declaration of victory and retreat from the field. Two examples are instructive. The New Jersey Supreme Court engaged in a long-term effort to increase the supply of housing for the poor, by finding that localities were constitutionally obligated to bear their "fair share" of such housing.⁵⁸ Acting in a roughly experimentalist way, the court invited a range of responses from legislatures, on both the local and the state levels, rather than specifying how "fair shares" should be determined and distributed.⁵⁹ Not surprisingly, many suburban jurisdictions strenuously resisted taking on the "fair share" obligation.⁶⁰ After a long series of exchanges, the New Jersey Supreme Court declared itself satisfied with the legislative responses, despite the fact that low-income housing remained pretty much in the same supply as had existed before the court began to act.⁶¹

Roach provides a Canadian example, particularly dramatic because of the forgone possibility of utilizing section 33 in response to a Canadian Supreme Court decision with which the legislature disagreed. *O'Connor v. The Queen*⁶² involved a prosecution for rape of four women in a residential school that occurred decades before the prosecution.⁶³ The defendant demanded access to the records

57. Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 515 (1989).

58. CHARLES M. HAAR, SUBURBS UNDER SEIGE: RACE, SPACE, AND AUDACIOUS JUDGES 20-21 (1996).

59. *Id.* at 26-28.

60. *Id.* at 111.

61. For an overview, see especially *id.* at 124-25 (describing the New Jersey Supreme Court's "expressed intent to defer to the council" and its "continuing desire, almost a need, to assert judge-made policy").

62. [1995] 103 C.C.C. (3d) 1 (Can.).

63. *Id.* at 2.

compiled during counseling sessions with the victims.⁶⁴ The Canadian Supreme Court decided, by a vote of 5 to 4, that the defendant had an unqualified right to all records in the prosecution's possession, and that the defendant could get access to possibly relevant records in the hands of doctors and rape crisis counselors if the trial court determined they should be made available after balancing the defendant's right to present a defense against the victims' rights to privacy.⁶⁵ The dissenters would have required the defendant to make a substantially stronger showing of need before gaining access to records in private hands.⁶⁶

The Canadian Parliament responded to *O'Connor* with new legislation that, according to Roach, "followed the dissent . . . by subjecting all records . . . to a two-stage process that balances the accused's rights against the complainant's privacy and equality rights and the social interest in encouraging the reporting of sexual assaults."⁶⁷ And, like the dissent, the statute enumerated "ten allegations that, alone or together, were not sufficient to establish that a record was relevant."⁶⁸ The Canadian Supreme Court found that the new legislation satisfied the Charter.⁶⁹ Saving face, it characterized *O'Connor* as a common-law decision, not one resting on the defendant's rights under the Charter, and asserted that the new legislation was, like the court's earlier "common law" rule, a reasonable specification of the protected right to present a defense.⁷⁰ Roach, a specialist in criminal law and procedure, believes that the legislation was indeed inconsistent with *O'Connor*, and that it would have been better for the court to say so and invite the legislature to use its power under section 33 to override a judicial interpretation of the Charter.⁷¹

The Canadian cases illustrate a problem common to weak-form and strong-form systems, but which takes on particular resonance in weak-form systems. The problem is that courts are not insensitive to the political responses to their actions.⁷² Sometimes they retreat

64. *Id.*

65. *Id.* at 6-7.

66. *Id.* at 17-18.

67. ROACH, *supra* note 7, at 278.

68. *Id.*

69. *L.C. v. Mills*, [1999] 139 C.C.C. (3d) 321, 339-40 (Can.).

70. *Id.* at 338-40, 353-54, 357-58, 390-91. If the initial decision was fairly described as a common-law decision, then the sequence of cases and legislation does not illustrate the operation of any form of judicial review at all, but only the ordinary and well-established practice of legislation consistent with the constitution displacing the common law.

71. ROACH, *supra* note 7, at 279-81.

72. In the United States, the Supreme Court's reaction to congressional

from advanced positions but attempt to conceal their capitulation to political disagreement by insisting that the new cases are truly and fairly distinguishable from the older ones. These retreats can be described as reinstating systems of parliamentary supremacy with respect to the rights at issue. In strong-form systems of judicial review, perhaps such retreats are sometimes necessary if the courts are to retain their power to overturn *other* legislation. What is striking is that weak-form systems purport to make such retreats unnecessary, because legislatures have the means at hand to reject the courts' decisions. Perhaps we can describe weak-form systems as degenerating when the retreats occur in such systems nonetheless.

The section 33 power suggests another way in which weak-form systems can degenerate. Defenders of Canada's system of judicial review have asserted that it promotes dialogue between the courts and the legislature.⁷³ I discuss some aspects of that dialogue below. For now, consider two types of "dialogue"—really, different monologues. First, sometimes a legislature will pass a statute that, on reflection, its members think ill-considered. The courts can invalidate the statute, and the legislature will do nothing in response even though it has the power to override the courts' decision. The reason is that the legislature, on reflection, agrees with the courts. This, sometimes called the "sober second thought" effect, is a real benefit of judicial review, whether strong- or weak-form. Second, suppose that the legislature routinely invoked its power to override the courts whenever a court invalidated a statute.⁷⁴ Weak-form review, under those circumstances, would be indistinguishable from parliamentary supremacy.⁷⁵ Weak-form

disapproval of a number of 1957 decisions involving the free speech rights of alleged Communists is an oft-cited example. See, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 137 (2000) (describing two 1958 cases as "[t]he Court's major peace offering" to Congress). The conventional story is that the Court followed up those cases by retreating from the protections it articulated, and upheld prosecutions that it would have barred earlier.

73. The most prominent work is Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 *OSGOODE HALL L.J.* 75 (1997), which has generated substantial responsive literature.

74. Of course, routine use of the power to override would occur only because of the political culture's understanding of the courts' role in the constitutional system.

75. As has most of the literature on judicial review, I have ignored the possibility of constitutional amendment as a response to judicial decisions. Constitutions that have judicial review, whether strong- or weak-form, and easy amendment processes, are similarly systems of parliamentary supremacy—so long as the political culture imposes no *practical* barriers to invoking the amendment process.

review supports true dialogue only when the legislature actually does respond to judicial decisions, but only on occasion.

There are, then, predictable ways in which weak-form systems of judicial review can be ineffectual. Next, I consider some predictable ways in which such systems can become strong-form systems in effect, if not in formal, law.

B. Escalating Into Strong-Form Review

Weak-form systems of judicial review seem attractive to some because they provide an opportunity for judicial oversight of legislation without displacing the ultimate power of legislatures to determine public policy. That possibility would be illusory, though, if weak-form review in practice turned out to be as final as strong-form review is in theory.⁷⁶ How might weak-form review escalate into strong-form review? Each version of weak-form review might be transformed through routes characteristic of the version.

Consider first *Grootboom* and experimentalist approaches. The conceptualization of these approaches as weak-form review is relatively new, but the approaches themselves are less novel than one might think. The New Jersey experience with low-income housing is representative of a broader phenomenon of institutional litigation in the United States; that is, litigation aimed at transforming the routine operation of large-scale government bureaucracies such as social service agencies and, notably, prisons.

The course of such litigation is reasonably clear. As we have seen, sometimes the courts declare victory and go home, with nothing much accomplished. Sometimes, though, the courts take the task of institutional transformation seriously.⁷⁷ They begin by observing gross violations of core constitutional rights, and direct the institutions to stop. The institutions are either recalcitrant, believing that what they have been doing is essential to carrying out their assigned missions, or incompetent, unable to develop mechanisms for performing their missions that do not violate constitutional rights. Courts respond by developing increasingly precise requirements for the institutions. The reason is twofold. When dealing with recalcitrant institutions, courts can monitor compliance with these requirements more easily than they can monitor compliance with general directives to stop behaving badly.

76. Of course the *form* of judicial review might remain the same, but when weak-form review escalates it loses its distinctive capacity to constrain the legislature *and* the courts through a process of dialogue and reconsideration.

77. The most comprehensive discussion and analysis of modern institutional litigation in the United States is MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

When dealing with incompetent institutions, courts can use detailed requirements to show even incompetents what they need to do.

Something similar might happen with *Grootboom*-like planning requirements. The court directs the government to develop a plan and begin to implement it. The plaintiffs come back to court, saying that the plan is inadequate in various respects, and that the implementation is flawed. The court responds by insisting that the plan be augmented to deal with the inadequacies and flaws. In the next round, new inadequacies and flaws are exposed, and the court again tries to get the plan to work.

The U.S. experience with school desegregation is instructive. After holding that segregation by law was unconstitutional, the Supreme Court directed lower courts to supervise the development of plans by school boards to desegregate their schools “with all deliberate speed.”⁷⁸ School boards came up with a variety of plans, including plans that would desegregate one grade per year and plans that allowed students to choose which schools they would attend. The courts initially accepted most of these plans. Plaintiffs returned to court to point out that under the plans as implemented schools remained as racially identifiable as ever. Courts responded by ratcheting up the requirements. Eventually the U.S. Supreme Court demanded that school boards come up with plans that “promise[d] realistically to work, and promise[d] realistically to work *now*.”⁷⁹ Lower courts took this injunction seriously, adopting plans that specified school operations in enormous detail.⁸⁰

What deserves emphasis here is that the processes I have sketched are entirely consistent with the general description of experimentalist judicial review. Courts specify constitutional requirements at a relatively high level of generality, observe how the institution responds, and adjust their constitutional specifications accordingly. In the end, we end up with courts micromanaging the institutions—just in the way a court exercising strong-form review would.

Next, consider the section 33 process in Canada. Roach’s work shows that critics of Canada’s Supreme Court believe that it has engaged in strong-form and activist judicial review. The quite limited use of section 33 itself suggests that there is little difference between the Canadian system and one in which the Constitutional

78. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

79. *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968).

80. The poster child for such plans was at issue in *Missouri v. Jenkins*, 515 U.S. 70 (1995), where the Court substantially limited the power of district courts to require large-scale program revisions to ensure, in the district courts’ view, that desegregation plans “worked.” *Id.* at 101-02.

Court's decisions are final.

As Goldsworthy points out, the reasons for section 33's desuetude are unclear, although the path-dependency mentioned above probably plays a large part.⁸¹ Defenders of Canada's system as weak-form despite the rare use of the section 33 power make two points. First, they point out that the failure to invoke section 33 does not show that Canada has a strong-form system. Legislatures might not invoke section 33 because, having listened to the Supreme Court, they decide that the court's interpretation of the Charter is correct. Democratic responsibility for Charter-interpretation is preserved, on this argument, because legislatures ultimately endorse the court's interpretations. Second, they note that sometimes legislatures do respond to Supreme Court decisions by re-enacting new versions of the statutes the court invalidated, altering them to meet the court's objections. In this way, according to Peter Hogg, the government achieves (most of) its policy objectives at smaller cost to Charter rights.⁸² Each of these arguments can be questioned.

Legislatures might not use the section 33 power because they agree with the courts' interpretations, it is true, but they may also fail to use the power because they are unable to use it. The reason lies in the structure of the legislative process. That structure is more clearly exposed in a separation-of-powers system than in a parliamentary system, but, after making the point in the easier context, I will show how the argument goes in parliamentary systems. The general problem is that the legislative process has a number of what political scientists call "veto points," places where less than a majority of the legislature can stop legislative proposals from going forward. In the United States, legislative committees, or even sub-committees, can be veto points.⁸³ Forty Senators constitute a veto point for most legislation as well, given recent changes in Senate norms regarding the propriety of filibusters. And, of course, the President has a formal veto power. Legislative inaction—of any sort, including the failure to invoke the override power—thus cannot be taken to represent a legislative judgment that the proposal (to override a court decision, for example) is ill-considered. Inaction

81. Goldsworthy, *supra* note 21, at 466-69.

82. See Hogg & Bushnell, *supra* note 73, at 85.

83. Note, for example, that judicial nominations in the United States Senate do not go forward until the Senate Committee on the Judiciary holds a hearing on the nomination, and that scheduling a hearing is entirely in the hands of the Committee's chair. Similarly, a nomination does not go to the full Senate if a majority of the Committee votes against the nomination. Obviously, the Committee majority may—but need not—be representative of the Senate as a whole.

may result from the exercise of power by a minority strategically located at a veto point.

Canada's parliamentary system appears—but only appears—to have fewer veto points. As a matter of formal law, a government can impose party discipline on its members and deploy its majority to enact *anything* the Prime Minister and Cabinet care enough about. So, one might think, the failure to invoke section 33 in Canada does indeed show that legislatures do not disagree strongly enough with court interpretations to do anything about them. But, here the formal law is misleading. Parliamentary majorities are actually coalitions, sometimes formal but sometimes informal. Imposing party discipline is politically costly—which means that a prime minister who does so with respect to one proposal will inevitably find it more difficult to assemble a legislative majority for some other proposal.⁸⁴ Failure to invoke the section 33 power does not mean that a majority approved of the courts' interpretation. It means only that the government surveyed the political terrain and decided that it would lose more on *other* important issues if it imposed party discipline to override the courts. Weak-form judicial review is supposed to impose political costs on the government by drawing public attention to the possibility that the government has violated constitutional rights. But, it imposes *other* political costs as well, not inherent in the theory of weak-form review but inherent in the structure of policy-making, as it induces the government to change its policy priorities. These costs may be sufficient to convert a decision that nominally can be overridden into one that is effectively final.⁸⁵

Judicial interpretations also impose a *policy* cost on

84. After the Canadian Supreme Court's abortion decision, the government introduced legislation that would have changed the nation's abortion law in a way that would have complied with the Court's requirements but would have still restricted the availability of abortions substantially. Anticipating the political costs of imposing party discipline, at a crucial point the government decided to allow a free vote—that is, informed members of the majority party in Parliament that they were free to vote their consciences on the proposal without regard to the fact that it was supported by the Prime Minister and Cabinet. The proposal failed on an evenly divided vote. For a description of the voting process, see F.L. MORTON, *PRO-CHOICE VS. PRO-LIFE: ABORTION AND THE COURTS IN CANADA* 290-93 (1992).

85. A defender of weak-form review could reply that a failure to override demonstrates that the government simply does not care enough about the substantive constitutional issue. But this means only that effecting the government's continued views of constitutional rights will impose policy losses in some other area that the government regards as more important. The point here is that the judiciary may succeed in imposing its views within the constitutional domain because of the government's concerns about issues outside that domain.

government, which proponents of weak-form judicial review as dialogue undervalue. Consider legislation adopted in response to court decisions invalidating earlier legislation or interpreting it distinctively because of constitutional concerns, and clearly consistent with those decisions. The new legislation *cannot* accomplish precisely what the earlier one did, because the enhanced protection of constitutional values necessarily reduces the statute's policy-effectiveness relative to the original. The reason is that the new legislation will incorporate rules directed by the courts, and rules are inevitably overinclusive with respect to their purposes.⁸⁶ Overinclusiveness means that the new statute will inhibit the accomplishment of the *valid* goals the legislature seeks to advance, and not merely the accomplishment of those goals when doing so would directly impair constitutional values.

Statutes authorizing searches provide a good example. Suppose a court finds that a statute authorizing a search for evidence of terrorist activities sets the standard for conducting such searches too low. The legislature responds by enacting a statute that requires evidence prior to the search of the sort the court thought necessary. We can assume that in many cases, perhaps even the vast majority, diligent work by investigators can produce that evidence, and the searches will occur. It may seem that the court has protected civil liberties at no cost to law enforcement, because investigators get authorization to search every time they ask. That appearance is misleading. The extra effort the investigators make to satisfy the new statute's requirements—that is, the court's requirements—is effort that might have been devoted to other investigations. In short, law enforcement is impaired by searches forgone because of the time and effort spent in complying with the court's requirements.

This point is quite general. Statutes pursue a complex set of goals, including substantive goals like law enforcement and cost-related goals like catching crooks at a level of expense the public finds acceptable. Any change in a statute amounts to a change in the goals the statute pursues. Judicial interpretations to which legislatures respond by changing their statutes also change the mix of public policies the legislature seeks. Such interpretations have the policy effects associated with strong-form judicial review.

Perhaps these policy effects could be avoided by enacting a new statute. But, apart from the fact that the legislature has already enacted the statute that in its view best accommodates constitutional values and non-constitutional policies, doing so faces

86. They are also inevitably underinclusive, but underinclusiveness does not impair the policy goals initially sought by the legislature.

two additional problems. First, consider the interpretive instructions in the new Commonwealth model of judicial review. As noted earlier, courts acting pursuant to these interpretive instructions change the policy goals effectively implemented by a statute's plain language, to ensure that the statute complies with constitutional norms. They say, "This statute must be taken to *mean* the following, because otherwise it would violate constitutional norms." How can a legislature respond? Of course it can modify the statute, but suppose it disagrees with the courts' assessment of what the constitutional norms require. The only response, it would seem, would be to reenact the statute, perhaps with a new provision saying so, pretty much in terms like, "And we really mean it!" Such a response seems to me quite unlikely, and might even be ineffective because the statute as initially enacted should have been taken by the courts in the first place as expressing the legislature's policy goals.

Second, enacting a new statute requires the expenditure of political resources. Even if the government gets exactly what it wants in the new statute, doing so takes time away from pursuing other legislative initiatives. Something falls off the bottom of the agenda when the government has to put re-enacting the statute on the agenda. That is a real cost to social policy, albeit one quite difficult to observe.

The British Human Rights Act 1998 might escalate into strong-form judicial review for another reason—its insertion into a legal system in which British statutes are subject to review by the European Court on Human Rights ("European Court"). The conventional wisdom is that Parliament will respond to a judicial declaration of incompatibility by modifying the challenged statute, and one of the reasons given is that Parliament would not want to be embarrassed by a decision from the European Court confirming the British courts' assessment.

That reason is probably a good one, but why it is is not as obvious as it might seem. After all, the British courts' determination is only a prediction about what the European Court would do if it got hold of the statute. Parliament might disagree with the British courts' prediction, in which case it ought to be willing to take its chances on an appeal to Strasbourg.

The structure of European human rights law might make the British courts' predictive judgments self-fulfilling, in which case their declarations of incompatibility would be the equivalent of exercises of strong-form judicial review. The reason is that European human rights law assesses whether a signatory's law is consistent with the European Convention by applying a "margin of appreciation." The "margin of appreciation" doctrine responds to the

observation that the signatories have different policy preferences, face different problems, and have different values that intersect with more general human rights norms even if those values are not inconsistent with such norms. The “margin of appreciation” doctrine gives some deference to a government’s claim that the statute at issue should be taken to be consistent with the Convention once the European Court considers the nation’s distinctive circumstances and characteristics.⁸⁷

The “margin of appreciation” doctrine might make a British court’s determination that a statute is inconsistent with the Convention self-fulfilling, because it might well affect the degree of deference the European Court is willing to give to a claim by the British executive branch that its statute responds to something special about Britain. After all, the European Court will have available to it a determination by a *British* institution that the statute violates the Convention. That gives the European Court a choice between British institutions to which it might defer, and, courts being courts, one can fairly expect the European Court to respect the British courts more than it will respect the British executive.

I should emphasize that I have sketched reasons and processes by which weak-form judicial review might escalate into strong-form review. But, as the section on the degeneration of weak-form review into parliamentary supremacy indicates, there is nothing inevitable here. We need more experience with weak-form systems before we can arrive at a judgment with any degree of confidence that compares them to weak-form systems.⁸⁸

V. CONCLUSION

Weak-form systems of judicial review are intriguing. With the demise of parliamentary supremacy as a system constitutionalists are willing to defend forcefully, weak-form judicial review provides constitution designers a new choice within the universe of constrained parliamentarism. I have suggested here some reasons for thinking that weak-form systems of judicial review might not provide a permanent resolution of the worry that unconstrained

87. The degree of deference varies; the “margin of appreciation” will be smaller if the human rights norm invoked has been given a specification that has received nearly universal acceptance within Europe.

88. I should note, though, my judgment that we have enough experience with the Canadian system to conclude that it is much closer to a strong-form system than the most avid defenders of the section 33 process believe, even taking into account the supposed contributions weak-form review makes to dialogues between courts and legislatures.

parliamentarism is insufficiently attentive to human rights, or of the worry that strong-form systems of judicial review are in tension with the values of democratic self-governance. Still, thinking about weak-form systems is certainly more interesting than reproducing the discussion of judicial activism and restraint in the context of new institutions. Perhaps weak-form systems of judicial review provide more in the way of academic interest than they contribute to solving practical problems of governance.⁸⁹ An academic will not take that as a criticism of weak-form judicial review.

89. My view is that constitution-designers should spend less time tinkering with institutions of judicial review and more time in thinking through the ways in which legislatures might be structured internally to respond to the constraints properly placed on democratic decision-making, and concomitantly the ways in which a political culture might assist citizens and legislators in internalizing those constraints.